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THE LEGAL FRAMEWORK OF SECURITISATION ON THE ROMANIAN CAPITAL MARKET

Cristian GHEORGHE[*]

Abstract

Securitisation scheme enables credit institutions to refinance a set of loans, exposures or receivables, such as residential loans, auto loans or leases, consumer loans, credit cards or trade receivables. These loans, transferred to a special purpose vehicle, are transformed in tradable securities offered to investors.

The lender organises loans into different risk categories for investors, thus giving them access to investments in loans and other exposures to which they normally would not have direct access. Returns to investors are originated in payments made by debtors of the underlying loans.

Domestic law regarding securitisation (Law no 31/2006) does not meet the market expectations in order to generate securitisation schemes. Moreover, the domestic law came into conflict with European legislation (Regulation UE 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation).

Finally, domestic law has been repealed to leave room for application of the European regulation.

Keywords: *securitisation, capital market, securitisation special purpose entity (SSPE), originator, investment firm.*

1. Introduction

This paper covers the matter of securitisation, a still new topic for Romanian capital market. In traditional Western economies securitisation scheme has proven useful in debt refinancing. In the most common situation securitisation allows credit institutions to refinance a set of loans. Investors acquires tranches of these loans as securities issued by the collectors of these loans, SSPE (securitisation special purpose entity).

Securitisation proved to be an important element of developed financial markets. It allows for a broader distribution of financial risk and can help free up creditors" balance sheets to allow for further lending to the economy. Securitisation creates a bridge between credit institutions and capital markets[1].

We will study the securitisation process in terms of Romanian law. First law in the field was Law no 31/2006) that did not meet the market expectations in order to generate securitisation schemes. Moreover, the domestic law came into conflict with European legislation (Regulation UE 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent

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[1] Regulation (EU) no 2017/2402, Preamble 4. The Regulation recognises the risks of increased interconnectedness and of excessive leverage that securitisation raises, and enhances the microprudential supervision by competent authorities of a financial institution's participation in the securitisation market.

and standardised securitisation). In present the domestic law has been repealed to leave room for application of the European regulation.

2. Concept of securitisation

Securitisation is a mechanism used by the lenders, *originato*rs in terms of securitisation, mainly credit institutions, to refinance a set of loans, exposures or receivables, such as residential loans, auto loans or leases, consumer loans, credit cards or trade receivables.

In principle, these originators" loans are transferred to a SSPE (securitisation special purpose entity), although securitisation may involve the transfer of risk achieved by the use of credit derivatives. In this case the exposures being securitised remain exposures of the originator.

The credit risk associated with exposures is "tranched". "Tranche" means a segment of the credit risk (associated with an exposure or a pool of exposures). Usually securitisation entity (SSPE) initiates a programme of securitisations. The securities issued by this programme predominantly take the form of asset-backed commercial paper (ABCP) with an original maturity of one year or less.

The lender organises loans into different risk categories for different investors, thus giving investors access to investments in loans to which they normally would not have direct access. Returns to investors are originated in payments made by debtors of the underlying loans.

The selling of a securitisation position is prohibited to a retail client unless the seller of the securitisation position has performed a suitability test[2] with the outcome that the securitisation position is suitable for that retail client.

Regarding institutional investor, European Regulation lay down due-diligence requirements. Prior to holding a securitisation position, an institutional investor shall verify that the originator or original lender grants all the credits (giving rise to the underlying exposures) on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing those credits[3].

Risk retention principle applying to a securitisation obliges the originator or sponsor to retain a material net economic interest in the securitisation of not less than 5 %. That interest shall be measured in a manner explained by Regulation[4].

Transparency requirements for originators, sponsors and SSPEs.[5] The originator, sponsor and SSPE of a securitisation shall make certain information available to holders of a securitisation position and competent authorities. Such information includes: information on the underlying exposures on a quarterly basis; all underlying documentation that is essential for the understanding of the transaction; where a prospectus has not been drawn up, a transaction summary or overview of the main features of the securitisation; quarterly investor reports, any inside information relating to the securitisation that the originator, sponsor or SSPE is obliged to make public[6].

Details of a securitisation are collected by a repository. A securitisation repository

[2] In accordance with Article 25(2) of Directive 2014/65/EU.
[3] Art. 5 Regulation (EU) no 2017/2402.
[4] Art. 6 Regulation (EU) no 2017/2402.
[5] Art. 7 Regulation (EU) no 2017/2402.
[6] In accordance with Article 17 of Regulation (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation.

shall be a legal person established in the Union and shall comply at all times with the conditions for registration. A securitisation repository shall, without undue delay, notify ESMA of any material changes to the conditions for registration[7].

3. Participants to securitisation

SSPE "securitisation special purpose entity" means a corporation or other legal person which is established for the purpose of carrying out one or more securitisations schemes, the activities of which are limited to those appropriate to accomplishing that objective. SSPE is intended to isolate the obligations of the SSPE from those of the originator who transfers the exposures.

"Originator" means a person which was involved in the original agreement which created the obligations of the debtor giving rise to the exposures being securitized. It can also be the purchaser of a third party"s exposures on its own account and then securitises them. *"Original lender"* means an entity which concluded the original agreement which created the obligations of the debtor giving rise to the exposures being securitised[8].

"*Sponsor*" means a credit institution[9], located in the Union or not, or an investment firm[10] other than an originator, that establishes and manages an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities. Sponsor can delegates the day-to-day active portfolio management involved in that securitisation to an entity authorised to perform such activity such an undertakings for collective investment in transferable securities (UCITS)[11], an Alternative Investment Fund Managers (AIFM)[12] or investment firm[13].

"*Investor*" means a natural or legal person holding a securitisation position.

"Securitisation repository" means a legal person that centrally collects and maintains the records of securitisations[14].

4. Legal framework

Domestic Law. Former internal law regarding securitisation (Law no 31/2006) did not meet the market expectations in order to generate securitisation schemes.

Securitisation was defined as a financial operation initiated by an investment vehicle (IV) that acquires receivables, groups and affects them to guarantee a securities issue. Receivables subject to securitisation can arise from credit agreements (including mortgage credit agreements, credit agreements for the purchase of cars, contracts for the issuance of credit cards), leasing contracts, term payment contracts (including sale-purchase contracts with payment in instalments) and finally any other debt securities provided that the rights they confer may be the subject of an assignment.

Under this domestic law an investment vehicle was an entity set up as a securitisation fund on the basis of a civil society contract or as a securitisation

[7] Art. 10-12 Regulation (EU) no 2017/2402.
[8] Art. 2 (20) Regulation (EU) no 2017/2402.
[9] As defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013.
[10] As defined in point (1) of Article 4(1) of Directive 2014/65/EU.
[11] In accordance with Directive 2009/65/EC.
[12] Directive 2011/61/EU.
[13] Directive 2014/65/EU.
[14] Art. 2 al. 23 Regulation (EU) no 2017/2402.

company organized in the form of a joint stock company.[15]

The administration of funds and securitisation companies was performed by legal entities established in the form of a joint stock company. The registration at the trade register office of a company having as object of activity the administration of investment vehicles was made only with its prior authorization by CNVM.[16]

The above provisions of the domestic law came into conflict with European legislation (Regulation UE 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation)[17]. Still, this conflict has an intrinsic solution. European law takes precedence over the national laws of the Member States. The principle of supremacy applies to all European acts that are binding. Member States may not apply a national rule which is contrary to European law. In EU Court of Justice wording, the law stemming from the treaty could not be overridden by domestic legal provisions[18]. Romanian Constitution states the same principles of the pre-eminence of European law over national law.19

The European regulatory act is a regulation [Regulation (EU) 2017/2402]. Such an act is directly applicable in national law, without a national implementation. Moreover, such an implementation would create a normative redundancy because the regulation has general applicability. It shall be binding in its entirety and directly applicable in all Member States (Article 288 of the Treaty on the Functioning of the European Union).

European Law. Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 lay down a general framework for securitisation and creates a specific framework for simple, transparent and standardised securitisation[20].

The Union is striving to improve the legislative framework implemented after the financial crisis. EU aims to address the risks inherent in highly complex, opaque and risky securitisation. EU legislator tries to ensure that rules are adopted to better differentiate simple, transparent and standardised (STS) products from complex, opaque and risky instruments. [21]

Finally, domestic law has been repealed to leave room for application of the European regulation. Now are enacted in domestic law measures implementing Regulation (EU) 2017/2.402 of the European Parliament establishing a general framework for securitisation and creating a specific framework for simple, transparent and standardized securitisation.[22] Romanian Law establishes competent authority in

[15] Art. 12 Law no 31/2006.

[16] Ibidem, art. 21. CNVM is former Romanian capital market authority, now Financial Supervisory Authority (ASF).

[17] Official Journal of the European Union L 347/35, 28.12.2017.

[18] Case 6/64 Costa v ENEL [1964] ECR 593: *the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.*

[19] Art. 148 Romanian Constitution: *Following accession, the provisions of the Constitutive Treaties of the European Union, as well as other binding Community regulations, shall take precedence over the contrary provisions of national law, in compliance with the provisions of the Act of Accession.*

[20] Official Journal of the European Union L 347/358, 12.2017.

[21] Regulation (EU) no 2017/2402, Preamble 2.

[22] Law no 158/2020, Chapter XI.

securitisation field (FSA – Financial Supervisory Authority) with particular competencies[23], supervisory powers[24] and powers to apply punishments for the violation of the rules[25]. With these implementing rules the European Regulation is directly applicable on Romanian capital market.

5. Simple, transparent and standardised ("STS") securitisation

European Regulation creates a specific framework for simple, transparent and standardised ("STS") securitisation, a unique defined operation throughout the Union. It should be established a general applicable definition of STS securitisation based on clearly laid down criteria. The implementation of the STS criteria throughout the Union should not lead to divergent approaches that would create potential barriers for cross-border investors. They would not be compelled to familiarize themselves with the details of the Member State frameworks, thereby undermining investor confidence in the STS criteria. A single source of interpretation would facilitate the adoption of the STS criteria by originators, sponsors and investors throughout the Union. The European Regulation and ESMA[26] should play an active role in addressing potential interpretation issues.

Traditional securitisation (true-sale securitisations) in Regulation wording[27] means a securitisation with the transfer of the economic interest in the exposures being securitised through the transfer of ownership of those exposures from the originator to an SSPE. By contrast, s*ynthetic securitisation* means a securitisation where the transfer of risk is achieved by the use of credit derivatives or guarantees. The exposures being securitised remain exposures of the originator.

The Regulation only accepts for traditional securitisation to be designated as simple, transparent and standardised STS. The transfer of the underlying exposures to the SSPE should not be subject to clawback provisions.

STS requirements are clearly laid down by the Regulation. In the end ESMA shall maintain on its official website[28] a list of all securitisations which the originators and sponsors have notified to it as meeting the STS requirements. ESMA shall add each securitisation so notified to that list immediately and shall update the list where the securitisations are no longer considered to be STS following a decision of competent authorities.

Requirements relating to simplicity[29] mean the title to the underlying exposures shall be acquired by the SSPE (by means of a true sale) and the transfer of the title to the SSPE shall not be subject to clawback provisions in the event of the seller"s insolvency.

Requirements relating to standardisation[30] mean the originator,

[23] Art. XV Law no 158/2020.
[24] Art. XVII Law no 158/2020.
[25] Art. XX Law no 158/2020.
[26] Regulation (EU) no 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.
[27] Art. 2 (9) Regulation (EU) no 2017/2402.
[28] https://www.esma.europa.eu/.
[29] Art. 20 Regulation (EU) no 2017/2402.
[30] Art. 21 Regulation (EU) no 2017/2402.

sponsor or original lender shall satisfy the risk-retention requirement. Thus means they shall retain a material net economic interest in the securitisation of not less than 5 %., measured at the origination (e.g. the retention of not less than 5 % of the nominal value of each of the tranches sold or transferred to investors).

Requirements relating to transparency[31]. The originator and the sponsor shall make available data on static and dynamic historical default and loss performance.

The Regulation edict a ban on resecuritisation. Resecuritisation means securitisation where at least one of the underlying exposures is a securitisation position.[32] The reason for ban is that resecuritisations could hinder the level of transparency that the Regulation seeks to establish.

The Regulation lay down above mentioned requirements regarding non-ABCP[33] securitisation. Further the text deals with ABCP securitisation.

The Regulation allows for the different structural features of long-term securitisations and of short-term securitisations (namely ABCP programmes and ABCP transactions) and there should be two types of STS requirements: one for long term securitisations and one for short-term securitisations corresponding to those two differently functioning market segments[34].

6. Conclusions

Securitisation proved to be an important element of developed financial markets. It can help free up creditors" balance sheets to allow for further lending to the economy. Securitisation creates a bridge between credit and capital markets, giving investors access to investments in loans and other exposures to which they normally would not have direct access. They can use sophisticated financial instruments such as credit derivative but tradeable securities used in traditional securitisations are more accessible.

Still, holding a securitisation position implies many risks. It is important that the interests of originators and sponsors that are involved in a securitisation and investors be aligned. In order to achieve this goal original creditors or other participants in this scheme should retain a significant interest in the underlying exposures of the securitisation. It is therefore important for the originator or sponsor to retain an economic exposure to the underlying risks in question. Any breach of that obligation should be subject to sanctions to be imposed by competent authorities.

The main purpose of the general obligation for the originator, sponsor and the SSPE to make available information on securitisations (via the securitisation repository) is to provide the investors with a source of the data necessary for performing their due diligence. Dissemination of relevant information deter participants to enter into securitisation transactions without disclosing sensitive commercial information on the transaction.

Securitisation scheme are still new for Romanian capital market. These operations should be implemented to provide both investors and institutional creditors with a new financial instrument.

The Romanian authority (FSA) must provide the necessary framework for the use of securitisation on the internal market.

[31] Art. 22 Regulation (EU) no 2017/2402.

[32] Art. 2 (4) Regulation (EU) no 2017/2402.

[33] Art. 2 (7) Regulation (EU) no 2017/2402: asset-backed commercial paper programme' or 'ABCP programme'.

[34] Art. 23 Regulation (EU) no 2017/2402.

References

- S. Angheni, *Drept comercial. Tratat*, Bucharest: C.H. Beck, 2019;
- I. Adam, *Tratat de drept civil. Obligațiile. Responsabilitatea civilă extracontractuală. Faptul juridic*, Bucharest: C.H. Beck, 2021;
- St.D. Cărpenaru, *Tratat de drept comercial român*, Bucharest: Universul Juridic, 2019;
- St.D. Cărpenaru et al., *Legea societăților. Comentariu pe articole.* Bucharest: C.H. Beck, 2014;
- P. Craig et al., *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină,* Bucharest: Hamangiu, 2017;
- C. Duţescu, *Contractul de vânzare-cumpărare acţiuni*, Bucharest: C.H. Beck, 2012;
- I.L. Georgescu, *Drept comercial român*, Bucharest: All Beck, 2002;
- Cristian Gheorghe, *Tratat de drept comercial român*, Bucharest: C.H. Beck, 2020;
- Cristian Gheorghe, *Piaţa de capital. Fundamentele juridice*, Bucharest: Universul Juridic, 2018;
- C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român*, Bucharest: All, 1996;
- A.-D. Merville, *Droit financier*, Issy-les-Moulineaux: Gualino, 2015;
- L. Pop et al. *Drept civil. Obligațiile*, Bucharest: Universul Juridic, 2020;
- O. Manolache, *Drept comunitar*, Bucharest: All Beck, 2003;
- G. Piperea, *Drept comercial român. Teoria generală, întreprinderea şi insolvența*, Bucharest: C.H. Beck, 2020;
- T. Prescure, N. Călin, D. Călin, *Legea pieţei de capital, Comentarii şi explicaţii*, Bucharest: C.H. Beck, 2008;
- A. Tutuianu, *Piața de capital. Regimul juridic aplicabil participanților*, Bucharest: Hamangiu, 2007.

PARENTAL AUTHORITY BETWEEN LAW AND PSYCHOLOGY

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Abstract

The Romanian Civil Code uses the concept of „parental authority", which means all the rights and duties concerning both the child and his/her assets. The rights and duties belong equally to both parents and are exercised in the best interests of the child. It does not matter whether the child"s parents are married or not, and whether the child was born during or outside the marriage. When making the decision, the court will consider, first of all, the interest of the child. So the court must observe the personality of the child, the lifestyles of his parents, as well as the emotional orientation and background of the child. The court will also must take into consideration the child"s right that the parents care for him, his right to maintain regular personal contact with the parent to whom he has not been entrusted and, for that parent, the right to obtain regular information about the child. Also, the court may also decide to approve an agreement between the parents unless it is clear that this agreement is not in accordance with the principle of the best interest of the child.

The term „parental authority" is an old concept from ancient times where parents were presumed to have power and a sense of ownership over their children, just as they had over their goods or animals. Nowadays, taking into consideration the recognition and acknowledgement of children"s rights, this concept of a parent having control or domination over the child"s life is seen as being outdated. More appropriate seems to be the term of „parental responsibility" or even „parental responsibilities", in order to refer at the rights and duties „owed" by the parents towards their children. More than authority, the parents have responsibilities and the children are individuals in their own right and should be treated as such. No one has power over another human being, but everyone has responsibilities to others and, most importantly, parents have the obligation to ensure that their children become into responsible and mature adults.

Keywords: *parental authority, parental responsibility, best interests of the child, children"s rights, Convention on the Rights of the Child, emotional development of the child, parenting styles.*

„1. Sons, listen to me, father, and behave so that you may redeem yourselves,
2. That the Lord raised the father over the sons and strengthened the mother"s judgment over the children."[1]

1. Short considerations about parental authority in the Roman and the Germanic law

In the Roman law, the power („*potestas*") was characterized by absolute rights over the persons and things belonging to the household. The power over the children of the house („*filii*" and „*filiae familias*") was called „*patria potestas*", the power over the wife to whom the „*pater familias*" was married „*cum manu*" was called „*manus*", and the power over slaves was called „*ownership*" (or „*dominicia potestas*").

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[1] *Book of Wisdom of Jesus, Son of Sirah (Ecclesiastic) 3:1-2, http://www.bibliaortodoxa.ro/carte.php?id=72&cap=3*, website consulted last time on March, 16th, 2021.

So, the Roman period placed the children under the „*patria potestas*" and they were, as a rule, under the authority of the head of the family, who could be their father or even their grandfather. Like their mother, the children were considered „*alienii iuris*", there was no age of civil majority, but children could become „*sui iuris*", even at an early age, if, for example, the head of the family was taken prisoner, or lost his citizenship.

On the other hand, in the Germanic law, like the „*patria potestas*" of early Roman law, the „*munt*" was initially a complex of powers. The idea that the head of the family owed duties to those subject to his power developed only later, in the Middle Ages. In Germanic law, legal capacity depended on the capacity to bear arms. Since women and children were not capable of bearing arms, they were subject to „*munt*". The reason for the subordination of women and children was thus the physical helplessness of the woman or child. „*Munt*" had to be exercised in the interests of the woman or child. For this reason, „*munt*" gradually lost his characteristic of power, and became an obligation to care for the woman or for the child.[1]

In ancient roman times, this power was actually limitless, the „*pater familias*" being able to punish children, sell them, abandon, banish, marry or even kill those under his power. So, the content[2] of „*patria potestas*" referred to:

a) the „*ius vitae necisque*" (the power of life and death) was expressly mentioned in the Twelve Tables and it was seen as the core of „*patria potestas*" – domestic discipline implied even the right to kill the child;

b) the power to alienate the child (the authority to sell those under his „*potestas*" into slavery; this authority was abolished in the post-classical period, however, the „*pater familias*" still had the power to sell new-born children into slavery in case of poverty);

c) the power over the child"s estate and juristic acts (almost any acquisitions by those under „*patria potestas*" automatically became the property of the „*pater familias*"; also, the „*pater familias*" had the right to give his children in marriage even without their consent; the „*pater familias*" also had the right to dissolve the marriages of his children);

d) the power to institute proceedings to recover the child against a third party who obtained possession of the child and exercised control over him.

Gradually, this situation of the descendants „*alienii iuris*" improved in classical and postclassical law, the parental power being restricted by many exceptions, but not completely abolished. Only in the age of Justinian, the legal personality of the person under parental power becomes complete.[3]

The patriarchal vision and full powers of the „*pater familias*" can only lead to the conclusion that, in relation to what we understand today by the notion of „parental authority", it was then exercised only by the

[1] See H. Kruger, *The legal nature and development of parental authority in Roman, Germanic and Roman-Dutch law - a historical overview*, page 102, *https://journals.co.za/doi/pdf/10.10520/AJA1021545X_69*, website consulted last time on March, 10th, 2021.

[2] See H. Kruger, *op. cit.*, pages 92-93.

[3] See, for more information, M.D. Bob, *Elementary manual of Roman private law*, Universul Juridic Publishing House, Bucharest, 2016, page 101-105, quoted by M. Floare, *The exercise of parental authority and the issue of the child's habitual residence in national Romanian law, comparative law and private international law*, in M. Avram (coordinator), *Parental authority. Between greatness and decline*, Solomon Publishing House, Bucharest, 2018, page 241 et sequens.

father or by another ascendant of the child and the mother never had „*potestas*". And how could the mother have had such power, since she herself „benefited" from a diminished civil capacity and was regarded as an „accessory", possibly „good accessory" of the man? It was only in the 4th century that imperial law enshrined the right of the mother to be the legal protector of her child whose father had died, but only if she did not to remarry, in order to watch over the property of the protected child from the possible fraudulent acts of the stepfather.

Unlike the Roman law, in Germanic law the mother enjoyed some authority over her children. In practice, she had considerable say over the care and education of the children, although her position was never equated with that of the father.[4]

In Roman law, in case of divorce, children born during marriage remained under the parental authority of their father. Their mother risked never seeing them again, and this fact weighed heavily when she could only think about dissolving the marriage.

However, in exceptional cases, for reasons related to the depraved nature of the father, the mother could receive physical custody of the child, a term that today would be called *the establishment of the child"s residence* with the mother. But, even so, the „*patria potestas*" of the father was not affected in any way.

In case of amiable divorces, the parents could agree, extrajudicially, to share physical custody over their children or, even, for those very young children, to remain with their mother.[5] We can see how the dichotomy between the exercise of parental authority and the concrete establishment of the child"s residence after divorce, when the parents no longer lived together, dates back to the era of classical Roman law.

