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CONTENTS

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STEPS TOWARDS HARMONISING AND IMPROVING CONSUMER INSOLVENCY RULES IN THE EUROPEAN UNION

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Abstract

At various stages of the development of human society, personal insolvency has been studied in depth and analyzed in relation to various jurisdictions. Looking at the overall picture in the European Union just ahead of the implementation date of the restructuring and insolvency Directive 2019/1023 / EU, most Member States had some rules on consumer insolvency. Research and evidence from these areas indicate that recourse to personal insolvency proceedings not only makes economic sense, but is also necessary to protect the fundamental rights of human beings but also the rights of consumers. However, a fundamental problem that arises in the EU is related to the ability of the various legislative frameworks in Europe to address the problem of over-indebted citizens in a more uniform way, especially since personal debts can originate in various states and can generate cross-borders issues so that certain harmonization revisions were seen as necessary. The Covid-19 crisis has added urgency to an already delayed review of these frameworks. In their efforts to mitigate the economic effects of the COVID-19 pandemic on consumers, some measures introduced by Member States, although largely uncoordinated, reflect an upward trend towards harmonization and a convergence towards common approaches. This paper questions whether the personal insolvency frameworks in different Member States provide adequate answers to the personal bankruptcies induced by the COVID-19 pandemic in different European countries. Thus, the study reveals the current inadequacy of legal procedures for determining the insolvency of the debtor in various jurisdictions of the Union to the particular situations induced by the pandemic, the limitations of the current approach to the recovery of the debtor and the lack of harmonization in personal insolvency between Member States. Finally, the paper proposes steps to follow and key recommendations for an EU consumer insolvency directive.

Keywords: *personal insolvency, Directive 2019/1023 / EU, consumer rights, harmonization, COVID-19 effects.*

1. Introduction

In modern times, credit is the basis of the economy, so that those who take out a loan may in some cases become overly indebted for reasons over which they do not always have control, personal business management being difficult and sometimes even impossible. The consumerist society has developed an economic model in which credit has become widely available to the vast majority of consumers. People access these financing products in the form of loans for personal needs, mortgages, overdrafts or credit cards. According to some studies, the primary causes of over-indebtedness include "life accidents"[1]: loss of employment or ability to work, health problems, divorce, reduced income so that the cost of living by using credit is inherently risky. If something

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[1] https://londoneconomics.co.uk/blog/publication/study-on-means-to-protect-consumers-in-financial-difficulty-personal-bankruptcy-datio-in-solutum-of-mortgages-and-restrictions-on-debt-collection-abusive-practices/.

does not work properly, the result is the consumer's over-indebtedness.

Personal insolvency has been studied and analyzed on a large scale and for long periods. It is to some extent available in most European countries and in many developed countries around the world. With regard to the categories of debtors against whom insolvency proceedings could be initiated, it is undeniable that most national regulations have taken into account the business sector, traders or individuals have long been ubiquitous in this category. As for insolvency, it has been and still is considered in those legal systems that refuse to regulate it extensively as a tool for consumers as a solution for professionals only and therefore unsuitable for individuals. These procedures, when recognized in law, generally have different purposes: if the insolvency proceedings of professionals are aimed at paying the debts of creditors, the insolvency proceedings of individuals seek to protect debtors against measures taken by creditors.

For instance, European Union law does not differentiate between traders and non-traders in the application of insolvency proceedings. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings provides, in paragraph (9)[2], that there should be no differentiated regime between traders and non-traders on insolvency. The Regulation thus recommends that Member States establish identical treatment of debtors in insolvency proceedings, without distinction between natural or legal persons, traders or non-traders. Council Regulation (EC) No 1346/2000 also applies to natural persons as consumers, provided that the national procedures are listed in its Annex A. The national procedures listed do not include the large number of national insolvency laws as they were adopted later by the Member States.

Therefore, the adoption of legislation regulating the insolvency of natural persons was not only necessary but also mandatory, given that the provisions of Regulation (EC) no. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings requires Member States to extend insolvency proceedings to natural persons. The limits of Regulation (EC) no. 1346/2000, among other things, concerns only cross-border insolvency.

2. Brief presentation of the legal framework on insolvency of individuals in other Member States of the European Union

Research[3] and expert evidence[4] confirm that the introduction of consumer insolvency frameworks makes economic sense and is necessary to protect the fundamental and human rights of citizens.

Three major schools on how to resolve the conflicting interests of creditors and debtors, identified by Kilborn[5] in several

[2] (9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000R1346.

[3] https://www.elibrary.imf.org/view/journals/001/2021/152/article-A001-en.xml.

[4] https://www.elibrary.imf.org/view/journals/001/2019/027/article-A001-en.xml.

[5] Kilborn, Jason J: Two decades, three key questions, and evolving answers in European consumer insolvency law. Responsibility, discretion, and sacrifice, în Johanna Niemi, Iain Ramsay, William C. Whitford: Consumer

studies. The general aim of these frameworks is to recover as much "value" as possible for creditors and also to provide debtors with a way out of debt to start over.

These are:

- The Nordic approach: the Nordic countries were the first to address the issue of the correctness of the concept of non-fulfillment of contractual obligations in order to get rid of over-indebtedness. They condition the exit from insolvency in the form of personal bankruptcy by the application of a "test of good faith". Individuals cannot access solutions for over-indebtedness if their behavior is considered to have been in bad faith such as taking out very large loans even before resorting to a path of financial recovery or if it is proven that they have not done enough efforts to repay loans.

- The German approach, initially implemented in Germany, Austria and Estonia. Unlike the Nordic model, it allows any individual access to a solution, but then requires compliance with a payment plan whose rationale is shaped by strict rules, whereby the debtor must honor as much of the debt as possible. The German model applies clear, standardized rules so that both debtors and creditors know exactly the consequences, whether they are or do not agree with a particular solution.

- The Latin model is characterized by greater freedom of action. This method is applied in the Benelux countries and in France and is an approach according to which voluntary agreements between debtor and creditor have been encouraged as much as possible, and the role of the courts is reduced to the control of the legality of the whole procedure. This is limited to the general rule that lawsuits are cumbersome, payment plans are lengthy, and the conditions for obtaining a debt relief are difficult, so that voluntary agreements are more advantageous.

With regard to the scope of the insolvency proceedings of the natural person, some jurisdictions limit the application of the law to natural persons whose debts are not incurred in connection with the conduct of business. In other jurisdictions, the scope is extended to include retailers.

Representatives of financiers (IMF) has pointed out that limiting the application of the procedure only to consumers raises the question, on the one hand, of the procedure applicable to natural persons engaged in commercial activities and, on the other hand, of the options available to such persons, in accordance with the general national insolvency framework[6].

Although there is no uniform approach in this regard, current areas of consumer insolvency can be broadly classified into three types: bankruptcy, debt settlement procedures or informal arrangements.

There are jurisdictions governing out-of-court procedures that apply in addition to court proceedings. It should be emphasized, however, that the opening of proceedings entails the limitation of the debtor's ability to dispose of his assets.

In recent years, Member States' jurisdictions have taken a much more active approach to insolvency. The recession following the 2008 credit crunch has brought this issue back to the attention of governments trying to address the problem of social hardship by creating consumer debt adjustment mechanisms.

credit, debt and bankruptcy. Comparative and international perspectives. Oxford, Hart Publishing, 2009, pp. 307-329.

[6] Amira Rasekh and Anjum Rosha Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive, https://www.elibrary.imf.org/view/journals/001/2021/152/article-A001-en.xml.

Looking at the overall landscape in the European Union, prior to the implementation of Directive 2019/1023 / EU on restructuring and insolvency, it is found that most Member States had some rules on consumer insolvency in place, each of them aiming to balance the interests of insolvent persons, those of creditors and society. Assessing current frameworks in terms of good practice and recurring shortcomings, problems with current regulatory frameworks fall into two main areas: the difficulty of individuals accessing the procedure and the failure to truly give them a fresh start or a second chance.

Best practices are identified as: a short process, which operates in accordance with clear and non-court-based rules, in which debt cancellation occurs during a short repayment plan.

It is also preferable for the procedure to allow the debtor's rehabilitation to take place after a sufficiently short period of time to be fully reintegrated into a social and economic life.

In principle, a natural person is considered to be insolvent when its assets do not have sufficient funds available for the payment of debts, as they become due. It should be emphasized, however, that the opening of proceedings entails the limitation of the debtor's ability to dispose of his assets.

With the efforts of lawmakers at Union and Member State level, personal bankruptcy has become more widespread in Europe[7].

3. Steps for harmonising and improving consumer insolvency rules in the European Union

When the financial crisis erupted in Europe in 2008, weaknesses in Member States' insolvency laws became apparent, leading EU authorities to consider a paradigm shift in the purpose of insolvency law. Primarily, in European jurisdictions based on Roman law, bankruptcy regulations had focused on the rights of creditors, the control that creditors have over the assets of debtors, and the satisfaction of creditors' claims. For more than a millennium, "the classical reaction to insolvency ('bankruptcy') was punishment of the debtor and comprehensive liquidation and distribution of the debtor's property among the creditors."

A change of vision in Europe happens only at the beginning of the 21st century, and even then only to a limited extent. At a time when economic instability is expected to affect households and the consumer credit market, emerged the need to rethink the European Union's legislative architecture in line with international standards and to harmonize national practices. At European level, protecting the debtor's dignity and ensuring his or her minimum living standards, regardless of the level of outstanding debts, tend to become the principles governing the legal treatment of over-indebtedness.

It was when the global crisis loomed on the horizon in June 2007 and Member States' governments came together to commit to addressing "debt issues" with legal solutions. They have made collective recommendations to the Council of Europe (CoE) to address debt and over-indebtedness issues by calling for legal action transposed by legislation in this area. The Council of Europe's recommendations also provided a clear way to address key issues in the debt of individuals and families. These recommendations formed the basis of a

[7] For an exhaustive list of good practices see pages 11-12, *„From debtor prisons to being prisoners of debt. Making the case for harmonized EU consumer insolvency rules"* A Finance Watch report, January 2022.

definition of over-indebtedness[8] and set crucial policy objectives for the various European governments to pursue in post-crisis reforms. Recommendation CM / Rec (2007)8[9] of the Committee of Ministers to Member States on legal solutions to debt problems which, although not binding on regulations, cannot be ignored in substantiating Directive 2019/1023 / EU. Thus, paragraph (32) states that a debt adjustment procedure leads to the adoption of a payment plan, which must contain the amount that the debtor is required to pay periodically to creditors, as well as a reasonable time frame within which such payments would be made must be completed.

Further on EU initiatives aimed to harmonise of insolvency rules and to establish a distinct regime for natural persons crystallised with the adoption of the European Commission Recommendation on a New Approach to Business Failure and Insolvency in 2014 (ECR 2014) [10] and the European Insolvency Regulation Recast 2015 (EIRR 2015)[11],

One more step into the course of a EU consumer insolvency regulation is the Preventive Restructuring Directive 2019 (PRD 2019)[12] on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Into the preamble of it is stated: (21) *Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. Furthermore, it is often not possible to draw a clear distinction between the debts incurred by entrepreneurs in the course of their trade, business, craft or profession and those incurred outside those activities. Entrepreneurs would not effectively benefit from a second chance if they had to go through separate procedures, with different access conditions and discharge periods, to discharge their business debts and other debts incurred outside their business. For those reasons, although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt.* The directive aims to address business insolvency, but leaves an option for EU Member States to apply some of the rules to individual citizens.

Although the harmonisation of insolvency laws has been at the top of the European institutions' agenda over the last decade, the COVID-19 pandemic has revealed some of the limits of these EU's harmonisation efforts and the Covid-19 crisis has made the already delayed review of these insolvency frameworks an urgent one. Previously, the analysis of the existing framework had proved its inadequacy in addressing the issue of over-indebted

[8] For a definition of over-indebtedness see Research note 4/2010 Over-indebtedness New evidence from the EU-SILC special module, page 4*:"An over-indebted household is, accordingly, defined as one whose existing and foreseeable resources are insufficient to meet its financial commitments without lowering its living standards, which has both social and policy implications if this means reducing them below what is regarded as the minimum acceptable in the country concerned."*.

[9] https://rm.coe.int/09000016807096bb.

[10] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014H0135.

[11] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848.

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019L1023.

citizens in situations of normal functioning of the economy.

It takes a long time for the EU legislature to adopt a completely new regulatory framework, as is the case with decisions, directives and regulations. On the other hand, recommendations and opinions can be adopted more quickly, but they are not binding on Member States. For the time being, the EU legislator has had to leave it to national governments to address the immediate effects of the crisis, and they have responded with financial support for Covid-19 or debt moratoria[13], which have mitigated the full impact of the crisis. Meanwhile the economic recovery of over-indebted European households may be hampered by the pandemic and also due to the war on the EU border.

The next steps towards harmonising and improving consumer insolvency rules in the European Union are provided by the Directive 2019/1023/EU[14].

Under recital (98),*"a study should be carried out by the Commission in order to evaluate the necessity of submitting legislative proposals to deal with the insolvency of persons not exercising a trade, business, craft or profession, who, as consumers, in good faith, are temporarily or permanently unable to pay debts as they fall due. Such study should investigate whether access to basic goods and services needs to be safeguarded for those persons to ensure that they benefit from decent living conditions."*

In the Review Clause (Art.33) is stated that *„no later than 17 July 2026 and every five years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application and impact of this Directive, including on the application of the class formation and voting rules in respect of vulnerable creditors, such as workers. On the basis of that assessment, the Commission shall submit, if appropriate, a legislative proposal, considering additional measures to consolidate and harmonise the legal framework on restructuring, insolvency and discharge of debt."*

For the next course of the process of lawmaking:

by 2022 the European Commission should conduct the study required under recital (98) of the Restructuring and Insolvency Directive 2019/1023 / EU;

also in 2022 European Commission to collect and review information on Member State transposition of Article 1 (4) of the Directive.

After analyzing the data, there are two options to move forward:

- in 2023 to compile the results and propose a new standalone consumer insolvency directive or

- according to Art.33, in 2026, to include a new chapter on consumer insolvency as part of a revision of the Restructuring and Insolvency Directive 2019/1023 / EU.

4. Aspects regarding the good faith of the debtor

The insolvency procedure of the natural person, whether it takes the radical form of immediate liquidation of the traceable assets or is done on the basis of the financial recovery plan proving the efforts of the over-indebted consumer to pay, grants

[13] See for example Comparative Table of Insolvency Related Measures Adopted or Planned for Adoption in Member States (European Commission, Directorate-General Justice and Consumers 2020) (August 19, 2021), available at: https://e-justice.europa.eu/fileDownload.do?id=8c19af5d-3e73-4de9-994b-0b975101b5eb.

[14] https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkzpoa70klz4.

the debtor discharge of uncovered debts only conditionally by the debtor's good faith.

When it is in default, good faith is the intention of the honest debtor to use the insolvency proceedings to get a fresh start, getting rid of oppressive debts that have been incurred either because of circumstances beyond his control, such as those contracted for unexpected medical conditions, caused by the loss of a job, or due to a recession, or because the debtor did not manage his finances well, but without being seriously guilty. On the contrary, when bad faith intervenes, the subject may borrow money that he does not intend to return or is aware that he cannot return it. Because good faith is necessary to achieve the purpose of the bankruptcy proceedings, the court will punish the lack of good faith, either by rejecting the debtor's claim without releasing the debtor, or by lifting the suspension of foreclosures, which prevented creditors from confiscating the debtor's assets or income in order to pay the debts.

With regard to the good faith of the debtor in the case of the insolvency of natural persons, two main typologies are recognized internationally:

- the Anglo-American model, called "fresh start"

- the continental - European version, also known as the deserved fresh start.

According to the Anglo-American model, almost any individual debtor can benefit from the effects of the law, while the second procedure, adopted by most European states in the field of insolvency of individuals, can only benefit the debtor who has reached the situation of impossibility to payment of current debts due to causes beyond his control or due to unforeseen causes, provided that he was in good faith.

5. Barriers and limitations in access to personal insolvency for debtors

The debtor's access to insolvency proceedings may be subject to several eligibility conditions, including a certain minimum level of debt.

Difficulties also arise in setting the minimum amount to be recovered by creditors in insolvency proceedings. This is a key issue for many low-income, low-assets or no-income and no assets borrowers (the so called 'NINA' – no income, no asset consumers - or 'LILA' – little income, little asset consumers), which can rule them out from the procedure ab initio. For the poorest borrowers, the costs of the procedure itself can also be a hindrance. Other thresholds refer not only to the amount of outstanding debt a person has, but also to their seniority, and the result is that access to proceedings is restricted to those who, although sufficiently indebted, payment incidents are not long enough. Where unpaid debt thresholds reach relatively high levels, a large number of other insolvent debtors may also be excluded if they do not fall under the scale. The debtor should be able to request that the proceedings be opened when it is reasonably foreseeable that he will not be able to continue to pay the debts at maturity. In other words, when the state of insolvency become imminent and not when it is found that he/she cannot pay the debts at maturity. This would allow the borrower to apply for debt restructuring at an early stage, thus increasing the prospects for creditors to settle and recover debts.

In some states, the debtor must demonstrate that he or she has consulted with an authorized intermediary, obtained advice, or attempted a method of settlement by agreement with creditors before filing for insolvency. For example, in Germany, in some cases, the admissibility of the application also requires certification by a

lawyer or a consulting agency that the debtor has tried to reach an out-of-court settlement with his creditors in the last six months, to no avail, as well as the reasons for not reaching such an agreement.

Although obviously extremely concise, this statement of the problems currently posed by the conceptualization and legal treatment of the over-indebtedness of the consumer of credit, it raises the need to harmonize at Community level the procedure of consumer insolvency through a tool that would complement the architecture of European Union legislation on the subject.

6. Personal insolvency in Romania

Due to the relaxed lending conditions for the population in the few years of economic boom before the mortgage crisis of 2008, Romanians became over-indebted to banks and sometimes the monthly instalment exceeded the income. But shortly after the crisis broke out, and with the austerity measures being taken, a significant number of Romanian consumers could no longer pay off their bank loans, and then the need for a debt discharge regulation for individual debtors began to be felt.

Despite the resistance, especially from financiers, a number of steps have been taken in Romania to help consumers, especially by reviewing and refreshing the regulations that apply to creditors who grant loans to individuals, aimed on preventing over-indebtedness[15]. However, Regulation no.24 from 28.10.2011 on granting loans to individuals which laid down provisions on sound lending practices and stricter rules for banks when setting the maximum amount that the consumer can borrow, could only apply to future borrowers, not for previously contracted debts.

The beginning of 2018 marked the entry into force of the Insolvency Law for individuals. Law no. 151/2015 on bankruptcy of individuals ("Law no. 151/2015"), which entered into force on 1 January 2018. The law establishes a collective procedure for recovering the financial situation of debtors-individuals in good faith, covering their liabilities and discharging their debts. Prior to the entry into force of the Personal Bankruptcy Law, the Romanian legislation regulated only the insolvency of legal entities.

The Law regulates three separate procedures that pursue to safeguard debtors from discretionary enforcement procedures and on the other side to maximize the amounts recovered by creditors. These are:

recovery plan procedure: a general insolvency procedure based on a debt recovery plan;

liquidation procedure: insolvency procedure based on liquidation of assets;

simplified procedure: simplified insolvency procedure.

Law no. 151/2015 has in its center the idea of protection of the debtor natural person who is in good faith, so that the provisions do not benefit the debtor in bad faith. As a result, the purpose of the Insolvency Law of individuals cannot be to impose a stigma on those who use the benefits of the law, its negative effects can only be felt in terms of access to credit and other financial instruments and does not limit access to the labor market or publicly discrediting the individual

According to Law no. 151/2015, the insolvency of a natural person debtor "is presumed when he, after a period of 90 days from the due date, has not paid his debt to

[15] NBR Regulation no.24 from 28.10.2011 on granting loans to individuals, https://legislatie.just.ro/Public/DetaliiDocumentAfis/132549.

one or more creditors". Therefore, only those who have debts of more than three months to at least one creditor can apply for the initiation of insolvency proceedings.

The provisions of Law no. 151/2015 applies to individual debtors who have their domicile, residence or habitual residence for at least six months prior to the submission of the application in Romania and who are in a state of insolvency and there is no reasonable probability of becoming able within one year to perform again their obligations as contracted, while maintaining a reasonable standard of living for themselves and their dependents.

6.1. Conditions and barriers to make use of Law no. 151/2015 by the debtors

The insolvency proceedings may not be applied to natural persons who have previously been the subject of such proceedings (completed with the elimination of residual debts) less than five years prior to the filing of a new application for insolvency proceedings or those already in such a procedure.

With regard to this instrument of treatment of the installed over-indebtedness of the individual, the scope of application of the Law 151/2015 distinguishes fairly and efficiently between excusable and non-excusable over-indebtedness. Nor can resort to insolvency proceedings those who have been definitively convicted of an offense of tax evasion, forgery or intentional infringement of property by disregard of trust, those who have been dismissed in the last two years for reasons which are attributable to them, those who, although fit for work, did not make an effort to engage in or unjustifiably refused a proposed job or any other activity that could bring them income, but also those who accumulate new debts while in a state of insolvency[16].

In the context of the Covid-19 pandemic, some criticisms could be brought against Law 151/2015.

Thus, according to Art. 4 par. (4) Letter c): the procedure does not apply to the debtor who has been dismissed in the last 2 years for reasons attributable to him.

We consider it appropriate to waive this provision, which limits access to proceedings for debtors who have had the misfortune to lose their jobs in the last two years, for reasons which are not always and entirely attributable to them, some of them being unpredictable, if we refer to the appearance of a pandemic.

Another debatable aspect of that provision is that, if the employee challenges the dismissal decision and goes through all the steps in court, including a reversal of the case with reference to retrial, only at the end of the trial which could exceed two years, in the event that the court issues a final judgment stating that the reasons are not attributable to him, the employee may make a request to initiate proceedings.

During all this time, the employee who has been dismissed for reasons considered imputable by the employer does not have the opportunity to address the territorial insolvency commission.

Moreover, if the text of the law were to apply strictly, neither the debtor who, after being dismissed for imputable reasons, had concluded a new employment contract could benefit from the effects of the procedure.

In Art. 4, paragraph (4) letter d): provides that it cannot benefit the category

[16] Romanian Law 151/2015, in its turn, offers a definition of insolvency. According to point 12 of art. 3, Definitions, "insolvency is that state of the debtor's patrimony which is characterized by the insufficiency of funds available for the payment of debts, as they become due. The insolvency of the debtor is presumed when, after a period of 90 days from the due date, he has not paid his debt to one or more creditors. The presumption is relative".

of debtors natural persons who, although fit for work, have not made the reasonable diligence necessary to find a job

By the above provisions, the legislator has restricted access to this procedure to individual debtors who have made no effort to find a job, in case they are in debt. The law does not determine what this "reasonable diligence" means, leaving it to the discretion of the insolvency commission or the court to assess whether or not the debtor has made the reasonable diligence to find a job. In the context in which millions of employees were in a situation of technical unemployment for certain periods of time in the last years of the pandemic, the submission of reasonable diligence could inevitably result in failure, even if it took steps to the employee, including proving that he is registered with the Employment Agency without being offered a job.

As a result, it would have been useful for the legislator to specify exactly what these "reasonable diligences" are, so that the text of the law gives rise to as few interpretations as possible.

If we consider the pandemic as an unpredictable event that has affected the whole society and the global economy, we consider that the legislator would take an important step in the event of an amendment to the Insolvency Law of natural persons, namely if, apart from good faith of individual debtors, the law could, under certain conditions, apply to individuals who have shown bad faith, but who could benefit from a "new chance" and the family of the bad faith debtor and/or the dependents of the debtor, could also take advantage of this chance.

Another[17] important deficiency of Law 151/2015 in the light of the coordinates drawn by this paper is the fact that the treatment of cross-border insolvency was omitted. A further revision of the act should take into account the issues of the recognition and enforcement of foreign insolvency judgments in matters of insolvency of individuals.

7. Conclusions

Although beneficial to the debtor in good faith, recourse to the procedure of personal bankruptcy should not become a habit for debtors. The legislator should prevent the abuse of this remedy, and the insolvency proceedings of the individual should be regulated so that the use of the personal bankruptcy procedure does not become recurrent and the individual does not repeatedly become insolvent. The legislator should also consider the causes that led to insolvency, assessing, as far as possible, good faith, without neglecting the preparation of a payment plan and proper supervision of compliance with it.

Regarding the rationale for regulating the insolvency of the natural person, this exists as long as the law establishes a framework that offers both the debtor and the creditor accessible and viable remedies. In order to achieve these goals, the balance between debtor and creditor must be ensured, but at the same time, an equilibrium must be ensured at the technical level, between the philosophy of regulation and the way it is transposed into law through the establishment of clear and well determined legal assumptions. Whatsoever option the

[17] For an exhaustive critics of the Law 151/2015 see Carmen Pălăcean, ”Insolvenţa persoanelor fizice prin prisma reglementărilor cuprinse în Legea nr. 151/2015: Scopul legii, principiile, domeniul de aplicare, formele procedurii şi iniţierea procedurii. Câteva aspecte cu privire la minusurile şi beneficiile aduse de lege”, https://www.universuljuridic.ro/insolventa-persoanelor-fizice-prin-prisma-reglementarilor-cuprinse-in-legea-nr-151-2015-scopul-legii-principiile-domeniul-de-aplicare-formele-procedurii-si-initierea-procedurii-cateva-aspecte-cu/.

legislator adopts, it is necessary to clearly define the scope of the law and the eligibility requirements for the debtor, as well as the explanation of the principles and logic that led to the solution, in order to determine whether the limits and requirements are adequate.

If the concern of the legislator is to provide a legal framework that provides solutions to the debtor to get out of default, this concern should target all debtors, providing them with viable and accessible solutions, as appropriate.

The main aim currently pursued at European level in private insolvency proceedings is, therefore, to rehabilitate the consumer, avoiding punitive measures against him as a result of the impossibility of paying debts.

The fact that debts are only partially recovered in the event of consumer bankruptcy should also encourage creditors to pay more attention to lending, helping to prevent over-indebtedness through responsible lending. However, the existence of a way to get out of debt through personal insolvency also creates a moral hazard problem in society, as consumers might be encouraged to engage in overly risky indebtedness. Therefore, the law should provide for bankruptcy relief only for those who are in real need, the truly insolvent debtors in whose case the inability to pay would generate social costs in the absence of debt write-down. In order to fully address over-indebtedness, Europe needs to address other variables, including cross-border insolvency.

In order to limit the risks of over-indebtedness of individuals, the macro-prudential policy should aim not only to improve the credit worthiness assessment, but also to limit the indebtedness of households.

The indebtedness is often reflected in the service capacity of household debt and the instantaneous probability of default.

The experience of the last decade after the 2008 financial crisis indicates that the macro-prudential framework in several countries could not prevent the further accumulation of household debt in the context of the liquidity of the market by central banks. Moreover, the easing of monetary policy in response to the Covid-19 crisis has also boosted household indebtedness and house prices. At the same time, the long-term environment of saturated interest rates has further delayed debt adjustment and widening imbalances, pointing to the need to revise macro-prudential policy on the household sector.

This analysis shows that a well-designed insolvency directive for individuals would represent another step in the European legal context towards legislative harmonization in the Member States and would optimize mechanisms for judicial cooperation and cross-border insolvency.

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The DOs and DON'TS of franchising in Romania

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Abstract

The importance of the franchise agreement per se is one which cannot be denied, both by European investors and by Romanian ones, since each business strives to gain the market relevance which characterizes a franchise. Also, more prominent EU franchises are entering Romanian markets while initially obscure Romanian brands are bolding emerging from the minds of visionary entrepreneurs.

While The European Union lacks a common legal framework on franchising, each Member State has established its own rules, which are similar to a certain extent.

This article aims to point out the main rules applicable for franchises established under Romanian laws, which both franchisor and franchisees should be aware of when analysing the potential success of a franchise located in Romania.

The study shall address what is mandatory for the franchisee to perform before setting up a franchise is Romania and while the franchise network is carrying out is business as well as what are the obligations which each franchisee must undertake, both pursuant to contractual norms and stemming from the legally mandatory framework. Also, another of the study's objectives is to determine the most frequent misinterpretations of Romanian franchise legal framework and to propose adequate solutions in order for future investors to avoid them.

Keywords: *Franchise, franchisee, same market, publicity, know how, brands, intellectual property, Romanian franchise laws.*

1. Introduction

This paper covers the analysis of the main legal and practical aspects and concepts which should be known and implemented by Romanian businessmen and novices working their way up to building a successful business.

At a mere Google search, there are more than 70,000 results, showcasing several franchises which have either been successful or still wait to be discovered and properly exploited by eager franchisees. This proves the high interest Romanian entrepreneurs have in franchises, which are popular success recipes, attractive due to the already established success on the local market. Doctrine[1] has reflected on the grounds for which franchises have recently seen such overwhelming success, considering that on the one hand, the franchisor has the possibility of creating a franchise network without needing a considerable investment, and, on the other hand, the franchisee enjoys the possibility of implementing a business model that has already been successful on the market, being accompanied in the process of starting a new business by the franchisor's experience.

But with great possibility for success comes great responsibility, which is why

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[1] Roxana Maria Chireac, *The franchise agreement and the exclusivity clause*, Pandectele Romane no. 5/2020.

both franchisees and franchisers should be aware, from a more practical perspective, what should they expect from each other during the franchise agreement and after its duration expires or the contract is terminated, and which is why the studied matter is important.

Therefore, the franchise **is of utter relevance for practitioners and businessmen, since recent amendments to the national legal framework, namely to Government Ordinance no. 52/1997 regarding the legal regime of franchise (hereinafter "GO no. 52/1997") bring new and intricate regulatory aspects which should be firstly understood and then, properly applied.**

This study aims to clarify the way in which Law no. 179/2019 should be approached so that it creates a meaningful tool for both the franchisee and the franchisor, and how several types of franchises are impacted, by means of analysing the practical impact of franchise agreements and their clauses.

The novelty of this study, apart from other existent specialised literature, resides in the perspective from which legal provisions are analysed, in the sense that its purpose it to be a practical guide for businessmen and legal scholars alike, in which the results from previous experience of court cases related to franchises are integrated, as good practices.

2. The parties involved in a franchise agreement

While it is easier to assume that the parties to the franchise are the franchisee and the franchisor, what GO no. 52/1997 tells us is that both parties must be professional, meaning that they should be registered in a form which allows them to perform commercial activities on a day to day basis.

As such, the franchisee must not fall in the trap of considering that the individual – sole shareholder of the limited liability company established for the purpose of joining the franchise is the franchisee and could benefit from the protection of the rules governing consumers in relation to their counterparts. Franchisees shall be considered to be only the legal entities established by those individuals, either legal entities or professional individuals, established either in compliance with Companies Law no. 31/1990 or with Government Ordinance no. 44/2008 regarding carrying out economic activities by authorized individuals, individual enterprises and family enterprises.

Given the above, before considering to join a franchise, an individual should choose a proper form in which to perform its economic activities under Romanian legislation.

As far as the franchisor is concerned, GO no. 52/1997 set out its main obligations, which include the following:

a) the franchisor must be the owner of the rights over a registered trademark or over any other intellectual or industrial property right, for a duration at least equal to the duration of the franchise agreement. As such, the law does not impose that the franchisor must be the actual owner of the brands under franchise, since he can receive the right to use the intellectual property rights pertaining to said brand based on a license agreement with the rightful owner of the brand.

b) the franchisor must provide the right to exploit or to develop a business, a product, a technology, or a service.

This provides for a wide range of franchises from which the franchisee may choose the one more appropriate to its own capabilities.

c) the franchisor must ensure that the franchisee has an initial training for exploiting the trademark.

Such obligation stems from the franchisor's previous experience, which is actually one of the pillars of the franchise. The franchisor acts like a protective brother for the franchisee, initiating the latter in the business which the franchisor is already extremely accustomed to. Mention must be made that the franchisor's experience has been defined by his own work in the same franchise so once the franchisee join the franchise, it shall most likely, at a certain extent, split the same market and the same customers with the franchisor.

d) the franchisor must use personnel and financial means in order to promote its brand, to perform research and innovation, to ensure the development and viability of the product.

From this perspective, the franchisor's attributions are more extended than the ones of the franchisee, since the franchisor is the one who introduces the brand to the world and is responsible for the way the brand is received. All actions related to marketing and promotion of the product and the concept of how the business should develop are geared by the franchisor and should be observed by the franchisee, since the purpose of this control with which the franchisor is vested by the law is to create a network of businesses in which the customer cannot distinguish between the franchisor's business and the franchisee's business.

e) the franchisor must prove the specific application of the know-how he has, within a pilot-unit, whose main objectives are to test and to define the business formula.

This obligation to have a pilot – unit has been deemed as necessary by the legislator in order to facilitate the franchisee's understanding of how the business model works and if such business model could be successful if replicated. Additionally, once in this pilot – unit, the franchisee shall have a clearer picture of his own capabilities and limitations whereas growing the business is concerned.

3. The independence of the franchisee from the franchisor

A less thought about aspect regarding the relationship between the franchisee and the franchisor is the independence one has from the other. Although legal rules dispose that the franchisor must provide initial support in view of establishing the franchise and permanent commercial or technical assistance during the contractual relationship, this cannot be interpreted as creating further obligations on behalf of the franchisor, limiting the franchisee's business perspective.

As doctrine[2] has put it, the lack of independence between the franchisee and the franchisor would lead to transforming the franchisee into a mere branch and if the franchisee is an individual, into the franchisor's proxy.

The consequences of such independence are that the franchisee undertakes the risk of becoming insolvent or even the risk to lose the business, if his commercial aptitudes are not sufficiently developed. It is not the franchisor who shall bear such risks, since the franchisor does not undertake result obligations towards the franchisee or towards the success of the franchisee's business.

Likewise, the franchisor is independent from the franchisee, which means that the franchisor cannot become more involved in the franchisee's activity than the law allows. Moreover, the franchisor shall not be liable towards third

[2] Vasile Nemeș. *Commercial Law*, IVth Edition, Hamangiu Publishing House, Bucharest, 2021, p.387.

parties for damages created by the franchisees, except if the franchisor bears a separate, individual fault in such damages, which must be proven.

Considering its independence, the franchisee should realistically analyse its actual possibility to carry out its obligations under a franchise agreement, prior to entering into such, since even though the franchisor shall provide guidance, the liability for the success of the business lies with the franchisee.

4. The pre-contractual phase of a franchise agreement

While it is common for contractual parties to be careful with respect to the way they are observing the contractual provisions, insofar as franchise agreements are concerned, the pre-contractual phase is just as important, since it gives the parties the opportunity to be better acquainted with the specifics of the business run by the franchisor and to confirm their decision to collaborate.

Law no. 179/2019 amending GO no. 52/1997 has stressed the importance for the franchisee to receive an information disclosure document, which must comprise specific data with reference to the history and experience of the franchisor, details of the identity of the management of the franchise, the franchisor's and franchisor's management bodies' litigation history, the initial amount which the franchisee must invest, the parties' mutual obligations, copies of the financial results of the franchisor from the past year and the information regarding the pilot-unit.

This means that withholding any information mentioned above triggers the liability of the franchisor towards the franchisee for any proven damages resulted from the breach of such pre-contractual obligations, even if such obligations are not included in the franchise agreement, so special attention should be drawn when negotiating the franchise agreement to these specific conducts which the franchisor should observe. However, if the franchisor proves it complied with these legal dispositions, the franchisee shall not be able to request court damages by arguing that the franchise failed to obtain certain material results or material results similar to the ones of the franchisor, for that matter, since the franchisor's obligations are and remain throughout the franchise relationship obligations of diligence and not obligations of result.

During this pre-contractual phase, the franchisee should request and the franchisor should provide access to the information disclosure document, and should verify if all information included in this document is compliant with the provisions of GO no. 52/1997. In order to protect its interest, the franchisor should include contractual clauses by which the parties agree that all information related to the franchise and its concept, as stipulated under Romanian laws, have been duly disclosed and understood within the pre-contractual phase.

5. The franchise network

The practical result of any franchise is the creation of a franchise network, which shall commence its existence after the franchisor shall have been able to efficiently operate a business concept for a period of at least one year in minimum one pilot-unit.

The establishment of the franchise network shall not lead to the creation of a

new legal entity, as legal doctrine[3] has very well pointed out.

Pursuant to art. 1 point 4) of GO no. 52/1997, the franchise network comprises an ensemble of contractual relations between a franchisor and its franchisees, with the purpose of promoting a technology, a product or a service, as well as for the development of production and of distribution of a product or a service.

The franchisor's role in the franchise network is key for its proper functioning, since the franchisor must be able to maintain its common identity and its reputation and also, to protect the franchise network from unlawful acts of know-how disclosure and unfair competition.

The franchisor should therefore establish sound rules in the franchise contract, while emphasizing the importance of the homogeneity of the franchise network, which should be explained by the franchisor and fully understood by the franchisee from the pre-contractual phase of negotiations and discussions. No franchisee is allowed to perform any action or manifest any conduct which is likely to lead to a disruption in the homogeneity of the franchise network, as such is defined by the franchisor, since any such deed is likely to harm the brand itself. Any reduction in sales and business due to infringements committed by a franchisee are likely to affect the entire network of franchisees, given that at the centre of the business is the brand itself so if the latter loses its reputation before consumers, each franchisee is likely to suffer. Consequently, each franchisee is allowed to seek repair of damage from other franchisees who choose not to observe contractual provisions, based on failure to adhere to the principle of homogeneity of the franchise network, established under GO no. 52/1997.

