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ASSESSING THE INFLUENCE OF THE INDUCED TELEWORK ON WOMEN'S EMPLOYMENT IN PORTUGAL

Ekaterina REZNIKOVA [*]
Laura Tereza GOMEZ URQUIJO [**]
Marta ENCISO SANTOCILDES [***]

Abstract

The COVID-19 pandemic has triggered significant shifts in labor markets worldwide, notably an increase in remote work even as restrictions have eased. This rise in telework has led employers to reconsider its viability and feasibility compared to pre-pandemic norms. However, this sudden transition, coupled with gaps in social policies, has disproportionately impacted existing issues such as gender disparities and labor market inequalities. To explore these dynamics, qualitative interviews were conducted with fifteen Portuguese experts specializing in labor and gender issues, alongside fifteen women who experienced a sudden shift from office-based work to remote work. The study examined how this abrupt change affected women's work processes and contributed to the growing trend of feminization of telework, where more women opt for remote work to balance paid and unpaid responsibilities like household and childcare duties. Data analysis was conducted using MaxQD software. This paper fills a research gap by focusing on female employment, a topic often overlooked in existing literature that predominantly covers general employment trends. The findings shed light on the increasing participation of women in remote work in Portugal, underscoring its negative impact on efforts to create a fairer and more inclusive labor market. Moreover, the study highlights how female telecommuters in Portugal often struggle with blurred boundaries between work and personal life. The findings underscore the need for transformative policies that prioritize positive discrimination in favor of female teleworkers.

Keywords: *female employment, gender gap, labor market, Portugal, telework.*

1. Introduction

Gender disparity in the labor market is a pervasive issue that impacts women's career trajectories from the onset of employment and continues throughout their professional lives, influencing job promotions, salaries, and access to social security benefits[1]. The Covid-19 crisis in Portugal has brought to light the significance of fostering connections between remote and on-site workers, particularly in addressing and mitigating potential gender gaps that may emerge in telecommuting arrangements. Labor market is a profoundly intricate and multifaceted institution, marked by hurdles for women starting from the stage of preparation (education

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[1] See Moraru G., *Gender equality in job classification and promotion: An analysis based on collective bargaining in Castilla-La Mancha*, 2022. https://institutomujer.castillalamancha.es/sites/institutomujer.castillalamancha.es/files/documentos/paginas/archivos/la_igualdad_de_genero_en_la_memoria (last time consulted 03.05.2024).

inequality), continuing with lower rates of entry for female workers comparing to men, worsening upon a double burden of additional reproductive labor and up to issues of retirement (pension gap)[2].

The advancement of technology and digitalization of the labor market have redefined employment as a number of opportunities which can be done presentially, remotely or in a hybrid (mixed) mode[3]. In this 'atypical employment'[4] personal productivity and advancement, as captured by supervisors, have been maintained as an important indicator for maintaining the job and career progression[5].

The paper covers the impact of induced telework on female employment in Portugal, examining the implications of telework adoption during the COVID-19 pandemic on women's participation in the labor market. It also discusses legal changes related to telework and proposes policy suggestions to address potential gender-related challenges and foster gender equality within the telework framework.

The studied matter is of extreme importance as it addresses potential inequalities that may arise from the widespread adoption of telework, particularly focusing on its impact on female employment. Ensuring gender equality in telework practices is crucial for promoting inclusivity and addressing any disparities that may emerge in the labor market due to remote work arrangements.

The current study intends to answer this matter by conducting a comprehensive assessment of the impact of induced telework on female employment in Portugal. This involves delving into the unique context of telework implementation in the country, analyzing legal changes related to telework, and proposing policy recommendations to promote gender equality within the telework framework.

The paper contributes to the existing specialized literature by providing insights into the specific context of telework in Portugal and its impact on female employment. It also analyzes recent legal changes related to telework and offers policy recommendations tailored to address gender-related challenges within the telework landscape. This adds to the body of knowledge on telework and gender equality, potentially complementing existing studies and informing future research and policy initiatives in this area.

2. Challenges in evaluating the effects on the labor market

Evaluating the impact of the COVID-19 pandemic on the labor market presents challenges due to limited gender-disaggregated data, as highlighted in the referenced sources. The difficulties in assessing the effects on society stem from incomplete indicators of income inequality and poverty risk, as noted in the World Inequality Report in 2022[6], which

[2] See Schneider M., *Labor-Management Relations and Varieties of Capitalism*, GLO Discussion Paper, No. 934, Global Labor Organization (GLO), Essen, 2021.

[3] See Donnelly R., Johns J., *Recontextualising remote working and its HRM in the digital economy: An integrated framework for theory and practice*, The International Journal of Human Resource Management, 32(1), 1-22, 2020.

[4] See Westhoff L. *Does Atypical Employment Come in Couples? Evidence from European Countries.* Social Indicators Research, 2024.

[5] See Yarberry S., Sims C., *The Impact of COVID-19-Prompted Virtual/Remote Work Environments on Employees' Career Development: Social Learning Theory, Belongingness, and Self-Empowerment,* Advances in Developing Human Resources, 23(3), 237-252, 2021.

[6] See *World Inequality Report 2022*, Harvard University Press.

emphasizes contemporary disparities in income and wealth, slow progress in gender equality, and the influence of national policies on ongoing inequality. However, current understanding is primarily focused on short-term effects and emerging trends, limiting a comprehensive analysis of the pandemic's societal repercussions.

Despite extensive global research on pandemic impacts on labor markets, a lack of comprehensive data on gender disparities persists. Existing data often excludes individuals without internet access or literacy, perpetuating gender, economic, and geographic disparities that hinder a thorough analysis of labor market inequalities. Women, disproportionately affected by pandemic-related employment challenges, are inadequately represented in data collection and subsequent analysis [7], further complicating efforts to address labor market issues effectively and impeding informed policy-making due to data limitations.

The scarcity of gender-disaggregated data restricts data availability despite the recognition that women are among the most affected groups during the pandemic. This limitation constrains the utilization of data for evidence-based policy-making, thereby restricting approaches to tackling labor market challenges. Notably, this study adopts a binary understanding of 'gender' as males and females within gender-disaggregated data[8].

An essential aspect for enhancing understanding and formulating effective policy responses lies in conducting an intersectional analysis that integrates quantitative and qualitative methodologies while considering variables such as gender, age, and migration status. This approach would provide a more nuanced comprehension of the impact and facilitate more targeted policy interventions. Despite acknowledging the dearth of gender-aggregated data, this study maximizes all available sources to achieve its analytical objectives.

3. COVID-19 and disruption: Portuguese labor market in imbalance

The impact of the COVID-19 pandemic on the Portuguese labor market has been extensively studied, with Lima providing valuable insights into this complex situation[9]. In 2020, Portugal experienced a notable increase in the national unemployment rate, rising from 6.9% at the beginning of the year to a peak of 8.1% in the third quarter before gradually declining. By the second quarter of 2021, the unemployment rate had returned to pre-pandemic levels at 6.8%. However, it is crucial to acknowledge that these figures do not fully capture the structural changes occurring within the labor market.

The absolute number of unemployed individuals surged from approximately 316000 to 392000 between the end of February and April, marking a 24% increase and causing significant market disruption. The nadir of the working population, recorded in May 2020, stood at 4.5 million

[7] See Flor. S.L., Friedman J., Spencer C., et al., *Quantifying the effects of the COVID-19 pandemic on gender equality on health, social, and economic indicators: a comprehensive review of data from March 2020 to September 2021.* March 2022 The Lancet 399(10344).

[8] See Global Research Council, *Gender-Disaggregated Data at the Participating Organisations of the Global Research Council: Results of a global survey, 2021.* https://globalresearchcouncil.org/fileadmin/documents/GRC_Publications/Survey_Report__GRC_Gender-Disaggregated_Data.pdf (last time accessed 03.05.2024).

[9] See Lima F., *Um ano de pandemia: uma breve síntese - 2020-2021. A year of pandemic: a brief overview*. 2021. Instituto Nacional de Estatística, I. P. Monografia.

individuals, constituting 46.1% of the population.

Data from the European Commission projected an average annual unemployment rate of around 7.7% for Portugal in 2020[10]. However, Portugal exceeded this forecast, experiencing substantial impacts during the initial year of the pandemic.

A substantial reduction in working hours was observed in the Portuguese economy during 2020-2021, with a notable decline of 14.9% compared to a modest increase of 1.8% in the preceding 12 months before the pandemic struck.

The concept of underutilization of work provides a comprehensive perspective on the labour market beyond just unemployment rates. This indicator encompasses individuals within the working age bracket (15-64) who are not employed for various reasons, including underemployed part-time workers and those inactive but seeking employment. In Portugal, an average of 761000 individuals were affected by underutilization during the first year of the pandemic, representing an 11.7% increase from 2019 and accounting for 17% of the active population.

In terms of income rates, the average monthly gross compensation per worker in Portugal saw a modest increase of 3.2% during the initial year of the pandemic compared to the previous year, reaching €1,014 (compared to €982 in the corresponding period). This rise does not signify overall salary growth but rather reflects shifts in job structures and compensation dynamics within approximately 4.1 million job positions covered by Caixa Geral de Aposentações.

The COVID-19 pandemic has significantly impacted Portuguese labor markets, manifesting in elevated unemployment rates, reduced working hours, increased underutilization of work, and alterations in income rates due to changes in job distribution and compensation structures.

4. Impact of induced telework on female employment in Portugal

The labour market dynamics in Portugal exhibit a dual structure characterized by a substantial prevalence of temporary employment contracts and a notable proportion of long-term unemployed individuals, including those disengaged from the labor force for extended periods[11]. The quest for employment in Portugal is protracted, with candidates typically taking an average of 22 months to secure a job, double the duration compared to other EU nations[12]. This employment landscape, marked by vulnerability and a high incidence of job losses during crises, underscores the fragility of the Portuguese labour market.

Pre-existing inequalities in Portugal, particularly concerning the unequal distribution of unpaid work encompassing domestic responsibilities and caregiving duties, were exacerbated by the COVID-19 pandemic[13]. The crisis heightened the

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[10] See Eurofound, *Telework and ICT-based mobile work: Flexible working in the digital age, New forms of employment series*, 2020a, Publications Office of the European Union, Luxembourg.

[11] See Nunes, N., *Governmental response to the COVID-19 pandemic in Long-Term Care residences for older people: preparedness, responses and challenges for the future: Portugal*, 2021. Colabor-Portugal.

[12] See Duarte, V., *The paradox of the Portuguese labour market: high long-term unemployment and record job vacancies*, 2023, CaixaBank research.

[13] See Tavares Oliveira F. et al., *Teleworking in Portuguese communities during the COVID-19 Pandemic*, July 2020 Journal of Enterprising Communities People and Places in the Global Economy; Mamede R., Pereira M. and Simoes A., *Portugal: A quick analysis of the impact of COVID-19 on the economy and in the business market.* 2020. ILO – Lisbon.

demand for unpaid work, disproportionately burdening women and weakening their position in the labour market. The gendered impact of the pandemic underscored existing disparities, perpetuating inequalities within Portuguese society[14].

The post-pandemic rebound period in 2021-2022 unveiled a distinctive scenario in Portugal where there was a higher number of economically active women compared to men. Despite this higher participation rate, women encountered challenges in securing employment. While women constituted 64.6% of economically active individuals up to 64 years old, their employment rate stood at 60.5%, lower than men at 67.2%. Additionally, women faced a higher unemployment rate at 6.4% compared to the overall rate of 5%[15]. The Caritas report of 2022[16] highlighted persistent labour market issues in Portugal, including underutilization of available workforce, elevated youth unemployment rates, and regional disparities.

Telework emerged as a pivotal response to the pandemic in Portugal, with data from the National Institute of Statistics revealing a substantial increase in teleworkers during the latter half of 2020, exceeding one million employees and constituting 21.3% of the employed population. Despite initial skepticism regarding Portuguese workers' telework capabilities, the adoption rate surged from 11% to 22%, facilitating white-collar worker retention[17].

The sudden transition to telework brought about significant shifts in work patterns in Portugal. While teleworking was less prevalent before the pandemic compared to other EU-27 countries due to employment structures and qualifications[18], data from COLABOR in 2021 indicated that women exhibited higher telework capacity during and post-crisis. Economic crises tend to amplify existing inequalities; thus, despite increased access to telework for women post-pandemic, they continued to bear the brunt of unpaid domestic responsibilities.

The COVID-19 crisis exacerbated gender and social disparities in Portugal, ushering in a new cycle of inequality and precarity. Efforts to mitigate these challenges led to the implementation of new or revitalized policies. The European Commission's financial assistance aimed at preserving economic activities and preventing mass job losses played a crucial role in supporting member states like Portugal during this tumultuous period.

In conclusion, the COVID-19 pandemic and induced telework measures have significantly impacted female employment in Portugal, magnifying existing inequalities and introducing novel hurdles. While telework presented opportunities for some women, it also underscored the unequal burden of unpaid work and emphasized the necessity for targeted policy interventions to address gender disparities within the labor market.

[14] See Lima F., *Um ano de pandemia: uma breve síntese - 2020-2021. A year of pandemic: a brief overview*. 2021, Instituto Nacional de Estatística, I. P. Monografia.

[15] See Caetano M., *Já há mais mulheres disponíveis para trabalhar do que homens*, 2022. https://www.dn.pt/dinheiro/ja-ha-mais-mulheres-disponiveis-para-trabalhar-do-que-homens--14819572.html (last time consulted on 03.05.2024).

[16] See Caritas Portugal, *Cares! National report on poverty*, 2022.

[17] See Tavares Oliveira F. et al., *Teleworking in Portuguese communities during the COVID-19 Pandemic*. July 2020 Journal of Enterprising Communities People and Places in the Global Economy.

[18] See Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, 2017, Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva. http://eurofound.link/ef1658 (last time accessed 03.05.2024).

5. Advancing telework regulations in Portugal

In 2021, the Portuguese government enacted legislation to regulate telework, aiming to establish a standardized framework for remote work practices within the country. This new law introduced key provisions designed to safeguard the rights and interests of teleworking employees.

A pivotal component of this legislation is the mandate for employers to reimburse teleworkers for any expenses incurred due to their remote work setup. This provision acknowledges the potential additional costs faced by teleworkers, such as heightened utility bills or the procurement of office equipment, ensuring that employees are fairly compensated for these expenditures. By enforcing reimbursement obligations, the law acknowledges and addresses the financial challenges that teleworkers may encounter, promoting equity and fairness in remote work arrangements.

Furthermore, the legislation recognizes the unique needs and vulnerabilities of specific groups of workers. Individuals belonging to these categories have the right to request telework arrangements without requiring prior approval from their employers. Among the identified vulnerable groups are parents with children under 8 years old, individuals experiencing domestic violence, and workers responsible for caring for elderly family members.

By acknowledging these distinct circumstances, the legislation underscores a commitment to safeguarding the rights and welfare of employees navigating challenging personal situations. Telework offers flexibility and support to individuals managing additional caregiving responsibilities or seeking a safe work environment away from potentially harmful conditions. The inclusion of these provisions reflects an acknowledgment of the diverse workforce needs and aims to ensure that remote work is accessible and accommodating for all employees.

The new telework law in Portugal signifies a significant advancement towards fostering an inclusive and equitable work environment. By mandating expense reimbursement for teleworkers and granting vulnerable employees the right to request remote work arrangements, the legislation establishes a framework that prioritizes the well-being and rights of individuals engaged in teleworking roles. These measures contribute to cultivating a sustainable and supportive labor market that addresses the evolving demands and complexities faced by workers in today's digital era.

6. Measuring the impact of digitalisation: empirical analysis

6.1. Methods

This qualitative study reports the findings of individual in-depth interviews with 15 female workers and 15 specialists using open-ended questions which were conducted in Portugal in 2023 and lasted for 4 months. Perceptions of specialists and workers on the issue were collected via a questionnaire that was aiming to reflect on the personal assessment of specialists who work with issues of gender and labor in Portugal as well as of females who to switch from onsite mode of work to a remote one. Opinions were collected and the content analysis was applied via MaxQDA.

This investigation uses an exploratory approach as multiple sides of the issue are investigated. In order to look into the challenge that women who switch to a remote mode of their professional activity and attitudes of professionals on that, the interviews were transcribed in a traditional

way, however, MAXQDA which is based on a classification system where data is organized into previously defined categories, was applied to texts of interviews. The ability to write notes, as well as to quantify and visualize the results determined the choice of software.

All the interviews were audio recorded and the transcripts were open coded by a researcher. Results: The response rate in this study was 73.65%. The following themes were extracted from the views and opinions shared by the specialists: the abrupt change of working conditions due to the pandemic; peculiarities of telework for female workers; legal framework of telework; feminization of telework; future of telework in Portugal. Opinions shared by female workers included their personal assessment of the abrupt change of the mode of work and its flexibility; individual benefits of new adopted law; preferences and choices concerning the organization of work; anticipative notions whether telework is here to stay.

The coding was done to make a qualitative content analysis. The categories were concept-based, i.e., defined before the actual analysis of the empirical data starts. Table 1 in the appendix shows the categories and statements of female employees that are tagged under them.

6.2. Study design and participants

This is a study with a content analysis approach which has been conducted to discover the various aspects of the induced work for female professionals in Portugal with the onset in March 2020 and ongoing. Participants were selected based on inclusion criteria through purposive sampling among female workers who were exposed to the change of the mode of work and specialists dealing with issues of labour and gender on a daily basis. Female workers include women with an age range of 18–65, having the ability to understand and transfer concepts to a researcher and experience of working onsite and remotely. Their family and maternity status differs. Exclusion criteria for female workers consisted of: volunteer desire to work remotely, as well as withdrawal and reluctance of the respondent to continue participating in the study. Experts cohort includes those specialists whose expertise has a link with digitalization and understanding of transformation that occurred due to it with the labor market in Portugal.

All individual and group interviews were conducted by one of the authors of the paper as a Ph.D student in human rights with the focus on labor rights dynamics and a history of participation in the classes of qualitative research methodology and the use of qualitative analysis software. She also has enough experience in the field of labor policies. All steps for data recording and data analysis were conducted under the supervision of the faculty members with several years of qualitative study.

6.3. Data collection

After selecting the subjects through the literature review according to the criteria for inclusion in the study, first, the purpose and reasons for the study were explained to each participant and, the times of the face-to-face interviews were set up as desired for the participants. Initially, a pilot interview was conducted, which was analyzed and helped to shape the interview guide and how to do the study. Open-ended questions were used to conduct interviews. General questions were first asked to express their individual experiences. In both types of interviews a similar interview guide was used. Examples of these questions for specialists are: ‘What kind of transformation of employment conditions happened due to the requirement

to telework upon the outbreak of the virus?', 'Was telework flexible and sufficient to incorporate all women's duties (homecare, childcare, elderly care) in their schedule during the pandemic?', 'Upon the pandemics, has the dynamics of feminization of telework changed (speeded up, slowed down, introduced a new direction of development)?' Examples of questions for workers are: 'Do you think that the induced telework has been beneficial for your employment?', 'What kind of difficulties the remote work brought to you and how your employer reacted on it?', 'What should be introduced to the regime of remote work to make it more adequate for your everyday professional life?'. To document the data, interviews were first recorded and then transcribed at the right time. Field notes were used as much as possible and non-verbal data such as tone and gestures was also recorded. Interviews were conducted at the workplace of the participants, in an isolated room without the presence of anyone except the participant or via Googlemeet. A code and nickname were assigned to each participant. Interviews lasted from 30 min to 60 min. A total of 15 individual interviews of experts and 15 individual interviews with female workers were conducted. No interviews were discontinued. One of the interviews was interrupted due to ambient noise and was repeated a few days later.

6.4. Data analysis

Data was analyzed based on content analysis with a conventional approach. The advantage of this method was to collect data from the participants directly without imposing any theoretical views by the interviewer. Data analysis was performed with each interview MAXQDA, after recording on paper using. Identified codes were the result of semantic units of the participants' comments.

Qualitative coding was used to analyze the collected data[19]. In the process of analyzing qualitative data after categorization of the codes and eliminating similar codes, 52 codes were obtained in 16 sub-sub-categories, 7 sub-categories, 3 main categories.

6.5. Theme of perceived difficulties of telework.

This theme consists of 2 categories, 5 sub- categories and 12 sub- sub-categories. The main categories consist of individual and socio-economical difficulties.

6.6. Individual difficulties and perceptions of female workers

Individual difficulties include a main category of individual difficulties which female employees meet while teleworking. This main category is extracted from 2 subcategories and 5 sub-sub-categories: inabilities and additional needs (physical and psychological) and mental difficulties (lack of time, lack of motivation and information, internal inhibitors).

In terms of inabilities and additional needs during the remote work mode, most participants referred to the constraints which are resulting from physical and functional conditions of working from home. They noted:

'The main change of the working conditions that has happened is that the work space and life space united and collided' (r.11)

[19] See Charmaz K., *Constructing grounded theory: A practical guide through qualitative analysis*, Sage, 2006.

'*Now I wake up and I am immediately at work.' (r.7)*

'*Since the work moved to my kitchen table, sometimes I simply can't disconnect at the end of the working day and continue thinking about work being in the kitchen' (r.2).*

In terms of the assessment by female workers of the organization of telework and its flexibility one of respondents said:

'The remote work seems to be a flexible arrangement, however, if I consider all the work that I do professionally and non-professionally it turns into a never-ending working day with no break and before at least I didn't work going to the office' (r.3).

The respondents showed a concern and weak understanding of the new legal regime of telework:

'I heard about a new law, but I still pay on my own for the electricity and wifi, the company does not reimburse it.' (r.7, r.15)

On the feminization of telework as a tendence of women to work exclusively in a remote mode, one respondent explicitly showed her concern of becoming an invisible worker:

'*Being at home helps me to manage many tasks but I am not sure that this way I can grow professionally' (r.6).*

Future of telework is an unknown concept for most female respondents, however they unite in a point of view that telework is here to stay.

6.7. Assessments and perceptions of specialists

The example of coding is given in table 2 (in the appendix).

All specialists agree that telework is a mode that has become an inevitable element of the organization of work. However, some of them focused on the point that it hasn't changed anyhow the structure and content of responsibilities at home.

'One hundred years ago women were responsible for washing clothes in rivers, now devices do it, but women are still those who take care of it and they do it while doing their work remotely' (r.16).

Several specialists noted that *'telework has to do with bringing women back home'* in a sense that it is a retroactive process, negatively influencing the equality of rights (r.19, 25, 29).

As for the future of telework, experts notice the following:

'Digitalization is a speedy process, and it is difficult to anticipate how it goes and which eventual consequences it will have' (r.20).

'There is a clear capacity that more and more people will telework in the nearest future' (r.23).

On legal novelties there are opposite opinions in a way that some experts consider positive discrimination of female workers as a step forward r. 16, 21) as long as others think that it is unacceptable (r.27,29).

The most concern experts show towards a mental health of workers as the isolation is an intrinsic element of teleworking even for workers who live with their family as it goes far beyond the physical isolation:

'The disruption of contact with other colleagues can bring a high level of anxiety that later on can end up in a burnout that will have a direct impact on the productivity' (r. 24).

'Women tend to have a slower pace of career advancement and the remote mode of work makes it even more difficult to grow professionally and eventually may bring a lot of consolidated distress and disappointment' (r.16).

*F*eminization of telework as a tendence of women to choose the remote jobs among the others was also reflected and specialists consider the concept as the crucial one as female workers take such a

mode of work as a form of a conciliation, an attempt to facilitate the work-life conflict for women, however, one expert (r. 21) *noted that 'it is not a case at all as it brings several structural disadvantages such as the loss of separation between private and professional and longer shifts that women tend to finish after those, who they take care off, fall asleep'.*

The general idea of several specialists was that telework and the impact that it brings to inequalities and female employment are extremely dynamic concepts and they should be observed and followed as by now it is impossible to conclude definitively whether it is benevolent or not. However, based on the present data and existing studies, the suggestions to the existing policy can be given:

'Legislator is to consider females as special actors of the labour market as numbers continuously show that women have to cope with a double or, sometimes, a triple burden comparing to male employees' (r.30)

'The capacity of the labour market to offer more remote jobs is not a stable figure, that is why we can only guess how it is going to be in the following years and how many women will be able to join and rejoin a labor market under telework. No doubt that it is a positive tendency for females, however, it is possible to make the regime of telework more comfortable and adequate for all categories of workers meaning not leaving a space for uncertainties and voluntarism' (r.27).

7. Conclusions

This paper enters into the debates about 'telework' and 'female employment' in neoliberal labour market by exploring the ways in which female workers have to make compromises in their professional track, in the context of Portuguese employment. While there is no doubt that being included into the labour market is central to female employment, gendered and personal expectations regarding what this engagement means are dissatisfying and upsetting for women, in spite of any attempt that working remotely might bring. In 'careless' companies neither subervisors nor human resource management consider that female workers also need to be gratified gradually, and they are simply expected to intensively perform the labor needed for production[20]. Our analytical choice to focus exclusively on women is supported by the understanding that gender gap so far is an intrinsic element of the modern labor market[21]. Thus, by looking at the experiences of women, we were not claiming that the challenges of telework exist only for women, nor that they represent a unified feminine (or feminist) standpoint[22]. Our objective was to highlight the experiences of women in Portugal with regard to their endeavors as professionals in a pandemic time. Based on the data analysis, the study suggests that the Covid-19 crisis has worsened gender disparities in Portugal in the short term, potentially leading to negative long-term effects on female employment. This is primarily due to the emergence of new precarious conditions and the absence of gender-sensitive responses.

[20] See Afota M., Provost Savard Y., Ollier Malaterre A., Leon E., *Work-from-home adjustment in the US and Europe: The role of psychological climate for facetime and perceived availability expectations,* The International Journal of Human Resource Management, 34(14), 2765-2796, 2023.

[21] See Gravel N., *Impacts of Gender and COVID-19 on the Division of Labour*, Carleton University, 2023.

[22] See Alexander R., *Spatialising careership: towards a spatio-relational model of career development,* British Journal of Sociology of Education, 44(2), 291–311, 2023.

Indeed, the existing literature on the impact of telework on employment offered initial evidence that males are also affected by the atypical jobs[23]. Little is known in details, however, about how men deal with the growing emotional distress and unclarity of career advancement as teleworkers, a gap that requires future research. Adopting a broader understanding of female remote work, our study also opens new investigative avenues to explore how the remote mode of work shaped career track strategies to navigate their professional responsibilities and expectations while being apart from colleagues and supervisors. Studies investigating the impact of the change of mode of work towards a remote one on women demonstrated how female workers found themselves torn between trying to create a perfect environment for conciliation of the double burden and a desire to be acknowledged as professionals, always experiencing a lack of recognition for any labor[24]. Our paper adds to this debate by showing how women's commitment to duties remotely can be linked to a number of different consequences, including the distress with mode of work and companies' gendered expectations of accepting less, the consumer culture of human resource management, the lack of adequate institutional understanding of telework management and a genuine commitment to solve life-family conflict. Interviews conducted with female workers who transitioned to telework revealed a mix of uncertainty and satisfaction, with telework offering relative flexibility. Similarly, expert interviews highlighted concerns about telework being misconstrued as a solution to work-family conflicts for women, as well as the growing desire among women to work remotely, potentially reinforcing traditional gender roles.

In the case of Portugal, given the gendered precarity in the labour market and the importance of being included into the labour market under any price, for many women, the negative impact of feminization of telework might irreversibly compromise their careers. It is essential to acknowledge the inherent instability and job insecurity experienced by female workers in Portugal. We are aware, however, that not all women were equally affected by the disruptions caused by the pandemic and the massive shift to telework that was maintained after the end of the sanitary crisis. The scholarship has shown that existing inequalities experienced by sexual minorities, racialised women, single mothers and mothers with disabilities are exacerbated upon new dimensions of segregation emerge[25]. Thus, the lack of diversity in those sectors of work that can adopt telework reproduced in our sample is a key limitation in our findings. We agree that telework can constitute a path to conciliation and certain flexibility to many families. However, 'the price' of such a path also encompasses a big volume of distress that can deplete women's well-being. Thus, the tendency of female workers to look for a necessarily remote job, without any clear understanding and instruction on how they can proceed with their professional development exacerbate their mental and emotional distress. Taking up Donnelly and

[23] See Eurofound, *Working conditions and sustainable work: The rise in telework: Impact on working conditions and regulations*, 2023.

[24] See Watson A. D., *The juggling mother: Coming undone in the age of anxiety,* UBC Press, 2020.

[25] See Lanau A., Lozano M., *Precariedad laboral y dinámicas de pobreza en hogares con niños.* Perspectives Démographiques, Núm. 027, 2022.

Johns´ idea[26] of humanized human resource management, we argue that, when management is informed by an ethic of care that also considers workers' needs, and not by a unilateral expectation of productivity, employees are better motivated and empowered by the process instead of experiencing invisibility and feeling of being lost and abandoned. Professional work underpinned by an ethic of responsibility for employees is committed to alternative forms of professional interactions, transforming enterprises into a place of mutual success and growth[27] instead of a marketplace. This allows for the creation of a true productive community supported by a network of reciprocal care, in which female workers' needs are also taken into account.

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[26] See Donnelly R., Johns J., *Recontextualising remote working and its HRM in the digital economy: An integrated framework for theory and practice*, The International Journal of Human Resource Management, 32(1), 1-22, 2020.

[27] See Cewinska J., Striker M., *Managers' Interference with Employees' Lifestyles While Working Remotely during COVID-19 Pandemic.* Sustainability, 15(15), Faculty of Management, University of Lodz, 90-136 Lodz, Poland, 2023.

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APPENDIX

Table 1. Assessment and perceptions of female workers

Meaning unit	Code	Sub-subcategory	Subcategory	Main category	Theme
There is no division between my own space and my professional life as there is no space for that in the apartment (r1)	Collision of home chores and professional work	Lack of time	Mental issues	Individual issues	Perceived issues
I wish I could have more real - life contact with my colleagues. Sometimes before a zoom meeting we share details of our personal life, but I know that other teams don't do even that. (r1)	Lack of communication with colleagues and management				
Sometimes working remotely, I feel like doing a lot, but I am so bored working from home, and it makes me lazy (r2)	Lack of readiness and motivation	Lack of information and motivation			
I don't know enough about the new law on telework and am afraid to ask for reimbursement of wifi and electricity.	Lack of enough information				
It is embarrassing to ask for special treatment at work as you are a woman and mother.	Shame	Internal reflections			
Sometimes I am not sure that I do the task in a right way and it is awkward to ask my manager since I am remote (r5)	Negative thought				
I am scared that I will be called back to work in office and I won't manage to take care of my elder mother	Fear				
I think that if I am called again to the office, I might miss working from home (r.7)	Worrying				

My company is going fully remote and I feel uncertain about how it will function eventually (r5)	Anxiety				

Table 2. Assessments and perceptions of specialists

Meaning unit	Code	Sub-subcategory	Subcategory	Main category	Theme
Women mistakenly can consider telework as a win-win situation that can make them feel good and effective in any environment - home and professional one. It leads to the situation that they chase only remote jobs excluding the opportunity of working in the office or in a hybrid way (r.21).	Transformation of career choices.	Feminization of telework	Collective unconscious and conscious issues	Professional observation mixed with individual observations	Reflection based on professional experience
The development of telework is to produce a positive effect on rural areas as employees including female ones tend to come back to their native towns and cities from capitals as they are able to work from there and support their families, obtaining a more peaceful environment (r.18).	Capability of future telework	Future of telework			
Mentioning a female worker as a special subject of law can lead to an ambiguous situation and undesired consequences for labor markets, giving preferences to a wider number of workers without any substantial reason for it (r. 27)	Positive discrimination and gender perspective in legislation	Legal adequacy			
The new law gives an overview of all additional costs which have to be a burden of an employer, however there is no monitoring over that (r.23).	Mechanism of new law on telework				

Teleworkers tend to be kind of lost for their colleagues and managers who work in the office (r. 17)	Professional loneliness	Peculiarities of telework conditions			
Living in a modern world, workers obtain mostly a tiny or small environment which is frequently not adjustable for both work and recreation. This way, a kitchen table becomes an office one (r. 25).	Merge of home and professional environment				
Management tends to involve mostly those subordinates with whom they have direct personal contact. Remote workers have to be extremely initiative to be noted and invited, especially if we talk about female workers (r.19).	Invisibility of remote workers				
Being on a run of home and professional chores, female employees tend to leave tasks for a calm time when everybody fall asleep in their residencies (r.30)	Longer shifts				
Feeling themselves further from the office than those who work presentially, female workers tend to underestimate themselves and feel lost concerning a further professional responsibility. This way, they are losing potential opportunities for their talent development.	Vague understanding of career growth				

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EUROPEAN UNION GEOGRAPHICAL INDICATIONS FOR CRAFT AND INDUSTRIAL PRODUCTS. A COMPARATIVE LOOK AT GEOGRAPHICAL INDICATIONS FOR OTHER TYPES OF PRODUCTS

Cristiana BUDILEANU[*]

Abstract

The geographical indications are part of intellectual property system, and their importance was proven over time both from consumer protection point of view, but also from business point of view. Since almost the end of 2023 we have a new EU Regulation which regulates the GIs for craft and industrial products at EU level and this paper is proposing to present the final legal framework and the provisions implemented regarding the products that will be object of the protection, the registration, opposition and cancellation procedures, the actions against which the registered GIs are protected, the new role of the EUIPO and other novelty aspects in comparison with (1) the legal provisions under the proposal of the EU Regulation, (2) the existing GIs for other types of products and with (3) the new proposal for GIs for wine, spirit drinks and agricultural products.

Keywords: *agricultural products, European Union Intellectual Property Office, coexistence, trademarks, domain name, Romania.*

1. Introduction

On October 18, 2023, the European Parliament and the Council adopted the EU Regulation on the protection of geographical indications for craft and industrial products ('EU GI Regulation for craft and industrial products') and it was published in the Official Journal of the EU on October 27, 2023[1] entering into force on November 16, 2023[2]. However, the EU GI Regulation for craft and industrial products will be applicable to EU member states starting with December 1, 2025, except from some provisions which entered into force on November 16, 2023[3], namely: (1) derogations from national stage, (2) establishment of an advisory board, (3) adoption by the Commission of implementation acts setting out the IT architecture and presentation of the Union register, (4) IT system, (5) establishment of the Committee for Craft and Industrial Geographical Indications, (6) exercise of the delegation by the Commission, (7) obligation of EU Member States to inform the Commission about their choice to

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[1] Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 published in JOEU Series L dated 27 October 2023.

[2] 20th day as of the publication in JOEU, according to art. 73 of EU GI Regulation for craft and industrial products.

[3] Art. 73 of EU GI Regulation for craft and industrial products.

derogate from the standard registration procedure.

This EU GI Regulation for craft and industrial products is important because the GIs for craft and industrial products could have been registered until its entering into force only at national level and not all EU member states had in their national legislation the possibility for such registration, existing therefore a non unitary legislation. Even if, at EU level existed before a quality scheme for food and wine products, GIs for other products, be they of natural or industrial origin – for instance, Carrara marble or Brussels lace – could not have obtained protection at EU level, but only at national level.

Unlike other authors[4], we do not think that this system of protection will negatively affect the trade and European competitiveness even if it is protecting traditional ways of doing the products because this system is rather preventing persons without rights to use geographical names for their products which are not originating from that specific area having in view that GIs protect the cultural heritage of a region and protecting the past does not mean standing in the way of innovation. In addition, GIs give a state of comfort to the final consumer in respect to the origin of the product.

Also, this EU Regulation comes to complete the existing quality scheme for food and wine products represented by the protection granted through GIs at EU level which covers:

a) Agricultural products and foodstuffs – based on Regulation (EU) no. 1151/2012 on quality schemes for agricultural products and foodstuff ('EU Regulation no. 1151/2012 for agricultural products and foodstuff')[5];

b) Spirit drinks – based on Regulation (EU) no. 2019/787 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) no. 110/2008 ('EU Regulation no. 2019/787 for spirit drinks')[6];

c) Wines – based on Regulation (EU) no. 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007 ('EU Regulation no. 1308/2013 for wines')[7];

d) Aromatised wines – based on Regulation (EU) no. 251/2014 on the definition, description, presentation, labelling, and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No. 1601/91 ('EU Regulation no. 251/2014 for aromatised wines')[8].

These quality schemes provide the basis for identifying and, where appropriate, protecting names and terms which, in particular, indicate or describe products with value-added characteristics; or value-added properties.

However, the Commission proposed on March 31, 2022 an EU Regulation on EU

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[4] Christina Wainikka, *A Geographical Indication protection for craft and industrial products will undermine both trade and European competitiveness*, 2022, https://www.svensktnaringsliv.se/english/a-geographical-indication-protection-for-craft-and-industrial-pro_1187360.html (last time accessed on 21.04.2024).

[5] Published in JOEU L 343 dated 14 December 2012.

[6] Published in JOEU L 130 dated 17 May 2019.

[7] Published in JOEU L 347 dated 20 December 2013.

[8] Published in JOEU L 84 dated 20 March 2014.

GIs for wine, spirit drinks and agricultural products ('Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products') whose purpose is to harmonise procedural rules, having as effect the repealing of EU Regulation no. 1151/2012 for agricultural products and foodstuff and amendment of EU Regulation no. 2019/787 for spirit drinks and EU Regulation no. 1308/2013 for wines.

It can be noticed that the European Commission was and still is preoccupied to consolidate the protection of GIs for agricultural products, and to create the system of protection through GIs for non-agricultural products at EU level.

2. Registration, protection and cancellation of GIS for craft and industrial products

2.1. General aspects regarding the EU GI Regulation for craft and industrial products

The interest of the EU Commission in the protection of GIs for craft and industrial products at EU level dates back in 2011 when it mentioned in a communication related to 'A single market for Intellectual Property Rights' that 'geographical indications are a tool for securing the link between a product's quality and its geographical origin' and that the fragmentation between EU Member States regarding the protection of non-agricultural products through the geographical indications system 'may negatively affect the functioning of the internal market'. Therefore, since that moment, the Commission took the responsibility to launch a study on the issue of geographical indications for non-agricultural and non-food products[9].

In 2019, the EU signed the Geneva Act of the Lisbon Agreement on Designations of Origin and Geographical Indications which grant protection for all types of geographical indications, therefore for agricultural, foodstuff, wines, spirit drinks, craft, and industrial products and which allows their international registration. If a legal framework would not have been introduced at EU level for craft and industrial products, the EU would not have been able to observe its obligations at international level for all kind of products.

In 2020, the above-mentioned study was released[10] and it revealed that 'the protection of craft and industrial geographical indications would be beneficial overall to both consumers and producers, while also supporting regional development'[11].

On April 13, 2022the Commission adopted the Proposal of a Regulation on geographical indication protection for craft and industrial products ('Proposal for the EU Regulation for craft and industrial

[9] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, 2011, p. 16, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0287:FIN:en:PDF (last time accessed on 21.04.2024).

[10] European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Winkel, A., Taranic, I., Waichman, I.et al., *Economic aspects of geographical indication protection at EU level for non-agricultural products in the EU* –, Publications Office, 2020, https://data.europa.eu/doi/10.2873/58493 (last time accessed on 21.04.2024).

[11] Eleonora Rosati, *Geographical indications (GIs) for craft and industrial products*, 2022, https://business.ideaspowered.eu/news/geographical-indications-gis-craft-and-industrial-products (last time accessed on 21.04.2024).

products'). The Proposal for the EU Regulation was accompanied by the Impact Assessment Report drafted by the Commission[12] which revealed three options for the protection of craft and industrial products, namely: (1) extending the existing protected geographical indications/protected designations of origin schemes to craft and industrial products, (2) self-standing EU Regulation creating sui-generis geographical indication protection and (3) trademark reform. Out of these three options, the Commission finally choose the second option.

On September 9, 2022, the European Economic and Social Committee issued its opinion on the Proposal for the EU Regulation[13]. In its opinion, the Committee mentioned that it would have been better if a single legal framework would have been implemented both for agricultural, food products and for craft and industrial products in order to 'avoid the further expansion of legislation, procedures and authorities'. We share the Committee's opinion all the more there are multiple identical provisions for these types of products on the other hand and different deadlines for certain actions on the other hand, as we shall see in the next sections of this paper. The other Committee's suggestions will be presented in the next sections where we discuss the registration, protection, and cancellation system.

On October 10, 2022, the Committee of the Regions issued its opinion on the Proposal for the EU Regulation[14]. This Committee had multiple recommendations of amendments and we will analyse them in the next sections where we discuss the registration, protection, and cancellation system.

Between the Council and the EU Parliament there were multiple discussions regarding the final content of the EU GI Regulation for craft and industrial products, discussions which finalized on October 18, 2023 when this regulation was adopted, as mentioned above.

2.2. Scope and object of protection by the EU GI Regulation for craft and industrial products

The EU GI Regulation for craft and industrial products, like the Proposal for the EU Regulation, is structured in eight titles, and it grants protection to craft and industrial products not applying to spirit drinks, wines, agricultural products, and foodstuffs. However, the Proposal for the EU Regulation provided that the craft and industrial products were those listed in Annex no. 1 to Council Regulation no. 2658/87 while the final text represented by the EU GI Regulation for craft and industrial products does not have this indication anymore.

We think that the reason for this deletion is represented by the fact that both European Parliament and Council proposed the deletion of the reference to the products listed in Annex no. 1 to Council Regulation no. 2658/87 and we find it welcomed

[12] European Commission, *Impact assessment report on geographical indication protection for craft and industrial products,* 2022, https://single-market-economy.ec.europa.eu/publications/regulation-geographical-indications-craft-and-industrial-products-documents_en#files (last time accessed on 21.04.2024).

[13] Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 of the European Parliament and of the Council and Council Decision (EU) 2019/1754, 21.09.2022, published in OJEU C-486 dated 21 December 2022.

[14] Opinion of the European Committee of the Regions — Protecting industrial and craft geographical indications in the European Union (revised), published in OJEU C-498 dated 30 December 2022.

because that annex also included food products and raw materials for foodstuff which could have been confusing.

If the Proposal for the EU Regulation provided for two separate definitions, namely for 'craft products' and for 'industrial products', the EU GI Regulation for craft and industrial products provide a single definition for 'craft and industrial products', the Council being the institution which suggested during discussions a combined definition for the two notions, namely 'craft and industrial products', by amending the initial definitions of each notion and resulting the following definition: 'craft and industrial products' refers to products '(a) produced either entirely by hand or with the aid of manual or digital tools, or by mechanical means, whenever the manual contribution is an important component of the finished product; or (b) produced in a standardized way, including serial production and by using machines'.

For a craft or industrial product to be protected under GI based on both the EU GI Regulation for craft and industrial products and the Proposal for the EU Regulation, it must accomplish the following cumulative requirements: (1) to originate in a specific place, region or country; (2) its given quality, reputation or other characteristics is essentially attributable to its geographical origin and (3) at least one of the productions steps of the product takes place in the defined geographical area.

If we compare this definition with the definition of GIs for other products, we notice that:

a) the condition related to the origin - For agricultural products and foodstuff and spirit drinks it is allowed that the product to bear the name of a country also, however, for wines this is allowed only in exceptional cases;

b) the condition related to the quality, reputation or other characteristics of the products – it is the same for the names of agricultural products and foodstuff, spirit drinks and wines;

c) the condition obliging to have at least one production step into the geographical area – it is the same for the names of agricultural products and foodstuff while for wines it is imposed that all productions steps from the from the harvesting of the grapes to the end of the winemaking process to have place in the geographical area and also for spirit drinks.

Also, it must be mentioned that the European legislator chosen the protection through the more relaxed means, excluding the stricter protection through protected designations of origin which involves that all productions steps to take place in the defined geographical area and that the product to have qualities and characteristics attributable mainly or exclusively to a certain geographic area with own natural and human factors.

The European Economic and Social Committee agreed with the option chosen by the Commission having in view that 'the identity of a craft or industrial product may remain, even if one of production stages originates in another region, as its identity stems from the history or method of production'. In addition, we mention that for craft and industrial products it is not necessary that the environment to have an impact on the product and give it certain characteristics that can be obtained from a certain area only, but it should be enough for the product to have a certain reputation only from the geographical area with only one production step in that area. We may criticize the 'reputation' criteria having in view that it is assessed based on 'subjective elements, such as the consumer appreciation, which are not necessarily

founded on verifiable facts'[15], but it confers an easier way to establish and maintain such a geographical indication for such a product.

In our opinion, the chosen option does not necessarily determine the increase of workplaces in the designated geographical area since only one step of the production process must take place in the designated geographical area. As such, 'all the raw materials can come from somewhere else; 99% of production steps can take place in Brazil or China, as long as 1% takes place within the defined geographical area.'[16]

However, the European Parliament suggested the amendment of the third condition, replacing 'at least one of the production steps' with 'the main' production steps. We salute the Parliament's suggestion, but unfortunately it was not taken into account even if, from our point of view, the amendment would have ensured a better protection of the local traditions and would have solved the criticisms regarding the low development of employment in the designated geographical area.

The registered geographical indications for craft and industrial products will use the same symbol, indication and abbreviation as the ones for agricultural products and foodstuff.

2.3. Names that cannot be protected through the GI system

The provisions of the EU GI Regulation for craft and industrial products forbid the registration of names as GIs if: (1) the name is or has become a generic term, (2) the name is homonymous with a prior one, with some exceptions, (3) the products for which the GI is seek are contrary to public policy.

The first two cases are stipulated more or less in the same way in the EU Regulations related to GIs for agricultural products and foodstuff, wines and spirit drinks. However, the third case is new, not being stipulated in any of the other existing regulations. However, in the Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products, the Commission introduced this provision also and it completed it with products contrary 'to accepted principles or morality', but only for agricultural products. This is a new approach for the registration of such names having in view that the trademarks can be registered irrespective of the nature of products, and it is forbidden only the registration of the trademark which would contravene to public policy or to accepted principles of morality.