It was only in the age of postclassical Roman law that Justinian"s *Novela* 117 established a major, substantial transfer of parental authority over the children to their mother if she had been unjustly repudiated by her husband or if she had obtained a divorce against the father of her children.[6]

As a conclusion, the doctrine[7] noted important differences between Roman and Germanic concepts of parental authority, regarding:

a) the nature of parental authority (*in Roman law* the „*pater familias*" was vested with a kind of quasi-ownership in respect of his children; *in Germanic law*, on the other hand, the reason for the subordination of women and children was the physical helplessness of the woman or child and the parental authority had to be exercised in the interests of the child);

b) the duration of the parental authority (the *Roman* „*patria potestas*" lasted until the death of the father, unless it was terminated before that date by emancipation, adoption or the marriage of a daughter and it was regarded as a kind of perpetual authority; in *Germanic law*, on the other hand, parental authority was exercised for the protection of the child);

c) in *Roman law* „*patria potestas*" was exercised by the „*pater familias*" and the child"s mother had no authority in respect of her children — she was herself subject to „*potestas*"; in *Germanic law*, on the other hand, although also subject to her husband"s

[4] For more informations about the parental authority in the Germanic Law, see H. Kruger, *op. cit.*, pages 100-104.

[5] See J.E. Grubbs, *Women and the Law in the Roman Empire – a sourcebook on marriage, divorce and widowhood*, Routledge, London and New York, 2002, pages 199-200, quoted by M. Floare, *op. cit.*, page 243.

[6] See P. Gide, *Étude sur la condition privée de la femme dans le droit ancien et moderne et en particulier sur le senatus-consulte velléien*, L. Larose et Forcel, Paris, 1885, page 191, quoted by M. Floare, *op. cit.*, page 244.

[7] See H. Kruger, *op. cit.*, pages 104-106.

„*munt*", the mother had some authority in respect of her children.

2. Meanings of the expressions „parental authority", „parental responsibility" or „parental responsibilities", between philosophy and law

If there are parental rights, what are their grounds? Many contemporary philosophers (but not only them) reject the notion that the children are there parents" property and reject also the idea that parents have rights to their children and over their children. Some philosophers argue for a biological basis of parental rights, while others focus on the best interests of the children or a social contract as the grounds of such rights. Still others reject outrightly the notion that parents have rights, as parents. They do so because of the skepticism about the structure of the putative rights of parents, while others reject the idea of parental rights in view of the nature and extent of the rights of children.

Apart from biological, best interests and social contract views, there is also a casual view of parental obligations, which includes the claim that those who bring a child into existence are thereby obligated to care for that child. It is not a simple, theoretical question about parental rights and obligations; we must also focus the attention on practical questions like: making medical decision[8], the autonomy of children, child discipline[9] or the propriety of different forms of moral, political and religious[10] upbringing of children.

Parental responsibilities express a collection of rights and duties in order to promote and protect the rights and the welfare of the children. It should, however, be pointed out that certain States prefer to use the term „parental authority", for example Germany[11] (*elterliche Sorge*), Italy (*potestà genitoriale*), Spain (*patria potestad*) or France (*autorité parentale*), or even „*custody*" as is the case in Canada and the United States. Other countries, the United Kingdom or the Czech Republic for example, use the term „*parental responsibility*". The Swiss legal system has

[8] Exceptions to parental autonomy are usually made at least in cases where the life of the child is at stake, on the grounds that the right to life exceed the right to privacy, if those rights come into conflict. A different issue arise with respect to medical decision making as it applies to procreative decisions. An increasing number of couples are using reproductive technologies to select the sex of their children (the process of *in vitro* fertilization or the process of sperm sorting). One criticism of this practice is that it transforms children into manufactured products, they become the result, at least in part, of a consumer choice. Similar worries are raised with respect to the future use of human cloning technology. For details, see M. Austin, *Rights and obligations of parents*, *https://iep.utm.edu/parentri/*, point 4, c. Medical Decision Making, website consulted last time on March, 10th, 2021.

[9] Some auhtors argue that punishment in the family should both result from and maintain trust. See D. Hoekema, *Trust and Punishment in the Family. Morals, Marriage and Parenthood*, Laurence Houlgate, ed. Belmont, CA: Wadsworth, 1999, pages 256-260, quoted by M. Austin, *op. cit*., point 4, d. Disciplining Children.

[10] See M. Austin, *op. cit*., point 4, e. The Religious Upbringing of Children.

[11] The term "parental responsibility" refers to all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care (custody). Parents have the duty and the right to care for their child. Parental care involves taking care of the child and his/her property, and representing the child; the right to make decisions for the child is therefore in principle associated with parental care. Parental responsibility also includes contact with the child and the duty to provide maintenance for the child. As a general rule, joint parental custody is possible if the child is born to married parents, or the parents marry after the birth of the child, or the parents declare that they wish to care jointly for the child (custody declarations) or if the Family Court (*Familiengericht*) grants them joint custody of the child. For details, see *https://e-justice.europa.eu/content_parental_responsibility-302-de-en.do?member=1*, website consulted last time on March, 15th, 2021.

both concepts: „parental responsibility" is used as a generic term referring to all the obligations of parents towards their children and includes both parental authority and the maintenance obligation. In this context, „parental authority" comprises all the rights and duties of parents towards children.

However, it is important to point that in *Canada* and in the *United States*, the term *parental responsibility* refers to the potential or actual liability that may incurred by parents for the behavior of their children.

Parental responsibility legislation has been enacted in three Canadian provinces: Manitoba (1997), Ontario (2000) and British-Columbia (2001). Under the *Parental Responsibility Act*, 2000[12], a *child* is anyone under the age of 18 years and *parent* means either the biological, adoptive or legal guardian parent of the child or the person who has lawful custody of, or a right of access to, the child. This legislation[13] allows victims of theft or property damage to sue the parents of a minor in Small Claims Court for their damages. The parents will be found automatically responsible, unless they can prove they were exercising „reasonable supervision" over the child at the time of the activity in question, and they had made „reasonable efforts" to prevent or discourage the child from engaging in such activity. Secondly, the legislation states that in all other litigation outside of the Small Claims Court, a parent will be assumed to have failed to exercise reasonable supervision and control over the child, unless they can prove otherwise. This is known as a „reverse onus" provision. The consequences of the Parental Responsibility Act may be significant if the child causes an injury to someone else.

All *U.S. states* allow parents to be sued for the various actions of their children. But the idea of a criminal legislation to allow the prosecution of adults for „neglectful" parenting is relatively new.[14] For example, a number of states have enacted or proposed laws that will automatically hold parents financially responsible for all expenses associated with a second false bomb threat or 911 call made by a child; or impose a prison term and order payment of restitution to any victims if the child commits a serious crime; but also if the child uses a gun owned by the parent to commit a crime.

The generally accepted definition of the concept of *parental responsibility*, as given in a recent Recommendation of the Committee of Ministers[15], identifies this notion like a „collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child"s evolving capacities". This collection of „duties, rights and powers" relate to health and development, personal relationships, education and legal representation, decisions on the habitual place of residence and the administration of the property of the children.

In the *UK"s law*, *parental responsibility* seems like an ambiguous and confused concept. In part, this ambiguity is

[12] See *https://www.ontario.ca/laws/statute/00p04?search=Parental+Responsibility+Act*, website consulted last time on March, 15th, 2021.

[13] See *https://oatleyvigmond.com/the-parental-responsibility-act/*, website consulted last time on March, 15th, 2021.

[14] For more information about parental reponsibility in U.S., see E.M. Brank, V. Weisz, *Paying for the crimes of their children: Public support of parental responsibility*, Journal of Criminal Justice, Science Direct. 32 (5), pages 465-475, 2004, *https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1551&context=psychfacpub*, website consulted last time on March, 15th, 2021.

[15] Recommendation CM/Rec(2015)4 of the Committee of Ministers on preventing and resolving disputes on child relocation, adopted on 11 February 2015, *https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22022&lang=en*, website consulted last time on March, 22th, 2021.

due to the wide statutory definition in that the definition includes all aspects of being a parent: „all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property"[16]. Although the statutory definition of parental responsibility and indeed the term itself refers to the rights and responsibilities of a parent, the concept is not synonymous with parentage or parenthood. At the time of the creation of parental responsibility, one of the recommendations of the Law Commission was that the title refer to responsibility instead of rights „it would reflect the everyday reality of being a parent and emphasize the responsibilities of all who are in that position"[17]. It can be seen that the Law Commission wished to underline the functional aspect of the new legal concept of parental responsibility, perhaps due to the greater diversity of family forms in the twentieth century. This was in order to benefit *all* parents, including those who lacked a genetic link with the child (for example, the step-parents, who lack automatic parental responsibility[18]).

Since its creation, judicial interpretation of the concept has tended to focus on the rights aspect rather than functional responsibilities (granting the practical benefit of having parental responsibility for social parents which would include the right to consent to medical treatment on the child"s behalf).

The *Danish national concept of „parental responsibilities"*, as defined by the Council of Europe (see above), is *forældremyndighed*, which is best translated as „parental authority".[19] The holder(s) of parental authority have certain duties and powers and decisions must be made from the perspective of the child"s interests and needs. The holder(s) of parental authority is/are also the child"s guardian(s), which entails a right to act on behalf of the child in legal and financial matters. It has been considered on a number of occasions whether the concept of parental authority should be changed into a concept which better reflects the responsibility of the holder(s). When the Danish Act on parental authority and contact was changed in 1985 the concept of parental authority was retained, the underlying reasoning being that a change in concept would not change the legal content of the concept. It was further stressed that the concept of parental authority entailed not just a right to decide

[16] See Children Act 1989, Section 3, (1), *https://www.legislation.gov.uk/ukpga/1989/41/section/3*, website consulted last time on March, 15th, 2021.

[17] See Law Commission, Family Law Review of Child Law, Guardianship and Custody, Law Com No 172 at paragraph 2.4., on *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-172-FAMILY-LAW-REVIEW-OF-CHILD-LAW-GUARDIANSHIP-AND-CUSTODY.pdf*, website consulted last time on March, 15th, 2021.

[18] The only acknowledgement of their legal position is provided within Section 3 (5) Children Act 1989 which auhorises the to "do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare". See Children Act 1989, Section 3, (5), *https://www.legislation.gov.uk/ukpga/1989/41/section/3*, website consulted last time on March, 15th, 2021.

[19] There are no official translations of Danish legislation. At *http://www.jur.ku.dk/biblioteker/infosoeg/* a number of unofficial translations of different acts can be found. The Danish Act on parental authority has not been translated. However, the unofficial translation of an older version of the Act on the formation and dissolution of marriage, Act No. 148 of 08.03.1991 with later amendments, uses the concept of custody. The concept of custody can also be found in a number of older articles and governmental reports. The concept of parental authority is chosen as a better direct translation of the Danish concept *forældremyndighed.* For details, see I. Lund-Andersen, C. Gyldenløve Jeppesen de Boer, *National report: Denmark, Parental Responsibilities – DENMARK*, *http://ceflonline.net/wp-content/uploads/Denmark-Parental-Responsibilities.pdf*, website consulted last time on March, 15th, 2021.

for the child, but also a duty to protect and care for the child. In general it is the parents or one of the parents who is/are the holder(s) of parental authority. Parental authority can be transferred to a non-parent (for example, a step-parent) or to two non-parents (this must be a married couple), but there can never be more than two holder(s) of parental authority at the same time (art. 11 Danish Act on Parental Authority and Contact). If child protection measures are taken, the holder(s) of parental authority retain parental authority but their rights and duties are accordingly restricted. When a child is taken into care as a child protection measure, the local authorities and/or the foster parents with whom the child is placed are not endowed with parental authority.

The Romanian Civil Code uses the concept of *parental authority*. Parental authority means all the rights and duties concerning both the child and his assets. The rights and duties belong equally to both parents and are exercised in the best interests of the child. Parental authority shall be exercised until the child reaches full legal capacity.[20]

According to the Articles 487-499 of the Romanian Civil Code and Law No 272/2004 on the protection and promotion of children"s rights, the parental rights and duties include[21]:

- the right and duty to establish and preserve the child"s identity;
- the right and duty to raise the child, to care for the health and physical, psychological and intellectual development of the child, of his education, studies and professional training, according to their own beliefs, characteristics and needs of the child;
- the right and duty to provide child supervision;
- the right and duty to provide child support[22];
- the right to take certain disciplinary measures against the child[23];
- the right to ask for the return of the child from any person who holds him with no right;
- the right of the parents to reunite with their child;[24]
- the right of the parent to have personal relations with his child (for example: visiting the child in his home, visiting the child while he is in school, the child spending holiday with each of his parents);
- the right to determine the child"s home;[25]
- the right to consent to the engagement and marriage of the child in the case of minors who have reached 16 years of age;
- the right to consent to the child"s adoption;
- the right to appeal against the measures taken by the authorities with regard to the child and to make requests and actions in their own names and on behalf of the child.

[20] See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

[21] *Ibidem.*

[22] Parents are obliged, jointly and severally, to provide maintenance for their minor child. Parents are obliged to support their grown-up child until graduation if he is pursuing his studies, but no later than by the age of 26 years.

[23] However, it is forbidden to take certain measures, such as some physical punishment that would impair the physical, mental or emotional state of the child.

[24] This right is correlated with the right of the child to not be separated from his parents other than for exceptional and temporary reasons (for example, placement measures).

[25] The minor child shall live with his parents. If the parents do not live together, they shall decide the child's home by mutual agreement. In case of disagreement between the parents, the Court shall decide.

The parental rights and duties (Article 500-502 of the Romanian Civil Code) as regards the child"s assets may include[26]:

• *management of the child"s assets*. The parent has no right over the assets of the child, nor has the child over the assets of the parent, apart from the right to inheritance and maintenance. Parents have the right and duty to manage the assets of their minor child and to represent him in legal civil acts or to give their consent to these acts. After the age of 14, the minor shall exercise his rights and shall execute his duties alone, however, with the consent of the parents and of the Court, where appropriate.

• *the right and duty to represent the minor in civil acts or to give one"s consent to such acts*. Up to the age of 14, the child shall be represented by the parents in civil acts as he lacks legal capacity entirely. From the age of 14 to 18, the child shall exercise his/her rights and shall execute his/her duties alone, however, the prior consent of the parents is required as she/he has limited legal capacity.

According to the Romanian Civil Code, the rights and duties belong equally to both parents[27] [Article 503 (1)]: if the parents are married; after divorce (Article 397); to the parent whose filiation has been established if the child was born out of wedlock and to both parents if the parents live in domestic partnership [Article 505 (1)].

From my point of view, which is not singular[28], the term *parental authority* is an obsolete concept from olden times where parents were presumed to have power and a sense of ownership over their children, just as they had over their goods or animals. Nowadays, taking into consideration the recognition and acknowledgement of children"s rights, this concept of a parent having control or domination over the child"s life is seen as being outdated. I find more appropriate using the term of *parental responsibility* or even *parental responsibilities*, in order to refer at the rights and duties „owed" by the parents towards their children. Maybe, in the past, children had no say in familial matters and parental authority was exercised with nothing say to the children"s wishes, but the world has moved away from such a drastic measures. More than authority, the parents have responsibilities and the children are individuals in their own right and should be treated as such. No one has power over another human being, but everyone has responsibilities to each other and parents have the obligation to ensure that their children become responsible and mature adults. Parental responsibilities are not static. As the child grows these responsibilities change and adapt, so, the level of responsibility diminishes, like a natural progression, as children grow older.

[26] See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

[27] Parents may agree on the exercise of parental authority or as regards the measures taken to protect the child with the consent of the Court, if it is in the best interest of the child (Article 506 of the Romanian Civil Code). If the parents cannot come to an agreement on the issue of parental responsibility, the alternative means for solving the conflict without going to court is mediation. Mediation is optional before the referral to the Court. During the resolution of the trial, the judicial authorities are obliged to inform the Parties about the possibility and advantages of using mediation. If mediation does not result in an agreement, the disputed issues shall be settled in Court.

See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

[28] See also A.M. Mangion, Is it the end of parental authority?, june 2010, https://timesofmalta.com/articles/view/is-it-the-end-of-parental-authority.310466, website consulted last time on March, 15th, 2021.

In decisions such as living arrangements, contracts, or consenting to medical/surgical/dental procedures, the capacity to make decisions and act in the child"s best interest was vested in their parent or guardian, because, until this moment, the child was seen as lacking the capacity to express a valid consent, until the child attained majority. The current approach establishes that the parental powers are effective only so long as they are needed for the protection of the person and of the property of the child. Therefore, it is no longer accepted the rule that children remain under parental control until they are of certain age.[29]

The principle according to which the extent of the parental responsibilities diminishes was established by *Gillick v West Norfolk & Wisbech Area Health Authority* (1986)[30]. The ruling in this case provides that the child"s voice is listened to in court when he reaches a sufficient understanding to be capable of making up his own mind. In practice, the child"s ability to make decisions for himself relates to a number of different situations, but the main areas where issues often arise, however, are connected with consent or refusal of medical or psychiatric treatment.

When we have to establish if the child has capacity to consent (his maturity and his understanding), we must determine that they can understand the nature, purpose and possible consequences of investigations or treatments proposed, as well as the consequences of not having treatment. Only if they are able to understand, retain, use and weigh this information, and communicate their decision to others can they provide a valid consent.

If the children are found to have the required level of understanding, their decision could be upheld even if the parents" wishes are different. After the court"s decision to uphold the child"s view, the parents will not have authority to contradict that decision or even to force their child into the opposite course of action. As Lord Scarman said in the *Gillick case*, „parental right yields to the child"s right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[31]

3. „Best interests of the child" and parental authority

The concept of the best interests of the child is defined by the United Nations *Convention on the Rights of the Child – CRC*, but also in the Convention of the Hague on international adoption, seen as a concept that has two „traditional" roles, one that seeks to control and one that finds solutions (criterion of control and criterion of solution[32]). „Best" and „interests", as a whole, mean that the final goal should and must be the well-being of the child, as defined through the Convention, especially in the Preamble and in the Article 3 of the CRC (paragraphs 2 and 3).

[29] See https://www.inbrief.co.uk/child-law/children-making-legal-decisions/, website consulted last time on March, 16th, 2021.

[30] *Ibidem.*

[31] See https://www.inbrief.co.uk/child-law/children-making-legal-decisions/, website consulted last time on March, 16th, 2021.

[32] See P. Pichonnaz, Le bien de l'enfant et les secondes familles (familles recomposées), in Le Bien de l'enfant, Verlag Ruegger, Zürich/Chur, 2003, page 163; H. Fulchiron, De l'intérêt de l'enfant aux droits de l'enfant in Une Convention, plusieurs regards. Les droits de l'enfant entre théorie et pratique, IDE, Sion, 1997, page 30 et sequens.

This expression is also included in a number of other articles of the CRC[33], as a reference point that must be considered in particular situations.

For example, Article 9 of the CRC put the principle promulgated by Article 3 of CRC in relation to the right of the child to live with his parents, also referring to the rule that the child must maintain personal relationships and direct contact with both parents, unless this threatens the best interests of the child (situations that include an open conflict between the child and one or both parents, or the cases when a child and his parents may become separated as a result of an official decision, necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child"s place of residence, but only when such a decision takes into account the best interests of the child).

Also, Article 18 establishes the principle according to which the two parents must be involved with the education of the child; this is called the common responsibility for education.

We observe that the principle of the best interests of the child is a general principle which must be applied in all activities related to implementation of the entire CRC.[34]

It is important to mention here that child"s rights do not eliminate parental responsibilities. Indeed, the Article 5 of CRC[35] provides that „*State parties shall respect the responsibilities, rights and duties of parents* or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, *to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized* in the present Convention."

This „right" is not the right of parents to control their child but rather the right to guide their child in exercising his or her rights; furthermore, the parents" rights diminish as the child grows in knowledge, experience, and understanding.[36]

We must consider the development of a proper family environment in which children may freely express their views.

The participation right of children is one of the core principles of the CRC. Citizen participation, of course, is a key value of a democracy, and the CRC establish new ground by viewing children as „agents who share the power to shape their own lives" and encouraging them to exercise their own rights as members of society.[37] The CRC[38] grants each child the right to

[33] See https://www.ohchr.org/documents/professionalinterest/crc.pdf.

[34] For details on the principle of the best interests of the child, see I. Pădurariu, *The principle of the best interests of the child*, LESIJ - Lex ET Scientia International Journal no. XXVII, vol. 2/2020, ISSN: 1583-039X, pages 7-13.

[35] See *https://www.unicef.org/child-rights-convention/convention-text*, website consulted last time on March, 16th, 2021.

[36] See, for more details about that, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

[37] *Ibidem.*

[38] Article 12 sets out this right:

"(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

participate in all decision-making processes that affect his life, so that the child might obtain a more equal role in relationships with adults and a greater opportunity to think and act independently.

It is also important to note that under Article 12, children have a right to the information necessary to formulate their views and to choose to not express their views.[39] The CRC does not, however, delineate an unlimited participation right – and decision making powers – of children. The treaty recognizes a right to free expression only for children who are capable of forming independent views, and even then, the weight given to their views depends upon the age and maturity of each child. Even when a child is able to express his or her views, they are not necessarily dispositive—Article 12 merely asks that children"s views, if expressed, act as a factor in decisions regarding the children.[40]

The CRC regulates different but yet fundamental principles (best interests of the child and the participation right of the children), and in some cases the principles are in „tension" with each another. For example, Article 12 stands in opposition to another central principle of the CRC: the best interests of a child. The CRC is committed to the protection of the „best interests" of each child, a principle best reflected in its Article 3 (1)[41].

The tension between those principles is due to the fact that Article 3 sees children as vulnerable objects in need of protection from parents or other authority figures, while Article 12 views children as autonomous beings with the right to make their own decisions, whether or not it is in their best interests.

Some critics of the CRC argue that the rights-focused approach of the CRC, a shift away from a purely best-interests-focused approach, has failed to protect either the rights or the best interests of children. After all, a child"s preferences may not always coincide with what is in his or her best interests, at least from the government"s or parents" point of view. [42]

The initial lack of guidance from the Committee resulted in a wide variety of methods of implementing the CRC into domestic law.[43] However, the *United Kingdom* and *Germany* demonstrate that different approaches to resolving the tension between Article 12 and parental authority have some telling similarities.

The CRC has helped update the language of parental authority to emphasize duties over rights. In *England and Wales*, the Children Act 1989 translated key principles of the CRC, including those of Article 12,

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." See https://www.unicef.org/child-rights-convention/convention-text, website consulted last time on March, 16th, 2021.

[39] See, for more details about that, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

[40] *Ibidem.*

[41] "In all actions concerning children (...) the best interests of the child shall be a primary consideration." See also, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

[42] See, for more details about that, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

[43] *Ibidem.*

into domestic law. The Act „replace[d] the concept of parental rights and duties with the concept of parental responsibility," abandoning such notions as the „right[s] to custody" in favor of the child"s interests. This was an acknowledgment of the outdated language of parental „rights" and „authority", incongruous with the modern view that „parenthood is a matter of responsibility rather than of rights."