From a legal and practical perspective, the franchisor is also obliged to provide continuous commercial and/or technical assistance throughout the contract period, which does not mean in any way that the franchisor takes any responsibility for the results of the franchisee's business. The obligation to provide assistance remains a diligence obligation and should be viewed as a necessary step so that the franchisor continuously ensures that the franchisee could perform its activity at the franchise standard, which is also set by the franchisor. The trademark and the know – how of the franchisor represent the guarantee of the quality of the products and services provided to consumers, so the franchisor is entitled to perform controls within the franchise network to see if the products and services provided by the franchisees live up to the standards set through the franchise.

6. The franchisee's specific obligations

GO no. 52/1997 establishes that the franchisee is selected by the franchisor based on its competence, meaning managerial qualities and financial capacity to exploit the business, as per art. 15.

In order to accomplish the purpose of having a successful and trustworthy franchise network, the franchisor must include several requirements which the franchisee is obliged to observe. To this end, the franchisee must support the development of the franchise network and must maintain its common identity and its reputation. Therefore, the franchisee is not allowed to use materials or products outside of the ones allowed by the franchisor in the franchise network. The same applies to other brands which cannot be used since their usage could

[3] Stanciu Cărpenaru, *Romanian Commercial Law Treaty*, VIth updated Edition, 2019, Universul Juridic Publishing House, Bucharest, p. 589.

determine a confusion in the consumer's perception with respect to the brand the network promotes. Of course, the usage of other brands than the one the franchise network promotes may likely lead to decreases in the quality of products and of services.

Apart from that, the franchisee must provide to the franchisor any information useful to facilitate the disclosure and analysis of the performance and of the real financial status of the franchisee, in order for the franchisor to be able to have an efficient overview of the franchise. Since this type of obligation requires a special conduct from the franchisee and although it is provided under the law, it is useful to include it in the franchise agreement, as well, so that any potential misunderstandings are removed from the start.

One of the main obligations of the franchisees, as set out under art. 4 point 3) of GO no. 52/1997, is not to disclose the know-how obtained from the franchisor to third parties, for the duration of the franchise agreement and afterwards. The secrecy of the know-how must be kept by the franchisee since this know-how, along with the brand and its market awareness, are actually the elements based on which the franchise is based on. Any such disclosure shall likely generate damages both for the franchisor, who should be able to efficiently protect the network, as well as for the other franchisees, who gain their main profit from the success of the franchise network and from the reputation of the brand and only subsequently, from their own business skills.

In order for the franchisor to maintain the homogeneity of the franchise network and to protect the remaining franchisees, it can establish contractual non-competition and confidentiality clauses, which prevent the franchisee from spreading the know-how obtained from the franchisor and are aimed to protect such know-how from leaking in any way outside the franchise. Such clauses can operate for the duration of the franchise agreement and afterwards, taking into account that the majority of franchisees are inclined to use the knowledge gained in a certain field afterwards.

Court practice[4] has shown that non-competition clauses have been established considering the fact that the franchisee benefits from the knowledge and the advantages obtained during the franchise agreement and could afterwards decide to carry out a competitive business, which could prejudice the franchisor. Such an obligation to non-compete includes, as per the court's interpretation, the possibility of the former franchisee to carry out, in its own name, for a period of 3 years after the franchise contract is terminated, a similar activity to the one carried out by the franchisor and for which the franchising agreement had been concluded.

7. Conclusion

While this study focused on the main outcomes of a franchise, meaning the practical implications of establishing a franchise network, the pre-contractual phase, the independence of the parties and the franchisee's obligations, it also shows that in practice parties may encounter difficulties due to the general manner in which the legal norms have been drafted.

Although Law no. 179/2019 has amended key points of GO no. 52/1997, there are still several elements which need to be better regulated, such as the content of the non-competition and confidentiality clause, the way the exclusivity clause operates and

[4] Bucharest Tribunal, IInd civil section, *Civil decision no. 233 2/A/17.11.2017*, available at www.rolii.ro, published in Pandectele Romane no. 6/2019.

the way parties could seek remedies for franchise infringements.

Until the legislator intervenes, practitioners are obliged to create lawful and comprehensive contractual clauses, for safeguarding both the franchisee and the franchisor, as well as the consumer, who is the final beneficiary of the franchise network and the engine of its development.

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EU TAXONOMY: QUALIFYING AS GREEN

Alina Mihaela CONEA*

Abstract

What is 'sustainable'? What economic activity qualifies as green and should receive, accordingly, investments? Is nuclear energy green? Is gas green? The legal classification system defines a list of environmentally sustainable economic activities that aims at playing a significant part in facilitating sustainable investment in EU. The paper points the different views member states have on what green means, on the Hinkley Point C Case before the Court of Justice of European Union. The main purpose of this paper is to explore the legal base concerning the concept of sustainable development in EU law. In order to address this question the paper is divided into three parts. The first part is dedicated to the legal framework of EU primary and secondary law relating to the concepts of sustainable development, green and environmental law. The recent classification of sustainable activities in the Taxonomy Regulation is considered in the second part. The third part of the paper selects some interpretations of the Court of Justice of European Union case-law.

Keywords: *nuclear energy, green, sustainable finance, climate law, CJEU jurisprudence, environment protection.*

1. Introduction

On 8 October 2014, the Commission approved an aid scheme planned by the United Kingdom for the construction of a nuclear power station 'Hinkley Point C'[1]. The Republic of Austria (supported by numerous member states) brought an annulment action before Court of Justice of European Union (CJEU), claiming, among others, that the construction of Hinkley Point C is not intended to meet an objective of 'common' interest, that there is a conflict between the promotion of nuclear energy, on the one hand, and the principle of protection of the environment and the principle of sustainability, on the other. In September 2020 the Grand Chamber of the CJEU handed in a final decision.

On 2 February 2022, the Commission approved in principle a Complementary Climate Delegated Act including specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy, a classification of green activities for investments purposes.

The question is what means 'sustainable'? What economic activity qualify as green and should receive, accordingly, investments? Is nuclear energy green? Is gas green?

Green, protection of environment and sustainability.

What exactly is the meaning of these terms? Is there any synonymy between them? Or are they, in fact, different

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[1] Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (notified under document C(2014) 7142) (Text with EEA relevance), OJ L 109, 28.4.2015, pp. 44-116.

concepts? Reminiscent a mirror situation of the Sergio Leone classical movie, The good, the bad and the ugly, where "Leone narrates the search for a cache of gold by three grotesquely unprincipled men sardonically classified by the movie's title[2].

The purpose of this paper is to explore the legal base concerning the concept of sustainable development, green and environment law in European Union (EU) law.

In order to address this enquiry the paper is divided into three parts. The first part is dedicated to the legal framework of EU primary and secondary law. The recent classification of sustainable activities in the Taxonomy Regulation is considered in the second part. The third part of the paper selects some approaches of the Court of Justice of European Union (CJEU) case-law.

2. The legal sphere: a wide shot

2.1. The sustainable development

- The EU primary law

The concept of sustainable development[3] appears 6 times in Treaty on European Union, and 1 time in the Treaty on the Functioning of the European Union, without any definition provided.

The Preamble of the treaty states that the Union has to take into account *the principle of sustainable development* within the context of the accomplishment of the internal market and of reinforced cohesion and *environmental protection.*

Thus, reading it the other way, in the context of environmental protection the Union has to take into account the principle of sustainable development.

Accordingly, the principle of sustainable development is *a limit of the* environmental protection.

Art. 3 of the Treaty on European Union (TEU) laid down the objectives of the Union[4]. Although the objectives do not impose legal obligations on the member states or confer rights on individuals[5], they are relevant for the interpretation of the Treaty provisions[6].

Art. 3 (3) of the TEU states that:

The Union shall establish an internal market. It shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Consequently, the purpose of the internal market is to work for the sustainable development of Europe.

The sustainable development is based on: economic growth, price stability and competitive social market.

The aims are full employment, social progress and *a high level of protection and*

[2] Jameson, Richard T., *Something to do with Death: A Fistful of Sergio Leone*, Film Comment 9, no. 2 (1973): pp. 8-16, cited by https://en.wikipedia.org/wiki/The_Good,_the_Bad_and_the_Ugly.

[3] For an evolutionary perspective of `sustainable development` concept in the normative filed of EU law, see Nicolas de Sadeleer, *Sustainable Development in EU Law. Still a Long Way to Go*, in Jindal Global Law Review. Special Issue on Environmental Law and Governance (2015) 6(1), pp. 39-60.

[4] Conea, Alina Mihaela, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2019.

[5] Klamert, Marcus, *Article 3 TEU*, In The EU Treaties and the Charter of Fundamental Rights: A Commentary, Oxford University Press, 2019, p. 209.

[6] Lenaerts, Koen, Piet Van Nuffel, Robert Bray, and Nathan Cambien. *European Union Law*, 3rd ed., London: Sweet & Maxwell, 2011, para. 7-007.

improvement of the quality of the environment.

The treaty provides for the external dimension of this objective in para. (5) of art. 3 TEU. So, the Union shall contribute to (…) the sustainable development of the Earth. In fact, the sustainable development appears widely within the general provisions on the Union's external action, in art. 21 TEU.

Remarkably, according to art. 21 (d) TEU the Union shall foster the *sustainable* economic, social and *environmental development*.

The Charter of Fundamental Rights also refers to sustainable development as a principle in art. 37.

The Treaty on the Functioning of the European (TFEU) Union, at art. 11 TFEU (ex art. 6 TEC) provides that:

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view *to promoting sustainable development.*

Art. 11 TFEU requires environmental protection requirements to be 'integrated' into the Union's policies and activities and is therefore also referred to as 'integration clause'[7]. According to the CJEU, this provision emphasises the fundamental nature of that objective and its extension across the range of those policies and activities[8].

- The EU secondary law and programmatic documents

The most usually mentioned definition of sustainable development is that of the United Nations Brundtland report from 1987[9]: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The 2001 Goteborg European Council outlines the concept: sustainable development – to meet the needs of the present generation without compromising those of future generations – is a fundamental objective under the Treaties. That requires dealing with economic, social and environmental policies in a mutually reinforcing way[10]. As the Brundtland report express it, "economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind"[11].

A single exception is that if of Regulation (EC) no. 2493/2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, that is no longer in force. According with this act sustainable development relies on the integration of the environmental dimension into the development process[12]. "Sustainable development" means, in the wording of this act, the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity

[7] Klamert, Marcus, *Article 11 TFEU*, In The EU Treaties and the Charter of Fundamental Rights: A Commentary, Oxford University Press, 2019, p. 564.

[8] Judgment of the Court (Grand Chamber) of 15 November 2005, Commission of the European Communities v. Republic of Austria, Case C-320/03, ECLI:EU:C:2005:684, para. 73.

[9] In 1983, the General Assembly of the United Nations created the World Commission on environment and Development chaired by the Prime Minister of Norway Ms. Gro Harlem Brundtland. The report (Brundtland report) entitled "Our Common Future" was presented in 1987.

[10] Presidency Conclusions, Göteborg European Council, 15 and 16 June 2001.

[11] Brundtland report entitled "Our Common Future", presented in 1987.

[12] Regulation (EC) no. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000, pp. 1-5, no longer in force.

of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations[13].

The Commission specifies in Europe 2020. A strategy for smart, sustainable and inclusive growth, that "*Sustainable* growth is promoting a more resource efficient, greener and more competitive economy"[14]. The accent is on the development side. Further, according to the explanation of the Commission, Europe must act to have „clean and efficient energy" basically for the following: financial savings (adding an extra 0.6% to 0.8% GDP), energy security and to create more jobs[15].

2.2. The *green*

The using of the word green is abundant, especially, in the non-binding acts of the EU institutions. For example, in different Commission's Communications (*green* solutions, *green* Infrastructure, *green* features such as green roofs and walls, greening our buildings)[16], Reports (lack of *green* engineering know-how)[17] or EU Parliament resolutions (*green* economy, *green* architecture)[18].

Green infrastructure is defined in the *EU green infrastructure strategy*[19] as 'a strategically planned network of natural and semi-natural areas with other environmental features designed and managed to deliver a wide range of ecosystem services. It incorporates green spaces (or blue if aquatic ecosystems are concerned) and other physical features in terrestrial (including coastal) and marine areas. On land, green infrastructure is present in rural and urban settings'.

Accordingly, the central element of the definition is biodiversity, an environment concept. Unlike *single-purpose grey infrastructure*, *biodiversity-rich green spaces* can perform a variety of extremely useful functions, often simultaneously and at very low cost, for the benefit of people, nature and the economy[20].

On 11 December 2019, the Commission presented the *European green deal*. This is a growth strategy aiming to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050

[13] Art. 2 of Regulation (EC) no. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000, pp. 1-5.

[14] Communication from the Commission , EUROPE 2020 *A strategy for smart, sustainable and inclusive growth*, COM/2010/2020 final.

[15] *Ibidem*.

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Green Infrastructure (GI) — Enhancing Europe's Natural Capital, * COM/2013/0249 final *, Communication from the Commission, A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives, SWD(2020) 550 final.

[17] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Review of progress on implementation of the EU green infrastructure strategy, COM/2019/236 final.

[18] European Parliament resolution of 17 September 2020 on the European Year of Greener Cities 2022 (2019/2805(RSP)), OJ C 385, 22.9.2021, pp. 167-172.

[19] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Green Infrastructure (GI) — Enhancing Europe's Natural Capital*, COM/2013/0249 final.

[20] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Review of progress on implementation of the EU green infrastructure strategy*, COM/2019/236 final.

and where economic growth is decoupled from resource use[21].

In this strategy, the word green is used in the following manner, referring to: *changes of economy* (green and the digital transformation, green transition), *financial market* (the risk of green washing, 'green claims', green public purchasing, green finance, overall greening of banks activities, EU green bond standard, green assets, greening national budgets, green budgeting tools, green public investment), *the legislative framework* (a green oath to 'do no harm', "green" regulation) and *external action* ('green deal diplomacy' focused on convincing and supporting others to take on their share of promoting more sustainable development).

The concept of *green* is to be found also in the legislative acts of the Union.

For instance, *greening* (or the *green* payment) is a new type of direct payment to farmers introduced with the 2013 reform of the Common Agricultural Policy (CAP). It is the only direct payment whose main stated objective is '*green*', namely to enhance the CAP's environmental performance[22]. The green payment serves two distinct objectives: enhancing the CAP's environmental and climate *performance* and supporting farmers' income.

Greening is mandatory. All farmers participating in CAP direct payment schemes must also apply for the green payment. However, smaller holdings can benefit from support under greening without having to meet all, or even any, of greening requirements. Greening requirements also do not apply to holdings considered 'green by definition': for example, organic farmers benefit from the green payment without having to demonstrate compliance with the three greening practices[23]. The European Court of Auditors, in Special Report 21/2017, concludes that: Greening, as currently implemented, is unlikely to provide significant benefits for the environment and climate[24].

In the field of financial market, *sustainable finance* refers to the process of taking *environmental, social and governance* considerations into account when making investment decisions in the financial sector, leading to more long-term investments in sustainable economic activities and projects.

A Commission study[25] presents an overview and analysis of worldwide efforts on defining "green" for green bonds, lending and listed equity. The study notes that the term "green finance" is closely associated with related concepts, such as climate finance and sustainable finance and that some organisations use these terms interchangeably. The Commission study is based on the understanding that *climate, green and sustainable finance are nested concepts*.

According to the European Central Bank, the term "green bond" refers to debt securities whose proceeds are used to finance investment projects with *an environmental benefit*. There are different approaches to defining and certifying green

[21] Communication from the Commission, European Green Deal, COM/2019/640 final.

[22] Regulation (EU) no. 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) no. 637/2008 and Council Regulation (EC) no. 73/2009, OJ L 347, 20.12.2013, pp. 608-670, Recital (37).

[23] European Court of Auditors, Special Report 21/2017, Greening: a more complex income support scheme, not yet environmentally effective, (pursuant to art. 287(4), second subparagraph, TFEU).

[24] *Ibidem.*

[25] European Commission, Study, Defining "green" in the context of green finance, 2017.

bonds, and no global market standard has emerged so far[26]. The definition accepted by the ECB is that of Bank for International Settlements. (Green bonds are fixed income securities which finance investments with environmental or climate-related benefits. Green bonds are an integral component of "green finance" more generally, which aims to "internalize environmental externalities and adjust risk perceptions" for the sake of increasing environmentally friendly investments)[27].

Disclosure frameworks and taxonomies are also developing rapidly to create an information architecture to enable banks to manage the risks and scale up green finance[28].

Speaking about *greenflation*, the ECB Member of the Executive Board, acknowledge that most *green* technologies require significant amounts of metals and minerals, such as copper, lithium and cobalt, especially during the transition period. Electric vehicles, for example, use over six times more minerals than their conventional counterparts.[29]

2.3. The environment law

A definition of *environmental law* is to be found in Regulation no. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. *Environmental law* refers to the objectives of Community policy on the environment as set out in the Treaty[30]. *'Environmental law'* means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems[31].

The EU objectives with respect to the environment, set out in art. 191(1) TFEU, are *preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.*

[26] Roberto A. De Santis, Katja Hettler, Madelaine Roos and Fabio Tamburrini, *Purchases of green bonds under the Eurosystem's asset purchase programme*, ECB Economic Bulletin, Issue 7/2018, https://www.ecb.europa.eu/pub/economic-bulletin/focus/2018/html/ecb.ebbox201807_01.en.html.

[27] Ehlers, T. and Packer, F., *Green bond finance and certification*, BIS Quarterly Review, September 2017.

[28] Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, Keynote speech, Industry outreach on the thematic review on climate-related and environmental risks, *Towards an immersive supervisory approach to the management of climate-related and environmental risks in the banking sector*, Frankfurt am Main, 18 February 2022.

[29] Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at a panel on "Monetary Policy and Climate Change" at The ECB and its Watchers XXII Conference, *A new age of energy inflation: climateflation, fossilflation and greenflation*, Frankfurt am Main, 17 March 2022.

[30] Recital (10), Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13-19.

[31] Art. 2 (1)(f), Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

Recital 10 of the Aarhus Regulation states that[32], in view of the fact that environmental law is constantly evolving, the *definition of environmental law* should refer to the objectives of EU policy on the environment as set out in the Treaty on the functioning of EU[33].

3. The EU taxonomy regulation: a close-up

To reach the objectives of the European Green Deal, the EU is determined to conduit investments into sustainable activities. For this purpose, the EU adopted Regulation 2020/852 (Taxonomy Regulation)[34] that provides harmonised criteria to determine whether an economic activity qualifies as environmentally sustainable.

The Taxonomy Regulation aims to establish at Union level a classification system to clarify which activities qualify as 'green' or 'sustainable'[35].

Consequently, in the wording of this legislative act 'green' or 'sustainable' appears to be synonymous.

The Taxonomy Regulation defines *six environmental objectives*: (1) climate change mitigation; (2) climate change adaptation; (3) the sustainable use and protection of water and marine resources; (4) the transition to a circular economy; (5) pollution prevention and control; (6) the protection and restoration of biodiversity and ecosystem.

The Taxonomy Regulation sets out *three groups of taxonomy users*: (1) financial market participants offering financial products in the EU; (2) large companies who are already required to provide a non-financial statement under the Non-Financial Reporting Directive; and (3) the EU and Member States, when setting public measures, standards or labels for green financial products or green (corporate) bonds.

An economic activity *can only be classified as sustainable*, according to art. 3 of Taxonomy Regulation, if: (1) The economic activity contributes to one of the six environmental objectives; (2) The economic activity does 'no significant harm' to any of the six environmental objectives; (3) The economic activity meets 'minimum safeguards' such as the UN Guiding Principles on Business and Human Rights to not have a negative social impact; (4) The economic activity complies with the technical screening criteria developed by the EU Technical Expert Group.

Hence, to be classified as a sustainable economic activity according to the EU taxonomy regulation, a company must not only contribute to at least one environmental objective but also must not violate the remaining ones[36]. The taxonomy does not ban investments in activities not labelled

[32] Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13-19.

[33] Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, *ClientEarth v. European Investment Bank*, Case T-9/19, ECLI:EU:T:2021:42.

[34] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance), PE/20/2020/INIT, OJ L 198, 22.6.2020, p. 13.

[35] Recital (5), Ibid.

[36] Gortsos, Christos, The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union (December 16, 2020). European Banking Institute Working Paper Series 2020 - no. 80, Available at SSRN: https://ssrn.com/abstract=3750039.

"green", but it limits which ones companies and investors can claim are climate-friendly.

The definition of 'sustainable investment' in Regulation (EU) 2019/2088 includes investments in economic activities that contribute to an environmental objective which, amongst others, should include investments into 'environmentally sustainable economic activities'.

The regulation distinguishes between economic activities that directly contribute to one of the defined objectives, activities that serve as *"enabling"* (Article 16) for such direct contributions, and activities that are needed as *"transitional"* technologies (contributing substantially to the transition- art. 10(2)).

The regulation requires the Commission to set out a list of environmentally sustainable activities by defining technical screening criteria for each environmental objective. These criteria will be established by means of delegated acts.

The first delegated act[37], defining green activities from sectors such as energy, chemicals, and waste was adopted in December 2021 and entered into force on 1 January 2022. On 2 February 2022, the Commission complemented the Climate Delegated Act[38], specifying the screening criteria for nuclear and gas activities. This act adds gas and nuclear power as "transitional" technologies under the EU taxonomy.

Under art. 23(6) of the Taxonomy Regulation, the European Parliament and Council have four months to block the publication of this act in the EU Official Journal and thereby keep it from entering into force.

4. The CJEU jurisprudence: some duels along the way

4.1. The concept of environmental law

The CJEU, interpreted, in the case *TestBioTech*[39], in a board sense the meaning of environmental law: the EU legislature intended to give to the concept of 'environmental law', covered by Regulation no. 1367/2006, a broad meaning, not limited to matters relating to the protection of the natural environment in the strict sense.

Subsequently, the Court states in *ClientEarth v European Investment Bank*[40] that the concept of a measure of individual scope[41] adopted 'under environmental law' (…) must be interpreted broadly, as meaning that it is not limited (…) to solely measures of individual scope adopted on the basis of a provision of secondary legislation that contribute to the pursuit of the objectives of

[37] Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives (Text with EEA relevance), C/2021/2800, OJ L 442, 9.12.2021, pp. 1-349.

[38] Commission Delegated Regulation (EU) /... amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, C/2022/0631 final (not published in the Official Journal).

[39] Judgment of the General Court (Seventh Chamber) of 14 March 2018, *TestBioTech eV v. European Commission*, Case T-33/16, ECLI:EU:T:2018:135, para. 44-46.

[40] Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, ClientEarth v. European Investment Bank, Case T-9/19, ECLI:EU:T:2021:42, para. 126.

[41] For the notion of `administrative act`, see: Ștefan Elena Emilia, *Răspunderea juridică. Privire specială asupra răspunderii juridice în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013.

the European Union in the field of the environment, which are laid down in art. 191(1) TFEU, but rather covers any measure of individual scope subject to requirements under secondary EU law which, regardless of their legal basis, are directly aimed at achieving the objectives of EU policy on the environment.

4.2. The economic- environment balance

As the concepts of (*sustainable*) development and protection of environment can be antagonist, one of most problematic topic in environmental law, is the balancing of environmental with other social and economic interest[42].

In fact, a general balance requirement is enshrined in art. 191 TFEU. The EU legislature has to take into account 'the economic and social development of the Union as a whole and the balanced development of its regions'. The balancing between economic interests and environmental protection is evident in the field of internal market law[43].

In fact, *one restriction to trade is the protection of the environment*[44]. As such, CJEU accepted different measures that can justify the restriction to trade. For example, in Judgment of 1 July 2014 *Ålands vindkraft*[45] the Court admitted that the objective of promoting the use of renewable energy sources for the production of electricity, such as the objective pursued by the legislation at issue in the main proceedings, is in principle capable of justifying barriers to the free movement of goods. Also in Judgment of 13 March 2001, *PreussenElektra*[46] the Court held that statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity are not incompatible with art. 30 TEC (now, after amendment, art. 28 EC), such provisions being useful for protecting the environment in so far as the use of renewable energy sources which they are intended to promote contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.

As to *the level of protection of the environment*, the CJEU stated in *Gianni Bettati v Safety Hi-Tech* that the level of protection aims as being high not highest. Finally, whilst it is undisputed that art. 130r(2) of the Treaty requires Community policy in environmental matters to aim for *a high leve*l of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be *the highest* that is technically possible[47].

[42] On judicial precedent, see: Anghel, Elena. *Judicial Precedent, a Law Source*, LESIJ- Lex ET Scientia International Journal XXIV, no. 2 (2017), pp. 68-76.

[43] Peeters, Marjan, and Mariolina Eliantonio, eds. Research Handbook on EU Environmental Law, (Cheltenham, UK: Edward Elgar Publishing, 2020), p. 495.

[44] Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) 2021/C 100/03, C/2021/1457, OJ C 100, 23.3.2021, pp. 38-89.

[45] Judgment of the Court (Grand Chamber) of 1 July 2014, Ålands vindkraft AB v. EnergimyndighetenCase C-573/12, ECLI:EU:C:2014:2037, para. 82.

[46] Judgment of the Court of 13 March 2001, PreussenElektra AG v. Schhleswag AG, Case C-379/98, ECLI:EU:C:2001:160, para. 73, 81 and operative part, pp. 1-2.

[47] Judgment of the Court of 14 July 1998, Gianni Bettati v. Safety Hi-Tech Srl, Case C-341/95, ECLI:EU:C:1998:353, para. 47.

The *concept of sustainable development* was considered by the Court in several cases.

In the Judgment of 20 May 2008, ECOWAS[48], the Court annuls a Council decision as it contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP. The Court stated that certain measures aiming to prevent fragility in developing countries, including those adopted in order to combat the proliferation of small arms and light weapons, can contribute to the elimination or reduction of obstacles to the economic and social development of those countries. Hence, the sustainable development receives a board meaning.

Sitting in Full Court, at 16 May 2017, the Court stated in Opinion 2/15 (Singapore Free Trade Agreement)[49] that the objective of sustainable development henceforth forms an integral part of the common commercial policy[50]. The Court considers that in the framework of sustainable development, the social protection of workers and environmental protection are mutually reinforcing components.

4.3. No exclusion needed (*Hinkley Point C*)

The final decision handed in case *Republic of Austria v. European Commission (Hinkley Point C)*[51], brings in forefront a tense antagonism between the supporters and the opponents of nuclear energy.

The present decision builds on the constitutional relation between the treaties.

The Court states, contrary to what the General Court held, that the Euratom Treaty does not preclude the application in the nuclear sector of the rules of EU law on the environment. It follows that, since Article 107(3)(c) TFEU applies to State aid[52] in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision[53].

The decision was that the requirement to preserve and improve the environment, expressed in both the Charter and the TFEU, as well as the principles relied on by the Republic of Austria, which flow from it, are *applicable in the nuclear energy sector*[54].

The Hinkley Point C Decision represents a step in the gradual assimilation of the nuclear sector into the EU Treaty framework, including its environmental law

[48] Judgment of the Court (Grand Chamber) of 20 May 2008, Case C-91/05, Commission of the European Communities v. Council of the European Union (ECOWAS), ECLI:EU:C:2008:288.

[49] Opinion of the Court (Full Court) of 16 May 2017, Opinion 2/15 (Singapore Free Trade Agreement), ECLI:EU:C:2017:376.

[50] For aspects related with international legal personality of EU, see: Popescu, Roxana-Mariana, *Legal Personality of International Intergovernmental Organizations*, Challenges of the Knowledge Society; Bucharest (2021), pp. 466-470.

[51] Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v. European Commission (Hinkley Point C), Case C-594/18 P, ECLI:EU:C:2020:742.

[52] For state aid details: Fuerea, Augustin, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 353.

[53] Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v. European Commission (Hinkley Point C), Case C-594/18 P, ECLI:EU:C:2020:742, para. 45.

[54] *Idem*, para. 42.

requirements, save for the specific matters covered by the Euratom Treaty[55].

Thus, since the choice of nuclear energy is, under those provisions of the TFEU, a matter for the Member States, it is apparent that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty, do not conflict. The principle of protection of the environment and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant[56].

5. Conclusions

It seems to be a discrepancy between the green discourse of the EU, of the sustainability strategies and the decision or legislative acts adopted. We conclude that the primary law and legislative acts are using a more complex meaning of the words, which is narrower (and more *green)* in the programmatic acts of institutions.

In fact, according to the treaties, the principle of *sustainable development* is a *limit of the environmental protection*.

The using of the word green is ample, especially, in the non-binding acts of the EU institutions. In Commission strategy, European Green Deal, the word green refers to: changes of economy, financial market, the legislative framework and external action. The Taxonomy Regulation aims to establish at Union level a classification system to clarify which activities qualify as 'green' or 'sustainable'. In the wording of this legislative act 'green' or 'sustainable' appears to be synonymous.

As the concepts of (sustainable) development and protection of environment can be antagonist, one of most problematic topic in environmental law, is the balancing of environmental with other social and economic interest. The decision handed in case *Hinkley Point C*[57], that brings in forefront a tense antagonism between the supporters and the opponents of nuclear energy, states that the requirements to preserve and improve the environment are applicable in the nuclear energy sector.

The line between good or bad is not simple, life (and *green*) is more complex than that[58].

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[56] Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v European Commission (Hinkley Point C), Case C-594/18 P, ECLI:EU:C:2020:742, para. 49.

[57] *Ibidem.*

[58] https://open.spotify.com/track/3QYMN6Q18OrIt94BCy8YLJ.

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- Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (notified under document C(2014) 7142) (Text with EEA relevance), OJ L 109, 28.4.2015;
- Commission Delegated Regulation (EU) /... amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, C/2022/0631 final (not published in the Official Journal);
- Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives (Text with EEA relevance), C/2021/2800, OJ L 442, 9.12.2021;
- Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) 2021/C 100/03, C/2021/1457, OJ C 100, 23.3.2021;
- Communication from the Commission , EUROPE 2020 A strategy for smart, sustainable and inclusive growth, COM/2010/2020 final;
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- European Commission , Study, *Defining "green" in the context of green finance*, 2017;
- European Commission, *The post-2020 common agricultural policy: environmental benefits and simplification*, 2019, https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/key_policies/documents/cap-post-2020-environ-benefits-simplification_en.pdf;
- European Parliament resolution of 17 September 2020 on the European Year of Greener Cities 2022 (2019/2805(RSP)), OJ C 385, 22.9.2021;
- Presidency Conclusions, Göteborg European Council, 15 and 16 June 2001;
- Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information,

Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006;
- Regulation (EC) no. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000;
- Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance), PE/20/2020/INIT, OJ L 198, 22.6.2020;
- Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) no. 401/2009 and (EU) 2018/1999 ('European Climate Law'), PE/27/2021/REV/1, OJ L 243, 9.7.2021;
- Regulation (EU) no. 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) no. 637/2008 and Council Regulation (EC) no. 73/2009, OJ L 347, 20.12.2013;
- Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Review of progress on implementation of the EU green infrastructure strategy, COM/2019/236 final;
- Treaty on European Union;
- Treaty on the Functioning of the European Union;
- Ålands vindkraft AB v. Energimyndigheten, Judgment of the Court (Grand Chamber) of 1 July 2014, Case C-573/12, ECLI:EU:C:2014:2037;
- ClientEarth v. European Investment Bank, Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, Case T-9/19, ECLI:EU:T:2021:42;
- Commission of the European Communities v. Council of the European Union (ECOWAS), Judgment of the Court (Grand Chamber) of 20 May 2008, Case C-91/05, ECLI:EU:C:2008:288;
- Commission of the European Communities v. Republic of Austria, Judgment of the Court (Grand Chamber) of 15 November 2005, Case C-320/03, ECLI:EU:C:2005:684;
- Gianni Bettati v. Safety Hi-Tech Srl, Judgment of the Court of 14 July 1998, Case C-341/95, ECLI:EU:C:1998:353;
- Nuova Agricast Srl v. Ministero delle Attività Produttive, Judgment of the Court (Grand Chamber) of 15 April 2008, Case C-390/06, ECLI:EU:C:2008:224;
- Opinion of the Court (Full Court) of 16 May 2017, Opinion 2/15 (Singapore Free Trade Agreement), ECLI:EU:C:2017:376;
- PreussenElektra AG v. Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein, Judgment of the Court of 13 March 2001, Case C-379/98, ECLI:EU:C:2001:160;
- Republic of Austria v. European Commission, Judgment of the Court (Grand Chamber) of 22 September 2020, Case C-594/18 P, ECLI:EU:C:2020:742;
- TestBioTech eV v. European Commission, Judgment of the General Court (Seventh Chamber) of 14 March 2018, Case T-33/16, ECLI:EU:T:2018:135.

CHANGES IN EXERCISING EMPLOYERS' RIGHTS DURING THE COURSE OF THE STATE OF DANGER

Dóra VARGA*

Abstract

Among other factors, the state of danger (a verbatim translation of veszélyhelyzet in official documents) declared because of the pandemic has made life more difficult than before also for the parties involved employment relationships. The constantly changing legislative environment and the increased presence of COVID-19 have put employers and their employees in a difficult situation both from economic and human perspectives. In what follows, I intend to give an overview of the regulations related to working during the state of danger declared because of COVID-19 from the point of view of the employers' rights and authority, highlighting two important aspects: that of the institution of home office and that of the vaccinations.

Keywords: *employer's authority, labour law, state of danger, COVID-19, Hungarian Law, home office, vaccination.*

1. Introduction

COVID-19 has forced, and still continues to force, the emergence of political, economic and social responses also in the dimension of legal systems, which prove to be unprecedented in a lot of cases. We have seen that, in the past period, due to the difficulties generated by the pandemic, Hungarian legislature has also adopted a number of measures that sometimes tend to seem less than logical at first glance. In the following, I will review the government decrees for the "settlement" of the situation that has been around for more than two years, focusing mainly on the changes affecting the issue of employers' rights and authority. [1]

My hypothesis is that employers' rights have been expanded due to the provisions and measures prompted by the pandemic situation, but this expansion has not been followed by adequate guarantee protection implements either on the part of the employees or on the part of the employers in order to facilitate avoiding potential adverse consequences later. In my opinion, employers have acquired additional rights that also greatly influence the exercise of fundamental rights, whose legal application during a period of the normal or ordinary legal order can prove to be a real headache even for the bodies that fulfill the role of the state. However, these additional rights have been accompanied by extra obligations with unforeseeable consequences, for which the emergency

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[1] Tamás Gyulavári detailed the overview of the most relevant government regulations in his study. Tamás Gyulavári, *Covid-19 and Hungarian Labour Law: the 'State of Danger'*. "Hungarian Labour Law E-Journal", vol. 2020/1. http://hllj.hu/letolt/2020_1_a/06_TGyulavari_ENG_hllj_2020_1.pdf (last access 16.08.2022.).

legislation has failed to provide adequate means for protection from them.

The right tool for examining the above problem and, simultaneously, the purpose of this study, is to present a comparison between the scope of the regulations affecting employers' rights during the ordinary and extraordinary legal order, while pointing out the changes that have occurred in the meantime and emphasizing their potential effects on the future. Primarily, essential information related to the distinction between remote work and home office, which has also become the focus of academic interest during the pandemic as well as the consequently emerging employers' rights and obligations are to be highlighted. Then, despite the fact that the government decree requiring it is no longer in force, I will examine the impact of mandatory vaccination on the private sector. [2]

For the sake of completeness, I wish to point out that, despite the fact that the state of danger/emergency caused by COVID-19 has ended, the oftentimes adverse consequences caused by the legislation created during its existence continue to have an impact on the labor market today as well as in several years to come. In view of all of the above, this study, in addition to the fact that it mainly focuses on legislative measures and provisions that are no longer in force or effect, cannot be considered "outdated" from the point of view of the sometimes negative effects affecting the subjects of the employment relationship.

2. About employers' rights and authority in general

First and foremost, I wish to emphasize that the chief characteristic feature of traditional employment relationships is the employers' predominance, which is the result of subordination. This can be seen mainly in relation to the sub-rights on the employers' side, which can be classified into three groups: the right to instruct (manage), control and discipline. [3] These rights have formed the authority of the employer since the beginning of the employment relationships that are traditional nowadays. [4] The exercising of these extensive rights is coupled with broad protection on the part of the employees. Nevertheless, and despite this, certain employee interests and rights are often violated, which can only be remedied through court proceedings. [5]

The enforcement of the above "triad" in traditional employment relationships and during the time of "regular" legal order can be achieved relatively easily – yet covering a path paved with certain obstacles. [6] The

[2] See more about the employer's basic obligations in: Tivadar Miholics, *A munkáltató kötelezettségei a munkaviszonyban*. "Magyar Jog", vol. 2018/7-8., pp. 392-400.

[3] László Román, *A munkajog alapintézményei II. kötet.* Pécs, University Press, 1996., p. 210.