Generic term

By the notion of 'generic term' it is understood under the EU GI Regulation for craft and industrial products: (a) the name that become the common name of a product within the EU (this situation is identical to the ones specified for agricultural products and foodstuff, wines and spirit drinks) or (b) a common term that describes the type of product, its attributes or (c) a term that does not refer to a specific product. The last two cases are new by reference to the legislation regarding the GIs for other products. The content of this definition was the same in the essential parts in the Proposal for the EU Regulation.

For the generic terms the current Court of Justice of the EU ('**CJEU**') case law will be applicable. In case no. C-343/07, CJEU established that 'a name becomes generic only if the direct link between, on the one

[15] Annette Kur, Thomas Dreier, Stefan Luginbuehl, *European Intellectual Property Law. Text, Cases and Materials. Second Edition,* Edward Elgar Publishing, 2019, p. 442.

[16] Christina Wainikka, *op. cit*.

hand, the geographical area of the product and, on the other hand, a specific quality of this product, its notoriety or another characteristic of it that can be attributed to that origin disappears, and the name only describes a genre or type of products'[17].

In the same case, the CJEU established how we appreciate that a name is a generic one. In this regard, the Court showed that 'in the assessment of the generic character of a name, it must [...] take into account the places where the respective product was produced both inside and outside the member state that obtained the registration of the name in question, the consumption of this product and the way in which this name is perceived by consumers inside and outside the respective Member State, the existence of special national legislation regarding the mentioned product, as well as the way in which this name has been used [...].'[18]

The factors that must be considered when assessing if a term has become or not generic are identical to the ones mentioned by EU Regulations for agricultural products and foodstuff, wines and spirit drinks, namely the existing situation in areas of consumption and the relevant EU or national legal acts.

Another identical provision in all EU normative acts is represented by the fact that protected GIs will not become generic within the EU. Therefore, after their registration, unlike trademarks, they cannot be cancelled on the grounds that they have become the usual commercial designation of the product for which they were registered.

Homonymous names

'Homonymous names' are not defined by neither EU Regulation related to GIs for agricultural products and foodstuff, wines and spirit drinks

However, for GIs for craft and industrial products, during the discussions related to the Proposal for the EU Regulation for craft and industrial products, the European Parliament suggests to add in the recitals that 'Homonymous indications are spelled or pronounced in the same way, but refer to different geographical areas'. This suggestion was taken into consideration and in Recitals (41) of EU GI Regulation for craft and industrial products, the 'homonymous names' received the above-mentioned definition.

As a rule under the EU GI Regulation for craft and industrial products, the subsequent request for registration of a GI which name is a total or partial homonymous name with a prior GI will be rejected.

As an exception, the registration is allowed under the following cumulative conditions:

a) There is a sufficient distinction in practice between the two homonymous names concerning the conditions of local and traditional usage and their presentation;

b) The producers concerned receive equitable treatment;

c) The consumers are not misled as to the true identity or geographical origin of the products. In case the consumers are misled as to the true geographical origin of a product, the GI will not be registered even if the name of the actual territory, region or place of origin of the product in question is accurate.

The above-mentioned rule and exception were stipulated as such also in the Proposal for the EU Regulation for craft and industrial products. They are also stipulated by the EU Regulation no. 1308/2013 for wines, EU Regulation no. 2019/787 for spirit

[17] CJEU, Decision dated 2 July 2009 in case no. C-343/07, pct. 107.
[18] CJEU, Decision dated 2 July 2009 in case no. C-343/07, pct. 101.

drinks and EU Regulation no. 1151/2012 for agricultural products and foodstuff. However, the last EU Regulation does not allow the homonymous neither in case of names of plant variety nor breed of animals.

Product contrary to public policy

As mentioned above, this is a case of refusal to registration of a GI which currently is applied only for craft and industrial products. However, in the Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products, the Commission introduced this provision also and it completed it with products contrary 'to accepted principles or morality', but only for agricultural products.

EU GI Regulation for craft and industrial products does not offer much details for this case of refusal, it only specifies in Recital (16) that the need to apply the public policy exception should be assessed on a case-by-case basis and to be in accordance with the Treaty on the Functioning of the European Union (TFEU) and the relevant case law of the Court of Justice of the European Union while the Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products does offer no complementary details.

From our point of view this is approach seems strange having in view that the public policy is applied to the good and not the name of the GI as it happens in case of trademarks.

2.4. Applicant

As a rule, the EU GI Regulation for craft and industrial products stipulates that the applicant for a GI for craft and industrial products is a producer group. Under the notion of 'producer group' are included also a local or regional authority or a private entity designated by a member state, elements which were introduced during consultations at the suggestion of the Committee of the Regions.

As an exception, a single producer can be applicant under the following conditions which must be cumulatively met: (a) such person is the only producer which wants to submit the application for registration and (b) the geographical area is defined by a particular part of the territory without reference to property boundaries and has characteristics that differ appreciably from those of neighbouring geographical areas or the characteristics of the product are different from those produced in the neighbouring geographical areas. These conditions were adopted as such even if during the consultations, the Committee of the Regions recommended the entire replacement of the (b) condition with the specification that the geographical indication remains open to any new producers complying with the product specification[19].

If the product has its origins in a cross-border geographical area, multiple applicants from different member states or from member states and third states or from third states can submit a common request of registration.

If we compare with other EU Regulations for GIs, we will notice slight differences. For instance, EU Regulation no. 2019/787 for spirit drinks, EU Regulation no. 1151/2012 for agricultural products and foodstuff and EU Regulation no. 1308/2013 for wines stipulate the rule that applicant can be groups that work with the product whose

[19] In our opinion, this recommendation of amendment is not correct having in view that the applicant is not the owner of the geographical indication, and that all persons complying with the product specification are anyway allowed to use the geographical indication.

name is sought for registration. EU Regulation no. 2019/787 for spirit drinks stipulates that an authority designated by a member state can be considered a group if the producers cannot form a group because of different reasons.

EU Regulation no. 2019/787 for spirit drinks and EU Regulation no. 1151/2012 provide as an exception the situation under which a natural or legal person can be considered a group if two cumulative conditions are met: (a) such person is the only producer which wants to submit the application for registration – which is the same with the one for GIs for craft and industrial products and (b) the defined geographical area possesses characteristics which differ appreciably from those of neighbouring areas, the characteristics of the product are different from those produced in neighbouring areas *or the product has a special quality, reputation or other characteristic which is clearly attributable to its geographical origin* (the part in Italics is applicable only to spirit drinks)– which is slightly different from the one for GIs for craft and industrial products in the sense that for the geographical area in case of GIs for craft and industrial products it is expressly mentioned that it must exceed the limits of a private property.

EU Regulation no. 1308/2013 for wines is not such detailed in exception stating only that in exceptional circumstances and adequately justified, any individual producer can submit a request for registration.

However, like in case of all GIs for other products, it must be mentioned that in case of GIs for craft and industrial products also, the applicant does not have the capacity of owner of the GI and that no property right is granted to it, no one, in fact, having the capacity of owner[20]. The applicant and other persons and/or entities which are observing the product specifications being entitled to use the geographical indication.

2.5. Stages of registration of the GIs for craft and industrial products

Since the beginning, the Commission proposed a two stages registration in its Proposal for the EU Regulation and it was maintained also in the adopted EU GI Regulation for craft and industrial products.

The first stage is represented by the national stage of the registration and the second by the Union stage of the registration.

Even if the registration of GIs for other products also must go through two stages of the registration, the institutions involved are different, as we will see during the next paragraphs.

2.5.1. National stage of the registration

For craft and industrial products, the national stage involves multiple steps, namely the (1) submission of the application to the national competent authority designated by the EU Member State, (2) its examination, (3) the national opposition and (4) the decision issued by the national competent authority.

This step is cvasi-identical to the one related to the registration of GIs for other products.

In relation to the step related to the national opposition, it must be mentioned that EU GI Regulation for craft and industrial products establishes a period of at least two months as of the publication of the request for registration as opposition period,

[20] For more details on this opinion to which we subscribe, Caroline Le Goffic, *La protection des indications géographiques. France – Union Européenne – Etats-Unis*, LexisNexis Publishing House, Paris, 2010, p. 243-258.

the same being established by the EU Regulation no. 1151/2012 for agricultural products and foodstuff while EU Regulations for spirit drinks and wines leave such deadline entirely to the discretion of member states, mentioning ‘a reasonable period’ as opposition period.

Under all EU Regulations for all kinds of products, the opponent may be any person which meets two cumulative criteria: (1) a legitimate interest and (2) is established or has the residency in the Member State where the national stage takes place.

Regarding the GIs for craft and industrial products, as an exception from the national stage, the European Commission may exempt a Member State from its obligation to designate a competent authority to manage this stage if until November 30, 2024, such Member State submits to the European Commission a request proving that the following two cumulative conditions are met: (1) the respective Member State does not has a national *sui generis* system related to GIs for craft and industrial products and (2) the local interest for the protection of GIs for such products is low.

In such a case, the applicant from a Member State exempted from the obligation to appoint a competent authority to manage the national stage will submit its application following directly the second stage, namely the Union stage, known in this case as ‘direct registration’.

Such derogations from national stage are not recognised for GIs for the other types of products under the other EU Regulations.

2.5.2. Union stage of registration

For craft and industrial products, like for any other products, the second stage, namely the Union stage, starts following the issuance of a favourable decision by the competent authority from the national stage and it involves multiple steps, namely (1) the Union application, (2) examination of the application, (3) opposition procedure at worldwide level, (4) final decision, (5) publication in the register of GIs for craft and industrial products.

The Union stage for GIs for craft and industrial products starts with the electronic submission of the application by the Member State to the European Union Intellectual Property Office (‘EUIPO’). In case of GIs for craft and industrial products, this is a novelty aspect because in case of the other types of products, the authority involved is the European Commission and not EUIPO.

The EUIPO will have to examine the application in maximum 6 months, however, delays are allowed under the condition to inform in written the application about them. The same is applicable also for GIs for spirit drinks, agricultural products and foodstuff and wines.

In case of GIs for craft and industrial products, exceptions from this deadline are also regulated, namely in case EUIPO receives a notification from the Member State informing that the national decision from the first stage was invalidated or requesting the suspension of the Union examination on the ground that the national decision was challenged in front of national administrative or judicial authorities. Such cases do not exist for GIs for spirit drinks, but they exist for GIs for wines and for agricultural products and foodstuff.

If during the examination, the EUIPO considers that the application is incomplete or incorrect, it will inform the applicant and give it 2 months to complete or correct it. If the application is not completed or corrected within the deadline, EUIPO will reject it. Such deadline is not granted in case of GIs for spirit drinks, agricultural products and foodstuff and wines, the Commission

rejecting directly the non-compliant application.

If the EUIPO solution following the examination of the application is favourable to the applicant, it will be published, and within 3 months as of the publication, any interested person may submit an opposition or notice of comment against the registration of the GI for craft and industrial product. This deadline is also applicable to GIs for spirit drinks, agricultural products and foodstuff and wines. However, for these products it does not exist the possibility of submission of a notice of comment.

This time also, the opponent must met two cumulative criteria for GIs for all types of products: (1) to have a legitimate interest (this condition is the same as in the national opposition) and (2) to be established or to have the residency in a third country or in another Member State (this condition is slightly different than the one from the national opposition, being allowed an established or residency anywhere in the world).

The opposition against GIs for craft and industrial products will be admitted by EUIPO if it meets two cumulative conditions: (1) the application infringes the following conditions: (a) the proposed GI does not comply with the requirements for protection – same in case of GIs for spirit drinks, but in this case, the EU Regulation no. 2019/787 for spirit drinks is more detailed referring to the product specification and the same is for agricultural products and foodstuff, (b) the registration is envisaging a name of GIs which have become generic term or which are homonymous with prior registered GIs or which are conflicting with prior trademarks with reputation that could mislead the consumers - – same in case of GIs for spirit drinks and agricultural products and foodstuff, (c) the registration would affect entirely or partially an identical or similar name used in commercial trade or of a trademark or products present on the market for at least 5 years prior to the publication of the GI application – such ground is also stipulated for GIs for agricultural products and foodstuff, but not for GIs for spirit drinks. However, the EU Regulation for GIs for spirit drinks include into the list of grounds of opposition also the grounds for cancellation represented by the non-placement on the market of a product under the GI for at least 7 consecutive years and (2) provides reasons drawn up in accordance with the form set out by the EU GI Regulation for craft and industrial products.

If the opposition is admitted by EUIPO, in two months as of the receipt of the opposition, EUIPO must invite the opponent and the applicant to engage in consultations during a period of maximum 3 months, with the possibility of extension with another 3 months - all these deadlines are applicable also for GIs for spirit drinks, agricultural products and foodstuff and wines. If following the consultation, amendments are brought to the application, the EUIPO will make a new examination and it will publish the modified application - same rule applies also in case of GIs for other products.

The grounds for the opposition will be assessed in relation to the EU territory for GIs for spirit drinks, agricultural products and foodstuff.

The final decision on the application is given by EUIPO by taking into consideration multiple aspects such as: any provisional periods, the outcome of the opposition procedure, the notices of comments received and it will be published in the EU register of GIs for craft and industrial products in all official languages of the EU.

As an exception, it is possible that the final decision to be rendered by the EU Commission if such decision may jeopardise

the public interest or the EU's trade or external relations. The EU Commission may intervene in such cases also in the procedure of cancellation and amendment of the product specification. Since in case of GIs for other products the Commission is the authority involved in the Union stage, there is no such provision.

2.6. Union register

The Union register of GIs for craft and industrial products will be developed, kept, and maintained by EUIPO. In case of geographical indications for agriculture products and foodstuff, spirit drinks and wines, such register is kept by the EU Commission.

Since the Proposal for the EU Regulation for craft and industrial products until the final text adopted, there were multiple versions of the elements that the Union register must contain. The Proposal for the EU Regulation for craft and industrial products stated that the following information should have to be entered into the register: (1) registered name of the product in its original script (if it is not in Latin characters, it will be transcribed and Latin characters and both versions will be mentioned), (2) class of the product, (3) reference to the instrument registering the name, (4) indication of the country or countries of origin.

The Committee of the Regions suggested amendments to all these four data and insertion of new data as follows: (1) registered protected geographical indication of the product in its original script (if it is not in Latin characters, it will be transcribed and Latin characters and both versions will be mentioned), (2) type of the product, (3) beneficiaries of the protected geographical indication, (4) reference to the instrument registering the name, (5) indication of the country or countries of origin.

In the end, the elements contained by the Union register are the following: (1) registered protected geographical indication of the product in its original script (if it is not in Latin characters, it will be transcribed and Latin characters and both versions will be mentioned), (2) type of the product, (3) name of the applicant, (4) reference to the decision registering the name, (5) indication of the country or countries of origin.

Therefore, we notice that the suggestions of the Committee of the Regions were taken into account and we consider that these suggestions of amendments were welcomed because they are more accurate. In addition, from our point of view it is good that ‘beneficiaries’ was replaced with ‘applicant’ because otherwise it would mean to amend the data in the registry each time a new producer was allowed to use the GI for a certain product.

2.7. The protection of the GIs

According to the EU GI Regulation for craft and industrial products, the GIs for craft and industrial products are protected against approximately the same uses as the GIs for the other types of products under the other EU Regulations mentioned earlier. This means that the preliminary rulings of the CJEU in GIs cases will be applicable also for craft and industrial products.

In this regard, we will present few law cases in matters of GIs for food that may be applicable to craft and industrial products and in which the CJEU interpreted the notions of ‘evocation’, ‘false or misleading indication’ and ‘any other practice liable to mislead the consumer’.

Regarding the notion of ‘evocation’, in case C-75/15[21] it is stated that the evocation

[21] CJEU, Decision dated 21 January 2016 in case no. C-75/15, pct. 21.

covers the hypothesis where the term used to designate a product incorporates part of a protected geographical indication, so that, in the presence of the name of the product in question, the consumer is given, as a reference image, the product benefiting from that indication. In addition, it states that it is legitimate to consider that there is an evocation of a protected geographical indication where, in the case of products with visual similarities, the sales names are phonetically and visually similar.

Case C-44/17[22] shows that in order to assess the existence of an 'evocation', it must be ascertained whether, in the presence of the subsequent name, the consumer is being given, as a reference image, the product covered by the protected geographical indication, the consumer being understood to be the average European consumer who is reasonably well informed and reasonably observant and circumspect. Moreover, it is mentioned that the identification of a phonetic and visual similarity of the subsequent name with the protected geographical indication is not a prerequisite for the existence of an „evocation', so it is not excluded that an „evocation' can be identified even in the absence of such similarity.

Case C-614/17[23] indicates that the evocation of a registered name may occur through the use of figurative signs and that the use of figurative signs evoking the geographical area with which a geographical indication is associated may constitute an evocation of the geographical indication, including where those figurative signs are used by a producer established in that region but whose products, similar or comparable to those protected by that geographical indication, are not covered by it.

By way of example, we mention that it was held that the term 'Cambozola' evokes the geographical indication 'Gorgonzola' all the more so since it was used for blue mould cheeses which do not differ in appearance from Gorgonzola, and the fact that the label indicated the true origin of the product does not alter the fact of evocation[24]. The same could happen in a situation in which the name „Murano' for glass could be evoked by a similar name.

In addition, the EU GI Regulation for craft and industrial products specifies regarding the „evocation' that it will arise whenever there is a sufficiently direct and clear linkwith the product covered by the registered GI is created in the mind of the average European consumer who is reasonably well-informed and reasonably observant and circumspect. It may be noticed that with this provision, the European legislator took into consideration the CJEU Case C-44/17 mentioned earlier. Such specification is not provided for the system protecting the other GIs for the other types of products.

The notion of „false or misleading indication' and the notion „any other practice liable to mislead the consumer' were analysed by the CJEU in case C-490/19[25] in which it shows that it is clear from the wording of the provisions that registered names for geographical indications are protected against various actions, namely, firstly, direct or indirect commercial use of a registered name, secondly, misuse, imitation or evocation, thirdly, false or misleading mention of the provenance, origin, nature or essential

[22] CJEU, Decision dated 7 June 2018 in case no. C-44/17, pct. 46, 47, 49, 101.
[23] CJEU, Decision dated 7 June 2018 in case no. C-614/17.
[24] CJEU, Decision dated 4 March 1999 in case no. C-87/97, pct. 25, 27.
[25] CJEU, Decision dated 17 December 2020 in case no. C-490/19.

qualities of the product, appearing on the inside or outside packaging, in advertising material or in documents relating to the product in question, and the packaging of the product in such a way as to create an erroneous impression as to its origin and, fourthly, any other practice liable to mislead the consumer as to the true origin of the product. Thus, these provisions contain a graduated list of prohibited actions. While Art. 13 para. (1)(a) of EU Regulation no. 1151/2012 prohibits the direct or indirect use of a registered name for products not covered by the registration in a form identical to that name or remarkably similar in phonetic and/or visual terms, Art. 13 para. (1)(b)-(d) of the same regulation prohibits other types of actions against which registered names are protected and which make neither direct nor indirect use of the names themselves, namely actions which suggest the registered names in such a way that the consumer establishes a sufficient link of proximity with them.

Regarding the notion of „false or misleading indication', this case C-490/19 shows that such actions extend the protected area, including in it, among others, „any (other) mention', namely the information provided to consumers, which appears on the inside or outside of the packaging of the product in question, in the advertising material or documents related to this product , which, although they do not evoke the geographical indication, are qualified as „false or misleading' regarding the links the product has with the latter. The expression „any (other) mention' includes information that may appear in any form on the inner or outer packaging of the product in question, in advertising material or documents relating to this product, in particular in the form of a text, an image or a content likely to inform about the provenance, origin, nature or essential qualities of this product[26].

As a novelty, the

EU GI Regulation for craft and industrial products regulates the protection of GIs for craft and industrial products against „false or misleading indication' as to the information provided on websites relating to the products. In our opinion, this should be also added to the protection of the other types of products.

Regarding the notion of „any other practice liable to mislead the consumer', the CJEU show in this case law that the legal provision aims to cover any action not already covered by the other provisions and thus to close the system of protection of registered names. The Court takes this reasoning further and states that the system of protection of GIs aims in particular to provide consumers with clear information on the origin and properties of the product, thus enabling them to make more informed purchasing decisions, as well as to prevent practices that could mislead them. Thus, it is prohibited to reproduce the shape or appearance that characterizes a product covered by a registered name when this reproduction may cause the consumer to believe that the product in question is covered by this registered name. It is necessary to assess whether that reproduction is likely to mislead the European consumer, normally informed and sufficiently attentive and informed, considering all the relevant factors in the case[27].

In the end, the CJEU states that the legal provisions are not limited to prohibiting the use of the registered name itself, but that its scope is wider, not only prohibiting the use by a third party of the

[26] CJEU, Decision dated 17 December 2020 in case no. C-490/19, pct. 28.
[27] CJEU, Decision dated 17 December 2020 in case no. C-490/19, pct. 29.

registered name[28]. Thus, the key to the actions against which geographical indications are protected is that the consumer should not be misled, geographical indications operating in the relationship between their legitimate users and the consumer, and that both parties should rely on the information provided, the doctrine showing that from this point of view the similarity with trademark law is striking[29].

We find very strange that the EU GI Regulation for craft and industrial products is listing among the expressions that accompany the actions of misuse, imitation, or evocation also the „flavour' in the conditions in which art. 2 para. (2) of this EU Regulation is clear and mentions that it does not cover the protection for spirit drinks, wines, agricultural products, and foodstuffs the only ones that can have a flavour. However, during the discussions on the Proposal for the EU Regulation for craft and industrial products, the European Parliament suggested the replacement of „flavour' with „fragrance' which seems better having in view that craft or industrial products may have fragrance, such as soaps. Unfortunately, this suggestion was not taken into account.

However, a step forward having in view the digital world in which we live in, is represented by the fact that the EU GI Regulation for craft and industrial products is providing the protection of GIs for craft and industrial products also with regard to the domain names which contain or consist of the registered geographical indication, such provision not existing in case of GIs for other types of products.

2.8. Cancellation of the registration of the GIs

The reasons for cancellation of the registration of a GI for craft and industrial products are similar with the ones for the GIs for other types of products, with the exception that EUIPO will manage the procedures instead of the Commission.

The persons and/or entities who may request the cancellation are: EUIPO on its own initiative, a Member State, a producer group, a third country or any natural or legal person with legitimate interest.

The reasons for cancellation are the following: (a) the compliance with the requirement of the product specification is no longer ensured. (b) no product has been placed on the market for at least five consecutive years. This deadline was of seven years in Proposal for the EU Regulation for craft and industrial products and the Committee of the Regions mentioned that the seven years period was „somewhat random' and proposed a ten-year period while the European Parliament proposed five years instead of seven years.

However, the same term of seven years is provided also in case of GIs for agricultural products and foodstuff, spirit drinks and wines.

In our opinion, it should have been established for GIs for craft and industrial products the same term as the one for the GIs for other types of products, namely the term of seven years in order to have a unitary deadline.

[28] CJEU, Decision dated 17 December 2020 in case no. C-490/19, pct. 30, 31.

[29] Justine Pila, Paul Torremans, *European Intellectual Property Law,* 2nd edition, Oxford University Press, 2019, p. 452.

3. Conflicts or coexistence of other signs with geographical indications

3.1. Domain names and geographical indications

Like trademarks and geographical indications, domain names have been qualified by the World Intellectual Property Organization („WIPO') as distinctive signs being able to distinguish between businesses or private individuals and, in addition, they have as well a technical function[30]. Also, domain names may have both a commercial and non-commercial vocation, becoming nowadays signs as important or even more important than trademarks[31].

We may say that in commerce, we do not exist without domain names that make us „visible' in the digital world, being therefore an important asset of a business. However, even if domain names are beneficial to the development of a business, they can be just as damaging if they are used by third parties in order to obtain quick and easy material benefits, resulting in misleading consumers.

EU GI Regulation for craft and industrial products comes with another novelty represented by a domain name information and alert system. However, its content is less detailed than the one under Proposal for the EU Regulation for craft and industrial products which stipulated that such system would have been useful in two moments: (a) upon submission of an application for a GI for a craft and industrial product – when it will inform the applicants if the name of the GI is also available as a domain name and (b) during the lifetime of the GI (i.e. after its registration) – when it will inform the holders about the registration of a domain name which contains an identical or similar name with the name of the geographical indication. This second information would have been made only if the holders opt for it. However, these provisions were deleted from the final text of the adopted EU Regulation and now, it is only mentioned that by June 2, 2026, the Commission shall carry out an evaluation of the feasibility of an information and alert system against the abusive use of GIs for craft and industrial products in the domain name system, and submit a report with its main findings to the European Parliament and the Council.

For this system to work, country-code top-level domain name registries established in the Union shall ensure that any alternative dispute resolution procedures for domain names recognise registered GIs as a right that can be invoked in those procedures.

The Proposal for the EU Regulation was regulating the implementation of such system also for EU trademarks, proposing the inclusion in the EU trademark Regulation of an article similar to the one for GIs for craft and industrial products „in order to ensure coherence' with the Proposal for the EU Regulation. However, such provision was not kept in the final act even if such provision would have brought a certain relief for holders because they would have been automatically informed about similar or identical, prior, or subsequent, domain names with their GIs name or trademark.

The advantage of such provision is that conflicts between the signs (i.e. between geographical indications and domain names) would be avoided.

[30] WIPO, *WIPO Internet Domain Name Process, Rapport intérimaire relatif au Processus de l'OMPI sur le Nomes de domaine de l'internet,* 23 December 1998, https://www.wipo.int/amc/fr/processes/process1/rfc/3/interim2_ch1.html (last time accessed on 21.04.2024).

[31] Nathalie Dreyfus, *Marques et internet. Protection, valorisation, défense,* Collection Lamy Axe Droit, Lamy Publiching House, France, 2011, p. 235.

Moreover, in case of a registered domain name which is conflicting with a geographical indication, the Proposal for the EU Regulation provided for the revocation or transfer of that domain name to the producer group following an alternative dispute resolution procedure or judicial procedure under the condition that the said domain name was registered without right or legitimate interest, or it was being used in bad faith. However, the EU GI Regulation for craft and industrial products does not contain such provisions, they will be drawn up and proposed by the EU Commission if it is concluding that an information and alert system against the abusive use of GIs for craft and industrial products in the domain name system is feasible.

3.2. Trademarks and geographical indications

EU GI Regulation for craft and industrial products establishes the rule based on which if a prior GI is registered or applied for registration, the subsequent trademark application will be rejected if it infringes the protection of the GI. In this regard, the EUIPO and the competent national authorities will have to invalidate registered trademarks or applied for registration if they infringe the above-mentioned rule.

Also, the application for registration will be rejected in case the name of the GI would conflict with a trademark's reputation and renown if it could mislead the consumer regarding the true identity of the product.

As an exception, it is allowed a co-existence between the subsequent GI and the prior trademark (registered or applied for registration) even if the latest is infringing the above-mentioned rule, under the following cumulative conditions: (a) the trademark to have been applied for, registered or established in good faith in the EU and (b) no ground for invalidity or revocation of the trademark exists.

Another exception is referring to guarantee or certification trademarks and to collective trademarks which are allowed to be used on labels, together with the GI.

4. Role of EUIPO

New structures will be created within EUIPO, namely a new department (Geographical Indications Division) and a Geographical Indications Advisory Board.

The Boards of Appeal which already exists within EUIPO will take over also the responsibility of issuing decisions on appeals procedures against the decisions of the Geographical Indications Division.

The Geographical Indications Division shall be responsible to issue decisions for applications for registration, amendment of geographical indications, filed oppositions, entries in the Union register and requests for cancellation of geographical indications.

The Geographical Indications Advisory Board will be composed of one representative of each Member State and one representative of the EU Commission and their alternate representative for mandates of maximum five years, but renewable and will have the role of issuing consultative opinions at the request of Geographical Indications Division and of the Boards of Appeal in the following matters: (a) assessment of the quality criteria, (b) establishment of reputation, (c) determination of generic nature of the name, (d) assessment of the link between a product's characteristics and its geographical origin, (e) the risk of confusing consumers in cases of conflict between geographical indications and trade marks, homonyms or names of existing products that are legally marketed.

5. Conclusions

Why is it important to have an EU regulation for craft and industrial products?

Firstly, because not all states have a national system to protect such goods under geographical indications and such goods should be protected in order to pass over the traditions to the next generations and not lose them.

Secondly, because such system will allow the registration of geographical indications at international level.

Thirdly, because once again the geographical indication system, even if it is about craft and industrial products, puts the consumer in the centre of attention, being important that in any way the consumer not to be misled as to the origin of the product.

As such, even producers' associations from Romania could protect their products through this system, example of products that could qualify being Horezu pottery, Bledea pottery, traditional wall carpets, and many other.

However, based on the comparative analysis made above, we consider that it would have been better if the GI system in general (i.e. for all types of products) would be regulated in a single normative act in two parts: (1) GIs with their specificities for each type of product and (2) procedure of registration, cancellation, etc. which should be the same for all GIs in order to simplify it because from the above analysis it can be noticed that there are different deadlines for same procedures.

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AWARDING COSTS IN COURT PROCEEDINGS FOR APPEALING REFUSALS OF REQUESTED ENTRIES IN THE COMMERCIAL REGISTER

Zarya SALOVA[*]

Abstract

The ultimate goal of the commercial registration is to serve the interests of private individuals and entities, so that they could take full advantage of the legal effects of the commercial register entries. To achieve this aim, sufficient control mechanisms should be in place to ensure that registry official rulings meet all legal requirements. The law therefore establishes a court procedure for contesting such refusals by the applicants. This procedure, although focused at the appealed refusal, calls for the protection of a broader range of civil rights, among which the compensation of the procedural costs incurred as a result of the faulty refusal and its contesting. The present paper explores the obstacles hindering the rightful course of the registry refusal litigation proceedings, with focus on awarding the appellant's expenses within the said court procedure. Despite the fact that these hindrances followed the legal amendments to the Law on the Commercial Register at the end of 2020, the shortcomings in the legal practice are not the result of imperfect lawmaking, but of the way the law is interpreted in recent case-law. The latter is analysed in detail further in this report, in order to identify the key misinterpretations which led to malpractice. This report also suggests ways forward to address the subject and to find solutions to the mentioned shortcomings.

Keywords: *commercial registration, refusal, appeal costs obstacles, case-law.*

1. Introduction

The procedure on granting entries in the commercial register (registry procedure) is essentially assistance by the State to achieve private interests so that the interested parties could benefit from the legal opportunities arising from commercial registration. Where achieving these interests is impeded by the refusal of a registration officer to make the requested entry, those affected by the refusal should be able to rely on an independent and effective mechanism for reviewing registry decisions. Such a mechanism is provided for in Article 25 of the Law on the Commercial Register and the Register of Non-Profit Legal Entities ('Law on the Commercial Register') by means of the possibility to appeal the refusal in court. The court proceedings set out for this purpose, although special in view of their purpose, bear the hallmarks of classical court proceedings and as such presuppose the protection of fundamental civil rights. Compliance with those rights is jeopardized by a misinterpretation of certain rules in the court proceedings against refusals concerning the powers of the Registry Agency in the proceedings and the award of costs to the applicant in the event of a refusal being annulled. This report will first address the specifics of the judicial proceedings against a registry refusal, before focusing on the obstacles in these proceedings, their

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origin, interpretation and their impact on the rights of the registrants.

The subject matter of this report has not been previously discussed in legal literature.

2. Content

2.1. Review of the appeal procedure against refusals of registration

The statutory framework of appeals against refusals by registration officers is contained in section 25 of the Law on the Commercial Register. The appeals are judicial proceedings which are specific in relation to the general civil and administrative court proceedings. This is because the registry procedure is itself a special administrative procedure and as such is regulated in a separate law. Jurisdiction to hear appeals against refusals by registration officials lies with the district courts where the registry subjects have their official address. The registry subjects are merchants and branches of foreign merchants, non-profit legal persons and branches of non-profit legal persons.

In practice, it is accepted that applicants and persons authorized to submit applications on behalf of registry subjects have the right to appeal refusals. This right may be exercised within 7 days of the notification for the refusal.

Appeals against refusals are lodged through the Registry Agency - the structure in charge of administering the commercial register within which the refusal was issued. The submission of the appeal may be made either on paper (Article 16 (1) of the Law on the Registration of Companies) or electronically (Article 17 (1) of the Law on the Registration of Companies). The Registry Agency is obliged to immediately send to the court the complaint, the refusal, the refused application and the annexes thereto. The Law on the Commercial Register does not expressly provide rules for the content of the appeal, but insofar as in the judicial proceedings against refusals the court examines the appeal the same way as it does for the rulings under the Civil Procedure Code (’CPC’), the mandatory requisites of the appeal are also thus determined (Article 275, paragraph 2, in conjunction with Article 260 of the CPC). In that sense, the appeal must contain the name and address of the registrant, the UIC, an indication of the refusal appealed against, an indication of the defect of the refusal, the nature of the claim and the signature of the appellant. The notice of appeal should also set out the new facts and evidence which the applicant wishes the court to consider. In any event, however, evidence which by law should have been submitted with the application for registration but for whatever reason was not submitted is not admissible.

Amendments to the the Law on the Commercial Register in December 2020 introduced the possibility for the Registry Agency to file a response to the complaint, accompanied by documentary evidence. The right thus conferred became an occasion to unjustifiably extend the interpretation of the Agency's powers in appeal proceedings against refusals. This flawed practice will be commented on a little later in this report.The appeal against the registry refusal is examined by a single judge in closed session. In the appeal proceedings against refusals, the court shall consider whether the rules on pronouncing the refusal of Article 24 (1) of the Law on the Commercial Register have been complied with. The court shall examine whether the refusal was made in accordance with the provisions of other laws governing the circumstances to be registered.

As already stated above, the appeal shall be dealt with in accordance with the

procedure for appeals against court rulings under the CPC, to which procedure Article 25 (4) of the Law on the Commercial Register refers to. This circumstance is significant in several respects. For example, the court has the power to collect evidence if it deems it necessary (Article 278 (2) of the CPC). An exception is made for evidence which must have been initially attached to the application for registration. Omissions in the application for registration cannot be remedied by the court. Another important consequence of the reference to the Civil Procedure Code in Article 25 (4) of the Law on the Commercial Register relates to the awarding of costs in court proceedings against refusals. Issues relating to the awarding of costs in appeals against refusals will be dealt with separately in this report.

In the appeal proceedings against registry refusals, the court shall rule either by confirming the refusal or annulling it. The decision by which the court confirms the refusal shall be subject to appeal by the appellant within seven days of its notification before the relevant Court of Appeal, whose decision shall be final. Where the refusal is revoked, the court shall give binding instructions to the Registry Agency to make the requested entry in the commercial register.

In case of revoked refusal, the Registry Agency has no legal possibility to appeal the court decision. There is also no possibility for the appellant to appeal against the revocation of a refusal, in so far as the revocation is the result sought by the appellant in relation to which he initiated the proceedings. the Law on the Commercial Register does not set a specific time limit for the court to rule on the appeal. In the absence of such a specific provision, the general rule of Article 235 (5) of the CPC applies, according to which the court shall announce its decision together with motives within one month from the hearing. However, this term is instructive and does not bind the court to strict compliance with it.

2.2. Problems in the appeal procedure against refusals of registration after the legislative changes of December 2020

In December 2020, three amendments were made to the statutory framework for appeal proceedings against refusals[1]:

1) Paragraph 2 of Article 25 of the Law on the Commercial Register has been supplemented to give the Registry Agency the right to file a response to the appeal against the refusal accompanied by written evidence. This change is only intended to provide the Registry Agency with an opportunity to give its opinion on the arguments set out in the appeal and to present its arguments in support of the contested refusal. 2) Paragraph 4 of Article 25 of the Law on the Commercial Register clarifies the persons to whom the court decision should be communicated, namely the appellant and the Registry Agency. The amended text literally reads: „the court decision may be appealed within 7-days of notification to the appellant and the agency before the relevant court of appeal, whose decision is final.’. 3) A new paragraph (6) of Article 25 of the Law on the Commercial Register was adopted which allows for expenses to be awarded in the appeal proceedings against refusals. This new provision reads as follows: ’In proceedings, the court shall award expenses to the parties in accordance with the Civil Procedure Code’ The amendment is dictated by the need to explicitly regulate the issue of

[1] Published in Bulgarian State Gazette, issue 105 of 11 December 2020.

expenses in these proceedings in order to resolve the long-standing controversy on this issue between legal practitioners and in case-law.

None of these amendments is intended to alter the substance of the appeal proceedings, but the practical application of the amendments has raised a number of issues and hindered the applicants' rights in the court proceedings. The explanatory notes accompanying the amendments do not comment on the first two changes and, in relation to the third, merely state that a change in the law is necessary to regulate the award of expenses in appeal proceedings against refusals. Prior to the adoption of the said amendments, there was a general agreement that only the appellant had the right to appeal a court decision on registry refusal case, and to claim expenses, albeit in the form of compensation in separate court proceedings. However, the statutory amendments have been interpreted by the Registry Agency in a way that would allow it to extend its powers in court proceedings against refusals. The agency began appealing court decisions revoking refusals, arguing the newly introduced legal option to provide an answer appeals. The Agency also referred to the recent addition to paragraph 4 on Art. 25 of the Law on the Commercial Register, according to which the court decision shall be communicated to the Agency as well as the appellant, pointing out that this also gives the right to the agency to appeal the decision in the specified 7-day term from the notification.

It is worth explaining here that the mere sending of the decision to the Registry Agency is not a new legal addition.

This rule is derived from paragraph 5 of Article 25 of the Law on the Commercial Register, according to which in case of revocation of the refusal, the court shall give binding instructions to the Registry Agency to make the requested entry by sending the decision and the documents relating to the entry.Based on the understanding thus formed as to the extension of its possibilities to participate in the proceedings, the agency began to claim expenses before the court, on the pretext that it could benefit from the new text for awarding expenses in the refusal proceedings. The above conclusions of the Registry Agency are unfounded, in so far as the legal provisions must be interpreted in accordance with the purpose of the law and the fundamental principles of Bulgarian law (Article 46 (1) of the Law on Statutory Instruments). The option for the agency to submit an opinion on the appeal and the fact that the decision is communicated to the agency cannot be interpreted broadly as creating new procedural rules for the Registry Agency which are expressly laid down in the law. The purpose of the Law on the Commercial Register is to regulate entries in the commercial register, and the main role of that register is to serve the interests of the registrants. The Registry Agency itself is subordinated to this role as a state structure responsible commercial registration. As such, the Agency does not oppose its own rights and interests to those of the registry subjects, but on the contrary - it is intended to serve the registrants.

In this sense, the agency is not justified in extending its procedural capabilities in court proceedings designed to protect the interests of registrants. Moreover, if the interpretations of the Registry Agency were to be adopted, the very essence of the procedure for appealing against refusals would be altered, which is not the meaning of the legislative amendments in question. Notwithstanding the above, a number of courts have allowed appeals by the Registry Agency against decisions in court proceedings against refusals, thus creating flawed case law. As a consequence of such appeals, the period for the final resolution of cases was substantially extended,

discouraging registrants from appealing refusals at all, and instead filing new applications for registration. This situation essentially thwarted the refusal appeal procedure itself: instead of providing protection against unlawful registry refusals, the court procedure significantly delayed the requested entries, which consequently hampered the applicants' activities and discouraged them from appealing the refusals. This led to violation the fundamental right to defence guaranteed by Article 56 of the Constitution of the Republic of Bulgaria.

Notwithstanding some contradictory court rulings, the current case-law does not allow the Registry Agency to appeal and does not award expenses to the agency in proceedings against registry refusals. This practice should be upheld, since in proceedings against refusals the legal interest of the registrant who suffers the consequences of the refusal shall be primarily defended. The Registry Agency (through the registration officers) is only obliged to rule lawfully on applications for registration, but its legal sphere is not affected either by the refusal or by the proceedings against its ruling.

The Supreme Court of Cassation has taken a similar view, stating in its judgments that the amendments to Article 25 of the Law on the Commercial Register (promulgated in the Official Gazette, issue No. 105/2020) are aimed only at an attempt by the legislator to resolve the issue of expenses in the appeal proceedings against registry refusals, but not to redefine the legal characteristics of the registration proceedings.'[2] For the reasons set out above, the Registry Agency should not be allowed to exceed its powers in court proceedings against refusals, as this would create dangerous precedents and distort the purpose of these proceedings and of the commercial registration procedure itself, which is subordinate to the interests of the registrants.

2.3. Awarding expenses in appeal proceedings against registry refusals

The issue of the expenses made by the appellants in court proceedings against refusals has long been controversial due to the incompleteness of the legal framework and the practical difficulties of its application. The amendments to the Law on the Commercial Register from December 2020 aimed to regulate the issue by explicitly creating the possibility of awarding expenses in the proceedings against registry refusals. However, instead of resolving the existing problems, the interpretation of the new legal amendment created new obstacles and made it virtually impossible to recover these expenses. Prior to the amendments to the Law on the Commercial Register, the law did not contain a legal basis on which appellants could claim expenses in appeal proceedings against refusals. The recovery of the pecuniary damage caused to the applicant by an unlawful revoked refusal was achieved in a separate court proceedings under Art. 1 of the Law on Liability of the State and Municipalities for Damages ('LLSMD').

A special reference to this law exists in Article 28 (2) of the Law on the Commercial Register, stating that the Registry Agency is liable for the damages caused to natural and legal persons by unlawful acts, actions and omissions of the registration officials under the procedure of the LLSMD. Expenses, therefore, were not awarded directly as such in a single proceeding, but had to be sought separately in the form of damages suffered

[2] Extract from Court Ruling in commercial case No 1250/2021 of the Supreme Court of Cassation.

in a second lawsuit. In order to pursue this separate lawsuit, the persons affected by unlawful refusals not only had to invest additional time, but also incurred further expenses for fees and for legal defence. In this manifestly unfair situation, the persons concerned in effect suffer twice from the unlawful action of a public authority. A legal solution to the problem was demanded both by legal practitioners and by the directly affected economic and social groups. The stakeholders united around the proposal to introduce an explicit wording in the Law on the Commercial Register regulating the awarding of expenses in court proceedings against registry refusals. As a result, Article 25 of the Law on the Commercial Register was supplemented by a new paragraph 6 with the following text: 'In proceedings [on appeal against refusals] the court shall award expenses in accordance with the Civil Procedure Code.'

It is obvious that in the context of the requested legal amendment the text refers to the general procedure for awarding expenses in civil proceedings, regulated under Article 78 and Article 81 of the CPC. This simple and equitable legal amendment was expected to put an end to a long-existing but resolvable controversy. However, a number of district courts, rather than awarding the applicants the expenses in the proceedings of revoked refusals, rejected their expenditure claims, reasoning on the basis of Article 541 of the CPC, which states that 'The expenses of non-contentious proceedings shall be borne by the applicant.' These courts maintain that the proceedings under Article 25 of the Law on the Commercial Register are non-contentious in nature, and in so far as the new paragraph 6 of Article 25 of the Law on the Commercial Register (concerning the expenses in appeals against refusals) refers to rules for awarding expenses under the CPC, Article 541 of the CPC on the expenses in non-contentious proceedings should be applicable.

Other courts did not even consider the applicants' claims for an awarding expenses.

The said reasoning of the District Courts has been repeated in several rulings of the Supreme Court of Cassation[3], thus turning these arguments into binding case-law. Thus, instead of facilitating the recovery of the appellants' property unlawfully diminished by the annulled refusal, the appellants' situation is further aggravated - the case-law of the courts inherently denies the appellants' right to expenses against registry refusals.

In this situation, is the option for material compensation of the expenses under the procedure of the Law on Compensation for Damages (which was in force before the discussed legal amendments) still applicable? The answer to this question is also in the negative. Such a conclusion follows from the interpretation of the provisions of the Law on the Compensation for Damages, in the context of the special procedure for the awarding expenses under Article 25 (6) of the Law on the Commercial Register. Art. 8 (1) of the Law on Compensation for Damages provides that damages caused by unlawful acts of public authorities may be compensated under this law, but only if no special method of compensation is provided for. Such a special method was put in place with the amendments to Art. 25 of the Law on the Commercial Register.

[3] In this sense: Court Ruling in commercial case No 2742/2021 of the Supreme Court of Cassation; Court Ruling in commercial case No 585/2022 of the Supreme Court of Cassation; Court Ruling in commercial case No 768/2022 of the Supreme Court of Cassation; Court Ruling in commercial case No 2297/2022 of the Supreme Court of Cassation; Court Ruling in commercial case No 1573/2023 of the Supreme Court of Cassation.

The administrative courts have passed decisions in that sense since the amendments to the Law on the Commercial Register, refuting the claims for expenses made under the Law on Compensation for Damages. As a result, the right of the applicants to be awarded the expenses according the special provisions of the Law on the Commercial Register is barred, but at the same time the procedure for compensation under the Law on Compensation for Damages is also unavailable to the applicants due to the existence of a special statutory procedure for recovering expenses. The practice for not awarding expenses thus created by case-law not only contradicts the basic principles of Bulgarian law, but is in the exact opposite direction to the objectives set by the discussed legal amendments.

In the first place, in court cases against registry refusals, where those refusals have been revoked by the court, the wrongful act of the registry official has compelled the appellant to incur expenses in defending his interests. These costs generally include State fees and attorney's charges.

The payment of a State fee is a prerequisite for judicial procedure against registry refusals, and it is precisely this procedure, regulated under Article 25 of the Law on the Commercial Register, which guarantees the possibility for the applicants to defend their violated legal rights. This payment is in direct relation to the revoked refusal, which was issued as a result of unlawful actions of the registration officer.