Germany reflects a similar trend, in which „the child and [his or her] welfare have increasingly become the focal point" in parental authority. Legal reform in 1979 transformed „parental powers" into „parental care," emphasizing both the rights and responsibilities of parents over their children.

The language of *U.S. law*, on the other hand, asserts the right of parents to manage their children"s lives on a basis separate from the interests of children. Yet much of the law reflects an underlying rationale grounded in the best interests of a child rather than the liberty interest of parents; in other words, giving parents primary authority and discretion over the upbringing of children is often justified as being in the child"s interest.

There is, therefore, an inconsistency between the rhetoric of parental rights and the practice of emphasizing the interests of children to justify parental rights.

Children are not at all the property of their parents. That being the case, we must admit that the term „authority" is a little bit more excessive, redundant. The Convention above mentioned admits that children"s capacities are evolving and increase as they grow up. Therefore, parental responsibilities should be exercised in accordance with the children"s evolving capacities. So, it is undeniable that children must be raised by a parent or parents who will best serve their interests. On this subject, parental rights are grounded in the ability of parents to provide the best possible context for childrearing.[44]

4. The psychological component of the concepts „best interests of the child" and „parental authority". Parenting styles and their effects on children

We know very well that the children do not come with instructions, and they certainly do not come with a „pause" button. So the children are not at all easy to raise. What they do come with is an important set of physical and emotional needs that must be met. As it was mentioned before, „failure of the parents to meet these specific needs can have wide-ranging and long-lasting negative effects"[45].

The essential responsibilities that parents must adhere to in order to defend and keep their child"s physical and/or emotional well-being are[46]:

1. *provide an environment that is safe* (keep the children free from physical, sexual, and emotional abuse; correct any potential dangers around the house; take safety precautions like use smoke and carbon monoxide detectors, lock doors at night, always wear seatbelts etc.);

2. *provide the children with basic needs* (water, food, shelter, medical care as needed/medicine when ill, clothing that is appropriate for the weather conditions, space / a place where the children can go to be alone);

3. *provide the children with self-esteem needs* (accept the children"s uniqueness and respect their individuality, encourage the children to participate in an

[44] See M. Austin, *op. cit.*, point 2, c. Best Interests of the Child.
[45] See *https://www.parentcoachplan.com/article3.php*, website consulted last time on March, 16th, 2021.
[46] *Ibidem.*

activity or sport, notice and acknowledge the children"s achievements and pro-social behaviors, set expectations for the children that are realistic and age-appropriate, use the children"s misbehavior as a time to teach, not to criticize or ridicule);

4. *teach the children morals and values* (honesty, respect, responsibility, compassion, patience, forgiveness, generosity);

5. *develop mutual respect with the children* (use respectful language, respect their feelings, their opinions, their privacy and their individuality);

6. *provide a fair, well structured, predictable and consistent discipline which is effective and appropriate*;

7. *involve in the children"s education* (communicate regularly with the children"s teachers, make sure that the children are completing their homework, assist the children with their homework, but do not do the homework, talk to the children each day about school, recognize and acknowledge the children"s academic achievements);

8. *get to know the children* (spend quality time together, be approachable to the children, ask questions, communicate, communicate and communicate, like Lenin once said[47] „Learn, learn, learn!).

On the other hand, it was also identified *responsibilities* that *parents do not have*: supplying the children with the most expensive designer clothes or shoes available; picking up after the children; cleaning the children"s room; dropping everything the parents are doing to give the children a ride somewhere; providing the children with a cell phone, television, computer, or game system; bailing the children out of trouble every time they does something wrong; replacing toys or other items that the children has lost or misplaced; welcoming any or all of the children"s friends into the home for social or other activities.[48]

From an emotional point of view, the characteristics of the family environment are dispersed. First of all, we are talking about psychological safety and balance, and secondly, about their opposite characteristics. Family life also includes all the material and spiritual conditions that are offered to the child, especially through psychological security, affection, freedom, independence, intellectual constructivism, appetite for culture and others.[49]

The parenting style can affect everything from how much the child weighs to how he feels about himself. It"s important to ensure that the parenting style is supporting healthy growth and development

[47] Apparently it wasn't Lenin who invented that phrase. That appears in earlier Lenin's writings. For instance, the first time Lenin used this exact phrasing was in his 1899 article "The reverse direction of Russian Social Democracy", published in "Proletarian Revolution" journal, 1924, no. 8-9 (after Lenin's death) ["While educated society loses interest in honest, illegal literature (...) the real heroes emerge from amongst workers who (...) find quite much of character and willpower within themselves *to learn, learn, and learn*, and to develop conscious social democrats from themselves(...)]".

The original of the quote is traced back to Anton Chekhov, who wrote these words in a context almost directly opposite to how Lenin used them. That was first published in a supplement to highly popular "Niva" magazine in 1896. Lenin could absolutely read that and probably did ("We must *study, and study, and study* and we must wait a bit with our deep social movements; we are not mature enough for them yet; and to tell the truth, we don't know anything about them." (Anton Chekhov. My Life, Chapter VII).

See *What is the origin of Lenin's quote "Learn, Learn, Learn"*?, on *https://www.quora.com/What-is-the-origin-of-Lenins-quote-Learn-Learn-Learn*, website consulted last time on March, 16th, 2021.

[48] See *https://www.parentcoachplan.com/article3.php*, website consulted last time on March, 16th, 2021.

[49] For more details about the psychological component of the notion "best interests of the child", see M.-M. Pivniceru, C. Luca, *The best interests of the child. Psychological expertise in case of separation / divorce of parents*, Hamangiu Publishing House, Bucharest, 2016, pages 19 et sequens.

because the way the parents interact with the child and how they discipline him will influence him for the rest of his life. Researchers have identified four types of parenting styles: authoritarian, authoritative, permissive and uninvolved.[50]

Authoritarian parents[51] believe kids should follow the rules without exception. Those parents are famous for a „because I said so" answer when a child questions the reasons behind a rule. They are not interested in negotiating, their focus is on obedience and they also don"t allow kids to get involved in problem-solving challenges or obstacles. They make the rules and enforce the consequences with little regard for a child"s opinion, using punishments instead of discipline. So rather than teach a child how to make better choices, they are invested in making kids feel sorry for their mistakes. Children who have authoritarian parents tend to follow rules much of the time. But, their obedience put a higher risk on them, while they may develop self-esteem problems because their opinions aren"t valued, or they may also become hostile or aggressive. Rather than think about how to do things better in the future, they often focus on the anger they feel toward their parents and may grow to become good liars in an effort to avoid punishment.

Authoritative parents[52] have rules and they use consequences, but they also take their children"s opinions into account. They validate their children"s feelings, while also making it clear that the adults are ultimately in charge. Authoritative parents invest time and energy into preventing behavior problems. They also use positive discipline strategies to reinforce good behavior, like praise and reward systems. Researchers have found that kids who have authoritative parents are most likely to become responsible adults who feel comfortable expressing their opinions. Children raised with authoritative discipline tend to be happy and successful. They are also more likely to be good at making decisions and evaluating safety risks on their own.

Permissive parents[53] are indulgent. They are quite forgiving and they adopt an attitude of „kids will be kids". When they do use consequences, they may not make those consequences stick. They might give privileges back if a child begs or they may allow a child to get out of time-out early if he promises to be good. Permissive parents usually take on more of a friend role than a parent role. They often encourage their children to talk with them about their problems, but they usually don"t put much effort into discouraging poor choices or bad behavior. So their children may exhibit more behavioral problems as they don"t appreciate authority and rules, often have low self-esteem and may report a lot of sadness. They"re also at a higher risk for health problems.

Uninvolved parents[54] tend to have little knowledge of what their children are doing. There tend to give few rules. Children may not receive much guidance and parental attention. Uninvolved parents expect children to raise themselves. They don"t devote much time or energy into meeting children"s basic needs and they are neglectful but it"s not always intentional. Children with uninvolved parents are likely to struggle with self-esteem issues. They tend to perform poorly in school. They also exhibit frequent behavior problems and rank low in happiness.

[50] For this typology of parenting sytles, detailed below, see *https://www.verywellfamily.com/types-of-parenting-styles-1095045*, website consulted last time on March, 16th, 2021.
[51] *Ibidem.*
[52] *Ibidem.*
[53] *Ibidem.*
[54] *Ibidem.*

5. Conclusions

The most significant feelings perpetuated in the family are love and intimacy. Both involve accepting and appreciating the other"s uniqueness, and observing their mode of consumption within the family substantiates the child"s future behavioral pattern regarding love relationships and the manifestation of his own intimacy. The gestation of a human being is a long process and the psycho-emotional development of the child is as relevant as his cognitive or physical development, because the degree of maturity acquired by the child will depend on that, and also his ability to relate authentically or not, as well as the autonomy that the child will assume it in his evolution.[55]

In the absence of „love"[56], the concept of „parental authority" and for sure the whole mechanism that turns the wheels of his profound understanding will become meaningless. Because loving your children is the most important parental „obligation" in the whole world, although some people might say that there is no duty to love. However, parents do have a moral obligation to love their children. A lack of love can harm a child"s psychological, social, cognitive and even physical development.

Parents – biological or adoptive – are those who have the strongest and most direct obligation to care for their children, and this obligation is the basis of their „authority" over those children. Just as a mother"s womb is the ideal place for physical and psychological gestation during the first nine months of life, so the natural family is the ideal place to complete that gestation, extending it morally and intellectually.[57] That confidence grounds a sense of security that permits children to develop their independence with the knowledge that someone will be there to pick them up when they fall, literally or metaphorically. As mentioned in the study[58] cited above, «When addressing the rights and obligations of parents in the *Summa Theologiae*, Thomas Aquinas speaks of a child as in some sense „a part" of its parents and as „enfolded in the care of its parents," first physically in the mother"s womb, and then in the *„spiritual womb"* of the family. *Aquinas"s „spiritual womb" metaphor* profoundly expresses the connection among parental obligations, children"s needs, and parental authority.»

It is very important that any cause involving a child can find a solution best suited to his best interests, so that his development will not suffer. It is also clear that the child has rights and he must be heard if he is able to form and communicate his views if the case affects him. Nevertheless, it is evident that the principle of the best interests of the child is, like the concept of „parental authority", most difficult to explain and to settle down. We need to clarify that we cannot see only the rights, but also the responsibilities that the parents have towards their children.

[55] C. Rusu, Assuming parental roles. Implications for children's development, in M. Avram (coordinator), Parental authority. Between greatness and decline, Solomon Publishing House, Bucharest, 2018, page 371 et sequens.

[56] "There is only the authority of love, the natural one, that we naturally have since birth, preserved only by love. Authority is not what I want to impose, but just what others recognize in me." See S. Baștovoi, *The price of love*, Cathisma, Bucharest, 2018, pages 80-81.

[57] See M. Moschella, *To whom do children belong? A defense of parental authority*, October, 2015, *https://www.thepublicdiscourse.com/2015/10/15409/*, website consulted last time on March, 16th, 2021.

[58] *Ibidem.*

References

- Book of Wisdom of Jesus, Son of Sirah (Ecclesiastic) 3:1-2, http://www.bibliaortodoxa.ro/carte.php?id=72&cap=3, website consulted last time on March, 16th, 2021;
- Hanneretha Kruger, The legal nature and development of parental authority in Roman, Germanic and Roman-Dutch law - a historical overview, https://journals.co.za/doi/pdf/10.10520/AJA1021545X_69, website consulted last time on March, 10th, 2021;
- Pascal Pichonnaz, Le bien de l"enfant et les secondes familles (familles recomposées), in Le Bien de l"enfant, Verlag Ruegger, Zürich/Chur, 2003;
- Hugues Fulchiron, De l"intérêt de l"enfant aux droits de l"enfant in Une Convention, plusieurs regards. Les droits de l"enfant entre théorie et pratique, IDE, Sion, 1997;
- Marius Floare, The exercise of parental authority and the issue of the child"s habitual residence in national Romanian law, comparative law and private international law, in Marieta Avram (coordinator), Parental authority. Between greatness and decline, Solomon Publishing House, Bucharest, 2018;
- Michael W. Austin, *Rights and obligations of parents*, https://iep.utm.edu/parentri/, website consulted last time on March, 10th, 2021;
- Eve M. Brank, Victoria Weisz, *Paying for the Crimes of Their Children: Public Support of Parental Responsibility*, 2004, Published in the Journal of Criminal Justice (2004) 32: 465-475, 2004, https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1551&context=psychfacpub, website consulted last time on March, 15th, 2021;
- Ingrid Lund-Andersen, Christina Gyldenløve Jeppesen de Boer, *National report: Denmark, Parental Responsibilities – DENMARK*, http://ceflonline.net/wp-content/uploads/Denmark-Parental-Responsibilities.pdf, website consulted last time on March, 15th, 2021;
- Ann Marie Mangion, Is it the end of parental authority?, June 2010, https://timesofmalta.com/articles/view/is-it-the-end-of-parental-authority.310466, website consulted last time on March, 15th, 2021;
- Ioana Pădurariu, *The principle of the best interests of the child*, LESIJ - Lex ET Scientia International Journal no. XXVII, vol. 2/2020, ISSN: 1583-039X, pages 7-13;
- Mona-Maria Pivniceru, Cătălin Luca, The best interests of the child. Psychological expertise in case of separation / divorce of parents, Hamangiu Publishing House, Bucharest, 2016;
- Claudia Rusu, *Assuming parental roles. Implications for children's* development, in M. Avram (coordinator), Parental authority. Between greatness and decline, Solomon Publishing House, Bucharest, 2018;
- Savatie Baștovoi, *The price of love*, Cathisma, Bucharest, 2018;
- Melissa Moschella, *To whom do children belong? A defense of parental authority*, October, 2015, https://www.thepublicdiscourse.com/2015/10/15409/, website consulted last time on March, 16th, 2021;
- https://e-justice.europa.eu/content_parental_responsibility-302-de-en.do?member=1, website consulted last time on March, 15th, 2021;
- https://www.ontario.ca/laws/statute/00p04?search=Parental+Responsibility+Act, website consulted last time on March, 15th, 2021;
- https://oatleyvigmond.com/the-parental-responsibility-act/, website consulted last time on March, 15th, 2021;
- https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1551&context=psychfacpub, website consulted last time on March, 15th, 2021;

- Children Act 1989, Section 3, (1), https://www.legislation.gov.uk/ukpga/1989/41/section/3, website consulted last time on March, 15th, 2021;
- Law Commission, Family Law Review of Child Law, Guardianship and Custody, Law Com No 172 at paragraph 2.4., on https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-172-FAMILY-LAW-REVIEW-OF-CHILD-LAW-GUARDIANSHIP-AND-CUSTODY.pdf, website consulted last time on March, 15th, 2021;
- https://www.inbrief.co.uk/child-law/children-making-legal-decisions/, website consulted last time on March, 16th, 2021;
- https://www.ohchr.org/documents/professionalinterest/crc.pdf;
- https://www.unicef.org/child-rights-convention/convention-text, website consulted last time on March, 16th, 2021;
- https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021;
- https://www.unicef.org/child-rights-convention/convention-text, website consulted last time on March, 16th, 2021;
- https://www.parentcoachplan.com/article3.php, website consulted last time on March, 16th, 2021;
- What is the origin of Lenin"s quote „Learn, Learn, Learn"?, on https://www.quora.com/What-is-the-origin-of-Lenins-quote-Learn-Learn-Learn, website consulted last time on March, 16th, 2021;
- https://www.verywellfamily.com/types-of-parenting-styles-1095045, website consulted last time on March, 16th, 2021.

SMART CONTRACTS TECHNOLOGY AND AVOIDANCE OF DISPUTES IN CONSTRUCTION CONTRACTS

Cristian Răzvan RUGINĂ*

Abstract

Claims and disputes had become endemic in the construction industry and, in spite of the continuous developments of the standard forms of contracts and consensual dispute resolution schemes from the past years, there is no indication that the incidence of claims and disputes is decreasing. Traditionally it is considered that the most often contractual disputes result from inappropriate or unclear risk allocation in the contract, or from breach of contract. However, recent studies suggest that these are only the apparent causes of disputes, the most profound one being the improper behavior of the parties involved in the contract determined by their asymmetric information and conflicting interests regarding the contract. This paper analyzes the most popular disputes avoidance methods and techniques currently used in construction industry, the most common causes of construction disputes, the behavioral risk as the main source of construction disputes, and how the available information and digital technologies would be embraced in the near future to prevent the disputes in construction contracts in an efficient manner.

Keywords: *construction contracts, avoidance of disputes, technology, smart contracts, blockchain, Building Information Modeling (BIM).*

1. Introduction

Prevention of claims and disputes is a constant preoccupation of the professionals involved in the construction industry, an industry known, *inter alia,* for its adversarial culture. In spite of the continuous development of methods and techniques used for avoidance of such claims and disputes, their number remain significant, involving substantial resources for their settlement.

This paper analyses the methods and techniques currently used in the construction industry for avoidance of contractual disputes, the most common causes of these disputes, and how the information technologies developed in the recent years may help the contracting parties to prevent the disputes in construction contracts in the near future.

2. Methods and techniques currently used in the construction industry for avoidance of contractual disputes

2.1. Standardisation of construction contracts and balanced allocation of risks

The practice of using standard forms of contract for construction and engineering projects is credited to have its origins in the nineteenth century in England. The early editions of *Hudson"s Law of Building, Engineering and Ship Building Contracts,* such as the one published in 1895, contained standard forms of construction and engineering contract prepared by the War

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Department, the Builders" Association and the Institute of British Architects, and the London County Council[1].

In the UK standard forms of construction and engineering contracts are produced by a number of industry bodies. The most widely used form of construction contracts are the contracts in the Joint Contract Tribunal ("JCT") suite, the New Engineering Contract ("NEC) suite, and the suite of contracts published by the Institution of Civil Engineers ("ICE")[2]. Standard forms of contract are also produced by other English industry bodies including the Association for Consulting and Engineering ("ACE"), the Royal Institute of British Architects (the "RIBA"), the Institution of Chemical Engineers ("IChemE"), the Institution of Mechanical Engineers ("IMechE"), and the Royal Institute of Chartered Surveyors ("RICS"). Domestic government contracts are often in a form from the General Conditions for Works Contracts suite ("GC/Works")[3].

In international construction and engineering projects it is common for parties to use standard forms of contract produced by the International Federation of Consulting Engineers ("FIDIC"). Moreover, in several countries from Central and Eastern Europe (including Romania), the FIDIC standardised conditions of contracts became mandatory elements of local public procurement law[4].

In addition to the standard forms produced by the aforementioned entities, it may be noted that there are a number of institutional bodies or governments which produce standard form construction and engineering contracts that are used widely in those jurisdictions. These include (among many others) the European International Contractors ("EIC"), the Canadian Construction Documents Committee, the Swiss Society of Engineers and Architects, the Swedish Construction Contracts Committee, the Danish Construction Association, the German DVA, the Joint Contracts Working Committee (Hong Kong), the Hong Kong government itself, the Singapore Institute of Architects ("SIA"), the Engineering Advancement Association of Japan ("ENAA"), the International Chamber of Commerce, and the World Bank.

The most widely used form of construction contracts in Romania in both private and public projects are the contracts in the FIDIC suite. For a certain period the use of FIDIC conditions of contracts for public works was mandatory for the public authorities[5]. However, the FIDIC standardised forms were replaced in 2018 by

[1] J. Bailey, *"Construction Law"*, Routledge, 2011, page 116.

[2] In August 2010 ICE announced that it is withdrawing from the ICE Conditions of Contract following the ICE Council's decision in 2009 to solely endorse the NEC3 Suite of Contracts.

[3] J. Bailey, *op. cit.*, page 123.

[4] L. Klee at al., "International Construction Contract Law", Wiley Blackwell, 2015, page 93.

[5] The obligation for public authorities to use the FIDIC conditions of contracts for public works was firstly introduced in the Romanian public procurement law by the Common Order no. 915/465/415/2008 for the approval of general and particular conditions of contracts at the conclusion of the contracts of works issued by the Ministry of Economy and Finance, Ministry of Transporation and Ministry of Development, Public Works and Houses, subsequently abrogated by Order no. 1059/2009 issued by the Romanian Ministry of Public Finance. The obligation to use the FIDIC conditions of contracts was reintroduced by the Government Decision no. 1405/2010 regarding the approval for the use of some conditions of contract of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation infrastructure of national interest financed by public funds.

the national standard construction contracts conceived by the Romanian Government[6].

The common purpose of standard construction and engineering contracts is to provide a coherent and predictable framework for the performance of the contract works, the making of payments, the administration of the contract and the project, and the determination or adjustment of the parties" respective rights and obligations. In this regard the issuing professional bodies put a great emphasis on the clarity of contractual provisions and procedures concerning such matters as the contractor"s scope of works (and the quality of works required), the contract price and the timing and amount of payments, the contractor"s time for completion and the effects of delay, the ordering and performance of variations, insurance, taking-over, guarantees and dispute resolution.

The cornerstone of the said standard construction and engineering contracts is the idea that a clear and balanced pre-allocation of responsibilities between parties in respect of certain risks that may transpire during the contract"s execution is determinant for the avoidance of prolongation of construction completion times, of wastage of resources, and of disputes.

In this respect in the construction literature it was emphasized that[7]: *"Proper risk identification and equitable distribution of risk is the essential ingredient to increasing the effective, timely and efficient design and construction of projects. If the parties to the construction process can stop thinking in an adversarial manner and work in a cooperative effort towards obtaining an equitable sharing of risks based upon realistic expectations, the incidence of construction disputes will be significantly reduced."*

In the same manner, pursuant to another opinion[8]: *"In practice, an inefficient allocation (of an unclear risk or of a risk that the party is not able to control) will result in speculative claims, disputes, or even contractor bankruptcy."*

From this perspective, it is considered[9] that, *"provided they are not significantly altered"* by the parties, the standard construction and engineering contracts *"guarantee a balanced and efficient risk allocation"* and, thus, a reduced likelihood of disputes to the benefit of the parties.

Standard contracts provide risk allocation solutions for, *inter alia*, natural risks (such as unforeseeable physical conditions, exceptionally adverse climatic conditions or natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity), political and social risks (such as war, hostilities, invasion, rebellion, terrorism, revolution, insurrection, civil war, riot, commotion, disorder, strike, or lockout), economic and legal risks (inflation, shortage of materials, equipment or labor, changes in legislation), assigning responsibilities and liabilities to each contracting party regarding performance of works, organisation, time frames,

[6] The Government Decision no. 1/2018 for the approval of general and particular conditions of contract for certain categories of public procurement contracts related to the investment objectives financed by public funds replaced the former standardised public procurement contracts based on FIDIC conditions of contract, previously mandatory for the road and railway infrastructure works only, with new ones, extending in the same time their applicability to all the investment objectives financed by public funds.