[4] In connection with the employer's authority as an essential element of the employment relationship, the most recent comprehensive research is attributed to László Román, who paid special attention to the employer's rights. In connection with the excess of power, see: László Román, *A munkajog alapintézményei I.* Pécs, Janus Pannonius Tudományegyetem, Állam – és Jogtudományi Kar, 1994.

[5] In connection with the rights existing in a traditional employment relationship, see more: György Kiss, *Alapjogok kollíziója a munkajogban.* Pécs, Justis, 2010.

[6] See more about the content and framework of the right of instruction and control: Réka Zambó, *A munkaviszony GPS-e: a munkáltató utasítási joga*. In: Lajos Pál – Zoltán Petrovics (ed.): *Visegrád 16.0 A XVI. Magyar Munkajogi Konferencia szerkesztett előadásai*, Budapest, Wolters Kluwer Hungary, 2019., pp.154-169., Péter Sipka – Márton Leó Zaccaria, *A munkáltató ellenőrzési joga a munkavállaló munkahelyi számítógépén tárolt magánadatai fölött*, Munkajog, vol. 2018/2. pp. 45-49.; Mária Kulisity, *A munkáltató jogellenes ellenőrzésével és adatkezelésével kapcsolatos bírói gyakorlat*, In: Zoltán Bankó – Gyula Berke – Erika Tálné Molnár (eds.): *QUID*

governing domestic and international legal provisions, as well as established judicial practice, mostly clarify the content of both the employers' right to instructions and the right to control. A specific and clear "scenario" has been developed for cases where the employer violates the rights of employees by crossing the limits already defined in principle in addition to the specific provisions in the legislation, be it an obligation to carry out an illegal instruction, a violation of the basic rights of the employee during the exercise of the right of control, or an unlawful termination of the employment relationship. [7]

First of all, it should be noted that there is no specific and determined concept regarding the issue of employers' rights and authority. [8] This is possible in view of the fact that, as a set of rights and obligations that pervade the employment relationship in general, this issue does not represent an itemized list of the totality of rights and obligations from the point of view of the individual content elements. With this in mind, I consider it necessary to emphasize that I am only highlighting aspects relevant to the present study regarding the employers' rights and authority. These include primarily the provisions of § 53 of Act I of 2012 on the Labor Code; namely, derogation from the employment contract, such as the possibility of employment different from the employment contract as the right of the employer, and the provision of a safe working environment that does not pose a risk to health as the employers' basic obligations. Nonetheless, it is important to note that, during the course of analyzing all these areas, we cannot draw a sharp line of demarcation between other rights and obligations, which are regulated as general behavioral requirements, among other things, since they are closely connected. [9]

Further on, I will examine the scope of the rights and obligations that make up employers' rights and authority, especially in the light of the legislation during the state of danger, with particular emphasis on the individual sub-areas mentioned above.

3. The labor code during the period of state of danger caused by COVID-19

As I have indicated in the introduction of this study, the labor law of emergency situations such as the state of danger is analyzed as a central element in order to find

JURIS? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára, Budapest-Pécs, PTE-ÁJK– Munkaügyi Bírák Országos Egyesülete, 2018. pp. 235-257.

[7] I share the position of György Nádas in connection with the fact that the fundamental limitation of the employer's right to give instructions, in addition to the requirement of equal treatment, is fair consideration, as one of the great innovations of labor law regulations. Certain occupational health and safety regulations and the obligation to organize and ensure safe working conditions that do not endanger health can be mentioned as substantive legal limitations. György Nádas, *A munkáltatói utasítás – jog vagy kötelezettség?*, In: Lajos Pál – Zoltán Petrovics (eds.): *Visegrád 16.0 A XVI. Magyar Munkajogi Konferencia szerkesztett előadásai.* Budapest, Wolters Kluwer Hungary, 2019. pp. 23-37.

[8] György Nádas – Tamás Prugberger, *Európai és magyar összehasonlító munka- és közszolgálati jog*. Budapest, Wolters Kluwer Hungary, 2014. p. 85.

[9] These include the protection of the legitimate economic interests of the employer, the prohibition of the abuse of rights or the principle of good faith and honesty. In connection with the content and more detailed analysis of the legal principles, see more: Gyula Rátz, *A munkáltatói jogos érdek fogalma*. In: Lajos Pál – Zoltán Petrovics (ed.): *Visegrád 15.0 A XV. Magyar Munkajogi Konferencia szerkesztett előadásai*. Budapest, Wolters Kluwer Hungary, 2018. pp. 235-271.; Márton Leó Zaccaria, *A munkáltató jogos gazdasági érdekének védelme*, "Gazdaság és Jog", vol. 2014/2., pp. 18-23.; István Herdon – Márton Leó Zaccaria, *A Kúria munkaügyi határozatának megállapításai a joggal való visszaélés tilalmáról*, "Jogesetek magyarázata: JeMa", vol. 2020/3-4., pp. 43-51.; Tamás Tercsák, *A joggal való visszaélés - A joggal való visszaélés elmélete, bírói gyakorlata és munkajogi jelentősége*, Budapest, HVG-ORAC Lap – és Könyvkiadó, 2018.

answers to the questions posed. First of all, I wish to note that, due to the continuous legislative changes, I will only highlight here the aspects that were the cornerstones of the legislative provisions made during the pandemic, and along which the surplus – or, perhaps, disadvantage – that has affected the subjects of the employment relationship in recent years can be presented in an appropriate way.

3.1. The issue of working from home: is it a necessary innovation or a "tacit" form of employment hiding between the lines?

Modernization not only brings technological achievements and advances to life; it also affects the dynamics of labor relations. It is becoming more and more common and, for certain jobs, it is even expected by employees to be able to do their work flexibly, perhaps even from home, at a time that suits them. Based on all of these factors, it is not surprising that, during a global crisis that was triggered by a virus infection, the above needs, in addition to multiplying, can attract much more attention and acquire a prominent role, thus pushing both employers and employees out of the "traditional " framework of the employment relationship.[10]

From the point of view of this study, it is by all means necessary to point out one of the most frequently arising issues of employment during the state of danger, which is also of particular importance in connection with the above digitalization: home office or remote work? Although the relevant literature has been concerned with this problematic duality for a long time, [11] there are some difficulties to sort out right at the initial steps regarding this issue. The thing is that, while there is even a statutory definition of remote work(ing)/telework(ing) [*távmunka*] available, the same cannot be stated with such clarity in terms of definition in the context of the issue of "home office" [12]

According to the above, based on the legal concept, teleworking is an activity carried out on a regular basis at a location different and separate from the employers' premises, using an electronic or computer technology device and the results of which are transmitted electronically.[13] If we consider this concept as a point of departure, then, as a result of the comparison with the above, we can come to the conclusion that, although it is classified under this heading in a number of cases in everyday sense, it still cannot be considered teleworking if the employers allow the employees to work from home, as well as for them to use some kind of computer technology device during this process to keep in touch with their colleagues or superiors. [14]

The main guideline on the basis of which we can differentiate between the two is the dichotomy between regularity and

[10] According to the report of the Central Statistical Office (hereinafter: KSH), while the proportion of people working remotely or in a home office was constantly changing in line with the waves of the epidemic, it amounted to 8.6% for the whole of 2020, which was three times the 2.9 % of the previous ten years average. (https://www.ksh.hu/docs/hun/xftp/idoszaki/koronavirus-tavmunka/index.html (last access 09.08.2022.).

[11] Lajos Pál, *A szerződéses munkahely meghatározása – a „home office" és a távmunka.* "Munkajog", vol. 2018/2. pp. 56–59.

[12] István Herdon – Henriett Rab, *Megvalósítható-e jogszerűen a home office? A home office fogalmi ismérvei és munkajogi keretei,* "PRO FUTURO", vol.2020/3. p. 66.

[13] LC. 196-197.§.

[14] Zoltán Bankó, *A távmunkával kapcsolatos jogalkotási, jogalkalmazási és foglalkoztatáspolitikai tapasztalatok Magyarországon*, "Magyar Munkajog E-folyóirat", vol.2016/2. https://hllj.hu/letolt/2016_2/M_04_Banko_hllj_2016_2.pdf (last access 15.08.2022.).

irregularity.[15]Accordingly, teleworking is a regular activity. In the case of a home office arrangement – on the basis of a more detailed analysis – it can be established that, on the one hand, the "transfer" of the employers' unilateral rights related to the place of work to the employee can be realized, due to which – according to the provisions related to unilateral commitments contained in § 16 of the Labor Code – the employees become entitled to choose their home as their place of work.[16] On the other hand, however, we cannot forget about the possibility arising from the employers' authority, as an additional option, given that the employer – arising from § 53 of the Labor Code – can essentially unilaterally order employment that differs from the employment contract at any time regarding either the job title or the working conditions concerning location. Thus, especially during a state of emergency or danger, it can often happen that employers, acting in their discretionary powers, designate the employee's home as the workplace, which, in practice, may turn out to be mostly irregular, in contrast to the regularity that exists in the concept of teleworking above.[17]

Arising from the employers' authority, the above possibility was confirmed by the currently no longer effective Government Decree 47/2020 (III. 18.) on the immediate measures necessary to mitigate the impact of the coronavirus pandemic on the national economy. This decree introduced a relatively "surprising" provision. Based on this provision, the Labor Code must be applied for thirty days after the end of the emergency with the exception that the employer can unilaterally order the employee to work at home and to work remotely. In this regard, it is necessary to emphasize that the reason for these changes was to comply with the prohibitions and restrictions imposed for the duration of the emergency, so the new rules should and could only be applied for these purposes. Besides being limited to a purpose and applying for a fixed period of time, the government decree reshaped the hierarchy of legal sources related to labor law, [18] according to which the scope of agreement of the parties is relatively dispositive only with regard to the second part of the Labor Code, while the rest of the Labor Code is cogent.[19] Based on this, the Government Decree contradicted the basic requirement related to teleworking, according to which the parties in the employment contract must expressly agree if the employee is to be employed in the framework of teleworking. In this context, it can be seen that the employers' authority has been broadened, reducing the possibility of consensus. However, in my opinion, this does not infringe the interests of the employees, given that the provision indicated the above option as a right that can be exercised on the employers' part only for a specific period of time.

As a matter of course, the above difference can be examined from several

[15] See more: István Herdon: *A munkavégzés helyének megváltoztatása – távmunka, „home office". Mailáth György Tudományos Pályázat 2020: Díjazott Dolgozatok, Budapest, Országos Bírósági Hivatal*, 2021, pp. 650-706.

[16] Bence Molnár took this position in his study regarding the ordering of the home office. Bence Molnár, *Gondolatok a home office-ról általában és vírus idején.* "Magyar Munkajog E-folyóirat", vol.2020/1., p.40. http://ius.jak.ppke.hu/letolt/2020_1/03_MolnarB_M_hllj_2020_1.pdf (last access 15.08.2022.).

[17] Pál ibid. (2018) pp. 58-59.

[18] Tamás Gyulavári, *Munkajogi jogforrások*. In: Tamás Gyulavári (ed.): *Munkajog*, Budapest, ELTE Eötvös Kiadó Kft., 2019, pp. 47-56.

[19] In this context, Attila Kun expresses similar views in his study, 40/2022. (III.11.) in connection with the Government Decree. See more: Attila Kun, *Munkajogi elvi kérdések: a felek (munkáltató és munkavállaló) egyéni megállapodásainak mozgásteréről.* "*Glossa Iuridica*", vol.2020/VII. (Law and Virus Special Issue), p.146.

aspects. [20] These include the following: the work schedule, the working hours, the provision of work tools and the observance of certain occupational health and safety regulations. The justification for the latter is that it may still be questionable whether the employees have the appropriate equipment at home to perform their work, as well as whether the necessary tasks are performed in safe conditions, in accordance with occupational health and safety aspects performed on the premises. In this context, the employers must be particularly careful, given that they remain responsible for observing and ensuring the above regulations – regardless of where the work takes place geographically. In my opinion, if the employers act with due care and provide sufficient comprehensive information for the employees – either in a unilateral instruction or in a separate regulation – about how to maintain the conditions they require, it can definitely satisfy the basic requirements related to the above obligations.[21] However, the focus of this study is the examination of the scope and content of the employers' rights and authority. Consequently, in the following, without going into excessive detail regarding the individual sub-aspects, I will mainly highlight elements different from the traditional employment relationship in accordance with the hypothesis outlined in the first chapter.

It can be clearly seen that, as a result of the pandemic, certain legal institutions that had already existed before have come to the fore, but their importance has become unquestionable only now. Remote work/teleworking and home-office-type work can also be classified as two of these. These two specific forms of work have become part of the everyday life of labor law actors and, at the same time, the detailed and precise development of the related regulations have become the main task of the legislator.

The greatest challenge for the legislator at this point is to find a balance between economic rationality and the social nature of labor law. We agree with PÉTER ZOLTÁN SINKÓ, according to whom "the goal is to create more flexible working relationships, while at the same time ensuring a greater degree of protection for employees. This is not only justified for the reason of the proper management of emergency situations and state-of-danger conditions. Both at the national and the European Union levels, everything seems to indicate that, with the development of information technology tools, digitization as a phenomenon will take control in more and more areas." [22]

Based on all of this, the legislator had to strike a delicate balance in the regulation of the above legal relationships, with which it could simultaneously protect the interests of employees and facilitate the economic progress of employers.

In my opinion, two options are available to the legislator to achieve this goal. On the basis of the above – regulated as a separate atypical legal relationship – based on remote working, it can expand the range of legal relationships aimed at working, creating a special set of rules in

[20] See more in connection with working time rules during the state of emergency: Gábor Kártyás, *A munkaidő szabályok veszélyhelyzet idején. Megvéd vagy gúzsba köt?* "Magyar Munkajog E-Folyóirat", vol. 2020/1, pp. 47-62. https://hllj.hu/letolt/2020_1/04_KartyasG_M_hllj_2020_1.pdf (last access 16.08.2022.).

[21] Regarding employer regulations, see: Tamás Gyulavári – Attila Kun, *A munkáltatói szabályzat az új Munka Törvénykönyvében.* "Magyar Jog", vol.2013/9., pp. 556-567.

[22] Zoltán Péter Sinkó, *A digitalizáció hatása az atipikus munkavégzésre. A távmunka és a Home Office szabályozásának irányvonalai.* "Erdélyi Jogélet 2", vol. 2022/1., pp. 55-68. https://www.jogelet.ro/index.php/eje/article/view/191 (last access 09.08.2022.).

connection with the regulations applicable in the course of working from home (home office). Alternatively, by taking advantage of the high degree of similarity between the two legal institutions, it can amend the rules of remote working, so that the rules laid down therein are properly applied not only to work that can be done with electronic computing devices, but also to any other employment whatsoever. [23] In my view, the proposal I have put forward in the first place would be suitable for consideration, given that – of course, after proper integration into the labor Code – by applying this method, the characteristics that distinguish home-office work from remote work and mainly converge with typical, traditional employment would not be fragmented and would not merge into an already existing atypical legal relationship that differs in some aspects. Besides, employees and employers would get an additional option, which would be available to them as a potential opportunity to normalize the economic conditions generated by the pandemic. In addition, the second option mentioned above also has a "positive" side: by expanding the existing regulation, we can expect less risk, given that the principles developed by the jurisprudence regarding remote work can be considered mature. In addition, by analogy, they can thus become applicable in the context of settling disputes that arise related to home-office work subordinated to remote work. [24]

Recognizing the need for the amendment, the legislator put an end to the debate on the questionable situation that had been going on for several years by amending the Labor Code effective of June 1, 2022. The above amendment extended the rules of remote working and treated home office work as a subset, classifying it under the already existing provisions on atypical employment, choosing the simpler – and in some respects perhaps even safer – solution to end the problem. However, in view of the fact that the relevant legislative change is outside the immediate scope of this study, and also that the possible problems arising during the application of the law have not yet surfaced due to the novelty of the law amendment, we refrain from further analysis in this context. Nonetheless, as a part of a potential future research project, the interesting topic of the "survival" of this provision may easily come to the fore.

3.2. A few thoughts about another government decree no longer in effect: vaccinations at the workplace

As I have already mentioned in this study, one of the basic obligations of the employer is to ensure safe working conditions that do not pose any risk to health. [25] However, it is always necessary to examine individually what "safe working conditions" mean. During the virus situation that this study focuses on, in addition to reviewing the statistics based on general epidemiological data, it is also necessary to examine the given workplace and to take into account the health status of the

[23] In connection with the high degree of similarity between these two legal institutions, see more: Gábor Fodor T. – Kristóf Tóth, *Occam borotvája, avagy a "home office" mint a munkajog unikornisa*. "Munkajog", vol.2021/4., pp. 34-38.

[24] Csenge Kárpáti, *„Home office" napjainkban – Az otthoni munkavégzés jelensége, széles körű elterjedésének munkajogi vetületű problémái*, "Munkajog", vol. 2022/2., p. 30.

[25] Henriett Rab, *A versenyszektor foglalkoztatását ösztönző mechanizmusok bemutatása*, "JURA", vol. 2018/2., p.519.

personnel working there.[26] Thus, the employers' obligations regarding working conditions that do not endanger health have multiplied because, in addition to due diligence, they also had an obligation to provide additional information to the employees. Accordingly, the employers need to inform the employees about the potential risks of infection, as well as about the measures and work organization changes they have taken. I believe that it may still be legal for the employers to require that the employees should take and maintain certain precautions, be those about enhanced hand hygiene, keeping a safe distance or even the mandatory wearing of a mask. At the same time, it may be noted that, if the employers, exceeding their authority, order the retention of objectively unjustified measures at the workplace, or if these measures represent an excessive interference in the employee's private sphere, then, after communicating this to the employer – and if this should not lead to results – the employee also has the opportunity to bring the potential violation of rights to court in order to remedy the situation. [27]

The unilateral ordering of mandatory vaccinations is perhaps the most controversial area of employer measures contended by employees, which is regulated by Government Decree 598/2021 (X. 28.) on the protection of workplaces against the coronavirus. As I see it, this decree gave the employer extraordinary power even compared to the traditional subordination pattern existing in economic labor relations. In addition to the fact that it caused serious fundamental rights concerns for employees, it also did not offer employers, contrary to appearances, satisfactory guarantees when exercising the above rights. Considering that Government Decree 598/2021 (X. 28.) expired in March 2022, during its less than 6-month existence, it forced employers to make decisions at a level that they alone would have to face the possible consequences of at a later stage.

According to this government decree, in the absence of medical contraindications, vaccination can be prescribed as a general condition of employment for those employed by the employers on the basis of a unilateral decision. If the employee does not comply with the employers' call to receive the vaccination, the employer can make the employee take unpaid leave, after which the employer can terminate the employment relationship with immediate effect after one year has passed if there has not been any change in the vaccination status of the employee in the meanwhile. In this context, however, it is necessary to point out that, in contrast to a number of state-of-danger government decrees, the legislator did not exclude the application of the general rules in this decree, which in this case mostly represent the provisions of the Labor Code.[28] Pursuant to points a) and b) of paragraph (1) of § 78, of the Labor Code, the employer or the employee may terminate the employment relationship without notice if the other party willfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship or otherwise engages in conduct that would render the employment relationship impossible. The

[26] Péter Sipka – Márton Leó Zaccaria, *Megújuló tájékoztatási kötelezettség a munkajogi viszonyokban és azokon túl*, "Munkajog", vol.2019/3., pp. 1-8.

[27] Dóra Takács – Márton Leó Zaccaria, *Hatékony és tényleges? Munkajogi irányelvek vizsgálata a Kúria joggyakorlatában, figyelemmel a munkavállalói igényérvényesítésre*, "Pro Futuro", vol. 2021/2., pp. 193–216.

[28] Gyula Berke also investigated the impact of emergency standards on labor law. See more: Gyula Berke, *Munkajog veszélyhelyzetben.* In: Lajos Pál – Zoltán Petrovics (eds.): *Visegrád 17.0 A XVII. Magyar Munkajogi Konferencia szerkesztett előadásai*, Wolters Kluwer Hungary, 2020. pp. 21–41.

termination without notice based on point a) can be justified according to the Labor Code at the same time as the failure to take the vaccination, regardless of the fact that, according to Section (9) § 2 of the Government Decree, the termination without notice after one year from the date of imposing the vaccination – in which case the employer can assign the employee to take unpaid leave – if the employee has not provided proof of vaccination for the employer by then. Based on all of the above, failure to receive the vaccination is a significant breach of obligations arising from the employment relationship, which justifies the immediate termination of employment on the part of the employer, which right – considering that it was not excluded by the legislator – can be exercised not only on the basis of the relevant government decree, but also on the basis of the Labor Code. This type of termination of the legal relationship – in addition to the employers' requiring of vaccination – raises certain fundamental rights concerns both on the part of the employee and the employer.

From the point of view of this study, the primarily relevant question is whether the state could authorize an employer "operating" in the private sector to unilaterally decide on requiring vaccination while significantly expanding its powers.[29] In order to answer this question, we first need to examine the limitation of the relevant fundamental right [30] – mainly the right of self-determination of employees – and the behavior that can be generally expected in the given situation from the point of view of judging the employers' behavior. In my opinion, the above question can be answered in the negative, given that, with regard to the specific case concerning vaccination – as it limits the employee's right to self-determination, which can be derived from the right to human dignity – only the state has such a level of monopoly regarding the restriction of certain basic rights. Thus, it cannot be outsourced to either a natural person or a legal entity, since even with the behavior generally expected in the given situation, there may be adverse consequences of the restriction of fundamental rights that are not only unforeseeable, but also unknown from the employers' point of view. When making decisions that restrict fundamental rights, the test of necessity and proportionality cannot be ignored, which is a formula limiting a fundamental right for which the state and not the private sector employer has the necessary information. [31] As co-authors ISTVÁN HERDON and HENRIETT RAB point out: "The employer does not have any data that would show the danger of jobs in

[29] Examining the conditions necessary to resolve the conflict between the obligations of the parties to the employment relationship can also raise an interesting question. In this context, Lajos Pál comes to the conclusion that, despite a lawful employer's instruction, the risk of fulfilling the employer's obligation to ensure healthy and safe working conditions cannot be transferred to the otherwise able-bodied employee, "therefore, the consequences of the lack of employment are not borne by the employee, but by the must be worn by the employer. The fact that the employer avoids employing the employee cannot be considered as an external and inescapable reason that would exempt him from the payment of compensation for downtime." Lajos Pál, *Munkajogi elvi kérdések: a foglalkoztatási és rendelkezésre állási kötelesség teljesítése a veszélyhelyzet tartama alatt*. "Glossa Iuridica", vol. 2020/VII., (Law and Virus Special Issue), p. 172.

[30] See more about the right to health self-determination and other patient rights: Judit Zákány, *Jogok és igényérvényesítési lehetőségek az egészségügyi ellátással összefüggésben I.* "MED ET JUR", vol. 2019/1., pp. 10-15., Judit Zákány, *Jogok és igényérvényesítési lehetőségek az egészségügyi ellátással összefüggésben II.,* "MED ET JUR" vol. 2019/2., pp. 10-15.

[31] Fruzsina Gárdos-Orosz, *Az alapjogok korlátozása*. In: András Jakab – Miklós Könczöl – Attila Menyhárd – Gábor Sulyok (eds.): "Internetes Jogtudományi Enciklopédia". (Constitutional law column, column editors: Eszter Bodnár, András Jakab) http://ijoten.hu/szocikk/az-alapjogok-korltozsa (last access 14.08.2022.).

such an epidemic situation, nor does it have any additional statistics that show the employees at risk. Likewise, the employer cannot assess the success of individual alternative therapies and is also not competent to judge the frequency and severity of complications caused by possible vaccinations." [32] Accepting the above point of view, we can come to the conclusion that employers need to consider imposing the vaccination for each employee individually. This, however, represents an extraordinary burden for the actors of the employment relationship, especially for the employers, since in addition to having to comply with the legal requirements, they cannot also endanger their own economic activity by dismissing too many employees or sanctioning them in other ways for not taking the vaccination. [33]

The outlines of the problems associated with imposing the mandatory use of vaccinations can already be seen, taking into account the constitutional court proceedings regarding the mandatory nature of vaccinations initiated by health workers or those employed in the public sector, as well as those involved in the economic employment relationship. All of these so far have been rejected without exception by the relevant judicial forum, because they did not establish a violation of fundamental rights in connection with the relevant legislation.

As it can be clearly seen from what has been said so far, employers – due to the task imposed on them by the state – can, in my opinion, experience problems on two levels when ordering or not ordering vaccinations for employees. On the one hand, there may be an employee claim for compensation for injuries and damage resulting from the imposing of the vaccination and the health risks that may arise in connection with the ordered and administered vaccination – due to a severe allergic reaction or the development of unknown complications. On the other hand, a claim for damages or compensation may arise on the part of the employees or their relatives when the employers, despite the fact that the law gave them the opportunity to do so, failed to impose the compulsory vaccination, so their employees later get infected with the virus, resulting in both material and personal damage.

With regard to claim enforcement, we agree with the position of co-authors ANNA KOZMA and LAJOS PÁL, according to which the employers' right of discretion regarding vaccinations falls within the framework of the relevant decree, so "the condition of its legality is that it is in accordance with the requirements of the law, i.e., the obligation to take the vaccination is for the sake of protecting health, and the means used must be adequate to achieve the desired goal. The employers' instruction is unlawful if it does not meet the conditions of the regulation." [34] The consequence of all this is that the legality of the employers' order imposing vaccination cannot be disputed in a court proceeding; however, the kind of sanction the employer applies based on the refusal of this order, and whether it is imposed in accordance with the law, can already serve as a sufficient basis for the

[32] István Herdon – Henriett Rab, *Hogyan írható elő kötelezően a védőoltás a gazdasági munkaviszonyokban?,* "Közjogi Szemle", vol. 2021/4., p. 3.

[33] See the cited decisions of the Constitutional Court regarding health care workers: Constitutional Court Decision no 3537/2021. (XII. 22.), in relation to those employed in the public sector: Constitutional Court Decision no 3128/2022. (IV. 1.); with regard to those involved in the economic employment relationship: Constitutional Court Decision no 3088/2022. (III. 10.).

[34] Anna Kozma – Lajos Pál, *A védőoltásra kötelezés feltételei a munkajogviszonyban.* "Munkajog", vol. 2021/4., p. 20.

employee in a lawsuit. I wish to note that, in such a legal dispute, the court may investigate the legality of the employers' instruction and the conduct of the appropriate consideration as a possible preliminary question, the burden of proof for which would be on the employer. [35]

4. Conclusions: the possible future labor-law-related consequences of the virus situation

In this study, I have primarily tried to point out, by comparison, the essential differences that affect the employers' rights and authority operating during the ordinary and the extraordinary legal order introduced because of the state of danger. In doing so, given that, in the past period, these two subjects have become the focus of interest in both everyday and academic life, I have highlighted the differences between the places of work in home office and remote working, examining the scope of the employers' rights in the given forms or arrangements of work.[36] Following this, I have analyzed the topic of mandatory vaccinations in economic employment relationships, which has also attracted a lot of attention, while the focus of my query has also been the employers' authority.

All in all, it can be concluded that the employers' authority was minimally broadened in some aspects compared to the general one during the state of danger/emergency. In this context, I need to highlight the now-out-of-force legal option, according to which the employer could unilaterally –and without the employee's consent – determine the place of work, which is otherwise an essential element of the employment contract, and which could even coincide with the employee's home. However, it is important to point out that, in my opinion, the employers' power is by no means unlimited, even during a state of danger/emergency, since the extended application of the rights that fall under the authority of the decree can only be applied with due care, without harming the interests and rights of the employees and the adequate occupational health and safety and liability frameworks provided by the employer. [37]

As regards the individual safety precautions – be them about the use of masks at work or the instruction to receive vaccinations – in a way similar to my opinion regarding the unilateral determination of the place of work, I wish to note that, although the employer has been granted the right by the legislator, there are still serious concerns about them that may affect the fundamental rights of both parties. [38] These concerns or problems affecting fundamental rights have either not surfaced, or have surfaced only to a lesser extent in economic labor relations. However, the legislator's decision, mainly related to vaccinations, according to which employees are obliged to receive vaccinations based on the employers' instructions, has created another dilemma

[35] György Nádas – Gergely Árpád Kiss, *A munkajogi perek átalakulása*. "PRO FUTURO", vol. 2021/2., p. 170.

[36] See more: Zoltán Bankó – Péter Sipka, *Otthoni munkavégzés, távmunka: A munkavégzés helyének munkajogi kérdései*. Budapest, Saldo, 2021.

[37] Péter Sipka, *A munkáltató felelőssége az otthoni munkavégzés során*. In: Lajos Pál – Zoltán Petrovics (eds.): *Visegrád 17.0 A XVII. Magyar Munkajogi Konferencia szerkesztett előadásai*. Budapest, Wolters Kluwer Hungary, 2020. pp.118-129.

[38] In this context, in addition to the right to self-determination, we also need to mention the right to work as a fundamental right under constitutional protection. See more Attila Kun, *A munkához való jog*. In: András Jakab – Miklós Könczöl – Attila Menyhárd – Gábor Sulyok (eds.): "Internetes Jogtudományi Enciklopédia", HVG-ORAC, 2021. p. 1., 6. and 21. https://ijoten.hu/uploads/a-munkahoz-valo-jog.pdf (last access 15. 08. 2022.).

and some tension between the parties involved in the employment relationship. In this regard, in accordance with my findings in part 2 of this study, I need to point out that the additional rights granted to the employer did not come with adequate guarantees either from the aspect of the employees or of the employers. In this context, given that employers had to terminate a considerable number of employment relationships due to refusal to take vaccinations, the number of court proceedings aimed at the enforcement of such claims may increase to a great extent, the center of which is the legality of the application of sanctions associated with the refusal of the employers' instructions.

Without taking a clear position in this regard, which is hindered by the lack of a uniformly developed practice in the literature and jurisprudence at the time of the conclusion of this study, I would predict, as a kind of speculation or as a potential future research topic, that an extremely sensitive and difficult substantiation procedure is supposed to be conducted during the course of court proceedings or litigation initiated due to claims related to refusal to take vaccination.[39] During the course of the latter, the employers would find themselves in a particularly difficult situation, given the fact that they are burdened with proving that the application of the contested sanction was not excessive. In this regard, a previously effective decree is available, which, however, without providing any other guarantee protection to either the employer or the employee, specified the possibilities of applying the legal consequences. Based on all of this, we can say that the hypothesis formulated in the introduction has been verified while, according to the contents of this study, we can come to the conclusion that the emergency employer authority is both a blessing and a curse for each and every one of the parties involved.

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[39] I share Anna Csorba's point of view regarding the fact that, in addition to the sanctions associated with the refusal of vaccination, among other things, wage reductions as a result of reduced working hours, compensation and compensation claims related to working in the home office may form the basis of the majority of labor lawsuits in the coming years. Anna Csorba, *Milyen típusú munkaügyi perek várhatóak a corona-vírus hatására?* "Magyar Munkajog E-Folyóirat", vol. 2020/1., https://hllj.hu/letolt/2020_1/02_CsorbaA_M_hllj_2020_1.pdf (last access 16.08.2022.).

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RIGHT TO A FAIR TRIAL IN THE CONTEXT OF CLASSIFIED INFORMATION. A SURVEY IN THE LIGHT OF CCR'S CASE-LAW

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Abstract

The paper intends to analyze the issue of respecting the right to a fair trial in the situation where the effectiveness of the defence depends on documents containing classified information. There is a delicate issue regarding the vulnerability of guarantees of the right to a fair trial in order to ensure the right of defense, given that the parties' lawyers should have access to all the evidence in the file. Obtaining an ORNISS certificate is the solution offered by law, but to really get one can be problematic. Based on various situations occurred during the proceedings, the whole legal regime of classified information and its influence on the conduct of the trial, in the qualitative requirements of fairness imposed by the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms, have been subject to the constitutional review exercised by the CCR. This article aims to summarize the case-law of the Constitutional Court, drawing the appropriate conclusions from it, in order to find the most efficient way to harmonize the need to protect the national security by classifying certain pieces of information with the right to access to public information and with the constitutional and conventional imperative of respect for the right to a fair trial.

Keywords: *Right to a fair trial, Classified information, Right to defence, Constitutional review, Constitutional case-law.*

1. Introduction

The right to defence, as an indispensable part of the right to a fair trial, cannot be fully accomplished unless the parties involved in the trial, as well as the trial judge and the prosecutor are able to know in full the contents of the file, including all the evidence it contains. However, there are situations where some important documents on which the accusation is based fall into the category of classified information and are therefore subject to a special regime regarding access to their content. It is about that information, data, documents of interest for national security, which, due to the levels of importance and the consequences that would occur as a result of unauthorized disclosure or dissemination, are protected by law, access to their content being allowed only to certain persons, which meet the conditions strictly provided by Law no. 182/2002 on the protection of classified information[1].

In such cases, there is an issue regarding violation of the principle of equality of arms in the process, for the party unable to read all the information in the file, due to the fact that it does not meet the

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[1] Published in the Official Gazette of Romania, Part I, no. 248, April 12, 2002.

standards of trust required by law to allow access to this kind of information. For this party, the right to defence remains only illusory and theoretical, contrary to the requirements established by art. 21 para. (3) of the Romanian Basic Law and those established by art.6 para. 1 of the ECHR[2], as well as by the case-law of the ECtHR, which shows that it should have sufficient guarantees to make it concrete and effective.

Even if it generates intense tensions, this issue has not been the subject of analysis of doctrinal studies and has been limited to the jurisdictional area, where a number of courts have faced the issue of providing a fair balance between the need to ensure access to information and, subsequently, the right of defence of the parties to the proceedings - on the one hand - and the interest in protecting national security and safety - on the other. In order break this vicious circle, CCR was asked to analyse various aspects involved in the application of the provisions of Law no. 182/2002 in criminal proceedings, but also in civil or administrative litigation.

Through the solutions it rendered, the CCR brought necessary clarifications, highlighting the vulnerabilities of the legal provisions regarding the classified information, from a constitutional point of view. The present paper aims to make a synthesis of the wide and complex issues contained in its decisions and to underline the practical implications of the case-law of the Constitutional Court in this particularly sensitive matter.

2. General overview of the legal framework referring to classified information

In a democratic society, where human rights and fundamental freedoms enjoy general respect and are granted both by state authorities and other subjects of law participating in social life, free access to information of public interest, with its multiple implications in the legal field, is essential to ensure a climate based on certainty and predictability, where all individual have the effective opportunity to evolve in accordance with their own aspirations, orienting their development according to clear and firm information landmarks.

The fundamental law of Romania enshrines in art. 31 para. (1) and (2) the right of access to information, stating that "The right of a person to have access to any information of public interest may not be restricted" and that public authorities have an obligation to ensure that citizens are properly informed about public affairs and on matters of personal interest. Also, art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, entitled "Freedom of Expression", regulates the right of everyone to freedom of expression, which includes freedom to hold opinions and to receive and share information and ideas.

As a consequence of the cited constitutional provisions, Law no. 544/2001 regarding the free access to information of public interest has been adopted[3]. It provides, in art. 1, that free and unrestricted access to any information of public interest is one of the fundamental principles that guides the relations between individuals and public authorities.

[2] See Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, Hamangiu Publishing House, Bucharest, 2019, p. 146 and following.

[3] Published in the Official Gazette of Romania, Part I, no. 663 of October 23, 2001.

However, there are certain categories of information that go beyond the realm of the public interest, being in an area protected by law due to the fact that, by their nature and content, making such information public may harm crucial values, such as national security and safety. As a result, legislation has been enacted in many states to protect such information against espionage, compromise, or unauthorized access, sabotage, or destruction, while creating conditions for it to be distributed exclusively to those who are entitled to know them[4]. A study drawn by Transparency International UK's Defence and Security Programme[5], dated February 2014, made a detailed review of current legislation across 15 countries and the EU, namely Austria, Australia, Czech Republic, Germany, Estonia, Hungary, Lithuania, Macedonia (FYR), Mexico, New Zealand, Poland, Republic of South Africa, Slovenia, Sweden, United Kingdom and the European Union. The report has also analysed, at a certain level, the system in the United States of America and took a glimpse at the NATO information standards. Basically, it shows that the freedom of information (FOI) has been gradually gaining ground all over the world and this development is positive for raising the accountability and transparency of defence and security forces. Accordingly, national security and defence sectors, which are traditionally inaccessible, have to increasingly accommodate new values of transparency and accountability.[6]

Based on the study developed, the report draws the guiding lines regarding the good practice in secrecy classification legislation. Firstly, any restriction on right to information has to meet international legal standards which have to be also present in the applicable national legislation. Secondly, the authority to withhold or classify information needs to be well defined and has to originate from a legitimate source of power and be performed in line with procedures prescribed by published legal rules. Thirdly, the report states that information may be protected by classification and/or exempted from disclosure if there is a real and substantial likelihood that its disclosure could cause serious harm. Finally, if information is withheld there should be procedures accessible to all that allow for substantial review by independent bodies.[7]

The report makes some interesting findings, featuring the negative practices that some countries adopt. The Polish law, for instance, allows for eternal classification of certain sensitive data. To similar effect in Lithuania the classification period of state secrets can be extended by 10 years as many times as needed.[8]

Surprisingly, the study states that "Austria is perhaps the farthest behind global trends as it has failed to accommodate either the developments of the right of access to information or to introduce transparency measures into its classification system. The Austrian system is an anomaly in Europe since secrecy is still the default position and access to information is treated as an exception."[9]

[4] See the explanatory memorandum to Law no. 182/2002 on the protection of classified information, available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=2517.