The hiring of a lawyer in an appeal against a refusal is a normal decision of the persons concerned for their impaired rights and interests, and the remuneration of that lawyer is peremptorily payable under section 36 of the Advocates Act. Since the applicant is entitled to counsel in appealing the refusal and has at the same time paid a fee for that counsel, it is for the purpose of properly defending himself against the registry refusal that he has expended the funds. If the unlawful refusal had not been issued, there would have been no judicial appeal against it, in which the applicant may exercise his right to defend himself as he sees fit, including by hiring a lawyer to whom he owes remuneration.

In spite of the optional nature of the lawyer's defence, the funds paid for it are subject to reimbursement, because the right to defence, including that provided by a lawyer, is a fundamental right, guaranteed by Article 56 of the Constitution of the Republic of Bulgaria. This right shall not be restricted in any way, including under the threat of non-recovery of the lawyer's fees paid, despite a successful outcome of the case for the applicant, who benefited from the defence. The fact that the use of counsel in this type of case is not mandatory does not lead to the conclusion that the applicant is not entitled to retain counsel.[4] In support of the above conclusion, additional arguments can be sought in the reasoning of the Supreme Administrative Court.[5] In the court rulings rejecting the requests for expenses in appeals against unlawful registry refusals, it is argued that in this case the proceedings are non-contentious. In this regard, it is suggested that the provision of Article 25 (6) of the Law on the Commercial Register, according to which expenses are to be awarded in accordance with the Civil procedure Code, refers to the regulation of non-contentious proceedings in the CPC and, in particular, Article 541 of the CPC, according to which expenses in non-

[4] In this sense: Court Decision in administrative case No 6208/2018 of Sofia Administrative Court.

[5] Interpretative Decision No. 1/15.03.2017 in commercial case No 2/2016 of the Supreme Administrative Court.

contentious proceedings are to be borne by the applicant.

This suggestion is entirely wrong: both as regards the nature of the proceedings and as regards the provisions of the

CPC to which Article 25 (6) of the Law on the Commercial Register refers. Bulgarian jurisprudence has traditionally held that the proceedings for entries in the commercial register are non-contentious in nature, insofar as they serve the interests of the registrants, affect only their private sphere and do not concern a legal dispute. The rulings of the registry officials, whether to grant the registry entry or to refuse it, belong precisely to the procedure of registration in the commercial register. These proceedings are designed to ensure that the interested party is able to achieve its objectives by means of the requested registry entry, where legal prerequisites for such entry exist. In cases where registration is refused, the applicants are prevented from achieving their legitimate interest.

In the event of a refusal, the applicants shall have the right to initiate judicial control of the correctness of the refusal, which impedes their interest. This right, however, is different from the right to apply for registration entry and is exercised in special court proceedings - the judicial control proceedings under Article 25 of the Law on the Commercial Register. The latter is distinguished from the procedure for entry in the commercial register both by reason and purpose. The judicial control proceedings examine whether there have been unlawful actions by the registration officer in the registry entry procedure. There is no doubt that these are two different proceedings which, moreover, cannot be placed under the same denominator as non-contentious proceedings. While the registry entry procedure involves the State and the applicant in the provision of a public service, the judicial control proceedings against a refusal involve the court as well, acting as arbiter for an appealed act of a State official. The fact of the appeal and the claim for restitution of the applicant's violated rights in the judicial proceedings against the registry refusal distinguish these proceedings substantially from the registry entry procedure designed to serve the interests of the applicant - it is this purpose that gives the registry entry procedure its non-contentious character.

In this sense is the ruling of the Supreme Administrative Court, concerning the awarding of expenses in a proceeding before a district court against a registry refusal[6]:'In view of the subject-matter of the appeal, the proceedings before the district court are not non-contentious, because they do not arise from a defense due and ordered by a court, but from contesting the correctness of an act rendered by a non-judicial body to which, by virtue of a special law, the rights and duties to perform an administrative service are attributed.'In view of the foregoing, it is unreasonable and erroneous to equate the appeal proceedings against a registry refusal to non-contentious procedures. Such notions in case-law do not rest on any legal arguments, but mechanically reproduce the understanding of the non-contentious nature of a registry entry procedure, which is definitely not analogous to judicial proceedings on appeal against registry refusals.

Hence Art. 541 of the Civil Procedure Code, according to which the costs are at the expense of the applicant, is inapplicable in court proceedings against refusals. This provision applies to non-contentious proceedings only, but the cases of contesting

[6] Court Ruling in administrative case No. 9198/2023 of the Supreme Administrative Court.

registration refusals are not non-contentious in nature.

Regardless of the above, there is another consideration that the rules of the Code of Civil Procedure, to which Art. 25, para. 6 of the Law on the Commercial Register refers, does not involve non-contentious proceedings. Para 4 of Art. 25 of the Law on the Commercial Register, regulating the procedure for appealing registration refusals, stipulates that the court examines the appeal in accordance with Chapter XXI 'Appeal of court rulings' of the Code of Civil Procedure. From the systematic place of para. 6 of Art. 25 of the Law on the Commercial Register, according to which expenses in proceedings against refusals are awarded according to the rules of the Civil procedure Code, it logically follows that the reference to the CPC concerns specifically Chapter XXI ' Appeals of court rulings' - according this chapter, the court shall rule on the claims in the appeal against the refusal, including requests for expenses.

Chapter 'Appeals of court rulings' does not specifically deal with expenses incurred in these proceedings. Art. 278, para. 4 of the CPC from the mentioned chapter, however, contains a reference to the rules for appealing court decisions. These rules include Art. 273 of the CPC, which in turn refers to the proceedings before the first instance court. In Art. 236 of the CPC, related to the proceedings before the first instance court, in para. 1, item 6, it is expressly stated that the decision shall also contain a ruling on the issue of awarding expenses, such as state fees and attorney`s remuneration.

Apart from that, Art. 81 of CPC provides that in each court decision the court shall also rule on the claim for expenses, and Art. 78 of the CPC regulates the manner in which expenses are awarded - proportionally to the awarded part of the claim (Art. 78, para. 1 Civil Procedure Code). The legal framework traced in this way undoubtedly leads the conclusion that the applicable procedure under the Civil Procedure Code for awarding expenses in proceedings on appeals against registry refusals is the one ensuing from Chapter XXI 'Appeals of court rulings', and not the regulation of non-contentious proceedings. Art. 541 of the CPC regarding the applicant's bearing the expenses in non-contentious proceedings is therefore irrelevant. There is also no doubt that the expenses include both State fees and attorney's remuneration due and paid by the appellant in the proceedings. The revoking of the refusal as a result of the appeal provides grounds for awarding the full amount of expenses claimed by the appellant.[7]

From what has been stated so far, an indisputable conclusion can be drawn that the problems with the implementation of the amendments to the Law on the Commercial Register are not due to defects in the law, but to its wrong interpretation and practical application. These erroneous practices lead to violation of the basic civil right of defence, guaranteed by Art. 56 of the Constitution of the Republic of Bulgaria.

3. Conclusion

The Bulgarian legislation provides a control mechanism over registry refusals in the form of a special court proceeding initiated on the applicant's claim. Judicial control aims to guarantee the rights and legitimate interests of the applicants in case of illegal actions of the State through the registration officials, insofar as the

[7] In this sense: Court Decision in administrative case No 8854/2021 of Sofia Administrative Court.

registration procedure itself is intended to benefit and serve the registrants and their business.

The current regulatory framework is tailored to the specifics of the appeal proceedings against refusals. The legal amendments in the Law on Commercial Register from December 2020 were aimed to supplement and clarify the existing rules, without fundamentally changing the essence of the proceedings. Of particular importance was the creation of a legal basis for awarding costs to the appellant in the overturned refusal proceedings.

Despite the intentions to improve the law, unexpected and contradictory interpretations of the new provisions appeared in case-law, which worsened the situation of the appellants and violated their fundamental rights. These vicious practices are related to the unjustified broad interpretation of the powers of the Registration Agency in the appeal proceedings, and above all, to the obstruction of the appellant' right to recover the expenses incurred as a result of the illegal registry refusal.

This report traces which legal provisions are subject to incorrect application, what constitutes the incorrectness of case-law interpretations and how these erroneous practices damage the rights of the applicants. A focus is placed on the fact that the contradictions are not a consequence of imperfections in the law, but in the vicious interpretations and legal practices, which urgently need to be reconsidered.

This report aims to give publicity to the presented problems, as it needs to be discussed on a broader scale by legal practitioners, business professionals, public and private representative bodies and civil right activists alike.

As until this moment the issues stated above have not been the subject of academic research, another purpose of this paper is to provoke further studies of the matter in question and its implications.

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THE ISSUE OF PROCEDURAL PASSIVE QUALITY IN THE PROCESSES WHICH CONCERN USUCAPION

Diana Andreea TOMA[*]

Abstract

In the Romanian legal system, usucaption is an original way of acquiring property rights. In court actions for the establishment of the existence of the right of ownership by virtue of usucaption, the question of the passive procedural quality has frequently been raised. The general rule is that the defendant is represented by the titleholder of the property to be usucaptioned. However, in practice there are different situations which need to be adapted to each individual situation. This paper aims to present the most common situations regarding the passive legal standing in actions for the establishment of ownership by virtue of usucaption.

Keywords: *usucaption, procedural passive quality, property rights, possession, court practice.*

1. Introduction

Usucaption is an original way of acquiring property rights which is characterised by the acquisition of ownership of real estate through long-term possession. Thus, the active subject is the person who has continuously and usefully possessed the immovable property and the passive subject is the legal owner of the property.

On the one hand, usucaption is a benefit for the person who has exercised uninterrupted possession of the property and, on the other hand, it is a penalty for the person who is the rightful owner of the property but has not taken an interest in it, thus remaining passive and allowing another person to acquire ownership of the property in question.

Depending on when the person subject to the proceedings began to exercise possession, several situations can be distinguished as regards the person who has passive procedural capacity.

Usucaption is regulated in the Civil Code in the matter of the effects of possession, applying accordingly the provisions concerning extinctive prescription.[1]

2. Passive procedural status depending on when possession was commenced

When the plaintiff seeks a declaration that he has acquired ownership regarding usucaption commenced before the Civil Code came into force, several situations will be distinguished.

The general rule is that the case will be brought against the person who has the last title to the property, who should bear the consequences of remaining in passive possession. As we have already stated, the

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[1] Gabriel Boroi, Carla Alexandra Anghelescu, *Fișe de drept civil*, Publishing House Hamangiu, Bucharest, 2021, p. 655.

institution of usucaption is not only a benefit of the law for the person who acquires the property in this way, but also a sanction against the non-diligent owner who leaves the property in the possession of another person for a long time.[2]

A first hypothesis, the one in which the fewest problems arise, is the situation in which the true owner is known. If the true owner is alive, the action will be brought against him and if he is deceased, the action will be brought against his heirs. If the action is brought against other persons or against the State or the territorial administrative unit within whose area the property is situated, the action shall be dismissed as being brought against a person who does not have the passive procedural position.

There are situations where the plaintiff has acquired the property based on a non-transferable document of title, for example a hand receipt from a possessor who has also acquired the property on based on a hand receipt. In this case, the claimant must identify the true owner, the person who has title to the property, and litigate against him or his heirs. If the action is brought against the person from whom the property was purchased, i.e. the person who sold the property with the handbill as the title deed, the action will be dismissed as being brought against a person who does not have the capacity to sue and be sued because he is not the true owner of the property.

'The person who must prove that the defendant is the owner, is the plaintiff, since it is he who brings the action and seeks a benefit. This solution is justified by the fact that in such an action, the plaintiff can be sued only in opposition to the true owner, whom he must indicate'.[3]

The second hypothesis is the situation where the person who was the owner of the property is not known. Frequently, in this case, the claimant brings the action against the State or the territorial administrative unit in whose area the property is located.

In recent judicial practice there have been two approaches. The first is to dismiss the action as being brought against a person without standing. The second approach has been mainly concerned with a person's right of access to justice. Starting from the premise that the plaintiff had made every effort to identify the true owner, but for objective reasons this could not be done, the national courts have recently taken a different approach, based also on the rulings of the European Court of Human Rights, in particular those in the Holy Monasteries v. Greece judgment.

On the basis of this ECHR judgment, domestic judicial practice has held that 'in this situation, if the administrative territorial unit were not considered the owner of the property and therefore had passive legal standing in the action for usucaption, the claimant-possessor would inevitably be deprived of any real possibility of obtaining recognition of his right of ownership acquired by usucaption. If the plea of lack of the passive procedural position on the part of the administrative territorial unit were to be examined as a matter of priority and upheld, the substance of the applicant's right to effective access to the courts, an essential pillar of the right to a fair trial, would be affected.'[4]

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[2] Hight Court of Cassation and Justice, dec. no. 356/2006, Adriana Pena, *Accesiunea imobiliară şi uzucapiunea.Culegere de practică judiciară*, Publishing House C.H. Beck, Bucharest, 2009, p. 90, apud Bogdan George Zdrenghea, *Problema calităţii procesuale pasive în procesele care au ca obiect uzucapiunea*, Analele Universității de Vest din Timișoara - Seria Drept, no. 2/2009, p. 9.

[3] Court of Appeal Bucharest, dec. no. 1528/1996, available at http://spete.avocatura.com/speta.php?pid=469 ud apud Bogdan George Zdrenghea, *op. cit.*

[4] District 3 Court, Bucharest, dec no. 8812 from 09.10.2023, pronounced in case no. 5808/301/2022.

Thus, according to domestic court practice, if the claimant is objectively unable to obtain information about the owner of the property he wishes to obtain the ownership on, he would be entitled to bring an action against the State or territorial administrative unit. Otherwise, his right of access to justice would be affected.

The High Court of Cassation and Justice also ruled in this regard in Decision No 24 of 3 April 2017 on the interpretation and application of the provisions of Article 1845 in conjunction with Article 1847 of the Civil Code of 1864 and Article 36 of the Code of Civil Procedure, in which it held: 'A review of the case law of the selected judgments of the courts of appeal shows that, to a considerable extent, the majority opinion of the courts is to the effect that as long as there are no other persons (natural or legal) who have title to the immovable property in relation to which it has been requested that the statute of limitations on acquisition has expired, the immovable property is deemed to belong to the public or private domain of the administrative-territorial unit, within the radius of the immovable property, which has passive legal standing.'[5]

Another possible situation would be where the true owner of the property is known but the claimant is unable to indicate his heirs because there is not enough data on the person in the population register databases. In our opinion, the above-mentioned situation, in which the plaintiff sues the State or the territorial administrative unit, is also applicable in this case.

At the same time, there may be situations where the true title holder is more than one person. In this situation, legal action should be brought against them or against the heirs of each of the owners. The situation becomes even more difficult when the title deeds are old and information about the heirs of the owners is difficult to obtain. However, if the plaintiff is only able to obtain information about the heirs of one of the owners and proves that he has made every effort to identify the heirs of the other owners, but is unable to do so, it has been held in judicial practice that this situation can be described as one of mixed passive legal standing.

In this case, the territorial administrative unit invokes the plea of lack of passive legal standing on the ground that it does not have passive legale position because the true heirs must be sued. However, a court judgment held that „Therefore, as regards the heirs of C T B, they have been identified, the defendants being the natural persons in the present case. As regards the heirs of M T B, they could not be identified. Analysing first of all the plea of lack of passive legal standing of the defendant Municipality of Bucharest, the court notes that judicial practice has consistently held that, in a situation where the true owner of the possessed property has not been identified in the usucaption action, the rulings of the European Court of Human Rights in the case of The Holy Monasteries v. Greece are applicable. In view of the all above reasons, the court considers that the case requires the existence of a mixed passive procedural capacity represented both by the heirs of C T B (the defendants natural persons in the present case) and by the Municipality of Bucharest through the Mayor who is suing in view of the impossibility of establishing the heirs of M T B. In the light of these considerations, the court will reject the plea of lack of locus standi of the defendant Municipality of

[5] Hight Court of Cassation and Justice, Civil Chamber, dec. no. 24 from 3.04.2017, www.scj.ro.

Bucharest, raised in the statement of defence, as unfounded.'[6]

Another approach taken by the courts in cases where the heirs could not be identified was to request that a certificate of inheritance vacancy be attached to the case file, on the grounds that this was the only way to justify the passive procedural status of the territorial administrative unit.

Thus, in doctrine, it has been held that 'before establishing usucaption, however, it must be established that the succession is vacant'.[7] 'In the same sense, the provisions of Article 1 letter b of Government Ordinance no. 128/199815 specify that among the goods that become the private property of the State are also movable or immovable property resulting from inheritances without legal or testamentary heirs.'[8]

A clarification is necessary to be made with regard to the application of the law over time in relation to the holder of the vacant inheritance. If the inheritance became vacant during the period of application of the old Civil Code, it is the State which becomes the holder of the inheritance. Thus the provisions of Article 477 of the Civil Code of 1864 state that 'All vacant and unclaimed estates, as well as those of persons who die without heirs, or whose estates are bequeathed, belong to the public domain'[9]. Article 680 of the same code also states that in the absence of legal or testamentary heirs, the property left by the deceased passes to the State.

On the other hand, if the inheritance becomes vacant after the entry into force of the new Civil Code, Article 1138 of the new Civil Code stipulates that 'Vacant inheritances shall revert to the commune, town or, as the case may be, the municipality in whose territorial area the property was located at the date of the opening of the inheritance and shall enter their private domain'.

In judicial practice, it has been decided that the court hearing an action for usucaption may find, as an incidental question, that the succession is vacant. In this respect, it has been pointed out that the absence of a notarial certificate of vacancy is not such as to justify the general lack of jurisdiction of the courts to find that the succession is vacant, especially as the court is seised of the application of a person who justifies an interest.[10]

In this situation it is important to note that the provisions on the jurisdiction of the courts are also relevant. Thus, if it is requested that an inheritance be found to be vacant, the provisions of Article 118 of the Code of Civil Procedure become applicable, which states that in cases concerning inheritance, until the end of the indivision, the court of the last domicile of the deceased has jurisdiction. However, in the case of actions for a declaration of the existence of a right of ownership by virtue of usucaption, the court of the place where the property is situated has jurisdiction. The two courts could therefore be different. In this situation, the court hearing the case on usucaption would be able to suspend the case under Article 413 alin. (2) para. 1 of the Code of Civil Procedure, until the case is resolved by finding that the inheritance is vacant, so that the administrative-territorial unit has standing legal position in the original case on usucaption.

[6] District 3 Court, Bucharest, dec no .1275 from 23.02.2024, pronounced in case no. 4326/301/2021.
[7] B. Zdrenghea, *op.cit*, p. 5.
[8] Government Ordinance no. 128/28.08.1998, published in Official Journal of Romania, Part I, no. 863 of 26 September 2005.
[9] Art. 477 Civil Code from 1864.
[10] B. Zdrenghea, *op.cit.*, p. 4.

As mentioned above, there have also been situations where courts have held that the territorial administrative unit or the State has standing when heirs cannot be identified, without also requesting the certificate of inheritance. Thus, in a ruling it was stated that „ As regards the passive legal standing of the defendant Municipality of Bucharest, represented by the Mayor General, the court holds that the plaintiff has not indeed provided unquestionable proof of ownership belonging to the private domain of the State, in the sense of showing a title deed. On the other hand, in the present dispute, all possible and necessary steps were taken before the court in order to ascertain the heirs of the owners of the property. From all the evidence in the case file it appears that there is no evidence for the period prior to the plaintiff's occupation of the land and that for over 42 years the plaintiff has never been disturbed in the exercise of his possession. However, in these circumstances, dismissing the case on the basis that the Municipality of Bucharest is a person lacking passive legal standing, would mean depriving the plaintiff of any possibility of recovering their rights, which constitute an 'asset' within the meaning of Article 1 of Protocol 1 of the European Convention on Human Rights.' [11]

In our opinion, if there are no heirs or if the heirs of the owner of the property right cannot be identified, the correct solution is that the plaintiff obtains a certificate of inheritance before filing a lawsuit for a declaration of ownership by virtue of usucaption. In this way, there can be no doubt as to the passive procedural status of the territorial administrative unit. This cannot be regarded as a restrictive interpretation restricting the claimant's access to justice. In the cases mentioned above, the passive procedural status of the territorial administrative units or of the State can be established by means of the certificate of inheritance, following a fairly simple procedure, which does not prevent the claimant from having access to justice. This will simplify the process of seeking a declaration of ownership on the basis of usucaption, as the passive procedural status of the State or of the territorial administrative units will be clearly established.

3. Passive procedural position in the case of usucaption commenced during the period of application of the new Civil Code. Special procedure provided by the new Code of Civil Procedure

If the plaintiff bases his action for a declaration of ownership on the basis of usucaption on the provisions of the new Civil Code and implicitly on the procedure provided for by the new Code of Civil Procedure, the passive procedural status changes quite a lot.

So far there has been ample discussion as to whether the plaintiff can avail himself of the provisions of the new Civil Code in relation to the time of the commencement of his possesion. The Constitutional Court's decision No 225 of 2 April 2015 established that the new procedure can also be applied with regard to rights acquired by virtue of usucaption under possessions commenced prior to the entry into force of the new Civil Code. Subsequently, the HCCJ[12], by Decision No 19 of 5 October 2015 handed down in an appeal in the interest of the law, established that the procedure provided for by the new Code applies only where possession began after the entry into force of the current Civil Code.

[11] District 3 Court, Bucharest, dec. no 10565 from 10.11.2022, pronounced in case no. 31453/4/2019.
[12] High Court of Cassation and Justice.

The question of the application of the law over time is not the subject of this paper, so the passive procedural quality in actions based on the establishment of the right of ownership by virtue of usucaption will be analysed on the premise that the new Civil Code and the new Code of Civil Procedure will apply.

Analysing the provisions of Articles 1050-1052 of the New Code of Civil Procedure, it can be seen that the procedure to be followed is a non-contentious one. At the initial stage of the action, the court checks whether the plaintiff's action contains all the documents provided for in Article 1051 and the list of the two witnesses to be heard. Subsequently, the court orders the summons to be served on the holder of the right entered in the land register or on his heirs and also orders the issue of summonses to be posted at the court's premises, at the premises of the property to be usurped, at the land registry office and at the premises of the town hall in whose district the property is located. Also, the summonses are published in two newspapers.

So we can see that at least in the initial phase, the procedure is not very long. Although the non-contentious procedure is defined as "a procedure involving the delivery of judgments in cases where the court is required to intercede, but in which the aim is not to establish an adverse claim against another person"[13], the legislator has chosen to greatly simplify the procedure whereby a person can obtain title to a piece of real estate, thus sanctioning the passivity of the true owner.

This 'non-contentious' procedure can only be transformed into a contentious procedure if the interested parties lodge opposition. Thus, if opposition has been lodged, it is communicated to the plaintiff so that he can defend himself by means of a statement of defence. It can be seen that in this case, although it is the plaintiff who brings the action, he subsequently becomes the party who formulates defences. This procedure thus introduces a new feature in the way civil proceedings are conducted in this respect too. In practice, passive procedural quality is also transferred to the plaintiff, who must defend himself against the claims of a person who is not interested to acquiring ownership of the property.

However, if no person objects, the procedure remains uncontested until the court finally finds that the claimant has acquired ownership of the property by virtue of usucaption.

4. Conclusions

In conclusion, the new procedure brings significant novelties in terms of passive legal standing in actions concerning usucaption. Although it starts from a non-litigious procedure, with no need to name a defendant, it can subsequently be transformed into a procedure involving two or more parties, depending on the number of persons lodging objections.

It is difficult to understand why the legislator chose to simplify so much a procedure whereby a person becomes the owner of a property right, as usucaption is an original way of acquiring property rights. In our opinion, the publicity of the procedure provided by the publication of notices is not sufficient.

Therefore, we can conclude that the issue of standing in actions based on obtaining a right of ownership by virtue of usucaption is topical, regardless of whether the plaintiff bases his action on the

[13] Răzvan Ion Vasiliu, *Procedura necontencioasă în Noul Cod de procedură civilă – Comentariu*, Revista de drept social, no. 8/2012, p. 2.

provisions of the old Civil Code or on the provisions of the new Civil Code.

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LEGAL FICTIONS IN COURT OF JUSTICE OF EUROPEAN UNION CASE LAW: SPACE

Alina Mihaela CONEA[*]

Abstract

This paper examines the pervasive yet often overlooked role of legal fictions in shaping the European Union's legal framework. It focuses on the concept of space, exploring three key fictions: lex rei sitae, habitual residence, and non-entry. Lex rei sitae, a fiction that simplifies property disputes by anchoring contracts to the location of the property, gains new layers of meaning through the case-law of the Court of Justice of the European Union (CJEU). Habitual residence, while intentionally flexible, defines jurisdiction for various legal matters. The controversial 'non-entry' fiction allows member states to deny legal entry to migrants despite their physical presence. By analysing these fictions, the paper sheds light on how the EU constructs and defines space within its legal system. This analysis paves the way for further research on legal fictions within EU law.

Keywords: *legal fiction, lex rei sitae, habitual residence, non-entry, case-law of CJEU.*

1. Introduction

Space is relative ….not only in physics.

It is important to acknowledge the constant presence of legal fictions within legal systems. Legal fictions are as necessary to law as are other technical procedures, fulfilling at least a corrective function in relation to existing legal norms and taking into account the dynamics of legal relations. For example, the fiction of the legal person has become a concrete reality through the deepening and resizing of the legal category of legal subject[1]. Legal fictions can serve a pragmatic purpose by providing solutions to life's complexities and enhancing efficiency or functionality within the legal system[2]. They are also constantly found in European Union law. In this paper, we will highlight some legal fictions that are related to the concept of space (the physical one).

In this paper, we will highlight some legal fictions related to the concept of space.

We focus on three areas of EU Law and examine the fictionalization of space.

First, we focus on the concept of space in contractual obligations. *Lex rei sitae* dictates that the governing law for a contract concerning immovable property is typically the law of the country where the property is situated. The lex rei sitae fiction simplifies matters by ensuring a clear and predictable legal framework for disputes involving immovable property.

Then, another legal fiction central to EU private international law is the concept of 'habitual residence.' It plays a crucial role

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[1] Ion Deleanu, *Ficțiunile juridice*, All Beck Publishing House, Bucharest, 2005.

[2] Douglas Lind, *The Pragmatic Value of Legal Fictions*. In: Del Mar, M., Twining, W. (eds) *Legal Fictions in Theory and Practice*. Law and Philosophy Library, vol 110. Springer, Cham. 2015.

in determining jurisdiction for various legal matters, including divorce, child custody, and social security benefits. However, the concept is deliberately fluid, allowing for interpretation based on the specific legal instrument.

Third, we examine space and borders in immigration law[3]. The concept of 'non-entry' employed in EU immigration law is a particularly controversial legal fiction. It allows member states to deny legal entry to third-country nationals (individuals not citizens of the EU) despite their physical presence on EU territory.

By examining these three legal fictions, we gain a deeper understanding of how the EU constructs and defines space within its legal framework. These fictions serve pragmatic and even creative purposes but also raise questions about fairness and consistency.

2. The trees and *lex rei sitae*

In the case C-595/20, *UE v ShareWood Switzerland*[4], an austrian consumer (UE) filed a lawsuit against ShareWood, a company located in Switzerland, in an Austrian court. The lawsuit stemmed from a main agreement between UE and ShareWood for the purchase of teak and balsa trees growing in Brazil. This agreement included four separate purchase contracts and additional terms. The purchase price encompassed ground rent for the land where the trees were planted. ShareWood managed the trees, including harvesting and selling them, and retained a portion of the profits as a service fee. Notably, one purchase contract involving 2600 teak trees was mutually cancelled by both parties. Austrian court (Oberster Gerichtshof) is deciding on the applicable law of this contract. Despite choosing Swiss law, the court considers Austrian consumer protection laws may still apply.

The Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) unequivocally establishes the principle of party autonomy in contractual obligations. This principle allows parties to freely choose the governing law of their contract without constraints. In the absence of choice, the regulation[5] establishes some rules, such as: a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated (*lex rei sitae*[6]).

However, the Regulation imposes certain limitations on party autonomy, particularly when its exercise would disadvantage the weaker party in contracts involving consumers[7].

Normally, contracts with consumers would be governed by the law of the party providing the primary performance if no choice of law is made (Article 4(2)). This typically refers to the law of the professional engaged by the consumer. However, Article 6 of the Regulation alters this approach by subjecting such contracts, in the absence of

[3] See on free movement of persons, Augustin Fuerea, *Dreptul Uniunii Europene. Principii, actiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 188.

[4] Judgment of the Court (Eighth Chamber) of 10 February 2022, UE v ShareWood Switzerland AG and VF, Case C-595/20, ECLI:EU:C:2022:86.

[5] Article 4(1)(c), Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

[6] Elena Anghel, *Drept privat roman: izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, p. 191.

[7] Article 6, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

a choice of law, to the law of the country where the consumer has their habitual residence. This is presumed to be, if not more favourable, at least more familiar to the consumer. Additionally, the Regulation extends consumer protection to all contracts, except those explicitly excluded by Article 6(4). So, a contract relating to a right *in rem* in immovable property or a tenancy of immovable property will be governed by the law of the professional.

According to the CJEU in its judgment of 10 February 2022, C-595/20, *UE v ShareWood Switzerland* [8],'the trees must be regarded as being the proceeds of the use of the land on which they are planted. Although such proceeds will, as a general rule, share the same legal status as the land on which the trees concerned are planted, the proceeds may nevertheless, by agreement, be the subject of personal rights of which the owner or occupier of that land may *dispose separately* without affecting the right of ownership or other rights *in rem* appertaining to that land. A contract which relates to the disposal of the proceeds of the use of land cannot be treated in the same way as a contract which relates to a 'right *in rem* in immovable property', within the meaning of Article 6(4)(c) of the Rome I Regulation.'

In conclusion, contracts relate to trees planted on land leased *for the sole purpose of harvesting* those trees *for profit* are not 'contracts having as their object rights *in rem* in immovable property or tenancies of immovable property'.

CJEU seems to have a flexible approach, taking the *lex rei sitae* rule as a starting point but holding its application against the light of the interests involved[9].

3. The habitual residence

The concept of habitual residence[10], central to EU private international law, presents a paradox. Interestingly, its meaning remains fluid, receiving different interpretations depending on the legal instruments to which it is linked.

'Habitual residence' is a connecting factor across various areas of EU legislation.

One area is the EU legislation concerning conflict rules, such as: (1) Contractual obligations (Rome I Regulation[11]); (2) non-contractual obligations (Rome II Regulation[12]); (3) divorce and legal separation (Regulation No 1259/2010[13]); (4) matrimonial matters and parental responsibility (Regulation Brussels II bis[14]); (5) maintenance obligations

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[8] Judgment of the Court (Eighth Chamber) of 10 February 2022, UE v ShareWood Switzerland AG and VF, Case C-595/20, ECLI:EU:C:2022:86, para. 28.

[9] Sjef van Erp, 'Lex rei sitae: The Territorial Side of Classical Property Law', in *Regulatory Property Rights*, Leiden, The Netherlands: Brill | Nijhoff, 2017, p. 80.

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

[11] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

[12] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31/07/2007, p. 40–49.

[13] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10-16.

[14] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 02/07/2019.

(Regulation No 4/2009[15]); (6) succession matters (Regulation No 650/2012[16]).

'Habitual residence' extends its influence beyond private law, serving as a connecting factor in various EU public law instruments. These include, for example: (1) social security coordination (Regulation No 883/2004[17]); (2) European Arrest Warrant (Council Framework Decision 2002/584/JHA [18]); (3) staff regulations of EU officials. A special area is that of the insolvency proceedings[19].

a) Habitual residence may be different for child and adults

In the field of family law CJEU recognise that „the particular circumstances characterising the place of habitual residence of a child *are clearly not identical* in every respect to those which make it possible to determine the place of habitual residence of a spouse'.

The CJEU case law establishes that a young child's *habitual residence* is determined in part by the parents' social and family environment.

Within the context of parental responsibility under Regulation No 2201/2003, the CJEU has established a framework for determining a child's habitual residence, particularly for young children. This framework prioritizes the parents' situation, focusing on their: (1) Stable presence and integration into a social and family environment; (2) Intention to settle in that location, where that intention is manifested by tangible steps.

This approach acknowledges the dependence of young children on their parents and the significance of their family environment[20].

The *IB v FA*, C-289/20[21], involves a French-Irish couple (IB and FA) married in Ireland (1994) with a family home there. IB initiated divorce proceedings in France (2018) where he had worked since 2010. While FA argued their habitual residence remained in Ireland, IB highlighted his stable employment, apartment ownership, and social life in France. The French appeal court acknowledged IB's ties to both countries: his professional center in France since 2017 and ongoing family connections in Ireland. This situation led them to question whether EU regulations allow spouses with divided lives to have a habitual residence in two member states, granting jurisdiction to courts in both locations.

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[15] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1–79.

[16] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107-134.

[17] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland), OJ L 166, 30.4.2004, p. 1-123.

[18] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, p. 1–20.

[19] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72.

[20] Judgment of the Court (Fifth Chamber) of 28 June 2018, Proceedings brought by HR, Case C-512/17, ECLI:EU:C:2018:513.

[21] Judgment of the Court (Third Chamber) of 25 November 2021, IB v FA, Case C-289/20, ECLI:EU:C:2021:955.

The court acknowledges that unlike children, whose environment is primarily familial (*Mercredi*, C-497/10 PPU[22]), adults have a more diverse range of activities and interests spanning professional, social, cultural, and financial aspects. This complexity makes it impractical to expect these interests to be concentrated within a single EU member state. This aligns with the objectives of Regulation No 2201/2003: facilitating divorce applications through flexible conflict of laws and protecting spouses who leave the common habitual residence due to marital breakdown (Mikołajczyk, C-294/15[23]).

For adults, the Court identifies the key factors in determining habitual residence: a stable stay within the Member State and, at minimum, evidence of integration into the social and cultural environment. The Court establishes that a spouse residing in two Member States can only have *one* habitual residence[24].

b) Habitual residence for social security

In the case *I v Health Service Executive*, C-255/13[25], Mr. I, an Irish national, fell severely ill while on holiday in Germany. Since then, for 11 years he has required constant medical care and resides there with his partner, Ms. B. Despite maintaining financial ties and contact with his family and children in Ireland, Mr. I's limited mobility prevents him from easily returning. This case centres on his eligibility for social security benefits. Ireland initially covered his treatment in Germany under EU regulations, but later denied further support due to his perceived residency shift. The Irish High Court questions if EU law allows continued healthcare coverage under these circumstances, considering Mr. I's compelled stay in Germany due to his medical condition.

The court establishes that „since the determination of the place of residence of a person who is covered by insurance for social security purposes must be based on a whole range of factors, the simple fact that such a person has remained in a Member State, even continuously over a long period, does not necessarily mean that he resides in that State'[26]. The court adds that „the length of residence in the Member State in which payment of a benefit is sought cannot be regarded as an intrinsic element of the concept of residence'.

The Court of Justice clarifies that such a person can be considered 'staying' in the second member state, but only if their *habitual centre of interests* remains in the first. Notably, a prolonged stay in the second state due to illness is not enough to establish *residency* for social security purposes.

c) Habitual residence as centre of main interest in insolvency proceedings

Jurisdiction to open insolvency proceedings belongs to the courts of the Member State in which the debtor's center of main interests (COMI) is located[27]. In the case of individual, the centre of main interests shall be presumed to be the place of the individual's *habitual residence* in the absence of proof to the contrary.

[22] Judgment of the Court (First Chamber) of 22 December 2010, Barbara Mercredi v Richard Chaffe, Case C-497/10 PPU, ECLI:EU:C:2010:829, para. 54.

[23] Judgment of the Court (Second Chamber) of 13 October 2016, Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki, Case C-294/15, ECLI:EU:C:2016:772, para. 50.

[24] Judgment of the Court (Third Chamber) of 25 November 2021, IB v FA, Case C-289/20, ECLI:EU:C:2021:955.

[25] Judgment of the Court (Fourth Chamber), 5 June 2014, I v Health Service Executive, Case C-255/13, ECLI:EU:C:2014:1291.

[26] Idem, para.48.

[27] Art. 3(1) Regulation 2015/848.

The Regulation provides a definition of the concept of '*center of main interests*' in Article 3(1) of Regulation 2015/848 as the place where the debtor habitually manages its interests and which is verifiable by third parties[28]. According to the CJEU, the concept[29] has an autonomous character. The interpretation of the concept provided by the CJEU in the *Eurofood*[30] and *Interedil*[31] cases has been codified in the amended version of the Regulation.

Thus, Recital 30 of the Regulation emphasizes that what is relevant in identifying the 'center of main interests' is the real center of management and supervision of the company and the center of management of its interests.

The following presumptions are established (subject to a time condition[32]):

(1) In the case of a company or legal person, the center of main interests is presumed, until proven otherwise, to be the place where the registered office is located.

(2) In the case of a natural person who exercises an independent activity or a professional activity, the center of main interests is presumed to be the main place of business, in the absence of evidence to the contrary.

(3) In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's *habitual residence* in the absence of proof to the contrary.

In the case *MH and NI*[33] A UK-resident couple seeks insolvency in Portugal, where their sole asset is located and financial troubles arose. The Portuguese lower court declined jurisdiction due to the presumption of COMI being habitual residence (UK). The couple argues Portugal is their COMI due to asset location and insolvency origin, questioning the presumption's strength. The referring court seeks clarification on rebutting the presumption for non-business individuals. The CJEU stated that' the presumption established in that provision for determining international jurisdiction for the purposes of opening insolvency proceedings, according to which the centre of the main interests of an individual not exercising an independent business or professional activity is his or her habitual residence, is not rebutted solely because the only immovable property of that person is located outside the Member State of habitual residence'[34].

d) Reside or stay in European arrest warrant

The interpretation of the terms 'resident' and 'staying' in the executing Member State emerged as a central issue in the European arrest warrant[35] case of

[28] For a critical review of the definition and presumptions: Renato Mangano, 'The Puzzle of the New European COMI Rules: Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises', *European Business Organization Law Review*, Springer, 2019.

[29] In the previous Regulation, Regulation No 1346/2000, the current definition was found in Recital 13.

[30] Judgment of the Court (Grand Chamber) of 2 May 2006, Eurofood IFSC Ltd, Case C-341/04, ECLI:EU:C:2006:281.

[31] Judgment of the Court (First Chamber) of 20 October 2011, Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA, Case C-396/09, ECLI:EU:C:2011:671.

[32] This presumption applies only if the main place of business has not been moved to another Member State in the three months preceding the application for the opening of insolvency proceedings.

[33] Judgment of the Court (Ninth Chamber) of 16 July 2020, MH and NI v OJ and Novo Banco SA, Case C-253/19, ECLI:EU:C:2020:585.

[34] Idem, dispositive.

[35] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

Szymon Kozłowski[36]. The CJEU concluded that a requested person is 'resident' in the executing Member State when he has established his actual place of residence there and he is 'staying' there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence. In order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying', it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State[37].

4. The borders and 'non-entry'

State borders mark physical lines separating countries (sovereignty) and legal reach (jurisdiction). The national legal systems rely on a defined territory for their rules and enforcement[38].

The concept of 'non-entry' is a legal mechanism employed by states to manage their borders. It allows them to deny third-country nationals (individuals not citizens of the member state) legal entry despite their physical presence on the territory. This fiction applies until the individual obtains official clearance from border or immigration officers. In the field of immigration control, the European Commission's proposal for a pre-screening regulation[39] alongside the amended procedures directive strengthens their preventative approach built on the 'non-entry' fiction[40].

Pre-entry screening in the EU subjects third-country nationals to a state of non-recognition. They are deemed unlawfully present despite their physical location within EU territory. This exclusion from lawful[41] presence denies them crucial human rights protections, particularly those prohibiting pushbacks and refoulement. International law obligates countries to uphold these protections, but only for those who have lawfully entered before seeking asylum. Furthermore, pre-entry screening integrates these individuals into the EU's extensive migration surveillance system, including mandatory biometric registration.

Scholars[42] debate the existence of a potentially contrary[43] or inconsistent[44] approach by the European Court of Human

[36] Judgment of the Court (Grand Chamber) of 17 July 2008, Szymon Kozłowski, Case C-66/08, ECLI:EU:C:2008:437.

[37] Idem, para. 54.

[38] Roxana-Mariana Popescu, *Drept Internațional Public. Noțiuni Introductive*, Universul Juridic Publishing House, Bucharest, 2023, p. 139.

[39] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612 final.

[40] Valsamis Mitsilegas, 'The EU external border as a site of preventive (in)justice', *Eur Law J.* 2022; 28(4-6): 263-280. doi:10.1111/eulj.12444.

[41] Elena Emilia Ștefan, *Drept administrativ, Partea a II-a, Curs universitar*, Universul Juridic Publishing House, Bucharest, 2023, p. 35.

[42] Valsamis Mitsilegas, idem.

[43] Sergio Carrera, 'The Strasbourg court judgement 'N.D. and N.T. v Spain': a 'carte blanche' to push backs at EU external borders', *EUI RSCAS*, 2020/21, Migration Policy Centre - https://hdl.handle.net/1814/66629.

[44] Anita Orav, Nefeli Barlaoura, *Legal fiction of non-entry in EU asylum policy*, EPRS | European Parliamentary Research Service, 2024.

Rights (ECHR) compared to the Court of Justice of the European Union (CJEU) on this issue.

Through a series of rulings[45], the CJEU has deemed such state practices incompatible with the Charter[46]. The CJEU uphold his constant approach in the case *M.A. v Valstybės sienos apsaugos tarnyba*, C-72/22 PPU[47], assessed national emergency measures enacted in Lithuania to address a migrant influx. The case involved M.A., a third-country national detained for irregular entry. Lithuania's emergency measures allowed detention based solely on irregular entry during a mass influx and restricted asylum applications. The CJEU ruled these measures incompatible with EU law. It emphasized that asylum procedures must guarantee effective access to protection, and irregular entry cannot prevent applications. Additionally, detention of asylum seekers solely based on irregular stay is not permitted. The CJEU concluded that EU law prohibits national provisions denying asylum applications and detaining solely on irregular residence during a declared mass influx.

4. Conclusions

Legal fictions are often unseen in the legal structure. They are present throughout legal systems, subtly shaping how the law operates. This paper explored three such fictions within the European Union: lex rei sitae, habitual residence, and non-entry. These concepts demonstrate the often-unnoticed role legal fictions play in streamlining legal processes (lex rei sitae), defining jurisdiction (habitual residence), and managing complex situations (non-entry). Recognizing these nuances allows for a more informed discussion about the role of legal fictions within the EU legal framework.

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[46] Mihaela-Augustina Niță (Dumitrașcu), Oana-Mihaela Salomia, *Dreptul Uniunii Europene II. Curs universitar*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2023, p. 253.

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SOME CONSIDERATIONS REGARDING DECISION NO. 364/2022 OF THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract

The issue of plagiarism has raised many theoretical and practical discussions. Also, the legal basis was not clear enough and certain misunderstandings have created the premises for losing the title of doctor. Arrived in court, the trials were judged differently. In 2022, the Constitutional Court pronounced Decision no. 364, one of the clearest decision of the court, and the issue was settled in a transparent manner. The current study will analyze the implications of this decision.

Keywords: *Constitutional Court, administrative act, civil circuit, plagiarism.*

1. Introduction

The authenticity of a paperwork seeking a doctoral title has been a widely discussed topic. The title of doctor in itself represents the highest scientific qualification that a person can obtain, followed by scientific recognition in the academic world or in the field in which the person to whom this distinction is awarded works, which automatically entails the need for the work to be the fruit of an extensive personal contribution, marked by an arduous path of rigorous scientific documentation. Therefore, the writing of a doctoral thesis is subject to particular scientific rigor, designed to produce a work of real interest, written according to rules of content and form that cannot be questioned for its authenticity and personal contribution. This is why, this act of genuine scientific creativity is backed up by legal rules which should clearly stipulate the conditions under which a title of doctor can be awarded and the requirements which a work must meet in order to be considered a genuine doctoral thesis. Regulations in this area have fluctuated, from superfluous legislation with few rigorous rules, leading to scientific works of poor quality, to direct interventions of the Parliament, such as Government Emergency Ordinance no. 4/2016 on the amendment and supplementation of National Education Law no. 1/2011[1], the provisions of which were declared unconstitutional in 2016, as we shall indicate below. However, these regulations have not always been so rigorous, so that no later than 2022, the Constitutional Court of Romania declared unconstitutional an extremely important text, with major implications for the practice of administrative courts dealing with plagiarism disputes in works for which the doctoral title had been awarded. Even though the legislation has been amended following the entry into force of the new

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[1] Government Emergency Ordinance no. 4/2016 was published in Official Journal of Romania Part I no. 182 of 10 March 2016.

education law, Law no. 199/2023[2] on Higher Education, the topic remains of the utmost interest, on the one hand due to the fact there are still disputes before the courts on this subject and, on the other hand, due to the fact the Constitutional Court is deciding certain issues applicable to future cases. Last but not least, Decision no. 364 of 2002 of the Constitutional Court regarding the unconstitutionality of the provisions of art. 170 para. (1) letter b) of National Education Law no. 1/2011 is a striking example of administrative law, which will be discussed in detail in this study.

2. Implications of Decision no. 364/2022 of the Constitutional Court on the doctoral title

2.1. Theoretical considerations on what the Constitutional Court ruled in Decision no. 364/2022

As we have shown above, the question of the competence of the authority empowered to establish plagiarism was widely discussed and finally settled by the Constitutional Court. However, the discussion should not have been reduced to answering the question: was there plagiarism or not? And answering this question, can the competent authority (until Decision 364/2022, the Ministry of Education) revoke the doctoral title?