[7] B. Shapiro, "Transferring Risks in Construction Contracts", 2010, page 5, available at: http://www.shk.ca/wp-content/uploads/2013/02/Transferring-Risks-in-Construction-Contracts-BSS.pdf.

[8] L. Klee et al., *op.cit*., page 18.

[9] L. Klee et al., *op.cit*., page 18.

guarantees, insurance, errors in technical documentations and payment.

2.2. Consensual forms of dispute resolution

For a significant period, the disputes resulted from construction and engineering contracts used to be referred to courts or arbitration.

The substantial length and costs related to these dispute resolution processes made the parties to resort to them only towards the end of a construction project, when the works were completed or nearing completion. As it was noted in the construction literature[10]: *"To invoke a formal dispute resolution procedure mid-way through a project has the potential to divert vital resources from the continuation of the project works, at the expense of progress."*

On a different note, in the same time, in the construction projects with a higher degree of complexity, the parties were often confronted with the lack of an efficient tool for the settlement in due course of the various contractual disagreements affecting the contemplated progress of works.

This situation led to the development in the last decades of consensual forms of dispute resolution that seek to achieve a consensual resolution of a dispute, rather than a resolution of a dispute through the determination or assessment of the parties" rights and obligations by a court or an arbitral tribunal. It was believed that a resolution of disputes by non-adversarial means or, at least, by adversarial process of a kind pre-agreed by parties, conducted by experienced construction and engineering specialists instead of persons not so familiar with technical matters (*e.g.* by judges or lawyers), will lead to the voluntary and quick compliance of the parties with the solutions established by consensus and/or with the decisions issued by the said specialists to the benefit of the contract.

In this respect, these days, the construction and engineering contracts contain dispute resolution provisions that regulate the conditions, steps, procedures and timelines which must be observed by parties for settlement of their disagreements. Such provisions commonly involve the notification of a dispute by an aggrieved party, followed by participation of the parties in a non-adversarial process (*e.g.* negotiation, conciliation, or some other form of attempted resolution), and in case the dispute is not resolved by agreement, the dispute is then to be resolved by an adversarial form of dispute resolution (*e.g.* expert determination, dispute board, arbitration or litigation).

For instance, FIDIC conditions of contracts provide that all contractual disputes are to be adjudicated in the first instance by a dispute board. The dispute board, called the "Dispute Ajudication Board (DAB)", "Dispute Board (DB)" or "Dispute Avoidance/Adjudication Board (DAAB)", normally comprises three (3) independent and impartial highly experienced engineers appointed by parties at the beginning of the contract. The scope of the DAB/DB/DAAB is to maintain the awareness of progress and potential problems by regular visits on site, as well as to ensure the resolution of disputes at an early stage. The DAB/DB/DAAB"s decision on a dispute is obtainable within 84 days from reference to decision, is contractually binding with immediate effect, and becomes final and binding unless at least one of the parties challenges it by giving the other party notice of its dissatisfaction with the decision within 28 days from the issue of the

[10] J. Bailey, *op. cit.*, page 1422.

decision. If the decision becomes final, it cannot be further challenged by either party at arbitration.

Thereafter, pursuant to FIDIC conditions of contracts, before commencement of arbitration, the parties shall attempt to settle their dispute amicably. As far as the scope of the amicable settlement stage is concerned, the construction literature[11] noted that this is mainly: *"to ascertain whether there is sufficient common intention to try to avoid the necessity of arbitration by seeking a mutually acceptable settlement."* Since at this stage the parties have already a determination of their dispute by the DAB/DB/DAAB, it is supposed that they have sufficient elements to negotiate and reach an agreement in good faith.

The final stage of dispute resolution mechanism provided by FIDIC conditions of contracts is the referral of dispute to arbitration.

Last but not least, it is noteworthy that by the Romanian national standard construction contracts, which replaced the FIDIC conditions of contracts in public works in 2018, the dispute resolution provisions switched from the FIDIC philosophy of dispute resolution back to the classical pattern, involving the notification of dispute by the aggrieved party (by a so-called "notice of disagreement"), followed by parties" attempt to settle the dispute by a non-adversarial process (by direct negotiation or by mediation), and in case the dispute remain unresolved, its referral to arbitration.

2.3. Relational contracting. Alliancing contracts

Relational contracting or relationship contracting arrangements aim to minimize disputes by recognizing and developing common interests among contracting parties. Project participants are encouraged to proactively manage and resolve conflicts and problems, targeting common objectives and reduced transaction costs.[12]

One of the most recognized modes of relational contracting is alliancing.

As it was noted in the construction literature[13]:

"In an alliancing model, the parties effectively abandon traditional rights of action, other than in limited circumstances. Their interests are aligned by a preagreed equitable sharing of risks and rewards in such a way that the parties are stimulated to collaborate to achieve maximum profit in relation to the delivered value."

The key difference between traditional contracting methods and alliance contracting is that while the traditional contracting methods are based on the philosophy of fair and balanced allocation of risk to the parties, specific risks being allocated to parties who are individually responsible for managing the risk and bearing the risk outcome, in alliancing all project risk management and outcomes are collectively shared by the participants.

Alliance contracts generally include a so-called "no-blame" or "no disputes" clause where the parties agree not to litigate, except in limited circumstances. The intention of this approach is to avoid the

[11] E. Baker, B. Mellors, S. Chalmers, A. Lavers, *"FIDIC Contracts: Law and Practice"*, Informa Law, 2009, page 541.

[12] M.M. Rahman, M.M. Kumaraswamy, *"Joint risk management through transactionally efficient relational contracting"* in *Construction Management and Economics (online)*, Taylor & Francis (Routledge), vol. 20(1), pages 45-54.

[13] J.S.J. Koolwijk, *"Alternative Dispute Resolution Methods Used in Alliance Contracts"* in *Journal of Professional Issues in Engineering Education and Practice*, January 2006, page 44.

adversarial or "claims-based" culture of the traditional construction and engineering contract, and in turn encourage the parties to find solutions to problems, rather than to deny responsibility and seek to blame others. To give effect to this, alliance contracts have traditionally not included a formal dispute resolution procedure but sets up a model of agreed behavioural principles to drive decision-making processes and issue resolution instead, serving to align the parties" objectives in relation to the project and reduce the risk of litigious disputes between the parties.

Generally, the alliance disagreements and disputes are resolved exclusively by the alliance leadership team, the emphasis being put on resolution by agreement, and not by resolution by reference to an independent person (*i.e.* a judge, arbitrator or expert). In this manner, the absence of an independent dispute resolution mechanism and, in particular, of a dedlock-breaking contractual mechanism compels the members of alliance leadership team to make their best endeavours to resolve disagreements themselves. In the exceptional circumstances in which the alliance leadership team is unable to resolve a disagreement, despite pursuing all reasonable opportunities to remedy it, the parties to the alliance may agree to termination.

The alliance cases analyzed in the construction law literature[14] revealed that parties to a project alliance adopted various approaches in their attempt to prevent disputes and motivate the alliance parties working together to achieve the same goals.

For instance, th*e Acton Peninsula Alliance* was formed for the construction of the National Museum of Australia in the city of Canberra, Australia. In this project the parties have agreed to use a "no-blame" clause, waiving their rights to go to court or arbitration over a dispute. Only in case of an event of willful default by an alliance partner the "no-blame" clause could have been bypassed. However, no disputes were actually brought in front of a court or referred to arbitration in connection with the said project.

Another alliance, the *Waardse Alliantie*, was formed for the construction of a railroad project in the south of the Netherlands. In this project, when a dispute came up it was referred to the alliance leadership team to be resolved by negotiations. Whenever the alliance leadership team was unable to resolve a disagreement, the dispute was referred to minitrial, judged by a panel of "wise men" appointed by the alliance parties. The decision taken in this regard by the panel was non-binding for the parties, yet it was further discussed by the alliance leadership team, which subsequently tried to solve the dispute internally. If one of the alliance parties could not agree with the non-binding resolution, that party could refer the dispute to arbitration, seeking a binding solution. No disputes were referred to arbitration in this project.

Unlike traditional contracting, only a limited number of standard form alliancing contracts are available, including the NEC4 Alliancing Contract, TAC-1 (Term Alliance Contract) and FAC-1 (Framework Alliance Contract)[15], the last two being published by the Association of Consultant Architects and King"s College London.

[14] J.S.J. Koolwijk, *op.cit.*, page 45-46.

[15] TAC-1 (Term Alliance Contract) and FAC-1 (Framework Alliance Contract) are published by the Association of Consultant Architects and King's College London.

3. The most common causes of construction disputes in the recent years

Claims and disputes had become endemic in the construction industry and, in spite of the continuous developments of the standard forms of contracts and consensual dispute resolution schemes from the past years, there is no indication that the incidence of claims and disputes is decreasing.

In the attempts to identify the most proeminent causes of disputes, exhaustive studies and research into causes of disputes were conducted in the construction literature, being considered[16] that: *"Identifying common causes and consequences of unresolved conflicts and claims would allow for more effective dispute avoidance as well as more efficient resolution of "unavoided and unavoidable disputes""*. The results of these studies were centralized by P. Fenn[17] (please refer to Figure 1 below).

However, as noted by another author[18], the direct comparison of these results is "neither possible nor useful, because of the diverse industry cultures and differing methodologies and terminologies used in data collection, analysis and outcome presentation".

Emphasizing the need for a deeper analysis of the causal connection between conflicts, claims and disputes, in 1997 M.H. Kumaraswamy conducted a questionnaire survey on sixty-one (61) contemporary construction projects in Hong Kong[19], identifying the root and proximate causes of construction claims and disputes (please refer to Figure 2 below). The findings of the survey revealed a new perspective over the causes of disputes, *i.e.* that the behaviour and actions of the contracting parties play a major role in the apparition of disputes.

[16] G. Younis, G. Wood, M.A.A. Malak, *"Minimizing construction disputes: the relationship between risk allocation and behavioural attitudes"* in *Construction Management and Economics (online)*, Taylor & Francis (Routledge), vol. 20(1), page 732.

[17] G. Younis, G. Wood, M.A.A. Malak, *op. cit.*, page 731 (adapted from P. Fenn, *"Rigour in research and peer review"*, in *Construction Management and Economics*, 1997, vol. 15, pages 383-385, and P. Fenn, (2006) *"Conflict Management and Dispute Resolution"*, in D. Lowe, and R. Leiringer, *"Commercial Management of Projects"*, Blackwell Publishing, Oxford, pages 234-269.

[18] M.H. Kumaraswamy, *"Consequences of construction conflict: a Hong Kong perspective, Journal of Management in Engineering"*, 1998, vol. 14(3), pages 66–74, cited in G. Younis, G. Wood, M.A.A. Malak, *op. cit.*, page 731.

[19] M.H. Kumaraswamy, *"Conflicts, claims and disputes in construction engineering"*, in *Construction and Architectural Management*, 1997, vol. 4(2), pages 95-111.

Last but not least, other authors as G. Younis, G. Wood, and M.A.A. Malak[20], and P. Mitropoulos and G. Howell[21] structured the causes of disputes in three (3) basic elements: project uncertainty, contractual issues and opportunistic behaviour.

While the project uncertainty is trying to be mitigated by the pre-allocation of risks between contracting parties, and the disagreements resulted from imperfections of contracts are expected to be mitigated by the multi-tiered contractual dispute resolution schemes, there are little remedies against the opportunistic behaviour of the contracting parties.

Figure 1 - Categorising Causes of Dispute (adapted by G. Younis et al. from P. Fenn)

Al Momani [15]	Causes of delay: poor design, change orders, weather, site conditions, late delivery, economic conditions, and increase in quantity.
Alkass *et al.* [16]	Strikes, rework, poor organization, material shortage, equipment failure, change orders, act of God.
Bristow and Vasilopoulous [17]	Five areas unrealistic expectations: contract documents, communication lack of team spirit and change.
Colin *et al.*[18]	Six areas: payment, performance, delay, negligence, quality and administration.
Diekmann *et al.* [19]	Three areas: people, process and product.
Heath *et al.* [20]	Seven areas: contract terms, payment, variation, time nomination, re-nomination and information.
Hewit [21]	Six areas: change of scope change conditions, delay, disruption, acceleration and termination.
Kululanga *et al.* [22]	Four sources of dispute: (1) errors, defects and omissions in the contract documents, (2) underestimating the real cost of the project in the beginning, (3) changed conditions and (4) stakeholders involved in the project.
Madden [23]	Three categories: legal, technical and quantum.
Molenaar *et al.* [24]	Three categories: people issue, process issue and project issues.
Rhys Jones [25]	Ten areas: management, culture, communications, design, economics, tendering pressures, lay, unrealistic expectations, contracts and workmanship.
Semple *et al.* [26]	Four areas: acceleration, access, weather, and changes.
Sykes [27]	Two areas: misunderstandings and unpredictability.

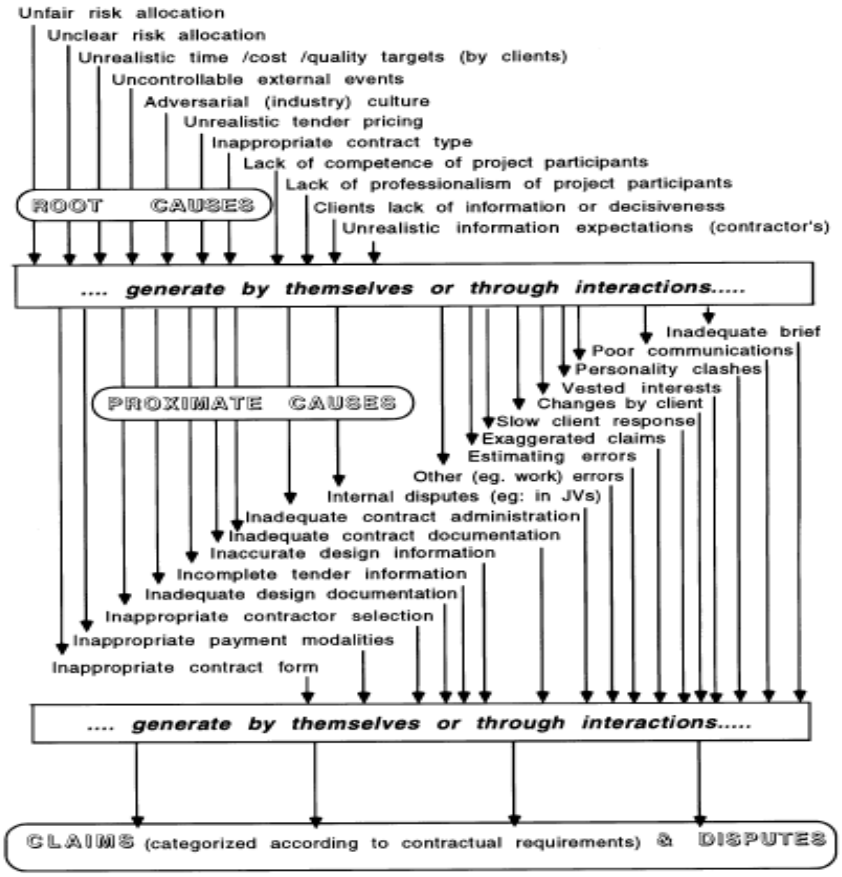
[20] G. Younis, et al., *op. cit.*, page 731.

[21] P. Mitropolous, G. Howell, *"Model for understanding, preventing and resolving project disputes"*, in *Journal of Construction Engineering and Management*, 2001, vol 127(3), pages 223-231, cited in G. Younis, G. Wood, M.A.A. Malak, *op. cit.*, page 731.

4. Opportunistic behaviour in construction contracts. The agent-principal theory

From the legal perspective, the contracts are governed by the principle of *Pacta sunt servanda* according to which any agreement based on the consent of the parties to it, is binding, and must be executed in good faith.

Figure 2 - The Root and Proximate Causes of Disputes (pursuant to M.H. Kumaraswamy)



However, as construction and engineering literature noted[22], once a contract is concluded the situation of the parties changes in one of bilateral dependence. This bilateral dependence together with the cost of using the legal system to arbitrate contractual disputes and the cost of an eventual termination of the contract favours the apparition of opportunistic behaviour whereby the parties pursue to improve their economic position, deviating from the initial understanding from the conclusion of contract[23].

The academic literature defined the "opportunistic behaviour" as "an act or behaviour of partnership motivated by the maximization of economic self-interest and occasioned loss of the other partners"[24], or as "the behaviour when the agent can provide the principal with incomplete or distorted information, can pursue self-interests notwithstanding formal and conventional norms, and make profit regardless the owner"s interests"[25].

The reasons and circumstances that favours the opportunistic behaviour of the contracting parties have been extensively studied by the economic literature within the so-called "principal-agent theory".

Agency relationships, in which one party (the principal) delegates work to another (agent), are the cornerstone of economic life. In construction field common examples of agency relationships include employer (principal) and contractor (agent), employer (principal) and engineer (agent), contractor (principal) and subcontractors (agents), employer/ engineer/ contractor (principals) and their employees (agents).

The principal-agent problem (also known as "agency dilemma" or the "agency problem") typically arises where, due to the contrary interests and information asymmetry of the parties, the agent does not act in the best interest of the principal. The information asymmetry, defined as any situation where "the principal and the agent are not in possession of the same information at the same time"[26], include hidden characteristics, hidden information, and hidden intentions.

Generally, the literature[27] considers that there are two (2) types of opportunism: (i) the "ex-ante opportunism" which may occur when an agent misrepresents its qualifications or abilities, or submit abnormally low bids before entering into the desired principal-agent relationship, normally referred to as "adverse selection", and (ii) the "ex-post opportunism" which may occur after the contract conclusion where the agent is not putting in the agreed effort, typically referred to as "moral hazard".

[22] C.Y. Chang, G. Ive, "Reversal of bargaining power in construction projects: meaning, existence and implications", in Construction Management and Economics, Routledge Taylor & Francis Group, 2007, vol. 25(8), page 846.

[23] H.I. Unsal, J.E. Taylor, *"An empirical investigation of opportunistic behaviour in project networks and its impact on market efficiency"*, in *The Engineering Project Organization Journal*, Routledge Taylor & Francis Group, 2011, page 96.

[24] R. Sönmez, *"Value Creation through Social Alliances: Theoretical Considerations in Partnership Relationships"*, in V. Potocan *et al.*, "Handbook of Research on Managerial Solutions in Non-Profit Organizations", IGI Global, 2017, pages 205-231.

[25] D.A. Zhdanov, *"Agency Cost Management in the Digital Economy"*, in M. Y. Kuznetsov *et al.*, "Challenges and Opportunities of Corporate Governance Transformation in the Digital Era", IGI Global, 2019, pages 130-151.

[26] A. Ceric, *"Strategies for minimizing information asymmetries in construction projects: Project managers' perceptions"*, in *Journal of Business Economics and Management*, 2014, vol. 15(3), pages 424-440.

[27] D.N. Wagner, *"The Opportunistic Principal"*, in *Kyklos*, John Wiley and Sons Ltd., 2019, vol. 72(3), page 4.

In order to cope with the agent opportunism, it is considered[28] that the principal has two (2) main options: (i) to invest in information systems to control the agent opportunism, or (ii) to try to align the interests of the agent with its own interests by providing suitable incentives.

While the economic literature has traditionally analyzed the principal-agent relationship from the perspective of the opportunistic behaviour of the agent only, usually defined as "*self-interest seeking with guile"*[29] , recent studies[30] have also taken into consideration the opportunistic behaviour of the principal, describing it as *"self-interest seeking with dominance"*.

In this respect it was noted[31] that: *"self-interest seeking with dominance is facilitated by the authority relationship between the principal and the agent. It is an asymmetric distribution of power and transaction specific investments which give rise to opportunistic principal behavior, leading to situations where an abuse of authority can be observed, resulting in distorted economic performance"*.

Same as in case of the opportunistic behaviour of the agent, there are also two (2) types of opportunistic behaviour of the principal: (i) the "ex-ante opportunism" may occur when the principal misrepresents the contractual situation, e.g. in terms of the quantum and nature of works, completeness or correctness of design, available permits and authorizations, site and underground conditions, production pressures, adequacy of equipment, construction costs, allocated budget, expected price adjustments, etc., leading to "adverse selection", and (ii) the "ex-post opportunism" where after the contract conclusion the principal illegally interferes with the autonomy of the agent, undermining the performance of the contract by its instructions and control activities.

Even though standardized forms of contracts provide contractual mechanisms and guarantees to limit the opportunistic behaviour of the parties, the enforcement of such mechanisms and guarantees fundamentally depend upon the good faith of the parties as well as the efficiency of judicial system and discretion of courts[32] .

Under these circumstances the questions arises whether the new information technologies developed in the past years may be of use in preventing and mitigating the opportunistic behaviour of parties in construction and engineering contracts, and thus to prevent the disputes that may occur in such contracts.

5. Using information technology to prevent the disputes in construction contracts

5.1. What are smart contracts

"Smart contract" is a concept used to describe a computer code that automatically executes all or parts of an agreement and is stored on a blockchain-based platform[33].

[28] D.N. Wagner, *op. cit*., page 4.

[29] O. Williamson, *"The economic institutions of capitalism. Firms, markets, relational contracting"*, New York, 1985, cited in D.N. Wagner, *op. cit*., page 6.

[30] D.N. Wagner, *op. cit*., page 6.

[31] D.N. Wagner, *op. cit*., page 6.

[32] C. D'Alpaos et al., *"Time overruns as opportunistic behavior in public procurement"* in *Journal of Economics*, Springer-Verlag Wien, 2013.

[33] S.D. Levi et al., "An Introduction to Smart Contracts and Their Potential and Inherent Limitations", in Harvard Law School Forum on Corporate Governance, 2018, page 1.

In a more comprehensive definition[34] "smart contract" was described as *"a computerized transaction protocol that executes the terms of a contract. The general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimize exceptions both malicious and accidental, and minimize the need for trusted intermediaries. Related economic goals include lowering fraud loss, arbitration and enforcement costs, and other transactions cost"*.

Utilizing a smart contract, contractual terms agreed by the parties can be converted into a programming language and be verified and enforced by a decentralized verification system, without the intervention of the contracting parties. Thus, during the performance of the contract, the agreed transaction, exchange or contractual action will automatically be executed after the occurrence of an event or after a specified time period, exactly as it was agreed by the parties at the conclusion of the contract.