[5] *Classified Information A review of current legislation across 15 countries & the EU*, report available at http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf.

[6] *Idem*, p. 4.

[7] *Ibidem.*

[8] *Classified Information. A review of current legislation across 15 countries & the EU*, p. 5.

[9] *Ibidem.*

The fore mentioned report also notices that „little is known about the information standards within NATO since not many documents on the subject are made public. However, from the few that are, a number of weaknesses in the system are highlighted. These include not defining rules of protection and thus making the system prone to arbitrary classifications, not listing the subjects which may require classification, and not developing an expiry of classification periods".[10]

In Romania, Law no. 182/2002 on the protection of classified information aims to protect classified information and confidential sources that provide this type of information and states, in this regard, that the protection of this information is done by establishing the national system of information protection[11]. At the same time, as established by art. 4 of the law, the main objectives of the protection of classified information are the protection of classified information against espionage, compromise or unauthorized access, alteration or modification of its content, as well as against sabotage or unauthorized destruction. It also aims achieving the security of computer systems and the transmission of classified information.

According to art. 15 b) of Law no. 182/2002, constitutes classified information "information, data, documents of interest for national security, which, due to the levels of importance and consequences that would occur as a result of unauthorized disclosure or dissemination, must be protected".

Moreover, the law expressly states that measures resulting from the application of the law are intended to prevent unauthorized access to classified information; to identify the circumstances as well as the persons who may endanger, by their actions, the security of the classified information; to guarantee that classified information is distributed exclusively to persons entitled to know it; to ensure the physical protection of the information, as well as of the personnel necessary for the protection of the classified information[12].

An landmark statement is contained in art. 3 of Law no. 182 of 2002, according to which no provision thereof may be interpreted as limiting access to information of public interest or ignoring the Constitution, the Universal Declaration of Human Rights, Covenants and other treaties to which Romania is a party, regarding the right to receive and disseminate information.

3. The institutional framework created in Romania to protect classified information

The complexity and importance of this area and the seriousness of the negative consequences that could result from compromising intelligence has required the creation of an institutional infrastructure to carry out the operations necessary to protect this type of information and those who come into contact with it. Precisely in view of the maximum importance of this area, it has been established that the entire activity regarding it will be carried out under the dome of the Supreme Council of National Defence, which will ensure the coordination at national level of all classified information protection programs[13].

Considering the legislation and practice in the matter developed in various other countries, Law no. 182/2002

[10] *Ibidem*.
[11] Art. 1 of the Law no.182/2002.
[12] Art. 5 of the Law no. 182/2002.
[13] Art. 14 of the Law no. 182/2002.

prescribed the establishment of the Office of the National Register of State Secret Information (ORNISS) under the subordination of the Romanian Government. Together with the Office of State Secrets Surveillance within the Romanian Intelligence Service and the National Security Authority under the Ministry of Foreign Affairs, it implements the national standards for the protection of intelligence[14].

The Office of the National Register of State Secret Information organizes – among others - the lists of information in this category and the length of time for keeping the information in certain classification levels[15].

The national standards for the protection of classified information are established by the Romanian Intelligence Service, with the consent of the National Security Authority. An important provision sets that these standards must be in line with the national interest as well as with NATO criteria and recommendations. However, the law gives priority to NATO rules in the event of a conflict between them and internal rules on the protection of classified information[16].

4. Legal guarantees established in order to maintain the rule of law

The Romanian legislator has shown a democratic spirit in this matter, given that the rigidity and strictness of these legal provisions cannot be misused by the public authorities involved, because a system of guarantees has been imagined to counteract such non-democratic tendencies. As such, art. 20 of Law no. 182/2002 enshrines the right of any Romanian natural or legal person to appeal to the authorities that have classified the respective information. The appeal may concern either the classification of the information itself, or the duration for which it was classified, or the manner in which a certain level of secrecy has been assigned. The appeal will be resolved in accordance with the law of administrative litigation.

Another guarantee likely to serve the realization of the right of free access to information consists in the fact that the declassification of the information classified as state secrets it is possible, by Government decision. Moreover, the law prohibits the classification of information, data or documents as state secrets in order to conceal violations of the law, administrative errors, limiting access to information of public interest, unlawfully restricting the exercise of certain rights or harming other legitimate interests. At the same time, information, data or documents related to a fundamental scientific research that has no justified connection with national security cannot be classified as state secrets. [17]

Access to state secret information is also allowed to other persons, but only on the basis of a written authorization, issued by the head of the legal entity holding such information, after prior notification to the Office of the National Register of State Secret Information.[18] This is the so-called "ORNISS certificate", which is issued on secrecy levels, following verifications carried out with the written consent of the person concerned. The validity of the authorization is up to 4 years. During this period the checks may be resumed at any time.

[14] As stated in the explanatory memorandum to Law no. 182/2002.
[15] See art. 14 and 21 of the Law no.182/2002. See, for practical details, www.orniss.ro.
[16] Art. 6 of the Law no. 182/2002.
[17] See art. 4 para. 3 to para. 5 of the Law no. 182/2002.
[18] Art. 28 of the Law no. 182/2002.

5. Control of constitutionality, as a means of ensuring fundamental human rights facing the requirement to protect classified information

5.1. The issue of access to classified information of the parties or their representatives (lawyers) in the proceedings

Probably the most difficult problem to overpass in terms of ensuring the proper confidentiality and integrity of classified data has been the need to balance national security concerns with granting citizens the right to a fair trial, when this kind of information is necessary to be exposed in order to find the truth and solve the situation in legal manner during a fair trial.

Issues regarding the clash between the fundamental right to access the information of public interest and the mechanism meant to protect the classified information were often brought in front of the Romanian courts. It has been argued that the right to a fair trial is endangered as the provisions of Law no. 182/2002 prevent persons who are parties to a trial from becoming aware of the content of certain classified documents, for the sole reason that they do not fall into the category of persons for whom a security certificate has been issued. The criticisms of unconstitutionality claimed that the legislative solutions implemented by the Romanian legislator through Law no. 182/2002 seriously violates the necessary balance between the need of the State to protect state secrecy and the rights and interests of the parties to the process.

In 2008, a few years after entering in force of the Law no. 182/2002, the Constitutional Court accepted[19] the fact that the said law contains specific rules on access to classified information of certain persons who have the status of parties to a process, respectively provided that the security certificate is obtained, and must be met in advance the requirements and the specific procedure for obtaining it, provided by the same law. The Court found that the criticized provisions of the law did not have the effect of absolutely blocking access to certain information, but conditioned it on the performance of certain procedural steps. These steps are justified by the importance of such information, the violation of the right to fair trial or the principle of uniqueness, impartiality and equality of justice for all. On the other hand, the Constitution itself provides, according to art. 53 para. (1), the possibility of restricting the exercise of certain rights - including guarantees related to a fair trial - for reasons related to the defence of national security.

The Constitutional Court considered that the strict regulation of access to information classified as state secrets, that establishes conditions that must be met by persons who will have access to such information, as well as verification, control and coordination of procedures that grant access to this information is a necessary measure to ensure the protection of classified information, in accordance with the constitutional provisions aimed at protecting national security[20].

Moreover, in its case-law[21], the Court has ruled that "it is the exclusive competence of the legislator to establish the rules of the

[19] Decision no. 1120 of October 16, 2008, published in the Official Gazette of Romania no. 798 of November 27, 2008.

[20] *Idem*.

[21] Decision of the Plenum no. 1 of February 8, 1994, published in the Official Gazette of Romania, Part I, no. 69 of March 16, 1994 and Decision no. 407 of October 7, 2004, published in the Official Gazette of Romania, Part I, no. 1112 of November 27, 2004.

process before the courts", as well as that "the legislator may establish, in view of special situations, special rules of procedure and the ways for exercising procedural rights."

More recently, The Court noted[22] that the criticized legal provisions contained in Law no. 182/2002 do not exclude the access of lawyers to classified information that constitutes a state secret and, respectively, a service secret, this access being ensured under the conditions of Law no. 182/2002 and of the Government Decision no. 585/2002 for the approval of the National Standards for the protection of classified information in Romania[23]. In this sense, the analysed law provides, at art. 28 para. (1), that access to state secret information is allowed only on the basis of a written authorization, issued by the head of the legal entity holding such information, after prior notification to the Office of the National Register of State Secret Information. These provisions apply, according to art. 31 para. (3) of the same law, in the field of secret service information as well. In turn, Government Decision no. 585/2002 provides, in art. 33, that access to classified information is allowed, in compliance with the principle of the need to know, only to the persons holding a security certificate or access authorization, valid for the level of secrecy of information necessary for the performance of duties. Both of the above-mentioned normative acts regulate procedural norms for access to the two categories of information. However, all these legal provisions constitute means of access that guarantee to the different professional categories - therefore also lawyers - the access to all the information they need to exercise their legal role in the criminal process, including those regulated by the criticized text, constituting thus guarantees of the right to defence, access to justice and the right to a fair trial.

The Constitutional Court concluded that the strict regulation of access to classified information, including in terms of setting conditions that must be met by those who will have access to such information, does not have the effect of effectively and absolutely blocking access to information essential to the settlement. but it creates precisely the normative framework in which two conflicting interests - the particular interest, based on the fundamental right to defense, respectively the general interest of society, based on the need to defend national security - coexist in a fair balance, which gives satisfaction both legitimate interests, so that neither of them is affected in its substance. Consequently, the infringement of the rights of the defense and of a fair trial cannot be sustained.

5.2. The issue of access of judges to classified information during trials

5.2.1. Magistrates' access to classified information until 2013[24]

Quite soon after rendering the fore mentioned decision, the CCR dealt with an

[22] By Decision no. 805 of December 7, 2021, published in the Official Gazette of Romania, Part I, no. 247 of March 14, 2022, para. 21.

[23] Published in the Official Gazette of Romania, Part I, no. 485 of July 5, 2002.

[24] When Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the modification and completion of some normative acts that modified the provisions of art. 7 of Law no. 182/2002 on the protection of classified information, in the sense of introducing judges, prosecutors and assistant magistrates of the High Court of Cassation and Justice among the holders of the right of access to classified information constituting state secret, respectively service secret, provided and taking the oath.

exception of unconstitutionality[25] raised *ex officio* during the same trial as the one in which it was raised and the previous exception. This time, the criticism of unconstitutionality was formulated in view of the possibility of the judge of the case to have access to the evidence in the file which represents classified information only after obtaining an ORNISS certificate. But the verifications performed regarding magistrates by an institution outside the judiciary would collide with the constitutional provisions regarding the competence and the role of the Superior Council of Magistracy. At the same time, one of the essential components of the professional conduct of judges is the observance of the obligation of confidentiality of this kind of documents. Also, the access of all parties to a fair trial must be viewed both from the perspective of an impartial court and from the perspective of equality of arms, which requires that all parties be able to defend themselves knowingly and may administer the evidence or have access to the evidence so as not to create a clear disadvantage for one of them.

Examining the objection of unconstitutionality, the Court noted[26] that the legal provisions on persons to have access to classified information, the protection of such information by procedural measures, their level of secrecy, and the prohibition of classifying certain categories of information or access to secret information state, does not represent impediments likely to affect the constitutional rights and freedoms, being in full agreement with the invoked norms of the Fundamental Law. Also, they do not rule out the possibility of the judge having access to state secret information, in compliance with the rules of procedural nature provided by law.

The Court considered that it could not be accepted that different categories of magistrates were created in the same judicial system. That is because, for reasons of expediency, not all employees of an institution should obtain security certificates. On the other hand, the magistrates accredited to hold, to have access and to work with classified information, although they meet the requirements for appointment and professorship of the position they hold, in accordance with the provisions of Law no. 303/2004 on the Statute of Judges and Prosecutors, they are evaluated only from the perspective of honesty and professionalism regarding the use of this information. Thus, there can be no sign of equality between the criteria for appointment as a magistrate and those necessary to obtain authorizations for access to classified information, especially since for the latter the access is limited by compliance with the principle of need to know, given aspects of vulnerability or hostility as a result of pre-existing conditions (such as the relationship environment, previous workplace, etc.) and the indisputable loyalty or character, habits, relationships, discretion and lifestyle of the person concerned. It is natural to be so, because otherwise there is a risk of creating a breach in the national system of protection of classified information, which, unlike the specific activity of the act of justice, cannot be covered by invoking causes of

[25] See, for a detailed analyze of the exception of unconstituionality as a way to contest the constitutionality of a norm by means of constitutional review performed by the Constitutional Court, Benke K., S.M. Costinescu, *Controlul de constituționalitate în România. Excepția de neconstituționalitate*, Hamangiu Publishing House, Bucharest, 2020.

[26] See also Decision no. 1335 of December 9, 2008, published in the Official Gazette of Romania, Part I, no. 29 of January 15, 2009.

incompatibility or recusal. As a result, the criticized regulations are a procedural remedy for situations in which the presumption of honesty or professionalism of the person who manages classified information is questioned.

In addition, the Constitutional Court stated that the statements of the said decisions are in accordance with the jurisprudence of the ECtHR. Thus, by the Judgment of February 9, 1995 in the *Vereniging Weekblad Bluf Case! v. the Netherlands*, the Strasbourg court ruled that access to public information may be restricted in order to protect the national interest, in accordance with the provisions of art. 10, para. 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which, for national security, territorial integrity or public safety, the protection of law and order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary. Therefore, in order to comply with the provisions of the Convention, the restrictions on freedom of information must meet the following conditions: a) be provided for by law; b) have a legitimate purpose; c) be necessary in a democratic society.

Also, in its judgment of 8 July 1999 in *Surek v. Turkey*, the ECtHR ruled that it was up to the State to decide whether and when it was necessary for certain information to remain confidential and, consequently, the State has a wide margin of appreciation in this matter.

In the present case, the Court notes that the restrictions on access to information are provided by law - Law no. 182/2002 -, have a legitimate purpose - the protection of classified information and confidential sources that provide this type of information, by establishing the national system of information protection - and are necessary in a democratic society.

5.2.2. Magistrates' access to classified information after 2013

Since 2013, the legislator's vision has broadened, opening up to a more efficient realization of the right to a fair trial, by consecrating a different legal regime for magistrates than the previous one. Thus, by Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the modification and completion of some normative acts that include criminal procedural provisions[27], the provisions of art. 7 of Law no. 182/2002 on the protection of classified information, in the sense of introducing judges, prosecutors and assistant magistrates of the HCCJ among the holders of the right of access to classified information constituting state secret, respectively service secret, provided and taking the oath[28].

The Constitutional Court noted that, although the explanatory memorandum of Law no. 255/2013 does not refer to the considerations that formed the basis of this legislative amendment, it aimed at ensuring access to classified information to the three

[27] Decision no. 1335 of December 9, 2008, published in the Official Gazette of Romania, Part I, no. 29 of January 15, 2009.

[28] Prior to this moment, the access to classified information that constitutes a state secret, respectively a service secret, was also guaranteed, under the condition of validating the election or appointment and taking the oath, for the following categories of persons: President of Romania; prime minister; ministers; deputies; senators. All other categories of persons were required to obtain an ORNISS certificate in order to have access to such information.

categories of magistrates regulated by Law no. 303/2004 on the status of judges and prosecutors, in order to guarantee the speedy settlement of criminal cases. This legislative solution was possible considering the fact that the three categories of magistrates represent public positions and, regarding them, the provisions of Law no. 303/2004 provide for a procedure for the appointment and taking of the oath, the condition of the lack of criminal record and of the fiscal record, as well as the condition of the good reputation in order to be admitted to the National Institute of Magistracy.

Moreover, the Law no. 303/2004 stipulates in the task of judges, prosecutors, assistant magistrates and specialized auxiliary staff certain obligations that denote their ability to get acquainted without risk with the content of classified information. It is about the obligation to give an annual statement on one's own responsibility stating whether the spouse, relatives or relatives-in-law up to and including the 4th degree are exercising a function or carrying out a legal activity or criminal investigation or investigation activities, as well as the place their work; the obligation to make an authentic statement, on one's own responsibility, according to the criminal law, regarding the affiliation or non-affiliation as an agent or collaborator of the security bodies, as a political police; the obligation to complete annually a holographic statement on one's own responsibility, according to the criminal law, showing that they were not and are not operative workers, including undercover, informants or collaborators of any intelligence service. Violation of these obligations is considered so serious that it is sanctioned with dismissal from the position held, respectively that of judge or prosecutor. All these declarations are registered and submitted to the professional file, respectively they are archived at the human resources department. Or, all the obligations previously shown are such as to guarantee the fulfilment by the magistrates of the conditions of honesty provided in art. 7 para. (1) of Law no. 182/2002. [29]

Unlike the magistrate positions shown above, according to art. 1 para. (1) of Law no. 51/1995 for the organization and exercise of the legal profession, the legal profession is free and independent, with autonomous organization and functioning, under the conditions of the aforementioned law and the status of the profession, but the obligation to give such statements is not provided in the task lawyers. Considering the differences in the regulation of the conditions of good reputation and dignity, respectively, in order to occupy the position of magistrate, respectively to hold the profession of lawyer, the guarantees of honesty that magistrates present through the annual statements they give, as well as the different nature of the two professions (civil service and liberal, respectively), the Court noted that the different legal regime provided by the legislator regarding the two professional categories for access to classified information is based on objective and reasonable criteria, which justify the procedure for verifying the honesty of lawyers, prior to granting access to classified information. [30]

[29] Decision no. 199 of March 24, 2021, published in the Official Gazette of Romania, Part I, no. 640 of June 30, 2021, para. 15, 16 and 18.

[30] Decision no. 199 of March 24, 2021, para. 19 and 20.

5.3. The access of the parties and their defenders to the classified information starting with 2018

An admission decision of the Constitutional Court[31] radically changed the relationship of the parties or their lawyers with the evidence containing classified information, greatly facilitating their access. Thus, the Constitutional Court verified the constitutionality of the provisions of art. 352 para. (11) and (12) of the Code of Criminal Procedure, according to which, if the classified information is essential for solving the case, the court urgently requests, as the case may be, total declassification, partial declassification or transfer to another degree of classification. The court can also request allowing access to classified information for the defendant's lawyer, and if the issuing authority does not allow that, those pieces of classified information may not serve as a solution to a conviction, waiver or postponement of the sentence in question.

The exception of unconstitutionality resolved by the Constitutional Court was raised by the Prosecutor's Office attached to the HCCJ - National Anticorruption Direction, on the grounds that the right to a fair trial and the principle of equality before the law of citizens are violated because the legal norm allows the exclusion from criminal proceedings of evidence that constitutes classified information, as a result of an unreasonable and discretionary decision of the administrative authority that classified the information and refuses to declassify it or the defendant's defence counsel (lawyer) has access to it.

Given that the evidence is at the heart of any criminal case and that classified information, which is considered "essential to the resolution of the case", has probative value in criminal proceedings, on the one hand, and that the adversarial principle is an element of the principle of equality of arms and of the right to a fair trial, and on the other hand, that the legality of the administration of evidence has a direct influence on the conduct and fairness of criminal proceedings, the Constitutional Court held that the defendant must have access to classified information to combat or support with the accuser, the legality of the administration of this evidence. As such, at the end of the preliminary chamber proceedings, the evidence consisting of classified information and on which the court notification is based must be accessible to the defendant in order to ensure the possibility of challenging their legality. Only in such a situation can they substantiate a solution of conviction, waiver of the application of the sentence or postponement of the application of the sentence, adopted as a result of a fair criminal trial. Thus, it is not the court of first instance that has to request, *ex officio*, as a matter of urgency, as the case may be, the total declassification, partial declassification or transfer to another degree of classification and allowing access to them for the defendant's defence counsel. The issue of classified information, essential for the settlement of the case, respectively the verification of the legality of the administration of such evidence, must have already been solved in the preliminary chamber, so before moving on to the procedural phase of the trial on the merits. That is because in this stage of criminal proceedings, there can be no evidence consisting of classified information inaccessible to the parties, without violating the provisions of art. 324-347 of the Code of Criminal Procedure and the case-law of the

[31] Decision no. 21 of January 18, 2018, published in the Official Gazette of Romania, Part I, no. 175 of February 23, 2018.

Constitutional Court in the matter of the preliminary chamber procedure.[32]

With regard to the request made by the judge requesting the public authority which ordered the classification to allow the defendant's defence counsel access to the classified information, the author of the exception argued that the condition of the right of access to classified information violates the right to a fair trial in terms of uncertainty of access to such a procedure. On the other hand, the author argued that the protection of classified information could not have priority over the defendant's right to information.[33]

With regard to the fact that the protection of classified information cannot take precedence over the accused's right to information, the Court, starting from the finding that classified information has probative value in criminal proceedings, found that the criticized rules, as amended, places the defendant (through his lawyer) in a more difficult position than the previous law, in the sense that, in addition to maintaining the requirement of access authorization in his respect, the defendant's lawyer needs the consent of the issuing authority of classified information on access to this information. Therefore, following the judge's assessment of the "essential nature of the case" of the classified information and the need to ensure access to it, by virtue of the right to information, corollary of the right to a fair trial, a public administrative authority may deny the defendant's defence counsel access to classified information. Due to the issuing authority's refusal to allow access to the classified documents / information, they remain inaccessible to the defendant and, consequently, "cannot be used to rule on a sentence, waive the sentence or postpone the sentence".

Or, such a legislative solution, which conditions the use of classified information, qualified by the judge as essential for solving the criminal process, by the accept of the issuing public administrative authority, is likely to prevent judicial bodies from fulfilling their obligation under art. 5 para. (1) of the Code of Criminal Procedure, that of "ensuring, on the basis of evidence, the finding of the truth about the facts and circumstances of the case, as well as about the person of the suspect or defendant". [34]

The Court found that the criticized legislative solution upset the right balance between the general and private interests, imposing an impediment to the defendant's right to information, with direct consequences on his right to a fair trial, an impediment that is not subject to any form of judicial review. In such a case, access to classified information is not conditioned only by the completion of procedural steps in order to obtain an authorization provided by law, but, after completing the legal procedure and obtaining the necessary authorizations, the defendant's defence counsel may be denied. This has the effect of absolutely block of access to classified information. The legal consequences are all the more serious as the request for access to this information does not belong to the defendant / defendant's defence counsel, but to the judge of the case, who previously found it essential to resolve the criminal case, assigning it probative value. It is obvious that it is no longer possible to discuss equality of arms and, implicitly, a fair trial. [35]

[32] Decision no. 21 of January 18, 2018, para. 31 and 32.
[33] *Idem*, para. 58.
[34] *Idem*, para. 62.
[35] *Idem*, para. 63.

Furthermore, the Court found that the criticized legal provisions are likely to create discrimination even within the category of defendants in a case, the issuing authority of the classified act having the possibility to selectively allow their defenders access to classified evidence, so that, depending on the decision of the administrative authority, the defendants in identical or similar situations, in the same criminal case, some could be convicted and others acquitted, based on criteria that, according to the law, cannot be subject to judicial review[36].

Given the need to find out the truth in criminal proceedings and the explicit requirement of the Code of Criminal Procedure that a person should be convicted only on the basis of evidence proving his guilt beyond a reasonable doubt, the Constitutional Court held that any information that could be useful to find out the truth must be used in criminal proceedings. Thus, if classified information is indispensable to the finding of the truth, access to it must be provided by the judge of the case, both to prosecution and defense, otherwise the equality of arms and respect for the right to a fair trial are enfringed. On the other hand, access to classified information may be refused by the judge, who, although noting its essential role in resolving the case before the court, considers that access may seriously endanger the life or fundamental rights of another person or that the refusal is strictly necessary to defend an important public interest or may seriously affect national security[37]. Therefore, only a judge can judge on the conflicting interests - the public interest, regarding the protection of information of interest for national security or for the defense of a major public interest, respectively the individual interest of the parties to a case, so that, through the solution it pronounces, to ensure a fair balance between the two.[38]

The Court concluded that the protection of classified information cannot take precedence over the right to information of the defendant and over the guarantees of the right to a fair trial of all parties to the criminal proceedings, except under express and restrictive conditions provided by law. Restriction of the right to information can only take place when it is based on a real and justified purpose of protecting a legitimate interest in the fundamental rights and freedoms of citizens or national security, the decision to refuse access to classified information always belonging to a judge.[39]

5.4. Administrative contentious review of acts concerning defence and national security

An interesting decision regarding the guarantees of respect for fundamental rights through the possibility of contesting administrative acts before the administrative contentious courts concerned the provisions of art. 5 para. (3) of the Law on administrative contentious no. 554/2004, according to which "Administrative acts issued for the application of the state of war, state of siege or emergency, those concerning defence and national security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and epizootics can only be attacked for excess of power. "The Constitutional Court

[36] *Idem*, para. 64.

[37] Elena Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, published in CKS-eBook, 2013, available at http://cks.univnt.ro/cks_2013.html.

[38] Decision no. 21 of January 18, 2018, para. 70.

[39] *Idem*, para. 71.

found[40] that the phrase "those concerning national defence and security" contained therein was unconstitutional.

The exception of unconstitutionality was raised by reference to the provisions of art. 126 para. (6) of the Constitution, which exempts from the rule of judicial control of administrative acts only military command acts, so that an extension, by law, of the notion of "military command acts" beyond the real will of the constituent contradicts with the Basic Law. The court held that, in order to avoid over-power of the institutions in the field of national security, defence and public order, national law must allow judicial control over them in an effective manner, in order to comply with the requirements of a fair trial.

Examining the exception of unconstitutionality, the Constitutional Court held that, the para. (6) of art. 126 of the Constitution establishes that the courts, by way of administrative litigation, exercise judicial control over the administrative acts of public authorities This kind of control is guaranteed and only two categories of acts are absolutely excepted - those of military command and those relating to relations with Parliament - which, by their nature, are not subject to judicial review in any form.

From a constitutional point of view, art. 126 para. (6) is the only seat of the matter regarding the administrative acts exempted from the judicial control[41], and art. 5 para. (3) of Law no. 554/2004, even if it is an organic law, cannot provide other exceptions, without thereby violating the indicated constitutional text, the provisions of which are limiting and imperative.

The Court found that the constitutional provisions mentioned must be interpreted restrictively on the basis of the rule *exceptio est strictissimae interpretationis*, any other exception to the judicial review of administrative acts being an addition to the Constitution, not allowed by its supreme character and its preeminence over all under-constitutional laws.

The term "excess of power", used in the text of the criticized law, has the meaning, according to art. 2 para. (1) letter n) of the law - "exercising the right of appreciation of public authorities by violating the limits of the competence provided by law or by violating the rights and freedoms of citizens". Thus, since the administrative acts regarding the defence and national security, except for the excess of power, to which the text that is the object of the exception of unconstitutionality refers, are not among the exceptions expressly provided by art. 126 para. (6) of the Constitution, it follows that they must be subject to judicial review.

6. Conclusions

The present paper aims to summarize the issue of classified information concerning criminal cases, when the evidence that seeks to find out the truth and establish the guilt or innocence of the accused comprise this kind of information. To this end, we first set out the relevant regulatory framework and then we depicted the difficulties faced by the parties' lawyers. Until the amendment, in 2013, of Law no. 182/2002, not even the judges were granted

[40] By Decision no. 302 of March 1, 2011, published in the Official Gazette of Romania, Part I, no. 316 of May 9, 2011.

[41] See, for further details on this issue, Elena Ștefan, *Acts extempt from the judicial control of the contentious administrative*, published în CKS e-Book 2016, pp. 534-538, http://cks.univnt.ro/cks_2016/CKS_2016_Articles.html and Marta Claudia Cliza, *Administrative acts exempted from judicial review by administrative courts*, published în CKS e-Book 2014, http://cks.univnt.ro/cks_2014.html.

the right of access to classified information, unless they obtained an ORNISS certificate.

The case-law of the Constitutional Court has clarified this issue to a large extent, examining up to what point a reasonable balance can be struck between the right of access to public interest information and the national security defence interest.

As there is a growing tendency at the international level to open up public access to a wide and various range of information, it remains to be analyzed in the future the degree to which the Romanian state will agree to provide a greater number of certain types of information subject to classification. Such an approach would increase the need for transparency and democratization of information, which is desirable in a state governed by the rule of law.

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- www.orniss.ro.

THE PRINCIPLE OF EQUAL RIGHTS: CONCEPT AND REFLECTION IN THE CASE LAW OF THE CCR

Elena ANGHEL[*]

Abstract

In this study I aim to analyze the constitutional principle of equality of rights, starting from the concept. Equality is an objective law principle, is also a subjective public law right and, more than that, as qualified in the doctrineI, is a "fundamental right with the value of a general principle for the field of fundamental rights". Equality "is rather considered as a principle right than as a law principle", because it accompanies and guarantees the use of the other rights.

On the other side, equality has also been interpreted as a distinct set of rights, composed of different specific realities. In its general form, equality resides in each citizen's right of not being subjected to discrimination and of being treated equally, both by public authorities and by the other citizens. This is about an "equality in rights", opposed to the concept of "actual equality" because the lawgiver provides an equal juridical framework for all citizens, ascertaining a formal equality, but he cannot guarantee equal results.

The jurisprudence of the Constitutional Court underlined the other perspective: the material equality, actual equality or equality by law, which refers to all concrete cases, considering the existent differentiations and aiming for a concrete equality of the results. As we`ll notice, the Constitutional Court analyzed equality also as a possibility of admitting a right to difference in case of different legal situations.

Keywords: *equality, principle, right, constitutional, discrimination.*

1. Introduction

No matter how different people are in terms of sex, race, nationality, language, religious belief, they all carry the same essence. Equality is an innate and inherent right of the human being. The definition of this innate right by normative acts represents only the necessary legal form by which equality takes meaning, and not the act of birth.

Professor Gh. Mihai refers to a principle of "anthropological" equality: "people are equal in the sense that no one is more or less a biopsychosocial being, in any way; this qualitative equality would lead us to identity, because people are essentially identical"[1].

But as poetic as the definition of The Declaration of the Rights of Man and Citizen 1789 is - "*men are born and remain free and equal in rights*"-, throughout life, they feel differently, act differently and valorize differently, therefore, natural equality described above remains only a concept to refer to. It is true that a relative identity of individuals can be nourished by their belonging to a certain human community,

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[1] Simina Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publishing House, Bucharest, 1999, p. 4.

[1] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, p. 185.

which delivers over them common ideologies and beliefs springing from a unique culture, religion or moral, but man goes through his own life experience, distinct of that of his peers.

The aim pursued by means of this study is that, starting from the concept of equality, to analyze the evolution of the constitutional principal of equality in the case law of the CCR[2].

2. Paper content

Human beings have certain rights simply because they are human, not because they are Jewish, Catholic, Protestant, German, or Italian[3]. However, as we have shown above, human beings valorize differently abstract equality of opportunity and abstract freedom of choice. We are born with a common biological background, but each of us consolidates his own traits, aspirations, values. Even though we are similar in the values we receive, we are different in the valorizations we make. There is no universal, perfect, timeless and aspatial moral model[4].

According to Simina Tănăsescu[5], equality is "a fundamental right with the value of a general principle for the matter of fundamental rights", a guarantee right and, at the same time, an objective principle of law concerning the balance of life, being considered "rather as a right of principle that as a principle of law", due to the fact it accompanies and guarantees the exercise of the other rights. As a right to equal rights, the principle of equality has a content enhanced by the content of the fundamental rights accompanied by it.

Therefore, the principle of equality is analyzed in the doctrine as a consequence of all the other rights, as it secures the full and non-discriminatory fulfillment thereof. The concept of "equal rights" concerns all the rights of citizens, whether or not defined in the Constitution or other laws[6]. In this respect, equality is assigned an essential feature: it has the role of strengthening the effectiveness of the other citizen's rights.

S.E. Tănăsescu highlights the fact that, in the field of the law, the standard called principle of equality is one of the most polymorphic principles of positive law. The author analyzes the options available to the legislator: either he resorts to a formal legal equality, thus establishing an equality by right of all subjects, or he supports his reasoning on a material equality, which aims at an equality of results.

Formal equality of opportunity is the one inspired by the famous formula defined by the Declaration of the Rights of Man and Citizen: "men are born free and equal in rights". By reprobating the inequalities enshrined in feudal law, French Revolution of 1789 proclaimed equality, freedom and fraternity among its commandments, being

[2] For detailed and exhaustive analyzes of the review of constitutionality performed by the CCR, see I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie*, 2nd ed., Hamangiu Publishing House, Bucharest, 2019; I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009; S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021.

[3] Otfried Hőffe, *Principes du droit*, Les éditions du Cerf, Paris, 1993, p. 65.

[4] For more, see E.E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[5] See Simina Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publishing House, Bucharest, 2003. See also, Tudorel Toader și Marieta Safta, *Constituția României*, 3rd ed., Hamangiu Publishing House, Bucharest, 2019.

[6] To have a view on the principle of equality in the Romanian Constitution of 1866, see C. Ene-Dinu, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020, p. 288.

subsequently taken over and regulated as fundamental principles of law. The law has thus become a guarantor of the fulfillment of equal opportunities for human beings.

Natural equality starts from the premise that people are born equal by right, ignoring the reality that they are not equal in fact. The doctrine points out that "the famous natural equality does not identify itself *eo ipso* with legal equality": if positive law were an accurate reflection of natural law, legal equality should require the legislator not to discriminate against nature. The legislator strives to establish an equal legal framework for all citizens, the latency to universalism of equality taking meaning by means of the general legal norm.

However, by legally enshrining equal opportunities, the legislator cannot guarantee equal results, because inequalities in fact are inherent in social life. The fact that the law cannot establish privileges and discrimination does not mean that it can remove inequalities existing in social life, by ensuring mathematical equal treatment. Therefore, the concept of equal rights is purely formal, it remains at a superficial level of the prohibition of discrimination[7], as "this framework has only the vocation to universalism; it cannot cover all subjects of law at the same time".

Material equality is situated at the opposite pole, de facto equality or equality by law, which descends from the abstract of the general and impersonal legal norm and focuses on concrete cases. Taking into account the existing natural differences and pursuing a concrete and fair equality of results, material equality "rejects the vocation to universalism of the principle".

By giving expression to the requirements regarding the generality and impersonality of the legal norm, the law can only provide a virtual equality of opportunity for the members of the society. If the identity of the legal norms that define equality is a natural and necessary reality, the equal treatment under the law is inconceivable, social life not being able to produce perfectly identical situations, but at most similar. In this background, a rigorous identity of the legal treatment applicable to different situations would be discriminatory, unequal, so that a differentiated equality must exist behind formal equality. "In order to compensate for the inequalities inherent in social life, equality redistributive discriminations are needed", according to Simina Tănăsescu. These positive discriminations, which the material equality itself postulates, have a corrective role, aiming at repairing de facto inequalities or reducing certain existing legal inequalities, materialized in (negative) discriminations that certain categories of persons endure.

This perspective which implies not only a vocation to equality, but an effective, tangible equality able to diminish the inequalities inherent in social life, as well the establishment of certain obligations on public authorities[8], has rarely been adopted by the Romanian constitutional judge.

Therefore, by means of **Decision no. 27/1996**[9] , the CCR noted that the wording of art. 16 para. (1) of the Constitution, corroborated with that of art. 4 para. (2) of

[7] We point out an interesting study regarding discrimination in our times, please see Marta-Claudia Cliza, *What Means Discrimination in a Normal Society with Clear Rules?*, published in LESIJ - Lex ET Scientia International Journal, no. 1/2018, vol. XXIV, pp. 89-99.

[8] For more information on public authorities in Romania, please see Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Drept administrativ. Editie revizuita conform modificarilor Codului administrativ*, Pro Universitaria Publishing House, Bucharest, 2021, pp. 7-22.

[9] CCR Decision no. 27 of 12 March 1996 on the ruling on the second appeal against CCR Decision no. 107 of 1 November 1995.

the Fundamental Law, refers to prohibited discrimination, not to admissible discrimination, therefore to "negative discrimination" not to "positive discrimination", taking into account the specificity of certain situations or the purpose of achieving distributive justice, in order to nullify or reduce objective inequalities. Furthermore, the aforementioned constitutional wording aims at equality between citizens as regards the recognition in their favor of certain rights, not the identity in legal treatment as regards the exercise or fulfillment of those rights. This explains not only the admissibility of a legal treatment which is different and privileged compared to certain categories of persons, but also the necessity hereof.

Essentially, equality, in its general wording, lies in the right of every citizen not to be subject to discriminations and to be treated on equal footing, both by public authorities[10], and by the other citizens. Notwithstanding, Tudor Drăganu distinguishes between equality in subjective rights and equality in the exercise of such rights. Therefore, it is shown that equality has two dimensions: an ideal dimension, defined under the law, equality as an intangible right and a technical dimension, by which equality acquires substance in the exercise of subjective law, as the case may be.

The principle of equality has been the subject of great resizing in the case law of the CCR. Therefore, the construction given by the Constitutional Court to the principle of non-discrimination has evolved from a strict conception according to which equality means non-discrimination, and the criteria of appreciation are those expressly provided by the aforementioned wording, to an extensive conception according to which discrimination is not necessarily the opposite of equality, only arbitrary discrimination being prohibited. By means of **Decision no. 26/1995 on the settlement of the second appeals against Decision no. 1/1995 ruled by the Constitutional Court on 4 January 1995**, the Constitutional Court provided that the legislator is free to assess objective situations in social life but "he cannot exceed the constitutional limits thus established, because otherwise he would violate the provisions of the fundamental law". In addition, differences in situations must be based on the law.