'Lately, there is a tendency, when the question of violations of the rules governing good conduct in scientific research arises, to reduce this to plagiarism.'[3]

The quoted author captures extremely well the administrative and judicial struggles that preceded the wave of litigations in court, litigations that had as object the revocation of the title of doctor by the Ministry of Education based on the suspicion of plagiarism.

These disputes have generated two forceful interventions of the Constitutional Court: the first one was in 2016, once with the pronouncement of Decision no. 624 regarding the admission of the objection of unconstitutionality of the provisions of the Law for the approval of Government Emergency Ordinance no. 4/2016 on the amendment and supplementation of National Education Law no. 1/2011.[4]

In this decision, the Constitutional Court has addressed certain ambiguities in Emergency Ordinance no. 4/2016 which aimed to amend Law no. 1/2011, questioning the issue of the individual administrative act, the principle of revocability, respectively the irrevocability of individual administrative acts that have entered the civil circuit.

Furthermore, in this decision, 'the Court qualified the doctoral title as an act of administrative nature (paragraphs 48 and 49), and the doctoral degree, as a document certifying the title, cannot be anything other than an act of an administrative nature (paragraph 48).

The Constitutional Court also ruled by Decision no. 624 of 26 October 2016, paragraph 49 that 'the provisions entail the legislative enshrinement of the principle of revocability of administrative acts, containing procedural rules establishing the means by which administrative acts that can no longer be revoked, since they have entered the civil circuit and have produced legal effects, may be subject to legality

[2] Law no. 199/2023 on Higher Education, by the consolidation of 23 April 2024 is based on the publication in the Official Journal, Part I no. 614 of 5 July 2023.

[3] Elena Emilia Ștefan, *Etica si integritate academica*, 2nd edition, revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2023, p. 297.

[4] Decision no. 624/2016 was published in Official Journal of Romania, Part I no. 937 of 22 November 2016.

review at the request of the issuing authority. According to this text legal, the administrative acts which have entered the civil circuit and have produced legal effects can no longer be revoked by the issuing authorities, and their nullity or annulment can only be ordered by the competent court by filing a petition within one year as of the date of issuance of the act. The principle of revocability of administrative acts is, together with the principle of legality, a basic principle of the legal regime of administrative acts, having an implicit constitutional basis (art. 21 and 52 of the Constitution) and legal support [art. 7 para. (1) of Law no. 554/2004]. According to the case law, in principle, all administrative acts may be revoked, normative acts at any time, and individual acts with some exceptions; among the individual administrative acts exempted are also the administrative acts that have entered the civil circuit and have generated subjective rights guaranteed by law. However, the scientific title of doctor is an individual administrative act which, once it has entered the civil circuit, produces legal effects in the field of personal, patrimonial and non-patrimonial rights.'

Subsequently, the Constitutional Court was vested with the exception of unconstitutionality of the provisions of art. 170 para. (1) letter b) of National Education Law no. 1/2011[5], currently repealed by Law no. 199/2023 on Higher Education, which read as follows:

'(1) *In case the quality or professional ethics standards are not observed, the Ministry of Education, Research, Youth, and Sports, based on external evaluation reports drafted as the case may be, by CNATDCU (National Council for the Accreditation of University Degrees, Diplomas and Certificates), CNCS (National University Research Council), the University Council of Ethics and Management or the National Council of Ethics for Research, Technological Development and Innovation, may take the following measures, alternatively or simultaneously*:

[...]

b) *to withdraw the title of doctor*.'

The solution of the Constitutional Court was to admit this exception and to note that the objected legal provisions are constitutional, provided that they refer to the withdrawal of the title of doctor which has not entered the civil circuit and has not produced legal effects. *Per a contrario,* the title of doctor which has entered the civil circuit and has produced legal effects can no longer be withdrawn (an operation equivalent to the impossibility of revoking it).

Given this context, it is worth analyzing the legal notions that the Constitutional Court uses since they will be repeated in Decision no. 364/2022 and, as we have already mentioned, they represent a real lesson in administrative law.

The administrative act, since it is unquestionable to remove this qualification with regard to the doctoral title and the doctoral degree, represents 'the main legal form of the activity of public administration bodies consisting of a unilateral and express manifestation of will to create, modify or extinguish rights and obligations, in the exercise of public power, under the main control of legality of the courts'.[6]

This definition given by Professor Antonie Iorgovan to the administrative act and which has remained emblematic for the

[5] National Education Law no. 1/2011 was published in Official Journal of Romania, Part I, no. 18 of 10 January 2011.

[6] Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, 4th edition, All Beck Publishing House, Bucharest, 2005, p. 25.

doctrine (the definition is quoted by most authors of administrative law) is complemented by the modern vision that Law no. 554/2004[7] of the contentious administrative gives to the administrative act. Law no. 554/2004 defines the administrative act in a similar way to the doctrinal definition, but expressly states that the administrative act is 'a unilateral act of an individual or normative nature.'

Law no. 554/2004 thus establishes that under the umbrella of the term 'administrative act' stay in fact the individual acts and the regulatory acts, types of administrative acts, with a similar legal regime for certain aspects, but totally different for others.

In works dedicated to administrative law, there are authors who analyze comparatively the normative administrative act and the individual administrative act, precisely in order to capture their different legal regime and to outline the essential differences between these two types of administrative acts.[8]

The idea of 'individual administrative act' is frequently repeated by the Constitutional Court, both in the substantiation of Decision no. 624/206 (paragraphs 48, 49, 50, 51), and in the substantiation of Decision no. 364/2022 (paragraphs 21, 22 23, 26, 27, 28) precisely in order to highlight the difference in the legal regime, in terms of revocability/irrevocability of the individual administrative act.

The analysis of the Constitutional Court on the provisions of National Education Law no. 1/2011, as we have mentioned above, currently repealed, show that 'according to art. 169 para. (2) of Law no. 1/2011, following the completion of scientific doctoral studies, the institution organizing the doctoral studies confers the diploma and the title of Doctor of Science. Art. 168 para. (7) provides that the doctoral title is awarded by order of the Minister of Education, Research, Youth and Sport, after validation of the doctoral thesis by the National Council for the Accreditation of University Degrees, Diplomas and Certificates (hereinafter referred to as CNATDCU). The doctoral degree is conferred after the successful completion of a doctoral degree programme, certifying the obtaining and possession of the title of doctor [art. 169 para. (1) of Law no. 1/2011]. Therefore, the law operates with two distinct terms, respectively 'doctoral title' and 'doctoral degree', each of which being subject to a different revocation procedure.'[9]

By continuing the substantiation, the Constitutional Court states, with reference to Decision no. 624/2016, that the title of doctor is an administrative act, in this case an individual administrative act, and from this moment on the great discussions on the revocation and annulment of individual administrative acts start.

In this constitutional and legal context, the Court ruled that a regulation which establishes that 'the administrative act finding the scientific title is annulled from the date of the issuance of the act of revocation and produces effects only for the future' represents a violation of the irrevocability of individual administrative acts, with serious consequences on the subjective rights created as a result of the entry into the civil circuit of that act. The possibility of the revocation of the administrative act performed by the issuing

[7] Law no. 554/2004 was published in Official Journal of Romania, Part I, no. 1154 of 7 December 2004.

[8] See in this respect Elena Emilia Ștefan, *Drept administrativ Partea a II-a, Curs universitar*, 4th edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, pp. 30-32.

[9] Paragraph 19 of Decision no. 364/ 2022.

authority violates the principle of stability of legal relationships, introduces insecurity into the civil circuit and leaves to the subjective discretion of the issuing authority the existence of the rights of the person who acquired the scientific title (Decision no. 624 of 26 October 2016, paragraph 50).'[10]

Based on these considerations of the Constitutional Court, we believe that certain theoretical aspects that have substantiated the decisions of the Court and that are cornerstones of administrative law should be highlighted.

With regard to revocation, this is the legal operation whereby the body issuing an administrative act or the superior hierarchical body abolishes that act. When pronounced by the issuing body, revocation is also called withdrawal.[11]

Revocation is therefore a particular case of nullity, but at the same time a rule, a fundamental principle of the legal regime of administrative acts.

This fundamental principle applicable to administrative acts results both from art. 21 and art. 52 of the republished Constitution and from the provisions of Law no. 554/2004 of the contentious administrative. This aspect was also noted by the Constitutional Court in Decision no. 364/2022, as follows: 'The principle of revocability of administrative acts has an implicit constitutional enshrinement in art. 21 and 52 of the Constitution, the exceptions thereto are also implicitly contained in the same provisions in conjunction with other values, requirements and principles with constitutional enshrinement. In this regard, the Court notes art. 1 para. (5) of the Constitution, in the legal certainty component, which outlines the content and limits of the revocability of administrative acts. Therefore, once an administrative act has entered the civil circuit and produces legal effects, the principle of legal certainty prohibits its revocation by the issuer itself.'[12]

But what is the legal basis for revocation, the fundamental principle of the administrative law?

The term of 'revocation' is found in art. 7 para. (1) of Law no. 554/2004 as further amended and supplemented, which states the following: *'Before approaching the contentious administrative court with jurisdiction, the person considering him/herself aggrieved with respect to a right or legitimate interest, by a specific administrative decision, shall request the issuing public authority, or the higher authority along the chain of command, within thirty (30) days of notice of such decision,* ***the revocation,*** *in full or in part of such decision.'*

However, according to Professor Antonie Iorgovan, the principle of revocability of administrative acts appears as a natural effect of the features of public administration, of the very raison d'être of administrative acts. The organizational structure of public administration is based on certain rules, including hierarchical administrative subordination, which is not, however, of a dominant nature. We will thus understand *the revocation of administrative acts as a rule, a principle of the functional structure of public administration.*[13]

As regards the legal regime of revocation, in conjunction with the provisions of Law no. 554/2004, art. 7 which provides that '*In case of a normative administrative act, the preliminary complaint can be filed at any time*', the

[10] Paragraph 23 of Decision no. 364/2022.
[11] Antonie Iorgovan, *op. cit.*, p. 83.
[12] Paragraph 28 of Decision no. 364/2022.
[13] Antonie Iorgovan, *op.cit.*, p.84.

conclusion is that normative administrative acts are always and at any time revocable, while individual administrative acts are in principle revocable.

There is a whole series of exceptions from the principle of revocability of administrative acts, including the administrative act that has entered the civil circuit.

Regarding this exception, there have been divergent opinions in the doctrine, as regards the interpretation of art. 1 para. (6) of Law no. 554/2004, which provides as follows: '*The public authority that has issued an unlawful unilateral administrative act may request the court to declare it null and void, whenever such decision may no longer be revoked because it has already entered the civil circuit and has produced legal effects.'*

According to a legal opinion, 'art. 1 para. (6) of Law no. 554/2004 is understood by one author on the basis of the meaning of the notion of *civil circuit*, seen as the totality of legal acts through which goods (patrimonial assets) circulate from one person to another. Hence, the identification of five conditions 'in order for an administrative act to be considered irrevocable by *ad literam* application of art. 1 para. (6)', namely: to be individual; to create a patrimonial effect; the right must have been acquired in good faith by the beneficiary; the right acquired by the act must have already been transacted and there must be such a close link between the initial administrative act and the subsequent civil act that the revocation of the former entails the dissolution of the latter.'[14]

Another opinion points out that there are reservations on the proposed definition of the civil circuit. The quoted author shows that 'its meaning should not be forcibly restricted to the circulation of goods, as the scope of the concept is much wider.' Furthermore, she considers that it concerns individual administrative acts the legal effects of which have left the applicable administrative law regime and entered another legal regime, which is that of civil law in the broad sense. It is not mandatory to conclude a subsequent civil act, but only to the extent that other such acts have been concluded.'[15]

In our opinion, the solution of the Constitutional Court in Decision no. 364/2022 is in line with the second opinion, which is correct because the situation under analysis takes into account other concepts, much more abstract than the limitation only to the concept of 'good'.

The Constitutional Court sees the entry into the civil circuit as the deadline by which the issuing authority could revoke its act. After this moment, which in practice will have to be proved, as we shall show below, the only one in a position to rule on the legality of the individual administrative act granting the title of doctor remains the court, but by means of an action for annulment, the issuing authority losing any right of withdrawal. The theoretical argument of the Constitutional Court is fully sustainable since any other discretionary power left to the issuing authority beyond this moment (of entry into the civil circuit and implicitly of the production of legal effects) would be capable of deregulating legal security.

[14] Ovidiu Podaru, *Drept administrativ, Vol. I. Actul Administrativ (I) Repere pentru o teorie altfel*, Hamangiu Publishing House, Bucharest, 2010.

[15] Dana Apostol Tofan, *Drept administrativ*, Volume II, 5th edition, C.H. Beck Publishing House, Bucharest, 2020.

2.2. Practical considerations on the rulings of the Constitutional Court in Decision no. 364/2022

What the Constitutional Court underlines in the decision under review is that 'The challenged text regulates the withdrawal of the doctoral title, regardless of whether or not the act in question has entered the legal circuit and produced legal effects. Since the issuing body withdraws it for reasons prior to its issue (failure to comply with quality or professional ethics standards), such withdrawal has the legal nature of a revocation. Notwithstanding the principle of the revocability of administrative acts is not an absolute one, but there are exceptions, including individual administrative acts which have entered the civil circuit and have generated subjective rights guaranteed by law, which cannot be revoked, but only annulled by an authority other than the issuing authority. Therefore, since the doctoral title and the doctoral degree which have entered the civil circuit and have generated subjective rights guaranteed by the law fall within the scope of this category, they cannot be revoked.'[16]

In conclusion: 'If they have entered the civil circuit and produced legal effects, both the doctoral title and the certificate accompanying it can be abolished only under a court decision, because, otherwise, if the institution issuing the document were left to abolish the title, insecurity on the legal relationship already established would be created.'[17]

Starting from these two hypotheses, we must distinguish in practice between two equally possible situations:

a) The title of doctor has not entered the legal circuit and has not produced legal effects, in which case the challenged text will continue to produce legal effects and the courts with jurisdiction in litigations concerning this hypothesis will continue the judgment by reference to the text of the law in force at the time of issuing the administrative act on the withdrawal of the title of doctor;

b) The title of doctor has entered the legal circuit and produced legal effects, representing a condition for access to a position, being the basis for acquiring a professional qualification, a professional status or producing patrimonial effects in the form of benefits and remuneration rights for those who hold the title of doctor. In this case, the courts will apply Decision no. 364/2022 and will admit the actions/appeals brought by those whose title has been withdrawn.

If in the situation where the title of doctor has entered the civil circuit and evidence can be provided in this regard, things are somewhat simpler to analyze, practically having to provide evidence in this regard, things will be somewhat more complicated with regard to titles/degrees that have not entered the civil circuit and have not produced legal effects. In this case, these individual administrative acts may be revoked by the institutions issuing the act, but under the observance of certain principles. Thus, the issuing authority will not be able to intervene and will not be able to rule or review the scientific substance of the doctoral thesis. The issuing authority will have to limit itself in the revocation decision only to the analysis of the aspects related to the legality of the conferral/award procedure, by observing the deadlines provided by law for their revocation. Furthermore, the issuing authority will refer only to the analysis of the legality conditions in force at the time of the award of the title of doctor.

[16] Paragraph 26 of Decision no. 364/2022.

[17] Paragraph 30 of Decision no. 364/2022.

In the decision under review, the Constitutional Court argued for the security of the civil circuit, stating that if these principles are not observed 'arbitration and permanent legal uncertainty regarding the holding of the title of doctor would occur'.[18]

These implications must also be analyzed from the perspective of the whole society on this phenomenon because, as an author of administrative law points out, 'From our point of view, the stakes for leaders at the highest level in states today are huge and on the long-term, involving future generations, namely: identifying solutions and mechanisms to increase public confidence in state authorities (…)'.[19] The circulation of doctoral theses of a high scientific level must concern the whole society and the mechanisms of verification of authenticity, as well as the authorities involved in this verification, must be clearly regulated by legislation in order not to create a dangerous phenomenon whereby works lacking authenticity and without an adequate scientific level enter the academic world and the people who wrote them wrongfully claim academic titles or patrimonial benefits that not only do not deserve them but that overshadow the idea of scientific act/scientific creation.

3. Conclusions

Although the text declared unconstitutional by Decision no. 364/2022 of the Constitutional Court is no longer in force, being repealed by Law no. 199/2023, the implications of this decision will still have effects in the future.

First of all, due to the fact the litigations started under the auspices of the texts declared unconstitutional and still *pending* will be judged in the light of the rulings of the Constitutional Court and the solutions to admit de actions are obvious, thus changing the practice of the courts which had registered a contrary trend until 2023.

Second of all, Decision no. 364/2023 of the Constitutional Court must be analyzed in the light of the terms it uses and the way in which it has managed to integrate the theory of revocability/irrevocability of the administrative act to the practical situation under analysis.

Moreover, we have a clear analysis of the distinction between normative and individual administrative act in this decision, more than in any other coming from this authority. Starting from the legislator's idea of classifying the administrative act in two categories (normative and individual), we reach the practical illustration of this benefit. We are obviously talking about two distinct legal regimes, with different rules that the contentious administrative judge will have to analyze differently.

The Constitutional Court admirably makes a theoretical examination of these notions, explains them and analyses their practical implications in an accomplished manner, which shows the professionalism and legal culture of those called upon to oversee the observance of the Constitution.

Notwithstanding, beyond these aspects, the question which remains is the following: when are we fully capable of writing a doctoral thesis? What is the meaning of taking on the idea of a creative act without plagiarizing, aiming only to bring an element of novelty to your chosen scientific field?

Because we can easily see that this is not an easy task. Firstly, we are talking about

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[18] Paragraph 37 of Decision no. 364/2022.

[19] Elena Emilia Ștefan, *Legality and morality in the activity of public authorities,* in Revista de Drept Public no. 4/2017, p. 96.

the idea of creation, about the idea of innovation, about the idea of putting a scientific product on the market with elements of novelty. Secondly, we are talking about compliance with a long string of substantive and formal conditions that the work in question must meet. Thirdly, we are talking about compliance with the relevant legislation. Last but not least, about the observance of certain moral values that the scientific work for which the author will finally be awarded with the title of doctor must fulfil.

One possible answer would be that the desire to receive this title must be beyond the direct benefits that might follow. There must be a desire to research, to innovate, to enrich the scientific world with valuable work. However, this desire should remain the one that motivates those who start on this path of research. These trailblazers should be joined by elements of the state that encourage research by establishing clear legislation, substantive and formal criteria that do not hinder the creative process but facilitate it.

Only when the desire to research is combined with a clear legislative framework will we have the idea of permanent legal security regarding the title of doctor and interventions such as those of the Constitutional Court will no longer be necessary.

All these challenges are coupled with the increasingly topical idea of artificial intelligence successfully competing with human creation. Further normative acts will have to be implemented to curb this phenomenon in which the authentic act of creation becomes irreplaceable by an act of creation coming from an overloaded software. New problems will arise, including legal ones, which will seek to enhance authentic human creation. So, here we are at the beginning of new paths in this matter and new legal solutions are expected.

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ACADEMIC IMPOSTURE AND THE WITHDRAWAL OF THE PH.D. DEGREE. PROCEDURES, LEGALITY AND CONSTITUTIONALITY

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Abstract

The current article aims in presenting and analysing the notion of 'academic imposture', with relevant aspects of the legislation incident to plagiarism and self-plagiarism, as well as the legality regarding the withdrawal of the Ph.D. title in the previous and current regulations. Is plagiarism a matter of pure legality, or should it have an ethical and moral dimension? By reviewing aspects of historical writings, contemporary examples of authors accused of plagiarism, and also national examples of Ph.D. thesis, this article intends to highlight the interpretations issued by Constitutional Court of Romania, and also emphasize the need to better understand the instruments accessible for issuing a decision of withdrawal/maintaining the Ph.D. title, through a legal, ethical and moral lens.

Keywords: *academic imposture, plagiarism, unconstitutionality, withdrawal of Ph.D. degree, originality.*

1. Considerations on academic imposture

In order to discuss the consequences of a situation such as an *academic imposture*, we need to explain a number of terms. Firstly, *imposture* is defined as an 'impostor's act', a 'charlatanry', a 'deception', according to the Explanatory Dictionary of the Romanian Language (hereinafter 'DEX'[1]), i.e. 'a situation in which someone is willing to deceive the good faith of others'. Secondly, according to the same source[2], the term *academic* refers to an 'exaggerated correctness', mainly because the term is a derivative of the Latin Academia which represents 'the idealistic philosophical school, founded by Plato (circa 387 BC) in a garden near Athens, which would have belonged to the mythological hero Akademos'[3] and for the reason that it refers to an academic work in general.

Therefore, by joining the two antagonistic terms, we are faced with a *deception of exaggerated correctness*, precisely because one who has taken the decision to appropriate an idea or a principle that does not belong to him, will be called a deceiver who has put more effort into copying than into creating something original, copying with *exaggerated correctness*. At first glance, subsequently, academic imposture may constitute a breach of ethics and integrity, and such deception in higher education could have severe consequences for academic teaching and research.

We can consider academic imposture an ancestral heritage in human society, with

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[1] https://dexonline.ro/definitie/impostur%C4%83.

[2] https://dexonline.ro/intrare/academic/175.

[3] https://ro.wikipedia.org/wiki/Academia_platonic%C4%83.

accusations and suspicions since antiquity. Plato's disciples stopped mentioning the great philosopher's name in their discourses, appropriating some of his ideas, even 'the evangelists themselves have been accused of plagiarism.'[4] Regarding this latter, the Greek writer Nikos Kazantzakis imagines in his work 'The Last Temptation of Christ' that the apostle and evangelist Matthew completed his stories about the saviour by copying ideas dictated to him by an angel. For the latter, however, the nature of the originality of a work is in question. The four evangelists wrote about the miracles and sufferings of Christ, a historical context that cannot be repeated, cannot be imitated. Their originality must be analysed from the perspective of the historical moment in which they were written, just as the originality of any work should be discussed and analysed.

The historical, geopolitical, geographical, ethnographic context are all conditions for determining whether ideas are original or not. William Ralph Inge, former English writer, Anglican priest, Cambridge professor and Dean of St. Paul's Cathedral, asks: '*What is originality? Undetected plagiarism*'. Since everything is perfectible up to God, the originality of the writing of the four evangelists should not be questioned. The four plagiarized, at worst, from the Old Testament so as to fit the one they believed at the time to be the Messiah. But, then, it could also be about interpretation and twisting of the prophets' sayings. The original presumes, first of all, something that has not been imitated, something truly new. In such circumstances, if we remain on the religious side of the discussion, the foundations of all religions would break down, because in the specific writings of each religion a common denominator can be found, however small and insignificant. Yet the Bible, the Talmud in Rabbinic Judaism and even the Vedas, the scriptures of Hinduism, share many common teachings, but each considers itself part of an original, unique and true whole.

Academic imposture manifests itself through unethical behaviours, including actions that violate established norms of integrity in academia, particularly through plagiarism and self-plagiarism.

Therefore, plagiarism and self-plagiarism are some of the most deceptive aspects of academic imposture. According to Law No 206/2004 on Good Conduct in Scientific Research, Technological Development and Innovation (hereinafter 'Law No 206/2004'), plagiarism is 'the presentation in a written work or an oral communication, including in electronic format, of texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of other authors, without mentioning this fact and without reference to the original sources'[5]. The same article also defines self-plagiarism and highlights it as: 'the description in a written work or an oral communication, including in electronic format, of the same author or authors, without mentioning it and without reference to the original sources'[6].

Henceforth, to consign someone else's work as your own shows a lack of basic awareness and a lack of education. Plagiarism is first and foremost a matter of ethics: 'Not appropriating the intellectual work of others, not copying another and

[4] Viorel Roș, '*Contrafacerea şi plagiatul în materia dreptului de autor: retrospectivă istorică şi încercare de definire*', *Romanian Journal of Intellectual Property Law* no. 1 /2004, p. 17.

[5] Art. 4 para. (1) letter d) of Law no. 206/2004.

[6] Ibidem, letter (e).

presenting what is merely a poor copy as your own is first and foremost a matter of ethics, of morality, and only afterwards a matter of law. That's why plagiarism is a moral concept and a matter of good morals'[7].

Plagiarism can have serious consequences for the career of the plagiarist or alleged plagiarist, despite the presumption of innocence. The label of plagiarist can remain even after the author's death; see cases where famous authors such as Homer, William Shakespeare, Constantin Hamangiu, I. L. Caragiale, Helen Keller, Dan Brown, J. K. Rowling, etc. have been accused of plagiarism. Although some of these accusations were unfounded, they have had and continue to have consequences for the reputation of these authors.

Plagiarism is currently a topic of public interest in Romania, involving in recent years a series of scandals with various politicians, notorious being the case of plagiarism of the former Prime Minister Victor Ponta. The consequence of this plagiarism was the start of an investigation by the National Council for the Accreditation of University Degrees, Diplomas and Certificates (hereinafter 'NCAUDDC'), following which the former Prime Minister's doctoral degree was withdrawn, triggering a wave of debate in civil society, but also political consequences for his career.

An accusation of plagiarism was also made in 2016 against the current Chief Prosecutor of the European Public Prosecutor's Office, Laura Codruța Kövesi. According to iThenticate reports, 34% of chapters 2, 3 and 4 of her Ph.D. thesis contained plagiarized passages. By Decision no. 3 of 30 October 2016 of the President of the Legal Sciences Commission of the NCAUDDC, the structure of the Working Commission established to analyse the authenticity of the aforementioned complaint of plagiarism was established, professors Claudia Ghica Lemarchand, Vlad Constantinesco and Radu Chiriță being part of this Commission.

In the Joint Report on the Ph.D. thesis entitled 'Combating Organized Crime through Criminal Law Provisions' presented in 2011 by Mrs. Laura Codruța Kövesi, the above-mentioned committee proposed the following: 'Maintaining the Ph.D. title of Mrs. Codruța Laura Kövesi, the withdrawal of which we consider to be an excessive and inappropriate sanction; 2. the publication of the Joint Report of our Commission and its attachment to all copies of Ms. Kövesi's thesis present in all libraries in the country - especially in the West University of Timișoara, where the thesis was presented; 3. Prohibiting the publication of the thesis in its current state, when - although plagiarism cannot be held - in our opinion, it is below the quality standards of a Ph.D. thesis'[8].

Therefore, the members of the committee noted that Ms. Kövesi's Ph.D. thesis contains several paragraphs that can be qualified as plagiarized and some on which certain suspicions of plagiarism may be kept, as these paragraphs were taken without citing the source, but they have 'little scientific value, (...) which do not add anything significant to the scientific debate'. In this context, a question arises: is the

[7] Viorel Roș, Ciprian Romițan, 'Ură, hulă, plagiate și educație (pentru o lege antiplagiat)', in the volume of the Conference «Controversies in Intellectual Property», Universul Juridic Publishing House, Bucharest, 2019), p. 122.

[8] Claudia Ghica Lemarchand, Vlad Constantinesco, Radu Chiriță, 'Raportul Comun asupra tezei de doctorat *Combaterea crimei organizate prin dispoziții de drept penal* susținută în anul 2011 de doamna Laura Codruța Kövesi', 30 November 2016, p. 17-18, available at https://media.hotnews.ro/media_server1/document-2016-12-9-21459844-0-raport-plagiat-teza-laura-codruta-kovesi.pdf.

measure of banning the publication of the Ph.D. thesis a fair and legal measure?

The right to express opinions and views, and the right to do so in writing, are fundamental human rights. According to the Romanian Constitution, the citizen has the right to 'freedom of expression, of thoughts, opinions or beliefs and freedom of creation of any kind, whether by speech, writing, images, sounds or other means of communication in public'[9].

In the same regard, the European Convention on Human Rights (hereafter 'ECHR') protects 'freedom of expression and information'[10], which includes the right to hold a belief and the right to manifest it individually and in public, as fundamental rights.

The right to have opinions is an essential and fundamental human right, recognized also by the Universal Declaration of Human Rights (hereinafter 'UDHR'), which implies 'freedom to hold opinions without interference by outsiders and freedom to seek, receive and convey information and ideas through any media and regardless of frontiers'[11].

In view of the above, I consider that the solution proposed by the Commission in the case of Ms. Laura Kövesi's Ph.D. thesis is illegal, since the Commission members point out that paragraphs of insignificant academic value have been taken without citing the source, but consider that these are not sufficient to remove the presumption of good faith of Laura Kövesi in writing the thesis, not considering in this regard plagiarism. Unequivocally, 'the identification of plagiarism in scientific paper works is not an easy task'[12], but such a sanction is unfair, as long as it was held that Ms Kövesi did not plagiarise.

I would like to underline that the current regulation, i.e. the Law on Higher Education No 199/2023 (hereinafter 'Law No 199/2023'), provides in Article 71 para. (12) that the Ph.D. thesis is considered as a public document and that 'its annexes will be available for consultation 90 calendar days before the public presentation, on the national platform managed by the Executive Unit for the Financing of Higher Education, Research, Development and Innovation (hereinafter 'EUFHERDI'), in accordance with the legal provisions in force in the field of copyright. After the Ph.D. degree has been issued, the Ph.D. thesis, in printed format, shall be archived in the library of the higher education institution on a permanent basis'[13].

Simultaneously, the Law no. 199/2023 foresees two hypotheses related to the possibility for the author/Ph.D. candidate to publish his/her Ph.D. thesis:

(i) the hypothesis in which the Ph.D. candidate does not wish to publish his/her Ph.D. thesis separately, in which case 'the digital form of the thesis remains public and will be freely accessible on the national platform managed by EUFHERDI, including after the decision granting the Ph.D. degree has been issued. The thesis will be assigned a copyright protection license'[14];

(ii) the situation concerns the Ph.D. candidate's decision to choose for a separate publication of the Ph.D. thesis, in which case

[9] Article 30 of the Romanian Constitution.

[10] Article 11 of the Charter of Fundamental Rights of the European Union (2012/C326/02).

[11] Article 19 of the Universal Declaration of Human Rights of 10.12.1948.

[12] Marta-Claudia Cliza, Dragoș-Cătălin Borcea, Laura-Cristiana Spătaru-Negură, 'To be or not to be plagiarism? Unconstitutionality criticisms of art. 170 para. (1) of the Romanian national education law', Challenges of the Knowledge Society, Public Law, 2022, available at https://cks.univnt.ro/articles/16.html.

[13] Article 71 para. (12) of Law no. 199/2023.

[14] *Ibidem*, para. (14).

'he is given a grace period of maximum 24 months for this publication, during which time his Ph.D. thesis, in digital format, becomes inaccessible to the public. After the expiry of the grace period, if a notification of the separate publication of the thesis has not been uploaded to the platform managed by EUFHERDI, the document in digital format automatically becomes freely accessible, with the assignment of a copyright protection license'[15].

According to the two hypotheses presented above, Law No 199/2023 requires the author/ Ph.D. candidate 'to notify the Organizing Institution of Doctoral Studies (hereinafter 'OIDS') of this fact and to send the bibliographic indication and a link to the publication, which will then be made public on the national platform managed by EUFHERDI'[16].

Last but not least, the new legal regulation stipulates a deadline of no more than 180 days from the decision to award the Ph.D. degree, within which 'OIDS is obliged to send to the National Library of Romania a printed copy of the Ph.D. thesis and its annexes, according to Law No 111/1995 on the Legal Deposit of Documents, republished, a copy for the Intangible Fund, as well as a digital copy of them, on electronic support, for consultation on request, at the National Library of Romania, by any interested person, in compliance with the legal regulations in force'[17].

Therefore, Law No 199/2023 provides for a legal and transparent procedure regarding the publication of Ph.D. theses, so I do not think that we will end up with situations such as the case of Ms. Laura Codruța Kövesi, where, although no plagiarism was found, the publication of her Ph.D. thesis was prohibited.

2. Considerations on the withdrawal of the Ph.D. title - former and new legal regulation

In the former regulation, i.e. in the National Education Law no. 1/2011, Article 170 provided the conditions under which the Ministry of Education could withdraw the Ph.D. title if the 'quality and professional ethics standards'[18] were not fulfilled.

The explanatory memorandum of the draft law on higher education stresses that 'there is a need for a general verification of Ph.D. thesis for which Ph.D. degrees have been awarded, a rethinking of the way Ph.D. degrees is awarded by making universities accountable'[19]. It is also stated that 'the Educated Romania project foresees the consolidation of an ethical climate in the educational system, as follows: integration of modules that provide for the learning of elementary rules on academic writing, correct citation of sources, and respect of ethical principles; support to universities to implement proactive measures regarding the

[15] Article 71 para. (15) of Law no. 199/2023.

[16] *Ibidem*, para. (16).

[17] *Ibidem*, para. (17).

[18] Article 170 of the National Education Act No 1/2011 - repealed - stipulated that:*' (1) In case of non-compliance with quality or professional ethics standards, the Ministry of Education and Research, on the basis of external evaluation reports, drawn up, as the case may be, by the CNATDCU, the CNCS, the University Ethics and Management Council or the National Council for Ethics in Scientific Research, Technological Development and Innovation, may take the following measures, alternatively or simultaneously: (a) withdrawal of the status of Ph.D. supervisor; b) withdrawal of the doctoral title; c) withdrawal of the accreditation of the Ph.D. school, which implies the withdrawal of the right of the Ph.D. school to organise an admission competition for the selection of new Ph.D. students.'*.

[19] Explanatory memorandum to the draft Law on Higher Education, page 9, available at https://www.cdep.ro/proiecte/2023/200/50/4/em270.pdf.

respect of ethical rules and subsequent principles of deontology and academic integrity'[20].

We can see from this provision that the current legislator's concern is to discourage plagiarism in the academic environment (and not only) by wanting to create an ethical climate in the academic system and to encourage students to research and document so that the originality of their work does not raise any suspicion of plagiarism.

Correspondingly, analysing the above-mentioned explanatory memorandum, we can highlight that the previous regulation had major shortcomings and a new reform was indispensable. I say this because only on the withdrawal of the Ph.D. title (which is the subject of this topic) have two decisions of unconstitutionality been pronounced over time.

The first unconstitutionality decision no. 624/26.10.2016 issued by the Constitutional Court of Romania (hereinafter 'CCR') regarding the objection of unconstitutionality of the provisions of the Law approving the Government Emergency Ordinance no. 4/2016 on amending and supplementing the National Education Law no. 1/2011 (hereinafter 'Decision no. 624/26.10.2016') concerns the objection of unconstitutionality of the provisions of the Law approving the Government Emergency Ordinance no. 4/2016 amending and supplementing the Law no. 1/2011.

It is important to point out that 'the provision of any civil law (ordinary or organic) or other normative act which would provide that that law or normative act would apply retroactively is unconstitutional.'[21]

In the above-mentioned decision, the CCR established, *inter alia*, the administrative nature of the Ph.D. title, which is subject to legality review under the Law No 554/2004 on Administrative Proceedings (hereinafter 'Law No 554/2004'). Thus, the CCR stipulates that Art. 1 para. (6) [22] of Law No 554/2004 represents 'the legislative enshrinement of the principle of revocability of administrative acts, containing procedural rules establishing the means by which administrative acts which can no longer be revoked, since they have entered into the civil circuit and have produced legal effects, may be subject to legality review, at the request of the issuing authority'.[23] The CCR therefore points out that the principles mentioned above are regulated in Articles 21 and 52 of the Romanian Constitution.

The CCR determined that, like any individual administrative act, as soon as it enters the civil circuit, will be liable to produce legal effects incident to non-patrimonial and personal rights, so that 'the possibility of revocation of the administrative act by the issuing authority violates the principle of stability of legal relationships, introduces insecurity in the civil circuit and leaves to the subjective discretion of the issuing authority the

[20] Explanatory memorandum to the draft Law on Higher Education, page 9, available at https://www.cdep.ro/proiecte/2023/200/50/4/em270.pdf.

[21] Gabriel Boroi, Carla Alexandra Anghelescu, Ioana Nicolae, *Fise de drept civil, Ediția a 7-a, revizuită și adăugită*, Hamangiu Publishing House, 2022, p. 3.

[22] *"The public authority issuing an unlawful unilateral administrative act may apply to the court for its annulment if the act can no longer be revoked because it has entered into civil law and has produced legal effects. If the action is admissible, the court shall, if it has been seized by the application, also rule on the validity of the legal acts concluded on the basis of the unlawful administrative act and on the legal effects produced by them. The action may be brought within one year from the date of the act's issuance".*

[23] Constitutional Court of Romania, Decision No 624 of 26 October 2016, paragraph 49.

existence of rights of the person who acquired the scientific title'[24].

Nevertheless, the CCR stipulates that where 'there are suspicions of non-compliance with procedures or standards of quality or professional ethics, the administrative act may be subject to the control of an entity independent of the entity that issued the Ph.D. title, with specific powers in this field, which may take punitive measures with regard to the withdrawal of the title in question. However, if the legislator opts for the revocation or annulation of the administrative act, this can only operate under the conditions stipulated by the law, i.e. the measure can only be ordered by a court, in compliance with the provisions of Law No 554/2004'[25].

The second decision of unconstitutionality, namely Decision No 364/24.08.2022 of the Constitutional Court of Romania on the admission of the exception of unconstitutionality of the provisions of Article 170 para. (1) letter b) of the National Education Law no. 1/2011 (hereinafter 'Decision No 364/24.08.2022'), refers to the unconstitutionality of the provisions of Art. 170 para. (1) (b) of Law No 1/2011[26].

The CCR stresses that a distinction must be made between the concept of Ph.D. title and the concept of Ph.D. degree, as the law regulates a separate procedure for the abolition of each.

Therefore, the CCR holds that, with regard to the withdrawal of the Ph.D. title, Article 146^1 of Law No 1/2011 - annulled[27] - made it clear that the Ministry of Education could decide to withdraw the Ph.D. title, following a finding of unquestionable deficiencies regarding compliance with the standards of quality of the work or compliance with professional ethics, thus halting any legal effects that the Ph.D. title produced from the moment the decision to withdraw it was communicated. Also, with regard to the withdrawal of the Ph.D. degree, Article 146^2 of the same law[28] stipulated that only a final court decision could cancel or revoke the Ph.D. degree.

Given that in the first unconstitutionality decision the CCR stipulated that the Ph.D. title is a document of an administrative nature, in the second unconstitutionality decision the CCR held that 'the Ph.D. degree as a document certifying the title cannot be anything other than an act of administrative nature'[29].

It follows, therefore, that if the Ph.D. degree/title has not entered the civil circuit and has not produced effects, it will be revoked; if it has entered the civil circuit and has produced effects, it will be annulled. These two situations will only be resolved by a final court ruling, and it will not be

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[24] *Ibidem*, paragraph 50.

[25] Constitutional Court of Romania, Decision No 624 of 26 October 2016, paragraph 51.

[26] *"Art. 170 (1) In case of non-compliance with quality or professional ethics standards, the Ministry of Education, Research, Youth and Sport, on the basis of external evaluation reports, drawn up, as the case may be, by the CNATDCU, the CNCS, the University Ethics and Management Council or the National Council for Ethics in Scientific Research, Technological Development and Innovation, may take the following measures, alternatively or simultaneously: [...] b) withdrawal of the Ph.D. title;".*

[27] Art. 146^1 *'The Ph.D. title shall cease to have legal effect from the moment of communication of the withdrawal of the title.'*

[28] Article 146^2 *'(1) The Ph.D. degree shall be revoked or annulled by final decision of a court. (2) By way of derogation from the provisions of paragraph (6) of Art. 1 of the Law on Administrative Proceedings No 554/2004, as amended, the issuing institution shall bring an action for annulment of the degree within one year from the date of the order withdrawing the Ph.D. degree.'*

[29] Constitutional Court of Romania, Decision No 364 of 24 August 2022, paragraph 21.

possible for the institution issuing the document to revoke it, as this would create uncertainty as regards the legal relationship in question.

For the annulment of the Ph.D. title 'the jurisdiction lies with the court, seized under the terms of the general law on the matter, namely Law No 554/2004. In this case, the withdrawal takes the form of annulment of the act, in which case the court will only verify the legality of the procedure for conferring/awarding the Ph.D. title and issuing the Ph.D. degree, without having the power to assess the quality of the work itself, its scientific level or the scientific nature of the work of the holder of the Ph.D. title. '[30]

Likewise, in the above-mentioned unconstitutionality decision, the CCR also held that the aspects pointed out by the Ph.D. committee and confirmed by the NCAUDDC, as provided for by Law No 1/2011 (art. 168), which determine the conferral of the Ph.D. title will no longer be re-evaluated in terms of the scientific value of the thesis by another committee, since there is no legal or constitutional basis for this. The CCR also stipulates that 'once the Ph.D. committee has pronounced itself, no other committee can become its censor, so that it cannot carry out a re-examination and re-evaluation of its assessment, overturn its findings and give its own verdict. Those established by the Ph.D. committee and validated by the NCAUDDC are non-censurable aspects of the administrative act issued, since they concern the value assessment of the content of the Ph.D. thesis, and engage the responsibility of the authority issuing the act. An axiological reassessment of the Ph.D. thesis and the invalidation of the Ph.D. title on grounds unrelated to the principle of legality creates a real risk to legal certainty'[31].

However, if the court cannot rule on the scientific merits of the Ph.D. thesis, as pointed out by the CCR in paragraph 32 above, neither can the authority that issued the Ph.D. degree reconsider and thus reassess the scientific merits of the thesis. Therefore, in view of this argument, the CCR held that 'the annulment or revocation, as the case may be, of the Ph.D. title/diploma cannot be reconsidered for these aspects, but only for aspects relating to the legality of the conferral/award procedure, in compliance with the deadlines laid down by law for their annulment/revocation, as well as with the conditions of legality in force at the time of their award. Thus, this would lead to arbitrariness and permanent legal uncertainty regarding the holding of the Ph.D title'[32].

In light of the above, the previous legal regulation provided for an unlawful procedure to revoke the Ph.D. title, which was corrected by the CCR from 2016, i.e. 2022, by issuing the unconstitutionality decisions presented above. It appears that from the year of entry into force of Law No 1/2011 (10 January 2011), until 2016, i.e. for almost 6 years, the Ph.D. title was unlawfully withdrawn.

In the new legal regulation, i.e. in Law No 199/2023, the Ph.D. degree is defined as follows: 'the degree awarded after the successful completion of a Ph.D. programme is called a Ph.D. degree, the content of which expressly mentions the disciplinary or interdisciplinary field of the Ph.D.'[33].

At the same time, para. (2) of the same article underlines the means in which the

[30] Constitutional Court of Romania, Decision No 364 of 24 August 2022, paragraph 32.
[31] *Ibidem*, paragraph 36.
[32] *Ibidem*, paragraph 37.
[33] Art. 47 para. (1) of Law no. 199/2023.

Ph.D. title is obtained: ’the Ph.D. degree confers the title of Doctor of Science, corresponding to the acronym Dr. or in a professional field, corresponding to the acronym Dr. P.’[34].

Law No 199/2023 provides in Art. 168 para. (1)[35] which are violations of the rules of deontology and ethics in the process of academic research, plagiarism being one of them.

Likewise, Law No 199/2023 defines in Article 169 plagiarism as ’the presentation as an allegedly personal scientific creation or contribution in a written work, including in electronic format, of texts, ideas, demonstrations, data, theories, results or scientific methods taken from written works, including in electronic format, of other authors, without mentioning this fact and without reference to the original sources’[36] and self-plagiarism as: ’the republishing of substantial parts of one's own previous publications, including translations, without properly indicating or citing the original’[37].

We note that there is a consistent attitude of the Romanian legislator, in the sense that, as presented above, the definitions given by Law No 206/2004 to plagiarism and self-plagiarism are similar to those in Law No 199/2023.

As regards to the sanctions established for non-compliance with the rules of academic ethics and deontology (plagiarism and self-plagiarism), Article 171 of Law No 199/2023 provides that these violations are verified by specialized commissions, the law stipulating a procedure by which these commissions can be notified.

Therefore, such committees ’examine complaints of plagiarism, taking into account the conditions of legality in force at the time of the writing of the Ph.D. thesis which formed the basis for the issue and award of the Ph.D. degree, correspondingly, without being able to re-evaluate the scientific substance of the Ph.D. thesis’[38].

Yet, the legislator has taken into account in the new Higher Education Law the unconstitutionality Decision no. 364/24.08.2022 pronounced by the CCR, highlighting that the scientific background of the Ph.D. thesis cannot be re-evaluated.

The complaint notified to the committee regarding the alleged violation of the rules of ethics and university deontology ends with a decision which ’is an administrative act and must explicitly include in its text the facts that led to the sanctioning of the person concerned, the legal basis, respectively the considerations for which the university ethics committee rejected the arguments put forward by the complainant’[39].

Pursuant to the above-mentioned decision, the higher education institution will submit the teaching staff (auxiliary and research) to sanctions as stipulated in Article 172 of Law No. 199/2023.

Law no 199/2023 provides in paras. (8)-(11) of Art. 172 what happens in the following scenarios where: (i) the committee referred to under Art. 171 of the Law considers that there is plagiarism in the content of a Ph.D. work, and the decision issued by this specialized commission has not been challenged before the NCAUDDC, the National Commission for Ethics in

[34] *Ibidem*, para. (2).

[35] *”(1) Deviations from the rules of ethics and deontology in academic teaching and research include: h) plagiarism”.*

[36] Article 169 lit. d) Law no. 199/2023.

[37] *Ibidem*, letter e).

[38] *Ibidem*, article 171 para. (8).

[39] *Ibidem*, article 171 para. (10).