5.2. Smart contracts and the blockchain technology

A blockchain, sometimes referred to as "Distributed Ledger Technology (DLT)", is essentially a digital ledger of transactions that is duplicated and distributed across a network of computer systems (the "nodes"). Each block in the chain contains a number of transactions, and every time a new transaction occurs on the blockchain, a record of that transaction is added to every participant"s ledger. The records are immutable, meaning that no participant can alter a transaction after it has been recorded to the shared ledger. If a record includes an error, a new transaction must be added to reverse the error, both transactions remaining thereafter recorded in the shared ledger.

As it was noted in the literature[35], the blockchain *"acts as infrastructure for smart contracts to be executed across a distributed network (those nodes validating and updating the distributed ledger) rather than being executed and adjudicated by centralized organizations (such as a judicial system). Furthermore, information stored in blockchains are a new potential trusted source of information to trigger those contracts […]. Because the contractual obligations of smart contracts are written into code - and will be enforced in a decentralized way across a blockchain network -contracting parties can have greater confidence that performance will be carried out."*

5.3. Smart contracts and Building Information Modeling (BIM)

In some situation in order to trigger the execution of contract the smart contracts as computer code might have to refer to external data, provided by a third-party information source (generally referred to as an "oracle"). As it was noted in the literature[36]: *"Preferably those oracles - including temperature readings, prices of other goods or any other event relating to the contract - are reliable and can be predetermined in contract negotiation"*.

In construction industry, the common data environment (CDE) used in Building

[34] N. Szabo, "Smart Contracts", 1994, cited in F. Möslein, "Legal Boundaries of Blockchain Technologies: Smart Contracts as Self-Help?", Philipps-Universität Marburg, pg. 2, available online at: https://ssrn.com/abstract=3267852.

[35] D.W.E. Allen et. al, "The Governance of Blockchain Dispute Resolution", in Harvard Negotiation Law Review, vol. 25:75, 2019, page 79.

[36] D.W.E. Allen et. al, *op. cit*., page 81.

Information Modelling (BIM) might be such third-party information source, playing the role of the oracle for the construction smart contracts.

Building Information Modelling (BIM) is often described as a highly collaborative process that allows architects, engineers, real estate developers, contractors, manufacturers, and other construction professionals to plan, design, and construct a structure or building within one 3D model. The cornerstone of BIM is that all the parties involved in the construction and lifecycle management of constructed assets are brought to the same platform, working collaboratively and sharing data (information).

These data (information) in a BIM model are shared through a mutually accessible online space known as a common data environment (CDE), and can be used to improve accuracy, express design intent from the office to the field, improve knowledge transfer between the involved parties, reduce variation orders and field coordination problems, and provide insight into existing construction for other related projects later on.

Being available in real-time to all the involved parties, these data (information) reduce the information asymmetry and prevent disagreements and disputes resulted from the incomplete or delayed availability of information. Last but not least, BIM is usually seen as an effective tool to support claims and disputes under the contract, being able to provide reliable contemporary records, created, obtained or produced at the same time with the facts or events upon which the claim or dispute is based.

Depending on how much information is being shared and managed throughout the entire construction process, there are different levels of BIM that can be achieved for various types of projects:

a) *Level 0 BIM: Using paper-based drawings and/or digital prints, zero collaboration between parties.*

b) *Level 1 BIM: Using 2D construction drawings and some 3D modelling* - this level implies the electronic sharing of data carried out from a common data environment (CDE) usually managed by the contractor. Level 1 BIM doesn"t involve much collaboration, each party publishing and managing their own data.

c) *Level 2 BIM: Teams work in their own 3D models* - at this level all parties use 3D CAD models but sometimes not in the same model. However, the way in which parties exchange information differentiates it from other levels. Information about the design of a built environment is shared through a common file format.

d) *Level 3 BIM: Teams work with a shared 3D model* - at this level everyone involved in the project uses a single, shared project model. The model exists in a "central" environment and can be accessed and modified by everyone. This is called Open BIM, meaning that another layer of protection is added against clashes, adding value to the project at every stage.

e) *Level 4 BIM: Time* - this level adds to the information model comprised by BIM the element of "time". Thus, this level includes scheduling data that helps outline how much time each phase of the project will take or sequencing of various components.

f) *Level 5 BIM* adds cost estimations, budget analysis, and budget tracking to the information model. When working at this level of BIM, project owners can track and determine what costs will be incurred during the length of the project.

g) *Level 6 BIM* ensures accurate predictions of energy consumption requirements and empowers parties to build structures that are sustainable.

5.4. Using the smart contracts technology in enforcing the contractual will of the parties expressed at the conclusion of contract

The experience acquired so far by the international construction industry shows that the actual tools, mechanisms and procedures used to prevent the disputes in construction and engineering contracts are insufficient, not being any indication that the incidence of claims and disputes would have decrease in the past years as a result of using such tools, mechanisms and procedures. Irrespective of the clarity of contractual provisions regarding allocation of risks and of the multi-tiered contractual dispute resolution schemes, any attempt to prevent claims and disputes by bureaucratic measures (contractual procedures) of which enforcement depend at the end of the day exclusively upon the good faith of the parties, proved to be not enough to ensure the voluntary compliance of the parties with their own contractual will as recorded at the date of contract conclusion.

The adversarial culture of construction industry, the cost of using the legal system and the substantial time needed to arbitrate contractual disputes transformed the tools, mechanisms and procedures initially intended to prevent the claims and disputes in construction contracts into efficient weapons of opportunistic behaviour, used by the parties to deviate from the initial understanding from the conclusion of contract and to dishonestly improve their economic position within the contract.

Illustrative in this regard are the experience encountered in the recent years with the use of contractual adjudication in prevention of construction disputes in civil law countries, including Romania. Initially intended to ensure the speedy resolution of disputes by a board of experienced construction specialists, adjudication shortly became itself a major source of disputes between the contracting parties. Matters as appointment of dispute boards" members, consequences created by this type of dispute resolution mechanism over limitation, the duration and costs of adjudication proceedings, and enforcement of dispute boards decision were opportunistically used by the contracting parties to delay and even block the resolution of contractual disputes by their referral to arbitration for an indefinite period. It is noteworthy that in Romania these problems have been solved only by removal of adjudication as mandatory condition precedent to arbitration from the applicable standardised construction contracts starting with 2017.

From the opportunistic behaviour perspective, the complexity of construction projects is currently given by the number of individuals involved in development of respective projects and, respectively, in management of contractual obligations. The more individuals involved, the more contrary interests, both contractual and personal, that are needed to be harmonized. While theoretically it is widely recognized that establishing a collaborative culture and aligning the involved parties" contrary interests are the best ways to ensure the smooth performance of a contract, implementing these principles into construction projects proved to be extremely difficult and time-consuming.

Under these circumstances the necessity of identifying new ways to ensure the voluntary compliance of the contracting parties with their own will as recorded at the date of contract conclusion, while disciplining their contractual behaviour appears to be evident. In this regard, smart contracts technology, in conjunction with blockchain technology and Building Information Modelling (BIM) present undeniable advantages to become the next generation of dispute avoidance tools and

mechanisms used in construction and engineering projects.

As to how these technologies could be implemented in construction projects, it is noteworthy that the construction and engineering industry is currently one of the most prepared for a quick switch to the digital management of contracts. The use of standardised detailed contracts (which may be easily translated into smart contracts/computer codes) is already a common practice in the industry both in common and civil law countries. In the same time the use of Building Information Modelling (BIM) is spreading throughout the industry, many countries already mandating the use of BIM in all major infrastructure projects that receives central public funding.

It is not hard to imagine how these technologies will work in the real life. Once a construction and engineering contract will be concluded in writing, a corresponding smart contract, translating the will of the contracting parties in computer codes will be created. Thereafter, the contract will automatically execute the contractual actions based on the contemporary, real-time data (information) received from the common data environment (CDE) created within the BIM process. The security and immutability of records and contractual actions will be ensured by the blockchain technology.

The most important advantage of smart contracts technology is that, once the required conditions are fulfilled (pursuant to data shared by the involved parties in CDE), the contractual obligations are executed automatically, in seconds, without human intervention. This means that all contractual procedures, which under traditional construction contracts depend by the will of a certain individual, *e.g.* application for an interim certificate, certification of works, determination, payment, contractual notices, etc., and usually take significant time to be concluded, will be executed instantly, without the delays usually generated by human behaviours and their opportunistic interests.

Adoption of smart contracts technology in construction and engineering contracts is not without challenges and risks for the contracting parties.

For instance, one of such challenges would be how quick the amendments made to the text-based version of the contract might be included in the computer codes of the same contract. Having in mind that the blockchains are immutable, amending a smart contract will be far more complicated than modifying a traditional text-based contract, or a standard software code that does not reside on a blockchain. In this regard in the literature[37] it was emphasized that: "*amending a smart contract may yield higher transaction costs than amending a text-based contract, and increases the margin of error that the parties will not accurately reflect the modifications they want to make"*.

Other matters of concern may include the allocation of risks and liabilities between the contracting parties for coding errors, and for the situations where the common data environment (CDE) would be unable to supply the data (information) necessary for self-execution of contract, would provide erroneous data or simply it would go out of business.

Last but not least, even though it is expected that implementation of smart contracts technology to discipline the contractual behaviour of the parties, reducing the disputes generated by their opportunistic behaviour, it is also expected that these types of disputes to be replaced by

[37] S.D. Levi et al., *op.cit.,* page 6.

disputes in relation to the computer codes corresponding to the text-based contract.

6. Conclusions

The disputes which occurred in construction projects are usually caused by one or more of the following three (3) elements: project uncertainty, contractual imperfections, and opportunistic behaviour of the contracting parties and their representatives.

While the matter of project uncertainty was traditionally mitigated by the pre-allocation of risks between the contracting parties, and the disagreements resulted from imperfections of contracts by the multi-tiered contractual dispute resolution schemes, so far there were little remedies against the opportunistic behaviour of the contracting parties meant to ensure the voluntary compliance of the parties with their own will as expressed at the conclusion of the contract.

The development in the recent years of new information technology tools like smart contracts, blockchain and Building Information Modelling (BIM) will provide in the near future an efficient remedy against the disputes resulted due to the opportunistic behaviour of the contracting parties.

However, as it was emphasized within this research, this remedy comes with its own challenges and risks which must be taken into consideration by the contracting parties at the conclusion of the contract accordingly.

References

- D.W.E. Allen et. al, *The Governance of Blockchain Dispute Resolution*, in Harvard Negotiation Law Review, vol. 25:75, 2019;
- J. Bailey, *Construction Law*, Routledge, 2011;
- E. Baker, B. Mellors, S. Chalmers, A. Lavers, *FIDIC Contracts: Law and Practice*, Informa Law, 2009;
- A. Ceric, Strategies for minimizing information asymmetries in construction projects: Project managers' perceptions, in Journal of Business Economics and Management, 2014, vol. 15(3);
- C.Y. Chang, G. Ive, *Reversal of bargaining power in construction projects: meaning, existence and implications*, in Construction Management and Economics, Routledge Taylor & Francis Group, 2007, vol. 25(8);
- C. D"Alpaos et al., *Time overruns as opportunistic behavior in public procurement* in Journal of Economics, Springer-Verlag Wien;
- L. Klee et al., *International Construction Contract Law*, Wiley Blackwell, 2015;
- J.S.J. Koolwijk, *Alternative Dispute Resolution Methods Used in Alliance Contracts*, in Journal of Professional Issues in Engineering Education and Practice, January 2006;
- M.H. Kumaraswamy, *Conflicts, claims and disputes in construction engineering*, in Construction and Architectural Management, 1997, vol. 4(2);
- S.D. Levi et al., An Introduction to Smart Contracts and Their Potential and Inherent Limitations, in Harvard Law School Forum on Corporate Governance, 2018;
- D. Lowe, and R. Leiringer, *Commercial Management of Projects*, Blackwell Publishing, Oxford;
- M.M. Rahman, M.M. Kumaraswamy, *Joint risk management through transactionally efficient relational contracting*, in Construction Management and Economics (online), Taylor & Francis (Routledge), vol. 20(1);

- B. Shapiro, *Transferring Risks in Construction Contracts*, 2010, available at: http://www.shk.ca/wp-content/uploads/2013/02/Transferring-Risks-in-Construction-Contracts-BSS.pdf;
- R. Sönmez, *Value Creation through Social Alliances: Theoretical Considerations in Partnership Relationships*, in V. Potocan et al., "Handbook of Research on Managerial Solutions in Non-Profit Organizations", IGI Global, 2017;
- N. Szabo, *Smart Contracts*, 1994, cited in F. Möslein, *Legal Boundaries of Blockchain Technologies: Smart Contracts as Self-Help?*, Philipps-Universität Marburg, pg. 2, available online at: https://ssrn.com/abstract=3267852;
- H.I. Unsal, J.E. Taylor, *An empirical investigation of opportunistic behaviour in project networks and its impact on market efficiency*, in The Engineering Project Organization Journal, Routledge Taylor & Francis Group, 2011;
- D.N. Wagner, *The Opportunistic Principal*, in Kyklos, John Wiley and Sons Ltd., 2019, vol. 72(3);
- O. Williamson, The economic institutions of capitalism. Firms, markets, relational contracting, New York, 1985;
- G. Younis, G. Wood, M.A.A. Malak, *Minimizing construction disputes: the relationship between risk allocation and behavioural attitudes* in Construction Management and Economics (online), Taylor & Francis (Routledge), vol. 20(1);
- D.A. Zhdanov, Agency Cost Management in the Digital Economy, in M. Y. Kuznetsov et al., Challenges and Opportunities of Corporate Governance Transformation in the Digital Era, IGI Global, 2019;
- Common Order no. 915/465/415/2008 for the approval of general and particular conditions of contracts at the conclusion of the contracts of works issued by the Ministry of Economy and Finance, Ministry of Transporation and Ministry of Development, Public Works and Houses;
- Government Decision no. 1405/2010 regarding the approval for the use of some conditions of contract of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation infrastructure of national interest financed by public funds;
- Government Decision no. 1/2018 for the approval of general and particular conditions of contract for certain categories of public procurement contracts related to the investment objectives financed by public funds replaced the former standardised public procurement contracts based on FIDIC conditions of contract, previously mandatory for the road and railway infrastructure works only, with new ones, extending in the same time their applicability to all the investment objectives financed by public funds.

HUMAN RIGHTS AND INHERITANCE LAW: A MIRRORED PERSPECTIVE

Aniela-Flavia ȚICĂU-SUDITU[*]

Abstract

The enforcement of fundamental human rights in the spectrum of inheritance law has a lengthy history. From a modern perspective, we confront with a divergent dynamism: the inheritance law has a static dimension, being considered the traditional area of private law. On the other hand, the human rights are more dynamic, and urge to find themselves respected in all the areas of law.

The article unfolds from two perspectives: a syncretic, at a national level point of view and a diachronic, evolutionary one, at a supernational level, of the way the jurisprudence on human rights led towards the legislative changes. As part of the national civil law system, as an anchor in private law, inheritance law is ruled according to internal provisions, making harmonizing the law a challenging endeavor. Despite mutual socio-historical heritage and Roman law origins, there are plenty differences within the substantive succession laws of Member States. Due to the intra-community right to free movement, the patterns of life changed, both from the perspective of the European Union and from the Member States" point of view. As a corollary, transforming life also means shifting the mortis causa legal approach, mainly by considering the succession law.

The aim of this article is to examine the influence of human rights in the area of inheritance law, mainly in family law and property law, across different jurisdictions. Its structure will follow the paradigm of outlining the influence of fundamental human rights in contrast with the general principles of inheritance national laws. The article concludes by exploring the legislative impact and the limits that human rights have from the inheritance law perspective.

Keywords: *inheritance law, human rights, succession law, harmonization.*

1. Introduction

This article seeks to address an analytical overview of critical issues concerning the interpretation and application of fundamental rights, observing that the major impact of fundamental rights, from the private law perspective, is not on the legislation, but on the case-law. This happens as a consequence of interpreting fundamental rights in an appropriate manner in order to apply them to private law rules. In fact, by ricochet, the impact transfers towards the legislation in time, that has to encompass the updated case-law. Therefore, the legal literature points towards an indirect horizontal effect, noting that basic human rights have only a limited influence on inheritance law. As a consequence, it is brought forward the concept of "*subsidiarity in reasoning"*, by interpreting private law using fundamental rights principles and patterns, even though national private law has priority[1].

Inheritance rights are traditionally considered constitutional rights, as most states" constitutions guarantee a specific

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[1] Verica Trstenjak, Petra Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2016, p. 9.

right of inheritance. Accordingly, there are some principles that encompass these rights. Throughout this paper, we will only discuss the most important ones. For example, the principle of equality, which entails that each natural person is equal in case of succession, with the same rules and conditions applying to all civil rapports. Also, it implies that men or women, legitimate and illegitimate children, as participants to civil relationships, must all be treated the same.

Initially, the rationale of asserting human rights involved vertical relationships. These rapports had the specific attributes that made the object of public law, thus regulating the relationship between the states and individuals by striving for the protection of individuals versus state interference in the area of fundamental rights. The objective is accomplished primarily by enforcing both negative and positive obligations for the states.

Subsequently, that rationale of asserting human rights is continuously expanded, merging in the process the area of private law. Due to the influence on horizontal relationships, this impacts the way that legislators establish and regulate these bonds between individuals.

2. Legal Sources of Human Rights

For a better approach, we will highlight the sources or instruments of human rights, on their different levels. At an international level, the human rights are defined and theoretically protected[2] by treaties, such as the *United Nations" Universal Declaration of Human Rights*, proclaimed by the *United Nations General Assembly* in Paris, in 1948[3].

At a regional level, the instruments become more effective: the *European Convention on Human Rights*, formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*[4] is recognized by the signing parties: member states and the Union itself. As a consequence, the *European Court of Human Rights* protects the human rights stated in the Convention. Another regional instrument is the *European Charter of Human Rights*[5], enacted in 2000. In addition to these instruments, general principles regarding human rights might be found in the *Treaty on the European Union*[6], *Treaty on the Functioning of the European Union*[7] and in the jurisprudence of the *Court of Justice of the European Union.*

Besides the instruments listed above, we also distinguish national-level instruments or sources, such as national constitutions and the rulings of constitutional courts or other national courts that impact by their jurisprudence not only the ruling of other courts, but also the legislative perspective. However, there is a constant dynamism regarding the interpretation of the concept of human rights, due both to social and economic

[2] It is only a theoretical protection due to the fact that the treaty is a non-binding legal instrument. As a consequence, there is no particular court, either at national or international level, that is bound to protect the human rights, as stated in the Treaty.

[3] Available at, https://www.un.org/en/about-us/universal-declaration-of-human-rights, accessed at 24.03.2021.

[4] Available at https://www.echr.coe.int/documents/convention_eng.pdf, accessed at 24.03.2021.

[5] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT, accessed at 24.03.2021.

[6] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, accessed at 24.03.2021.

[7] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, accessed at 24.03.2021.

progress. In this respect, the development of private law protection of human rights enables reducing discrimination by protecting weaker parties[8].

Enabling human rights provisions is in close connection with the harmonization or adaptation of Member States" legislations. The purpose of unifying inheritance law in the European Union led towards the enactment of *Regulation (EU) No 650/2012*[9] *and* the implementation of the *European Certificate of Succession*. The regulation was met with great confidence, as being a proof of institutional harmonization of succession law among the Member states of European Union, concurrently establishing a better integration within the European Union and its principles.

The ideal scenario for best implementing human rights, as they are provided for by the sources indicated, implies reducing the divergences of Member states" national regulation concerning inheritance law. This is best achieved by unifying the rules of conflicts of law, mainly involving technical aspects, such as the procedure of determining the variables of inheritance, like heirs, estate portions, reserved estate portions et alii.

In case of cross-border inheritance procedures, because of the different inheritance laws that might apply, the context increases the difficulty, generating concerns not only regarding the lack of legal uniformity, but also in relation with the legal incompatibility. Therefore, the exercise of harmonizing succession laws is welcomed at European level. Moreover, the tendency leans towards creating a common European succession law framework. In this regard, *Regulation No. 650/2012* represents a first step towards harmonization, addressing cross-border juridical matters in a dual manner, by observing both legal and jurisprudential features. Also, the *Regulation No. 650/2012* founds the *European Certificate of Succession* that scrutinizes succession related rights from the Member States.

The *Regulation*"s prime purpose from the European Union"s standpoint was the removal of internal Member states" legal inheritance-related obstacles, as they were encountered while exerting the right to free movement of persons[10]. In other words, the *Regulation*"s aim involved the "*collision uniformity of the succession*", as a first step towards harmonization. This concept entails that the applicable inheritance law involves a single connector, and as a consequence, the estate can be entirely inherited under a single substantive national law. By contrast, in case of inheritance disputes that involve more connectors, such as nationality or category of assets, the determination of applicable law can lead towards *"collision divisibility of the succession"*, enabling the divergent jurisdiction of national substantive laws over distinct inheritance assets.

This purpose would be accomplished in a dual manner. Firstly, the *Regulation* was intended to support the procedures of

[8] Verica Trstenjak, Petra Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2016, p. 6.

[9] *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,* available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0650, accessed at 24.03.2021.

[10] Recital 9 of the *Regulation* provides that it applies to '*all civil law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession*.", available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62016CJ0558, accessed at 24.03.2021.

recognition and enforcement at intranational level. Therefore, the judgments delivered by a Member State could be easily recognized by a different Member State, thus reducing the incidence of inheritance-related incoherent case-law and jurisdictional disagreements involving a cross-border element. Secondly, the *Regulation* provided for the *European Certificate of Succession*, thus enabling a prompt assessment of inheritance cases involving a cross-border element, without altering the Member states internal substantive succession legislation.

One of the main features of the *Regulation* is the establishing as a general principle[11] the jurisdiction of the Member State where *de cuius* had the last *habitual residence*[12]. Therefore, the *habitual residence* at the time of death is a main connector that is provided by the *Regulation.* Nevertheless, the *Regulation* does not impose this connector unto its recipients. For example, *de cuius* can indicate the applicable law, and as a result, the choice of law is a connector itself.

Therefore, even though the *Regulation* could not be a silver bullet for the legal harmonization issue, delivered an efficient solution for the applicable legislation. In time, this process will eventually help reducing the legislative divergence by enabling the juridical communication among Member states and by decreasing the discrepancies and conflicts encountered in the process of applying the law, that led towards the above mentioned "*collision fragmentation of the estate"*[13].