The scope of the wording of art. 4 of the Constitution was considerably widened when the case law of the Constitutional Court marked out the idea that not only the non-discrimination criteria expressly provided in the fundamental law must be complied with; all arbitrary exclusions of subjects of law shall be deemed discriminations. Therefore, according to Simina Tănăsescu, "within the categories set out by the law, the legislator shall not create discrimination between categories, but differences are possible or even necessary".

The doctrine points out that "any act that tends to degrade or enslave certain categories of persons due to such criteria is an act that threatens the universality of man, an act that tends to exclude from the human race some beings who have an inalienable right to belong to it". It is considered that human dignity, the supreme value of society, is the one to oppose to both differentiation for exclusion, and to assimilationist identity. Human dignity prescribes unity in diversity, thus reconciling freedom with equality.

The evolution of the constitutional case law reveals two distinct tendencies: on the one hand, there has been stated that equality should not be defined by opposition

[10] E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

to discrimination, but by reference to that of difference; on the other hand, equality does not mean uniformity, but rather proportionality.

Therefore, in the first stage of the evolution of the concept in terms of the case law, a relative version of the principle of equality was admitted, stating that equality does not mean uniformity. Equality does not mean equal treatment in all situations; equal treatment must correspond to equal situations, but in different situations there may be different treatment.

By means of **Decision no. 70/1993**, the Constitutional Court, notified to rule on the unconstitutionality of art. 11 para. (1) and (2) of the Law on accreditation of higher education institutions and diploma recognition, which established the possibility for the students of a state higher education institution to continue their studies within both state and private institutions, while para. (2) established that the students of a private higher education institution can continue their studies only within institutions of the same nature, namely private, noted that: "special situations in which the students from the two types of higher education institutions find themselves have also determined different solutions of the legislator, without violating the principle of equality, which, as we have already mentioned, does not mean uniformity. In other words, the principle of equality does not challenge the possibility of a law to establish different rules in relation to persons who find themselves in special situations".

Subsequently, the Constitutional Court reconsidered its case law, by admitting not only the possibility, but also the need to establish a different legal regime in different situations. Therefore, it was established that "equal treatment must correspond to equal situations; in case of different situations legal treatment can only be different". However, in the latter case, there must be an objective and reasonable justification, so that there is no obvious disproportion between the aim sought by the unequal legal treatment and the means employed.

In the light of these considerations, we note that the limits of the constitutional principle of equality have varied between strict equality, sometimes assimilated with non-discrimination and relative equality, which accepts and subsequently claims a differentiation of legal treatment for different legal situations. By postulating that legal equality in subjective rights does not mean an equal measure for different situations, the court of constitutional control confirmed the need for the right to apply different treatment for situations which, by their nature, are not identical.

There was only one step from the admission of a right to differentiation to the definition of a new fundamental right, the right to difference, "as an expression of the citizens' equality before the law, incompatible with uniformity". By means of **Decision no. 107/1995 on the constitutional challenge of art. 8 para. (1) of Law no. 3/1977**, the Constitutional Court provided that "it is generally held that the violation of the principle of equality and non-discrimination occurs when different treatment is applied to equal cases, without an objective and reasonable justification or if there is obvious disproportion between the aim sought by the unequal legal treatment and the means employed. In other words, the principle of equality does not prohibit specific rules in the event of different situations. Formal equality would lead to the same rule, despite the difference in situation. Therefore, real inequality that results from this difference may justify distinct rules, depending on the purpose of the law they are contained in. This is why the principle of equality leads to the emphasis on the existence of a fundamental right, the right to

difference, and provided that equality is not natural, to impose it would mean to establish discrimination".

In its case law, the CCR has ruled that when the criterion according to which a legal regime is applied is objective and reasonable and not subjective and arbitrary, being established by a certain situation provided by the hypothesis of the norm, and not by the belonging or quality of the person, the application of which depends on, therefore *intuitu personae*, there is no ground for the classification of the regulation subject to control as discriminatory, therefore contrary to the constitutional norm of reference[11].

In the same respect, we mention the constant case law of the ECtHR, which provided, in the application of the provisions of art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition of discrimination, that any difference in treatment committed by the State between individuals in similar situations without an objective and reasonable justification shall represent an infringement of these provisions (for example, by means of Judgment of 13 June 1979, ruled in case Marckx v. Belgium, and by Judgment of 29 April 2008, ruled in case Burden v. The United Kingdom). Furthermore, by means of Judgment of 6 April 2000, ruled in case Thlimmenos v. Greece, the European Court of Human Rights provided that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when States treated differently persons in analogous situations without providing an objective and reasonable justification (such as Judgment of 28 October 1987, ruled in case Inze v. Austria), but also when States, without an objective and reasonable justification, failed to treat differently persons whose situations were different (**Decision no. 545 of 28 April 2011, OJ no. 473 of 6 July 2011**).

The ECtHR provided that a difference of legal treatment is discriminatory if it has no objective and reasonable justification[12], this means that the aim sought is not legitimate or that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized (in this respect, see judgments ruled in cases "Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, 1968, Marckx v. Belgium, 1979, Rasmussen v. Denmark, 1984, Abdulaziz, Cabales and Balkandali v. The United Kingdom, 1985, Gaygusuz v. Austria, 1996, Larkos v. Cyprus, 1999, Bocancea and others v. Moldova, 2004). Furthermore, in accordance with the case law of the same Court of Human Rights, the States benefit from a certain margin of appreciation in deciding whether and to what extent the differences between similar situations justify a legal treatment, and the aim of this margin varies according to certain circumstances, scope and content (in this respect, see judgments ruled in cases "Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, 1968, Gaygusuz v. Austria, 1996, Bocancea and other v. Moldova, 2004) (**Decision no. 190 of 2 March 2010, OJ no. 224 of 9 April 2010**).

Following the assessment of the aforementioned case law, we note that, despite the vocation for universalism of natural equality, legal equality is not an absolute principle. The following are considered **limits of the constitutional**

[11] Decision no. 192/2005.

[12] Please see Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului*, Hamangiu Publishing House, Bucharest, 2019, pp. 180-181.

principle of equality: the principle of non-discrimination[13] and the principle of proportionality.

Paragraph (1) of art. 16 is correlated with the constitutional provisions of art. 4 para. (2), which established the criteria of non-discrimination, namely race, national or ethnic origin, language, religion, sex, political opinion or affiliation, property or social origin.

The principle of non-discrimination entails two possibilities of conception: in the narrow sense, it concerns the protection of persons against any restriction or preference in the exercise of the rights and freedoms enjoyed by other persons for reasons of identity; in the broad sense, combating discrimination[14] involves taking special measures in favor of disadvantaged groups. We thus distinguish between negative and positive discrimination.

In what concerns the concept of "negative discrimination", this must be understood as an unjustified, illegitimate, arbitrary differentiation. By the constitutional definition of the equality before the law, the legislator is prohibited to introduce arbitrary discriminations between different categories of addressees in the content of the norm. According to art. 2 para. (1) of GO no. 137/2000 on preventing and sanctioning all forms of discrimination, republished, discrimination shall mean "any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life".

In addition to the State's obligation to abstain, public authorities are required in certain circumstances to adopt positive measures in order to secure equal treatment. In what concerns "positive discrimination", sometimes called compensatory inequality, art. 2 para. (9) of GO no. 137/2000, republished, provides that "measures taken by public authorities or by legal entities under private law in favor of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disfavored groups, shall not be regarded as discrimination under the ordinance herein". The aforementioned normative act defines in art. 4, the concept of disfavored category as the category of persons that is either placed in a position of inequality as opposed to the majority of citizens due to their social origin or is facing rejection and marginalization.

The Treaty on European Union also provides on "positive discrimination", specific right being recognized for children, elderly and disabled persons. A constant concern of the Union is to ensure equality between men and women, in this respect art. II-83 para. (2) of the Treaty provides that "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.".

[13] For more see E.E. Ștefan, *Opinions on the right to nondiscrimination*, in CKS e-Book 2015, pp. 540-544, available online at http://cks.univnt.ro/cks_2015/CKS_2015_Articles.html, Public law section.

[14] For a specific perspective, see C. Ene-Dinu, *Discriminarea și libera circulație a lucrătorilor în lumina dispozițiilor art. 45 din Tratatul privind funcționarea Uniunii Europene*, in Public Law Review no. 1-2/2021, pp. 145-150.

The establishment of special measures to protect disfavored categories (women, minorities, disabled persons or HIV infected persons) is a necessary redistribution of formal equality, a remedy against discrimination.

3. Conclusions

Equality valorizes the whole system of law, representing the foundation of the European construction, along with universal ideas such as human dignity, freedom, solidarity, democracy. The European rule of law model is a liberal model, structured around the idea of respecting and defending fundamental rights[15]. In this respect, the Preamble of the Treaty Establishing a Constitution for Europe defines equality and the other inviolable and inalienable human rights as universal values inspired by Europe's cultural, religious and humanist heritage.

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[15] Human rights have to be respected all the more in our times, please see Laura-Cristiana Spătaru-Negură, *Militating in Favor of International Human Rights Law (Even in Times of Covid-19 Pandemic)*", published în CKS Proceedings (Challenges of the Knowledge Society) 2021, Bucharest, pp. 517-523, http://cks.univnt.ro/cks_2021.html.

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HOW DO THE EUROPEAN COMMISSION, MEMBER STATES AND CITIZENS INTERACT IN ENFORCING INTERNAL MARKET RULES?

Oana-Mihaela SALOMIA[*]

Abstract

The Internal Market is the main element of European economic integration, the achievement of which was provided for in the Treaty establishing the European Economic Community (Rome, 1957).

The implementation of the four fundamental freedoms of movement for the benefit of the citizens of the Member States was one of the major objectives of the Internal Market and led to the adoption of specific European rules, the respect of which is ensured by the Member States under the supervision of the European Commission.

Currently, the Treaty on European Union mentions, among the Union objectives, the establishment of the Internal Market, and the Treaty on the Functioning of the European Union provides for the shared competence of the European Union with the Member States in the field of the Internal Market.

The rules adopted at Union level for the achievement of the freedoms of movement must be implemented by the authorities of the Member States for the advantage of the citizens of the Member States and of undertakings. In the situation of non-compliance with these rules, the European Commission may bring the Member State concerned before the Court of Justice of the European Union.

Thus, the completion of the Internal Market depends on the way in which the three actors interact - the European Commission, the Member States and the citizens according to their specific interests.

In conclusion, the full completion of the Internal Market area requires a balanced and effective action carried out by the European Commission, the Member States and their citizens, based on a transparent and collaborative approach.

Keywords: *Internal Market, enforcement, free movement, European Commission, European citizens.*

1. Introduction

European integration was a necessity and a plan for the reconstruction of Western Europe after the Second World War which contributed to raising the well-being of its peoples and to the economic ranking in the world by unifying the economic and social interests of the European states which wanted to develop harmoniously their economy and maintain peace.

The Treaty establishing the European Economic Community, Rome, 1957 mentioned, since art. 2, the central objectives as the establishment of the common market, the high level of employment and social protection[1], and solidarity between Member States.

In the doctrine, it has been pointed out that „European construction also faces a delicate issue: reconciling national

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[1] Mihail Vladimir Poenaru, *Considerații cu privire la regimul juridic al pensiilor ocupaționale din sistemul de drept român în a doua decadă a secolului XXI*, in Hic et Nunc: Alexandru Athanasiu, ed. Facultatea de Drept. Centrul de Drept Social Comparat, C.H. Beck Publishing House, Bucharest, 2020, p. 448.

sovereignty with supranational integration[2], the two realities being found within the European Union with the three pillars, existing in this form until 1 December 2009[3] and which continue, from certain views, and after this date. After more than five decades of European integration, through the drafting of treaties, their amendments, criticisms, compromises, uncertainties, crises and failures, there are undoubtedly, according to O. Bibere, many achievements in the EU: freedom of movement, common policies, single currency, institutions, budget, own resources, legal order, anthem, flag, common currency, European citizenship, European initiatives, economic aid, humanitarian aid, etc."[4]

Currently, art. 3 para. (2) of the Treaty on European Union (TEU) provides as a general objective of the European Union - an international intergovernmental organization endowed with legal personality - to promote the well-being of its peoples which can be achieved by achieving other specific objectives such as: the establishment of an area of freedom, security and justice without internal frontiers; the continuous development of the Internal Market[5]; the balanced economic growth and price stability, a highly competitive social market economy; the social justice and protection, equality between women and men, solidarity between generations.

The Union institutions have the task of pursuing these objectives[6] in accordance with the principles of conferral of competence and the sincere cooperation, which are clearly reflected in the legislative and budgetary procedure; in particular, the European Commission shall oversee the application of Union law under the control of the Court of Justice of the European Union.

In this context, the answer to the question: *How do the European Commission, Member States and citizens interact in enforcing Internal Market rules?* could identify different reactions between these actors which will have an impact of the EU competences and the EU institutions tasks. The Internal Market has been created for the wellbeing of the European citizens but the Member States would need EU flexible mechanisms and the support of their citizens for implementing all obligations in this regard.

2. Internal Market - general issues

The Internal Market, which succeeds the Common Market and the Single

[2] See: Roxana-Mariana Popescu, *Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court*, in Challenges of the Knowledge Society, (Bucharest, 17th - 18th May 2019, 13th ed.) http://cks.univnt.ro/articles/14.html.

[3] At that date the Lisbon Treaty has entered into force.

[4] Mihaela-Augustina Dumitrașcu and Oana-Mihaela Salomia, *Dreptul Uniunii Europene II*, Universul Juridic Publishing House, Bucharest, 2020, pp. 154-171.

[5] CJEC, 5 May 1982, *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, case 15/81, ECLI: ECLI:EU:C:1982:135, 33: "The concept of a common market as defined by the court in a consistent line of decisions involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market . It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market".

[6] See Oana-Mihaela Salomia, *La théorie de l'apparence en droit de l'Union européenne. Confiance des citoyens des États membres dans les institutions de l'Union*, in *In honorem Flavius Antoniu Baias. Aparenta în drept. The appearance in law. L'apparence en droit* II, ed. Adriana Almășan, Ioana Vârsta, Cristina Elisabeta Zamșa, Hamangiu Publishing House, Bucharest, 2021.

Market[7], is an area of shared competence according to para. 2 of the art. 4 of the Treaty on the Functioning of the European Union (TFEU), for the implementation of which the Union adopts legislative acts, binding for Member States which can no longer legislate unless the Union has exercised its competence or if the Union has decided to cease exercising its competence.

Regarding the content of this concept, it is interesting to note that its regulation is very brief, respectively Part III of the TFEU begins with Title I entitled the Internal Market which includes only two articles, the second paragraph of art. 26 defining the field of the Internal Market: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties"[8].

Thus, in the architecture of the Treaty, Title II regulates the free movement of goods[9], and Title IV regulates the free movement of persons, services and capital. Therefore, according to the Treaty, it would seem that the internal market is limited to the four fundamental freedoms, provided for by the Treaty of Rome and gradually developed throughout the Community / Union construction for the benefit of citizens, but their content has expanded to new complex areas (standardization for goods, public procurement).

Naturally, the Internal Market is one of the main domains addressed by the green and digital transitions[10], and the measures taken to do so are aimed at implementing the four fundamental freedoms, and Member States are working together to find appropriate ways to meet European obligations.

Regarding the regulation in this field, two main categories of acts can be observed:

1. legislative acts adopted pursuant to the TFEU to implement the freedoms of movement; and

2. soft law acts adopted by the European Commission covering the whole area of the Internal Market and its development[11].

[7] Simon Usherwood and John Pinder, *Uniunea Europeană. O foarte scurtă introducere*, Litera Publishing House, Bucharest, 2020, p. 76: "Therefore, as the European economies developed, the initial project of the EEC, focused on the abolition of tariffs in a customs union, was in the 1980s through the single market program, then in the 1990s through the single currency".

[8] See: Oana-Mihaela Salomia, Dragoș-Adrian Bantaș, *Aspecte generale privind competența Uniunii Europene în domeniul achizițiilor publice*, *Achiziții publice. Idei noi, practici vechi*, Ecaterina-Milica Dobrotă, Dumitru-Viorel Pârvu (coord.), Universitară Publishing House, Bucharest, 2020, pp. 228-230.

[9] See: Augustin Fuerea, *Funcționarea pieței interne pe baza liberei circulații a mărfurilor*, (non-official translation: Functionning of the Internal Market on the basis of the free movement of goods), in *Dreptul Uniunii Europene - principii, actiuni, libertăți,* Universul Juridic Publishing House, Bucharest, 2016, pp. 184-186.

[10] See: Elena Lazăr, Nicolae Dragos Costescu, *Dreptul european al internetului*, Hamangiu Publishing House, Bucharest, 2021, pp. 18-36; Alina-Mihaela Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, pp. 193-194; Oana-Mihaela Salomia, *European legal instruments for green and digital transitions*, Challenges of the Knowledge Society, (Bucharest, May 21st 2021, 14th ed.), pp. 487-492, http://cks.univnt.ro/articles/15.html.

[11] https://ec.europa.eu/growth/single-market/single-market-act_en

"The Single Market Act presented by the Commission in April 2011 set out twelve levers to boost growth and strengthen confidence in the economy" and

"In October 2012, the Commission proposed a second set of actions to further develop the single market and exploit its untapped potential as an engine for growth".

https://ec.europa.eu/growth/single-market/single-market-strategy_en

"On 28 October 2015, the European Commission presented a new single market strategy to deliver a deeper and fairer single market that will benefit both consumers and businesses".

At the institutional level, it should be noted that the current European Commission includes a portfolio dedicated to the Internal Market, as well as other portfolios that manage aspects of the impact on the Internal Market – Economy, Jobs and Social Rights[12] and An Economy that Works for People, and to ensure that the rules in this area are followed, it was set up the Single Market Enforcement Task Force (SMET) under the Action plan for better implementation and enforcement of single market rules Search adopted in March 2020 as part of the European industrial strategy, ”as a high-level forum where the Commission and EU countries work together”[13]; SMET inform the Competiveness Council and the European Parliament's Internal Market and Consumer Protection Committee on the progress made.

3. Benefits of the Internal Market for the citizens of the Member States

The evolution of the fundamental freedoms of movement within the concept of the Internal Market has been carried out in parallel with the economic and social trends that have marked the world economies, with the evolution of human society so that, nowadays, such as: Single market for goods, Single market for services, European standards , Public procurement or Single digital gateway ; the aspects regarding the competition rules[14] fall within the exclusive competence of the European Union according to art. 3 para. 1 letter b) of the TFEU.

At the heart of these actions are the nationals of the Member States whose authorities are responsible for transposing or applying directly the rules adopted by the institutions of the Union in order to achieve the general objectives of the Internal Market. Examples include achievements in the free movement of services which was facilitated by the adoption of a legislative act only in 2006 - *Directive 2006/123/EC on services in the internal market*, although the Treaty of Rome established this freedom which could only be conceived, at that date, in relation to the free movement of persons. At present, services occupy an important place in European economic development, focusing on retail services, business services or construction services. „As one of the largest service sectors, business services contribute to 11% of EU GDP” and ”they range from technical services such as engineering, architecture and IT, to other professional services such as legal services, employment services and facility management”[15].

This Directive obliges the Member States to establish the Points of Single

[12] The General Directorate which is under the responsibility of the European Commissioner for Internal Market has been renamed last year DG Grow.

DG Grow is “responsible for responsible for:

- completing the internal market for goods and services
- helping turn the EU into a smart, sustainable, and inclusive economy
- fostering entrepreneurship and growth by reducing the administrative burden on small businesses; facilitating access to funding for small and medium-sized enterprises (SMEs); and supporting access to global markets for EU companies. All of these actions are encapsulated in the small business act
- generating policy on the protection and enforcement of industrial property rights
- coordinating the EU position and negotiations in the international intellectual property rights (IPR) system, and assisting innovators on how to effectively use IP rights”

https://ec.europa.eu/growth/about-us_en.

[13] https://ec.europa.eu/growth/single-market/single-market-enforcement-taskforce_en.

[14] See: Adriana Almășan, Ștefan Bogrea, *Harmonization of Romanian Law to EU Competition Law*, Analele Universității din București, Seria Drept, 2015.

[15] https://ec.europa.eu/growth/single-market/single-market-services/business-services_en.

Contact (PSCs) which "are e-government portals that allow service providers to get the information they need and complete administrative procedures online"[16]. In Romania the PSC was created by the National Authority for Digitalization[17] and it is used for different administrative procedures as recognition of professional qualifications for the regulated professions, customs authorization, urbanism certification, construction, consumer protection and others. Nowadays the Member States must also implement the *Regulation (EU) 2018/1724 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services* which "will facilitate online access to the information, key administrative procedures and assistance and problem-solving services that citizens and businesses may wish to contact if they encounter problems when exercising their internal market rights while living in or doing business in another EU country"[18]. The same Romanian National Authority for Digitalization has the task to make functional the Single Digital Gateway where all the public authorities, universities or professional bodies will provide with online information and online procedures for the European citizens.

In fact, digitization remains one of the most useful tools created in the internal market for the benefit of citizens, which is regulated by binding acts for Member States.

4. Monitoring of the Internal Market's rules by the European Commission

According with the art. 17 para. 1 of the TEU and art. 258 of TFEU, the European Commission monitors the application of EU law and can launch infringement proceedings against EU countries that do not comply.

As mentioned, the European Commission has created SMET which "is composed of EU countries and of the Commission. EU countries have nominated a SMET contact point from the competent national authorities with direct responsibility for single market issues, in the majority of the cases the ministries for economic affairs"[19]. In Romania, the Ministry of Economy is represented within SMET and collaborates with all Ministries having competences in the field of Internal Market[20].

The SMET will complement a cooperation network to be set up between national enforcement coordinators, making use of the existing Internal Market Advisory Committee (IMAC) framework.

In the meantime, in order to succeed and to keep the momentum in the implementation, the Single Market Scoreboard will provide both Member States and the Commission with a useful performance-monitoring tool on the application of single market rules

However, not only can the European Commission be notified, but it can also be notified by citizens or other Member States that a Member State is not complying with Internal Market rules.

[16] https://ec.europa.eu/growth/single-market/single-market-services/services-directive/practice/points-single-contact_nl.

[17] https://edirect.e-guvernare.ro/SitePages/landingpage.aspx.

[18] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4374365.

[19] https://ec.europa.eu/growth/single-market/single-market-enforcement-taskforce_en.

[20] http://www.economie.gov.ro/eliminarea-barierelor-de-pe-piata-unica-instituite-in-contextul-pandemiei-covid-19-dezbatuta-in-cadrul-reuniunii-smet.

Thus, the question arises as to whether the citizens of a State are not required to turn against their own State which, for various reasons, does not implement the rules of the Internal Market, although it has an obligation to do so. What are the reasons why a Member State does not comply with these rules? Are there justified situations?

”Member States must ensure compliance with single market law if the rights of individuals or businesses are to be protected. This must start at the stage of designing national legislation, and be carried through to individual judicial or administrative decisions. The Commission has the task to support Member States in preventing the creation of new barriers to the single market, in the transposition and application of EU law and to initiate remedial action where necessary”[21].

In accordance with the EU law, the European Commission has established the following ”Tasks and responsibilities for the implementation and enforcement of single market rules:

Member States - Transpose EU law timely and accurately, refraining from unjustified “gold plating”, and ensure a level playing field

Commission - Assist Member States in transposing EU law correctly, fully and on time

Member States - Ensure that national legislation is proportionate and non-discriminatory

Commission - Assist Member States in applying EU law

Member States - Ensure sufficient and proportionate administrative checks and controls so that any breaches are identified

Commission - Check the transposition and monitor the application of EU law

Member States - Avoid any national measures that contradict or hamper the application of EU law

Commission - Act against breaches of EU Law and take formal infringement action if needed

Member States and Commission and - Cooperate effectively to ensure compliance with EU law”[22].

These tasks that fall to the European Commission and the Member States have as legal basis the fundamental principle of sincere cooperation[23] between Union and Member States provided for the art. 4 para. 3 of the TUE where it is laid down that ”the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”.

The question arises on that topic is whether there is real and active support of the European Commission’s services for the authorities of the Member States during the transposition period of a directive. How can it be explained that there are directives that have not been correctly and completely transposed by a large number of Member States? Is it the fault of the Member States or do most Member States have a different view of the Commission as regards the

[21] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2020) 94 final, Long term action plan for better implementation and enforcement of single market rules, https://ec.europa.eu/info/sites/default/files/communication-enforcement-implementation-single-market-rules_en_0.pdf.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2020) 94 final, Long term action plan for better implementation and enforcement of single market rules, https://ec.europa.eu/info/sites/default/files/communication-enforcement-implementation-single-market-rules_en_0.pdf.

[23] See: Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, *Principiul cooperării loiale – principiu constituțional în dreptul Uniunii Europene*, in *In Honorem Ioan Muraru. Despre Constituție în mileniul III*, Ștefan Deaconu, Elena Simina Tănăsescu (coord.), Hamangiu Publishing House, Bucharest, 2019.

transposition of that Directive? For example, for three Directives with o very high impact for the free movement of professionals an important number of Member States have received reasoned opinion or letter of formal notice from the European:

- on the 7 March 2019, the Commission has sent reasoned opinions to **24 Member States** (Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) and complementary letters of formal notice **to 2 Member States** (Estonia and Latvia) regarding the non-compliance of their national legislation and legal practice with EU rules on the recognition of professional qualifications - Directive 2005/36/EC as amended by Directive 2013/55/EU[24]

- in June 2019, the Commission sent letters of formal notice to all EU Member States,requesting them to comply with the Services Directive and improve their Points of Single Contact. The letters covered several aspects of the PSCs, including calls on Member States to: provide user-friendly one-stop shops for service providers and professionals; help service providers overcome administrative hurdles in the access to service activity; address issues related to online availability and quality of information on requirements and procedures; and ensure ability to access and complete procedures online through the PSCs, including from other Member States (with reference to the importance of complying with Regulation (EU)910/2014 on electronic identification)[25] and

- on the 9 February 2022, the Commission has decided to open infringement proceedings against **Latvia and Spain** for not having properly transposed the EU rules on a proportionality test before adoption of new regulation of professions - Directive (EU) 2018/958. This decision follows the opening of infringement proceedings **against 18 Member States** in December 2021[26].

The infringement procedure is described very clear on the website of the European Commission according with the art. 258-260 of TFEU[27]: "If the EU country concerned fails to communicate measures that fully transpose the provisions of directives, or doesn't rectify the suspected violation of EU law, the Commission may launch a formal infringement procedure. The procedure follows a number of steps laid out in the EU treaties, each ending with a formal decision:

1. The Commission sends a letter of formal notice requesting further information to the country concerned, which must send a detailed reply within a specified period, usually 2 months.

2. If the Commission concludes that the country is failing to fulfil its obligations under EU law, it may send a reasoned opinion: a formal request to comply with EU law. It explains why the Commission considers that the country is breaching EU

[24] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1479.

[25] Erik Dahlberg et al., *Legal obstacles in Member States to Single Market rules*, Study Requested by the IMCO committee, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, November 2020, p. 80 (https://www.bruegel.org/wp-content/uploads/2020/11/IPOL_STU2020658189_EN.pdf).

[26] https://ec.europa.eu/commission/presscorner/detail/en/inf_22_601.

[27] This primary legal basis does not provide with a detailed infringement procedure but only the main steps. The deadlines for compliance are not specified but the European Commission mentioned in each step (letter of formal notice or reasoned opinion) the mandatory deadlines for national authorities.

law. It also requests that the country inform the Commission of the measures taken, within a specified period, usually 2 months.

3. If the country still doesn't comply, the Commission may decide to refer the matter to the Court of Justice. Most cases are settled before being referred to the court.

4. If an EU country fails to communicate measures that implement the provisions of a directive in time, the Commission may ask the court to impose penalties"[28].

It is obvious that the European Commission has a discretionary power to issue the letter of formal notice, the reasoned opinion or to take the Member States to Court of Justice. "Workload pressures and political considerations each play a part in deciding which infringements to pursue. (…) Art. 258 TFEU operates at the level of inter-institutional relations, with the Commission fulfilling a politically sensitive role in policing and implementation of EU law by the Member States and it is not mechanically applied to all violations"[29].

The Court of Justice of the European Union has pronounced last year in the case… that: "As regards **the seriousness of the infringement**, it must be borne in mind that the obligation to adopt national measures for the purposes of ensuring that a directive is transposed in full and the obligation to notify those measures to the Commission are fundamental obligations incumbent on the Member States in order to ensure optimal effectiveness of EU law and that failure to fulfil those obligations must, therefore, be regarded **as definitely serious** (judgments of 8 July 2019, Commission v Belgium (art. 260(3) TFEU-High-speed networks), C-543/17, EU:C:2019:573, para. 85; of 16 July 2020, Commission v. Romania (Anti-money laundering), C-549/18, EU:C:2020:563, para. 73; and of 16 July 2020, Commission v. Ireland (Anti-money laundering), C-550/18, EU:C:2020:564, para. 82)"[30].

"Further to an enquiry or a complaint (by citizens, businesses and organisations), or on their own initiative, the Commission's services might need to gather additional factual or legal information for a full understanding of an issue concerning the correct application of EU law or the conformity of the national law with EU law"[31]. For this purpose, the European Commission has implemented in 2008 the EU Pilot project with the participation of 15 Member States; by July 2013 the entire EU-28 had signed up. The EU Pilot's procedure is the following:

- The Commission's services submit a query to the Member State concerned via EU Pilot.

- Member States normally have 10 weeks to reply and the Commission's services, in turn, also have 10 weeks to assess the response

- If the response is not satisfactory, the Commission will normally launch

[28] https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en.

[29] Margot Horspool (Author), Matthew Humphreys (Author), Michael Wells-Greco (Author), Siri Harris (Contributor), Noreen O'Meara (Contributor), *European Union Law*, 9th ed., Oxford University Press, Oxford, 2016, p. 227.

[30] CJEU, European Commission v Kingdom of Spain, 25 February 2021, ECLI:EU:C:2021:138, para. 64. It is the first decision under the art. 260. 3 where the Court of Justice obliged a Member State to pay a lump sum and penalty payment: "3. Should the infringement established in point 1 persist at the date of delivery of this judgment, orders the Kingdom of Spain to pay the Commission, as from that date and until that Member State has put an end to that infringement, a daily penalty payment of EUR 89 000. 4. Orders the Kingdom of Spain to pay the Commission a lump sum in the amount of EUR 15 000 000".

[31] https://ec.europa.eu/internal_market/scoreboard/_archives/2014/07/performance_by_governance_tool/eu_pilot/index_en.htm.

infringement proceedings by sending a letter of formal notice to the Member State concerned[32].

In Romania, the Ministry of Foreign Affairs is the National Contact Point for EU Pilot and coordinates the formulation and substantiation, by the relevant line institutions, of the responses transmitted to the European Commission via the electronic platform[33].

The European Commission has also created a useful tool for citizens facing obstacles in relation with the national public authorities which is named SOLVIT - Internal Market Problem-Solving – "SOLVIT is a service provided by the national administration in each EU country and in Iceland, Liechtenstein and Norway. SOLVIT is free of charge. It is mainly an online service. SOLVIT aims to find solutions within 10 weeks – starting on the day your case is taken on by the SOLVIT center in the country where the problem occurred"[34].

In Romania, the SOLVIT National Contact Point is Ministry of Foreign Affairs[35] which solves the problems raised by the Romanian citizens in relation with the Romanian public authorities or other national public administrations and in this case the National Contact Point from that Member State will be contacted.

„A real partnership of the different actors at European and Member State level responsible for implementation and enforcement will be essential to overcome existing single market barriers. It will help the directing of targeted enforcement action and improving single market law compliance"[36].

5. The impact of the pandemic crisis on the Internal Market[37]

The European Parliament has published in 2021 a study regarding the impact of COVID-19 on the Internal Market which presents the types of the restrictions and their consequences for citizens, business and administrations. On the „restrictions at EU Member State level that impacted cross-border" it is mentioned that the „restrictions to travel have been a feature of the COVID-19 response from the earliest days of the crisis and notifications."

They are also mentioned the restrictions self-imposed by individuals and their effects because „Once people realize that they are at serious risk of a life-threatening infection, many will voluntarily

[32] CJEU, *Darius Nicolai Spirlea and Mihaela Spirlea v European Commission*, 25 September 2014, case T-306/12, ECLI:EU:T:2014:816, para. 62: "Thirdly, even though the EU Pilot procedure is not in all respects equivalent to the infringement procedure, it may nevertheless lead to it, since the Commission may, at the conclusion of an EU Pilot procedure, formally commence an infringement investigation by sending a letter of formal notice and may, possibly, apply to the Court for a declaration that the breach of obligations alleged against the Member State concerned has occurred. That being so, the disclosure of documents in the context of an EU Pilot procedure would be prejudicial to the subsequent phase, that is to say, the infringement procedure".

[33] https://www.mae.ro/node/27934.

[34] https://ec.europa.eu/solvit/what-is-solvit/index_en.htm.

[35] https://www.mae.ro/node/19314.

The website of all Romanian Ministries must published the link for SOLVIT on their web pages.

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Long term action plan for better implementation and enforcement of single market rules, COM(2020) 94 final.

[37] J. Scott Marcus et al., *The impact of COVID-19 on the Internal Market*, Study Requested by the IMCO committee, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, February 2021 (https://www.europarl.europa.eu/RegData/etudes/STUD/2021/658219/IPOL_STU(2021)658219_EN.pdf).

begin to practice various forms of social distancing". „The prolonged restrictions have taken a heavy toll on the EU citizens, confronted with a dramatic change in their lifestyles and expectations. It could be argued that the culture of rights in Europe – some critics might label it as a culture of entitlement – has significantly crippled the pragmatic efforts made by the governments to fight the pandemic"[38].

Accordingly with this Study, "Measures imposed or recommended at European level can be assigned to one of three major categories: (1) measures which imposed restrictions, which was largely limited to unified restrictions to travel from third countries into the Union; (2) measures which sought to reduce the cross-border impact of restrictions imposed by Member States individually; and (3) measures that had little do with restrictions or cross-border flows, but were nonetheless important from an EU Internal Market perspective".

In the meantime, the European Commission[39] has underlined that „We are addressing export bans and have issued border management guidance to keep essential goods available". SMET has had the role „to ensure the free flow of products such as face masks, medical supplies and food across the single market". The Commission have also approved measures on the export of protective equipment outside the EU and issued a communication with guidance to EU countries to help them address the shortages of health workers and minimise the effects of the coronavirus emergency's impact on harmonised training requirements[40], including a guidance on the implementation of Directive 2005/36/EC on the recognition of the professional qualifications in respect to healthcare professionals; for certain sectoral professions such as general care nurses, dentists (including specialists), doctors (including specialists), midwives and pharmacists, the Directive also lays down minimum training requirements at EU level.

"The Commission has made liquidity measures available to support European small and medium-sized enterprises (SMEs). €1 billion was redirected from the European Fund for Strategic Investments to reinforce the COSME Loan Guarantee Facility and the InnovFin SME Guarantee Facility to mobilise liquidity support for at least 100,000 SMEs"[41].

6. Final remarks

The main elements of the relationship between European Commission and European citizens were also established by the six Commission's priorities for 2019-2024 among which can be mentioned "An economy that works for people" in parallel with the sensitive "Promoting our European way of life"[42] which has the rule of law at its center, a interesting topic in the last years for some European Central Member States.

The current French Presidency of the EU Council has on its "agenda for a sovereign Europe" some priorities for EU citizens as the following:

[38] Monica Florentina Popa, *Negotiating our health: the EU public policies on covid-19 vaccination and the Astra Zeneca Advance Purchase Agreement*, Challenges of the Knowledge Society, 14th ed., Bucharest, 21st May 2021, p. 454 (http://cks.univnt.ro/articles/15.html).

[39] https://ec.europa.eu/growth/coronavirus-response_en.

[40] Communication from the Commission Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC, C(2020) 3072 final.

[41] https://ec.europa.eu/growth/coronavirus-response_en.

[42] https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people_en; https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life_en.

With regard to social issues, the first decision was to revise the posting of workers directive on the basis of the principle of "equal pay for equal work at the same workplace";

With regard to economic issues, a historic recovery plan funded by joint European borrowing has helped Europe overcome the crisis. And Europe is progressively acquiring commercial protection instruments to no longer be naive when it comes to globalization"[43].

The impact of the Ukraine's situation[44] is serious on the Internal Market and for sure it will deeply analyzed in the future. For the next period, the European Commission must adopt specific rules for Internal Market which could help not only the functioning of this area but also EU citizens and their economic wellbeing.

In conclusion, „the development of European legal provisions and the jurisprudence of the Court of Justice of the European Union on the internal market increase the complexity of the European construction, which is distinguished by a series of stable Union rules, but also by a variable freedom of decision recognized to Member States"[45].

We appreciate that the relationship among European Commission, Member States and EU citizens could be developed on the new aspects and interactions in the benefit of the Internal Market as the cornerstone of the European Union and the power relations must be abandoned.