University Management (hereinafter 'NCEUM') or the National Council for Ethics in Scientific Research, Technological Development and Innovation (hereinafter 'NCESRTDI') within a period of 30 days from the communication; (ii) the NCAUDDC determines that there is plagiarism in a Ph.D. work; (iii) an action has not been formulated, as stipulated in para. (6) of Art. 172[40], respectively:

- within 10 days from the communication of the decision of the NCAUDDC, the decision is transmitted to the rector who, within a maximum of 30 days, has the obligation to file an action for annulment of the Ph.D. degree, for degrees awarded by the higher education institution, if the Ph.D. degree has entered the civil circuit and has given rise to subjective rights guaranteed by law. If the rector does not initiate the action for annulment of the doctoral degree, the Ministry of Education shall bring its own action for annulment of the Ph.D. degree and refer the matter to the NCEUM;
- within 10 days from the communication of the NCAUDDC decision, it is communicated to the rector, who, within a maximum of 30 days, orders the revocation of the Ph.D. degree, for degrees awarded by the higher education institution, if the Ph.D. degree has not entered the civil circuit and has not given rise to subjective rights guaranteed by law;
- within 10 days of the communication of the NCAUDDC 's decision, it is communicated to the Minister of Education, if the Ph.D. title has been confirmed by order of the Minister. The Ministry of Education, within a maximum period of 30 days, shall bring an action for annulment of the Minister's order confirming the Ph.D. title, if the order has entered the civil circuit and has given rise to subjective rights guaranteed by law;
- this is communicated to the Minister of Education, if the Ph.D. title has been confirmed by order of the Minister. The Ministry of Education shall, within a maximum of 30 days, order the revocation of the Minister's order confirming the Ph.D. title, if it has not entered the civil circuit and has not given rise to subjective rights guaranteed by law'[41].

Basically, the law offers two hypotheses when the degree is granted by the university: (i) the hypothesis in which 'the Ph.D. degree has entered the civil circuit and has given rise to subjective rights guaranteed by law', in which case the rector is obliged to file an administrative action for the annulment of the Ph.D. degree, and (ii) the hypothesis in which 'the Ph.D. degree has not entered the civil circuit and has not given rise to subjective rights guaranteed by law', in which case the rector orders its revocation.

Two hypotheses are also foreseen in the situation where the Ph.D. title has been established by order of the Minister, where if (i)'the order has entered into the civil circuit and has given rise to subjective rights guaranteed by law', the Ministry of Education formulates an action in administrative litigation aimed at annulling the Minister's order confirming the Ph.D.

[40]Art. 172 para. (6): *"If the decision of the CNATDCU or CNEMU, as the case may be, differs from that of the ethics committees at the level of higher education institutions, it shall be implemented by the higher education institution within 30 calendar days of its communication. Failure to implement the decisions of the CNATDCU or the CNEMU, as the case may be, constitutes a breach of public accountability, sanctioned in accordance with Art. 174 para. (5). The final decision shall be communicated to the person under investigation and to the person who made the referral to the NATDCU or the NCEUMC, as the case may be, within 10 calendar days of the issuance of the decision. The right to apply to the court is guaranteed.".*

[41] Art. 172 paras. (8)-(11) of Law no. 199/2023.

title and (ii) 'the order has not entered into the civil circuit and has not given rise to subjective rights guaranteed by law', the Minister of Education orders the revocation of the Minister's order confirming the Ph.D title.

It is therefore easy to understand that Law No 199/2023 was drafted taking into account the two unconstitutionality decisions handed down by the Constitutional Court of Romania, which we have analysed in this paper.

3. Conclusions

The law has its limits in assessing human behaviours. Even God, in his many attempts, did not succeed with the Ten Commandments in leading the Jewish people to obedience, but was always directed to forgiveness.

That is why, in this case too, when discussing academic imposture, the law cannot prohibit or regulate conscience or common sense. We have to cross the border and go into the academic realm in order to discuss plagiarism and self-plagiarism. We have seen what the definitions of these terms are, and they are ultimately limited to 'citation of source'. This means, on the face of it, that the aspiring Ph.D. must acknowledge the work of another researcher who was himself a trailblazer.

With regard to the application of the law in force, in relation to the unconstitutionality decisions that we have analysed, the reference that the re-examination of the substance of the Ph.D. thesis from the point of view of the scientific value of the work on which plagiarism is suspected is not allowed either by another commission or by the court, beyond the legality and constitutionality of such a measure, could still constitute an incorrect measure.

Firstly, in order to get to the point of re-examining the content/background of the Ph.D. thesis, a reasonable suspicion must hang over it. Secondly, if the first condition is met, it is incumbent on the academic community to ensure that what is contained in the Ph.D. thesis cannot cause harm. It does a disservice to the society that has direct access to that work, risking the take-up of incorrect, false, plagiarized ideas that will inevitably lead to the perpetuation of intellectual and cultural impostorism.

The solution proposed by the CCR, concerning the fact that the court cannot analyse the merits of the Ph.D. thesis from the point of view of the scientific value of the work, is justified and correct, since the court may not have the necessary expertise to analyse the subject under review. However, I consider that the CCR's decision that the issues raised by the Ph.D. committee and validated by the NCAUDDC 'may not be re-examined by another committee from the point of view of the scientific value of the thesis' is not as justified and correct, there is no constitutional or legal basis for doing so', since if plagiarism is suspected and the CNATDCU has incorrectly validated the points made by the Ph.D. committee, a plagiarized work with no scientific value could enter the civil circuit.

It is totally inappropriate for the annulment/revocation of the Ph.D. degree/title to be made solely on matters relating to the procedure for conferring or awarding the title or the Ph.D. degree. In essence, a person's decision to obtain a Ph.D. is due to a sense of duty to deal with an academic subject in a manner that can only benefit society. The legal relationships that arise from this title represent pecuniary effects and benefits. Thus, re-examination of the Ph.D. thesis is a duty, not an option, and the annulment/revocation of the Ph.D. degree/title should be a sanction designed to discourage any further attempt to minimize the importance of an endeavour such as Ph.D. studies.

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MOVEMENT PROTECTION: OPPORTUNITY TO IMPROVE VIETNAM MIGRATION LAW

Thuy Anh NGUYEN*

Abstract

In recent years, two major issues that humanity has faced are forced migration and climate change. Climate change is affecting human life and, if not mitigated, will continue to lead to global warming, desertification, the rise of sea levels, the disappearance of islands, and the increased frequency and scale of climate-related natural disasters. Many Vietnamese workers overseas have had negative effects as a result of the COVID-19 pandemic and the war between Ukraine and Russia. Given the situation, Vietnam has been adopting laws and several programs to protect the rights of women migrant workers overseas and to provide secure employment prospects for workers who return home. However, Vietnam hasn't joined the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). This convention contains a considerable number of provisions for migrant workers. This paper analyses and describes the advantages and challenges of Vietnam as a member of the ICRMW Convention.

Keywords: *movement, protection, migrant workers, Vietnam Law, human rights.*

1. Introduction

Migrant workers in Vietnam are mainly export workers. Vietnam's labor export process is marked by three main stages (1975-1996, 1980-1991 and after 1994).

Robert E.B. Lucas[1] indicated that from 1975 to 1996, Vietnam had more 755 thousand refugees aboard. In addition, from 1980 to 1991, Vietnam had an agreement to send approximately 300 thousand workers to the Soviet bloc countries.

Following the collapse of the Soviet bloc and changing conditions inside Vietnam, workers from Vietnam are now looking elsewhere, particularly to Thailand and more recently to Taiwan.

The first and second phases are aimed at Eastern European bloc countries and the former Soviet Union. The third phase began in 1994 with the destination being East Asia, and the target audience were contract workers or interns.

Taiwan (China), Japan, Korea, Laos and Malaysia are the major labor receiving markets of Vietnam. Vietnam's export workers mainly in Malaysia, Taiwan and Korea.

In general, the above markets, although promising for Vietnamese workers, are only open to skilled workers. This is a big, globally competitive challenge for labor sending countries like Vietnam. Therefore, there are still many illegal migrant workers due to insufficient conditions to meet the requirements of the receiving country such

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[1] Lucas R. E. (2001). *Diaspora and Development: Highly Skilled Migrants from East Asia.* Boston: World Bank, p. 78.

as qualifications, language, etc.

There are two major concerns related to labor export abroad: one is the situation where the employer violates the workers' rights; and the second is that the employee breaks the contract.

Chia Siow Yue[2] emphasized that the reality of labor exploitation and mistreatment still exists for migrant workers in ASEAN, one of the important reasons being that many ASEAN countries, including labor exporting countries, have not yet ratified international treaties for protection of migrant workers. For instance, Vietnam has not joined the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - ICRMW. Among the fundamental causes of international migration, family reunification also occupies an important place, and protecting the rights of migrant workers and their families plays a very important role.

2. Migrant worker protection in Conventions

In the late 1930s, the International Labour Organization (ILO) issued several treaties regarding migrant workers. The first treaty in this area of the ILO is the Migration Convention on Employment. This convention was later amended by the Migrant Workers Convention (Convention No. 97 of 1949). Following this, in 1975, the ILO adopted Convention No. 143 on migrants in abusive environments and the promotion of equality of opportunity in the treatment of migrant workers.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMRW)[3] is a comprehensive international human rights mechanism adopted with the purpose of protecting the migrant workers and members of their families. However, as compared to other international human rights treaties, the ICMRW has been less recognized by States.

According to the available information[4], until this date there are only 58 States which have ratified the Convention, 11 signatories, and 129 no action, and Vietnam has not joined. This low ratification record shows that most governments do not consider the rights of migrants as 'real' human rights that should be guaranteed by international law.

According to United Nation Migrant Worker Convention, such under-ratification is an expression of the conflict between globalization and the necessary mobility of labor across borders on the one hand and the need for protection and for a right-based approach toward the governance of migration on the other.

Bridget Anderson[5] argues that the labour demand and supply are not generated independently. Instead, there is a dynamic and mutually conditioning relation between labour demand and supply. Employer demand for labour is malleable, aligning itself with supply, at the same time, labour supply adapts to the requirements of demand. Additionally, in many sectors increasing, employer demand for migrant workers can, to a significant degree, be explained by 'system effects' that produce certain types of domestic labour shortage.

[2] Yue C. S., *Demographic Change and International Labour Mobility in Southeast Asia- Issue, Policies and Implication for Cooperation*, in G. H. Young (ed.), *Labour Mobility in the Asia-Pacific Region*, ISEAS Publishing, 2008, p. 93.

[3] Adopted by General Assembly resolution 45/158 on 18 December 1990.

[4] https://indicators.ohchr.org/.

[5] Bridget Anderson M. R., *Who needs migrant workers?,* Oxford University Press, 2012, p. 98.

Desmond[6] notes that despite the diverse setbacks pertaining to its ratification, the ICMRW is perhaps more significant today than it ever was, as more and more people are on the move. With an increasing number of migrants worldwide and the relative rise of human rights violations toward migrants, the ICMRW represents a potentially relevant strategy to safeguard the human rights of migrants. In this context, this chapter aims at providing a general assessment of the ICMRW, identifying the major obstacles that prevent its ratification, and highlighting the diverse limitations toward its full implementation.

Antoine[7] explains why ICMRW focus on the rights of migrant workers, not others' rights like irregular, migrants, trafficked migrants, migrant women. This is not just a matter of words, as this semantic change has political implications.

However, it is necessary to place a focus on human rights as well (rather than only labor rights) in order to safeguard immigrants who are not employed or whose presence is only partially related to their ability to work.

The ICMRW refers to this category of people as 'members of the families' of migrant workers, yet, one can think of other 'non-working' categories of migrants whose significance has increased in scholarly and policy debates since the Convention was adopted (for instance forced or trafficked migrants).

However, as will be addressed below, a significant portion of the present scholarly and policy arguments on the ICMRW centre on the trade-off between nationals' and non-nationals' rights, with the former being opposed to the latter.

The Convention is less likely to be ratified, as this essay will argue, if citizens believe that it merely grants rights to outsiders. This might easily generate negative responses along a 'we and them' division.

Ratification can be seen as favourable not only for citizens, but also for foreigners if, on the other hand, the ICMRW is presented from the perspective of international labor and as a problem that benefits all workers by limiting competition amongst them.

Some authors[8] report that NGOs which usually play an important role in building document of almost Conventions were largely absent in the case of the ICMRW. This Convention almost focus on social and economic rights while people think human rights aim to civil and political rights. This resulted in a lack of civil society support for the Convention.

3. The rights of migrant workers and members of their families are protected by the 1990 international convention

Content-wise, the ICMRW provides a more precise and specific interpretation of the way human rights should be applied to migrant workers which target other potentially vulnerable groups (women, children and, more recently, disabled people, for example).

While ICMRW codifies some new rights specific to condition of migrants (such as the right to transfer remittances or to have access to information on the migration

[6] Desmond A., *Introduction: the continuing relevance of the UN ICRMW*, in Desmond A, *Shining new light on the UN Migrant Workers Convention*, Pretoria University Law Press, 2017, pp. 1-22.

[7] Antoine P., *The Politics of the UN Convention on Migrant Workers' Rights*, in Groningen Journal of International Law, vol 5 (1): Migration and International Law, 2017, p. 59.

[8] Mariette G., Marie D., *Role of Civil Society in Campaigning for and using the ICMRW*, in *Migration and Human Right*s, Cambridge University Press, 2009, p. 72.

process), one of the most important thing is that ICMRW covers the rights for undocumented migrants.

Logically, undocumented migrants are human beings and, as such, are protected by international human rights law; the ICMRW puts this on paper, in a way that earlier treaties did not. However, it is controversy when the destination States are required to guarantee the people they may not wanted to admit. States tend to find it very difficult to respect migrants' rights when trying to remove undocumented migrants and, in practice, these measures regularly lead to human rights violations[9].

The legal doctrine[10] has frequently noted that the ICMW generally complies with current legal norms, particularly in Western democracies. States would find it reasonably simple to ratify if they were inclined because the majority of the rights outlined in the ICMW are already covered by their own laws.

This convention is more noticed to Asia countries than suitable domestic law. One[11] of the most detailed analyses found that 'Belgian national law is (in practice) highly compatible with the provisions of the Convention'.

ICMRW calls for a new set of rights that they haven't existed before in domestic laws, therefore no legal obstacle that could justify the reluctance to ratify and implement the Convention. Antoine[12] wrote that from a cost-benefit perspective, the rights of migrants are difficult to reconcile with market logics in destination countries and there are structural economic forces that make it very difficult to reach multilateral agreements on migrant workers' rights. In particular, the socio-economic imbalances between origin and destination States make reciprocal arrangements almost impossible.

It is true for Vietnam case that in Vietnam Labour Code has not enough article or agreements relevant to movement protection of export workers. There is a number of migrant workers aboard as low-skilled labour without degree of practical certificate. They are hired for domestic or health-care work and almost no guarantee from Government. Undocumented migrant workers are sent every year because they desire to move out their country for ensuring higher life standard with good salary. This is one of reasons why Vietnam has not ratified the ICMRW Convention.

One of the central contents of the 1990 International Convention is the rights of migrant workers as provided for in Parts III and IV of the Covenant. These rights can be divided into 2 basic groups:

civil and political rights group: no migrant worker or member of their family shall be subjected to torture, ill-treatment, inhumane or degrading treatment or punishment; no migrant workers or members of their families shall be enslaved, forced or forced to work;

economic, social and cultural rights group: all migrant workers and their families are entitled to health care; the right to an education equivalent to that of people in the country of origin; the right to ensure respect for the cultures and beliefs of migrant workers and members of their families and not to interfere in preventing them from maintaining cultural ties to their country of

[9] Bosniak L. S., *State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention* in International Migration Review, 2023, p. 34.

[10] Euan Macdonald, Cholewinski R., *The ICRMW and the European Union*, in *Migration and Human Rights,* Cambridge University Press, 2009, p. 158.

[11] Vanheule D. F., *The Signifiant of the UN Migrant Workers* in *European Journal of Migration and Law*, 285, 2004, p. 320.

[12] Antoine P., *op. cit.*, p. 90.

origin.

In addition, the 1990 International Convention also stipulates two groups of special rights for migrant workers: accommodation-related rights for migrants who have a legal place of residence in the host country and group of rights related to accommodation, especially for migrant workers.

With a comprehensive regulation of the rights of migrant workers, the 1990 International Convention attempted to establish the minimum standards that Member States should apply to migrant workers and Members. In addition, the 1990 International Convention also covers the protection of the rights of undocumented migrant workers, in which states recognize that workers with informal status often exploited and suffered serious human rights violations. The Convention recognizes that appropriate action should be encouraged to prevent and eliminate the illegal movement and entry of migrant workers, and to protect their human rights.

4. Challenges and Opportunity to improve Vietnam Immigration Law

Van Krieken[13] wrote that the final draft of convention is more consensual but nevertheless grants rights to irregular migrants in a way that is much more explicit than in other human rights instruments.

While the Convention establishes a distinction between regular and irregular migrants, with more rights for the former than the latter, it does not permit reservations that would exclude irregular migrants from the scope of the Convention (Article 88). From a labour protection or human rights perspective this makes a lot of sense. From the perspective of destination States, this can be interpreted as challenging their right to control and regulate migrants' movements and as an indication that the ICMRW is predominantly based on origin countries' interests.

Vietnam is one of the countries with a large foreign migrant workforce. According to data released by the ILO, every year about 80,000 Vietnamese workers go abroad to work. In total, there are currently about 400,000 Vietnamese workers working abroad, sending an amount of money about 2 billion USD to the country every year.

Reality shows that Vietnamese migrant workers play an important role in the economy financial resources of the country. In order to manage Vietnamese migrant workers abroad, many legal regulations have been issued.

However, in order to effectively manage and protect the rights of migrant workers, one of the important issues is the mechanism to bind the responsibilities of the relevant countries through a multilateral international commitment because Vietnam has migrant workers abroad, conversely many countries also have migrant workers in Vietnam[14].

For Vietnam, the optimal solution to this problem is to join multilateral international conventions related to the protection of the rights of migrant workers, of which the 1990 International Convention is a fully governing convention and comprehensive.

Joining the Convention helps Vietnam to complete a number of gaps in the law on migrant workers as follows.

- completing the definition of migrant

[13] Van Krieken P., *Migrants' Rights and the Law of the Sea: Further Efforts to Ensure Universal Participation*, in *International Migration*, 2007, p. 74.

[14] Durst Jurdit, *Introduction. Cultural Migrants? The Consequences of Educational Mobility and Changing Social Class Among First-in-Family Graduates in Hungary.*

workers: A full and official definition of migrant workers will make an important contribution to clearly defining the scope of subjects considered as Vietnamese migrant workers abroad that need to be covered. Therefore, Vietnam has a plan of ensure and response to the object that needs protection because the Vietnamese are abroad;

- *the reality of migrant workers abroad*: the number of Vietnamese people working abroad is quite large, workers working abroad significantly contribute to the economic development of Vietnam through remittances sent back home. However, Vietnamese workers working abroad still face risks and challenges such as high costs, fraud in the recruitment process, and some forms of labor rights violations even the problem of illegal migrant workers and very limited access to a complaint mechanism.

The issue of concretizing necessary mechanisms to protect the rights of Vietnamese workers abroad, especially specific communication channels in emergency situations. The process of handling the case of 39 illegal Vietnamese workers in the UK[15] as well as many other cases has shown the need to establish an international coordination mechanism to intervene quickly when problems arise toward issues related to migrant workers occur in practice.

The ICJ will be the competent international court for solving potential conflicts, under Article 92:

'*Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court'*[16].

However, there are some challenges for enjoying the 1990 International Convention:

a) the conflict of laws between the application of the Convention and the domestic law: application of the Convention, pursuant to Article 6 of the International Treaty Law;

b) conflict in analysing 'migrant workers': under Vietnam Labour Law, Article 3 of 152/2020/ND-CP does not mention about the nationality of migrant workers, while Article 2 of the ICRMW regulates that: 'The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. Therefore, when joining the 1990 International Convention, in case workers have two nationalities of Vietnam and the country which they will come to work, there will be conflicts in the interpretation of the language. If Vietnam joins this Agreement, Vietnam need adjust definition of 'migrant worker' in the domestic law.

5. Conclusion

With the basic contents as analysed above, it is clear that the 1990 International Convention is one of the most humane legislative achievements of the international community, contributing to the protection of migrant workers worldwide. The progressive provisions of the 1990

[15] https://www.theguardian.com/law/2020/dec/21/essex-lorry-deaths-vietnamese-trafficking-victims-died-uk-has-anything-changed. Access on 2nd May, 2024.

[16] https://www.un.org/en/about-us/un-charter/chapter-14. Access on 2nd May, 2024.

International Convention should be rapidly applied to all countries of origin and host of migrant workers and should also be rapidly assimilated and internalized. Besides, it is codified into national legislation to improve its applicability to practical cases. For Vietnam, when the number of Vietnamese migrant workers abroad is larger than the number of foreign migrant workers in Vietnam, it is clear that the accession to the 1990 International Convention will bring many advantages to Vietnam in the future of labor protection.

Furthermore, the 1990 convention also mentions the minimum right of illegal migrant worker protection – something that is not covered in other migrant worker conventions.

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THE ROAD TO FISCAL DECENTRALIZATION OF MUNICIPIALITIES IN THE REPUBLIC OF BULGARIA

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Abstract

This publication is dedicated specifically to local taxes, given their importance for the actual achievement of local self-government in the Republic of Bulgaria. Here, financial decentralization is understood as a way to strengthen the legal role and economic power of local government. An expression of financial decentralization de lege lata are the tourist tax and the patent tax.

Keywords: *local taxes, competence, enforcement procedure, fiscal decentralization.*

1. Introduction

The determination and collection of local taxes by local government bodies derives from the principle of local self-government. As a form of increasing the efficiency of state administration and solving important problems with local importance, in art. 2, paragraph 1 of the Constitution of the Repulic of Bulgaria, it is declared that the Republic of Bulgaria is a unitary state with local self-government. The financing of municipalities in practice creates, gives meaning and guarantees, the manifestation of local authority. Therefore, local taxes are of key importance as it is through them that the autonomy of the local fiscal is formed and defended. It is no coincidence that Decision No. 9 from September 21, 2000 of the Constitutional Court of the Republic of Bulgaria summarizes that 'the legal possibility to perform certain functions would become meaningless, given that the local self-government bodies are deprived of financial resources for their implementation...' This publication is dedicated specifically to local taxes, given their importance for the actual achievement of local self-government in the Republic of Bulgaria. Here, financial decentralization is understood as a way to strengthen the legal role and economic power of local government. An expression of financial decentralization de lege lata are the tourist tax and the patent tax.

2. Content

Local self-government, therefore, imposes the need for the municipality to have its own financial revenues. In 2007, with the Act to Amend and Supplement the Constitution of the Republic of Bulgaria (promulgated SG No. 12 of 2007), a significant change was made affecting the organization of taxes in the Republic of Bulgaria. In the amended art. 84, item 3 provides that the National Assembly establishes taxes and determines the amount of state taxes. The newly created para. 3 of art. 141 decrees that the municipal council determines the amount of local taxes under the conditions, according to the order and

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within the limits established by law. The rules introduced by art. 60, para. 1 and para. 2 of the Constitution, that citizens are obliged to pay taxes and fees established by law, according to their income and property and that tax reductions and burdens can only be established by law, remained unchanged. In all Bulgarian constitutions until the adoption of these amendments, the tax matter was regulated solely, explicitly and invariably by the legislative power.

According to the reasons for the Act to Amend and Supplement the Constitution of the Republic of Bulgaria, 'the purpose of the changes is to achieve real financial decentralization, to achieve compliance between the functions and responsibilities of the municipalities, on the one hand, and the financial possibilities for their realization - on the other , as well as to create opportunities for municipalities to fully participate in the absorption of the structural and cohesion funds of the European Union.' With the changes made, the legislator introduced a distinction in determining the amount of republican and local taxes. The establishment of all taxes is reserved as the sole authority of the National Assembly, which determines the amount of republican taxes, and the municipal councils are assigned the competence to determine the amount of local taxes under conditions and procedures determined by law. These constitutional changes are also part of the implementation of the Decentralization Strategy 2006-2015 adopted by Decision No. 454 of the Council of Ministers dated 02.07.2010. By granting the municipalities the right to determine the amounts of local taxes, the process of financial decentralization continues and local self-government is strengthened, since the greatest importance for the development of the process is the strengthening of the financial independence and autonomy of the municipalities. Local taxes are involved in the formation of revenues for the local budget, they are only one of its budgetary sources. However, the municipality cannot unilaterally and arbitrarily establish the local taxes themselves, this, as correctly noted in Decision No. 9 of the Constitutional Court of the Republic of Bulgaria, always remains within the powers of the National Assembly.

However, the normative granting of authority to the municipal council to determine the amount of local taxes (of those determined by the National Assembly for such taxes) even within the framework of the law is an important guarantee for the real achievement of local self-government, because the independent budget strengthens and maintains the independence of the local power, i.e. makes possible its separation from the central government. Thus, if it is admitted that local self-government is a form of decentralization of state power, it must be admitted, and that the determination and collection of local taxes by local self-government bodies is an expression of decentralization of state finances. Moreover, it must be assumed that financial decentralization fosters and ensures the decentralization of state power itself.

Financial decentralization includes the way of distribution of financial responsibilities at the central and local level in the field of public revenues and expenditures. It is a specific process of transferring powers and responsibilities from the central government to the municipalities regarding the financing of local budgets.

Taxes are the main source of budget revenue. In the conditions of a market economy, taxes achieve not only fiscal goals, but also economic and social ones. Taxes affect economic activity and the income from them is an indicator of the development of the economy, as well as of the society itself. The tax reductions provided for in the legislation are a tool for

achieving a fair distribution of the tax burden.

With the adoption of the Public Finance Act (promulgated SG No. 15 of 15 February 2013, in force from 01.01.2014), which repealed the Law on the Structure of the State Budget in force until then (SG No. 54 of 15.07 .2011, repealed by SG No. 15 of February 15, 2013) and the Law on Municipal Budgets (SG, No. 33 of March 24, 1998, repealed by SG No. 15 of February 15, 2013), the regulation of the general arrangement and structure of public finances with one common normative act became a fact. The adoption of this law is an expression of the desire to consolidate all aspects of the management and use of public resources, both at the national and local levels. Public finance is considered as a unified system for provision and financing of public goods and services, redistribution and transfer of income and accumulation of resources by budget organizations. According to art. 45, para. 1, item 1, b. 'a' of the Public Finance Act, the revenue from local taxes is also included in the structure of the municipal budget, under conditions, according to the order and within the limits established by law.

As a result of the expanded powers of the Municipal Councils in 2007 for a more active tax policy at the local level, it did not lead to a significant change in the revenue structure and greater autonomy of the municipalities:

- The budgets of most Bulgarian municipalities remain strongly dependent on state transfers – more than half of municipal expenses are financed through state transfers;
- The municipal budget continues to be abstractly rather than functionally related to the economic processes (for example, investments and the labor market) taking place in the municipal territory - with the exception of the real estate market;
- The implementation of an independent fiscal policy is greatly hampered by the lack of sufficient own revenues, which limits the role of municipal councils as conduits of the democratic will of the voters and deprives them of the necessary tools for forming local policies;
- The access to the European funds of the Bulgarian municipalities both concealed and deepened the lack of own resources, and the increased obligations of the local authorities from the requirement to co-finance the projects proved the importance of the problem;
- There are examples of fiscally anemic municipalities with mounting debts, periodically frozen accounts and dysfunctional administrations unable to meet any emergencies.[1]

According to a report by the National Association of Municipalities in the Republic of Bulgaria (NSORB), municipalities in Bulgaria are mainly financed by transfers from the national budget (71%), local taxes (15%) and fees, rents, fines and non-tax revenues (14%). Transfers from the national budget finance the activities delegated by the state, mainly public education (94% of local spending is on education) and social services (85%). Matching the delegated functions with the relevant state budget leads to a low ratio of state transfers to public works and communal services, and more than half of the municipal administration's expenses are financed by the state budget.[2]

One of the proposals made by the NSORB has a plan to set aside 20% of

[1] https://www.regionalprofiles.bg/var/images/IME-Fiscal-Decentralization.pdf.

[2] https://www.namrb.org/uploadfiles/news/11418/Technical%20Report_fiscal%20decentralisation_FINAL %202761-6228-9416.2_BG.pdf.

personal taxes and 10% of corporate tax as shared local revenues, redistributed according to their place of origin. These shared revenues will create significant new resources for municipalities: 37% own revenues or 12.1% expenditures for activities delegated by the state. Both types of shared revenue are concentrated in large urban centers.

The revenue sharing method of financing municipalities has several advantages: it is a significant source of revenue, personal income taxes (excluding corporate taxes) are a stable source and predictable revenue. Indirectly, the sharing of tax revenues binds the local economy and the municipal budget. Revenue sharing can be introduced by replacing some of the state subsidies allocated to state-delegated activities. The apportionment method should be based on the actual place of residence of the taxpayer or by using an alternative method - apportionment based on formulas. Tax distribution also offers a good opportunity for equalization based on the per capita income redistribution mechanism. Shared taxes enhance local autonomy if they provide discretionary local sources of revenue.

In the Strategy for Decentralization 2016 - 2025, it is reported that financial decentralization is currently not perceived as a means of improving the financial situation of municipalities. The main problem that led to the suspension of the reform in the field of financial decentralization was the lack of resources for financing municipal services. In general, it can be said that functions are preemptively transferred to the municipalities with a normative act, without providing the necessary financial resources, which is contrary to art. 9 of the European Charter of Local Self-government. Bulgaria ratified the Charter with the Law on Ratification, adopted by the 37th National Assembly of the Republic of Bulgaria on 17.03.1995. With the adoption of the Law on Ratification of European Charter of Local Self-government, according to art. 5, para. 4 of the Constitution of the Republic of Bulgaria, the Charter becomes part of the domestic legislation and takes precedence over it. In this regard, it should be borne in mind that when it comes to the provision of public services that are not provided with financial resources, their quality and access to them deteriorate.

The other unresolved issues in the field of financial decentralization:

- Activities delegated to local authorities still exceed their own activities in volume. There is no clarity in the division between delegated powers and own powers of the local government bodies, which is one of the key findings in the Second Monitoring Report of the Council of Europe;
- The processes of administrative reform and financial decentralization should continue to be carried out in a coordinated manner. With its development, the decentralization process has clearly reached a point where continued financial decentralization will be critical, i.e. without the implementation of financial decentralization measures, other decentralization measures would not be realistically feasible. Currently, public investment decisions are concentrated in the Ministry of finance. Municipalities have the right to make independent decisions on a small percentage of the revenues and expenditures of the local budget;
- Own sources of income are limited and represent an insignificant share of municipal budgets for the majority of municipalities. This makes them unreliable partners of European funds in the co-financing of local projects. Financial decentralization is a necessary condition for the development of a municipal credit market and for increasing the ability of municipalities to receive financing outside the central budget;

- Some imperfections in the formula for financing local authorities and difficulties in securing financial resources from the state sometimes allow bypassing the objective mechanism for financial regulation and switching to 'manual management', i.e. distribution of available resources 'to each a little' and thus the state continues to be the guarantor of local deficits. Municipalities must have control over their revenues in order to be able to analyze the effectiveness of one or another of their activities;
- There are a number of legal possibilities and prerequisites for increasing the revenue part of municipal budgets by using bank loans, issuing municipal bonds, creating conditions for the municipality's participation in national and international programs, attracting investors and others that are not sufficiently well known and used by local authorities;
- Local authorities do not have the authority to determine tax reductions for certain taxpayers, as well as the ability to determine user fees for optional services provided by municipalities;
- The spending powers of the municipalities are limited in relation to the delegated services;
- The lack of regulation for determining the total amount of the capital subsidy, led to its formation on a residual basis, with the amount of additional subsidies for capital costs distributed among the municipalities being determined without any rules and often exceeding 50% of the actual amount of capital subsidies granted.

The path to fiscal decentralization in Bulgaria can happen in several ways. The transfer of part of the income from the VAT to the municipalities cannot and should not be an isolated, self-serving and unconditional change in the structure of the tax system. In order to ensure the success of such a change, a number of additional steps need to be taken, including:

- Transition to effective program budgeting at the local level, which will lead to greater efficiency and transparency at the local level;
- Improving the efficiency and transparency of the finances and management of municipal enterprises and municipal property;
- Territorial-administrative reform to guarantee the long-term sustainability of the territorial structure.

A real change in terms of the financial independence of the Bulgarian municipalities is possible only by restructuring the existing tax system. The imposition of new taxes (for example, on turnover) carries the risk of duplication of taxation, and the increase of existing local taxes will not solve the problem of incentives for local authorities and implies an overall growth of the tax burden on the economy.

Revenue sharing from indirect taxes such as VAT seems difficult to implement, and giving municipalities the power to determine its level or even the tax base of this tax would lead to absolute administrative chaos and create the conditions for the emergence of tax arbitrage where consumption is artificial aimed at municipalities with a lower tax burden.

Thus we arrive at the most likely and widely applied in the EU model of fiscal decentralization in the form of direct revenue sharing or the transfer of powers in relation to already existing direct taxes - on the income of individuals (general income tax) or on profit (corporate tax).

The vast majority of policy challenges and administrative hurdles seem easily surmountable in revenue sharing or devolution of personal income taxes to local authorities:

- The resulting link between taxation and democratic representation at the local level will create incentives for local

authorities to work to create jobs (mainly by attracting investment) and will link the financial situation of municipalities to the social and economic processes taking place at their territory;

- Incentives for tax arbitrage can be removed by applying the 'money follows the identity card' principle, whereby revenues from personal income taxes are distributed among individual municipalities based on the individuals' permanent address;
- The relationship between taxation and democratic representation in personal income taxes is much more pronounced than in corporate taxation and creates incentives for real tax competition between municipalities;
- The vast majority of personal income tax revenues are monthly transfers from employers to the tax authorities. The timely redirection of these funds to municipal authorities will provide an additional source of liquidity and can help meet extraordinary expenses;
- The legislative effort and follow-up involved in implementing such a system are significantly lighter than existing alternatives. Taxes on the income of natural persons can be collected in the same order (by the National Revenue Agency), after which the relevant part of them can be redirected to the accounts of the municipalities.

3. Conclusions

In this regard, I consider it is correct to strengthen and further develop the tendency to increase the local fiscal by transferring part of the revenues from national taxes to the local budgets of the municipalities, the so-called financial decentralization. Currently, legal and factual manifestations of the same are the tourist tax and the patent tax. This is undoubtedly positive, but it is not enough, as it did not achieve financial autonomy of the municipalities.

The transformation of more national taxes into local taxes is useful and fair, not least because the possible increase in the amount of the current local levies will create an excessive burden on the taxpayers, thereby deepening the collection problem and there was an overall increase in the tax burden in the country's economy.

It is important to emphasize that in the process of financial decentralization an optimization between local and national interest should be achieved. It is harmful that the financial independence of municipalities is realized arbitrarily and entirely at the expense of the national interest. The demeaning of the national interest should not be explained as a way to understand and develop the local interest. From this point of view, for example, the direct sharing with the municipalities of a part of the income from taxes on the income of individuals appears to be adequate and balanced.

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NATURE OF THE DISTINCTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW AS BRANCHES OF INTERNATIONAL LAW

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Abstract

Despite the fact that there is a trend in understanding international humanitarian law and international human rights law as two separated branches of international law, discussions about these two concepts and their relationship continues. Rather than looking for which approach is correct, we should analyse what implications these discussions have in both theoretical and applied terms. To achieve that it is necessary to ascertain what is the nature and, consequently, what are the implications of identifying international humanitarian law and international human rights law as branches of international law, as well as the attributing specific norms to a particular branch.

Keywords: *international law, international humanitarian law, legal regulation, human rights.*

1. Introduction

The fairness of the application of the approach widely held in legal theory, according to which the division into branches depends on the object and method of legal regulation , is disputed even with regard to the rules of national law. Thus, some authors insist on the use of criteria such as the 'presence of specific functions' , the purpose and content of the legal regulation, the particularities of the subject composition and the types of legal liability

2. Content

The term ’law of war’[1] has long been used to refer to international legal norms concerning the laws and customs of war, the codification of which began in 1864[2], , but as the ICJ noted in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. Over time, these norms were given a new name, 'international humanitarian law'. By the mid-1970s in the twentieth century, the concept of ’international humanitarian law’ became associated with the Geneva Conventions, dedicated to the protection of the victims of war, and was separated from the Hague Conventions, which limited the means and methods of warfare. It is this approach that is reflected in the writings of such scholars

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[1] Мартенс Ф.Ф. Современное международное право цивилизованных народов. СПб.: Тип. Министерства путей сообщения (А. Бенке), 1883. Т. 2. С. 513.

[2] ICJ (International Court of Justice), Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 8 July 1996. Para. 75.

as, for example, D Levin,[3], L. Savinsky[4], as well as K. Ipsen. It is generally accepted that with the adoption of the two Additional Protocols to the Geneva Conventions for the Protection of Victims of War[5] in 1977, this distinction was to some extent overcome[6]. Today, the term 'international humanitarian law' is mainly used as a generic term for the Geneva and Hague Conventions [7].

In addition to the concept of ’international humanitarian law’, it has been proposed in academic and educational literature to use terms such as ’law of armed conflict’[8], „law of war’[9] to refer to rules dealing with the conduct of armed struggle and the protection of victims of armed conflict’[10], ’international humanitarian law applicable to armed conflict’[11],’international law during armed conflict’[12].

At the same time, with the polyphony of viewpoints still existing, there is now a tendency to use the term ’international humanitarian law’ to refer to international legal norms specifically designed to protect the victims of armed conflict and limit the means and methods of war. One of the most frequently cited is the definition of ’international humanitarian law’ formulated by H.-P. Gasser, ’the law applied in armed conflicts ... which attempts to mitigate the manifestations of war by, first, imposing restrictions on the methods of warfare ... and, second, obliging those engaged in hostilities to protect those who do not or have ceased to engage in hostilities’.[13] A similar approach to the definition of this concept has been followed in recent decades by the United Nations, the International Criminal Court as well as the International Committee of the Red Cross (hereinafter ICRC), which is by no means a passive guardian of the Geneva Conventions and their Protocols, but actively contributes to the further development of international legal norms in this field[14].

There are many approaches to the relationship between the concepts of ’international humanitarian law’ and international human rights law, but despite the fact that it is still impossible to put an end to the decades-long dispute over the terms, it should be noted that a viewpoint has already been formed that is shared by most researchers. The prevailing view in scholarship is that international humanitarian law and international human rights law are two independent branches of

[3] Полторак А.И., Савинский Л.И. Вооруженные конфликты и международное право. М.: Наука, 1976. С. 80.

[4] Ipsen K. Völkerrecht. München: Beck, 2004. S. 1211, 1219–1220.

[5] Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts, dated 8 June 1977.

[6] Heinegg W.H. von. Entschädigung für Verletzungen des humanitären Völkerrechts // Berichte der Deutschen Gesellschaft fuer Voelkerrecht. Bd. 40. Heidelberg, 2003. S. 5-6.

[7] Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, para. 75.

[8] Международное право: Учебник / Отв. ред. С.А. Егоров. 5-е изд. М.: Статут, 2014.

С. 997–1004; Арцибасов И.Н., Егоров С.А. Вооруженный конфликт: право, политика, дипломатия. М.: Международные отношения, 1989. С. 19; Белугина А.В. Указ. соч. С. 12; Бирюков П.Н. Международное право: Учебник для вузов. 6-е изд. М.: Юрайт, 2013. С. 517.

[9] *Фердросс А.* Международное право. М.: Иностр. литер., 1959. С. 429.

[10] *Батырь В.А.* Международно-правовая регламентация применения средств ведения вооруженной борьбы в международных вооруженных конфликтах // Государство и право. 2001. № 10. С. 63.

[11] Международное гуманитарное право: Учебник / Под ред. А.Я. Капустина. 2-е изд. М.: Юрайт, 2011. С. 522.

[12] *Бирюков П.Н.* Международное право: Учебник для вузов. 6-е изд. М.: Юрайт, 2013. С. 562–563.

[13] Gasser H.-P. Einführung in das humanitäre Völkerrecht. Bern; Stuttgart; Wien: Haupt, 1991.

[14] URL: // http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

international law[15].

It should be noted that J.Pictet, the author of the famous commentaries on the Geneva Conventions who introduced the term ’international humanitarian law’ into scholarly circulation, pointed out in his earlier writings its dual nature, including in this concept both the international law protection of human rights and the law of war[16]. Over time, however, his position changed - he came to see international humanitarian law as ’an important part of public international law that draws inspiration from the ideas of humanity and that focuses on the protection of people in times of war[17], indicating that international human rights protection and international humanitarian law are ’close but distinct and should remain so as they complement each other perfectly’[18].

As a generic name for these two branches of G. Pictet proposes to use the term ’humane law’[19]. Another authoritative international jurist, T. Meron, also insists that these branches of law are ’distinct and must remain distinct’ and ’there is no point in pretending that international humanitarian law and international human rights law are one and the same’[20].

Proponents of this approach offer definitions of international human rights law that are quite similar in meaning. For example, A. Saidov proceeds from the fact that it is ’a branch of modern public international law which establishes obligations for the subjects of international law with respect to persons under their jurisdiction to guarantee, respect and protect their rights and freedoms’[21]. Y. Kolosov, D. Bekjashev and D. Ivanov understand ’international human rights law’ as ’principles and norms governing international cooperation in the promotion and protection of human rights, the respective rights and obligations of the subjects of international law, including the obligation of States to respect the rights and fundamental freedoms of all people without distinction of race, sex, language or religion’. According to V. Gavrilova, ’international human rights law protection’ is ’a set of international legal principles and norms that determine the general standards and framework of conduct of States in their activities to recognize, protect and control the observance of socially determined rights and freedoms of individuals and their associations in a particular territory, as well as to regulate inter-State cooperation in this area’. The author specifies that the ’international legal protection of human rights’ ’has its own specific sources, special sectoral principles and qualitatively distinct subject matter of legal regulation’, which is why its ’must be distinguished from ... international humanitarian law, the norms of which are aimed exclusively at protecting the participants and victims of armed conflicts and limiting for this purpose the means and methods of warfare’[22]. The existence of two branches - international humanitarian law and the international

[15] Shaw M. International Law. 6th ed., Cambridge: Cambridge University Press, 2008. P. 1167–1170; International Law / Ed. by M.D. Evans. 4th Ed. Oxford: Oxford University Press, 2014. P. 783–790, 821–831.

[16] Pictet J., *Le droit humanitaire et la protection des victims de la guerre*. Leiden: Sijthoff, 1973. P. 11.

[17] Pictet J., *International Humanitarian Law: Definition // International Dimensions of Humanitarian Law. International Dimensions of Humanitarian Law*. Geneva: Henry-Dunant Institute/UNESCO, 1986. P. XIX.

[18] Пикте Ж. Развитие и принципы международного гуманитарного права. М.: МККК, 2001. С. 11.

[19] Гассер Х.-П. Международное гуманитарное право. Введение. М.: МККК, 1999. С.12.

[20] Meron T. International Criminalization of Internal Atrocities // American Journal of International Law. 1995. Vol. 89. P. 100.

[21] *Саидов А.Х.* Указ. соч. С. 11.

[22] Пак там, С. 480.

protection of human rights - was the basis for the advisory opinions of the International Court of Justice on the legality of the threat or use of nuclear weapons in 1996 and on the legal implications of the construction of a wall in the Occupied Palestinian Territory in 2004, as well as the 2005 decision in the case of ’Democratic Republic of Congo v. Uganda’[23].

In addition to this approach to the relationship between the concepts of ’international humanitarian law’ and international human rights protection, scholarship presents others, the essence of which is that the scope of these two concepts are fully or partially inclusive. Some scholars, when formulating the concept of ’international humanitarian law’, start from the meaning given to the term ’humanitarian’ - ’relating to man and his culture; directed to the human person, to the rights and interests of man’. So, according to I. Blishchenko, A. Sukharev and O. Smolnikova, ’international humanitarian law’ is ’a set of international legal norms defining the regime of human rights and freedoms in peacetime and in times of armed conflict, as well as a set of legal norms defining the limitation of the arms race, the restriction and prohibition of certain types of weapons and disarmament.’[24]. O.I. Tiunov also uses the concept of ’international humanitarian law’ as a general one, including in it ’contemporary international norms relating to human rights in all aspects of these rights (’human rights law’)’, and ’humanitarian norms that have evolved with regard to the protection of the individual in a particular situation, namely in armed conflict’[25], which the author also calls ’international humanitarian law’[26], clearly based on the possibility of appealing to this concept in a broad and narrow sense.

A. Kapustin adheres to a similar position, understanding by ’international humanitarian law’ the norms of international human rights law, as well as ’international humanitarian law applicable in armed conflicts.’[27]. D. Yagofarov also notes that ’international humanitarian law essentially includes human rights norms applied ... in times of war and/or armed conflict’[28]. The same approach is used by Biryukov, however, using the concept of ’international humanitarian law’ to mean ’a body of international legal principles and norms governing the provision and protection of human rights and freedoms both in peacetime and in times of armed conflict, the regulation of cooperation between States in the humanitarian sphere, the legal status of all categories of persons, and the establishment of responsibility for violations of human rights and freedoms.’ Accordingly, calling ’international law in time of armed conflict’ a branch of international law that

[23] ICJ: Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, para. 25; Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004. Paras. 102, 106 http://www.icj- cij.org/docket/index.php?p1=3&p2=4&k=5a&case =131&code=mwp&p3=4 (далее – Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory); Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congov. Uganda, Judgment, 19 December 2005. Paras. 217–219 [Электронный ресурс]. http://www.icj-cij.o

[24] Блищенко И.П. Обычное оружие и международное право. М.: Международные отношения, 1984. С. 75; Смольников О.Ю., Шапочка А.Г. Красный Крест и международное гуманитарное право в современном мире. М.: Медицина, 1989. С. 9.

[25] Тиунов О.И. Указ. соч. С. 10.

[26] Пак там С. 151.