3. The legislative impact of human rights in the inheritance law

The *European Court of Human Rights*, by its jurisprudence, recognized in an indirect manner the fundamental human rights, in this purpose presenting a synthesis of the constitutional laws and traditions established by the Member states. Likewise, The *Charter of Fundamental Rights* represents a significant landmark for the Union"s legislation, because it represents a written bill of rights, whereas *European Convention on Human Rights* embodies an outward bill of rights, generating a possible blunder regarding the legislative origin or legal source of fundamental rights. However, most fundamental rights are not considered absolute rights, recognizing that they can be limited accordingly with the public interest and the principle of proportionality.[14]

Even though the *European Convention on Human Rights* has impacted just a few cases regarding inheritance issues, it remains an important instrument invoked by parties involved in an inheritance dispute. The main provisions that are raised in order to settle the disputes are articles 6, 8, 14 of the Convention and article 1 of Protocol No. 1. The principle of "*the right to enjoy a possession"* and its protection according to *European Convention of Human Rights*, has been an unsettled odyssey. Allegedly, this particular bill of rights is not very resourceful in the inheritance-related issues. This being said, we will examine inheritance-related rights recognized by the

[11] Entitled 'the backbone of the system of succession established by the Regulation'; see Mariusz Zatucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future," Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

[12] The concept of habitual residence designates the place where de cuius was 'at home', where life was most significant and where animus semper manendi contrasting with the concept of "domicile", as it is recognized by national jurisdictions.

[13] See Mariusz Zatucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future" , Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

[14] Robert Schütze, An Introduction to European Law, Cambridge University Press, 2015, pp. 105.

Convention. For example, the right to inheritance is considered, according to *European Convention of Human Rights*, a possession within the scope of Article 1 of Protocol No 1. The European Court established a judicial divergence between two type of rights: on one hand, a settled right, and on the other hand, an expectation of inheritance. In order to have a consistent perspective, we shall examine some of the relevant case-law[15] in the following pages.

As a parenthesis, the consequences of discrimination are plenty and deceptive. In some legislations around the globe, the discrimination is mirrored by the failure of enacting the principle of equality. In such countries, the right to own property is not guaranteed by law for women[16]. However, the right of every person to equality before the law and enjoy the right to own property or the right to inherit, is still an unattained purpose. For example, in a decision from Kenya,[17] regarding the inheritance of land, the Court observed the violation of article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women*. In the cited case, because of the gendered-biased customary law, the daughters-heirs were entitled to a smaller portion of land than the sons-heirs, based expressly on their gender, thus infringing on basic human rights.

3.1. Property and inheritance as human rights

As stated in the legal literature, inheritance law "*deals with the passing on of property and rights and obligations, upon the death of an individual"*[18]. The legal research indicates that more than half a million legal cases encompass every year cross-border inheritances. Moreover, the percentage of cross-border inheritances amongst all the inheritance legal cases in the member states reaches the value of 10%[19]. It is a general rule that, at a European Union"s level, the differences among the national inheritance laws generate insecurity and uncertainty, rendering the difficulty both for de cuius and for the heirs to acknowledge their rights to leave and to receive inheritance in different countries[20]. Undoubtedly, this divergence of Member states" national regulation is an important obstacle in achieving real harmony in the area of human rights. In the following lines we will analyze the circumstances of forced heirship and disinheritance from a human rights standpoint.

Table 1:

Some Member States" legislations provide that one portion of the deceased"s estate must be granted, to a class of heirs titled forced heirs. This provision is effective no

[15] Jonathan Glasson QC and Toby Grahamy, Inheritance: a human right?, Trusts & Trustees, Vol. 24, No. 7, September 2018, pp. 659–666.

[16] Land and Human Rights, Standards and Application, HR/PUB/15/5/Add.1 © 2015 United Nations "In Cameroon there is no legal provision for women to own property. Following traditional laws, a woman does not inherit land since she will marry and then be provided for by her husband outside her community. When her husband dies, again she will not inherit as the land returns to the husband's family." Source: Report of the Special Rapporteur on violence against women (E/CN.4/2000/68/Add.5), para. 14.

[17] Court of Appeal Eldoret: Mary Rono v. Jane and William Rono, Civil Appeal No. 66 of 2002, as cited in Land and Human Rights, Standards and Application, HR/PUB/15/5/Add.1 © 2015 United Nations.

[18] Martin Schauer, Bea Verschraegen (eds), *General Reports of the XIXth Congress of the International Academy of Comparative law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2017, f. 91.

[19] See Eleanor Cashin Ritaine, *National Succession Laws in Comparative Perspective*, 14 ERA F. 131, 132 (2013).

[20] Mariusz Zatucki, "*Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*," Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

matter the deceased"s will and is applied both to donations and testaments. But even if the provisions are well established in the national legislations, they are, nevertheless, constraining the right to property. As a consequence, the deceased cannot freely dispose of the property, thus disregarding the right to protection of property, as stated in the *European Convention on Human Rights,* Article 1 of Protocol no. 1. From this perspective, the legal provisions on forced heirship interfere with the right to protection of property as stated in the *European Convention on Human Rights*, Article 1 of Protocol no. 1, although the institution itself theoretically pursues a legitimate purpose.

Table 2:

Another aspect is to distinguish if this particular interference is needed and appropriate in a democratic society and if the margin of appreciation, the way it is recognized to each Member State, is not distorted from its purpose. According to the margin of appreciation principle, member states have a certain autonomy regarding legislative policies related to controversial human rights, although guaranteed by the *European Convention on Human Rights.*

Table 3:

As stated by the legal provisions, part of the deceased"s estate is granted de iure to the designated class of forced heirs. In order to achieve that, the legislator envisioned two portions of the estate: the non-reserved portion, of which de cuius can dispose of without restrictions, and the reserved portion, that entitles the reducing of both donations and wills that surpass the non-reserved portion; nevertheless, the reduction only operates after the death of *de cuius*, but the effects can retroactivate in the case of the donations.

Table 4:

As a principle, *de cuius* has the right to dispose *animus donandi* of his property. In order to do so, one can make donations during his or her lifetime, or a will, that has effect in devising the estate *post mortem*. From this point of view, the limitations concerning the right to decide the outcome of one"s property, are in fact limitations of the right to property[21]. The rules concerning forced heirship are somehow disregarding the right to property as a fundamental human right, as stated in the *European Convention on Human Rights*, Article 1 of Protocol no. 1. In fact, Article 1 of Protocol no. 1 of the Convention, is applicable to more situations, that span from full enjoyment of possessions to control of the use of property and the guarantee of not being deprived of property.

Table 5:

Even though *de cuius* has the right to decide to do whatever he wants with the property during his or her lifetime, if the arrangements involve the reserved portion of the estate, they will be annulled. In other words, the right to inherit the reserved portion is shieled better than the right to protection of property, as stated in the *European Convention on Human Rights,* Article 1 of Protocol no. 1. As a consequence, it is obvious the interference with the aforementioned fundamental right.

Table 6:

From our point of view, the legal mechanism of forced heirship is not only obsolete, but also detrimental to the legal order. Moreover, it does not appear necessary for the society"s wellbeing, enabling to believe that the legislator does not trust the law"s recipients to make the right choices in protecting their family. Because of that, the legislator decides for the citizens, taking away a part of their freedom of choice by

[21] As stated in the case *Marckx v. Belgium*, application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021.

imposing limitations regarding the protection of property, but delivering a greater protection to heirs by imposing the forced heirship mechanism, thus carrying out a legitimate purpose.

Table 7:

Another important matter is the possibility or impossibility of disinheriting the successors by *de cuius.* The connection with the human rights issue resides in the blurry lines designating the recipient of this protection: the deceased"s will or the designated heirs.

Table 8:

The deceased"s choice of disinheriting an heir is stipulated distinctly across the member states legal systems. Besides the fact that some Member States lack entirely the provisions regarding disinheritance, the ones that provide a legal framework, also specify different legal treatments, both substantive and procedural. As a consequence, enabling a homogenous treatment as provided by the Regulation is not a realistic choice, considering that protecting the deceased"s will over the protection of the designated heirs might not be applicable.

Table 9:

Nonetheless, due to the concept of margin of appreciation recognized to member states by the Convention, for the time being, a claim brought up to the *European Court of Human Rights* concerning the violation of Article 1 of Protocol no. 1 of the Convention, by the mechanism of forced heirship or disinheritance, will probably be dismissed by invoking the Member State"s margin of appreciation doubled by the juridical consistency of the Member states" legislation[22].

Table 10:

For better understanding the essence of the protected right, we will cite the Court"s caselaw, pointing out the provisions taken into consideration for the protection of fundamental human rights.

Table 11:

In the case *Slivenko v Latvia*[23], the court stated that the Article 1 of Protocol No. 1 can be applied when the protection of the right to peacefully enjoy a possession deals with already existing possessions, not future or potential possessions. Therefore, the Convention does not provide any assurances related to the right to attain possessions. However, the Convention does provide a certain protection when the circumstances indicate a legitimate expectation of enjoying a possession.

Following the same rationale, in *Saghindaze and others v Georgia*,[24], the Court stated that the notion of "possession" envisioned by art.1 of Protocol No.1, is an autonomous concept, surpassing the limitations of physical goods, including rights, interests, and even claims, as long as they are under the *"legitimate expectation"* umbrella.

Likewise, in *Fabris v France*[25], the Court stated that even though Article 1 of Protocol No. 1 of the Convention does not provide assurances related to the right to attain possessions, they do offer a certain protection when the circumstances indicate a legitimate expectation, as well as claims

[22] Dimitris Liakopoulos, 'Interactions between European Court of Human Rights and Private International Law of European Union' (2018) 10(1) Cuadernos de Derecho Transnacional 248.

[23] Slivenko v Latvia, Application No 48321/99, 2003, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[24] Saghindaze and others v Georgia, Application no 18768/ 05, 27 May 2010, (2014) 59 EHRR 24, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[25] Fabris v France, Application no. 16574/08, 2013, ECHR, available at hudoc.echr.coe.int, accessed at 24.03.2021.

based on a legitimate expectation[26] of enjoying a possession. Also, the court stated that the autonomous concept of "p*ossession*" might also encompass an advantage as a consequence of discriminatory provisions or circumstances.

The case unfolds as it follows: Mr. Fabris, a French citizen, was considered an illegitimate child, given the fact that he was "*born of adultery"*. As a consequence, he was entitled to only a half of the share a legitimate child would receive. Later on, France passed amendments to the obsolete legislation from 1972, that was deemed discriminatory, and as a consequence, illegitimate children were granted the same inheritance rights like legitimate children. However, the amendments did not have retrospective effect, and Mr. Fabris was only entitled to half of his legitimate brothers" inheritance shares, being considered illegitimate.

The Court solved the cause by applying Article 1 of Protocol No. 1 of the Convention, that provided: *"Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*." and article 14 of the Convention, that provided the "*enjoyment of the rights and freedoms set forth in Convention shall be secured without discrimination on any ground such as (…) birth"*. In this context, it was underlined the principle of equality, as a human right, and its impact on the right to inherit, and as a consequence, on the right to peacefully enjoy property.

Another interesting case is represented by *Re Land*[27], in which the claimant, the sole beneficiary under his mother"s will, had been found guilty for her death by manslaughter, and as a consequence was applicable the forfeiture rule. The court interpreted the right to inherit as a right to enjoy a possession by itself, according to Article 1 of Protocol No 1 of the Convention. Therefore, it is expected of the national courts to give effect to primary legislation by considering the human rights enshrined in the Convention.

3.2. Family life: children rights and different types of union

Until recently, inheritance laws that violated the rights of the children considered illegitimate were not regarded as discriminatory. There is a certain concern at European level that substantive family law continues to remain in the exclusive competence of Member states, interim enabling European institutions to take measures concerning family law with cross-border implications.

It is an undeniable fact that the main interest of children is to have legal provision that would protect them. The lack of legislation to address the most important rapports regarding the rights and obligations that are particular to family life can be extremely harmful for children, regardless of the rationale that was counted for the lack of legislative protection, such as the parents gender identity, ethnicity or sexual orientation[28].

[26] As a rule, for the legitimate expectation to be recognized, it must be justified by a legislative provision that enables the law's recipients to undertake a certain conduct.

[27] Re Land , [2006] EWHC 2069 (Ch), available at hudoc.echr.coe.int, accessed at 24.03.2021.

[28] L. HODSON, Loveday: *Ties that bind. Towards a child-centered approach to lesbian, gay, bi-sexual and transgender families under the ECHR*, International Journal of Children s Rights, 2012, p 503, available at https://www.researchgate.net/publication/274466020_Ties_That_Bind_Towards_a_Child-

Table 12: The *European Court of Human Rights* handed down an ample case-law that acknowledged the violation of article 14 of the *Convention* where children "*born of adultery"* and as a consequence considered illegitimate, were denied the right to inherit an equal share of their parent"s estate, due to the national legislations.

In *Marckx v Belgium*[29], the Court stated that its provisions, namely Article 1, Protocol No. 1, expresses the protection of the right to peacefully enjoy one"s possessions. As a result, it applies only to existing possessions without guaranteeing the right of mortis causa acquiring possessions, that is only a potential right. Also, in the same case the Court stated not only that the concept of "*family life"* is an autonomous one, but that one cannot make any proper difference in the human rights area between the legal status of a family: legitimate or illegitimate. The legal reason points towards article 8 of the Convention, that uses the word "*Everyone*"[30], in relation with the law"s beneficiaries. As a paradigm, the Court stated that the right of succession between children and parents, and in general between ascendants and descendants, is closely linked to "*family life"*.

In *Paradiso and Campanelli v Italy*[31], the concept of "*family life"* is recognized in relation with the presence of close personal ties, the latter being a sine qua non condition for the acknowledgment of "*family life"*. Moreover, the concept is considered lato sensu, encompassing not only immaterial and non-patrimonial relationships, such as social, cultural or emotional bonds, but also patrimonial and pecuniary relationships, for instance child and spousal support, joint use of property or even the right to inherit property among the individuals of a family, that may have the legal basis of the institution of the forced heirship or the right to a reserved portion of an estate. The same issues were taken into consideration by the Court in the cases *Munioz Diaz v. Spain*[32], *Kroon and Others v. the Netherlands*[33].

Analogously to the circumstances of illegitimate children, the Court noticed human rights violations in the case of adopted children. For instance, in the cases *Hand v George*[34] or *Pla and Puncernau v Andorra*[35], the Court restated its position towards the right of adopted children to be considered equal to natural children,

Centred_Approach_to_Lesbian_Gay_Bi-Sexual_and_Transgender_Families_under_the_ECHR, accessed at 24.03.2021.

[29] *Marckx v Belgium*, Application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[30] Article 8 of the Convention states: '1. *Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*'.

[31] *Paradiso and Campanelli v Italy*, Application No 25358/ 12, 24 January 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[32] *Munioz Diaz v. Spain*, Application no. 49151/07, 2009. In the decision, the Court stated that: 'children born out of wedlock may not be treated differently-in patrimonial as in other family-related matters-from children born to parents who are married to each other', available at hudoc.echr.coe.int, accessed at 24.03.2021.

[33] *Kroon and Others v. the Netherlands*, Application number 00018535/91, October 27, 1994, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[34] *Hand v George*, [2017] EWHC 533 (Ch), available at https://uk.practicallaw.thomsonreuters.com/D-101-2266?transitionType=Default&contextData=%28sc.Default%29, accessed at 24.03.2021.

[35] *Pla and Puncernau v Andorra*, Application no. 69498/01, 2004, available at hudoc.echr.coe.int, accessed at 24.03.2021.

concluding that discriminating against them would violate the provisions of articles 8 and 14 of the Convention. The Court admitted that even though it is not vested to settle disputes of private nature, it cannot remain passive in case of infringement on the prohibition of discrimination, provided by article 8, 14 and the principles underlying the *European Convention on Human rights*, such as the right to respect for private and family life.

The problem of unequal treatment of adopted children or born out of wedlock is amplified by the sexual orientation discrimination that impacts the right to succeed. This is mainly because an important number of Member states do not recognize same-sex marriages and do not provide extra-marital partners the same inheritance rights as provided to spouses.

An unequal development at European level of family law and inheritance law generates many family relationships disputes. These are mostly caused by the fact that these relationships are legally recognized only in some countries. For example, same-sex couples, married in gender-neutral marriage legislations, fear that they would be deprived of their inherent rights as a consequence of the contradictory legal framework. In this respect, the Court paved the way by its case-law, towards the endorsement and the acquiescence of this highly debated human rights.

The cases did not specifically address the issue of substantial marriage validity. However, interpreting the European Court"s case-law, renders that the internal recognition of a same-sex marriage, requested for a precise purpose, does not pose the peril of violating the public national order, albeit one of the spouses is a citizen of that Member state. Also, the case-law projected an emerging European public order that provides its own conformity agenda.[36]

The case *Coman and others v Romania*[37] involved a same-sex married couple, with spouses of different nationalities. One spouse was a Romanian national, hence a European Union citizen. According to the European Union legislation, the European Union citizens have the right to move freely, together with their family members. In the Coman v Romania case, the spouse that was not an European Union citizen was not allowed to move freely, as a consequence of applying the principles of national identity and public order, Romania being one of the member states that do not recognize same-sex marriages. As a result, the legislation fails to offer the legal protection implied traditionally by family rights, both for the spouses, and for the eventual children, such as inheritance rights. Although the case was decided solely in relation to the requirement of recognizing the right to move freely as distinct, autonomous right of the national identity principle, the case could also entail the patrimonial aspects of the family rights, such as inheritance rights.

Likewise, the case *Orlandi and others v Italy*[38] involved more same-sex married couples that were denied family rights by the Italian authorities, on the basis that such unions cannot be recognized by registering into the civil records office, despite the fact that they are legally concluded in a different state, because the national law only provided

[36] Laima Vaige, *"Listening to the Winds of Europeanisation: The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland,"* Oslo Law Review 7, no. 1 (2020): 46-59.

[37] Case C-673/16, *Coman and Others v Romania*, 2018 (Grand Chamber), available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN, accessed at 24.03.2021.

[38] *Orlandi and others v. Italy*, 26431/12 , 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021.

rules for the traditional families. The Court stated that Italy disregarded fundamental human rights as they are enshrined in article 8 of the *European Convention on Human Rights*.

Despite the fact the Court stated that Member States have the freedom of constraining access to marriage for same-sex couples, having a wide margin of appreciation in this respect, most domestic cases are decided by invoking the principle of public order, that blocks the application of legal provisions and instruments that seem discordant with the national legislation.

For some member states, the concept of marriage is enshrined in the Constitution, as a traditional, different-sex union. As a consequence, an eventual registration or transcription of same-sex parenthood or marriage, might be considered as disregarding the public order. Such Member States do not provide legal protection of same-sex couples family rights, or state same-sex marriages exclusion, defining the legal union only from a heterosexual perspective[39].

The difficulty lays within the outcome of the substantial legitimacy of the legal status of same-sex couples whether they need the legal recognition of their *status quo* in a country that does not give legal effect to such unions, nor recognize as legitimate the children of such spouses. For example, in an internal decision of one Member state[40], the court had to decide the outcome of the legal status of a child whose parents were of the same sex. The object of the case was the transcription of the child"s birth certificate in conformity with a legal birth certificate from Great Britain. The court considered the child"s best interest and the principle of equality and non-discrimination in order to issue a decision. Also, the court acknowledged the fact that the child" s rights could only be protected by recognizing the legal status in relation with his family.

However, besides the direct application of some European Union" Regulations, the optimum manner of providing certain effects of same-sex marriages in the Member States that would not legally recognize these types of unions, implies the acknowledgment, and as a consequence, the recognition, of the case-law provided by the *European Court of Human Rights.*

4. Conclusions

Analyzing the jurisprudence of the *European Court of Human Rights* is one way of understanding the impact of fundamental rights in this specific area of private international law, namely the succession law. In this respect, it is a critical role the was taken up by the *European Court of Human Rights* from the perspective of protecting fundamental rights as a top priority.

Moreover, the development of implementing uniform rules by the European Union, aims towards the methodical elimination of the legal boundaries between the Member States, hence providing superior protection to fundamental rights in comparison to the one

[39] See Mole, Richard CM; (2016) *Nationalism and homophobia in Central and Eastern Europe*. In: Slootmaeckers, K and Touquet, H and Vermeersch, P, (eds.) *The EU enlargement and gay politics: the impact of Eastern enlargement on rights, activism and prejudice*. (pp. 99-121). Palgrave Macmillan: London, UK.

[40] *Judgment of Supreme Administrative Court of Poland, 10 October 2018, ref no OSK 2552/16*, as it is mentioned in Laima Vaige, "*Listening to the Winds of Europeanisation: The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland*," Oslo Law Review 7, no. 1 (2020): 46-59. According to the author, the child's '*birth certificate was transcribed with only one mother, while the second parent in the registry remained anonymous. The second mother was mentioned only in the margins of the entry in the registry'*.

provided by the national legislation. Among the effects of implementing human rights in national legislations, one can identify the decreased impact of national public order, on one hand, and the augmented role of the European Union"s public order, on the other hand, and, as a consequence, improved legal certainty and predictability for the legal issues that are bound to arise in the context of human rights protection.

Inheritance law harmonization finds itself at the stage of work in progress. A modern Europe cannot and should not withdraw from this project. Obviously, the policy of small steps applies best in this scenario. Therefore, doctrinal harmonization through comparative studies of legislation and case-law dynamics is a first necessary step, leading towards the so-called "*spontaneous harmonization"*[41]. Once achieved this stage, it enables the synchronization at the European institutional level.

Rendering human rights reasonable entails finding the accurate balance amongst different types of protection. Mutually conflicting human rights are frequently debated. For example, the forced heir"s right to a portion of the estate might infringe the testator"s right to dispose mortis causa of the property, according to the personal will; the debtor"s right to a home might infringe the buyer"s right to property, the child"s right to protection might impact the public order of the Member state that would not provide legal effects for the same-sex marriage of the child"s parents, and so on.