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[43] https://presidence-francaise.consilium.europa.eu/en/programme/priorities/.

[44] https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-solidarity-ukraine_en.

[45] Sergiu Deleanu, *United in diversity - Some aspects to consider regarding elementary rules applicable within the Internal Market of the Union*, in Adriana Almășan, Ioana Vârsta, Cristina Elisabeta Zamșa (eds.) *In honorem Flavius Antoniu Baias. Aparența în drept. The appearance in law. L'apparence en droit*, vol. I, Hamangiu Publishing House, Bucharest, 2021, p. 43.

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THE PHILOSOPHICAL BASIS OF THE PRINCIPLE OF PROPORTIONALITY

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Abstract

The proportionality is a general principle of law, signifying the ideas of balance, justice, responsibility and the needed adequate suiting of the measures adopted by the State to the situation in fact and to the purpose aimed by the law.

The principle is expressly formulated in the European Union documents but also in the constitutions of other states. The normative or jurisprudential regulation of the principle explains the numerous preoccupations at scientific level to identify its dimensions. In this study, the principle of proportionality is analyzed from the perspective of the philosophy of the law, in order to try to identify its value dimensions that are to be found in the normative consecrations or in jurisprudence.

The normative of jurisprudential dimension of proportionality, as a law principle has its content in the concepts and philosophical categories that make up the contents of the principle of proportionality, in the law philosophy's main periods and currents.

We consider that such a scientific attempt is useful, having into consideration the importance of this principle for the contemporary law. The principle of proportionality is an important guaranty in the observance of the human rights, mainly in situations in which their exercising is being restricted by the actions ordered by state's authorities, being at the same time an important criterion to delimit the discretionary power from the power excess in the activity of state's authority.

In our opinion, only in the extent of our knowledge and understanding of the philosophical contents of this principle it is possible this one's correct applying in jurisprudence. This study is aiming to be a pleading for the possibility and usefulness of law's philosophy in this epoch dominated by juridical pragmatism and normativism.

Keywords: *proportionality, equity, idea of justice, lawful state, rational law, adequate relationship, freedom of action, margin of appreciation, just measure, principle of law, human rights.*

1. Introduction

The legal understanding of the principle of proportionality presents difficulties, because its content depends on a certain philosophical conception of justice. The legal doctrine, from antiquity to the present, evokes proportionality as meaning the idea of order, balance, rational relationship, fair measure.

Proportionality is not exclusively a principle of rational law, but at the same time, it is a principle of positive law, a principle of normative value. Thus, proportionality is a legal criterion that assesses the legitimacy of the interference of state power in the field of exercising fundamental rights and freedoms.

This principle is explicitly or implicitly enshrined in international legal

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instruments, or by the majority of the constitutions of democratic countries. The Romanian Constitution expressly states this principle in art. 53, but there are other constitutional provisions that imply it.

In constitutional law, the principle of proportionality is applied especially in the field of protection of fundamental human rights and freedoms. It is considered an effective criterion for assessing the legitimacy of the intervention of state authorities in the situation of limiting the exercise of certain rights. Moreover, even if the principle of proportionality is not expressly enshrined in the constitution of a state, doctrine and jurisprudence consider it to be part of the notion of the rule of law[1].

This principle is applied in several branches of law. Thus, in administrative law it is a limit of the discretionary power of the public authorities and represents a criterion for exercising the judicial control of the discretionary administrative acts. Applications of the principle of proportionality also exist in criminal law or in civil law.

The principle of proportionality is also found in European Union law, in the sense that the legality of Community rules is subject to the condition that the means used correspond to the objective pursued and do not go beyond what is necessary to achieve that objective.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied in concrete cases. Thus, in the case law of the European Court of Human Rights, proportionality is conceived as a fair, equitable relationship between the factual situation, the means of restricting the exercise of certain rights and the legitimate aim pursued or as a fair relationship between the individual interest and the public interest. Proportionality is a criterion that determines the legitimacy of the interference of the Contracting States in the exercise of the rights protected by the Convention.

In the same sense, the Constitutional Court of Romania, through several decisions, established that proportionality is a constitutional principle[2]. Our constitutional court stated the need to establish objective criteria, by law, for the principle of proportionality: "it is necessary for the legislature to establish objective criteria that reflect the requirements of the principle of proportionality"[3]. Therefore, the principle of proportionality is increasingly imposed as a universal principle, enshrined in most contemporary legal systems, explicitly or implicitly found in constitutional norms and recognized by national and international jurisdictions.

As a general principle of law, proportionality presupposes a relationship considered fair, between the legal measure adopted, the social reality and the legitimate aim pursued. The doctrine states that proportionality can be analyzed at least as a result of the combination of three elements: the decision taken, its finality and the factual situation to which it applies. Proportionality is correlated with the concepts of legality, opportunity and discretion[4]. In public law, a breach of the principle of proportionality is considered to be a violation of the freedom of action left to the authorities and, in the last

[1] Petru Miculescu, *Statul de drept*, Lumina Lex Publishing House, Bucharest, 1998, pp. 87-88.

[2] Decision no. 139/1994 published in the Official Gazette of Romania no. 353/1994; Decision no. 157/1998 published in the Official Gazette of Romania no. 3/1999; Decision no. 161/1998 published in the Official Gazette of Romania no. 3/1999.

[3] Decision no. 71/1996 published in the Official Gazette of Romania no. 13/1996.

[4] M. Guibal, "De la proportionnalité", in *L'actualite juridique. Droit administratif 5*, Dalloz, Paris, 1978, pp. 477-479.

resort, an excess of power. There is interference between the principle of proportionality and other general principles of law, namely: the principles of legality and equality, as well as the principle of fairness and justice. The essence of this principle lies in the relationship considered fair between the components.

In summary, we can say that proportionality is a fundamental principle of the law enshrined explicitly or deduced from constitutional regulations, legislation and international legal instruments, based on the values of rational law, justice and fairness and which express the existence of a balanced or adequate relationship between actions. situations, phenomena as well as the limitation of the measures ordered by the state authorities to what is necessary to achieve a legitimate aim, thus guaranteeing the fundamental rights and freedoms, and avoiding the abuse of rights.

2. Content

Many contemporary authors consider the principle that ensures the unity, homogeneity, balance and capacity of the particular normative development of society to be the principle of justice[5]. In essence, the principle of fairness and justice supposes the existence of fundamental, a priori prescriptions derived from reason or from a superindividual order and whose purpose is to give security to social life.

Proportionality expresses the content of this principle through the idea of balance between situations and social phenomena, between state and individual, but also as a "fair measure", when comparing different situations or to assess the legitimacy of decisions of state authorities.

Justice is synonymous with justice and emphasizes the ideal of fairness, which must characterize any legal relationship. The balance that it supposes and that represents proportionality is not only an abstract notion, but it also has a concrete dimension that is achieved through the equivalent of benefits, or in other words "to give everyone what they deserve". Justice protects every natural or legal person, establishes the proportion of interests in order to ensure everyone's freedom in the context of achieving the freedom of all. In the literature it has been shown that: "Justice is an absolute victory over selfishness, and whoever says justice says subordination to a hierarchy of values"[6].

It is necessary to distinguish between the values of fairness, justice and proportionality, analyzed from antiquity to the present, of theology, philosophy and law, and on the other hand proportionality as a principle of established normative law and jurisprudence. Mircea Djuvara said: "There can be no immutable principles of law that are valid for any time and any place"[7]. The author wants to say that on the one hand there are principles and values of universal law, and on the other hand their capitalization is variable according to time and place. Indeed, one is the existence of fairness and proportionality, long since law existed, and another is their formulation as principles in contemporary law as an expression of justice and fairness, given that the modern legal meanings of the principle of proportionality contain the traditional and perennial value connotations of the idea of justice.

[5] Gheorghe Mihai, Radu Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, ALL Publishing House, Bucharest, 1999, p. 127.
[6] Nicolae Popa, *Teoria generală a dreptului*, Actami Publishing House, Bucharest, 1999, p. 129.
[7] Mircea Djuvara, *Drept şi sociologie*, ISD, Bucharest, 1936, p. 11.

Since ancient times, the ideas of justice and justice have been well outlined, and their content is formed by the concept of proportionality, as a way to achieve the balance between the benefits of participants in legal relations. The purpose of justice is to exclude any discriminatory behavior between people.

Plato makes the issue of the nature, origin and purpose of the law the central issue of his political dialogues[8]. The fundamental principles of Plato's philosophy are: One, Good, Virtue, and Truth. Laws are created by people, not anyway, but as a reflection of these principles. The law is based on the rational principles, listed above, and its purpose is virtue and good, as moral realities, in the ideal state conceived by Plato. The law determines the social order, but in turn it is based on reason. Plato says that "…in a word, wherever the laws will endeavor, in all their power, to make the state as unitary as possible, it can be argued that the culmination of the political virtue has taken place there". The laws to which the state is subordinated, in Plato's philosophical doctrine, are imbued with the ideas of *justice* and *morality*. The great philosopher wants to apply the moral principles to society as a whole, but also to the behavior of each individual. In this context, the laws must be assessed from the point of view of correspondence with the principle of justice, *i.e.* on considerations superior to the legal order[9]. The laws are accompanied by a statement of reasons, which has the role of making citizens understand not only the existence of the norm, but also its necessity. The rulers, in the state conceived by Plato, are subject to the laws and cannot act arbitrarily. Platonic theory expresses an absolute confidence in law, the only one capable of limiting political power, thus preventing the formation of an authority too strong, "not temperate"[10] as a result of which the state must pursue the "union, science, and freedom"[11].

Plato argues for the need to moderate state power and subordinate the law to the principle of justice. The limitation of the power of the rulers by law, the balance and the moderation in the exercise of state authority are forms of expression of proportionality, as an element of content of the principle of justice, as Plato conceived it. The rule of law is based on the concept of justice. However, Plato conceives of a state in which individuality is considered in the background. In Plato's ideal state, the individual will unconditionally submit to the law, everything being governed by the law, from intimate life to the highest political relationship. Therefore, in Plato's philosophical conception, which is part of the ancient traditional thinking of "state – city", there is no proportional relationship between individual and state, because man is fully integrated into the state, and material equality between members of a state represents the guarantee of social harmony.

The principle of justice and implicitly the idea of proportionality are well emphasized, in Antiquity, in the work of Aristotle, many of these considerations remain valid today.

In order to define justice and law, and then to explain the nature of the state, Aristotle started from the concept of sociability: "man is by nature a social

[8] Plato, *The Laws* (Bucharest: IRI, 1995); "Republic" in *Works*, 5th vol., Scientific and Encloclopedic Publishing House, Bucharest, p. 1986.
[9] Plato, *The Laws*, p. 155.
[10] *Idem*, p. 112.
[11] *Ibidem.*

being"[12]. In this context, "justice is a social virtue, for law is only the order of the political community"[13]. In another work, Aristotle states that "law is what creates and maintains for a political community happiness and its constituent elements, and happiness in the city is given by legality and equality"[14]. For the trainee, justice as well as the law is a medium term that ensures the balance between extremes, in other words justice and implicitly the principle of justice have in their content and express the idea of proportionality.

Justice is no longer for Aristotle, as for Plato, virtue in general, but that social virtue which consists in the harmonization of interests respecting proportionality, in social relations. The legislator who wants to introduce just laws must consider the public good. Justice is equality here, and this equality of justice takes into account both the general interest of the state and the individual interest of the citizens[15]. Unlike Plato, in whom the state represents the absolute, and the human individual a simple means in achieving his goals, Aristotle notes a greater attention paid to the human individual, according to a relationship of balance, proportionality, between state and citizens, a relationship that substantiates the principle of justice.

Aristotle distinguished between *distributive justice* and *corrective justice*[16]. The first presupposed the fact of attributing to each one what is due to him, of achieving not a formal equality but a concrete one, an equivalence of the benefits on the condition of observing the distribution criteria. Distributive justice is based on *proportion*, being conceived as an equality of relations. "The justice in question here is, therefore, a *proportion*, and the injustice is that which is out of proportion, assuming on the one hand more, on the other hand less, than what is proper. This also happens in practice because the one who commits the injustice owns a larger part of the distributed good, and the unjust one, a smaller part than he deserves"[17]. Aristotle considers that justice consists in reciprocity and the existence of a common standard by which to appreciate facts. Reciprocity ensures the connections between people, respectively the legal relations, it being based on proportion, and not on equality in the strict sense.

Justice or corrective justice intervened when disputes arose between people, and the judge determined the proportion, granting the necessary compensation. It is interesting that Aristotle conceived of justice as proportion, but not purely quantitative, but as an equality that is achieved between persons participating in legal relations, through various consideration: "Justice is therefore a kind of *proportion* (for proportion is not a property only of the abstract number, but of the number in general), the proportion being an equality of relations and assuming at least four terms"[18].

The Roman jurists also contributed to the definition and understanding of the principle of justice. The Latin adage is known, which defined law as "*Jus est boni et aequi*". The idea of equity, existing in this definition, represents a dimension of proportionality. not to hurt your neighbor; to

[12] Aristotle, *Politics*, Antet Publishing House, Bucharest, 1997, p. 29.
[13] *Idem*, p. 7.
[14] Aristotle, *Nicomachean Ethics, Book I*, IRI, Bucharest, 1998, p. 28.
[15] Aristotle, *Politics*, p. 29.
[16] Aristotle, *Nicomachean Ethics*, p. 128.
[17] Aristotle, *Nicomachean Ethics*, p. 115.
[18] *Idem*, p. 114.

live honestly[19]. The principle of "giving everyone what is their own" expresses distributive justice, which in turn imposes the idea of proportion between the performance of the participants in the justice reports.

Proportionality, as a concept, appears in the doctrine of natural law, either by direct reference, as in the work of Jean Jacques Rousseau, or in the form of categories such as "right reason", which expresses the essence of law and signifies the idea of justice and fairness. Equality is a consequence of sociability resulting from natural law. Proportionality also appears in the analysis of the relations between the state and the citizen and of the way in which the freedom of the individual in relation to the authority of the state is conceived.

An important representative of this school is Montesquieu, who reveals in his work some ideas that involve the principle of proportionality. In Montesquieu's view, everything is subject to the action of universal laws, expressions of necessary relations which derive from the nature of things: "There is a primordial reason, and laws are the relations between it and different entities, and the relations between these entities"[20]. The author considers the law in general to be human reason, and the civil and political laws of a state are particular cases of human reason. The idea of "necessary relations" and especially the identification of the law with human reason means the principle of justice and implicitly the proportionality understood as a balanced relationship between the different entities.

One of Montesquieu's greatest contributions to legal doctrine is the theorizing of the principle of the separation of powers in the state. The essence of this theory, developed in his work "The Spirit of Law", is to prohibit the accumulation of state powers. At a first analysis it is found that the author promotes equality between powers. However, he argues that the judiciary does not play a very important role in relation to other powers. At the same time, in the author's conception, the separation of powers is achieved by reference to the law, or in this situation, the legislature becomes the dominant power in the state[21]. There is not so much equality between the powers of the state but especially a balance, based on the differentiation of roles, which is a form of the principle of proportionality. The activity of the executive and the judiciary aims at the sovereignty of the law and the assurance of the freedom of the citizen.

Related to the idea of social justice, the principle of proportionality appears explicitly formulated, or through other concepts, in the work of Jean Jacques Rousseau[22]. The social pact gives the state authority full power over all members of society. This power is not unlimited, because the state must respect the natural rights of the citizens: "It is appropriate, therefore, that the respective rights of citizens and the sovereign, as well as the duties which citizens should perform in their capacity as subjects, should be clearly distinguished from the natural rights which they should enjoy as human beings"[23]. The author's effort to harmonize the rights of the individual with sovereign power is noted. Man transmits part of his rights to the sovereign, who is animated by the general will expressed by law. On the other hand, the

[19] Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *Filosofia dreptului. Marile curente*, All Beck Publishing House, Bucharest, 2002, p. 83.
[20] Montesquieu, *The Spirit of Law (1748)*, 1st vol., Scientific Publishing House, Bucharest, 1964, p. 11.
[21] Montesquieu, *The Spirit of Law (1748)*, 2nd vol., p. 200.
[22] Jean Jacques Rousseau, *The Social Contract*, Antet Publishing House, Bucharest, 1999, p. 23.
[23] *Ibidem.*

general will cannot annul the natural rights of the individual. In this sense, Jean Jacques Rousseau said: "We have agreed that what alienates everyone from his power, from his goods, from his freedom – through the social pact – is only that part of whose use is important for the community"[24]. This relationship between the rights of the sovereign and the natural rights of the citizen evokes proportionality and, implicitly, the idea of limiting state power, but also of harmonizing it with the natural, inalienable rights of the individual. The author believes that there must be a balanced relationship between the power of a state and its extent: "The stronger the social bond, the weaker it becomes, otherwise a small state is generally proportionally stronger than a large one"[25].

The principle of proportionality is applied to the relationship between sovereign, executive power (government) and state. "So, what is government? An intermediate body placed between the subjects and the sovereign, for their mutual connection and in charge of the application of the laws and the maintenance of the freedom, both civil and political"[26]. In Jean Jacques Rousseau's view, government is the middle ground between a sovereign and a state in a mathematical relationship of "continuous proportion". This proportion is not arbitrary, but a necessary consequence of the nature of the political body. Failure to respect the proportionality between the three terms can have consequences in the author's conception, disturbing the balance and social harmony. If the power of government increases too much in relation to that of its subjects, the rule of law and that of private judgments will be confused. This can lead to despotism. If the subjects become too strong, then anarchy prevails. "Moreover, says Jean Jacques Rousseau, none of these terms could be changed without the proportion immediately disappearing. If the sovereign wants to govern, if the magistrate wants to make the laws, or if the subjects refuse to obey, disorder instead of order, force and will no longer act in harmony, and the decomposed state falls into despotism or anarchy"[27]. Proportionality appears in this report, more in a mathematical, quantitative sense, but it is also a legal principle based on which the powers of the state are organized and the connection between the state and the individual is explained. The author reveals the nature of social relations with reference to the relationship between the individual, society and sovereign power, proportionality expressing balance and harmony, necessary for the stability of the state.

Proportionality as a way of expressing the principle of justice and fairness is also found in the work of the representatives of the rational school of law. This doctrine states that by law we must not only understand the positivist meaning, but we must also consider the rational dimension, which is the essence of law, meaning its understanding as "*jus-dike*", or in other words, as "*just measure*". This is the expression of proportionality as a rational principle of law. For rationalists, the application of proportionality to the legal norm means to give it meaning and value, while achieving the equivalence between law, understood as the totality of legal norms, and justice as a principle.

Immanuel Kant considers that law comes from reason and man can rise to the pure universal, intelligible through morality, whose fundamental concept is that of

[24] *Idem*, p. 29.
[25] *Idem*, p. 53.
[26] *Ibidem.*
[27] *Idem*, p. 54.

freedom[28]. For Kant, "law is therefore the set of conditions by which the arbitrator of one can agree with the arbitrator of the other following a general law of liberty"[29]. The conditions to which Kant refers impose limits on freedom in order to be able to correlate with the freedom of the other. It follows from the definition that freedom in law is a freedom of relationship, limited and constraining. Consequently, it is in accordance with the law, and therefore just any action that reconciles my freedom with the freedom of all, following a general rule. Exceeding these limits makes freedom an unjust act. A person's freedom must not harm the freedom of others but be in harmony with it. Although Kant does not explicitly refer to the principle of proportionality, *freedom as a relationship*, which is the basis of law, means balance, fairness, in a word an appropriate proportion between individual freedoms.

In the conception of Giorgio del Vecchio, who is an important representative of legal rationalism, neo-Kantian ideas constitute a reaction to legal positivism and empiricism. Giorgio del Vecchio constructs a philosophy of law starting from an a priori principle, which is the ultimate limit and on which the entire legal edifice rests. This fundamental principle is the *principle of justice*. The author makes an analysis of the Aristotelian conception of justice, criticizing the fact that in Aristotelian theory various species of justice appear, which are not deduced from a single principle. "What is essential – argues Georgio del Vecchio – in any kind of justice is the element of intersubjectivity, or correspondence in the relations between several individuals, which is found in the last analysis, even where it does not appear at first sight"[30]. The author considers that in a very general sense, justice implies a certain harmony, congruence and proportion, to which Leibnitz also referred[31]. At the same time, said the great jurist, "not every congruence or correspondence realizes – properly – the idea of justice, but only that which is verified or can be verified in the relations between several persons; not any proportion between objects (whatever they may be), but only that which, in Dante's words, is a *hominis ad hominem proportio*. Justice, in its own sense, is the principle of coordination between subjective beings"[32]. Proportion is the quality of relations between persons, which only insofar as it meets this requirement means justice as a principle. The author emphasizes other features of the principle of justice, one of the most important being that the prescriptions of positive law are subject to this principle[33]. Thus, laws can be unfair if they do not correspond to the concept of "Justice", understood as a balanced, harmonious proportion between the content of the norm and social reality. In this situation, it is necessary to change the existing laws and even the existing legal order in order to achieve the imperative of Justice.

The law, as a normative act, is general, impersonal, and the legal equality it implies is formal, because the generality of the law is categorical in nature. In contrast, equality, understood as a fair proportion, as required by the principle of justice, involves the reporting of concrete situations and legal assessments to be achieved according to rigorously established criteria. Equity, understood as legal proportionality, requires

[28] Immanuel Kant, *Foundations of the Metaphysics of Morals*, Antaios, Bucharest, 1999, p. 49.
[29] *Idem*, p. 50.
[30] Georgio del Vecchio, *Justiția*, Cartea Românească Publishing House, Bucharest, 1936, p. 64.
[31] *Idem*, p. 33.
[32] *Ibidem.*
[33] *Idem*, p. 56.

taking into account the factual situations, personal circumstances, the uniqueness of the case, the relationship between the legal means used and the appropriate legitimate purpose, thus completing the generality of the legal norm. For Giorgio del Vecchio, the rule of law corresponds to the principle of justice, only if it is appropriate to the diversity of social reality, but also to the ideal of justice, as a rational value. This appropriate report is the expression of proportionality as a general principle of law.

Mircea Djuvara analyzes the principle of justice from the perspective of rational law inspired by Kantian philosophy. For the representatives of the neo-Kantian school of law, justice is transcendental. It may be, or as the case may be, not insured by law enforcement. Law as a system of legal norms is not always equivalent to the principle of justice. Prof Mircea Djuvara divided the "characteristics of justice" into rational and factual elements. As rational elements he suggested: a) equality of the parties; b) the objective (rational) and logical nature of justice; c) the idea of equity, which establishes a balance of interests in essence; d) the idea of proportionality in the conduct of justice. Proportionality would operate primarily through qualities between which relationships are established. Second, it would operate on the idea of equivalence.

Analyzing the legal report and its applicable prescriptions, the author states that the ideal of justice refers to: "the rational equality of free persons, limited in their actions only by rights and debts"[34]. This is the basis in relation to which there is the possibility of normative generalization and the consecration of the formal equality of the law without any discrimination. However, equality in principle can be achieved only by taking into account factual situations, particular factors and individual cases. The author emphasizes that the administration of justice makes necessary the idea of proportion in any legal relationship, including the criminal one: "The idea of proportion proceeds through quantities between which relations are established"[35].

Respect for the principle of proportionality is a general condition for a law to be "fair" or in other words, to be conform to the principle of justice and fairness. In this sense, the author states: "Why in the application of justice do we find the idea of proportion? The penalty must always be proportionate to the guilt. If the idea of proportion were not a rational idea, this assertion would make no sense. The idea of proportion proceeds through quantities, between which relationships are established. Rational appreciation always tends to quantify relationships. Science also aims to establish quantitative relationships; it is known that contemporary science, in any branch, is considered all the more advanced as it eliminates the subjective elements of experimental knowledge, reduces them to simple quantities and thus matures"[36]. It is obvious that for Mircea Djuvara, proportionality is a principle of rational law, which evokes the idea of justice and justice. In the desire to provide rigor and precision to the application of the legal norm, the author conceives the proportionality more, mathematically, as a quantitative ratio, between two quantities or values.

Eugeniu Speranţia, another representative of the neo-Kantian school of law, considers that the spirit is the one who leads the human activity. The need for normality and non-contradiction is realized in social life "by organizing the law, the

[34] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, p. 268.
[35] *Idem*, p. 271.
[36] *Idem*, p. 272.

norm and the sanction"[37]. In the author's opinion, coercion and sociability are the two elements that can define law, and both belong to rationality. Law is "a system of rules of social action, rationally harmonized and imposed by society"[38]. Normativity means that, in all his actions, man must follow certain directions and must strictly observe certain limits. The author does not refer to proportionality as a principle, but as we have noted in other situations, proportionality, even if not explicitly stated, is implicit in the idea of rationality which means a certain harmonious ordering of the constituent elements of society and compliance with the rules in order to achieve social order, and ultimately justice.

George Alexianu evokes the principle of proportionality, although he does not explicitly use this concept. Referring to the role of the state in contemporary society, the author points out that it must ensure social order and guarantee individual freedoms. Its power must be limited in relation to the exercise of individual freedoms. State authorities can restrict individual freedoms only if this measure is absolutely necessary for the preservation of society. The state is only a means of guaranteeing individual freedoms. The limitation of the power of the state, the fact that the actions of the state must not exceed the purpose of their exercise, as well as the existence of the "necessity" to justify the interference of the state in the exercise of fundamental freedoms implies the principle of proportionality[39]. "The state has a duty to ensure the social order without which the life of society is not possible. By ensuring the social order, it ensures and guarantees the individual life, because the individual can only live in a society. He must demand of individual freedom only those sacrifices which are absolutely necessary for the coexistence of individuals in society. The state is therefore a means of securing individual life. "The necessary strictness to which its intervention is limited is dictated by political science"[40].

The French jurist François Geny pointed out that the rule of law is guided by the ideal of justice and that this, beyond the inclusion of basic perceptions, not to harm, not to harm another person and to give everyone what they deserve, involves deeper thought. of establishing a balance between conflicting interests in order to ensure the essential order to maintain the progress of human society[41].

Paul Roubier noted that the rule of law that aspires to govern human societies must conform to a certain ideal of justice, otherwise it will be neither respectable nor respected if it rejects that ideal. The author proposes among the values that guide law "justice as an essential value of the good order of human relations with its own qualities of equality and proportionality"[42].

For Rudolf Stammler, the law is justified in so far as the aims pursued by him are just. "Fair law" must always be in line with social aspirations. "The basis of the justice of a legal system must be sought in the fundamental law of the will. We deduce the possibility that a legal will is fair exclusively from the highest concept of free will. "Justice will therefore be the harmonization of all social wills"[43]. In our

[37] Eugeniu Speranția, *Principii fundamentale de filozofie juridică*, Institutul de Arte Grafice Ardealul, Cluj, 1937, p. 7.
[38] *Idem*, p. 8.
[39] George Alexianu, *Curs de drept constitutional*, Casa Școalelor, Bucharest, 1930-1937, p. 149.
[40] *Ibidem.*
[41] François Geny, *Science et technique en droit positif*, 1st vol., Sirey, Paris, 1925, p. 258.
[42] Paul Roubier, *Théorie générale du Droit*, L.G.D.J., Paris, 1986, p. 268.
[43] Rudolf Stammler, *Theorie der Recktswissenschaft*, University of Chicago Press, Chicago, 1989, p. 58.

opinion, the harmony that Stammler speaks of is the expression of proportionality as a value and principle of law.

In contemporary Romanian legal literature, there are characterizations of the principles of equity and justice that imply proportionality. Thus, for Radu Motica and Gheorghe Mihai "the principle of equity implies moderation in the prescription of rights and obligations by the legislator, in the process of elaborating legal norms… This principle and equity first appeared because experience has shown that there is no perfect equality between people, absolute, this must be covered"[44]. Proportionality is perceived by legal doctrine as a form of expression of the principle of justice and justice through the idea of an equivalent, balanced, harmonious relationship between two or more values or quantities. works of authors or law schools.

The question is whether the understanding of proportionality, in relation to the general principles of law, in particular, the idea of justice, justice and fairness is relevant to contemporary law and especially to constitutional law. We consider that the answer is in the affirmative, for the following reasons:

The end of the 18th century and the beginning of the 19th century marked the accentuation of preoccupations, both in terms of legal doctrine and in the elaboration of political declarations, or normative acts, which enshrine and guarantee human rights and normative continued previous rationalist traditions and at the same time meant an emphasis on the analysis of the limits of state power and the inalienable human rights.

The fundamental question that arises in the legal doctrine of this period is: how can man be a free being, whose fundamental rights and freedoms are recognized and at the same time live in an organized society? The answer to this question depends on how the law is considered and implicitly the content of its fundamental principles. The solution of this problem has meant and means an evolution of the legal doctrine, oriented more and more towards the conciliation of the law, as an instrument of affirmation of the human being through the freedoms that must be recognized and guaranteed by law.

In the legal doctrine of the mentioned period, man is not only a citizen, a subject of law passively integrated into social relations, dominated by state power, but he is a person who has rights and freedoms essential for his existence, inalienable, which he can oppose to power. state. Law is increasingly understood as the "coexistence of freedoms" and not just a system of positive rules applied by the discretionary authority of the state. In this context, proportionality is found in legal doctrine both to characterize the principle of justice and to explain the increasingly complex social relations that require the recognition of individual freedoms in the context of the freedoms of all, but also to determine the limits of state power. in relation to the fundamental rights recognized to man. Proportionality is increasingly understood as a guarantee of respect for fundamental rights and a criterion for assessing the legitimacy of their restriction by the state authority.

The French Declaration of the Rights of Man and of the Citizen of 1789 enshrines the principle that people "are born and remain free and equal in rights. Freedom means being able to do everything that does not harm another". The documents with constitutional value from that period, evoke the idea according to which, if the man is born with some inalienable rights, from

[44] Radu I. Motica and Gheorghe C. Mihai, *Teoria generală a dreptului*, ALL Publishing House, Bucharest, 2001, p. 81.

which no one can separate him, it means that the state power is not unlimited either. There is, therefore, a fair, proportionate relationship, on the one hand, between the recognized freedoms of each individual, and on the other hand between the liberties of the individual and state power.

The doctrine and the constitutions enshrined the principle of equality. The elimination of privileges and discrimination is a condition for any democratic state. However, the principle of equality has a formal, abstract dimension: equality before the law or equality of opportunity. Few legal concepts have supported material equality. The enshrinement of the principle of equality by the liberal doctrine in law did not mean ignoring the differences between social situations or between participants in social life. The law applied to social relations must take into account these differences, it must not be a simple uniforming factor, based on the abstract and general nature of the legal norm. Different normative regulation of different situations is an application of the principle of proportionality.

Although fundamental human rights are inherent in the human being and essential to his development, liberal legal doctrine holds that there is no equality between the private interest and the public interest, but only a fair balance, *i.e.* a relationship of proportionality, because the two social realities and legal, however, have a different nature. Therefore, the liberal doctrine in the field of law has led to the assertion of human individuality, constituted as a counterweight to statism. The liberal doctrine in law is based on the assertion of human rights, but does not support the abolition of any authority, but a society in which the power of the state is limited, only in drafting and enforcing the law, there is a balanced, proportionate relationship between the state and individuals.

An important representative of liberal doctrine, John Stuart Mill, evoked proportionality as the relationship between the fundamental rights of individuals and state power, or so to speak, between freedom and authority, two concepts which in a first analysis are mutually exclusive[45]. The author considers that a limit should be found beyond which the interference of the state in the sphere of individual independence is no longer legitimate. "Finding this limit and defending it against any violation is an indispensable condition for the smooth running of people's lives, an indispensable condition for protection against political despotism"[46]. As a result, there must be a balance between human rights and the right of the state to intervene in individual life. This balance actually means a relationship of proportionality. For the intervention of state authorities in individual life to be justified, there must be a legitimate purpose: "the only purpose which entitles men, individually or collectively, to interference in the sphere of the freedom of action of any of them is self-defense, the only purpose in which power may be legitimately exercised over any member of civilized society against his will is to prevent harm to others"[47]. The balance that the author is talking about is an application of the principle of proportionality and imposes the existence of limits for individual freedom, beyond which the authority of the state begins. The first limitation of individual liberty is not to infringe on the rights of others. The second restriction is to bear the burdens imposed by the existence of the company. This self-

[45] J.S. Mill, *Despre libertate (1859)*, Humanitas Publishing House, Bucharest, 1994, p. 7.
[46] *Idem*, p. 12.
[47] *Idem*, p. 17.

limitation of individual behaviors expresses proportionality in the relationships between members of society.

We also notice Alexis de Tocqueville's conception of democracy as a form of government. The basic principle of democracy, in the author's conception, is equality of conditions. Tocqueville believes that the ideal democracy is realized through the reciprocity of legal equality and political freedom, the latter signifying the possibility and the right of all to participate in government. One danger in democratic society, the author says, is "the tyranny of the majority and the tendency to centralize power"[48]. The tyranny of the majority is the result of the equality and independence of every human being in society. If everyone is right, the disproportion of believing the mass increases, so that the opinion of the majority leads the world. This danger is an obvious disproportion between the power of the state and the freedom of individuals. In order to counteract this risk, the political freedom of man must be ensured, whose role is to limit the power of the state in its relationship with individuals and at the same time, to limit individual excesses. Consequently, a balance is achieved, *i.e.*, a relationship of proportionality, between state power and individual freedoms, and man ultimately benefits from this balance.

Another representative of the liberal doctrine in law, in whose conception is found the principle of proportionality is John Rawls. His main objective is to theoretically establish a constitutional democracy. His whole conception of law is based on the principle of justice[49]. The theory of justice, in which equity plays a major role, supports the enshrinement and observance of human rights, the principle of just equality of opportunity and the principle of difference. In a democratic, pluralistic society, the idea of reasonableness plays a major role. Reasonable, in John Rawls's view, is that which brings together different situations, and which expresses "tolerance", the achievement of harmony and stability in a pluralistic society. The principle of "equal opportunities, the principle of difference, fairness and reasonableness" are categories that express, in our opinion, the proportionality in social relations. Democratic equality, in the author's conception, does not exclude the "differences", and social harmony is achieved through equitable, proportionate relations between participants in social life.

Once the state is created, it must intervene in the regulation of the social phenomena. This intervention must be well justified, it must serve a legitimate purpose, it must be done only to the extent necessary and by appropriate means that can be controlled. The existence of the state and its manifestation implies a "status of power" that creates its limits, prevents it from becoming discretionary. State power is institutionalized by law, but the law must legitimize its exercise, first and foremost by the constitution[50]. "The rule of law – said J. Chevallier – is inseparable from the representation of a minimal state, respectful of social autonomy and which does not go beyond its legitimate powers". The same author states that the doctrine of the rule of law is based on the fundamental idea of limiting power through threefold game: 1) the protection of individual freedoms; 2) the submission of power to the nation; 3) entrusting a restricted area of competence to

[48] Alexis de Tocqueville, *Despre democraţie în America (1840),* Humanitas Publishing House, Bucharest, 1994, p. 160.

[49] John Rawls, *Liberalismul politic (1988)*, Sedona, Bucharest, 1999, p. 8.

[50] George Burdeau, *Traité de science politique*, 4th vol., L.G.D.J., Paris, 1976; Ion Deleanu, *Drept constituţional şi instituţii politice*, 1st vol. Europa Nova, Bucharest, 1996, p. 260.

the state. The structuring of the legal order is only a means to ensure and guarantee this limitation through the mechanisms of law creation. Thus, the rule of law covers a) a conception of public liberties; b) a conception of democracy; c) a conception of the role of the state, which constitutes the underlying basic foundation of the legal order.

The application of the principles of the rule of law posed the problem of finding a criterion for assessing the measures ordered by the state authority, in the situation when they are taken within the limits of the competence established by law. Thus, in order not to be arbitrary and discretionary, the measure ordered by a state authority must be in accordance with the law, but also adequate for the proposed legitimate purpose. The relationship between means and purpose is in the doctrine of the rule of law, but also in jurisprudence, one of the particular aspects of the principle of proportionality.

The rule of law is also based on the idea of harmony, balance between its constituent elements. This balanced relationship "is another aspect of the principle of proportionality, in fact a dimension of the general principle of fairness and justice. Thus, the analysis of fundamental rights or the perpetuation and preservation of human life, through the prism of the way of thinking of natural law, will reveal the principle of proportionality. Between the individual and the general, between the public and the private, there must be a fair measure, a balance, because "the exacerbated individual bears in himself the seal of absolutism and totalitarianism"[51], as the exaggerated and disproportionate power of the state in relation to fundamental human rights leads to same purpose: abuse of power and right. In the classical conception of natural law, taken over by the doctrine of the rule of law, law was only a "just measure", that is, proportionality.

The principle of proportionality represents in the doctrine of the rule of law the introduction of a new concept, namely legitimacy. The right that limits the power of the state is not only the "the rule of power", in the sense of "legislative power", *i.e.* to create legal norms as an expression of the will of the legislature, nor of "subjective rights", in the sense of human rights, as powers of the individual to claim something, even the state, only if these rights are recognized by objective law, as legal norms enacted by the legislator, but the law must be understood, in addition to these two meanings, which are real, and by the criterion of law as "fair measure", in the sense of giving each He deserves it, as Aristotle said. Legitimacy, conceived as an adequate and fair measure, is the expression of the principle of proportionality[52].