[27] Международное гуманитарное право: Учебник / Под ред. А.Я. Капустина. 2-е изд. М.: Юрайт, 2011. С. 9.

[28] Ягофаров Д.А. Международное гуманитарное право // Права человека: энциклопедический словарь / Отв. ред. С.С. Алексеев. М.: Норма: ИНФРА-М, 2013. С. 523.

’determines the permissibility of the means and methods of warfare, provides for the protection of victims of armed conflict, establishes the relations between belligerent and non- belligerent States’[29].

Another approach to the relationship between the concepts of ’international humanitarian law’ and international human rights protection is that, on the contrary, international humanitarian law, which contains rules that grant individuals subjective rights, is in this part included in international human rights law. This position has been consistently held by Kartashkin, who since the mid-1970s has written that ’human rights as a branch of international law are a set of principles and norms embodied in three ... groups of international instruments’: the first includes ’principles and norms relating to human rights mainly in conditions of peace,’ the second ’international conventions for the protection of human rights in time of armed conflict,’ and the third ’international instruments which regulate responsibility for criminal violations of human rights both in peaceful[30]. Accordingly, the scholar provides the following definition of this industry: ’a set of principles and norms that define the obligation of states to guarantee and respect fundamental human rights and freedoms without discrimination of any kind, both in peacetime and during armed conflict, and also establish responsibility for criminal violations of these rights’[31]. This point of view is shared by N. Morozov[32], as well as A. Saidov, directly stating that ’international humanitarian law is included in international human rights law in the part that relates to the rights of victims of war’[33]. Indeed, international humanitarian law and international human rights law have both similarities and differences. The generality and even interconnectedness of these norms is due to the fact that both branches of international law pursue the same goal - the protection of the individual[34]. Moreover, human rights and international humanitarian law have influenced each other in their development[35]. The Universal Declaration of Human Rights[36] was taken into account in the formulation of the provisions of the Geneva Conventions for the Protection of Victims of War of 1949, and the provisions of the International Covenants of 1966 were taken into account in the texts of the two Additional Protocols to the Geneva Conventions adopted in 1977. At the same time, the branches of international humanitarian law and international human rights law have different histories, are codified in different sources and are only partially applicable to the same relations[37]. Unlike international human rights law, international humanitarian law is specifically designed to regulate armed

[29] Бирюков П.Н. Международное право: Учебник для вузов. М.: Юрайт, 2013. С. 562–563.

[30] Карташкин В.А. Права человека: международная защита в условиях глобализации. С. 50–51; Карташкин В.А. Международное право и личность // Современное право. 2012. № 11.С. 110-118.

[31] Права человека: Учебник / Отв. ред. Е.А. Лукашева. 2-е изд. М.: Норма: ИНФРА-М, 2012. С. 495.

[32] Морозов Н.В. Права человека: Учеб. пособие. М.: Московский фил. ЛГУ им. А.С. Пушкина, 2012. С. 268-269.

[33] Саидов А.Х. Указ. соч. С. 72.

[34] Пикте Ж. Развитие и принципы международного гуманитарного права. М.: МККК, 2001.С. 11; Эйде А. Внутренние волнения и напряженность / Международное гуманитарное право / Аби-Сааб Д. и др. М.: Ин-т проблем гуманизма и милосердия, 1993. С. 341.

[35] Gasser H.-P., *International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion?* // German Yearbook of International Law. 2002. Vol. 45. P. 152–153.

[36] Всеобщая декларация прав человека от 10 декабря 1948 г. Резолюция 217 А (III).
Генеральной Ассамблеи ООН // Действующее международное право. Т. 2. С. 5.

[37] Gasser H.-P. Op. cit. P. 161–162.

conflict and therefore deals with such concepts as ’military objectives’, ’military necessity’, ’combatants’, ’direct participation in hostilities’, ’collateral damage’, ’internment’ and many others[38], i.e. if human rights are based on the principle of humanity, then international humanitarian law is a compromise between the requirements of humanity and military necessity. Finally, if fundamental human rights are universal, the application of international humanitarian law is limited both by the type of armed conflict and by the category of persons to which a person falls [39].

So, the treaty norms of international humanitarian law emerged much earlier than international human rights treaties, humanitarian law obligations extend to other actors, including non-state actors, the specificity of norms in this sector is to limit their application to armed conflict and occupation. International humanitarian law, like international human rights law, has developed its own system of principles. Moreover, the norms of international humanitarian law and international human rights law have long been enshrined in various international treaties. All this cannot but provide a basis for isolating the body of international legal norms designed to regulate the situation of armed conflict from all others, including the norms of international human rights law. In general terms, the division of international law norms into those related to international humanitarian law and those related to international human rights law is a manifestation of the fragmentation of international law, a natural process of norm diversification due to the expansion of the subject matter of regulation and the geographical, institutional and functional decentralization of international law-making and law enforcement bodies.

Despite the fact that there is a trend in understanding international humanitarian law and international human rights law as two separated branches of international law, discussions about these two concepts and their relationship continues. Rather than looking for which approach is correct, we should analyse what implications these discussions have in both theoretical and applied terms. To achieve that it is necessary to ascertain what is the nature and, consequently, what are the implications of identifying international humanitarian law and international human rights law as branches of international law, as well as the attributing specific norms to a particular branch.

The fairness of the application of the approach widely held in legal theory, according to which the division into branches depends on the object and method of legal regulation, is disputed even with regard to the rules of national law. Thus, some authors insist on the use of criteria such as the 'presence of specific functions'[40], the purpose and content of the legal regulation, the particularities of the subject composition and the types of legal liability.

In international law, which is a separate legal order, these two criteria obviously cannot be applied: in international law, one method of legal regulation is used - that is the method of ’coordinating, harmonizing the wills of states’[41] .

At least three main approaches have

[38] *Гассер Х.-П.* Международное гуманитарное право. Введение. С. 27.

[39] Greenwood Ch. Historical Development and Legal Basis // The Handbook of Humanitarian Law in Armed Conflicts / Ed. by D. Fleck. Oxford: Oxford University Press, 2003. P. 9.

[40] Радько Т.Н. Теория государства и права. М.: Проспект, 2011. С. 403.

[41] Ануфриева Л.П. Соотношение международного публичного и международного частного права (сравнительное исследование правовых категорий): дис докт. юрид. наук. М.,2004. С. 240.

been presented in the scholarly literature that are proposed to be used in the process of dividing international law into branches. First, the recognition of the existence of a branch of international law may be based on the attribution to rules governing a particular group of relations with the properties of 'autonomous' or 'self-contained' regimes. Secondly, a functional approach may be used, where a set of norms is considered as a 'special regime'[42]. Finally, third: this can be an extremely utilitarian approach. This occurs when a number of norms governing a particular area of relations, based on a set of criteria, are combined under a certain general concept for ease of understanding, teaching or application. Without, however, claiming to clearly distinguish the norms of that industry from others.

If we are to understand an autonomous or self-contained regime as 'an interrelated set of rules on a particular subject matter, together with rules designed to create, interpret and apply, modify and terminate those rules', i.e. as a regime isolated from general international law, then we must recognize that M. Koskenniemi was right to conclude, in a report on the fragmentation of international law prepared under his direction, that none of the regimes claiming to be self-sufficient is completely closed, if only by virtue of clause 3(c) of Article 31 of the Vienna Convention on the Law of Treaties, which subjects every treaty to the 'principle of systemic integration'[43]. Accordingly, neither international humanitarian law nor international human rights law are autonomous regimes stricto sensu.

In considering whether international human rights law can be considered an autonomous regime in the broad sense, i.e., isolated not from general international law but from other branches, it would be fair to draw a line between the individual international human rights treaties that provide for the creation of a jurisdictional body, on the one hand, and the general body of international law governing human rights, on the other. But even individual international human rights treaties cannot be considered autonomous regimes, since Article 31(3)(c) of the Vienna Convention on the Law of Treaties indicates that, in addition to the context, the interpretation of the rules takes into account 'all relevant rules of international law applicable in the relations between the parties'. Even if we were to recognize these treaty regimes as autonomous, this isolation is not an inherent property of the entire body of international human rights law, but merely an artificial construct designed to resolve pragmatic problems related to the need to establish and limit the competence of treaty bodies. Going beyond this institutional perspective, it should be concluded that, in general, the norms of international human rights law cannot be regarded as an autonomous regime, since they do not exclude reference to general norms not only of the law of treaties, but also of international responsibility, recognition of subjects of international law, succession, territory, etc., including the norms of international humanitarian law. Therefore, neither international humanitarian law nor international human rights law can be recognized as autonomous regimes, neither in a narrow nor in a broad sense.

The next step is to determine whether these sets of rules constitute 'special regimes'. Unlike the concept of 'autonomous regime', which is based on the opposition of

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[42] Международное право: Учебник для бакалавров / Под ред. А.Н. Вылегжанина. 2-е изд. М.: Юрайт, 2012. С. 42.

[43] Виенска конвенция за правото на договорите от 1969.

a special set of rules to general international law, the concept of 'special regime' implies the possibility of distinguishing it from other 'special regimes' by the subject matter of regulation[44]. But is it possible to clearly separate international humanitarian law and international human rights law in terms of the subject matter of regulation? The subjects of regulation of these branches do overlap, insofar as international humanitarian law contains human rights norms. As the ICJ stated in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, three situations are possible: 'some rights may be exclusively governed by international humanitarian law, others may be exclusively governed by human rights law, and some may be subject to both branches of international law'[45]. Therefore, it cannot be concluded that international humanitarian law and international human rights law are 'special regimes'.

In general, despite the fact that almost every modern textbook on international law is based on the branch system of international law, there is still no common understanding in Russian and foreign scholarship on international law regarding the criteria to be used for dividing norms into branches of international law and in relation to the name and number of branches. As a rule, a utilitarian approach is used in classifying norms: a set of norms regulating homogeneous social relations is distinguished as an independent industry, provided that it has special principles, a large body of normative material and a number of other criteria that vary according to the theoretical views of the authors[46]. This approach is undoubtedly voluntaristic[47] and the classification made on its basis cannot serve as one of the preconditions for drawing conclusions related to the application of specific rules of international law.

However, it must be recognized that this approach is at the heart of the qualification of international humanitarian law and international human rights law as two independent branches of international law. These branches regulate overlapping, but not completely overlapping, relationships, are based on different international treaties, and are each based on their own set of special principles. In international humanitarian law, these are the principles of humanity, distinction, proportionality, precaution, military necessity and responsibility for violations of international humanitarian law[48], and in international human rights law, the principles of inalienability of rights, universality, non-discrimination, equality and interrelatedness. Thus, behind the attribution of international legal norms to the first or second branch is a desire to give a certain generic concept to a number of rules in order to facilitate understanding, application or teaching; behind such an act of naming there are neither clear criteria nor the will of States themselves to divide norms into independent groups and, accordingly, such a division does not imply logical

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[44] Усенко Е.Т. О системе международного права // Советское государство и право. 1988. № 4. С. 117-126.

[45] Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 106.

[46] Фельдман Д.И. О системе международного права // Советский ежегодник международного права. 1977. М., 1979. С. 105–107; Курс международного права. В 7 т. Т. 1: Понятие, предмет и система международного права / Ю.А. Баскин, Н.Б. Крылов, Д.Б. Левин и др. М.: Наука, 1989. С. 264–267.

[47] Ушаков Н.А. Международное право: основные понятия и термины. М.: Изд-во ИГиП РАН, 1996. С. 17.

[48] Котляров И.И. Международное гуманитарное право. М.: Юнити-Дана, 2013. С. 16-17.

’purity’, i.e. non-overlapping scopes of these concepts.

It follows that the discussion of the scope of the concepts of ’international humanitarian law’ and international human rights protection, their relationship, and the attribution of a particular rule of international law to the first or second branch, is of no practical significance, and the use of these concepts, as well as the identification of these branches, is of a purely utilitarian nature. At the same time, this does not alleviate the acute problems that arise in determining the relationship between the various rules of international law that regulate fundamental human rights in armed conflict.

3. Conclusions

Thus, in deciding which norm of international law should apply and how it relates to another, the separation of rules into branches of international humanitarian law and international human rights law cannot be relied upon. On the other hand, the approach to analyse the relationship directly between the rules of international law governing fundamental human rights in armed conflict will be based on the substance and content of the individual rules, rather than their affiliation to international human rights law or international humanitarian law, as this classification has no clear criteria is not the result of scholarly consensus and does not reflect the will of the creators of the rules of international law themselves.

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- Advisory Opinion on Legality of the Threat or Use of NuclearWeapons, para. 75.
- Международное право: Учебник / Отв. ред. С.А. Егоров. 5-е изд. М.: Статут, 2014; С. 997–1004; Арцибасов И.Н., Егоров С.А. Вооруженный конфликт: право, политика, дипломатия. М.: Международные отношения, 1989. С. 19; Белугина А.В. Указ. соч. С. 12; Бирюков П.Н. Международное право: Учебник для вузов. 6-е изд. М.: Юрайт, 2013. С. 517.
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- URL: // http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.
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EVFTA: GOING BEYOND LABOUR COMMITMENTS IN A NEW GENERATION FREE TRADE AGREEMENT

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Abstract

This article provides profound knowledge of labour commitments in the new-generation European Union (EU) free trade agreement (FTA). It sheds light on the historical and theoretical rationales that underlie trade-labour linkages in EU policy in general and the labour commitments under the new-generation EU FTA in particular. The article further elaborates on how labour commitments are proposed in EU FTAs by making a comparison among developing countries, including the EU-Vietnam FTA (EVFTA). And ultimately, the paper revisits and critically analyses the decision of the panel of experts with reasoning regarding the EU-South Korea (Korea) dispute under labour commitments within the EU-Korea FTA so as to clarify the nature of these commitments in EU FTAs and suggest policy implications for Vietnam and other developing countries on how to effectively implement them within EU FTAs in the long run.

Keywords: *EVFTA, EU, Vietnam, free trade agreement, labour commitment.*

1. Introduction

It is undeniable that the proliferation of FTAs has played a significant role in multilateral and bilateral collaboration under the fast-paced evolution of international economic integration nowadays[1]. As one of the leading partners of countries and regions around the world, the EU would also be regarded as one of the most prosperously open markets for developing countries[2], and it has paid a lot of attention to social dimensions in its trade agreements besides the pursuance of the policy on 'Trade for all'[3]. To be more specific, the EU-Korea FTA in 2011 paved the way for a new-generation FTA that embraces not only commercial but non-commercial aspects, including labour and environmental commitments[4]. Given the same approach, among developing countries, the EVFTA in 2020 is noteworthy as the most comprehensive and promising FTA between

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[1] Shujiro Urata, "Globalization and the growth in free trade agreements", *Asia Pacific Review*, 2002, *9*(1), pp. 27-28.

[2] European Commission, *EU position in world trade*, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en (last access: 08.10.2023).

[3] European Commission, 'Trade for All Towards a More Responsible Trade and Investment Policy'. In: *Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions*, 2015, Brussels.

[4] European Commission for Trade, *The EU-Korea Free Trade Agreement in practice*, 2011, European Union, Luxembourg, p. 3.

the EU and a developing nation[5]. However, experiences from international legal practice and labour dispute settlement cases reveal the limits of compliance with EU FTAs in terms of labour commitments among nations globally, even for developed ones like Korea[6]. So it is necessary to require an in-depth comprehension of labour commitments in EU FTAs not only for Vietnam and other developing countries but also for EU partners in trade negotiations in order not to put them in Korea's place.

The remaining parts of this article, except for the conclusion part, are organised into three sections: The next section revisits the relationship between trade and labour in EU policy and the foundation of labour commitments in new-generation EU FTAs. In Section 3, by making a comparison between the EVFTA and several typical FTAs, it illustrates how labour commitments are promulgated in EU FTAs among developing nations. Based on the labour dispute settlement under the EU-Korea FTA, Section 4 suggests policy implications for Vietnam in the EVFTA labour commitments enforcement. Eventually, the research would be an expected model lesson for other developing countries and upcoming EU trade partners as well.

2. The trade-labour linkage in EU policy and labour commitments in EU free trade agreements

From historical and theoretical perspectives, this section clarifies the backdrops that the EU has incorporated social dimensions/labour provisions into its schemes of preferences and FTAs and then provides the background of labour commitments in its trade agreements.

Tracing back to the 1990s, there was a passionate debate between ’free trade versus fair trade’[7], accordingly, for those who supported the ’free trade’ theory, they believed that the International Labour Organisation (ILO) and its labour standards were not necessary[8]. These would even be barriers against the economic market and labour or working conditions, and besides that, everybody, of course, including employees, would benefit from globalisation[9]. On the other hand, ’fair trade’ advocates followed the idea of revealing the undoubted dark sides of globalisation[10] and the ILO and international labour standards would play a significant role in preventing

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[5] Areg Navasartian, ”EU-Vietnam Free trade agreement: Insights on the substantial and procedural guarantees for labour protection in Vietnam”, *European Papers – A Journal on Law and Integration*, 2020, *5*(1), p. 562.

[6] European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation and Enforcement of EU Trade Agreements*, 2022, Brussels, pp. 17-18.

[7] Gerda van Roozendaal, *Trade unions and global governance: The debate on a social clause*, 2002, Psychology Press, p. 67.

[8] Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, *Trade and labour standards*, *Open Economies Review,* 1998, *9*(2), pp. 171-194.

[9] De Wet Erika, *Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization*, *Human Rights Quarterly,* 1995, 17, p. 3; Alston Philip, *Post-post-modernism and international labour standards: The quest for a new complexity*, Werner Sengenberger/Duncan Campbell (Eds.), *International Labour Standards and Economic Interdependence,* 1994, Geneva, pp. 95-104 and Vandaele Arne, *International labour rights and the social clause: friends or foes*, Cameron May, 2005, p. 73.

[10] Jan Martin Witte, *Realizing Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, 2008, Eschborn, p. 16.

nations from ’a race to the bottom’ and ’social dumping’[11].

In addition to this, under pressure from rising unemployment in Europe, besides the social dumping effects of international commerce and the impact of globalisation and human rights, the EU found a way to incorporate these matters into its trade policy[12]. However, attempts by the EU, US, and other developed countries at that time to integrate labour standards into multilateral coordination of trade liberalisation (WTO negotiations) were unsuccessful, leading the EU and many states to turn to bilateral coordination to further their agendas[13]. And thereby, labour provisions have featured significantly in EU trade-policy-making through three milestones, as follows: (i) from the mid-1990s, they were most prominent in the EU's unilateral systems for developing countries, which include commitments in relation to labour standards under its Generalised Systems of Preferences Plus (GSP+)[14]; (ii) during the 2000s, quotations to labour standards within those FTAs ’widened and deepened’, especially with the presence of the 2007 Lisbon Treaty as an important institutional factor[15]. From the EU's perspective, typical for this time were the first-generation agreements with Egypt, Israel, Jordan, Lebanon, Tunisia and Morocco, signed in the early 2000s and collectively known as the Euro-Mediterranean Association Agreements, followed by the agreement with Mexico and Chile signed in 2000 and 2002, respectively; (iii) the second and newest generation of EU FTAs came into being after the signing of European Commission ’Global Europe: Competing in the World’ communication in 2006. Under its new strategy towards international trade laid out in this communication, the EU embarked on aggressive negotiation of bilateral trade deals in response to the US's successful wave of FTAs in the 1990s and early 2000s. Multiple FTAs have been negotiated following this communication. The EU-Korea FTA, signed in 2010, was the first one signed under the new strategy and has been a model for the agreements that followed. Since this FTA, within the chapter titled ’Trade and Sustainable Development’ (TSD), these provisions have been combined with rules governing environmental protection. And these chapters are now a crucial component of the EU's ’new-generation’ FTAs[16]. According to this, the FTA between the EU and Columbia/Peru/Ecuador and the one between the EU and Central America, both signed in 2012, were significant FTAs in this period. It was not until 2020, with the signing of EVFTA, the EU, for the first time,

[11] According to Namgoong June, ’Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP’, *International Journal of Comparative Labour Law and Industrial Relations*, 2019, *35*(4), pp. 487-488. Social dumping: ’*The practice whereby workers are given pay and/or working and living conditions which are substandard compared to those specified by law or collective agreements in the relevant labour market, or otherwise prevalent there*’. See European Commission, *Social Dumping,* available at: social dumping (europa.eu) (last access: 09.10.2023).

[12] Jan Orbie, Hendrik Vos and Liesbeth Taverniers, *EU trade policy and a social clause: A question of competences?,* Politique Européenne, 2005, *17*(3), pp. 159–187.

[13] Smith Adrian et al, *Free Trade Agreements and Global Labour Governance: The European Union’s Trade-Labour Linkage in a Value Chain World*, 2022, Routledge , p. 4.

[14] European Commission, *European Union's GSP+ Scheme,* 2019, available at: Factsheet on the European Union's GSP+ scheme (europa.eu) (last access: 09.10.2023).

[15] Lore Van den Putte and Jan Orbie, ”EU bilateral trade agreements and the surprising rise of labour provisions”, *International Journal of Comparative Labour Law and Industrial Relations*, 2015, 31(3), pp. 263-269.

[16] Roberto Bendini, *The future of the EU trade policy*, European Parliament, 2015, available at: The future of the EU trade policy (europa.eu) (last access: 09.10.2023).

expected that it would be the most comprehensive and promising FTA between the EU and a developing nation[17].

3. Labour commitments in EU free trade agreements: old wine in new bottles?

With the aim to clarify the characteristic traits of labour commitments in the EVFTA in particular and in EU FTAs among developing countries in general, this study focuses on these commitments regarding their scope, implementation and enforcement provisions relevant in a brief comparison study[18]. Broadly speaking, the research offers a comprehensive examination of labour commitments and seeks to identify any similarities or disparities among EU FTAs with developing countries. Where applicable, the study differentiates between labour commitments in first-generation FTAs and second-generation ones among the examined nations. To conclude, the EVFTA has not only similar labour commitments to others' but also a 'wider and deeper' approach in some aspects.

Six EU FTAs are picked up for this study[19]. According to the EU, they are all typical for FTAs that are currently in force and represent FTAs between the EU and developing nations[20], as illustrated in Table 1 below:

Table 1: EU FTAs selected for the comparative study

Free trade agreement	Signature date*	Coming into effect**	Labour commitments and relevant regulations***
EU-Mexico Partnership Agreement (The Global Agreement)	27/11/2000	01/7/2001 (full)	Not promulgated
EU-Chile Association Agreement****	18/11/2002	01/02/2003 (provisionally); 01/03/2005 (full)	Article 44 on Social cooperation & Article 10, 11 on Civil Society Dialogue
EU-Korea FTA	06/10/2010	01/7/2011 (provisionally); 13/12/2015 (full)	Chapter 13 TSD includes provisions on labour and Annex 13 deals with Cooperation on TSD.
EU- Col/Peru/Ecuador Trade Agreement	26/6/2012	01/3/2013, 01/8/2013 & 01/01/2017 (provisionally with Peru, Colombia & Ecuador respectively)	Title IX TSD includes labour provisions.
EU-Central America Association Agreement	29/6/2012	01/8/2013 (provisionally Honduras, Nicaragua; Panama); 01/10/2013 (provisionally Costa Rica, El Salvador); 01/12/2013 (provisionally Guatemala)	Part IV on Trade, Title VIII on TSD include provisions on labour. Part III on Cooperation, Title II on Social Development and Social Cohesion include provisions on employment and social protection, indigenous peoples and other ethnic groups, vulnerable groups, gender. Title VI on Economic and Trade Development includes Article 63 on Cooperation and Technical Assistance on TSD.
EVFTA	30/6/2019	01/8/2020 (full)	Chapter 13 TSD includes provisions on labour. Chapter 16 on Cooperation and capacity building includes provisions on cooperation in TSD.

Source: Author analysis

* Information cited from EUR-Lex.
** Information cited from EUR-Lex.
*** Information cited from EUR-Lex.
**** Although the EU and Chile have concluded the modernisation of the existing EU-Chile Association Agreement recently, within the context of the paper, this only focuses on the EU-Chile Association Agreement as the representative of the first-generation EU FTAs. See Delegation of the European Union to Chile, *EU Chile Advanced Framework Agreement*, 2022, available at: EU-Chile Advanced Framework Agreement | EEAS (europa.eu) (last access: 09.10.2023).

3.1. Scope of labour commitments in EU FTAs

The study examines the scope of labour commitments by categorising related provisions into the following areas:

Reference to the ILO and international labour standards

Except for the agreement with Mexico, all the EU FTAs examined refer to the ILO and its significant role in reinforcing social standards in the country partners. However, the EU-Chile Association Agreement just mildly indicates the ILO importance and its relevant conventions regarding freedom of association, collective bargaining rights, forced/child labour abolition, non-discrimination at work and men-and-women equal treatment[21], all the remaining EU FTAs pertain to core labour standards admitted at an international level and promulgated in eight fundamental

[17] Navasartian, *op. cit.*, p. 562.
[18] For each category examined, the author chose specific factor(s) to be the major point of comparison.
[19] These six FTAs include the EU-Mexico Partnership Agreement (the Global Agreement) and the EU-Chile Association Agreement, which represent the first-generation EU FTAs; the EU-Colombia/Peru/Ecuador Trade Agreement, the EU-Central America Association Agreement, and the EVFTA, which represent the second-generation EU FTAs between the EU and developing nations; and the EU-Korea FTA as the model for a new generation of FTAs and also as the one employed in the next Section under the context of the labour dispute settlement between the EU and this country.
[20] See European Commission, *Free trade agreements*, available at: Free trade agreements | Access2Markets (europa.eu) (last access: 08/10/2023).
[21] For example, article 44.1 of the EU-Chile Association Agreement.

Conventions of the ILO[22]; specifically, they all link to the 'ILO Declaration on Fundamental Principles and Rights at Work' in 1998[23], encompassing freedom of association, rights to organise/collectively bargain, forced/child labour elimination, and non-discrimination at the workplace. Besides aforementioned fundamental rights (ILO core labour standards), the EVFTA, same as other new-generation EU FTAs, tend to broaden the scope of referred international labour standards, for instance, health/safety at occupation and migrant workers rights[24]. For more details, see Table 2 below:

Table 2: International labour standards references

Free trade agreement	Freedom of association	Right to organise & collectively bargain	Forced labour elimination	Child labour abolition	Non-discrimination	Occupational health & safety	Migrant workers rights
EU-Mexico Partnership Agreement (The Global Agreement)							
EU-Chile Association Agreement	✓	✓	✓	✓	✓		
EU-Korea FTA	✓	✓	✓	✓	✓		
EU- Col/Peru/Ecuador Trade Agreement	✓	✓	✓	✓	✓	✓	✓
EU-Central America Association Agreement	✓	✓	✓	✓	✓	✓	
EVFTA	✓	✓	✓	✓	✓		✓

Source: Author analysis

Reference to other social commitments

Once again, except for the agreement with Mexico and Chile, the other EU FTAs promulgate commitments on Corporate Social Responsibility (CSR)/Responsible Business Conduct (RBC). While previous agreements have shown a preference for clauses that aim to enable and enhance trade in commodities that are subject to CSR programmes, such as the EU-Korea FTA. Recent FTAs tend to prioritise the promotion of CSR/RBC, besides relating instruments at an international level, including the OECD Guidelines supporting multinational enterprises[25], the UN Global Compact[26], and ILO Tripartite Declaration of Principles concerning multinational enterprises and Social Policy[27], as seen in the EU-Colombia/Peru/Ecuador Trade Agreement. Besides, four out of six agreements also refer to gender, as shown in Table 3 below:

Table 3: Other social commitments

[22] Conventions on Freedom of association and effective recognition of collective bargaining rights (No. 87 and 98); Conventions on Forced/compulsory labour elimination (No.29 and 105); Conventions on Effective child labour abolition (No. 138 and 182); Conventions on Elimination of employment and occupational discrimination (No.100 and 111). Up to now, the ILO has updated one fundamental Convention (No. 155) and a Promotional Framework for Occupational Safety and Health (No.187). See International Labour Organization (ILO), *Conventions and Recommendations,* available at: Conventions and Recommendations (ilo.org) (last access: 08/10/2023).

[23] For example, article 13.4 of the EU-Korea FTA; article 269 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 63 of the EU-Central America Association Agreement and article 13.1, 13.4 of the EVFTA.

[24] For example, article 276, 278 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 49, 292 of the EU-Central America Association Agreement and article 13.14 of the EVFTA.

[25] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, 2023, OECD Publishing, Paris, available at: https://doi.org/10.1787/81f92357-en (last access: 08/10/2023).

[26] See United Nations Global Compact, *Social Sustainability*, available at: Social Sustainability | UN Global Compact (last access: 09.10.2023).

[27] See International Labour Organization (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration),* 2022, available at: Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) (ENTERPRISES) (ilo.org) and Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ilo.org) (last access: 08/10/2023).

Free trade agreement	Gender	CSR/RBC Promotion
EU-Mexico Partnership Agreement (The Global Agreement)		
EU-Chile Association Agreement	✓	
EU-Korea FTA	✓	✓
EU- Col/Peru/Ecuador Trade Agreement		✓
EU-Central America Association Agreement	✓	✓
EVFTA	✓	✓

Source: Author analysis

Labour regulatory sovereignty

All second-generation EU FTAs contain provisions on the domestic right to regulate in labour that prohibit derogations from domestic labour laws in order to promote trade/investment[28]. This aspect is not available in the first-generation EU FTAs.

For the first conclusion, in terms of the scope of labour commitments, the first-generation EU FTAs tend to be overwhelmed by the second-generation ones. Besides, not all the first-generation EU FTAs cover social aspects, like the EU-Mexico Partnership Agreement, which is still considered to be upgraded and revised in the near future[29]. The EVFTA, like all the other second-generation FTAs, covers almost all aspects of 'social dimensions' in EU policy, not only about labour but also related aspects, including gender and promotion of CSR/RBC. In addition, regarding some areas, for instance, ILO labour standards, the EVFTA even guarantees more standards than developing countries besides the mandatory core labour standards, for example, EU-Korea FTA in Table 2.

3.2. Implementation of labour commitments in EU FTAs

The analysis continues to examine the implementation provisions related to labour commitments in terms of the two main levels:

Intergovernmental mechanisms

Regarding this aspect, the second-generation EU FTAs still reveal the predominance of diversity and level of interaction between the EU and host nations in terms of labour commitments, compared to the remaining-generation EU FTAs. For more details, except for the EU-Mexico Partnership Agreement and EU-Chile Association Agreement, all evaluated EU FTAs require regulatory cooperation on labour matters, including information exchange on ratification and implementation of labour conventions. Technology and best practices can also be shared in regulatory cooperation[30].

Besides, some of the EU FTAs that promulgate technical assistance and capacity-building provisions in labour matters are the ones signed with developing countries, including the EVFTA[31]. And almost FTAs selected have incorporated the establishment of an intergovernmental committee as a means to facilitate the execution of labour commitments. The nomenclature for such an entity may vary depending on the specific provisions outlined in the agreement, with possible designations including committee[32], sub-

[28] For example, article 13.7 of the EU-Korea FTA; article 277 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 291 of the EU-Central America Association Agreement and article 13.3 of the EVFTA.

[29] See European Commission, *EU-Mexico Trade Agreement*, available at: EU-Mexico (europa.eu) (last access: 08.10.2023).

[30] For example, article 12.7 of the EU-Korea FTA.

[31] For example, article 13.14 of the EVFTA.

[32] For example, article 6 of the EU-Chile Association Agreement and article 13.15 of the EVFTA.

committee[33], or board[34]. Intergovernmental committees often address labor-related topics and consist of senior leaders from each party's administration who hold responsibility for labour or general affairs[35].

Collaboration in scientific endeavours is frequently anticipated in the realm of labour affairs (in two out of six EU FTAs). However, while the EU-Central America Association Agreement provides the cooperation relatively simply (Article 292), in the EVFTA, by contrast, provisions might specifically pertain to aspects related to international labour law, but more comprehensive and explicit cooperation on 'trade-related aspects of the ILO Decent Work Agenda, in particular the inter-linkage between trade and full and productive employment for all, including youth, women and people with disabilities, labour market adjustment, core and other international labour standards, labour statistics, human resources development and lifelong learning, social protection for all including for vulnerable and disadvantaged groups, such as migrant workers, women, youth and people with disabilities, and social inclusion, social dialogue and gender equality' (Article 13.14.1).

Please see the table 4 below for details:

Table 4: Intergovernmental mechanisms

Free trade agreement	Regulatory cooperation*	Technical assistance and capacity-building	Intergovernmental committee	Joint scientific cooperation
EU-Mexico Partnership Agreement (The Global Agreement)				
EU-Chile Association Agreement			✓	
EU-Korea FTA	✓		✓	
EU- Col/Peru/Ecuador Trade Agreement	✓	✓	✓	
EU-Central America Association Agreement	✓	✓	✓	✓
EVFTA	✓	✓	✓	✓

Source: Author analysis

* This category includes cooperation activities, such as information exchange

Civil society participation

Almost the EU FTAs examined include provisions for civil society participation in monitoring the implementation of labour commitments at the national and transnational levels[36]. But there is still a big gap between the first-generation EU FTAs and the second-generation ones because the majority of the latter-generation FTAs call for the participation of civil society in estimating the agreement's impacts on labour. And all of them allow the general public or specific elements of civil society to submit comments and views on the implementation of labour commitments. Public submissions can be made to the Parties themselves, for instance, through the Civil Society Forum or Domestic Advisory Group (DAG) within the EU-Korea FTA[37], or the Sub-committee under the EU-Colombia/Peru/Ecuador Trade Agreement[38]. In addition, through specific consultative mechanisms, both parties are required to notify their respective civil society organisation about the aforementioned communications[39]. Please see the table 5 below for details:

Table 5: Civil society participation in monitoring labour commitments' implementation

Free trade agreement	Monitoring of implementation at national level	Monitoring of implementation at transnational level	Participation in impact assessment	Public submission
EU-Mexico Partnership Agreement (The Global Agreement)				
EU-Chile Association Agreement	✓	✓		
EU-Korea FTA	✓	✓	✓	✓
EU- Col/Peru/Ecuador Trade Agreement	✓	✓	✓	✓
EU-Central America Association Agreement	✓	✓		✓
EVFTA	✓	✓	✓	✓

Source: Author analysis

[33] For example, article 280 of the EU-Colombia/Peru/Ecuador Trade Agreement.
[34] For example, article 294 of the EU-Central America Association Agreement.
[35] For example, article 6, 9 of the EU-Chile Association Agreement.
[36] For example, article 48 of the EU-Chile Association Agreement; article 13.13 of the EU-Korea FTA; article 282 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 295 of the EU-Central America Association Agreement and article 13.15 of the EVFTA.
[37] According to article 13.13 of the EU-Korea FTA.
[38] According to article 280 of the EU-Colombia/Peru/Ecuador Trade Agreement.
[39] For example, article 13.17.9 of the EVFTA.

For the second conclusion, in terms of labour commitments on implementation, among the EU FTAs examined, the second-generation FTAs are definitely more specific and comprehensive than the first-generation ones. Among the second-generation EU FTAs, the EVFTA still illustrates that it almost covers more aspects than other developing country parties, from intergovernmental mechanisms to civil society participation. In other words, it could also be understood that the EU requires Vietnam to maintain a relatively higher level of commitment regarding the implementation of the EVFTA.

3.3. Enforcement of labour commitments in EU FTAs

Despite relative differences in institutions responsible for dispute settlement in terms of labour commitments, for instance, non-compliance, between the first-generation EU FTAs and the second-generation ones, for more details, within the EU-Chile Association Agreement, the Association Committee and arbitrators are in charge of resolving these disputes (Articles 6 and 185), besides the presence of a committee and a panel of experts under the latter generation of EU FTAs[40]. Except for the EU-Mexico Partnership Agreement, there are always two steps to follow focusing on cooperation and consultations to avoid and settle disputes: Government consultations and the panel/group of experts' or arbitrators' who facilitate the proceedings. In the event that the disagreement remains unresolved following the government consultation, it may be necessary to convene a panel/group of experts, or alternatively, arbitration panels, to facilitate the resolution of the dispute between the involved parties[41]. Although more specified institutions get involved in resolving disputes related to labour commitments from the second-generation EU FTAs' perspective[42], the EU persists in maintaining the policy that generally excludes regulations pertaining to trade sanctions and potential remedies, including compensation, for instances of non-compliance or failure to implement those commitments[43].

For the third conclusion, in terms of labour commitments on enforcement, the way that the EU chooses to settle disputes related to commitments in labour is consistent, even with developing or developed country partners, and Vietnam is no exception. Based on 'naming and shaming'[44] as well as encouraging approaches[45], the EU urges parties to fulfil labour commitments and avoid non-compliance in reality in order to guarantee that trade liberalisation leads to economic growth and higher labour standards[46] and therefore to achieve sustainable development goals.

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[40] For example, article 13.15 of the EU-Korea FTA; article 284 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 297 of the EU-Central America Association Agreement and article 13.17 of the EVFTA.

[41] For example, article 184 of the EU-Chile Association Agreement; article 13.14, 13.15 of the EU-Korea FTA; article 283, 284 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 296, 297 of the EU-Central America Association Agreement and article 13.16, 13.17 of the EVFTA.

[42] According to article 285(4) of the EU-Colombia/Peru/Ecuador Trade Agreement and article 13.17(9) of the EVFTA.

[43] Evgeny Postnikov, *Social Standards in EU and US Trade Agreements*, 2020, Routledge, p. 21.

[44] María J. García, *Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case*, *Politics and Governance*, 2022, *10*(1), pp. 58-67.

[45] This argument is further explained in Section 4 of the paper.

[46] European Commission (2015), *op. cit.*

Overall, it is clear that the EU's strategy regarding the incorporation of labour commitments in FTAs has evolved quite significantly since the 1990s. And now, the second-generation EU FTAs, known as the new-generation ones, have the TSD chapters that are fully binding, integrated into the main text of the agreement dealing with trade issues, and have a wider scope, containing more specific and comprehensive country-based provisions on labour while treating them under the same heading. Among those new-generation FTAs, the EVFTA would be noticeable and regarded as one of the most comprehensive and promising FTAs between the EU and a developing nation. However, the enforcement of labour commitments in EVFTA and other EU FTAs based on dialogue and cooperation still remains the EU's hallmark approach[47].

Back to the earlier question, may labour commitments in EU FTAs be regarded as old wine in new bottles? Probably, it depends on the point of view, but it cannot be denied that these commitments are not totally brand new, because they also refer to essential issues in labour like fundamental principles/rights at the workplace and highlight the importance of the ILO as a partner of the EU in trade negotiations[48]. However, recent legal practice has revealed that even though both EU and US FTAs refer to ILO core labour standards as well as their related conventions, the legal consequences of violating the obligations under those FTAs are different[49]. So, that requires an in-depth understanding of the nature of the EU labour commitments so as to set a good example not only for Vietnam but also for developing nations in trade negotiation and implementation with the EU.

4. Labour dispute settlement under the context of the EU FTA and policy implications

By concisely examining the case as a 'milestone dispute' between the EU-Korea within the context of EU-Korea FTA labour commitments, the Section aims to reveal the nature of these commitments and then make suggestions for Vietnam and other EU FTA parties in the future[50].

4.1. EU-Korea dispute related to labour commitments under the TSD chapter

Background of the dispute

Unions both at home and abroad have long criticised Korea's trade union registration regulations and other labour practises as restrictive. In particular, the use of migrant workers without providing them with basic protections (such as the nonregistration of Trade Union of Migrants) and disproportionate police force used against labour unions have been called into

[47] Postnikov, *op. cit.*, p. 22.

[48] Daniela Sicurelli, "The EU as a partner of ILO in trade negotiations. Explaining labour reform in Vietnam', *Journal of Contemporary European Studies*, 2022, *30*(3), pp. 461-473.

[49] This will be clarified in the next Section.

[50] Not in order to clarify all the information related to the case, this Section is supposed to focus on the core requirements of the EU-Korea obligations regarding labour commitments based on the conclusions of the panel of experts and noticeable misunderstandings from both sides, the EU and Korea, so as to set the outcome lessons for Vietnam and other parties in trade negotiations with the EU. See more the report of the panel of experts: Jill Murray, Laurence Boisson de Chauzournes and Lee Jaemin, 'Report of the panel of experts'. In: *Panel of experts proceeding constituted under Article 13.15 of the EU–Korea Free Trade Agreement*, 2021.

question[51]. Certain occupational groups, including as public employees, military sector workers, educators, and individuals employed in vital public services, have significant restrictions on their ability to engage in strike actions. The prevailing hostile environment against labour unions allows for the enforcement of significant sanctions for engaging in activities that disrupt corporate operations, even in instances where such activities are nonviolent, thereby establishing a criminal infraction against union members[52].

Since 1992, ILO has received a total of 16 complaints from both Korean and foreign trade unions over these issues. Although these concerns have also been continuously raised in ILO conferences and even during FTA negotiations with the EU, during that period, out of the ILO's eight core Conventions, Korea had only ratified four. These include Convention 100, which addresses the issue of equal remuneration, Convention 111, which aims to combat discrimination in employment and profession, and Convention 138, which focuses on establishing minimum age requirements, and Convention 182 to combat the most severe manifestations of child labour[53]. Furthermore, Korea potentially decreased the reliance on ILO conventions as references and, significantly, eliminated any explicit mention of an immediate requirement to ratify core ILO conventions[54].

Since the FTA initiation, the EU has consistently urged Korea to ratify and enforce the outstanding essential ILO conventions, including Convention 87 and 98 address freedom of association and rights to organise/collectively bargain; Convention 29 and 105 address forced labour. All the minutes from the TSD Committee and all the joint DAG statements have this as a common theme[55]. However, Korea has always given 'legal incompatibilities' as an excuse for its poor progress in this area[56].

In the last month of 2018, the European Commission made a formal statement to the government of Korea, encouraging the commencement of official negotiations in alignment with the TSD chapter. The correspondence conveyed a cautionary message indicating that the EU intends to forward to the subsequent satge of the procedure for settling disputes, thereby bringing the subject to a panel comprised of experts unless the Korean government took

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[51] Lee D, *Repression against workers—Republic of Korea*, *Asian Labour Update*, 2009, 72, pp. 8–14, available at: https:// www.amrc.org.hk/content/repression-against- workers-republic-korea (last access: 08.10.2023).

[52] Gerda van Roozendaal, "Where symbolism prospers: Impact on evolving rights of labour provisions in FTAs with the Republic of Korea', *Politics and Governance*, 2017, *5*(4), p. 25.

[53] International Labour Organisation (ILO), *Ratifications for Republic of Korea,* 2021, available at: Ratifications of ILO conventions: Ratifications for Republic of Korea (last access: 08.10.2023).

[54] Campling Liam, et al, *South Korea's automotive labour regime, Hyundai motors' global production network and trade-based integration with the European Union*, *British Journal of Industrial Relations*, 2021, *59*(1), pp. 139–166.

[55] Civil Society Forum, *Joint statement by the chairs of the Korea DAG and the EU DAG*, 2018, available at: https:// www.eesc.europa.eu/en/documents/joint- statement-chairs-korea-dag-and-eu-dag; TSD Committee, *Minutes of 4th meeting of the TSD Committee*, EU–Korea FTA, 2015, available at: https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_ 153802.pdf; TSD Committee, *Minutes of 5th meeting of the TSD Committee*, EU–Korea FTA, 2017, available at: https://trade. ec.europa.eu/doclib/docs/2018/may/tradoc_ 156839.pdf; TSD Committee, *Summary of discussions of 6th meeting of TSD Committee*, EU–Korea FTA, 2018, available at: https://trade.ec.europa.eu/doclib/docs/2018/july/ tradoc_157105.PDF.

[56] Van Roozendaal, 2017, *op. cit.,* p. 21.

immediate action to address the problems raised in the consultations. In July of 2019, the European Commission made a formal proposal for a panel of experts establishment. The EU has raised concerns over two issues: *firstly*, the lack of significant advancements in the ratification process of the pending fundamental conventions of the ILO; *secondly*, the insufficiency of the Trade Union and Labour Relations Adjustment Act (TULRAA) of Korea in ensuring the labour rights protection[57].

Legal issues

From the EU's perspective, it officially raised several major concerns about the TULRAA, related to: According to Article 2.1, the definition of employees is limited to individuals who get compensation in the form of wages, salary, or other forms of remuneration. This definition excludes specific groups such as self-employed individuals, jobless individuals, and those who have been terminated from their employment, from being eligible to join trade unions[58]. In addition, according to Article 2.4.d, the recognition of a trade union is prohibited if it encompasses individuals who do not fall within the prescribed and specific definition of a worker[59]. According to Article 23.1, individuals serving as trade union officials are restricted to being elected exclusively from the pool of trade union members[60]. Article 12.1.3 outlines a discretionary certification system that governs the foundation of a trade union[61].

Besides, the EU has also asserted its concerns regarding Korea's prolonged delays in ratifying the essential conventions of the ILO. It also proposed that the concept of ’sustained efforts’ outlined in Article 13.4.3 the EU-Korea FTA entails the requirement for efforts to be continuous or ’uninterrupted’[62]. So, despite subjective or objective reasons given by Korea, especially related to the time for political change, the EU still reaffirms the opinion that the delays mentioned mean a violation of this FTA[63].