In the judgments referred to above, the European Court focused on basic principles like the right to inherit as a fundamental element of family life. Although there is a divergent application and lack of harmonization between private international law and basic human rights, in time, due to the continuously expanding case-law of the European supranational courts, the Member States" legislation will surely find the proper balance, adjusting the legal provisions in order to comply with the supranational legislation concerning human rights

References

- *The European Convention on Human Rights*, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed: 24.03 2021;
- 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, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0650, accessed at 24.03.2021.
- *Slivenko v Latvia*, Application No 48321/99, 2003, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Saghindaze and others v Georgia*, Application no 18768/ 05, 27 May 2010, (2014) 59 EHRR 24, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Fabris v France*, Application no.16574/08, 2013, ECHR, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Re Land*, [2006] EWHC 2069 (Ch), available at hudoc.echr.coe.int, accessed at 24.03.2021;

[41] The so called *'spontaneous harmonization'* indicates a synchronized legislative development at the national level, by means of replicating the changes observed in other countries. For more details about the issue, see Mariusz Zatucki, "*Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*," Iowa Law Review 103, no. 5 (July 2018): 2317-2342

- *Marckx v Belgium*, Application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Paradiso and Campanelli v Italy*, Application No 25358/ 12, 24 January 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Munioz Diaz v. Spain*, Application no. 49151/07, 2009, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Kroon and Others v. the Netherlands*, Application number 00018535/91, October 27, 1994, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Hand v George*, [2017] EWHC 533 (Ch), available at https://uk.practicallaw.thomsonreuters.com/D-101-2266?transitionType=Default&contextData=%28sc.Default%29, accessed at 24.03.2021;
- *Pla and Puncernau v Andorra*, Application no. 69498/01, 2004, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- Case C-673/16, *Coman and Others v Romania*, 2018 (Grand Chamber), available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN, accessed at 24.03.2021;
- *Orlandi and others v. Italy*, 26431/12 , 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021;
- *Marckx v. Belgium*, application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021.
- Verica Trstenjak, Petra Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2016;
- Robert Schütze, *An Introduction to European Law*, Cambridge University Press, 2015, pp. 105;
- Jonathan Glasson QC and Toby Grahamy, *Inheritance: a human right?*, Trusts & Trustees, Vol. 24, No. 7, September 2018, pp. 659–666;
- Land and Human Rights, Standards and Application, HR/PUB/15/5/Add.1 © 2015 United Nations;
- Martin Schauer, Bea Verschraegen (eds), *General Reports of the XIXth Congress of the International Academy of Comparative law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2017, f. 91;
- Eleanor Cashin Ritaine, *National Succession Laws in Comparative Perspective*, 14 ERA F. 131, 132 (2013);
- Dimitris Liakopoulos, "Interactions between European Court of Human Rights and Private International Law of European Union" (2018) 10(1), Cuadernos de Derecho Transnacional 248;
- Hodson, Loveday: *Ties that bind. Towards a child-centered approach to lesbian, gay, bi-sexual and transgender families under the ECHR*, International Journal of Children s Rights, 2012, p 503, available at https://www.researchgate.net/publication/274466020_Ties_That_Bind_Towards_a_Child-Centred_Approach_to_Lesbian_Gay_Bi-Sexual_and_Transgender_Families_under_the_ECHR, accessed at 24.03.2021;
- Mole, Richard CM; *Nationalism and homophobia in Central and Eastern Europe*. In: Slootmaeckers, K and Touquet, H and Vermeersch, P, (eds.) The EU enlargement and gay politics: the impact of Eastern enlargement on rights, activism and prejudice**.** (pp. 99-121). (2016), Palgrave Macmillan: London, UK;
- Laima Vaige, "Listening to the Winds of Europeanisation: The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland," Oslo Law Review 7, no. 1 (2020): 46-59;
- Mariusz Zatucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future," Iowa Law Review 103, no. 5 (July 2018): 2317-2342

ROBOTICS AND LAW - THE LINKS BETWEEN ROBOTICS AND LABOR LAW, IN PARTICULAR THE LEGAL PERSONALITY OF EMPLOYEES II.

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Abstract

Recently in the fields of labour law the researchers focus connection points between robotics and law, including labor law, and raise potential problems and their answers. There are lot of types AI, or robots, but robots that may have labor law relevance, those, which move physically in the same space as humans in the workplace. These robots are called collaborative robots. Collaborative robots were developed to be able to perform a specific task in the same worksplace with a human at the same time. The study examines issues related to occupational safety, employer power, employee individual and collective will, and employee legal personality in the context of the emergence of robotics.

Keywords: *labour law, collaborative robots, artificial intelligence, flexibility, security.*

1. Contents

When collaborative and autonomous robots work with humans in the same workspace, there are basically three issues to consider in labor law regulation. On the one hand, how the balance between the protective nature of labor law and flexible employment conditions is changing. On the other hand, robot and artificial intelligence, as well as how employer death prevails in human interactions, and how employee individual and collective will can be interpreted thereafter. That is why it is justified to take a position on the issue of protection during technological development, as well as to examine the development of decisions and their impact on employment and labor law, including liability.

Thirdly, the present study also deals with future ideas and policy-making, in which the question for me is whether the broad concept of employee legal personality is still sustainable, and if so, how it can be interpreted. Of particular importance is the role of the social welfare system, employment policy and education policy in the future visions of the next 25 years.

Since I answered the first question in the first part of the study, the second and third questions are explained in this part of the study.

The transformation of decision-making power opens a new front in regulatory debates. Since artificial autonomous robots, and thus collaborative

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'The present paper represents the second part of the study "ROBOTICS AND LAW - THE LINKS BETWEEN ROBOTICS AND LABOR LAW, IN PARTICULAR THE LEGAL PERSONALITY OF EMPLOYEES", and the first part of the study was published in LESIJ no. XXXVII, vol. 2/2020, pp. 73-86, please see http://lexetscientia.univnt.ro/download/2020_XXVII_2_7_LESIJ.pdf.

autonomous robots, will also be able to perform activities in a collaborative workspace that were previously typically and exclusively performed by humans. As the European Parliament points out, ensuring *non-discrimination, i.e. equal opportunities, due process, transparency and comprehensibility of decision-making processes*, is essential when defining the legal framework. Safeguards shall be incorporated in automated and algorithmic decision-making processes and human monitoring and control shall be made possible.[1] In the following, therefore, we deal with the issue of decision-making power.

In labor law, similarly to civil law relations, the decision plays a key role due to the specific position of the parties. Decisions made by the employer, the employee (individual will) and the community of employees (collective will) are of great importance. Let us first review *the importance of decisions* in the employment relationship from the point of view of individual and then collective will.

The basic principle of the private law of employment is the so-called contractual principle. More specifically, this means that everyone has the opportunity to establish and shape their legal relationships through self-determination regulation - through decisions.[2] In addition, however, it is the task of the legislature to enact regulations that protect the individual employee against the power of the employer.

During the Industrial Revolution, in the 18th-19th century, the legal system applied the principles of private law and property law to the sale of labor. At first, the employment contract was considered as a classical private law contract. Freedom of property took absolute precedence over the interests of employees. At the same time, keeping labor law purely within the framework of private law was unsustainable in the long run, as the subjects of private law relations are ancillary parties at the market, whereas the asymmetry between the employer and employee is clear.[3] The contractual freedom of the employee was only an illusion, in the last century the unbridled pursuit of the employer"s interest may have led to the vacancy of the employment contract, and today - I believe - *one of the marginal problems of (Hungarian and foreign) labor law is the vacancy of employment contracts.*[4] There are two ways to protect the weaker party and thus restrict contractual freedom: collective action and state intervention.[5]

According to *György Kiss*, labor law is primarily the right of those who are not at such a degree of independence that they would not need to use their labor force for

[1] It is also important to note that as divisions in society continue to increase as the middle class shrinks, we must keep in mind that the development of robotics may result in the concentration of large wealth and considerable influence in small groups. P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Preamble Sections H and K and Q.

[2] Kiss, Gy. (2005) 27.

[3] Hajdú, J., Kun, A. (2011): Labor Law I., Budapest, Patrocinium, 59.

[4] 'It may seem that the employment contract is only relevant as a causa, it has little or no role in shaping the legal relationship at the time of performance.' Kiss, Gy. (2014) 40. This is also reflected in the fact that Dutch labor law treats the employment contract as similar to civil consumer contracts, which view is not unfamiliar to Tamás Prugberger and György Kiss, either, which can also provide protection for the weaker party, the employee.

[5] Hajdú, J., Kun, A. (2011) 59. Prugberger, T. (2002a): The issue of the protection of the more vulnerable party in the contract law part of the Concept of the new Hungarian Civil Code, *Civil Law Codification*, 3, 37. 39. Kiss, Gy. (2010) 29-30.

others" interests.[6] All this led to the incorporation of safeguards into the legal relationship, which served to maintain a state of equilibrium between the parties. This has become a primary task of labor law. While legal relations of work under civil law are synallagmatic, the content of the employment relationship needs to be made *more synallagmatic*.

Private law is *"the right of individuals, which really becomes that with the institutionalization of individual self-government.[7] The special and concrete right that results from this is the truest private law, and its central concept is the contract."* The significance of the individual self-government is what, by its nature, labor law lacks due to its subject matter, the indeterminacy of the job and its concretization, namely, in accordance with the right of the employer to give instructions, to control and management.[8] That is, the imbalance is inherent in the legal relationship because of its subject matter (the indeterminacy of the service) and the associated "right of employer to specify".[9] The employer"s individual self-government is seemingly and actually strong. The definition of performance by the employer does not mean a change in the basic conditions of the employment relationship, but the concretization of performance, which can basically be deduced from the contract.[10] The unilateral definition of performance is an important decision that is limited by the principle of fair consideration.[11]

[6] Kiss, Gy. (2001) 200-202. József Radnay considers collective bargaining autonomy to be such a protective measure. Radnay, J. (2001): The relationship between the Civil Code and labor law, with special regard to Hungarian law. In: Manfred Ploetz - Hilda Tóth (ed.): *The codification and functional relations of labor law and civil law.* Study volume. Novotni Publishing House, Miskolc, 259-260. Kiss, Gy. (2013) 6., Kiss, Gy. (2006) 255.

[7] Kelemen, L. (1941) 17.

[8] The Labor Code (Mt.) does not contain Section 102 (3) (b) of the Mt. as of 1992, according to which the employer is obliged to provide the employee with the information and guidance necessary for the performance of the work. This obligation is incumbent on the employer even in the absence of an explicit statutory provision. This also follows from the fact that the employer directs the work and, and as the Explanatory Memorandum to Section 51 of the Mt. emphasizes, 'it follows from the provision in Section 42 (2) of the Mt. that it is not only a right but also an obligation of the employer, so he must organize the work in such a way that the employee can perform his job properly.' Berke, Gy. - Kiss, Gy. (2015).

[9] *'The effects of the indicated characteristics of the employment relationship are analyzed by Wank, who calls the employment relationship an Äquivalenzverhältnis that gives the employer ample scope to influence the content of the employment relationship in the performance process. In German law, this is referred to as the Einseitige Leistungsbestimmung or Leitungsmacht.'* Kiss, Gy. (2014) 40.

[10] The two basic duties of an employee are the duty of availability and the duty to work. The employment relationship is distinguished from all other private employment relationships by the duty of availability. The dogmatic basis of availability can be deduced from the nature of the employment contract and the employment relationship, so to that extent it has a contractual basis. In the employment contract, the object, ie the service, is defined only in a framework, according to a 'kind' and consequently the employer has the right to determine the manner of performance of the employee. … Although the duty of availability is an independent duty of the employee and a defining criterion of the employment relationship, it is not an obligation for one's own purposes. Passive behavior, which otherwise requires the employee to comply with a number of other behavioral requirements, has the direct purpose of fulfilling the duty to work, which is realized through the acceptance of the employer's instruction. Berke, Gy. - Kiss, Gy. (2015) In contrast, the employer's right to form (Gestaltungsrecht) in this capacity covers a wider scope. This distinction is also important from the point of view of Hungarian labor law. The difference between the two legal systems is that while in German law the determination of the legal basis of the Weisungsrecht, Direktionsrecht and the removal of its limits is a legal issue, in Hungarian labor law the power of concretization occurs ex lege - at least in the legislator's concept – and its limits are also defined by law. Kiss, Gy. (2014) 40-41.

[11] According to Section 6 (3) of the Labor Code, 'The employer is obliged to take into account the interests of the employee on the basis of fair consideration, the unilateral determination of the method of performance may

A working person really needs protection, but once he or she can protect himself or herself, he or she *does not want* to work in a strict labor regulatory environment. I do not want to simplify the problem in any way; however, it must be seen that the changes in the world around us *simultaneously shape the playing field, the players*, with the direct consequence that *the rules of the game* also change. That is why we are talking about the future of labor law. Of course, labor law has a future, only *in a different context, on different bases* than in the last nearly 200 years.

Over the last fifty years, regarding changes in the economic and social environment, we have to highlight three major challenges to which the legal system has had to respond: *globalization, changing forms of work, the strengthening of the individual, and thus the decline of collective consciousness*. What all three have in common is that technological innovation has had a major impact on the development of the processes.[12] In this development, in my view, economic and social changes make *employment relations shift towards civil employment relationships*, the sharp boundaries between individual relationships are blurred, and employment relationships are often transformed.

However, the rules of the game need to be reconsidered when, due to technological advances, namely automation, certain work processes are carried out by collaborative autonomous robots / artificial intelligence. From this point of view, it is appropriate to deal in detail with the legal personality of the robot and artificial intelligence, as well as with labor law liability. Since we cannot talk about the contractual principle, the individual and collective will of the parties, which shape the employment relationship in this case. At this point, the role of the social partners, and that of the collective will, arises.[13] *Globalization, the changing nature of work and the increased role of the individual* can be said to shake the foundations of labor law regulation at the same time, reinforcing each other. In the 19th and 20th centuries, working conditions were improved through collective bargaining. The collective consciousness of the workers was strong. However, as a result of the cross-border activities of multinational companies, the organization of

not cause disproportionate harm to the employee.' The institution of fair consideration is related to the so-called right to unilateral performance determination.

Paragraph 315 of the German Civil Code (BGB) governs the facts in which one of the parties has the right to determine the manner in which the contract is to be performed. Under the rule, if performance is determined by one of the contracting parties, in case of doubt, the decision must be interpreted on the basis of fair consideration. However, this principle must also be interpreted in conjunction with the General Code of Conduct (§ 6 of the Mt.), such as good faith, fairness, the obligation of mutual cooperation, and the principle of 'Nemo suam turpitudinem allegans auditur'.

[12] Bellace, J.R. (2018) 15. In this connection, Arturo Borstein considered the crisis symptoms of labor law to be synthesizable in four main points: the uncertainty pervading labor law, including the increasingly more difficulty for labor law to adapt to changes in economic conditions as regards the examination of the limits of labor protection, the declining relevance of labor law provisions at national level, and there is no real transnational labor law which would prioritize the system of labor law ideas seeking to give greater effect to the social and protective nature of labor law against the market aspects of economic competitiveness. Quotes: Attila Kun: The New Labor Code, In: https://jog.tk.mta.hu/uploads/files/13_Kun_Attila.pdf (Downloaded: October 23, 2018).

[13] It is clearly stated in the Pillar that the social partners have a very important role in the development of the *employment model*, so the freedom of organization and the right to collective action can also be considered the core of the rights included in the Pillar.

workers has weakened.[14] In the digital economy, it is not easy to solve the issue of workers taking collective action, as the playing field is completely different.[15] And in the cooperation of humans and robots, collective action cannot be interpreted. In this uncertainty, we must continue to adhere to core values.

The fundamental value of labor law is that it *provides security* and thus *predictability* in economic terms: on the one hand, with rules to protect the employee, and on the other hand, by building a social network from the side of the state in case the employee is unable to work in some disturbance. Another very important value is a healthy and safe work environment.

In 1998, the ILO set out the fundamental rights that all states must respect: "(a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the liquidation of all forms of forced and obligatory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation. … "[16] *These rights must prevail as basic rules of the game, regardless of the playing field.*[17] So security means upholding fundamental values within labor law.[18]

[14] During this period, we find such an unfavorable situation in Hungary and other former socialist countries that, after the change of regime, workers with a modest collective consciousness were even more vulnerable. It can be felt that nearly forty years of disadvantage after the 2nd world war is very difficult to compensate up to this day. Meanwhile, we can see the changes in the Labor Code of 1992 and 2012, and the emergence of a civil law approach can be clearly established. See later.

[15] In the 21st century, another very important component of the employment relationship has changed. Namely, the employer paid the wage not so much for the work done as for the time spent at the workplace. As Bellace puts it, 'the platform and algorithms work automatically'. Nowadays, however, the employer pays wages more for the task performed, making the place of work less significant. Accordingly, non-typical work, such as teleworking and outsourcing, has developed, in which case the employer's right to specify is narrowed. One can agree with the view that in the world of algorithms and applications, in the gig-economy arena, the information age is seen as *an industrial revolution in home work*, and there is no point in fighting for a minimum wage, a decent wage for extra time. At this level, it is of great importance whether the employee is considered an employee or a self-employed person (capitalist, owner). As the European Court of Justice has considered Uber drivers to be more of an employee, the question arises what kind of protection employees on the new platform are entitled to. *Bellace* herself takes the view that the answer of labor law may be its return to its core values. Bellace, J. R. (2018) 20-22.

[16] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labor Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

'… The International Labor Conference… (2) Declares that all Member States, even if they have not ratified the Conventions in question, are obliged, by virtue of their membership of the Organization, to respect, promote and implement fundamental rights in good faith and in accordance with the Constitution; principles to which these Conventions apply. These principles are: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) The elimination of all forms of forced and compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation. ...'

[17] Regarding algorithms, Mangan also refers to what Bellace drew attention to. Namely, that algorithms can lead to inequalities, i.e., discrimination. Mangan, D. (2018) 72.

[18] *I do not analyze Freedland and Countouris' theory of personal working relationships in the present research, as I do not consider the concept feasible. However, there are a number of elements in the concept that deserve to be highlighted. One of these is about the values that appear in work.* They point out that, correctly, the normative basis of labor law regulation is to balance the situation of unequal parties. Human dignity is already known to all of us, a first-generation right included in many international documents. *Freedland and Countouris* complement thinking about dignity with a concept of autonomy and equality. Autonomy means that a person makes decisions about his or her own life (working life) independently, without any coercion. This is complemented by equality, which, like human dignity, is also one of the oldest first-generation human rights. However, equality is thought of in *Amaryta Sen*'s concept of equality, which is equality based on ability, considering this to be the most appropriate for labor law and social law. Dignity is closely linked to the person of the employee, which is based on personal work. Freedland, M. - Countouris, N. (2011b) 372-376.

All these thoughts seem irrelevant with a view to the collaborative autonomous robot. At the same time, we must keep it, as the working person will not step off the playing field, his role will change and he must adapt to the changed circumstances.

It is a question *what happens to the social partners and their decisions with the development of robotics and artificial intelligence.* After all, in the long run, current trends towards the development of intelligent and autonomous machines that can be taught and make decisions independently not only bring economic benefits, but also raise various concerns about the direct and indirect effects[19] on society and the economy as a whole, which must be discussed.

As a result of automation, in my opinion, with the development and improvement of digital skills, both individual and collective will can be strengthened, and thus the ability of those involved to negotiate the definition of working conditions, which is a fundamental institution of labor law.[20] This is true even when individual work processes can be replaced by a robot, and in these processes man is increasingly pushed into the background. It is predicted that in the collaborative workspace, to help the human work will remain the task of the robot. In the case of production lines, flexibility may not be guaranteed without the human factor. With regard to *the decision-making power* attached to the individual, I consider it very important to state the following from the European Parliament"s resolution:

On the one hand, the development of autonomous and cognitive functions[21], such as the ability to learn from experience and make quasi-independent decisions, makes the robot[22] and artificial intelligence more and more similar to those actors who interact with their environment and are able to change it significantly; and in this context, legal liability (and not just legal liability) arising from damage caused by the robot becomes an important issue.[23] The intelligent robot is thus capable of

[19] Martin Ford (2015) xvi. P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Recital G.

[20] Blanpain wrote about globalization and technological innovation that it leads to the disintegration of companies into interconnected groups, where work is organized on a project basis. All this changes the role of the employment relationship and the social partners. The *gig economy* actually represents a network of connected individuals along separate projects. Blanplain, R (1999): European Social Policies: One Bridge Too Short, *Comparative Labor Law and Policy Journal*, 20. 497. Mangan, D. (2018): Labor Law: The Medium and the Message. In: Frank Hendrickx - Valerio de Stefano (eds.): Game Changers in Labor Law. Shaping the Future of Work. *Bulletin of Comparative Labor Relations - 100.* Kluwer Law International BV, Netherlands, 65. See also martin Ford (2015) 53-55.

[21] See also McKensey Global Institute: A future that works: automation, employment and productivity. January 2017, Executive Summary, 1.

[22] What characterizes an intelligent robot? Achieving autonomy through sensors and / or exchanging data with the environment (connectivity) and through exchanging and analyzing this data, independent learning through experience and interaction (optional criterion), at least a small physical appearance, behavior and adaptation of actions to the environment; lack of life in the biological sense. See: P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Point 1. See also: Tamás Klein - András Tóth (ed.): Technology Law - Robot Law - Cyber Law. Woltres Kluwer Hungary Kft., Budapest, 2018, 181-182.

[23] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Recital Z.

With regard to non-contractual liability, Directive 85/374 / EEC can only cover damage caused by a manufacturing defect in a robot and only on condition that the injured party can prove actual damage, a defect in

adaptation and independent decision-making. This changes the player, the playing field and certainly the rules of the game, too. In this respect, research in the field of civil liability is also relevant to Hungarian labor law regulatory issues, as labor liability is based on civil law principles.

In the case of autonomous and collaborative robots, the responsibility of the trainer may arise within the scope of contractual responsibility, and it may also be important to develop a sense of responsibility of the intelligent robot. As I mentioned earlier, we need to treat the intelligent robot as a "human" in order to resolve liability issues. At this point, I must refer to the point of view that an analogy between the robot and human should be avoided during regulation.[24] Regarding responsibility, I cannot interpret collective responsibility in any other way unless we provide the robot with commands that teach people to adapt to the rules. Thus, in case of damage, the robot is penalized. In this case, it is not a social problem that actually arises, but a legal situation that needs to be resolved.

At the same time, it is important to emphasize that robotics has a huge potential to improve workplace safety by transferring many dangerous or harmful work tasks from humans to robots, but also carries with it the potential for a number of new risks.[25]

On the other hand, the autonomy of the robot can be defined as the ability to make decisions and implement them in the outside world, independent of external control or influence. This autonomy is purely technological in nature and its extent depends on how sophisticated the interactions between the robot and its environment have been designed.[26] It is important that the intelligent robot is able to learn, its knowledge is not lost but can be "transferred".

Thirdly, although we cannot yet talk about this, but if the robot is able to make its own decisions, the traditional rules will not be sufficient to establish legal liability for the damage caused by the robot, as they would not allow the party responsible for compensation to be identified and enforcement of the party"s obligation to pay compensation for the damage caused.[27] This finding, in my view, needs to be nuanced because the responsibility of the trainer cannot be ignored, and so must the responsibility of the employer be analyzed from the point of view of control.

In view of the above, it is clear that the current legal framework is incomplete, but not only in the area of contractual liability. Machines designed to select partners, negotiate contract terms, conclude contracts, and decide on the performance of contracts

the product or a causal link between the damage and the defect, so a framework of liability without objectivity or no fault may not be sufficient.

Despite the scope of Directive 85/374 / EEC, the current legal framework would not be able to cover the damage caused by the new generation of robots if robots can be endowed with adaptive and learning skills that make their behavior somewhat unpredictable, as these robots would learn on their own from their changing experience and interact with their environment in a unique and unpredictable way.