The role of the state is another area of application of the principle of proportionality. The state cannot do them all, nor is it good to do them. There are objective limits to state activity, which result from the nature of things. The most important criterion for determining these limits is the principle of proportionality. In this regard, J.J. Chevallier states that social activities must, as far as possible, escape the influence of the state, which must reduce its interventions to what is strictly necessary, which means the adequacy (proportionality) of the measures adopted by the state for the purpose pursued, namely maintaining order and ensuring law enforcement. At the same time, it is better for the market and the initiative to be diffuse, spreading throughout the social body, than to be concentrated in a

[51] Louis Dumont, *Eseu asupra individualismului*, Anastasia, Bucharest, 1998, pp. 27-35.
[52] Petru Miculescu, *op. cit.*, p. 257.

single body that has an exorbitant power. The balance of the social system is all the better ensured as it results more from the free play of the natural laws of functioning and not from a state regulation that risks falsifying and distort them.

3. Conclusions

The application of the principle of proportionality results in the concretization of the legal norm, the legitimacy of which is given by the fair application to each particular case or situation. At the same time, by this principle the individual is not subsumed to the general, the latter expressed by the legal norm, but has its own legitimacy, which imposes a different relationship than the logical-formal one, which confers existence and necessity only to the general. Therefore, the principle of proportionality used in its philosophical meanings imposes the right adequacy of the rule of law (of the general) to the individual who is essentially man in all his existential determinations. Thus, the legal norm is not only "legal" but also legitimate.

The question is whether the understanding of proportionality, by reference to the general principles of law, in particular, the idea of justice, justice and fairness is relevant to contemporary law and especially to constitutional law. We consider that the answer is in the affirmative, for the following reasons:

Law cannot be reduced to a positivist or normative dimension, which, we must admit, dominates the contemporary legal reality. Not every right is expressed by the rules. Therefore, the reference to principles, including the principle of proportionality, is likely to give value to normative regulations. Moreover, the application of legal norms to the diversity of individual cases cannot ignore the idea of justice, of equity, in the sense that the application of the norm must be adequate to the concrete situation, which means the observance of the principle of proportionality.

From the perspective of the idea of justice, the principle of proportionality is also important for constitutional law. The constitution is "the political and legal establishment of a state"[53]. "Moreover – says Ioan Muraru – a constitution is viable and efficient if it achieves the balance between citizens (society) and public authorities (state) on the one hand, then between public authorities and of course even between citizens. It is also important that the constitutional regulations ensure that public authorities are at the service of the citizens, ensuring the protection of the individual against arbitrary attacks by the statute against his freedom"[54]. It does not limit itself to regulating only the exercise of power. It also regulates the principles that govern society. Thus, art. 1 para (3) of the Romanian Constitution enshrines justice as the supreme value of the state and society. The term "justice" is equivalent to the principle of justice and implies proportionality. Aristotle stated that "justice is a middle term"[55], which explains why the principle of justice has a regulatory role in the application of law.

Taking this idea into account in contemporary doctrine, it has been stated that: by limiting them. It therefore has a positive role, because it ensures social cohesion and a negative one, because it

[53] Ion Deleanu, *op. cit.*, p. 120.

[54] Ioan Muraru, *Protecţia constituţională a libertăţilor de opinie*, Lumina Lex Publishing House, Bucharest, 1999, p. 17.

[55] Aristotle, *Nicomachean Ethics*, *op. cit.*, p. 112.

ensures that none of the other principles become predominant"[56].

Schleiermacher's words are still valid today, including for any actor in the field of law: "Every scientist must philosophize in order not to remain only a crossing point of a tradition that is transmitted through him, a collector of material, because whatever representation in which neither principles nor connections are seen, it is only a material".

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GENDER BASED VIOLENCE STILL UNDER FIRE. THE ISTANBUL CONVENTIONAND THE ROMANIAN WAY

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Abstract

Romania ratified the Istanbul Convention on 23 May 2016, and this can be considered a very important moment in the history of fighting gender-based violence. The Istanbul Convention is considered to be the most far-reaching international treaty addressing violence against women and domestic violence by offering a detailed and comprehensive set of provisions together with important and overarching preventive and protective measures in fighting these phenomena. Nevertheless, there are voices openly criticizing the Convention and advocate for different countries to withdraw from the international agreement. Given the abovementioned context, in my article I will first try to make an analysis of the arguments that made the Convention into the gold standard in protecting women and girls' rights. Secondly, I will briefly present how and why this "gold standard" has been contested. Last but not least, using the document analysis method, I will attempt a critical review of the way in which Romania responded to the Istanbul Convention requirements, underlining the most important conceptual and legal developments/adjustments that have been done.

Keywords: *Romania, Istanbul Convention, gender-based violence, gold standard, opponents.*

1. Introduction

Gender-based violence (GBV) is stated to be a global issue and an extensive human rights abuse that the we cannot afford to overlook. Gender-based violence that disproportionately affects women is considered to be alarmingly high, even if we still do not have a complete image of the phenomenon's real amplitude due the fact that this kind of abuse is still considerably and systematically under-reported to the authorities. For instance, the FRA study – which is reflecting the EU state of affair - illustrates that only 14 % of women reported their most serious incident of intimate partner violence to the police, and 13 % reported their most serious incident of non-partner violence to the police[1]. Addressing gender-based violence in developing countries, Palermo, Bleck and Peterman are reporting that forty percent of women experiencing GBV previously disclosed to someone; however, only 7% reported to a formal source (regional variation, 2% in India and East Asia to 14% in Latin America and the Caribbean)[2].

Also, FRA – The European Union Agency for Fundamental Rights in the study *Violence against women: an EU-wide survey* (2014), has reported the following:

- one in 10 women has experienced

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[1] FRA – European Union Agency for Fundamental Rights, 2014, Violence against women: a EU-wide survey), p. 3, available at: https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf.

[2] Palermo T, Bleck J, Peterman A. Tip of the iceberg: reporting and gender-based violence in developing countries. Am J Epidemiol. 2014 Mar 1;179(5):602-12. doi: 10.1093/aje/kwt295. Epub 2013 Dec 12. PMID: 24335278; PMCID: PMC3927971.

some form of sexual violence since the age of 15;

- one in 20 has been raped;
- just over one in five women has experienced physical and/or sexual violence from either a current or previous partner, and
- just over one in 10 women indicates that they have experienced some form of sexual violence by an adult before they were 15 years old.[3]

UNwomen[4] also reports that:

- **Globally, an estimated 736 million women have been subjected to intimate partner violence, non-partner sexual violence, or both at least once in their life (30 per cent of women aged 15 and older).** This figure does not include sexual harassment. The rates of depression, anxiety disorders, unplanned pregnancies, sexually transmitted infections, and HIV are higher in women who have experienced violence compared to women who have not, as well as many other health problems that can last even after the violence has ended;
- **Most violence against women is perpetrated by current or former husbands or intimate partners.** More than 640 million women aged 15 and older have been subjected to intimate partner violence (26 per cent of women aged 15 and older);
- **In 2018, an estimated one in seven women had experienced physical and/or sexual violence from an intimate partner or husband in the past 12 months (13 per cent of women aged 15 to 49).** These numbers do not reflect the impact of the COVID-19 pandemic, which has increased risk factors for violence against women;
- **One hundred thirty-seven women are killed by a member of their family every day.** It is estimated that of the 87,000 women who were intentionally killed in 2017 globally, more than half (50,000) were killed by intimate partners or family members. More than one third (30,000) of the women intentionally killed in 2017 were killed by their current or former intimate partner;
- Calls to helplines have increased five-fold in some countries, as rates of reported intimate partner violence increased due to the COVID-19 pandemic. Restricted movement, social isolation, and economic insecurity are increasing women's vulnerability to violence.

Underlining that human life, pain and suffering do not have a price, and perhaps also as a strategy to get the issue on the formal agenda of mostly male politicians holding power in the EU member states, the European Institutes for Gender Equality (EIGE) **has estimated that the cost of gender-based violence across the union is €366 billion a year. Violence against women makes up 79 % of this cost, amounting to €289 billion**[5]**. EIGE has calculated that** the biggest cost coming from physical and emotional impact (56 %), followed by criminal justice services (21 %) and lost economic output (14 %). Other costs can include civil justice services (for divorces and child custody proceedings for example), housing aid and child protection.[6] That is why Carlien Scheele, EIGE's Director said that "EU countries need to

[3] FRA – European Union Agency for Fundamental Rights, 2014, Violence against women: a EU-wide survey), p. 3, available at: https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf.

[4] UNWomen, Facts and figures: Ending violence against women, accessed in 27.03.2022 at https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures.

[5] EIGE, 2021, The costs of gender-based violence in the European Union, accessed on 27.04.2022, at https://eige.europa.eu/publications/costs-gender-based-violence-european-union.

[6] EIGE, 2021, The costs of gender-based violence in the European Union, accessed on 27.04.2022, at https://eige.europa.eu/publications/costs-gender-based-violence-european-union.

invest more in activities that prevent violence against women and protect victims - this is both a moral imperative, as well as savy economics"[7]. The need for effective and efficient intervention in fighting GBV is also stated by the Istanbul Convention, which is considered to be perhaps the most important international documents relating to fighting gender-based violence. In January 2022 the Convention has been ratified by 21 EU members states (Austria, Belgium, Croatia, Cyprus, Denmark, Finland, Estonia, France, Germany, Ireland, Greece, Luxemburg, Italy, Malta, Portugal, Poland, Netherlands, Romania, Slovenia, Sweden and Spain) and signed by all. Turkey was the first but also the only one to withdraw from the Convention, even though was also the first who ratified it.

2. The Istanbul Convention. Why is it so important?

The Council of Europe Convention on preventing and combating violence against women, known also as the Istanbul Convention after the city in which it opened for signature on 11 May 2011, was negotiated by its 47 member states and adopted on 7 April 2011 by its Committee of Ministers. It came into force in 2014, and its importance is also related to the fact that it is the first legally binding international instrument on preventing and combating violence against women and girls at the international level. Until the Istanbul Convention, which is also considered to be very important due the fact that offers a common framework and common tools in addressing GBV, we faced a variety of ways of defining and addressing the phenomenon which differed a lot from country to country. The Convention substantively **addressed the need to offer clear definitions and conceptualizations** in the field, clear common definitions and concepts that would enable researchers to do comparative studies, and, even more important, to use the data collected in order to facilitate policy transfer. That is why defining and conceptualizing violence against women is from my point of view, one of the important added value of the Convention. In this respect, the article 3 is defining four very important concepts:

1. "violence against women" is understood as a violation of human rights and a form of discrimination against women, encompassing all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

2. "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;

3. "gender" shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men;

4. "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately.

Those definitions are stated in order to reflect the premises and the values on which the text is based, some of which are strongly stating, that the roots of the problem are to be looked for in the patriarchal construction of the societies most of us live in. That is the

[7] EIGE, 2021, The costs of gender-based violence in the European Union, accessed on 27.04.2022, at https://eige.europa.eu/publications/costs-gender-based-violence-european-union.

reason why *gender* reflected especially as a power relation between women and men (a contested term as we shall see) became very important in the Convention text, but also in developing integrated policies for ending violence that affects women and girls. In this respect, the Preamble of the Convention underline "that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women". Further more, the convention is "recognizing the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men". That was why domestic violence was also considered not enough to cover the complexity of the reality addressed. That was why also **violence against women** and **gender-based violence against women** were added in the convention text**.**

Another extremely important **added value of the Istanbul Convention I consider to be the deconstruction of the patriarchal (mis)interpretation of the public-private division.** The public-private division is directly connected both with the gender roles, but also with what we can call the area of legitimate state intervention, and in consequence with the status of citizen. Feminist scholars have substantively challenged the patriarchal public-private divide, one of the epic illustrations of this contestation process being the expression "The personal is political!". For instance, Ruth Lister recalls two of the connotations of this division: the state-market separation and the patriarchal separation between the domestic sphere and the public one. Lister recalls also the original liberal meaning of the public-private division - which refers to the need to create a sphere of personal autonomy, an area of personal inviolability, body security, freedom of thought, conscience and religion - and it's distortion by the introduction of the patriarchal domestic area in the equation.[8] In Gender, the Public and the Private, Susan Moller Okin begins her plea precisely form the original liberal meaning of the distinction referring to private as the space in which intrusion or interference with freedom requires further justification, while public refers to the more generally and just accessible spheres - the society/state jurisdiction[9].

But what happens when we add gender to the public-private divide in a patriarchal world? One of the paradoxes of doing that is the reversal of the value added to the two spheres. Thus, if initially in the liberal sense the private sphere was the one valued in its sense of enhancing individual autonomy, now the public sphere is the one that acquires a socially valued meaning.

The existence of the gendered hierarchy between the two spheres has also led to the limitation of women's private sphere by virtue of their so-called inability to be autonomous. The paradox is also manifested in the identification of the family with the private sphere and, in one way or another, the translation of autonomy - which is a fundamental individual attribute - over a form of social organization – the family. This translation becomes even more natural in a patriarchal world in the context in which the supreme authority in the family is held

[8] Ruth Lister, *Citizenship: Feminist Prespective*, (New York: Palgrave, 2003, 2nd ed.), 119.

[9] Susan Moller Okin, Gender, the Public, and the Private, în Anne Phillips, ed. *Feminism and Politics*, (Oxford: Oxford University Press, 1998) 119.

by the father/man, the head of the family or the household.

Assuming the above criticism the Convention text state "that violence against women and domestic violence can no longer be considered a private matter, but that states have an obligation, through comprehensive and integrated policies, to prevent violence, protect victims and punish the perpetrators.**"** That is why the **governments of the states that signed and ratified the Convention are obliged to take action in order to stop GBV**. They are obliged "to change their laws, introduce practical measures and allocate resources to adopt a zero-tolerance approach to violence against women and domestic violence."[10]

Last but not least, by **underlying the importance of gender-based stereotypes and prejudice in powering the tolerance towards violence against women,** the Istanbul Convention is addressing the phenomenon in a very complex and in-depth way, pushing steps forward towards the discourse and actions regarding GBV. That is why prevention become one of the four pillars (prevention, protection, prosecution and integrated policies) of the Convention. Is not less important that prevention is strongly related in the text with patriarchal norms and power relations between women and men: Chapter III – Prevention, Article 12 of the Convention states that "Parties shall take the necessary measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."[11]. So we are facing a consistent update of approaching GBV, one which integrates a particularly useful set of tools for addressing violence such as: power, consensus, choice, autonomy, exploitation, dominant culture, hate, culture of violence, toxic masculinity etc.

The text and spirit of the Istanbul Convention underlines once again the fact that protection and prosecution are not enough in fighting GBV and that this happens because we still witness stereotypical representations of women and men and their relations, but also stereotypical representation of violence itself. Unfortunately, for instance in the case of Romania there are many studies that underline the fact that neither school nor media brings useful approaches in this respect and that in fact we are dealing with traditional gendered socialization that perpetuates violence[12] (Rughiniș, Grunberg, Popescu 2015; Grunberg 2004; Grunberg, Ștefănescu 2002). The media does not help either in this respect by presenting unreliable information, with unreliable victims and aggressors - men have more authority, have decision-making positions in the media and

[10] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and answers, accessed in 27.04.2022 at https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80.

[11] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and answers, accessed in 27.04.2022 at https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80.

[12] UNICEF and ISE. 2004, Perspective asupra dimensiunii de gen în educație (Perspectives about a gender sensitive approach in education)., Bucharest, available at http://www.unicef.org/romania/ro/STUDIU_de_GEN.pdf.; Cosima Rughiniș, Laura Grünberg, Raluca Popescu, 2015, *Alice în țara manualelor (Alice in the country of textbooks),* The Faculty of Sociology and Social Work, Bucharest University, accessible at http://doctorat-sociologie.ro/wpd/wp-content/uploads/2017/09/Alice-in-Tara-Manualelor.pdf; Claudia-Neptina Manea, "Gender Stereotypes. A Comparative Analysis: Preschool Children from Romania and France", Procedia - Social and Behavioral Sciences, Volume 78, 2013, Pages 16-20, ISSN 1877-0428.

identify with the aggressors. The excusing of aggressors and perpetuation of stereotypes about victims (blaming and victimization), the focus on women's behaviors - provocative - and not men's, the symbolic dissociation of sexual violence from the social mainstream; the omission or misinterpretation by positioning attackers as 'others', 'others' and victims as well, the association with mental illness, drug addiction remain unfortunately mainstream in the so-called understanding of violence against women. Last but not least, the emphasis on law-and-order can hide gender inequalities: the law is not neutral, it is often built on patriarchal, racist, homophobic foundations (Kitzinger, 2004). The lack of analysis of society as a whole, of intersectional approaches, can put us in a situation in which efforts to protect and prosecute to be only partially effective (Kitzinger, 2004). In this context, the Convention calls for a joint effort to develop a series of integrated policies – educational policies inclusively - aimed at addressing the harmful beliefs, stereotypes and prejudice that perpetuate violence against women and girls.

That was why Amnesty International called the Istanbul Convention "**the gold standard that can save the lives of millions of women and girls" also adding to the above-mentioned arguments the fact that the convention is "**a widely accepted human rights instrument".

3. A contested gold standard?

It is now notorious the fact and Turkey, which was the first state ratified the convention on 14 March 2012, is also the first and only country in the Council of Europe to have withdrawn from the international human rights convention, but also from an international human rights convention in general. The Amnesty International called shameful Turkey's withdrawal from the Istanbul Convention and underlined that this today will put millions of women and girls at greater risk of violence. How Turkey justified the decision? Zehra Zumrut Selcuk, Minister of Family, Labor and Social Services, said that Turkey, by virtue of its own laws and constitutional provisions, has the power to protect women's rights without the need for the Istanbul Convention – a pseudo - argument dismounted by other experts in the field. For instance, Alina Isac Alak, a Romanian islam researcher said, in a commentary for the paper Adevărul, that the withdrawal can be read as a sign of weakness of Erdoğan's regime and in line with the AKP ideology, which from a gender perspective is a conservative and nationalist party that has constantly promoted a neo-traditionalist ideology in the style of the Muslim Brotherhood. This ideology is based on the preservation of traditional gender roles with minor, culturally opportunistic adjustments."[13]

But not only Turkey has contested the Convention, Poland also announced the intention to withdraw. Slovenia had also some street demonstrations against it. What happened there? Agnieszka Graff and Elzbieta Korolczuk explain the Polish anti-Instanbul Convention in the wider framework of the Polish "anti-genderism" which they connect with the strong right-wing, catholic, conservative movement in the country that officially inaugurated, on 29 December 2013 (by the Pastoral Letter of the Bishops'Conference) a campaign against

[13] Alina Isac Alak, 22 March 2021, Turcia, violența îndreptată asupra femeilor și succesul nefast al neotradiționalismului Islamic (Turkey, violence against women and the disastrous success of Islamic neo-traditionalism), accessed in 03.05.2022, at adev.ro/qqd20n.

"gender equality education and legislation, sexual and reproductive rights, as well as the very use of the term "gender" in policy documents and public discourse." Polish anti-gender campaigners claim that their aim is to protect the Polish family (especially children) against feminists and the "homosexual lobby"; to defend authentic Polish cultural values (which are equated with Catholic values) against the foreign influence of the corrupt West and liberal European Union, which has supposedly replaced the USSR as Poland's "colonizer". Targets include sex education, ratification of the Istanbul Convention and gender equality policies more broadly. Conference read in Poland's parishes."[14] In this context the Polish minister of justice Jarosław Gowin publicly opposed ratification of the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), calling it a "carrier of gender ideology" (Graff 2014; Grzebalska 2015). As Graff and Korolczuk says "the rationale offered by Gowin was that the Convention is an ideological Trojan Horse: Its hidden agenda, he claimed, was undermining the traditional family. The fact that the text of the Convention includes the word "gender" was viewed as proof of its portrayed as traitors, mere puppets in the hands of an international or even global conspiracy against the existing traditional gender order."[15] This perspective on "gender" word is also officially stated in the Comments submitted by Poland on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) [16] in which the Polish Government makes the following remark: "The use of the term "gender" in the Convention poses many problems of interpretation. The term is not a legal term and is not rooted in universally binding international mechanisms. Furthermore, because of its ambiguity, it has a forcible character which, in the context of the rights and obligations guaranteed, creates doubts about the correct understanding and application of the legislation."[17] Also in the same document is stated that "There is a risk that measures to combat "gender-based violence" may include, among other things, attempts to reduce the importance of basic social institutions, in particular the family, as the family and the roles of its members associated with it may be wrongly perceived as a source of women's oppression and a space for men's domination."[18]With this comment and invoking the Polish Constitution and it's values[19] Poland

[14] Agnieszka Graff and Elzbieta Korolczuk, "Worse than communism and Nazism put together": War on gender in Poland in Kuhar R., Paternotte D. (eds) (2017). *Anti-Gender Campaigns in Europe Mobilizing against Equality*. Maryland: Lowman &Littlefield, p. 132.

[15] Agnieszka Graff and Elzbieta Korolczuk, "Worse than communism and Nazism put together": War on gender in Poland in Kuhar R., Paternotte D. (eds) (2017). *Anti-Gender Campaigns in Europe Mobilizing against Equality*. Maryland: Lowman &Littlefield, p. 134 – 135.

[16] Received by GREVIO on 8 September 2021 GREVIO/Inf(2021)10 Published on 16 September 2021, accessed in 03.05.2022 at https://rm.coe.int/grevio-inf-2021-10-eng-final-comments-gov-poland/1680a3d208.

[17] Pag. 5.

[18] Comments submitted by Poland on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) , 2021, Pag. 3.

[19] - the obligation of impartiality of public authorities in the field of religion, convictions and philosophical beliefs (Article 25, paragraph 2, of the Constitution of the Republic of Poland), − the fulfilment of the fundamental obligation of public authorities to respect and protect human dignity and to guarantee the freedoms and rights derived from it (Article 30 of the Constitution of the Republic of Poland), − the protection of marriage as a union of a man

designed its anti-Istanbul Convention/anti-gender profile.

But interesting is also the fact that the above-mentioned Polish traditional, cultural, deeply socially rooted values that were invoked seems not to be that Polish, but in fact are invoked as being much more spread and accepted. That was why for instance on 2 September 2020, the same Polish Justice Minister Zbigniew Ziobro has invited Slovenia in an official letter to join Poland in withdrawing from the Istanbul Convention. We have reasons to believe that Ziobro in fact wanted to speculate the effervescence of an anti-gender movement that took shape also in Slovenia. Roman Kuhar makes an analysis of the anti-gender movement in Slovenia saying that the discourse concentrated on the controversies around public schools education and children being exposed to "gender theory". In this context there were voices that urged the Slovenian government not to ratify the Istanbul Convention due the "extreme ideas of gender theory" that should not be integrated into national legislation and school curricula.[20] The Slovenian officials refused the Polish invitation to join what is in fact a global-conservative club. The Modern Centre Party (SMC), of which Justice Minister Lilijana Kozlovič is a member, said that Slovenia's withdrawal from the Istanbul Convention would be unacceptable, and Janja Sluga member of the same party underlined that "Slovenia as a state should not be even considering that", and that Poland's initiative jeopardizes Slovenia's constitutional and legal system and that the withdrawal would push Slovenia back to the dark times when women and children's abuse was a norm.[21]

Bulgaria also do not ratified the Convention due it's so called incompatibility with the Bulgarian constitution, the controversies being also around the gender meaning. The Constitutional Court said that the word "gender" can only indicate biological sex, and that ratification of the Istanbul Convention which defines gender as a social construct would be anti-constitutional. Emberi Méltóság Központ in Hungary also criticized the Convention as being part of the "gender ideology" and in Croatia the implementation of the Convention has been delayed due the conservative protests organized all over the country.

Romania also had a number of public voices that opposed to the Istanbul Convention. It is now not a surprise that the voices were form the orthodox side of the story, for instance priest Necula, a prominent public figure in Romania, signed in March 2018, together with other 8 high-education professors an open letter denouncing the gender theories adopted by Romania trough the Istanbul Convention. Also, in 2018 a group of NGOs sent the Ministry of Education an address in which concerns regarding the Istanbul Convention were expressed. In the address was mentioned and criticized the definition of gender as a social

and a woman, the family, motherhood and parenthood (article 18 of the Constitution of the Republic of Poland), − respect for the right of parents to bring up their children in accordance with their beliefs (article 48, paragraph 1 of the Constitution of the Republic of Poland), − respect for the right of parents to provide their children with moral and religious education and training in accordance with their convictions (article 53, paragraph 3, of the Constitution of the Republic of Poland).

[20] Roman Kuhar, Changing gender several times a day: The anti-gender movement in Slovenia, in Kuhar R., Paternotte D. (eds) (2017). *Anti-Gender Campaigns in Europe Mobilizing against Equality*. Maryland: Lowman &Littlefield, p. 160.

[21] Poland Invites Slovenia to Withdraw from Convention Aimed at Preventing Violence Against Women, By STA, 02 Sep 2020, accessed in 03.05.2022 at https://www.total-slovenia-news.com/politics/6881-poland-invites-slovenia-to-withdraw-from-convention-aimed-at-preventing-violence-against-women.

construct, the fundamental right of parents to choose the values they pass to their children that was threatened by the Convention provisions, but also the fact that the GREVIO monitoring mechanism violates the national sovereignty of Romania.[22] The Education Ministry requested clarification form NAEO (National Agency for Equal Opportunities) which clearly in the response stated that the "whole process of ratifying the Convention has complied with all the steps provided by law and the rules of a real democracy in terms of the legislative process in our country" and that "the ratification of the Istanbul Convention is a certainty of continued governmental efforts to prevent and combat the phenomenon of violence against women and domestic violence and that Romania is reaffirming it's support for the Convention also in the spirit of solidarity other countries that ratified the convention, but also as a sign of its unquestionably support for the elimination of all discrimination against women and men on the grounds of sex"[23]. In this respect, addressing the the most important topics of the anti-gender rhetoric in Romania Oana Băluță identifies the following issues: 1. Gender equality *per se*, understood as "making the girls boys, and the boys girls", or conservative rhetoric pro traditional gender roles ; 2) Feminist movement; 3) LGBTQ rights – see the 2018 Romanian referendum for the traditional family; 4) Istanbul Convention, 5) Sexual and reproductive rights; 6) Formal gender education, including gender studies; 7) Non-formal gender education.[24]

But even though Romanian did not escape this anti-gender rhetoric, the Istanbul Convention was not until now in the front line of the attacks. In Romania the anti-gender rhetoric worked as an ideological glue for a variety of conservative groups (around 30 Romanian NGOs) - the Coalition for Family - that initiated in 2018 a National Referendum for changing the Constitution of the country. On the same track of hostility, in November 2019, a Senator – member of a young right-wing party (Popular Movement in Romania) known as the Parliamentary Prayer Group, which includes prominent supporters of the Coalition for Family, proposed a law that should forbid any kind of sex/gender proselytism in education, because gender theory is not scientifically proven and gender sensitive education artificially creates different kinds of minorities. As a follow-up, the Romanian Parliament passed in June 2020 an amendment to the education law, banning all educational institutions from "activities propagating theories and opinions on gender identity according to which gender is a separate concept from biological sex"[25]. At the end of 2020, the

[22] National Agency for Equal Opportunities, Response to The Education Ministry referring some concepts and provisions of the Istanbul Convention, Nr. 3975/SG/MC/22.11.2018.

[23] National Agency for Equal Opportunities, Response to The Education Ministry referring some concepts and provisions of the Istanbul Convention, Nr. 3975/SG/MC/22.11.2018.

[24] Băluță, Oana. "Egalitatea de gen. Politici publice sau un câmp de luptă discursiv și politico-religios?" *Transilvania*, no. 11-12 (2020): 18-33. https://doi.org/10.51391/trva.2020.12.03.

[25] See Cătălin Avramescu, lecturer at Bucharest University and his interview (18 Jun. 2020) about gender studies as pesudo-science:https://www.libertatea.ro/stiri/catalin-avramescu-studiile-de-gen-sunt-pseudostiinta-3039462 (accessed on March, 5th, 2021); Adina Papahagi, lecturer at Babeș Bolyai University, facebook post about gender studies as being ideology and propaganda, https://www.facebook.com/papahagi/posts/595211791109749/?_rdc=1&_rdr (accessed onMarch, 3rd, 2021) or his article about gender studies as being non-science, intelectual imposture and leftist indoctrination published in June, 17th 2020 at https://inliniedreapta.net/monitorul-neoficial/adrian-papahagi-studiile-de-gen-nu-sunt-stiinta-ci-impostura-intelectuala-indoctrinare-stangista/(accesed on March 1st 2021); Daniel Funeriu's (former minister of Național Education) facebook post about academic freedom and political corectness cited in the article published

Constitutional Court, in perfect opposition with the Bulgarian one, declared the law unconstitutional in response to a claim of the Romanian president.

4. Consolidating legal framework in Romania: follow up after the Istanbul Convention ratification

Romania ratified the Istanbul Convention on 23 May 2016. The coordinating body is the NAEO (National Agency for Equal Opportunities Between Women and Men). The agency is responsible for the elaboration, coordination and implementation of strategies and policies in these two areas of competence and as a state authority, coordinates the implementation of two programmatic documents in the two areas of competence: the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

The NAEO's competencies are based on the 202/2002 Law and treatment between women and men, republished, with subsequent amendments and completions and its functions and from the provisions of the Law no. 217/2003 on preventing and combating domestic violence, republished.

As such, NAEO is the responsible body for the coordination and monitoring of the implementation of the National Strategies for promoting equal opportunities for women and men and combating domestic violence and the operational plans, but also for developing, coordinating and implementing the national strategy on preventing and combating sexual violence (see "Synergie" 2020-2030).

In order to give meaning to various requirements of the Istanbul Convention Romania, especially via NAEO, made since 2016 a series of amendments to various laws, but in particular the Law 217/2003 for the prevention and combating of domestic violence (the Domestic Violence Law) and Law 202/2002 on equal opportunities and treatment for women and men (the Gender Equality Law).

New concepts and definitions have been added to Domestic Violence Law by the amendments maid in 2018 in order to provide a comprehensive understanding of domestic violence. The conceptualization was done in full compliance with Article 3 (Definitions) of the convention[26], but also recognized two additional forms of domestic violence - social and spiritual violence.

The law domestic violence law was also amended in in July 2020 when cyber violence was recognized and added as a form of domestic violence. Article 4 paragraph 1 let (h) defines cyber violence as: "online harassment, online messages that instigate hate on the basis of gender, online stalking, online threats, non-consensual publishing of information and intimate graphic content, illegal access to interception of communications and private data and any other form of misuse of Information and Communication Technology by means of computers, smartphones or other similar devices that use telecommunications or can connect to the

by Newsweek in June, 19th 2019 at https://newsweek.ro/educatie/teorii-opinii-gen-aparare (accessed on February, 27th 2021); Alexandru Lăzescus article about gender studies as pseudo-science and neo-marxist ideology published in June, 2nd 2020 at https://inliniedreapta.net/monitorul-neoficial/alexandru-lazescu-studiile-de-gen-sunt-pseudo-stiinte-ce-ar-trebui-studiate-ca-parte-a-curentelor-neo-marxiste/ (accessed on March, 13th 2021).

[26] "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

Internet and may transmit and use social platforms or email platforms, with the intent to cause embarrassment, humiliate, scare, threaten, or silence the victim". Like that all forms of domestic violence are now covered by the Romanian legal framework: verbal, physical, psychological, sexual, economic, social, spiritual and cyber violence.

Also, there were amendments provided a more detailed definition of family members (Article 5), one that overpassed the traditional perspective on what family is and can be. In this respect, children from previous relationships and the children witnesses to domestic violence were explicitly acknowledged as victims. But, in line with the need for a common understanding of GBV it is important to underline that some other changes and updates are to be done by Romania in order to have a coherent legal framework in addressing this kind of abuses. For instance, even though the Domestic Violence Law was amended in accordance with the Istanbul Convention provisions, the Criminal Code still contains a restrictive definition of "family members" (Article 177) and only covers current - but not former – family relations (spouses and partners) and also limits the recognition of the aggression to the condition of family members that share the same residence.

Another very important step made by Romania in order to define and recognize violence against women as an issue of gender and power relations was the introduction in the Law nr.178/2018 (which completes the 202/2002 Law and treatment between women and men) of the concept of "gender-based violence" as follows: "gender-based violence is the act of violence directed against a woman or, as the case may be, a man and motivated by gender. Gender-based violence against women or violence against women represents any form of violence that affects women disproportionately. Gender-based violence includes, but is not limited to, domestic violence, sexual violence, genital mutilation of women, forced marriage, forced abortion and forced sterilization, sexual harassment, trafficking in human beings and forced prostitution".

Multiple discrimination is also addressed by the Romanian legislation in Article 2 paragraph 6 of the Antidiscrimination Law – which states that the discrimination on multiple criteria shall be considered an aggravating circumstance (Art. 2, alin. 6) - and Article 4(h) of the Gender Equality Law. Although the concept of multiple discrimination is reflected in the legislation, it is important to underline here that it is also a reported lack of acknowledgment and understanding of the concept of multiple and intersectional discrimination within the courts and legal institutions, but also within the population in general.[27]

Sexual harassment is criminalized in Romania since 200, but the definition offered by Criminal Code, which entered into force in 2014 refers to it as acts of repeatedly demanding sexual favors in the context of an employment which intimidate the victim or place her in a humiliating situation (Art. 223). This approach is not in line with the Istanbul Convention due the fact that limits the harassment once to requesting sexual favors and second to the repetitiveness of the abuse. The Istanbul Convention refers to any unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading,

[27] See here the research results presented in the Intersectionality – Training Manual, 2022 accessible hereTraining-Manual-Final-Intersect-Voices.pdf.

humiliating or offensive environment (Art. 40). Also, the Romanian Criminal Code Code limits sexual harassment to the workplace or similar relationship which is not in line with the Convention text which does not have such reference.

In respect with the protection pillar of the convention it is also important to mention the introduction in the Domestic Violence Law of **the Provisional Protection Order** (PPO), as a measure of immediate protection. The PPO allows and requires law enforcement bodies (especially the police) to quickly intervene in order to protect victims of domestic violence also by the immediate removal of the aggressors form the home. The PPO was accompanied by measures to monitor compliance and prevent infringement of court-ordered protection orders and to assess risk in cases of domestic violence according to Article 51 of the Convention, supportive legal framework consolidated by the changes done in 2018. The PPO proved to be a very useful tool in fighting GBV due the fact that the overwhelming majority of the PPO were later confirmed by the prosecutors.

Year	PPO	Confirmed by a prosecutor	Unconfirmed	Transformed in PO (Protection Orders)	PPO violated
2020	8393	7296	1097	3887	479
2021 (first 6 months)	4561	4040	521	2065	264

Source: National Agency for Equal Opportunities Between Women and Men

It is also important to underline the fact that, in Romania, there is no specific offence or other legislation expressly criminalizing **female genital mutilation, forced abortion or forced sterilization** and **forced/early (**illegal child**) marriage**. Further efforts should be done by Romania in this respect and in order to have a substantive implementation of the IC. The Convention addresses those forms as violence in the articles 37, 38 and 39 and underlines that they are a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men.

5. Conclusions.

To sum up, gender-based violence is still under fire of the detractors that are not sporadic and isolated, but global and organized. This can be seen by the same ideological framework that was invoked in different contexts, a conservative/religious framework that goes against the women empowerment, against women's rights as human rights. The contesters of the Istanbul Convention are in fact part of a wider anti-gender global movement that are in the back of the global gender backlash, a phenomenon well documented in the last years[1]. As Kuhar and Paternotte notes "in

[1] Petö A. (2018). *Attack on Freedom of Education in Hungary. The case of gender studies, LSE Blogs*. Accesed at: https://blogs.lse.ac.uk/gender/2018/09/24/attack-on-freedom-of-education-in-hungary-the-case-of-gender-studies/, August 30th, 2020; Băluță, I. (2020) "Studiile de gen: un turnesol al democrației românești" (Gender Studies: a Litmus for the Romanian Democracy), *Transilvania*, no. 11-12 (2020): 34-

fact, Slovenian activists were inspired by Italian activists, and Italian activists were themselves inspired by a French group, the Veilleurs (Vigilist), which they imported to their own country and hybridized. Born in 2013 in Paris, this group initially gathered a few (mostly Catholic) youngsters who wanted to oppose the same-sex marriage bill and promote "human ecology"[2]. But even though for scholars is obvious that we are dealing with a strong ideological opposition to gender equality, for the rest of the citizens we are dealing with a dangerous play. We are dealing with a war which is delegitimizing the actions/policies aimed at ending GBV and is re-legitimizing the submission of women, the patriarchal norms that are reenforcing the power relations and and inequalities between women and men. In this ambiguous global and regional context, one in which some of its neighbors had had strong voices opposing the Council of Europe Convention, Romania is showing signs of keeping it's commitment to the values and principles stated by this important international document. The milestones I consider worth mentioning in this respect are related to the Constitutional Court response to the sex/gender debate, the NAEO response to the detractors which addressed the Education Ministry, but also the steps are being done in order to do an ambitious and comprehensive reform of gender-based violence legal framework.