In Korea's opinion, the objection was raised against the EU's stance on multiple grounds. Korea argued that the scope of Chapter 13 under the EU-Korea FTA was narrowed to ’trade-related aspects of labour’, and further argued that they ’did not intend, by agreeing to Chapter 13, to subject their labour laws and policies to obligations that bear no connection to trade (or investment)’[64]. This argument was based on the citations from two articles in the trade agreements between Korea and the EU/US, which were deemed equivalent by this country. Korea illustrated that because of the Korea-US FTA requirement to establish evidence of non-compliance with labour commitments that has an impact on trade/investment between the parties, the TSD Chapter within the EU-Korea FTA (Chapter 13) would have to take the same

[57] García, *op. cit.,* p. 63.
[58] Murray, Boisson de Chauzournes and Lee, *op. cit.,* p. 41.
[59] *Idem*, p. 53.
[60] *Idem*, p. 56.
[61] *Idem*, p. 61.
[62] According to article 13.4.3: *”Each Party shall: (a) make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions’.* See Murray, Boisson de Chauzournes and Lee, *op. cit.,* p. 73.
[63] *Idem*, pp. 71-72.
[64] *Idem*, p. 16.

approach[65]. This argument was also supported by the only arbitral panel decision to date in the context of a labour dispute inside the framework of an FTA, specifically the case involving the US and Guatemala within the Dominican Republic-Central America FTA) (CAFTA-DR)[66]. The EU was addressing aspects relating to labour commitments that were not directly linked to EU-Korea trade, so the authority of the Panel does not extend to the examination of the concerns highlighted by the EU's request for the Panel of Experts establishment within Chapter 13[67].

Legal conclusions

Firstly, the provisions of TURLAA, including Articles 2.1, 2.4.d, and 23.1, appear to be incongruous with the underlying freedom of association principle, as outlined in the EU-Korea FTA Article 13.4. The group of experts has additionally determined that TURLAA Article 12.1.3 is in conflict with the responsibilities outlined in the TSD chapter aforementioned[68].

Secondly, however, the panel reached the conclusion that Korea's actions were not in violation of the provisions outlined in the TSD chapter regarding the obligations to ratify the outstanding fundamental conventions indicated of the ILO[69], because one of the most important conclusion was that the panel identified a noteworthy aspect in the absence of a stated goal date or milestone for the ratification process in the final language of Article 13.4.3. Instead, the provision simply emphasises the need for the parties to engage in 'continued and sustained efforts towards ratification'[70].

Thirdly, the Korea-EU FTA and Korea-US FTA, even though they have things in common, including labour commitments that refer to ILO labour standards, have different approaches to upholding the enforcement of these standards, and the way that Korea cited the agreement between this country and the US to refuse the role of the EU (in particular, the panel of experts) in raising the problem related to the TSD Chapter is inappropriate[71]. And therefore, even though labour commitments have become an essential part of the EU and US FTAs, the nature of this linkage is not the same, as the EU and the US exhibit distinct approaches

[65] According to article 13.7 of the Korea-EU FTA, TSD chapter: *'1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. 2. A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties'.* See Official Journal of the European Union, *The FTA between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part,* L 127; and article 19.2.2 of the Korea-US FTA: *'Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph'.* See Office of the United States Trade Representative, *Korea–US Trade Agreement*, 2019, available at: Final Text (as of January 1, 2019) | United States Trade Representative (ustr.gov) (last access: 08.10.2023).

[66] Kevin Banks, Theodore R. Posner and Ricardo Ramirez Hernandez, Final Report of the Panel, In the *Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of CAFTA-DR*, 2017, available at: Final Report of the Panel - Article 16.21(a) of the CAFTA-DR (Guatemala Labor) (trade.gov) (last access: 09.10.2023).

[67] Murray, Boisson de Chauzournes and Lee, *op. cit.,* p. 16.

[68] *Idem*, p. 79.

[69] *Ibid.*

[70] *Idem*, p. 74.

[71] *Idem*, pp. 18-19.

towards it. In stark contrast to the EU, the US emphasises sanctions as a means of enforcing labour commitments/social provisions. While the scope of labour commitments in EU FTAs has been gradually increasing over time[72], the EU has adopted a distinctive approach in enforcing employment commitments, characterised by collaborative implementation and interaction with partner governments and civil society, therefore enhancing transnational connections[73]. This would probably be partly explained through the EU's policy on 'Trade for all'[74] and 'making friends' with the ILO in trade negotiations[75], as well as how weak institutional insulation of trade policy executives from societal actors results in the inclusion of labour commitments in the EU and the US[76].

4.2. Policy implications for Vietnam and other countries

Above all, in terms of nature, labour commitments in the TSD chapter under the new-generation EU FTAs refer to the principles and obligations derived from ILO membership and the maintenance of laws that ensure freedom of association, absence of forced labour, etc, in practice[77]. In other words, in order to fulfil the long-term purpose to incorporate social standards into their FTAs[78], the EU, by the way regarding the ILO as a partner in trade negotiations[79], has employed and reinforced the parties' principles and obligations under the ILO membership, but at a more comprehensive and higher level[80].

First and foremost, the EU requests that the party members fully comply with ILO fundamental principles/rights at work, which are also deemed to be ILO core labour standards promulgated in eight ILO fundamental Conventions and so on[81]. Regarding these labour standards, it is noteworthy that there are differences between ILO core labour standards and other international labour standards[82]. All members, not only Vietnam, are bound by an inherent commitment, irrespective of their ratification status of the relevant fundamental conventions, to uphold, advance, and actualise the concepts pertaining to fundamental rights. This obligation stems directly from their membership in the ILO, the 1998

[72] Also see Section 3.

[73] Harrison James, et al, *Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, *World Trade Review,* 2019, *18*(4), pp. 635-657 and Postnikov, *op. cit.,* p. 22-23.

[74] European Commission (2015), *op. cit.*

[75] Sicurelli, *op. cit.,* pp. 461-473.

[76] Postnikov, *op. cit.,* p. 3.

[77] García, *op. cit.,* p. 64.

[78] The historical and theoretical perspectives are revisited in the Section 2 of the paper.

[79] Sicurelli, *op. cit.,* pp. 461-473.

[80] See Section 3.

[81] For instance, in the EVFTA and several FTAs outlined in Section 3, there is an extended scope of fundamental Conventions on occupational health and safety and migrant workers rights. Recently, this tendency has also been employed in EU FTAs among developing countries like Canada and the UK in terms of fundamental Conventions on minimum wage and labour inspection. See more at European Commission, *CETA chapter by chapter*, available at: CETA chapter by chapter (europa.eu); and European Commission, EU-United Kingdom Trade and Cooperation Agreement, available at: The EU-UK Trade and Cooperation Agreement (europa.eu) (last access: 09.10.2023).

[82] European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation and Enforcement of EU Trade Agreements*, 2021, p.18.

Declaration[83], and must be fulfilled in a sincere manner and in conformity with the ILO Constitution[84].

So a key priority obligation for Vietnam and other EU parties under TSD Chapters in EU FTAs has been the ratification of fundamental Conventions of the ILO first, and the implementation of these core labour standards, besides the other ones that have already been ratified, provided that the ILO Conventions ratification would come along with timing domestic legal internalisation because of the inherent limits in legislation, for instance in Korea[85] and Vietnam as well[86].

Last but not least, there is the obligation to guarantee that the implementation of core labour standards and other labour standards will be effective[87]. However, in order to fulfil all the requirements from labour commitments indicated or to avoid putting parties in Korea's place at least, based on lessons from the case between Korea and the EU aforementioned[88], it is believed that Vietnam and other parties should carefully follow annual recommendations from the ILO in terms of ILO fundamental convention ratification and implementation[89].

5. Conclusion

Behind the EU's statement regarding the EVFTA as the most comprehensive new generation FTA among other FTAs between the EU and developing countries, the study would clarify aspects of labour commitments in EU FTAs and highlight that the key obligations for parties to the new-generation EU FTAs in terms of these labour commitments are the ratification of ILO conventions, legal internalisation, and their implementation in practice. Recent scholarly study has indicated that the implementation of TSD chapters has not yet yielded tangible improvements in workplace rights in practical terms[90], and, besides, although the party, for instance, Vietnam, has even ratified ILO conventions yet, present limits

[83] Cuc Nguyen and Phuoc Huu Ngo, *Elimination of Child Labor in Vietnam's New Generation of Free Trade Agreements*, Lentera Hukum**,** 2022, *9*(1)**,** p. 128.

[84] See International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022,* available at: Key document - ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022 (last access: 9.10.2023).

[85] See Part 1 in Section 4 of the paper.

[86] Xuan Thu Nguyen, Tien Dung Nguyen and Xuan Hung Nguyen, ”Labour Commitments in the EVFTA: Amendments and Supplements to Vietnamese Law and Recommendations”, *Journal of Law, Policy and Globalization*, 2022, 125, pp. 76-83.

[87] For example, article 13.4 of the EU-Korea FTA; article 286 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 285 of the EU-Central America Association Agreement and article 13.4 of the EVFTA.

[88] Campling, *op. cit.,* pp. 139–166.

[89] See International Labour Organization (ILO), *Committee of Experts on the Application of Conventions and Recommendations*, available at: Committee of Experts on the Application of Conventions and Recommendations (ilo.org) (last access: 09.10.2023).

[90] Harrison James et al, *”Governing labour standards through free trade agreements: Limits of the European Union's trade and sustainable development chapters”*, *Journal of Common Market Studies*, 2019, *57*(2), pp. 260–277; Marx Axel, Brando Nicolas and Lein Brecht, ”The protection of labour rights in trade agreements: The case of the EU–Colombia Agreement”, *Journal of World Trade*, 2016, *50*(4), pp. 587–610; Marx Axel, Ebert Franz and Hachez Nicolas, *Dispute settlement for labour provisions in EU FTAs: Rethinking current approaches*, *Politics and Governance*, 2017, *5*(4), pp. 49–59; Orbie Jan, Van den Putte Lore and Martens Deborah, 'The impact of labour rights commitments in EU trade agreements: The case of Peru', *Politics and Gover-nance*, 2017, *5*(4), pp. 6–18 and Van Roozendaal, *op. cit.,* pp. 19–29.

in the legislation[91] as well as in the implementation of institutional mechanisms still remain[92]. So, it is time to revisit TSD chapters and conduct further empirical research in order to warrant their effectiveness in protecting employees under the pressure of globalisation./.

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[91] Nguyen, Nguyen and Nguyen, *op. cit.*

[92] Chi, Do Quynh, *Formation of the EU-Vietnam Free Trade Agreements Domestic Advisory Group: What it means for the civil society in Vietnam?*, Working Paper, 2022, *191*/2022, Hochschule für Wirtschaft und Recht Berlin, Institute for International Political Economy (IPE), Berlin.

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PROPOSALS FOR A BROADER APPROACH OF „MISUSE OF DEVICES AND PROGRAMS' PROVISION IN COMBATING CYBER-DEPENDENT AND CYBER-ENABLED CRIMES

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Abstract

The adoption, in 2001, in Budapest, of the Council of Europe Convention on Cybercrime brought an important step forward in the prevention and combatting cyber-related crimes, through the creation of a special indictment (Article 6) against the production, sale, procurement for use, import, distribution, import or making available of devices, computer programs, passwords or any other such data with the scope to further illegal access to a computer system, interception without right of a computer data transmission, an illegal data interference or an illegal system interference, offences comprised in the Articles 2 to 5 of the Convention. Although the offence in Article 6 represents the „mean-crime' in relation with the further commission of the above mentioned crimes against the confidentiality, integrity and availability of computer data and systems („purpose-crimes'), the nowadays Cybercrime phenomenon shows that the misuse of the devices and computer programs actually exceeds the legal boundaries of Articles 2 to 5, and (technically) impacts much of the other forms of cyber-related or cyber-enabled offences, especially in the FinTech area, electronic payment, blockchain, cryptocurrency etc. Taking into consideration the proliferation of illegal activities against personal information, confidential data or access credentials, especially the commercialization, especially in Dark Web, of codes, passwords, hacking tools, malware and other present or future cutting-edge system interference technologies, thus posing a great danger to the whole cyber-ecosystem, an improvement of Article 6, and of all the correspondent (related) articles in the special laws or the criminal codes adopted by the signatory countries, would contribute to the creation of an extensive and much comprehensive legal tool in the prevention and efficiently combating cybercrimes.

Keywords: *criminal liability, misuse of devices, cyber-dependent crimes, cyber-enabled crimes, CoE Convention on Cybercrime, illegal operations with devices and software.*

1. The context of computer programs and devices being used for committing cyber-related crimes

Generally, the phenomenon of cybercrime refers to a variety of criminal activities that are either committed against the computer data and systems or with the use of such automated 'tools'.

Under various names along the time, such as: *computer crime*, *e-crime*, *internet crime*, *digital crime*, *online crime*, *virtual crime*, *techno crime* or *net crime*, the 'cybercrime' has yet a not commonly agreed definition, although the term is somehow known and used since 1970s.

And this is to be confirmed by the latest studies on the domain, that 'the only consensus within the literature, is that there is no single clear, precise and universally accepted definition of cybercrime, a fact that

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is acknowledged by both academics and organizations alike'[1].

A simple, but comprehensive definition, we partially agree with, states that 'cybercrime is the use of a computer as the instrument to further illegal ends'[2]. For all that, we must admit that not only computers may be the material object or the tool of a crime, but also computer data (data, software, applications etc.), that should be regarded in a distinctive manner.

The relevant international organizations seem to also have failed somehow in finding a commonly acceptable definition on cybercrime. For all that, we may acknowledge the United Nations Office on Drugs and Crime' s definition 'cybercrime is an act that violates the law, which is perpetrated using information and communication technology (ICT)'[3].

The industry tends to see cybercrime as 'an illegal activity involving computers, the internet, or network devices'[4] or as 'illegal usage of any communication device to commit or facilitate in committing any illegal act'[5].

In the study '*Conceptualizing Cybercrime: Definitions, Typologies and Taxonomies*', the authors[6] gathered from the literature different approaches of the term, as follows:

- Computer crime or computer-related crime;[7]
- '*any illegal behaviour directed by means of electronic operations that target the security of computer systems and the data processed by them' or 'any illegal behaviour committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession and offering or distributing information by means of a computer system or network*'[8];
- '*actions directed against the confidentiality, integrity and availability of computer systems, networks and computer data, as well as the misuse of such systems, networks and data by providing for the criminalization of such conduct*'[9];
- '*criminal acts committed using electronic communications networks and information systems or against such networks and systems*'[10];

[1] Kirsty Phillips, Julia C. Davidson, Ruby R. Farr, Christine Burkhardt, Stefano Caneppele, Mary P. Aiken, *Conceptualizing Cybercrime: Definitions, Typologies and Taxonomies*, Forensic Sciences, 2022, 2(2), 379-398, https://doi.org/10.3390/forensicsci2020028, available at https://www.mdpi.com/2673-6756/2/2/28 (accessed on 14.04.2024).

[2] Michael Aaron Dennis, *Cybercrime*, Encyclopedia Britannica, 19 Apr. 2024, https://www.britannica.com/topic/cybercrime (accessed 28.04.2024).

[3] https://www.unodc.org/e4j/en/cybercrime/module-1/key-issues/cybercrime-in-brief.html.

[4] https://www.cisco.com/site/us/en/learn/topics/security/what-is-cybercrime.html.

[5] https://cybertalents.com/blog/what-is-cyber-crime-types-examples-and-prevention.

[6] See also Kirsty Phillips *et alii*, *op.cit.*

[7] *United Nations Manual on the Prevention and Control of Computer-related Crime*, United Nations, NY, USA, 1994 (accessed by Google Scholar on 14.04.2024).

[8] UN Congress Crimes Related to Computer Networks. *10th UN Congress on the Prevention of Crime and the Treatment of the Offenders*, UN, Vienna, Austria, 2000 (available at https://www.unodc.org/documents/congress/Previous_Congresses/10th_Congress_2000 accessed on 14.04.2024).

[9] Council of Europe, *Convention on Cybercrime*, European Treaty Series ETS-185, Budapest, Hungary, 2001, p.1-25, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008156 1.

[10] Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council and the Committee of the Regions: Towards a General Policy on the Fight against Cyber Crime*, Bruxelles, Belgium, 2007, vol. 267 (accessed through Google Scholar on 14.04.2024).

- ’*a broad range of different criminal activities where computers and information systems are involved either as a primary tool or as a primary target*’[11].

The most interesting issue in analyzing the phenomenon of cybercrime is the categorization. While most of the authors rely on a two-factor category of cybercrime, there are also specialists that argue in the favor of a three-factor categorization of cybercrimes.

The dual-approach is based mainly on distinguishing between ’cyber-dependent’ and ’cyber-enabled’ crimes. This option derives from the most accepted official and academic visions on cybercrime[12], whereas computer systems and data represent the target (object) of the illegal conduct or the tools that facilitate the commission of other (traditional) crimes.

According to some authors, ’cyber-dependent crimes are crimes that arose with the advent of technology and cannot exist outside the digital world, e.g. hacking, such as ransomware attacks or hacktivism’[13]. In contrast, ’cyber-enabled crimes are traditional crimes that predate the advent of the technology, and are now facilitated or have been made easier by cyber technology. Cyber-enabled crimes range from white-collar crime to drug-trafficking, online harassment, cyberterrorism and beyond’[14].

On the top of these classifications, there is the opinion of authors D. Wall and A. Pattavina[15] that cybercrime may be regarded from three perspectives:

’*Cyber-dependent crimes or true cybercrimes*’, where the computer is the target and the crime could not happen without a computer, i.e. truly new opportunities for crime, e.g. hacking, malware and DoS/DDoS, parasitic computing*;*

’*Cyber-enabled crimes or hybrid crimes*’*,* where a computers and data may be involved, but the crime could still be perpetrated without them, i.e. new opportunities for traditional crimes, e.g. frauds, scams, ID Theft, and phishing;

’*Cyber-assisted crimes or the use of computer in traditional crime*’*,* where the computer and data simply constitute the tool for the commission traditional crimes, e.g. frauds, pyramid schemes, stalking, harassment, criminal communications.

As most of the researchers recognize, the significant classification system of cybercrime is provided by the notorious *Council of Europe (CoE) Convention on Cybercrime*, signed in Budapest in 2001. This instrument, supplemented by additional protocols over time, made a particular classification of computer crimes, as shown below:

1. Offences against confidentiality, integrity and availability of computer data and systems

- Illegal access (article 2)
- Illegal interception (article 3)
- Data interference (article 4)
- System interference (article 5)
- Misuse of devices (article 6)

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[11] European Commission, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, Brussels, Belgium, 2013 (accessed through Google Scholar on 14.04.2024).

[12] See also Kirsty Phillips *et alii*, *op.cit.*

[13] See Mike McGuire, Samantha Dowling, *Cybercrime: A Review of the Evidence: Summary of Kedy Findings and Implications*, Home Office, London, UK, 2013 (available through Google Scholar).

[14] *Ibidem.*

[15] David S. Wall, *The Internet as a Conduit for Criminal Activity* (October 21, 2015). Information Technology and the Criminal Justice System, A. Pattavina, ed., pp. 77-98, Sage Publications, Inc., 2005 (revised 2010, 2015), Available at SSRN: https://ssrn.com/abstract=740626.

2. Computer-related offences

- Computer-related forgery (article 7)
- Computer-related fraud (article 8)

3. Content-related offences

- Offences related to child pornography (article 9)

4. Offences related to infringements of copyright and related rights

- Offences related to infringements of copyright and related rights (article 10)

5. Acts of a racist and xenophobic nature committed through computer systems

It is worth mentioning that, in 2013, the European Union adopted and enforced the Directive 2013/40/EU[16], that made available a definition of criminal offences in the area of attacks against information systems, as well as a categorization of such offences:

- Article 3 - Illegal access to information systems
- Article 4 - Illegal system interference
- Article 5 - Illegal data interference
- Article 6 - Illegal interception
- Article 7 - Tools used for committing offences
- Article 8 - incitement, aiding and abetting and attempt.

Analyzing the last two important pieces of legislation, one could come to the conclusion that, although slightly different (in concepts and definitions), both documents fail to provide with a general understanding of the concept of cybercrime, but offer a broad perspective of the crimes that may be committed against the computer systems and data.

2. Legal provisions on illegal operations with computer data, applications and devices

A distinct attention of this article is paid to the offence of *misuse of devices*, as it is considered as a 'facilitating-offence'[17] and a helpful mean of committing other crimes in the area of computer systems and data (cybercrime).

The offence of misuse of devices first appeared officially in the CoE Convention on Cybercrime, in Article 6 (with the same name).

According to this document, the CoE Convention on Cybercrime urged states '*to adopt such legislative and other measures to establish as criminal offence, when committed intentionally and without right:*

a) the production, sale, procurement for use, import, distribution or otherwise making available:

- a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with Articles 2 through 5;
- a computer password, access code or similar data by which the whole or any part of a computer system is capable of being accessed, with the intent that it be used for the purpose of committing any offences established in Article 2 through 5, and

b) the possession of an item referred to in paragraph a.i or ii above, ***with the intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5'***[18].

[16] Directive 2013/40/Eu of the European Parliament and of the Council on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, Official Journal of the European Union 2013, 218, 8-14, available online at https://eur-lex.europa.eu/legal-content/EN (accessed on 20.04.2024)

[17] Versus a 'facilitated-offence' or the 'target offence' that is committed using the outcomes of the 'facilitating-offence'.

[18] Article 6, CoE Convention on Cybercrime (ETS no. 185, available at https://rm.coe.int , accessed on 20.04.2024).

One could very easily note, as we also underlined in the text, that the European legislator in 2001 regarded all the acts comprised in Article 6 as offences only if committed with the intent or for the purpose of committing a specific set of offences, namely those provided in Articles 2, 3, 4 and 5.

It is a curious approaching of this offence, mainly because it fails to take into consideration that all the acts mentioned in Article 6 (facilitating-offence) could be also used in committing of other crimes and offences, particularly those mentioned in the CoE Convention itself in Article 7 – Computer-related forgery, and Article 8 - Computer-related fraud, and also in Article 9 – Offences related to child pornography (as ’facilitated-offences’ or ’target-offences’).

It is a surprisingly decision of the lawmakers of that time to let apart the offences provided in Articles 7 to 9, as being possible ’facilitated-offences’ (’target-offences’), as they are usually committed, from the technical point of view, by the means of devices, programs, applications, codes or other similar data.

The Directive 2013/40/EU also addresses the ’misuse of devices’, and states, in Article 7 - Tools used for committing offences, that ’*member states shall take the necessary measures to ensure that the intentional production, sale, procurement for use, import, distribution or otherwise making available, of one of the following tools, without right and* ***with the intention that it be used to commit any of the offences referred to in Articles 3 to 6****, is punishable as a criminal offence, at least for cases which are not minor:*

a) a computer program, designed or adapted primarily for the purpose of committing any of the offences referred to in Articles 3 to 6;

b) a computer password, access code, or similar data by which the whole or any part of the information system is capable of being accessed.’.

It is worth remembering (see above mentions) that Articles 3 to 6 of the Directive refer to offences that are generally committed against data and computer systems.

Again, the European lawmakers made a clear distinction between the so called ’cyber-dependent offences’ and ’cyber-enabled offences’, and urged Member States to adopt legislative measures to indict (as ’facilitating-offence’) the conduct related to the production, sale, procurement, distribution or making available of computer programs or codes only in the situation that the respective acts are committed without right and with the intention to serve for the further commission of just the ’computer-dependent offences’ (as ’facilitated-offences’).

This time, also, the mentioned acts (see Article 7) cannot be regarded as offences unless the target-offence itself is not one against a computer system or data.

Having these two important pieces of legislation in place, the European Member States did take measures and established different legal solutions to comply.

Thus, the proposals of a distinct legal provision criminalizing the misuse of devices and programs have further been adopted in the substantive criminal law of many countries, such as:

Austria - Section 126c of the Criminal Code[19] considers the crime of „misuse of computer programs arid access data’ the alternative acts of producing, introducing, distributing, selling or otherwise making

[19] https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Austria%20_30%20May%2007_En.pdf.

available '*a computer program or a compatible equipment which has been obviously created or adapted due to its particular nature to commit an unlawful access to a computer system (sect. 118a), an infringement of the secrecy of telecommunications (sect. 119), an unlawful interception of data (sect. 119a), a damaging of data (sect. 126a) or an interference with the functioning of a computer system (sect. 126b)*'. So, the Austrian legislator backed the CoE Convention and incriminates the misuse of device and data only in the case of a specific sort of computer crimes: the computer-dependent crimes.

Belgium - art. 550bis of the Criminal Code, in paragraph (5) punishes the person who '*unduly possesses, produces, sells, obtains with a view to his use, imports, distributes or makes available in another form, any device, including computer data, primarily designed or adapted for allowing the commission of the offences provided for in paragraph (1) to (4)*[20]', while art. 550ter, in paragraph (4) addresses the same illegal conduct, but in connection with the offences of data interference (alteration, deletion, damaging) and system interference (preventing the correct functioning of a computer system…). One can note that these 'misuse of device and programs'-like offences in the Belgian legislation are linked with the further commission (or further intent to commit) of only cyber-dependent offences, as also envisaged by Article 6 of the CoE Convention on Cybercrime.

Bulgaria - art. 319e of the Criminal Code[21] only considers a crime when a perpetrator circulates computer or system passwords thus causing disclosure of personal data or an information representing a state secret, so no entirely mapping with the CoE Convention on Cybercrime Article 6.

Canada - art. 342.2 of the Criminal Code, amended by the 'Protecting Canadians from Online Crime Act' (SC 2014, c.31)[22], refers to '*everyone who, without lawful excuse, makes, possesses, sells, offers for sale, imports, obtains for use, distributes or makes available a device that is designed or adapted primarily to commit an offence under section 342.1*[23] *or 430*[24], *under circumstances that give rise to a reasonable inference that the device has been used or was intended to be used to commit such an offence*'. Also in this case, the provision only covers the situation when the material acts of this offence are put in a direct link with the commission (or with the intent to the commission) of a computer-dependent crime.

Czech Republic - on its Criminal Code[25] has Section 231 under the name of 'Obtaining and possession of access device and computer system passwords and other such data' that criminalize any conduct of a person who '*produces, puts into circulation, imports, exports, transits, offers, provides, sells, or otherwise makes available, obtains for him/herself or for another, or handles – a device or its component, process, instrument or any other means, including a*

[20] Illegal access to computer data and systems, damage caused to computer system and data, and data interference.

[21] https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Bulgaria%20_9%20May%2007_En.pdf.

[22] https://laws-lois.justice.gc.ca/eng/annualstatutes/2014_31/page-2.html#docCont.

[23] Unauthorized use of computer.

[24] Section 430 (1.1) Mischief in relation to computer data.

[25] https://antislaverylaw.ac.uk/wp-content/uploads/2019/08/Czech-Republic-Criminal-Code.pdf.

computer program designed or adapted for unauthorized access to electronic communications network, computer system...'. Partially mapping with the Article 6 of the CoE Convention on Cybercrime, the Czech legislators considered the offence of Section 231 only in the context of the perpetrator's intent to commit a 'breach of secrecy of correspondence' (under Section 182-1 b), c)) or a criminal offence of 'unauthorized access to computer systems and information media' (under Section 230 paragraphs (1), (2)). So to say, one facilitated cyber-enabled offence and one facilitated cyber-dependent offence.

Cyprus - adopted the Law 22(III)/2004[26] – revised, that actually copy-pasted and slightly adapted the legal provisions from the CoE Convention on Cybercrime. Thus, Article 8 of Law 22(III)/2004 is a reproduction of Article 6 of the Convention, and therefore the criminalizing of the 'misuse of devices' is linked with the intent of the perpetrator to commit only a cyber-dependent offence, as stated by the law.

Estonia - art. 216[1] of the Criminal Code[27] maps with the Article 6 of the CoE Convention on Cybercrime and consider an offence of 'Preparation of computer-related crime' the conduct of a person '*for the purposes of committing the criminal offences provided in articles 206[28], 207[29], 208, 213[30] or 217[31] of this Code...*'. One can observe that, the Estonian Penal Code extended the applicability of the 'misuse of devices and programs' also to a cyber-enabled crime, respectively the computer-related fraud (art. 213).

Finland - chapter 34, sections 9a and 9b of the Criminal Code[32], criminalize the conduct of possessing, importing, acquiring for use, manufacturing, selling or otherwise making available or disseminating devices, computer programs, information system's passwords, access codes or equivalent information, as well as instructions for the manufacturing of a computer program or a set of programming instructions, with the intent to cause harm, to damage the data processing or the functioning of a information system or a communication system, or to decode or disable the technical protection of electronic communications or the protection of an information system. It is worth noting that the target offence represents, also in this case, a computer-dependent offence, thus in accordance with the provision of Article 6 of the CoE Convention on Cybercrime.

France - art. 323-3-1 of the Criminal Code[33] maps in part with the provisions of Article 6 of the CoE Convention, and criminalize '*the import, possession, offering, distributing or making available of an equipment, an instrument, a program or computer data, created or specially adapted for the commission of one or more crimes, as*

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[26]https://www.olc.gov.cy/olc/olc.nsf/ECB669A2EBF5FE75C225871100236DEC/$file/The%20Convention%20of%20the%20Council%20of%20Europe%20on%20Cybercrime%20(Ratification)%20Law%of%202004%20%20L.22(III)-2004.pdf.

[27]https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20ESTONIA%20_april%202008_.pdf.

[28] Interference in computer data.

[29] Hindering of operation of computer system.

[30] Computer-related fraud.

[31] Unlawful use of computer system.

[32] https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf.

[33]https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20France%20_26%20March%2007_En.pdf.

provided by articles 323-1[34] *to 323-3.*'. As noted, the French legislator preferred to indict the so-called 'misuse of device and programs' just with the conditions of further commission of a cyber-dependent crime.

Germany - art. 202c of the Criminal Code[35] maps for a large percentage with the Article 6 of the CoE Convention, and relates the '*creating, procuring for himself or another party, selling, giving over to another party, disseminating or otherwise providing access to passwords, security codes….computer programs whose purpose is to commit such an act*' to the preparation of '*a criminal offence pursuant to section 202a*[36] *or 202b*[37]'. We observe that the German legislator remained in the same paradigm of computer-dependent crimes when it comes to the 'misuse of devices and programs'.

Hungary - art. 300/E of the Criminal Code[38] partially maps with the Article 6 of the CoE Convention, and conditions the unlawful conduct by the commission of an offence under art. 300/C, that covers both cyber-dependent crimes (such as illegal access to a computer system and data, and data interference) and cyber-enabled crimes (such as computer-related fraud – alignment 3).

Ireland - Offences Related to Information Systems Act 2017, section 6[39] (use of computer programme, password, code or data for purposes of section 2, 3, 4 or 5) represents a copy of the provisions of Article 6 of the CoE Convention on Cybercrime, and relates the 'misuse of devices and programs' only to the other offence of the same law, mentioned in section 2[40], section 3[41], section 4[42] and section 5[43], thus computer-dependent offence.

Italy - in the Penal Code[44], article 615 quarter '*whoever, in order to obtain a profit for himself or others or to cause damage to others, illegally procures, reproduces, disseminates, communicates or delivers, codes, keywords or other means suitable for access to a computer system or electronically, protected by security measures, or in any case provides indications or instructions suitable for the aforementioned purpose*', while article 615 quinquies '*whoever, with the aim of illicitly damaging a computer or telematic system, the information, data or programs contained therein or pertinent to it or to favor the total or partial interruption or alteration of its functioning, procures, produces , reproduces, imports, disseminates, communicates, delivers, or, in any case, makes equipment, devices or computer programs available to others*'. One could easily observe that the Italian legislators mapped with the Article 6 of the CoE

[34] Illegal access to a computer system and system interference.

[35] https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Germany%20_1%20June%2007_En.pdf.

[36] Data espionage (unauthorized access to data).

[37] Data interception.

[38] https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Hungary%20_7%20June%2007_En.pdf.

[39] https://www.irishstatutebook.ie/eli/2017/act/11/section/6/enacted/en/html#sec6.

[40] Accessing information system without lawful authority.

[41] Interference with information system without lawful authority.

[42] Interference with data without lawful authority.

[43] Intercepting transmission of data without lawful authority.

[44] https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20Italy%20_26%20%20April%202008_pub.pdf.

Convention on Cybercrime, and considered the offence only if committed in connection with another computer-dependent crime.

Lithuania - art. 198-2 of the Criminal Code maps with the general provisions of the Article 6 of the CoE Convention on Cybercrime, and relate the respective offence of 'Illegal possession of the devices, computer program, passwords, access codes and other data with intent to commit a crime' by the further commission of certain articles of the Code, such as art. 166[45], art. 196[46], art. 197[47], art. 198[48], and art. 198-1[49]. Despite the existence of article 166 that refers to the breaching of the private correspondence inviolability, the rest of the target offences are generally those comprised also in Article 6 of the CoE Convention on Cybercrime, meaning computer-dependent crimes.

Netherlands - Section 139d of the Criminal Code[50], states in paragraph (2) that 'any person who: a. manufactures, sells, obtains, imports, distributes or otherwise makes available or has in his possession a technical device that has been primarily adapted or designed for the commission of such serious offences, or b. sells, obtains, distributes or otherwise makes available or has in his possession a computer password, access code or similar data that can be used for accessing a computer device or system or a part thereof, with the intent of using it in the commission of a serious offence, as referred to in section 138ab(1)[51], 138b[52] or 139c[53]'. Obvious that the Dutch legislators not entirely mapped the Article 6 of the CoE Convention, but still connected the 'misuse of devices and programs' (Section 139d) with the commission of cyber-dependent offences (as described above).

Poland - in Chapter XXXIII – crimes against the protection of information in the Penal Code[54], there is Article (Rule) 269b criminalized the conduct of a person who '*manufactures, acquires, disposes of, or provides facilities to other persons or computer programs designed to commit an offence referred to in Art. 165 paragraph (1) point (4)*[55]*, Art. 267 paragraph (2)*[56]*, Art. 268a paragraph (1)*[57]*…, Art. 269 paragraph (2)*[58]*, or Art. 269a*[59]*, and the computer passwords, access codes or other data, allowing access to information stored in a computer system or network of ICT*'. With a single exception (the offence mentioned in Art. 165 paragraph (1), point (4)), the offence of 'misuse of devices and programs' merely enclose references to other cyber-dependent offences, mapping with the

[45] Violation of inviolability of a person's correspondence.
[46] Unlawful influence on electronic data.
[47] Unlawful influence on an information system.
[48] Unlawful interception and use of data.
[49] Unlawful connection to an information system.
[50] https://legislationline.org/sites/default/files/documents/f3/Netherlands_CC_am2012_en.pdf.
[51] Computer trespass (Illegal access).
[52] Hindering the access to or use of a computer device or system.
[53] Illegal interception of data.
[54] https://eurcenter.net/wp-content/uploads/2020/09/Criminal-Procedure-Code-of-Poland-1997-amended-2004.pdf.
[55] Endanger the life and health by impairing, preventing, or otherwise affecting the automatic processing, collection or transmission of data.
[56] Unlawful obtaining of information.
[57] Data interference.
[58] Destroying / damaging a device.
[59] System interference.

’request’ of the Article 6 of the CoE Convention on Cybercrime.

Portugal - Law no. 109/2009 on the Cybercrime[60] states in Article 3 – Computer Forgery, paragraph (4), that ’*whoever imports, distributes, sells or holds for commercial purposes any device that allows the access to a computer system, to a payment system, to a communications system or to a conditioned access service*’, while in Article 4 – Computer Damage, paragraph (3) shows that ’*the same penalty of paragraph (1) will be applied to those who illegally produce, sell, distribute or otherwise disseminate to one or more computers or to other systems devices, software or other computer data intended to produce the unauthorized actions described in that paragraph*[61]’. Finally, the Article 6 – Illegal access, paragraph (2), states that ’*the same penalty will be applied to whoever illegally produces, sells, distributes or otherwise disseminates within one or more computer systems devices, programs, a set of executable instructions, code or other computer data intended to produce the unauthorized actions described under the preceding paragraph*[62]’. Analyzing the above-mentioned legal provisions, we can notice that the Portuguese legislators mapped somehow the Article 6 of the CoE Convention on Cybercrime, and conditioned the ’misuse of devices and programs’ by the existence of only a cyber-dependent crime.

Romania - art. 365 of the Criminal Code[63] represent a copy of the Article 6 of the CoE Convention on Cybercrime, and it is obvious that the offence of ’Illegal operations with devices and computer programs’ is only linked with the target offences mentioned in Articles 360 to 364[64], meaning just cyber-dependent crimes.

Spain - has a distinct situation in terms of the legal provisions in its Criminal Code[65] for ’misuse of device and programs’, and the principal sections are: **197ter** – that mainly deals with producing, acquiring for use, importing of computer programs and passwords or codes with the intent to further illegal access computer systems and data, personal data interference and eavesdropping of electronic communications, **264ter** – that deal with unauthorized producing, acquiring of or importing computer programs, passwords or codes and similar data with the intent of committing any of the offences mentioned in sections 264[66] and 264bis[67]. There is also section **400** that refers to the ’manufacture, receipt, obtainment or possession of tools (…) computer data or programs (….) with the intent to commit the criminal offences’ related to forgery (documents, currency, cards).

Sweden - although there is no distinct offence dealing with the ’misuse of devices and programs’, in Section 9c of the Chapter

[60] https://cibercrime.ministeriopublico.pt/sites/default/files/documentos/pdf/portuguesecybercrime_law.pdf.

[61] Meaning the deletion, altering, destroying, in whole or in part, damaging, removing or rendering unusable or inaccessible programs or other computer data of others.

[62] Meaning the ”illegal access to a computer system’.

[63] http://www.vertic.org/media/National%20Legislation/Romania/RO_Criminal_Code.pdf.

[64] Art. 360 – Illegal access to a computer system, art. 361 – Illegal interception of a transmission of data, art. 362 – Data interference, art. 363 – System interference, and art. 364 - Unauthorized transfer of computer data.

[65] https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf.

[66] Altering the integrity of computer data.

[67] System interference.

4 in the Swedish Criminal Code[68], the legislators criminalized the '*installation of a technical device with the intent to breach telecommunication secrecy or to perform….an unlawful interception*'.

United States of America - art. 2512 of Chapter 119 in Title 18 of the Criminal Code[69] on the manufacturing, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited considers the aforementioned offence only in connection with illegal interception of electronic communications or oral communications. Art. 1030 'fraud and related activity in connection with computers' of Chapter 47, in paragraph (5) has a provision that addresses the '*transmission of a program, information, code, or command, and as a result of such conduct, (a person) intentionally causes damage without authorization, to a protected computer*'. So, the US legislators did not take to much attention to what kind of target offences to related the 'misuse of devices and programs', while preferred to cope with this issue on a case-by-case basis, and depending on the topic of the chapter.

As we previously demonstrated in another study's results[70], almost all the above legal provisions have certain features in common, such as:

- the reference to products like: computer programs, applications, computer data, devices, passwords or codes etc.;
- the products are either prohibited *de jure*, or their use may be unlawful, without right, without a legitimate reason etc.;
- the products are described as being *designed*, *made, created, produced, manufactured, adapted* etc. as for being used in a sort of specific type of crimes (offences), mainly cyber-dependent offence, but also cyber-enabled offences;
- the existence of the intent or the scope (target) to commit further offences.

Analyzing all the above mentioned national legal provisions, we may draw the conclusion that the overwhelming majority of them are mapping or are inspired by the Article 6 of the CoE Convention on Cybercrime, that is *per se* a good thing. At least, there is an agreed framework in what regards the 'misuse of devices and programs'.

The common thing for many of them is the legislators' decision to criminalize the 'misuse of devices and programs' only if in connection with specific or general computer-dependent offences, that we may accept from a national criminal justice policy point of view.

Notwithstanding the foregoing, there are states that approached the issue in a slightly different way, by criminalizing the 'misuse of devices and programs' in connection with both cyber-dependent offences and cyber-enabled offences, and even with other kind of offences (e.g. Austria – infringement of the secrecy of communications, Bulgaria – disclosure of personal data and state secrets, Czech Rep. – breach of secrecy of correspondence, Germany – data espionage, Lithuania – breaching the secrecy of correspondence, Poland – endangering the life and health by impairing, preventing or otherwise affecting the automatic processing, collection or

[68] https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the swedish-criminal-code.pdf.

[69] https://www.law.cornell.edu/uscode/text/18/part-I/chapter-119.

[70] See Maxim Dobrinoiu, *Criminal Liability in the Case of Vendors of Software and Hardware Further Used in Cybercrime Cases*, International Conference 'Challenges of the Knowledge Society', Bucharest, 2022, Nicolae Titulescu University Publishing House (available at http://cks.univnt.ro/download/cks_2022).

transmission of data, Portugal – access to a conditioned access service, Spain – committing offence related to forgery, Sweden – breach of telecommunications secrecy).

So, it appears that not only the cyber-dependent or cyber-enabled offences could be a ’target offence’ that may justify the criminalization of the ’misuse of devices and programs’ offence, but many other illegal conducts, when committed with the help of specially designed devices, computer systems, computer data, passwords or codes.

3. Types of Cyber-enabled offences as ’facilitated-offences’ by misusing devices and programs

As official papers, studies and research materials found, the cyber-enabled offences are usually crimes/offences that do not traditionally depend on computer systems, computer data or electronic devices, but they suffered modifications over time in scale and form by the use of computers, networks or means of electronic communications. Among them, the most prevalent, for our analysis, are:

- **Economic related cybercrimes** - cyber fraud, fraudulent financial operations, card cloning, financially motivated Phishing (Spear Phishing, Smishing, Vishing, Quishing) or Pharming, Ransomware, Scareware, Intellectual property crimes, CEO fraud – Business Email Compromise (Whaling), establishment and operation of illegal online marketplaces, illegal online gambling, online money-laundering, digital wallet draining, establishment and operation of criminal digital assets exchanges, mixers, stablecoins, illegal or criminal decentralized finance (DeFi), account takeover etc.;
- **Non-necessarily economic related cybercrimes** - cyber forgery (Email Spoofing, Web Spoofing, Hyperlink Spoofing, Caller ID Spoofing), non-financially motivated Phishing and Pharming, ID Theft, establishment, operation and provision of end-to-end encrypted communications platforms and services etc.;
- **Individual related cybercrimes** – Social Engineering, Virtual Mobbing, Cyberstalking, Cyber-bullying, online harassment, illegally disclosure of private data, illegally accessing of electronic communications services (e.g. social media), online or electronic child sexual offences, online hate speech, online extortion, commercialization of online identities and credentials, romance scams, online sexual grooming etc.;
- **Government related cybercrime** – Cyber-espionage, Cyber-terrorism, Hacktivism, online recruitment and training for terrorist or ideologically purposes, online illegal propaganda, creation and distribution of fake new, interference with voting systems, online violations of human rights etc.

As observed by analyzing the above-mentioned illegal activities (offences, crimes etc.), there is a common link between all of them: the use of computer data, devices or even systems, as well as the intent to commit further (cyber-related) offences.

From a technical perspective, many of these cyber-enabled crimes rely on devices, programs, applications, passwords, codes and other same digital data that ease, facilitate or make possible the commission of the illegal or unauthorized material acts.

On the other hand, in many legislations, there are offences that for being committed require ’digital tools’ (as instruments), and they are not necessarily regarded as computer-enabled crimes (such as: the counterfeiting of banknotes with a computer system and a printer, misleading and altering reality in an official document, written on a computer system by a public servant etc.).

4. Conclusions

This article has the meaning to draw attention of the fact that the EU lawmakers and other legislators, from Europe and beyond, missed to approach the offence generally called ’*the misuse of devices and programs*’ from a broader perspective of the outcomes, namely the possibilities that the material and technical acts of this ’facilitating-offence’, as well as their results, may very well facilitate or may constitute the foundation for the commission of another offences, and not necessarily those ’cyber-dependent’.

In our opinion, taking into consideration the fast-evolving cybercrime ecosystem, and the large implementation of new technologies, legislators and law enforcement agencies must keep the pace with the continuously, newly, complex and more sophisticated tactics, techniques and procedures, as well as with the tools used by cybercriminals in performing their nefarious activities in cyberspace or in the visible, natural and traditional environment.

For that, we think that they need to adopt a much larger perspective in what regards the production, the commercialization, the detaining and the making available of devices, computer programs, applications, passwords, codes or other similar data, considering a criminal behavior not only when the intent is to further affect computer data and systems, but also when this intent is directed towards committing other sort of traditional or new kind of crimes and offences (see cyber-enabled crimes and offences).

In order this to happen, and the legal systems to be prepared for what comes next in the field of cybercrime (and not only), the legislators have to urgently adapt the national criminal laws with relevant and comprehensive legal provisions that also cover the way in which the computer systems, the electronic devices, the programs and applications, as well as the passwords, credentials or other such data may be used, intentionally and without right, to enable the commission of all sort of offences, irrespective if they are against the confidentiality, integrity and availability of computer systems and data or against other legal protected social values.

Such a discussion may arise, for example, about the creation, production, selling, acquiring, importing/exporting, making available etc. of AI-powered tools that are nowadays on a high trend as key enablers of committing both cyber crimes as well as other traditional crimes or even new type of crimes.

Another interesting issue may be related with the creation, procurement and distributing of digital tools that may be used in FinTech crimes, that are generally cyber-enabled crimes.

In the absence of a correct and comprehensive legal provision in place, the national criminal law systems (as well as law enforcement agencies) may not apply the principle *nullum crimen sine lege*, while struggling to use the existing legislation approaching the new faces of more technologized offences.

The idea of this article is to emphasize the need for a legislation update, with the following two aspects:

1. The definition of ’cyber-dependent crimes’ and ’cyber-enabled crimes’
2. The modification of the related articles on ’misuse of devices and programs’ adding also the ’cyber-enabled crimes’ as target offences that may be intended to be committed or even committed with the prohibited devices, computer programs, passwords, codes or likewise data.

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THE INCIDENCE OF THE PRINCIPLE OF PROPORTIONALITY IN THE CASE OF PRECAUTIONARY MEASURES ORDERED IN THE ROMANIAN CRIMINAL PROCESS

Alina ANDRESCU*

Abstract

The object of the analyzed topic deals with the limits and incidence of the criterion of proportionality in taking, maintaining or terminating insurance measures, offering several procedural remedies. The purpose of the study is to determine some criteria of objectivity and predictability incident to the taking and maintaining of precautionary measures, in order to prevent the abuse of law and the blocking of the use of the patrimony of the person concerned, criteria offered in a set of guarantees of a procedural-criminal nature, the observance of which constitutes a result obligation for the judicial bodies issuing the measure. The author carries out an analysis of the legal content of the protective measures in Romanian criminal procedural law from the perspective of the principles of ensuring the preemption of substantive European law and ensuring European public order, fundamental principles in the European and national normative construction, seeing in this legal order a standard capable of guaranteeing the defense concrete and effective of the rights of the procedural participants, drawing objective boundaries between them, the purpose being to increase the confidence of litigants in the judicial act.

Keywords: *Precautionary measures, principle of proportionality, criminal process, European law, abuse of law.*

1. Introduction

The size and importance of precautionary measures at European level. As early as 1928, Professor H. Donnedieu De Vabres observed that ,,delinquency has no borders', which is why he argued that ,,the internationalization of crime must be opposed by the internationalization of repression'[1]. These conclusions represent a postulate, an objective law that highlights the need to adopt legal instruments, law and criminal procedure, capable of repressing the cross-border criminal phenomenon.

In the context of a Europe ,,without internal borders'[2] the reasoning of professor

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[1]Henry Donnedieu De Vabres, *Les princípes modernes du droit pénal international*, 1928, p. 302, author and work cited by Jean Pradel and Geert Corstens, in *Droit pénal européen*, 2nd edition, Dalloz Publishing House, Paris, 2002, pag. 39, ideas also taken over in our legal literature, see, Gheorghiță Mateuț, *Tratat de procedură penală - Partea generală*, vol. I, C.H. Beck Publishing House, Bucharest, 2007, p. 40.

[2]The concept of a Europe without internal borders, for the first time, received normative content in Title II, art. G 3, lit. c) in the European Union Treaty, signed in Maastricht on February 7, 1992, hereinafter referred to as TEU, published in the Official Journal of the European Community, C-191/5 of 29.07.1992. Later, on the occasion of the improvement and republishing of the T.U.E., this principle was repeated in art. 3 of the Treaty, specifying that 'the Union offers its citizens an area of freedom, security and justice, without internal borders, within which the

De Vabres seems to be more current than ever, the European legislative authority, the European Parliament and the Council, as well as the legislators of the member states, having the task of legislating at the Union level procedural instruments for the defense of the area of freedom, security and justice[3].

Given that criminality is often transnational in nature, European decision-makers have concluded that the seizure and confiscation of instruments and proceeds of crime is essential, being among the most effective methods of combating crime at the Union level, the activity representing an important objective in cross-border cooperation .

In achieving such an objective, the principle of mutual recognition of court judgments and judicial decisions represented the cornerstone in the construction of the new vision of judicial cooperation in criminal matters within the Union, aspects decided on the occasion of the Tampere European Council of October 15 and 16, 1999.

In the framework of the Stockholm Program - ,,An open and secure Europe serving and protecting citizens'[4] The Union is committed to ensuring more effective identification, confiscation and re-use of the proceeds of crime.

2. The Union normative framework regarding the unavailability and confiscation

In a first stage, the adopted Union normative framework, in the matter of mutual recognition of non-availability orders and confiscation orders, was represented by the Framework Decisions 2003/577/JAI[5]and Framework Decision 2006/783/JAI[6] of the Council.

Later, Directive 2014/42/EU, the European Parliament and the Council[7] was adopted, in the content of which the main instruments regulated by the aforementioned Framework Decisions were brought together, on which occasion it was reiterated that the existence of an effective system of non-disposal and confiscation at European Union level is intrinsically linked to the proper functioning of the mutual recognition of freezing orders and confiscation orders.

free movement of persons is ensured...', the European Union Treaty was republished in the Journal Official of the European Union, C-326/17 of 26.10.2012.

[3] We consider the provisions of art. 2 para. (2) within the framework of the Treaty on the functioning of the European Union (consolidated version), hereinafter cited T.F.U.E., published in the Official Journal of the European Union, C-202/47 of 16.06.2016, according to which, 'if the treaties attribute to the Union a competence shared with the member states in a determined field, the Union and the member states can legislate and adopt legally binding acts in this field', and in art. 4, para. (2), lit. j) of the T.F.U.E., it is stipulated that 'the powers shared between the Union and the member states are applied in the following main areas: letter j) the space of freedom, security and justice'. From the content of these provisions of European value, it follows, explicitly, both the cooperation of the authorities on a legislative level, in order to ensure the legal, procedural framework for European cooperation in criminal matters, as well as the effective and efficient procedural cooperation of the judicial authorities, at the Union level, in defense of guaranteed social values.

[4] The resolutions of the Stockholm Program, brought together under the motto 'An open and secure Europe at the service of citizens and for their protection', were published in the Official Journal of the EU, C-115 of 4.5.2010, p. 1.

[5] Framework-decision 2003/577/JAI of the Council of 22 July 2003 regarding the execution in the European Union of orders to freeze goods or evidence, published in the Official Journal of the EU, L-196 of 2.8.2003, p. 45.

[6] Council Framework Decision 2006/783/JAI of 6 October 2006 on the application of the principle of mutual recognition for confiscation orders, published in the Official Journal of the EU, L-328 of 24.11.2006, p. 59.

[7] Directive 2014/42/EU, European Parliament and Council of 3 April 2014 on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union, published in the Official Journal of the EU, L-127/39 of 29.04.2014.

Unfortunately, the regime established by these normative acts was not fully effective, considering that neither the framework decisions nor Directive 2014/42/EU were transposed and applied uniformly in the member states, which led to an insufficient degree of mutual recognition and sub-optimal cross-border cooperation.

The new problems that have arisen, represented by the existence of a fragmented system in terms of the recognition and enforcement of judicial confiscation decisions, have led the Union to reposition judicial instruments within a single, comprehensive system of confiscation and confiscation of instruments and proceeds of crime.

3. The reconfiguration of the European normative framework and the establishment of its obligation for the EU member states

Following the analysis of the efficiency criteria[8], the unanimous conclusion was that, in order to effectively ensure the mutual recognition of freezing orders and confiscation orders, the rules on the recognition and execution of these orders should be laid down in a binding Union act of legally and directly applicable.

For these reasons, the EU Regulation was adopted. 2018/1805 of the European Parliament and of the Council of November 14, 2018 on the mutual recognition of orders of non-disposal and confiscation[9], its normative content having direct applicability in the internal law of the EU member states.

In the content of the introductory part, at para. 12, of this Regulation, the European legislator emphasized that „it is important to facilitate the mutual recognition and execution of orders of non-availability and confiscation orders by establishing rules that impose on a member state the obligation to recognize, without other formalities, the orders of non-disposal and confiscation orders issued by another Member State in criminal proceedings and to execute those orders on its territory'.

Also on this occasion, it was recalled that, at the level of Union law, „procedures in criminal matters' represent an autonomous notion of law, interpreted by the Court of Justice of the European Union despite the jurisprudence of the European Court of Human Rights, the recognition and execution of judicial decisions of non-disposal by the Union states, not being conditioned by the existence of a criminal conviction. It was emphasized that the notion of criminal proceedings includes all types of non-disposal orders and confiscation orders issued following proceedings initiated as a result of the commission of a crime, their scope cannot be limited only to the orders falling under the scope of Directive 2014/42 /E.U., respectively those issued on the basis of convictions.

Another new aspect regulated in the Regulation is given by the recognition and execution of the decisions of the non-disposal orders issued in the framework of some judicial investigation procedures, in reference to the investigative activities of the judicial bodies, regardless of whether the investigated crimes are serious or less

[8]In this sense, see the Commission Communication of April 28, 2015, entitled 'The European Agenda on Security' and the Commission Communication of February 2, 2016 on the Action Plan to strengthen the fight against terrorist financing, in which the Commission emphasized that 'in order to undermines the activities of organized crime that finance terrorism, it is imperative that those criminals be deprived of the proceeds of crime'.

[9] EU Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on mutual recognition of freezing and confiscation orders, published in the Official Journal of the EU, L-303/1 of 28.11.2018.

serious, which which means a repositioning of the scope of the object of the non-disposal of assets, including both the assets obtained by committing crimes and those actually used/involved in the commission of such acts (criminal bodies)[10].

The new bases of the ,,judicial procedures in criminal matters', recognized at European level, in the content of which were also included the procedures issued/communicated unconditionally by the existence of a criminal conviction, determine the reconfirmation of the procedural guarantees that the persons concerned by the restrictive component on patrimonial rights, inherent effect of the measure of unavailability.

The standard of legality requires the issuing authority, when issuing a non-disposal order or a confiscation order, to ensure that the principles of necessity and proportionality are respected, i.e. to check whether between the level of intrusion into the private life of the person concerned, as well as relative to the level of restriction of real rights, on the patrimony of the one concerned, and the judicial/procedural purpose pursued by the establishment of such measures, there is a balance[11]. Also, the issuing authority must consider that the non-disposal or confiscation order is issued and transmitted to the enforcement authority in another member state only when such a restrictive measure of real rights could be issued and used in - an internal case.

In situations where the criminal procedural legislation of the issuing state also allows authorities other than the judicial ones to issue orders for the non-disposal of assets or order the measure of their confiscation, prior to their transmission to the enforcement authority, they must be validated by a judge, by the court or the prosecutor.

As part of the validation activity, in order to prevent arbitrariness and imbalance, the competent judicial authority must verify the aspects on the basis of which the conditions for the necessity and proportionality of issuing the order of non-disposal or the measure of confiscation have been found to have been met.

In situations where the confiscation was ordered by a final judgment of conviction, the issuing authority must specify in the confiscation order submitted to the enforcement authority whether the person concerned by the measure of confiscation and confiscation participated or not in the ongoing criminal process and, in the situations in which he did not participate, it must be specified and proven how exactly he was notified, notified about the existence of the process and its object.

After receiving the judicial confiscation decision issued on the basis of a conviction, the enforcement authority, if it finds that the person against whom the confiscation order was issued did not appear at the trial following which the confiscation order was issued, has the right not to recognize or not to execute confiscation orders. Also, the person subject to confiscation, who did not know about the

[10] In this sense, at para. 14 of the Regulation, it was shown that 'crimes requiring the issuing and mutual recognition of orders to freeze goods in the framework of the Union criminal proceedings should not be limited to particularly serious crimes with a cross-border dimension, since Article 82 of the Treaty on the operation of the European Union (T.F.E.U.) does not impose such a limitation in terms of measures to establish rules and procedures to ensure the mutual recognition of judgments in criminal matters'.

[11] At para. 21 of the Regulation, it was emphasized that 'the issuing authority should be responsible for assessing the necessity and proportionality of such an order in each case', which means that, in situations where the person targeted by the restriction and intrusion of the blocking order wishes to dispute the necessity and proportionality of the measure must be addressed to the competent authorities within the issuing state, which is responsible for complying with the issuing criteria.

existence of the procedures carried out by the issuing state completed with real insurance measures against his patrimony, must be ensured the exercise of an effective way of appeal, within which the person concerned can exercise his the right of defence. Such national rules at the level of the executing state are in accordance with both the provisions of the Charter and those of the European Convention, especially in relation to the provisions of the right to a fair trial[12].

Along the same lines, in those situations where the executing state finds that there are real and objective reasons regarding a clear violation of a relevant fundamental right belonging to the person concerned by the application of the preventive measure, a right mentioned in the Charter, the right of the authority to enforcement not to recognize or enforce the order in question. The fundamental rights that should be relevant in this respect are, in particular, the right to an effective remedy, the right to a fair trial and the right to defence.

When considering a request from the executing authority to limit the period during which the asset should be subject to freezing, the issuing authority should take into account all the circumstances of the case, in particular whether the continuation of the freezing order could cause undue harm to the State execution.

Before deciding not to recognize or enforce a freezing or confiscation order based on any reason for non-recognition or non-enforcement, the executing authority should consult with the issuing authority to obtain any additional information necessary.

Pronouncing the judgment on the recognition and enforcement of the freezing or confiscation order and the concrete execution of the freezing or confiscation should take place with the same speed and with the same degree of priority as in similar domestic cases.

Where a confiscation certificate relating to a confiscation order relating to a sum of money is transmitted to several executing States, the issuing State should aim to avoid the situation of confiscation of more assets than necessary, and the total amount obtained from the execution of the order would exceed the specified maximum value. To this end, the issuing authority should, inter alia, indicate in the confiscation certificate the value of the assets, if known, in each executing state, so that the executing authorities can take this into account, maintain the necessary contact and dialogue with the authorities of enforcement in respect of the goods to be seized and to immediately inform the relevant enforcement authority(ies) if it considers that there may be a risk that the enforcement may concern an amount greater than the maximum amount. Where appropriate, Eurojust could exercise a coordinating role within its sphere of competence to avoid excessive confiscation.

The issuing authority should inform the executing authority if the authority of the issuing State receives an amount of money paid in connection with the confiscation order, it being understood that the executing State should only be informed if the amount paid in connection with the order affects the outstanding amount to be forfeited under the order.

Following the execution of a freezing order, and following a decision to recognize and enforce a confiscation order, the enforcing authority should, as far as

[12] In this sense, see the Judgment of November 7, 2019 issued by the European Court of Human Rights, in the case of *Apostolovi* vs. *Bulgaria*, as well as the Judgment of March 3, 2020, delivered by the European Court of Human Rights, in the case of *Filkin* vs. *Portugal*, available at www.echr.coe.int.

possible, inform known affected persons of such enforcement or decision. To this end, the executing authority should make all reasonable efforts to identify the affected persons, to verify how they can be found and to inform them of the execution of the freezing order or of the recognition and enforcement decision of the confiscation order. In fulfilling this obligation, the executing authority could request assistance from the issuing authority, for example when the affected persons appear to reside in the issuing state.

The enforcement of a freezing order or a confiscation order should be governed by the law of the executing State and only the authorities of that State should be competent to decide on enforcement procedures.

4. The definition and scope of the concept of „precautionary measures' in the Romanian criminal procedure.

A part of the Romanian legal doctrine[13] defines the preventive measures as measures of real coercion, consisting in the unavailability of assets and income belonging to the suspect, the defendant, the civilly responsible party or other persons, while another part of our doctrine[14] defines the preventive measures from in view of their procedural character, they represent real procedural measures that have the effect of making available movable and immovable assets belonging to the suspect, the defendant, the civilly responsible party or that are in the possession or property of other persons for a specific purpose[15].

From our point of view, the real constraint, representing only the effect of a restriction with a real character, must be analyzed as a natural consequence of the measure, being subsequent, but the definition offered to the measure must highlight the reassurance character, i.e. the preventive purpose of the measure.

If the real coercion were regarded as the main attribute of the preventive measure, on the one hand, an error would be induced between the real prevention and the real punitive component, and on the other hand, a confusion would be created between the procedural preventive purpose (insurance) of the real measure and the effective patrimonial compensation of the civil party or the covering of court costs or the payment of the criminal fine, the latter relating to the termination of the criminal and/or civil action within the criminal process (highlighting the punitive nature).

Professor Siegfried Kahane, in defining precautionary measures[16], also starts from the objective/positivist aspect of the measure, i.e. the unavailability of the targeted assets through the establishment of the seizure, positioning the factual consequence prior to the method of legal realization.

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[13] See Grigore Gr. Theodoru, Ioan-Paul Chiș, *Tratat de drept procesual penal*, 4th edition, Hamangiu Publishing House, Bucharest, 2020, p. 547; Anastasiu Crișu, *Drept procesual penal – Partea generală*, 4th edition, revised and updated, Hamangiu Publishing House, Bucharest, 2020, p. 578.

[14] Ion Neagu, Mircea Damaschin, *Tratat de procedură penală. Partea generală*, 4th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2022, p. 748; Nicolae Volonciu, Andreea Simona Uzlău *et alii*, *Noul Cod de procedură penală - comentat*, Hamangiu Publishing House, Bucharest, 2014, p. 567.

[15] The purpose or finality of the precautionary measures consists in avoiding the concealment, destruction, alienation or subtilization (evasion) of immovable or movable assets from the effective foreclosure.

[16] We have in mind the definition of preventive measures expressed by prof. Siegfried Kahane in Title IV called 'Preventive measures and other procedural measures', in the content of the monumental work *Explicațiile teoretice ale Codului de procedură penală. Partea generală*, by Vintilă Dongoroz, Siegrfied Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu, Rodica Stănoiu, Romanian Academy Publishing House, Bucharest, 1975, p. 337.

Unfortunately, the doctrinal definitions do not highlight two defining components of the measure, namely its temporary and preventive character and its proportionality.

From a technical-legal perspective, provided by art. 249 para. (1) of the Penal Code, the insurance measure can be defined as a form of real prevention, consisting in the temporary restriction of the exercise of one or some of the attributes of real rights[17], which has as its object immovable and movable assets, present and future , belonging to the suspect, the defendant, the civilly responsible party or in the property or possession of third parties[18], of a patrimonial value close to the damage caused and the criminal consequences generated, prevention materialized by the effective unavailability of the assets in order to prevent their concealment, destruction, alienation or theft from prosecution and enforcement.

Unfortunately, the doctrinal definitions do not highlight two defining components of the measure, namely its temporary and preventive character and its proportionality.

Even if we would be criticized that the definition provided would be more of an explanation of the precautionary measure, overcoming the synthetic form of its main features, we still believe that the temporality and proportionality of the real measure belong to its essence, requiring the emphasis to take place even within definition.

Although in para. (2) of art. 249 of C. pr. pen.[19] only seizure is provided as a form of exercise of non-disposal in the framework of preventive measures, however, as, justly, it has been observed in the criminal procedural legal doctrine[20], from the set of criminal procedural regulations, there are 3 ways of exercising preventive measures, respectively: the sequestration itself, the mortgage notation in the land register and the insurance attachment.

Although we are in the framework of an injunctive measure that has a limiting purpose and is well known from the moment of its disposition, however, nowhere does our legislator include proportionality among the criteria that must be taken into account at the time of ordering the injunctive measure, as well as during its development, although , as I stated above, the Union legislation requires the member states to regulate and respect in domestic law the proportion in terms of the quantitative extent of the unavailability in order to prevent arbitrariness and abuse by the authorities.

The criterion of proportionality concerns the balance between the value of the damage caused, the criminal consequences of a criminal sanction and the amount of assets made available from a person's patrimony.

For example, it would be disproportionate to seize by seizing the

[17] Restrictive form of rights that, as a rule, concerns the component of the abusus disposition and, in some situations, also applies to *the usus* and *fructus* components.

[18] Considering the principle of legality of the criminal process, regulated in art. 2 of C. pr. pen., seeing the intrusive nature of the precautionary measure, in order to prevent any abuses, we believe that the procedural subjects or the parties targeted by real measures restricting rights should be explicitly determined/indicated by the legislator.

[19] The reference is to the Criminal Procedure Code in force, adopted on the basis of Law no. 135/2010 regarding the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 486 of July 15, 2010, entered into force on February 1, 2014, according to art. 103 of Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the completion and modification of some normative acts that include criminal procedural provisions, published in the Official Gazette of Romania, Part I, no. 515 of August 14, 2013.

[20] See, I. Neagu, M. Damaschin, *op. cit.*, p. 749.

entire patrimony of a commercial company worth over one million euros in order to ensure the payment of a possible fine that cannot exceed the amount of 10,000 euros, or the seizure of a 200,000 euro villa belonging to the spouses for ensuring a future confiscation of 70 euros that could be ordered against one of the spouses.

The ratio between the value of the damage and criminal costs/sanctions, on the one hand, and the value of the assets made available is only one of the forms of establishing proportionality.

In addition to this criterion, in determining the proportionality of the measure, other criteria whose objectivity is obvious must be taken into account, such as:

a) the exercise or not of the civil action within the criminal proceedings;

b) solidarity or individuality of civil liability;

c) the patrimonial guarantees offered/made available to the judicial bodies by the person(s) targeted by the measure in the form of a bond;

d) voluntary compensation and/or reconciliation between the parties;

The criterion of proportionality must be verified throughout the maintenance of the precautionary measure and in cases where there are reasons for reducing the extent of the measure or terminating the measure, the legislator should grant the judicial body the right to order, ex officio, its removal.

5. Conclusions and Ferenda law proposals

Preventive measures, represent a way of prevention with a real character, which can only be taken within the framework of the criminal process, having a well-established purpose and being available for a determined period.

Considering the intrusive and restrictive character of real rights that is the object of the precautionary measures, we believe that it is necessary to rethink the procedural institution of the preventive seizure and introduce some objective criteria into the content of the regulatory legal provisions, based on which the proportionality test of the measure should be carried out , both at the time of disposition and during its existence.

In this sense, by law ferenda, we propose the introduction in the content of art. 249 of C. pr. pen of some objective criteria, able to ensure compliance with proportionality, as well as the regulation of some mechanisms for verifying this criterion during the course of the measure. It would also be necessary to specify the temporary nature of the measure in the legal content of the criminal procedure texts.

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SOME CONSIDERATIONS REGARDING MEDIATION IN CRIMINAL PROCEEDINGS: HARMONIZING THE BENEFIT OF THE DOUBT WITH THE TENETS OF SECTION 67, SUBSECTION (2) OF LAW NO. 192/2006

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Abstract

Within the annals of Romanian legal practice, the mediation process has long been entrenched, holding its ground as a voluntary recourse for resolving conflicts entangled within criminal matters, alongside other mechanisms designed to absolve criminal culpability. This paper endeavours to scrutinize the milieu wherein this legal framework may encroach upon the sacrosanct principle of the benefit of the doubt, surveying the jurisprudence of the European Court of Human Rights and the prevailing domestic judicial ethos.

Keywords: *mediation, benefit of the doubt, European Court of Human Rights, European Court of Justice.*

1. Succinct preliminary reflections on mediation as a legal fixture

Per observations by legal pundits, the incorporation of mediation into the Romanian legal landscape transpired in the wake of the new millennium. A prerequisite for Romania's accession to the European Union entailed the codification of mechanisms facilitating alternative dispute resolution. Such measures were envisaged to bolster the efficacy of judicial proceedings and forestall the inundation of the legal apparatus[1].

In line with the directives[2] outlined by the European Commission for the Efficiency of Justice (CEPEJ) to enhance the implementation of recommendations concerning mediation in criminal matters, a fresh action plan has been earmarked for prioritization by the Council of Europe. Its aim is to streamline the effective enforcement of the instruments and regulations therein pertaining to alternative dispute resolution methodologies.

It has come to light that these nations have encountered sundry deficiencies in the domain of mediation between victims and wrongdoers, stemming from hurdles such as a dearth of awareness regarding restorative justice and mediation, alongside the absence of mediation procedures between victims and delinquents—both pre- and post-adjudication. Furthermore, the authority to steer parties towards mediation was vested solely in a solitary criminal entity, mediation costs proved substantial, and there was an

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[1] Ilie Dorin, Parascheva Dorin, *Procesul de mediere – conflict – comunicare - acord*, University Publishing House, Bucharest, 2018, p. 13-18.

[2] CEPEJ(2007)13, see entire article on https://rm.coe.int/comisia-europeana-pentru-eficacitatea-justitiei-cepej-ghid-pentru-o-ma/1680747ba2.

inadequacy of specialized professional training, resulting in mediators with markedly disparate academic credentials.

To this end, the aforementioned guidelines highlight the importance for member states to recognize and champion both existing action plans in the realm of mediation and newly formulated strategies. Such support can be extended through financial contributions or other means of assistance. Member states were encouraged to boost accessibility by raising awareness, promoting professional training, and exercising suitable oversight. The same guidelines underscore the pivotal role of magistrates and other legal bodies in the sphere of criminal law in facilitating procedures dealing with various disputes arising from criminal offenses. This assistance entails furnishing information and arranging awareness-raising sessions for both victims and offenders concerning the available avenues. Furthermore, the guidelines stress the significance of legal representation, proposing the implementation of an obligation or, at the very least, a recommendation for solicitors to advise parties on the potential benefits of engaging in mediation procedures. Naturally, the CEPEJ guidelines also cover directives pertaining to the quality of mediation action plans, confidentiality, the professional credentials of mediators, the involvement and safeguarding of children and minors, codes of conduct, international mediation, victims' rights, offenders' rights, mediation expenses for the parties, and other associated aspects.

In 2006, following several prior attempts, Law No. 192 was enacted and published in the Official Gazette No. 441 on May 22nd, 2006. Over the years, Romanian legislators have endeavoured to refine the legislation pertaining to this legal institution.

Mediation is elucidated as an alternative and discretionary approach to resolving disputes amicably, employing third-party individuals accredited as mediators. These mediators are obligated to maintain a stance of neutrality, impartiality, and confidentiality (Section 1 of Law No. 192/2006).

Sections 67 through 70 delineate specific provisions of note, as they regulate the mediation process within the sphere of criminal law.

The Romanian legislature has determined that mediation operates akin to the withdrawal of a prior complaint and the reconciliation of the parties in cases where such legal institutions are applicable. Consequently, we deduce that the same conditions required for these two institutions will similarly apply, with necessary adjustments, to mediation for it to be efficacious. It is also imperative to note an aspect derived from Decision No. XXVII of September 18th, 2006, of the High Court of Cassation and Justice, which entertained a motion for an appeal in the interest of the law. Thus, in the application of the provisions of Article 11, paragraph 2, letter b, with reference to Article 10, paragraph 1, letter h, second thesis of the former Code of Criminal Procedure, the judicial authorities did not adopt a uniform standpoint. It was observed that in the case of offenses for which reconciliation of the parties eliminated criminal liability, disparate solutions were pronounced. In this respect, certain courts held that the desire for reconciliation expressed by the aggrieved party through a request could be recognised, resulting in the cessation of criminal proceedings, even in the absence of both the defendant and the aggrieved party from the proceedings. Others opined that the conclusion of criminal proceedings subsequent to the reconciliation of the parties could occur even without the defendant present, deeming that they implicitly consented to the desires of the

aggrieved party. A third viewpoint pertained to the stance of other courts, which held that for the cessation of criminal proceedings, the parties must genuinely convey their agreement regarding complete and unequivocal reconciliation.

The High Court of Cassation and Justice deemed the latter perspective as accurate, contending that in accordance with the stipulations of Article 132 of the erstwhile Penal Code, 'the reconciliation of the parties in cases provided by law eliminates criminal liability and extinguishes the civil action.' Conversely, Article 10, paragraph 1, letter h) of the former Code of Criminal Procedure asserts that criminal action cannot be instigated, and if initiated, cannot be pursued if the prior complaint has been retracted or if the parties have reconciled.

From the aforementioned legal texts, it follows that reconciliation of the parties, in addition to eliminating criminal liability, also extinguishes the civil action exercised within the criminal proceedings, which constitutes an accessory to the criminal action.

The High Court also highlighted that unlike the withdrawal of the prior complaint, which is a unilateral act of volition, the reconciliation of the parties constitutes a bilateral action, inherently requiring the agreement of both the aggrieved individual and the defendant. It's worth noting that reconciliation is individual and must be conclusive, unambiguous, clearly demonstrating the agreement of the parties who have opted to reconcile. Consequently, unlike the scenario of the prior complaint, where the withdrawal applies universally and impacts all involved parties, reconciliation operates on a personal basis, absolving criminal liability solely concerning the defendant with whom the aggrieved person has reconciled.

From this standpoint, it has been observed that, as per the stipulations of Article 11, paragraph 2, letter b), in conjunction with Article 10, paragraph 1, letter h), second clause of the former Code of Criminal Procedure, the closure of criminal proceedings may only be decreed when the court directly confirms the consent of both the defendant and the aggrieved party to reconcile, as expressed in the courtroom, either in person or through duly authorized representatives, or when evidenced by notarized documents.

For the reasons stated, the Supreme Court accepted the appeal in the interest of the law filed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and decided that the termination of criminal proceedings in cases where the reconciliation of the parties eliminates criminal liability can be ordered by the court only when the judicial panel directly observes the total, unconditional, and definitive consent of the defendant and the aggrieved person to reconcile, expressed in the court session by these parties, personally or through persons with power of attorney, or through notarised documents.

2. Mediation in Criminal Proceedings and the Presumption of Innocence from the Perspective of Article 67, Paragraph (2) of Law No. 192/2006

By means of Government Emergency Ordinance No. 24/2019, amending and supplementing Law No. 211/2004 concerning certain measures to ensure the protection of victims of crimes, as well as other regulatory enactments, issued in the Official Gazette No. 274 dated 10th April 2019, the provisions of Article 67, Paragraph (2) of Law No. 192/2006 concerning mediation and the organization of the mediator profession have been revised.

Consequently, the current rendition of the law reads as follows: *concerning criminal proceedings, the provisions relating to mediation are applicable solely in instances involving offenses for which, in accordance with the law, the withdrawal of the prior complaint or the reconciliation of the parties absolves criminal liability, provided the perpetrator has acknowledged the offence before the judicial authorities or, as stipulated in Article 69, before the mediator*.

From the preface of the Emergency Ordinance, it is discernible that the impetus behind the formulation of this regulation was to transpose a succession of provisions originally found in Directive 2012/29/EU of the European Parliament and of the Council dated 25th October 2012, instituting minimum standards on the rights, support, and protection of victims and superseding Council Framework Decision 2001/220/JHA, which was published in the Official Journal of the European Union, Series L, No. 315 dated 14th November 2012.Mediation in Criminal Proceedings and the Presumption of Innocence from the Perspective of Article 67, Paragraph (2) of Law No. 192/2006.

Before making assessments regarding the national legislator's choice regarding the transposition of the provisions of the directive into domestic law, it is important to underline that the entire content of the European legislative act is focused on the rights of the victim in criminal proceedings. In this context, Article 12 of the directive expressly provides for the minimum guarantees that must be afforded to persons who have the status of victim of a crime and who opt for restorative justice services[3], such as mediation. These include: *the victim's predominant interest, under conditions of safety and with their freely given and informed consent, which may be withdrawn at any time; complete and objective information provided to the victim prior to initiating any procedure;* ***the acknowledgment of the offence by the perpetrator****; the voluntary nature of any agreement reached; the consideration of such agreements in subsequent criminal proceedings; and the confidentiality of discussions within restorative justice procedures, which do not take place in public, with mention of exceptional situations in which disclosure may occur*[4].

It's undeniable that the directive's intent was to establish a set of principles aimed at bolstering the protection of the rights and interests of victims of crime by the authorities of the Member States, rather than burdening individuals accused of committing crimes excessively in order for them to avail themselves of the benefits of mediation. We acknowledge that, considering the directive's objective, the condition outlined in Article 12 pertains to an admission of the offence by the accused individual, within the private realm of mediation, which facilitates mutual understanding between the parties and the amicable resolution of the conflict. Notably, there's no provision mandating that mediation be contingent upon an admission of guilt before the judicial authorities. Supporting this interpretation, we also highlight the directive's provision explicitly stating that the victim's rights don't encroach upon the rights of the perpetrator of the crime, along with a similar provision in

[3] The term r*estorative justice'* is defined within the Directive as *'any process whereby the victim and the perpetrator of the offense may, if they freely consent, actively engage in resolving the issues arising from the offense with the assistance of an impartial third party*'.

[4]https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32012L0029&from=HU, [Last accessed: 18.11.2022].

Recommendation (99)19[5], which posits that while the mediation process should ideally commence with both parties acknowledging the primary facts of the case, participation in mediation shouldn't be construed as evidence of guilt in subsequent criminal proceedings.

However, in the process of transposing the directive, by amending the provisions of Article 67, paragraph (2) of Law No. 192/2006, the Romanian legislator has, in our opinion, unjustifiably departed from the principles outlined in the directive and has reconfigured the institution of mediation in criminal proceedings by complicating the situation of the accused person, conditioning the effects of mediation on the criminal side of the process on the acknowledgment of the offence before the judicial authorities, but imposing this obligation only on the perpetrator of the offence.

Firstly, we note an initial error on the part of the legislator, who incorporated the notion of 'author of the offense' into Article 67, paragraph (2) of Law No. 192/2006, disregarding the definition provided for the phrase in the directive, where it is specified that the term refers to a person who has been convicted of committing an offense, but also to a person suspected or accused before any finding of guilt or conviction, with the express clarification that the phrase used does not affect the presumption of innocence.

Although the legislator's intention was likely aimed at the perpetrator, the term 'author' utilized in the current regulation fosters a distinct and unjust legal disparity among individuals involved in the commission of a crime. We observe that, pursuant to the stipulations of Article 83, section g) of the Code of Criminal Procedure, the attribute to appeal to a mediator, in cases sanctioned by law, is a lawful entitlement extended to the accused, irrespective of the role in which they are suspected of partaking in the act proscribed by criminal law, whether as an author, co-author, instigator, or accomplice. The principle of legal parity in treatment among participants in the commission of an act also emanates from the provisions delineated in Article 49 of the Criminal Code. These provisions stipulate that the penalty applicable to participants aligns with that prescribed by law for the author, with each individual's contribution to the offense's commission and the general criteria for customization delineated by law being considered in the customization process.

Therefore, under such conditions, we consider that the current content of Article 67, paragraph (2) of Law No. 192/2006 is likely to create a discriminatory and disadvantageous situation for the accused - the perpetrator in terms of substantive criminal law who opts for the conclusion of a mediation agreement, compared to the accused - instigator or accomplice, for whom the legislator has not established the condition of acknowledging the offence in order to benefit from the effects of concluding a mediation agreement. Although the principle of equality does not require legal uniformity, a violation will be noted when differential legal treatment is applied to similar factual situations that do not justify differentiation, without there being an objective and reasonable justification, as is the case here.

At the same time, the principle of equality of treatment, provided for by

[5] The Recommendation No. R(99)19 of the Committee of Ministers of the Council of Europe, addressed to the Member States on mediation in criminal matters, adopted by the Committee of Ministers on 15th September 1999 at its 679th meeting of ministers' representatives, is available at https://irdo.ro/irdo/pdf/539_ro.pdf, [Last accessed: 19.11.2022].

European Union law, which member states must respect even in the process of transposing the Directive, requires a uniform regulation of all similar situations because, otherwise, differential treatment could also be applied to persons who have fallen victims of crimes and who would have the opportunity for unconditional mediation with the instigator and accomplice, but not with the perpetrator, who is conditioned by the acknowledgment of the offence before the judicial authorities. However, the less attractive the mediation procedure is for the accused, the less likely it is that the victim will benefit from the advantages of mediation, should they opt for it, and so the method of regulation chosen by the national legislator is in disagreement with the purpose pursued by the Directive.

It becomes self-evident that the provisions of Article 67, paragraph (2) of Law No. 192/2006 are likely to infringe upon the equality of rights, as provided for by Article 16, paragraph (1) of the Romanian Constitution, as well as upon the provisions of Article 124, paragraph (2) of the Romanian Constitution, which stipulate that judicial is unified, impartial, and equal for all, to the extent that the said regulations will constrain the court to withhold from conferring the effects provided by Article 396, paragraph (6) and Article 16, paragraph (1) letter g) of the Code of Criminal Procedure to the mediation agreement if the accused - perpetrator has not acknowledged the deed before the judicial authorities, even though they participated in the mediation procedure together with the aggrieved person, and this was finalized through a mediation agreement that constitutes the expression of the parties' agreement to amicably resolve the conflict so that the accused is no longer held criminally liable.

Secondly, from the corelation of the provisions of Article 16, paragraph (1), letter g) final clause of the Code of Criminal Procedure with those of Article 396, paragraph (6) of the Code of Criminal Procedure, it follows that the court, as it verifies whether the mediation agreement was concluded in accordance with the law, is also called upon to verify the condition of the acknowledgment of the deed by the perpetrator before the judicial authorities. Such an analysis may entail several procedural difficulties, which we will further address in the continuation of this exposition.

A first issue that arises is to what extent must the acknowledgment of the offence, referred to in the provisions of Article 67, paragraph (2) of Law no. 192/2006, meet the same conditions as in the case of the expression of the will of the defendant who opts for the simplified procedure of acknowledging the indictment, the legal provision being devoid of predictability in this regard. Thus, it is worth recalling that the procedure for acknowledging the indictment entails, among other conditions, the defendant's full acknowledgment of the offence attributed to them by the court's filing act, and the acknowledgment must be total and unconditional in all factual aspects[6]. Consequently, judicial investigation is compressed, meaning that no evidence is admitted other than written documents, leading to a reduction in the duration of judicial procedures and lower costs associated with the administration of justice[7].

[6]Victor Văduva, *Judgement in the case of an admission of the indictment, Section 320[1] of the Criminal Procedure Code, Commented Jurisprudence,* Hamangiu Publishing House, Bucharest, 2013, p. 65.

[7]Bogdan Micu, Radu Slăvoiu, Andrei Zarafiu, *Procedură penală*, Hamangiu Publishing House, Bucharest, 2022, p. 615; see also Andrei-Viorel Iugan, *Procedură penală – partea specială*, C.H. Beck Publishing House, Bucharest, 2024, p. 247.

Additionally, in judicial practice, it has been considered that in the case of criminal participation, the defendant can benefit from the provisions regarding the simplified procedure only if the acknowledgment also concerns the contribution of other persons involved[8].

Delving into the tenets delineated in Decision no. 397 of June 15, 2016, by the Constitutional Court[9], let us consider a scenario where the parties engage in the mediation procedure subsequent to the culmination of the criminal investigation phase, which ended in an indictment, with the defendant adopting a somewhat evasive stance, exercising their right to remain silent, or disclaiming involvement in the offense during the criminal investigation phase. However, when faced with the court, the same defendant opts to admit to the offense, presumably aiming to avail themselves of the mitigating ramifications of mediation. Yet, envisaging the procedural framework wherein such an admission could transpire proves to be rather perplexing. This is owing to the stipulation that the acknowledgment of the offense must immediately succeed the procedural juncture of perusing the indictment, specifically, the notification of the accusation and procedural entitlements.

In that very same hypothetical scenario, the compulsory attendance of the defendant afore the court to admit to the deed flies in the face of the ruminations set forth in paragraph 39 of the aforementioned decision. Here, the Constitutional Court dissected the modus operandi by which the court acknowledges the existence of a mediation pact and observed that, pursuant to the provisions of Article 70 paragraph (5) of Law no. 192/2006, it suffices for the mediator to furnish the mediation pact and the mediation closing report in their original guise, sans the necessity of trotting out a notarised document or corralling the parties afore the court, as is the wont in the case of reconciliation.

Although Law no. 192/2006 posits that the sealing of a mediation pact vis-a-vis the criminal charge constitutes a cause that absolves one of criminal culpability, courtesy of the amendment proffered by Law no. 97/2018, it behoves us to regale in this discourse the ruminations espoused by the Constitutional Court in paragraph 35 of Decision no. 397/2016. Therein, it is opined that the sealing of a mediation pact regarding transgressions amenable to reconciliation essentially serves as a conduit for reaching amity, as a causative agent for the remission of criminal liability.

Unlike a reconciliation inked afore the bench, contingent purely on the mutual agreement of the defendant and the aggrieved party to settle matters entirely, unreservedly, and irrevocably, absent any procedural prerequisite mandating the defendant to explicitly concede to the

[8] High Court of Cassation and Justice, Criminal Chambre, Decision 2479 of September 8th 2014, www.scj.ro Bucharest Court of Appeals, 2nd Criminal Chambre, Decision 2515/R of December 15th 2011, unpublished, Bucharest Court of Appeals, 1st Criminal Chambre, Decision 1063/A of August 4th 2022, unpublished.

[9] By Decision No. 397 of 15th June 2016 regarding the exception of unconstitutionality of the provisions of Article 67 of Law No. 192/2006 on mediation and the organization of the mediator profession, in the interpretation given by Decision No. 9 of 17th April 2015 of the High Court of Cassation and Justice — the Joint Panel for the resolution of legal issues in criminal matters, and of Article 16 paragraph (1) letter g) final thesis of the Code of Criminal Procedure, published in the Official Gazette No. 532 of 15th July 2016, the Constitutional Court admitted the exception of unconstitutionality and established that the provisions of Article 67 of Law No.192/2006 on mediation and the organization of the mediator profession, in the interpretation given by Decision No. 9 of 17th April 2015 of the High Court of Cassation and Justice — the Joint Panel for the resolution of legal issues in criminal matters, are constitutional to the extent that the conclusion of a mediation agreement concerning offenses for which reconciliation is possible shall have effects only if it occurs before the reading of the indictment by the court.

offence, the stipulations delineated in Article 67 paragraph (2) of Law no. 192/2006 posit the prerequisite that the perpetrator must own up to the offence before the judicial authorities. This provision, however, is apt to engender a rather thorny predicament, in terms of criminal culpability, for a defendant who enters into a mediation accord, in contrast to another who strikes a reconciliation pact before the bench, **albeit the desired denouement of both being identical, with the cessation of criminal proceedings being pronounced in either scenario.**

We also view the requirement for the 'author' to admit to the offence as encroaching upon their presumption of innocence and the safeguards afforded by the benefit of doubt, namely the privilege to remain silent and the liberty not to incriminate oneself, acknowledged for any individual facing criminal allegations.

As elucidated by scholars[10], this principle gained independence and assumed statutory form during the 18th century, subsequent to its initial proclamation in the French Declaration of the Rights of Man and of the Citizen of 1789. The right to remain silent and the presumption of innocence constitute two legal and societal assurances automatically granted to those accused of perpetrating criminal transgressions[11].

In the realm of national law, the presumption of innocence is governed by Article 23, paragraph (11) of the Romanian Constitution, which dictates that an individual is to be presumed innocent until proven otherwise by a definitive ruling rendered by a criminal tribunal. This principle is also echoed in Article 4, paragraph (1) of the Code of Criminal Procedure, wherein it is stated that every individual is to be deemed innocent until their culpability is established by a conclusive verdict in a criminal court.

Within European legislation, the presumption of innocence finds sanctuary in Article 48, paragraph 1 of the Charter of Fundamental Rights of the European Union. Moreover, in the European Convention on Human Rights[12], it is delineated as a safeguard for the right to a just trial, as articulated in Article 6, paragraph 2 ('Every individual accused of a criminal offence shall be presumed innocent until proven guilty in accordance with the law')[13].

The nexus between the presumption of innocence and the right against self-incrimination is a fundamental aspect of criminal jurisprudence, prominently highlighted in the jurisprudence of the European Court of Human Rights. The Court has consistently found breaches of Article 6(2) of the Convention when the onus of proof has unjustly shifted from the prosecution to the defence.

Similarly, within the realm of Romanian law, Article 99(2) of the Code of Criminal Procedure explicitly enshrines the presumption of innocence for suspects or defendants, affording them the right not to prove their innocence and the privilege of remaining silent in order to avoid self-incrimination.

[10] Ion Neagu, Mircea Damaschin, *Tratat de procedură penală – partea specială*, Universul Juridic Publishing House, Bucharest, 2022, p. 96.

[11] Doru Pavel, 'Reflecții asupra prezumției de nevinovăție', *Revista Română de Drept,* issue 10/1978, p. 10, quoted by Ion Neagu, Mircea Damaschin, *op. cit.*, p. 99.

[12] Judgement by the ECHR of March 20th 2001, *Telfner v. Austria.*

Judgement by the ECHR of December 17th 1996, Saunders v. the United Kingdom of Great Britain and Northern Ireland.

[13] Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului*, course notes, 2nd edition, Hamangiu Publishing House, Bucharest, 2024, p. 203.

To invert the presumption of innocence requires the prosecution to establish, beyond a reasonable doubt, both the existence of the offence and the culpability of the accused. Consequently, conditioning the invocation of any impediment to prosecution or initiation of criminal proceedings—such as mediation—on the admission of guilt by the accused, especially when other legal impediments take precedence under the law, amounts to a violation of the accused's entitlement against self-incrimination.

In the jurisprudence of the European Court of Human Rights, it has been established that the right to silence is fundamental to the essence of the right to a fair trial and entails that in a criminal case, the prosecution must build its case without resorting to evidence obtained from the accused against their will, through coercion or pressure[14]. It is our opinion that unquestionably, in the present case, the accused person is subjected to a certain pressure to admit to the offence, considering that otherwise, they will be deprived of the benefits of mediation, even in the absence of guarantees regarding obtaining a legal and secure benefit, given that any potential mediation agreement is hypothetical, with no assurance for the accused.

Therefore, it is observed that in an analysis through the lens of constitutionality, the amendment to the provisions of Article 67 paragraph (2) of Law no. 192/2006 through Emergency Ordinance no. 24/2019 seems to infringe upon the constitutional principle of equality before the law, the principle of equal treatment, as well as the procedural rights that both national legislation and the Strasbourg Court unconditionally recognize for individuals accused in criminal matters.

3. Proposals for Legislative Reform

Following the analysis presented earlier, we propose, as a matter of law reform, that the provisions of Article 67(2) of Law No. 192/2006 should contain the following formulation: '*In the criminal aspect of the process, the provisions regarding mediation shall apply only in cases concerning offences for which, according to the law, withdrawal of the prior complaint or reconciliation of the parties removes criminal liability, if the offender has admitted the deed before the mediator.'*

Additionally, we suggest specifying in a new paragraph of Article 67 of Law No. 192/2006*, that the statement made by the perpetrator for the purpose of concluding the mediation agreement cannot be used, against their will, as evidence in the criminal proceedings, for the purpose of resolving the case according to the common law criminal procedure.*

4. Conclusions

Until a legislative change is made in line with the aforementioned proposals, the role of the national judge in applying the principle of conform interpretation, as established in the case law of the Court of Justice of the European Union, should not be overlooked. This principle entails interpreting national law in light of the text and purpose of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, in order to identify a solution consistent with its intended purpose.

[14] Judgement by the ECHR of July 11th 2006, *Jalloh v. Germany*.

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