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FREEDOM OF CONSCIENCE, OPINION AND FREEDOM OF RELIGION BELIEFS - A RIGHT OF PERSONS DEPRIVED OF THEIR LIBERTY

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Motto: „Man cannot be compelled to act against his conscience, especially on religious matters." (Declaration of Dignitatis Humanae adopted by the Second Vatican Council on the 5th of December 1965)

Abstract

This article represents an analysis of the manner in which the freedom of conscience, freedom of opinions and freedom of religion of inmates are respected, with a particular analysis made on a Romanian prison. In this study I referred to the jurisprudence of the ECtHR in cases against Romania, the national legislation governing the rights of detainees, the collaboration between religious organizations and prisons in order to respect the right to religious freedom, the impact of respecting this right on behavior, the impact of re-educating inmates.

Keywords: *inmates, prisons, religious freedom, opinion, confessions, cult, freedom of conscience, faith.*

1. Introduction

Persons deprived of their liberty are those persons who serve a prison sentence applied by a final ruling or minors who serve an educational measure deprived of liberty or those who are in state custody under the power of a temporary measure with deprivation of liberty (pre-trial arrest, temporary medical hospitalisation).

During the communism period, the execution of freedom-deprived punishments was characterized by torture, humiliation, inhumane treatment, forced labour until exhaustion, and inmates' rights were violated. Occasionally they received a package, were able to have telephone conversations with their family members or they received visits. Freedom of conscience, opinion and religious beliefs were non-existent at that time, and even less so for those deprived of their liberty, some of whom were arrested precisely due to their intense Christian experiences, having practiced their Orthodox faith. From a conceptual point of view, faith (in whatever form it may be) enters in conflict with the principles of communism, because while the former wanted the man to be free, to do things out of love and devotion to fellow men, communism wanted the man to be subjugated, easy to manipulate, perverted. The result of this oppressive system was, contrary to religious belief, the opposite of what had been expected, hoped by the representatives of the communist political class, because most of the people who had been sent to communist prisons had a deep Christian morality, were secretly prayed and lived an intense spiritual life in squalid prison cells. Instead of extinguishing and

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exterminating the faith of people through lies and violence, the communists contributed to deepening the religious phenomenon, hope and faith in God being the only ones that brought the prisoners a little peace and which, eventually, led to a plenary victory of the Christian phenomenon against communism.

2. Content

After the Romanian Revolution in 1989 and to our present days, Romania has been constantly concerned with humanising detention conditions for people deprived of liberty, both from a legislative standpoint by adapting our legislation to the European one, as well as by adopting internal actions that ensure the fulfilment of rights and legitimate interests of inmates, rights that can only be restricted in expressly provided for situations.

The national legal framework that regulates the execution of sentences and custodial measures ordered by judicial bodies during criminal proceedings is provided by the Romanian Constitution and Law no. 254/2013 on the execution of sentences and custodial measures ordered by judicial bodies during criminal proceedings, published in the Official Gazette of Romania, Part I, as well as other laws, treaties, protocols, decrees on the rights of prisoners.

Among universal sources that regulate the principle of religious freedom we would like to mention the ECHR, the Recommendation of the Committee of Ministers to member states regarding rules in European prisons REC (2006)2, art. 18 of the Universal Declaration of Human Rights[1], art. 10 of the Charter of Fundamental Rights of the European Union[2], as well as other treaties, regulations, directives on the rights of prisoners.

We will begin with art. 9 of the ECHR which states "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief and freedom, either alone or in community with others, in public or private, to manifest his religion or belief in worship, teaching, practice and observance.

Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

I have identified two cases of the ECtHR in which the Court was notified by complainants who were in detention in various prisons in Romania, that they were not receiving kosher meals according to the precepts of their religion: Case of Erlich and Kastro v. Romania[3] ruled by the ECtHR – Fourth section, judgement dated 09.06.2020, which became final on 09.09.2020 or that they did not receive meals according to Muslim religious precepts, Case of Affaire Saran v. Romania[4] (text in French), ruled by the ECtHR – Fourth Section, on 10.11.2020, which became final on 10.02.2021.

[1] The Universal Declaration of Human Rights was adopted on the 10th of December 1948 by Resolution 217 (III) of the UN General Assembly. The text of this declaration may be consulted in A. Năstase, B. Aurescu, *Contemporary International Law. Essential Texts*, R.A.M.O Publishing House, Bucharest, 2000, pp. 225 et seq.

[2] The Charter of Fundamental Rights of the European Union was adopted by the European Council on 07.12.2000 in Nice, integrated in Part II of the Treaty to organize a Constitution for Europe, adopted at the European Council in Athens in 2003 and published in the Official Gazette no. 465/01.06.2005.

[3] Case of *Erlich and Kastro v. Romania*, http://ier.gov.ro.

[4] Case of *Saran v. Romania*, https://hudoc.echr.coe.int.

In the case of Erlich and Kastro v. Romania, two Israeli citizens of Jewish religion complained to the ECtHR that during their imprisonment at the Rahova Prison in Bucharest they did not receive kosher meals according to the precepts of their religion, having previously addressed both the custodial judge and the court which had ruled: ["... complainants are allowed to receive daily (bearing the cost) kosher food, in the required quantity that would meet their personal needs (including foods that require heating, baking, boiling or other heat treatments in order to be eaten), to ensure distribution of food under the same conditions as those that are being provided to other prisoners and to ensure food storage facilities on days when these cannot be delivered). Detailing the provisions of domestic law, as well as of relevant international law, in particular the Recommendation Rec (2006)2 of the Committee of Ministers of the Council of Europe to member states on European Prison Rules (adopted on the 11th of January 2006) and the Comment to it, the Court of law observed that the requests of the two (connected) were admissible under the applicability principle of art. 9 of the Convention.

On the merits of this case, the ECtHR reminded that "as defended in art. 9 of the Convention, the freedom of thought, conscience and religion is one of the foundations of a democratic society according to the meaning set forth in the Convention. This freedom is, in its religious aspect, among the most essential elements of the believers' identity and of their conception on life ...." (para. 28). With regard to the right to religious freedom in Romania, the Court of law noted that "the Romanian state has expressly established the right to religious freedom, both at the level of the Constitution and at the legislative level, and the Jewish religion is among officially acknowledged religions" (para. 34 from the aforementioned judgement). Having analysed both the Government's and complainants' assertions, the Court of law found that the Rahova Prison, through its representatives, had set up a separate kitchen in which kosher food was prepared, who had been approved by a Jewish religious foundation whose representatives came regularly to the prison for religious holidays, and on this occasion they would deliver kosher food and, taking into account the extremely small number of prisoners of Jewish faith in Romanian prisons (at the time of these facts, in 2015, there were only 8), taking into account the margin of appreciation that the state benefits from, which must take into account keeping a balance between general interest and personal interest, the ECtHR ruled that art. 9 of the Convention had not been violated.

On the other side, in the case of Affaire Saran v. Romania, the Court of law found a violation of art. 9 of the Convention consisting in the authorities' refusal to provide to the complainant, in Iași Prison, meals in accordance with the complainant's religious precepts, who had declared to be a Muslim.

On the merits of this case, the Court of law stated that the complainant's request concerned the period during which he was imprisoned in the Iasi prison and consisted of two parts: one part was about the fact that he had not received food in accordance with the precepts of the Muslim religion, and the other was about the fact that he had not been provided with a suitable place for prayer. Referring to domestic law, the Court of law noted that it contained provisions which expressly established the right of prisoners to receive meals according to their religious precepts, and the problem raised in this case was that according to the Decree of the Minister of Justice no. 1072/2013 (currently repealed by the Decree of the Minister of

Justice no. 4000/C/2016 of 10.11.2016 for the approval of Regulations on religious assistance of persons deprived of their liberty who are in the custody of the National Administration of Prisons) and which constituted the national law applicable on the matter, prisoners declared their religious affiliation at the time of their incarceration, on their own responsibility and if, during the execution of the sentence, they embraced another religion, a declaration on their own responsibility was not sufficient, but had to be accompanied by a document of "confirmation" issued by the new religion to which he had adhered.

The judge supervising the deprivation of liberty within the Iași Prison rejected, on the 8th of July 2016, the complainant's request to be provided with food under the Muslim religion on grounds that upon imprisonment the plaintiff had stated that he was a Christian Orthodox, an untruthful statement, because after verifying the complainant's file the Court noted that before his transfer to Iași he had been imprisoned at the Prison in Botoșani, and his record on religious assistance showed that he had been registered as belonging to the Islamic religion. Furthermore, the Romanian State was reprimanded that the complaint of plaintiff Affaire Saran formulated against the decision of the judge supervising the deprivation of liberty ruled on 08.07.2016 was settled on 28.03.2017 by the District Court of Iași, while the complainant was transferred to the Codlea Prison from the 6th of December 2016, where he received meals according to the precepts of Muslim religion.

The ECtHR noted that the District Court of Iași had ruled without verifying the documents in the prisoner's personal file, as well as a lack of organization and coordination between state authorities that should have ensured the flow of information to such an extent that there should not be a situation like this. Consequently, the European Contentious Court considered that in this case there was a violation of art. 9 of the Convention which consisted in the authorities' refusal to provide the complainant, at the Iaşi Prison, with meals in accordance with the complainants religious precepts as he had declared himself to be a Muslim, and there was no further need to rule on the authorities' refusal to provide the complainant, at the Iași Prison, with a suitable place for prayer.

In domestic law, as we have shown, the general legislative framework governing the freedom of conscience, opinion and freedom of religious belief is regulated by the Romanian Constitution (art. 29 "Freedom of thought and opinion, as well as the freedom of religious beliefs cannot be restricted. Nobody can be compelled to adopt an opinion or adhere to a religious belief that is contrary to his or her beliefs") which is supplemented by the provisions of art. 50, 56, 58 of Law no. 254/2013; with Law no. 489/28.12.2006 Rep. on religious freedom and the regime of religions, Decree no. 4000 C/2016 of 10.11.2016 for the approval of Regulation on religious assistance of persons deprived of liberty found in the custody of the National Administration of Prisons, the Protocol concluded on 26.03.2013 on the provision of Orthodox religious assistance within the System of National Administration of Prisons concluded between the National Administration of Prisons and the Romanian Patriarchate.

In order for this paper to not just be a theoretical analysis of mentioned legal texts, we have obtained actual information from a prison in Romania (Codlea Prison, Braşov county) about the mechanism of observing the right referred to in art. 58 of Law no. 254/2013:

"(1) Freedom of conscience and opinion, as well as the freedom of religious beliefs of convicts cannot be restricted.

(2) Convicts have the right to freedom of religious beliefs, without prejudice to the freedom of religious beliefs of other convicts.

(3) Convicts may attend, based on their free consent, religious services or meetings organised in prisons, may receive visits from representatives of said religion and may obtain and hold religious publications as well as objects of worship".

Regarding the first component of this right, *freedom of conscience and opinion*, at the Codlea Prison every morning, between 09:00 AM - 11:00 AM, a show created by an inmate is broadcast on TV (each detention room has a TV connected to cable network), and its topics are established by prison agents (as an example, below are the topics broadcast during a day: Information about vaccination; Good to know; Health; Did you know that...; General culture – European geographical curiosities; Entertainment), a show that, occasionally, features interviews with inmates whose behaviour is outstanding.

The Codlea Prison magazine is published quarterly and is entitled "Sheet for mind, heart and soul" in which inmates may express their thoughts, ideas, emotions, literary talents (in the form of interviews, poems, maxims, anecdotes), their artistic talents (drawings, cartoons) all published under their initials. From the prison staff in charge of the publication of this magazine we learned that inmates are interested in the content of this magazine, participate voluntarily in writing it, without being rewarded, as they feel the need to express their thoughts and opinions in various forms (writing, drawing).

As for the second component, *freedom of religion*, we observe that on 09.03.2022 out of the 462 inmates imprisoned at the Codlea Prison, 408 were Orthodox, 1 belonged to the Seventh-day Adventist Church religion, 1 Christian according to the Gospel, 16 Greek Catholics, 5 Pentecostals, 20 Reformed, 25 Roman Catholics, 1 Unitarian and 2 atheists.

Priest Laurenţiu Nistor, an Orthodox chaplain at the Codlea Prison for 14 years, said that inmates are provided with religious services according to their faith (which they declare upon entering the prison). Based on collaboration protocols concluded between the representatives of religions acknowledged in Romania and prison management (according to art. 2 of the Regulation on religious assistance of persons deprived of liberty found in the custody of the National Administration of Prisons), prior to the outbreak of the pandemic caused by the Coronavirus infection (Covid-19), priests, pastors, preachers used to come regularly to the prison where they held religious ceremonies with special prayer rooms, except for Catholic priests who officiated in the Orthodox chapel (*e.g.* the Baptist pastor came weekly, the Catholic priest once a month). Inmates practising their Islamic faith have not been here recently, and some had stated to be Muslims only in order to receive a pork-free diet.

Before the Order of the Minister of Justice no. 1072/C/2013[5] for the approval of the Regulation on religious assistance of persons deprived of liberty found in the custody of the National Administration of Prisons had entered into force, currently

[5] Order 1072/C/2013 of the Minister of Justice provided that, during the execution of the custodial sentence, the persons in custody of the National Administration of Prisons may change their confession, which was to be proved by a declaration on their own responsibility and by a document of confirmation of belonging to said cult.

repealed by the Order of the Minister of Justice no. 4000/C/2016 of 10.11.2016 (which includes the provisions regarding the conditions for the acceptance the change of confession in art. 4), persons deprived of liberty would, at a declarative level, "change their religion", meaning they would become Muslims or Adventists because, according to this religion, you cannot eat pork so they hoped they would get better food, the priest pointing out that this type of persons were not, in fact, believers.

The inmates' religious life, as told by the priest Laurenţiu Nistor, is, in general, like that of any other person, in the sense that some persons deprived of liberty, based on a request, attend services organized in the prison on Sundays and during church holidays, request individual conversations with the priest, but a small number of them confess (10% maximum), and on this occasion only a few of them prove real penance. The priest tries to enlighten them on the benefits of confession, tries to convince them about the liberation of their conscience from committing sins, saying that even if they do not receive the Sacrament of Holy Communion, he does not give them any canon, because he believes that their punishment is the canon itself, and before getting released from prison he shares Holy Communion with those who had an outstanding behaviour and had been in an open regime of execution.

In general, inmates do not practice the religion to which they claim to belong, but some of them actively attend religious activities inside the prison, doing so voluntarily and "for free," in the sense that they do not receive any rewards, such as: before the Covid 19 pandemic hit, in December, the priest would prepare a choir of carollers and they would go to the House of Culture in Codlea where concerts with several groups of carollers from Braşov as well as soloists from other counties used to be organized. One year they also went to the Students' House of Culture in Braşov (2010). In other years they went to some churches in Codlea where they would attend the service and sing carols at the end. The priest says that in when they went out in the community, the reward consisted in going out in the community and "the guys enjoyed it very much because they had the opportunity to leave the prison." At religious services, singing in the pew is also supported by inmates who are specially trained by the priest. Some of them even learned musical notation and continued to play a musical instrument after they were released from prison. We would like to highlight that these persons deprived of their liberty attend these activities voluntarily and without receiving any credits (credits are granted for attending moral and religious educational programs or thematic competitions).

Also, as an expression of the freedom of religious beliefs in the prison, the priest recalled that a prisoner was baptised in the Christian-Orthodox religion while he was serving a custodial sentence (he had not been baptised at all when he was a child because his father was an atheist). The fact that persons deprived of liberty ask the priest to officiate memorial services, they obtained, as a reward, permits to leave the prison in order to officiate their religious wedding, they attend the Sacrament of Anointing of the Sick, a service that the priest organizes together with colleagues from the community during the two major fasts (Easter and Christmas), they attend various conferences organized on Christian topics, they go on pilgrimages to monasteries, visits to memorial houses, museums and other outings on this topic organized by the priest Laurenţiu Nistor.

An aspect that should not be omitted is the fact that Christian inmates who hold long-term or one-day positions, on a weekly basis (an extremely small number, approx.

5%) receive food from home, at their own expense or extract from the food received in prison (Case of Erlich and Kastro v. Romania, cited above).

Having talked to five inmates, with ages between 22 and 47, including one Adventist, one Catholic, two Orthodox and one Reformed, they said that while they were incarcerated at the Codlea Prison, in Braşov county, their religious freedom was observed. They have very good relationships with one another, regardless of the religion that they belong to and, in addition, regardless of the religion that these five inmates practice, they said that they feel the need to talk to a priest ("I feel great talking to my Orthodox priest, we have nice discussions, I appreciate it. He mentioned that he does not attend Orthodox services, but he watches shows of his religion broadcast on certain channels on TV", C.M.M. - Adventist; "This priest is helpful, he talks to us, tells us stories, makes himself useful to inmates. A lot of people come to church and talk to the priest" - H.A.I., Orthodox; "There is only one God, I attend Orthodox services, I was not denied to attend the religious ceremony organized by the Reformed pastor; the discussions that I have with the priest are very useful, and he keeps us close to God" - B.L.M., Reformed).

Last but not least, we would like to state that inmates receive religious-themed materials such as prayer books, the Bible, crosses provided by the Metropolitan Church of Transylvania, and they are not forbidden to receive such materials from any other religious cult.

Therefore, currently, the activity of religious denominations in prisons is one of the methods used to empower, re-educate, help convicts re-socialise, as mentioned by prof. Ioan Chiş: "Including religious assistance in treatment and re-socialisation programs also ensures the right of those who have minority religions, who can and must be protected so as not to change the attitude they have had since childhood or which they acquired as a result of conversion due to newer beliefs. It is very important that all those who attend religious re-socialisation projects are allowed and encouraged to work with convicts individually, in order to uproot violent conceptions, some even in the name of religious or mystical beliefs (Satanists). This would be the first step towards inoculating unanimously accepted moral values and therefore towards the observance of laws and leading a normal life."[6]

Freedom of conscience, opinion and freedom of religious belief is a fundamental right of any human being and, implicitly, of persons serving a custodial sentence but which is exercised under the conditions of legal provisions that ensure specific functioning of prisons and whose violation attracts the legal liability of those responsible for said actions. If the administration of a prison disregards or violates this right, convicts may lodge a complaint with the judge supervising the deprivation of liberty who will settle it after a mandatory hearing of the complainant, and if the complaint is not settled favourably, the inmate may address a court of law with an appeal within five days after the decision of the judge supervising the deprivation of liberty was ruled. The complaint is settled during a public hearing, with the summons of the appellant and administration of the prison, the inmate's presence is not mandatory, and with the participation of the prosecutor. The court of law rules a final sentence, in a public hearing, and the solution is then communicated.

[6] I. Chiş, Al.B. Chiş, *Executing criminal sanctions*, Universul Juridic Publishing House, Bucharest, 2021, p. 445.

3. Conclusions

Finally, we believe that the Romanian legislation and the way it is applied in places of detention comply with international standards on prison rules. Authorities are aware of the importance of the freedom of conscience, opinion and religion for the re-education of convicts, social reintegration, behaviour change, and finding as diverse solutions as possible in order to implement all of the inmates' rights will positively affect those who are in custody.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE ISSUANCE OF EUROPEAN INVESTIGATION ORDER

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Abstract

The chosen topic, through its novelty in the field of international judicial cooperation in criminal matters, presents both theoretical and practical importance through the procedural-criminal implications it determines.

The author analyzes both synthetically and analytically the functionality of the institution of the European investigation order, determining its content, application limits and subjects involved in the criminal trial report, highlighting the aspects of non-correlation of the objective with the intended purpose.

The conclusions materialized in proposals to complete and improve the existing legislative framework, represented by Law no. 236/2017.

Keywords: *international judicial cooperation in criminal matters, the European Investigation Order, Law no. 302/2004 on international judicial cooperation in criminal matters.*

1. Introduction

The European Investigation Order, which is an expression of the existing international judicial cooperation at European level, is part of the set of judicial procedural acts, representing an effective judicial instrument whose purpose is the swift administration of evidence in criminal proceedings.

Although the European Parliament has adopted the European Investigation Order since March 2014[1], in Romania, despite being a member of the European Union, the Directive no. 2014/41 was implemented only at the end of 2017[2].

From a procedural point of view, the reason and purpose envisaged by the European Parliament when adopting the European Investigation Order are based on the need to make judicial proceedings more flexible / efficient between Member States as part of investigative measures in order to achieve the standard of procedural speed which is necessary in the administration of justice.

Both in relation to the other legal rules governing judicial proceedings for international judicial cooperation and in relation to domestic judicial rules, the procedure for issuing and enforcing the European Investigation Order is of a special

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[1] At the level of the European Union, the European Investigation Order in criminal matters was adopted by Directive no. 2014/41/EU of 03.04.2014 of the European Parliament and of the Council, published in the Official Journal of the European Union.

[2] Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette of Romania, Part I, no. 993 dated 14.12.2017.

nature and is a matter of priority and strict execution[3].

From an objective point of view, the European Investigation Order is based on the realities and needs of judicial practice which are based on the principles of finding out the truth and legality of the entire criminal process.

In this sense, all European states, through their own criminal procedural legislation, acknowledge that *the activity of probation of criminal acts* occupies a central place, decisive for finding out the truth and for carrying out the act of justice.

Judicial proof is a decision-making body which includes the means of proof and the evidence obtained, the latter having an essentially deductive component, derived from the means of proof.

2. Procedural aspects of the European Investigation Order

A) The European Investigation Order is the decision-making procedural act by which *evidentiary activities* are requested to be performed or *the evidence* in the possession of the requesting state or *obtained* by the latter on the basis of a previous request *is transferred* as a form of judicial cooperation.

According to provisions of art. 268^{25} para. (1) of Law no. 236/2017, the object requested through the European Investigation Order may also consist of, taking any necessary measures to conceal, destroy, alienate, transform or move items that may be used as evidence", thus as a means and measure of protection / preservation of evidence.

Given the strictly restrictive object of the European Investigation Order, from which results its special character, through which it is not possible to request, for example, the communication of judgments given by the courts of the requested State in other criminal cases or acts concerning the duration of the execution of criminal punishments in the execution procedure [4].

In order to carry out these activities, the requesting judicial bodies have at their disposal other judicial instruments regulated by the international legal assistance provided by art. 228 letter b) combined with the provisions of art. 254 para. (2) of Law no. 302/2004[5], as amended, which have as their object the communication of procedural documents between Member States.

The European Investigation Order has a double procedural-criminal significance, it includes both a decision-making component, in the sense of a firm measure, expressed by the judicial body of the requesting State, and a component of clear and predictable determination of the means of evidence to be administered and the factual aspects to be clarified.

The practical function of the European Investigation Order is to request and carry out investigative measures by the execution of means and evidentiary procedures regulated by law (part of the judicial investigation) and to obtain and transmit

[3] In this sense, see the conclusion decision no. 431 of 19th July 2018, delivered by the HCCJ, having as object the resolution of the conflict of competence.

[4] In national judicial practice, there have been situations in which, contrary to the special provisions of the European Investigation Order, a Romanian court, using the European Investigation Order, has requested a Correctional Court in France to provide information on the length of detention of a convicted person, see in this regard, the conclusion of 13.12.2019 pronounced by the Oradea Court of Appeal, crim. s. and cases with minors, in the criminal case no. 1479/177/2018, published on www.portal.just.ro.

[5] Law no. 302/2004 on international judicial cooperation in criminal matters, was republished in the Official Gazette of Romania, Part I, no. 411 dated 27.05.2019.

evidence by the requested State (third party within the judicial proceedings initiated / invigorated by the requesting state).

In relation to the judicial role of the European Investigation Order it is obvious that the *evaluation and determination of the probative value*, *i.e.* the logical-rational activity of analysing the facts established after performing the requested activity, is the attribute of the judicial body in the requesting state.

This is an intrinsic limitation of the European Investigation Order related to the analytical side of the evidence, while the explicit limitation is the impossibility of establishing a joint investigation team and the joint gathering of evidence by such a team, explicit prohibition established by art. 2681 para. (1), letter a), the second thesis of Law no. 236/2017[6].

The ban on the establishment of joint investigation teams by the European investigation order itself is due to the following reasons:

- the establishment, activities and functional competences of joint teams, including officials from two or more Member States, can only be arranged on the basis of normative provisions, and not on the basis of a procedural act;
- the investigative activity, materialized in judicial acts, can only be carried out by judicial bodies, materially and territorially competent in relation to the object and place of carrying out the requested judicial activity;
- the requested investigative activity must be carried out in compliance with the principle of sovereignty / independence of the requested State, that is why procedural acts must be issued only by the judicial authorities of the requested State.

B) The analysis of the subjects involved in the issuance of the request and in the execution of the European Investigation Order involves some discussions, on the one hand determined by the bilateral nature of the obligations recognized between the states parties from which the concerned judicial bodies come, and on the other hand, the scope and competence of the bodies empowered to issue and execute the European Investigation Order.

Thus, while *the issuing authority* within the requesting / issuing State may be represented by both a judicial body and an administrative body competent in gathering evidence for the purpose of referral to judicial bodies (in which case, the request must be validated by the competent judicial body prior to its transmission), the executor, within the requested State, can only be *a judicial authority*.

C) The substantial, substantive conditions underlying the issuance of the European Investigation Order (opportunity, proportionality of the procedural measure and similarity with the conditions of the internal letters rogatory) are mandatory criteria, the analysis of which falls within the competence of the issuing State, while the judicial authority of the requested State, at the time of recognition of the European

[6] It is true that, both through art. 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Framework Decision 2002/465/JHA of the Council of the European Union, the establishment of joint investigation teams was regulated, but the purpose and activity of these teams is to ensure a high level of protection of individual liberty in a specific area within the European Union where members can move freely, consisting of police forces and customs authorities.

Consequently, the primary purpose of setting up joint teams comprising police officers and customs bodies from different countries of the European Union is to ensure a climate of order and social freedom between the Member States and, only in the alternative, to carry out legal acts in order to obtain evidence, only if it has arisen as a result of incidents related to the activity of monitoring the climate of order.

order, verifies the *formal criteria* of the procedural act.

The component of recognition of the validity of judicial acts issued by judicial bodies is regulated in the legislation of both states involved (issuing state and executing state) belonging exclusively to judicial bodies.

In this respect, the requested State, through its own judicial bodies, by virtue of its own authority, has the power to recognize a European Investigation Order and to ensure its execution by direct reference to its own judicial rules capable of providing procedural guarantees related to the essence of the principle of legality and fairness.

D) The substantial, substantive conditions to be met in order to issue or validate the European Investigation Order shall be based on a set of objective criteria which, in particular, justify the measure taken.

The Romanian legislator provided these criteria in art. 268^4 para. (1), letter a) and b) of Law no. 236/2017 respectively, *the necessity and proportionality* of the measure in relation to the purpose of the criminal proceedings, taking into account the rights of the suspect or defendant and the measure or measures ordered / indicated by means of the European Investigation Order may be decided, under the same conditions, in a similar internal case.

a) The criteria provided by the Romanian legislator include a series of criticisms that appear, in excess, in the activity of validating a European Investigation Order requested by an administrative body with responsibilities for verifying factual situations and gathering evidence or clues necessary in order to notify the judicial bodies.

In this respect, since in the procedure for issuing the European Investigation Order, the legislator imposes the condition that the rights of the suspect or defendant be respected, it would be inferred that this act can only be issued against passive procedural subjects, therefore only in a criminal case in which the initiation of the criminal investigation was ordered or in which the initiation of the criminal action was ordered.

However, this condition contradicts the attributes of preliminary control and the quality of administrative body with investigative role (in the broad sense of the term, for example NAFA, Court of Accounts, Environmental Guard, Customs Authority), which, pursuant to art. 4 of Directive no. 2014/41, has attributions and can carry out preliminary activities to gather evidence in order to notify the judicial bodies.

Also, art. 4 letter b) of the European Directive 2014/41, which is the seat of the matter of the European Investigation Order, according to which "the order may also be issued / requested by an administrative authority", therefore in civil / administrative procedures", seems to justify the reason for reintroducing in the Romanian legislation *the procedural documents prior to* the beginning of the criminal investigation, an institution previously regulated by art. 224 of the Code of Criminal Procedure of 1969.

The establishment of such a condition in the Romanian legislation seems to limit the bodies and the circumstances in which one can appeal to the judicial instrument represented by the European Investigation Order, therefore to restrict their scope regulated by Directive no. 2014/41.

These aspects produce direct legal effects within the judicial procedures based on the issuance and especially the capitalization of the European Investigation Order and, especially, within the criminal process, since, in art. 20 para. (2) of the Romanian Constitution, priority is given to the application of national law if national laws contain more favorable provisions (real

exception of the principle of priority of application in domestic law of international legal norms in case of discrepancies between domestic law and that of the international treaties to which Romania has acceded).

Consequently, since our criminal procedure legislation no longer recognizes the validity of the procedures carried out with the title of "preliminary acts" and, through the provisions of art. 268^4 para. (1), letter a) of Law no. 236/2017, includes passive criminal proceedings among the conditions to be met at the time of issuing the European investigation order, it is clear that acts issued or recognized by administrative and judicial authorities outside the criminal proceedings are null and void.

In the same key of reasoning, considering that the object of the investigation order requires the administration of evidence, on the basis of art. 102 para. (3) of Code of Criminal Procedure, the interested procedural subjects could invoke the nullity of the act by which the administration of a trial was ordered, therefore of the European order itself.

De lege ferenda, we propose the modification of art. 268^4 para. (1), letter a) of Law no. 236/2017, in the sense of replacing the terms "suspect" and "defendant", which, in our law, are qualified as subjects or procedural parties with the terms "suspected person", the equivalent of the term "suspect" (perpetrator / author of an action or omissions), that is, a person suspected of having engaged in a particular conduct, activity capable of producing certain criminal legal consequences, or "accused person", *i.e.* a person in whose name there is a complaint or a denunciation, but in respect of whom no criminal proceedings have been issued.

The proposed solution is supported even by the text of Directive 2014/41 in which, at art. 6 - marginally called "the conditions for issuing and transmitting a European Investigation Order", at para. (1), leter a) speaks of "suspects or accused", terms that confer a wider scope of coverage than those used in art. 268^4 para. (1), letter a) of Law no. 236/2017, making efficient and applicable art. 4, letter b) of Directive 2014/41.

Unfortunately, in the case of Romania, at the time of transposition of the content of Directive 2014/41 into national law, either due to a translation error (which is unlikely, given that the Directive was prior to the adoption of the law translated on the official website of the Journal of the Union), or with the intention of limiting / diminishing the effectiveness of the European Investigation Order, the terms "suspect and accused person" have been translated / transposed as "suspect and defendant", which, of course, seems unfortunate, especially since, in order to transpose, it took the Romanian state more than 3 years.

Moreover, art. 268^4 para. (1), letter a) generates confusion, considering that, at annex 11 of Law no. 236/2017, where the legislator described the content of the form of the European Investigation Order, the text refers to the "suspected or accused person", an inconsistency that needs to be corrected as soon as possible.

b) regarding the criteria *of the necessity* and *proportionality* of the issuance of the European Investigation Order, these are objective, substantial conditions specific to restrictive measures of subjective rights or freedoms.

The criterion *of necessity* must be analysed in the light of a democratic society based on the principles of the rule of law.

The need to request evidence by means of a European Investigation Order must contain an objective statement of reasons, *i.e.* the only way in which evidence can be obtained (for example, it is only on the

territory of the requested State and can only be obtained on that state territory).

Also, in order to analyse the *proportionality* of the measure ordered, the European Investigation Order must contain an enumeration of the rights and freedoms affected or the risks related to them (for example, indication of imprisonment and all existing criminal consequences in the present case).

E) With regard to the fairness of the procedures for obtaining evidence by means of the European Investigation Order, there are multiple criticisms in the judicial practice related to the exercise of the right of defence as part of legal aid and the right of the defence to question at the time of obtaining evidence.

Although Law no. 236/2017 does not provide anything regarding the procedural guarantees granted to interested parties, we believe that the issuing body, at the time of the hearing or at their express request, has the obligation to notify them, especially in cases where they have the quality of parties in the criminal proceedings, regarding the issuance and object of the European Investigation Order, as well as about the possibility of participation / assistance of their lawyer at the time of carrying out the evidentiary activity.

We believe that this activity is an implicit obligation of the judicial bodies to inform and present evidence, activities inherent in ensuring the exercise of the right of defence of the procedural subjects.

The effectiveness and exercise of the right of defence, provided by art. 92 para. (1) of Code of criminal procedure, in the composition of the legal assistance occasioned by the execution of the European Investigation Order - right provided by art. 6, points 1 and 3, letter b) The European Convention on Human Rights and art. 24 para. (2) of the Romanian Constitution - seem to conflict with the provisions of art. 268[14] of Law no. 236/2017, marginally called ,,confidentiality", which stipulates that "both in case Romania is an issuing state and in case it is an executing state, the Romanian authorities will respect the confidential nature of the investigation, according to Romanian law, to the extent necessary for the execution of the investigation measure. This obligation takes into account both the existence and the content of a European Investigation Order".

Unfortunately, the legislator, at the time of the implementation of the Directive, limited its regulatory activity only when taking over the art. 19 of Directive 2014/41, without describing concrete ways to ensure confidentiality, without indicating the gradual and proportionality of the restriction of the right of subjects to "know", which will generate contradictory judicial practices at national level, which will lead to a decrease in public confidence in the act of justice.

During the criminal investigation, such a restriction of the rights of the defense lawyer to consult the documents of the case, may be ordered, according to art. 94 para. (4) of Code of criminal procedure, for the entire period in which the client has the status of suspect, but, after the moment of initiating the criminal action, the restriction may not exceed 10 days.

However, we believe that, at the time of the judicial activity, the object of the European Investigation Order, its content and purpose cannot be hidden from the person to whom it refers, all the more so if the activity directly involves him/her (*e.g.*, hearing, confrontation, recognition from photographs, etc.), all these activities, must be carried out in compliance with procedural guarantees and the principle of loyalty under the sanction of nullity and exclusion of evidence.

In our opinion, confidentiality would be easier to achieve if the European Investigation Order targeted the *suspected* or

accused persons, in the meanings indicated above, which further strengthens the idea of amending art. 268^4, letter a) of Law no. 236/2017.

F) The remedies against the European Investigation Order issued by the Romanian authorities are provided, succinctly, in art. 268^{11} of Law no. 236/2017, within the same article being regulated the procedure of contesting the European Investigation Order within which Romania has the quality of requested executor state.

This overlap of normative hypotheses creates some confusion in judicial practice, the text attracting some confusion regarding the possibility and admissibility of challenging the European Investigation Order issued by the Romanian state before the judge of rights and freedoms. The analysis is of both theoretical and practical importance, given that, in essence, the challenge and the remedies relate to the substance of the right of access to justice, a defining component of the right to a fair trial.

Thus, in para. (2) within art. 268^{11} of Law no. 236/2017, it was provided that "the substantive reasons for the European Investigation Order may be challenged only before the issuing authority". We deduce that the contestation of the formal reasons (for example, the lack of form provided by the annex of the law or the lack of the issuer's signature) would be inadmissible, which has as immediate purpose the violation of the right of access to justice in Romania, the issuing country.

Also, imposing the contestation of the substantive conditions only before the issuing authority, seems to be a preliminary judicial procedure, similar to the one regulated by art. 336-339 of Code of criminal procedure, which brings the European Investigation Order closer to the order issued by the prosecutor, in terms of the legal regime.

For identity reason, we believe that this appeal must also be filed with the Prosecutor's Office even if the order was issued by an administrative body of investigation and was validated by a prosecutor. In the latter case, the appeal will be filed in the criminal case filed as a result of the validation report issued by the administrative body.

The legislator did not stipulate the procedural act for settling the appeal issued by the issuing body. We believe that this act can only be the order, if the issuer is the prosecutor, or the closing of the hearing, if the requesting issuer is the judge.

Against the solution issued by the Romanian judicial authority, as the issuing / requesting state, as a result of the exercise of the appeal, the legislator failed to clarify, explicitly, whether the given solution can be challenged before the judge of rights and freedoms, which also represents a form of violation / limitation of the right of access to justice provided by art. 21 para. (1) of the Romanian Constitution. In these circumstances, obviously, the appeal against the solution given by the issuing body becomes inadmissible.

3. Conclusions

De lege ferenda, it is necessary to adopt a much clearer and more effective procedure, which should also include the possibility to challenge the order of the prosecutor by which the appeal was settled, component part of the right of access to justice.

Also, *de lege ferenda*, it is necessary to regulate the possibility of contesting the European Investigation Order issued by the Romanian judicial authorities and for non-fulfilment of its formal conditions, because, for these reasons, it is absurd to challenge, the order before the judicial authorities in the requested country, when this right is

restricted in the issuing country whose nationality is usually held by interested parties.

From the content of para. (5) of art. 268^{11} of Law no. 236/2017, there is obviously a different legal treatment in terms of the legal-criminal effects deriving from the admission of the appeal or the remedy of the European Investigation Order.

Thus, without exposing objective reasoning, the Romanian legislator gave efficiency to the sanction of excluding the evidence based on art. 102 of the Code of criminal procedure only for the situations in which the appeal has been admitted in the executing state failing to provide the sanction or the applicable procedural remedy, in case the contestation by the issuing state of the order would be admitted.

For the fairness of the solution, *de lege ferenda*, we believe that it is necessary to regulate the sanction of nullity of the criminal procedural act in case the appeal against the European Investigation Order was admitted.

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