[24] See Tamás Klein - András Tóth (ed.) 183.

[25] See Section 46 of the resolution. P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 46.

[26] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Preamble Recital AA.

[27] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics. Preamble Recital AF.

render traditional civil and labor law inapplicable.[28]

Thus, the development of robotics and artificial intelligence has an impact on the work environment by all means, which generates new concerns about the dynamic and static elements of the employment relationship. It is also important from an employment law point of view that the development of robotics requires more knowledge to develop a common position on the joint action of humans and robots, which should be based on two basic interdependencies: predictability and controllability. If controllability is lost, the responsibility of the trainer also becomes questionable. These two interdependent relationships play a key role in determining what information should be shared between humans and robots and how a common human-robot basis can be formed to ensure the smooth co-operation of humans and robots.[29]

In this respect, it is important that the specific legal personality of robots be established in the long term, so that at least the most sophisticated autonomous robots can be classified as electronic persons with specific rights and obligations - including compensation for any damage they may cause – especially in cases where robots make independent decisions or otherwise interact independently with third parties. [30] I do not consider it necessary to analyze the concepts of legal capacity and capacity to act in today"s sense. Klein and Tóth[31] have done this, however, I think it is important to emphasize that we do not have to respond to the technological challenges we face with today"s meaning of our concepts. *In today"s conceptual system, the issue of the legal personality of the robot making collaborative autonomous decisions cannot be solved, therefore, it is pointless to talk about it.* However, it will be the subject of rights and obligations anyway, in cases where it makes independent decisions or otherwise interacts independently with third parties, including the working person.

After the considerations regarding decisions, it can be stated with certainty that by observing the mainstays mentioned in the Pillar and the values highlighted by the European Parliament[32] , we will get to the fundamental principles of the Schuman Declaration and regardless of the level of adaptation to technological development, there is a need for concrete achievements in the construction of not only Europe but the whole world, in particular for the establishment of real solidarity. What are

[28] See: P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Preamble Recital G.

[29] Boston-based Rethink Robotics designed Baxter, a humanoid robot that performs a number of repetitive tasks in close proximity to humans. Martin Ford (2015) 5. and P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 50.

[30] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 50.

[31] See Klein - Tóth (2018) 192-199.

[32] See P8_TA (2017) 0051 Civil law rules on robotics European Parliament resolution of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Recital U: whereas the further development and increasing use of automated and algorithmic decision-making undoubtedly has an impact both on the choices of individuals (such as businesses or internet users) and on the final decisions of administrative, judicial or other public authorities, whether consumer, business or regulatory; whereas, as a general principle, rules on accountability, transparency and accountability, in particular, are useful and necessary, reflecting the essentially European and universal humanist values that characterize Europe's contribution to society; whereas these rules must not affect research, innovation and development in the field of robotics.

these specific achievements? I will examine them below.

The basic rules of future ideas

For businesses, the benefits of automation are relatively clear, however, the issue is already much more complex for policy makers. On the one hand, they need to exploit the potential for productivity growth and develop policies that encourage investment and market functioning to foster continuous development and innovation. At the same time, employees and institutions need to be helped to adapt to employment. This includes rethinking education and training, income support and building safety nets, including support for jobseekers.[33] As part of their day-to-day activities, individuals need to deal with machines in a more comprehensive way and acquire the new skills needed in the new era of automation.[34]

So how can a gradual, pragmatic and cautious approach to all future initiatives on robotics and artificial intelligence be implemented?[35]

Automation does not happen overnight, and at least five key factors influence its actual realization. The first is technical feasibility[36], as technology needs to be adapted to work processes. Second is the development of solutions and their installation cost, which affects the ability of the business to adapt. Third, labor market dynamics[37], including human labor supply, demand and costs. Fourth is the economic benefit, which can include better quality as well as wage savings. Finally, social acceptance and willingness to regulate can also influence the success of adaptation. Taking all these factors into account, there is a chance in decades that automation will have measurable labor market and economic impacts. It is expected that the effects of automation will be slower at the macro level, while it will be felt earlier at the micro level within a company or between companies.[38] After all, automation creates a competitive situation. However, it is important to point out that the degree of automation at the current level of technological development, as I mentioned earlier, can cause inflexibility, as it is difficult to meet changing customer needs.

[33] This can also be treated as a transit state. See about this. Auer, P. – Gazier, B. (2011) 34-36. Individuals are not always able to retain and take with them their social protection rights when switching between different labor market statuses, such as moving from employment to self-employment or unemployment, combining employment as an employee with self-employment, starting a business or terminating a business. The portability and aggregation of rights between schemes is also crucial in order to ensure that workers who work in several jobs or change jobs or change from an employee status to a self-employed person or vice versa can actually benefit from contributory schemes and receive adequate coverage, and to encourage their participation in voluntary social protection schemes. Council Recommendation on access to social protection for workers and the self-employed, COM (2018) 132final. 20.

[34] McKinsey Global Institute (2017) 3. 18-20.

[35] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103 (INL)) (2018 / C 252/25) Preamble Recital U.

[36] While planning, optimization, information gathering are very well automated activities, the following definitely need development: understanding natural language, emotional and reasoning ability, sensory perception and movement. The latter, of course, come at a very serious cost. McKinsey Global Institute (2017) 10.

[37] The dynamics of the labor market is also determined by geographical location and labor supply is influenced by not only changing demographic factors, but also wage rates. Manufacturing automation is likely to be implemented sooner in countries with high wages, such as North America and Western Europe, than in developing countries with lower wages. McKinsey Global Institute (2017) 10.

[38] McKinsey Global Institute (2017) 2. 10-11.

In fact, if we do not recognize and adapt to technological development, we will indeed find ourselves right in the middle of a great storm, where the cyclone will bring inequality[39], technological unemployment, climate change, and obviously they will have a mutually reinforcing effect.[40]

In developing the strategy, the European Commission"s initiative should be highlighted. It proposes a roadmap for the possible use and revision of the framework of digital skills and a description of digital skills at all levels of learners. The European Parliament has called on the Commission to provide significant support for the development of digital skills in all age groups, regardless of employment status. It stresses that, in order to achieve growth in the field of robotics, Member States need to develop more flexible education and training systems to ensure that strategies relating to skills shall meet the needs of the robotics-based economy.[41] In all this, the support of women is also important.[42] Medium- and long-term trends in jobs need to be assessed, with a special focus on job creation and loss in different areas of skills, in order to identify where jobs are being created and are being lost as a result of increased use of robots.[43] Real social problems are very important to be mapped. We must see the potentials and the dangers, too. [44] Particular attention should be paid to the viability of Member States" social security systems.[45]

With regard to civil liability, the following principles need to be emphasized:

Civil liability is an important issue that must be pursued throughout the European Union, for the benefit of citizens, consumers and businesses alike, in order to ensure the same level of efficiency, transparency, consistency, enforcement and legal certainty.[46] It is important that under no circumstances should it limit the type and extent of compensable damage or limit the forms of compensation that can be offered to the injured party on the sole ground that the damage was not caused by a human being.[47]

With regard to liability, two approaches can be taken: a system based on risk management and a system based on strict liability.

[39] Economists studying finance show a strong correlation between, for example, the growth in the financial sector, inequality, and a decline in the share of workers in national income. However, the financial sector could not have achieved results without technological development, indeed.

[40] Martin Ford (2015) xiii. Martin Ford asked whether technological advances could destroy our entire system to such an extent that we need to fundamentally rethink the principles we will follow to survive and thrive.

[41] It stresses the importance of flexible skills and social, creative and digital skills in education; it is convinced that, in addition to the transfer of theoretical knowledge in schools, lifelong learning must be achieved through taking lifelong action P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics, Sections 41 and 45.

[42] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 42.

[43] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 43.

[44] Tamás Klein - András Tóth (ed.) 182-183.

[45] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 44 Tamás Klein - András Tóth (ed.) (2018) 199-200.

[46] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 49 Tamás Klein - András Tóth (ed.) (2018) 200.

[47] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics. Section 55 Tamás Klein - András Tóth (ed.) (2018) 200.

The risk management approach does not focus on the "negligent person" as the individual responsible, but on the person who, in certain circumstances, is able to minimize the risks and manage the negative effects.[48] Objective liability only requires proof that damage has occurred and that there is a causal link between the malicious operation of the robot and the damage suffered by the injured party.[49]

The most important thing is therefore to determine the liable persons, after which the risk is implemented.

Once the ultimately responsible parties have been identified, their responsibilities should be commensurate with the actual level of instructions given to the robot and the robot"s autonomy, so the greater the robot"s learning ability or autonomy, the less responsibility the other parties should have and the longer the "educating" of a robot took place, the greater the responsibility of the "educator" is. It notes, in particular, that when it comes to identifying the person to whom the robot"s harmful behavior can actually be attributed, the robot"s skills gained from "training" should not be confused with skills that depend strictly on its own learning abilities. It notes, however, that with regard to the transition period, at least at the current stage, the responsibility should be taken by humans and not robots.[50]

The European Parliament considers it important to take out compulsory robot liability insurance, which would be supported by a venture capital fund.[51]

I asked the question earlier if an intelligent robot could be considered as a dangerous plant. Klein and Tóth reject the possibility of dangerous operational liability, finding it to have an adverse effect on the development of robot technology. In practice, co-operation and coexistence are realized due to the objective responsibility of occupational safety and health, indeed. Because of this, it is really difficult for employers to go in the direction of collaborative technology.[52] As long as technological advances do not reach the level where collaborative autonomous robots work with humans in a collaborative workspace, responsibility cannot be deployed on the robot, but the responsibility of the robot"s trainer may still exist, considering the circumstances under the employer"s control.

Besides autonomous means of transport (autonomous vehicles, drones), the European Parliament emphasizes that research and development into robots for the elderly has become more common and cheaper over time, and they creating more useful and consumer-friendly products. It also notes that these technologies provide prevention, assistance, follow-up, stimulation and companionship for the elderly, people with disabilities and those

[48] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics. Section 52 Tamás Klein - András Tóth (ed.) (2018) 200.

[49] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics. Section 54 Tamás Klein - András Tóth (ed.) (2018) 201.

[50] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 56.

[51] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 66.

[52] Tamás Klein - András Tóth (ed.) (2018) 203.

with dementia, cognitive impairment or memory impairment.[53]

One fundamental aspect of human care is the human relationship. It believes that the full replacement of the human factor by robots could render care impersonal, while it recognizes that robots can help automate caring tasks and facilitate the work of care-givers while enhancing human care and making the rehabilitation process more targeted. This would give doctors and care-givers more time to diagnose and better plan treatment options. It stresses that, although robotics has the potential to increase the mobility and integration of people with disabilities and the elderly, there will still be a need for human care-givers who will continue to provide them with an important, fully irreplaceable source of social contact.[54]

How can the adverse effects on the employee be addressed? The question that arose in me was to what extent the broad concept of the employee"s legal personality could be applied in solving the tasks ahead of us?

There is a broader concept of the employee"s legal personality, which is the sum of environmental and personal factors in *legal, economic and social terms*. This is because not only the health status and abilities of an individual determine the success of employment, but also economic and labor market conditions, subsequent labor law regulations, adult protection regulations, the development and capacity of the education and training system, the functioning of the social welfare system, including access to rehabilitation services and relief policy.

It is certain that a specific, country-specific social and labor market model and strategy needs to be developed. One element of this is the nature of labor law regulation, in which achieving a balance between flexibility and security is a big issue. *Balance* means the intensity of legal guarantees in a legal relationship to such an extent that it is still motivating for an employer requiring flexibility to keep the given legal relationship within the framework of labor law.

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

The broad concept of the employee"s legal personality draws attention to the fact that the purpose of labor law is not only to redress imbalances between the parties. The objectives of labor law must include *promoting the principle of autonomy and equality at work by extending individual capacity, as well as ensuring a decent living in an automated environment.*

If the aim is to integrate as many people as possible into the labor market in a changing economic and social environment, the legislator must take a *holistic approach* and recognize that labor market integration is not only a matter of labor law, but also of employment, rehabilitation, and also an issue of education and social protection. The complex thinking about the employee"s legal personality is in line with the European Union"s and state goal of achieving the highest possible employment and productivity, as well as the European

[53] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Section 31.

[54] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics. Section 32.

Parliament"s future ideas related to automation.[55]

I am convinced that the changes in the labor market over the next fifty years can only be addressed through employment and education policy instruments as well as ensuring the joint provision of social protection in order to create *de facto* solidarity.

References

- Blainpain, R. – Hendricks, F.: *European Labor Law*. Kluwer Law International Bv, The Netherlands 2010;
- Blainpain, R. – Hendricks, F. (eds.): *Labor Law between Change and Tradition.* Liber Amicorum Antoine Jacobs. Kluwer Law International, The Netherlands. 2011;
- Bronstein, A.: *International and Comparative Labour Law.* Palgrave Macmillan, International Labour Organisation. 2009. pp. 1-22;
- Cherry, M. - Poster, W. :*Crowdwork, Corporate Social Responsibility, and Fair Labor Practices.* Saint Louis University Legal Studies Research Paper No. 2016-8, https://ssrn.com/abstract=2777201;
- Collins, H. – Ewing, K. D. – Mccolgan A.: *Labour Law*. Cambridge University Press, Cambridge. 2012;
- Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights; 6. (The English text can be found at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social -rights-20-principles_en) (For the English text, see: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/ european-pillar-social-rights-20-principles_en);
- Council and Commission Joint Employment Report 2005/2006, 6, 12-13. http://aei.pitt.edu/40091/1/COM_(2006)_30_3.pdf (24.06.2014);
- Council Recommendation on access to social protection for workers and the self-employed, COM (2018) 132final 1;
- Deakin, S.: The Contribution of Labor Law to Economic and Human Development. In: Guy Davidov - Brian Langille (ed.): *The Idea of Labor Law.* Oxford University Press, Oxford, 2011. pp. 156-178;
- Deakin, S. – Morris, G. S.: *Labor Law*. Sixth Edition. Hart Publishing. Oxford and Portland, Oregon, 2012. pp. 30-37. 131-190;
- Deakin, S. – Wilkinson, F.: The Law of the Labor Market. Industrialization. Employment and Legal Evolution. Oxford University Press, Oxford, 2005;
- Eurofound (2016), *Exploring the fraudulent contracting of work in the European Union*, Publications Office of the European Union, Luxembourg. Executive summary, 2;
- Eurofound (2017). Aspects of non-standard employment in Europe, Dublin. 3;

[55] The widest possible integration of the labor market is enshrined in Title IX on Employment of the Treaty on European Union and Title X on Social Policy. Similarly, the Explanatory Memorandum of the Hungarian Labor Code also points out that the Fundamental Law attaches special importance to the work-based community and society. Section 1 of Article XII states that 'Everyone has the right to freedom of choice of employment and occupation and to the right to free enterprise.' Regarding the latter: 'By working in accordance with their abilities and capabilities, everyone has a duty to contribute to the growth of the community.' The focus of the Green Paper, like the Wim-Kok report, is on how to achieve the goal of sustainable development set out in the above-mentioned Lisbon Strategy with more and better jobs. Modernizing labor law plays a key role in the success of the adaptability of workers and companies. The objectives must be pursued with productivity, full employment and social cohesion in mind. See Green Paper: Modernizing labor law to meet the challenges of the 21st century, Brussels, 22.11.2006 COM (2006) 708 final.

- Finkin, M.: Beclouded Work in Historical Perspective. *Comparative Labor Law and Policy Journal*, 37 2016/3 pp. 603–618;
- Florisson, R. - Mandl, I. (2018): *Digital age Platform work: Types and implications for work and employment - Literature review.* Eurofound, Publications Office of the European Union, Luxembourg 1;
- Ford, M.: Rise of the robots: technology and the threat of a jobless future, New York, Basic Books, 2015, ix.-x.;
- Freedland, M. – Countouris, N.: The Legal Characterization of Personal Work Relationships and the Idea of Labor Law. In: Davidov, G. – Langille, B. (ed.): *The Idea of Labor law.* Oxford University Press, Oxford 2011, pp. 190-208;
- Freedland, M. –Countouris, N: *The Legal Construction of Personal Work Relations*. Oxford University Press, Oxford., 2011;
- Frey, M.: The Employment Strategy of the European Union. 2004. http://econ.core.hu/doc/mt/2004/eng/Frey_I.pdf (23.06.2014) pp. 145-193;
- Mélypataki, G.: A munka digitalizálódása a munkajogi alapelvek tükrében. Miskolci Jogi Szemle: A Miskolci Egyetem Állam- És Jogtudományi Karának Folyóirata Xv : 3. pp. 97-104. , 8 p. (2020);
- Mélypataki, G. – Juhászné, Riczu, Zs.: Labour Law and Employment Policy Implications of Digitizing Work and Inroducing Robotics. *Hantos Periodika* 1 : 1 pp. 57-74. , 18 p. (2020);
- Green Paper Modernizing labor law to meet the challenges of the 21 st century, Brussels, 22.11.2006 COM(2006) 708 final, 3. M. Frey, (2004) pp. 162-164;
- Gyulavári T.: A gazdaságilag függő munkavégzés szabályozása: Kényszer vagy lehetőség? *Magyar Munkajog E-folyóirat*, 2014/1, pp;
- Gyulavári T.: A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán. [The Grey zone. . Economically dependent work at the frontier of employment and self-employment] Jogtudományi Monográfiák 6. Pázmány Press, Budapest, 2014;
- Hendrickx, F.: European Labor Law and the Millennium Shift: From Post to (Social) Pillar. In: F. Hendrickx, –V. Stefano (eds.): Game Changers in Labor Law. Shaping the Future of Work. *Bulletin of Comparative Labor Relations - 100*. Kluwer Law International BV, Netherlands, 2018. pp. 60-61;
- ILO (1997) Contract Labor - Fifth item on the agenda Report V (1) to the 86th Session of the International Labor Conference 1998, Geneva;
- Jakab N: A munkavállalói jogalanyiság munkajogi és szociális jogi kérdései- Különös tekintettel a megváltozott munkaképességű és fogyatékos személyekre, [Labor and Social Law Issues of Legal Personality of Employees - with special regard to People with Disabilities and Work Disabilities] Miskolc, Bíbor Publishing, 2014;
- Jobs, Jobs, Jobs Creating more employment in Europe, Report of the Employment Taskforce chaired by Wim Kok, November 2003, pp. 8-9;
- http://www.ciett.org/fileadmin/templates/eurociett/docs/Kok_Report_2003_Jobs_Jobs_Jobs.pdf (23.06.2014);
- Kessler S.: The Optimist"s Guide to the Robot Apocalypse, March 9, 2017, available at https://qz.com/904285/the-optimists-guide-to-the-robot-apocalypse/ (March 7, 2020);
- Kiss Gy.: A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közlöny*, 2013/1, pp.4-8;
- Klein T. – Tóth A. (szerk.): *Technológia jog – Robotjog – Cyberjog*. [Law of Technology – Law of Robots – Law of Cyber] Wolters Kluwer Hungary Kft., Budapest, 2018, pp. 184;
- Kovács, E.: Regulatory Techniques for "Virtual Workers". *Hungarian Labor Law E-Journal*, 2017/2. pp. 1-15;

- McKensey Global Institute: A future that works: automation, employment and productivity. January 2017;
- Michie, J. - Sheehan, M. (2005): Labor "flexibility" - securing management"s right to manage badly? In: Brendan Burchell - Simon Deakin - Jonathan Michie - Jill Rubery (ed.): *Systems of Production, Markets, Organizations and Performance.* Routledge, London and New-York. pp. 178-191;
- MSZ EN ISO 10218-1: 2011 Robots and robotic devices. Safety requirements for industrial robots. Part 1: Robots, MSZ EN ISO 10218-2: 2011 Robots and robotic devices. Safety requirements for industrial robots. Part 2: Robotic systems and their coordination, MSZ EN ISO 12100: 2011 Safety of machinery. General principles of design. Risk assessment and risk reduction, MSZ EN ISO 13850: 2016 Safety of machinery. Emergency stop. Design principles., MSZ EN ISO 13855: 2010 Safety of machinery. Arrangement of safety devices taking into account the approach speed of (human) body parts, ISO / TS 15066 Technical specification;
- Prugberger T.: Az önfoglalkoztatás intézménye a nyugat-európai és a magyar munkajogban. *Magyar jog*, 2014/2, , pp.68-69;
- P8_TA (2017) 0051 Civil law rules on robotics. The Resolution of the European Parliament as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103 (INL)) (2018 / C 252/25) Preamble B;
- Rogowski – R. Salais – N, Whiteside: *Transforming European Employment Policy- Labor Market Transitions and the Promotion of Capability*. Edward Elgar Publishing, Cheltenham, 2012B. Szekeres: A szürke zóna védelme Németországban. „Jogalkotás és jogalkalmazás a XXI. század Európájában" *Doctoral student conference, University of Miskolc, Faculty of Law, March 11*., 2016;
- Schiek, D. – Gideon, A.: Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier? *International Review of Law Computers & Technology*, 32 2018/3. pp. 1-20;
- https://www.researchgate.net/publication/324449617_Outsmarting_the_gigeconomy_through_collective_bargaining_-_EU_competition_law_as_a_barrier_to_smart_cities;
- Smith, R. - Leberstein, S.: *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy.* New York, National Employment Law Project, http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf 2015;
- *Social protection rights of economically dependent self-employed workers*; Study; Directorate General for internal policies; Policy department A: Employment policy, 2013.; pp. 14;
- De Stefano, V.: The rise of the "just-in-time workforce": on-demand work, crowd work and labor protection in the "gig-economy". *Comparative Labor Law and Policy Journal*, Vol 37 2016/3 pp. 471-503;
- Stevenst, Y, - Buggenhou, van B. (1999-2000): The Influence of Flexibility as a Motor of Changing Work Patterns on Occupational Pension as a Part of Social Protection in Europe. *Comparative Labor Law & Policy Journal*, 21. 331-370;
- Stone, K. V. W. (2009): Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in our Time. In. Bercusson, B. - Estlund, C. (ed.): *Regulating Labor Law in the Wake of Globalization. New Challanges, New Institutions.* Hart Publishing, Oxford and Portland, Oregon. 115-136;
- Szekeres, B.: A munkavállalóhoz hasonló jogállású személyek munkajogi és kötelmi jogi védelme a német jogrendszerben. Spring Wind Conference, Political Science and Law Section; Labor Law, Agricultural Law Subsection, University of Óbuda, Budapest, April 15-17, 2016;
- Szekeres, B.: A munkavégzési viszonyok változásai, in: *XI. Ph.D. - Konferencia előadásai (szerk.: KONCZ, I., SZOVA, I.), [XI. Ph.D. - Conference lectures ed.: KONCZ, I., SZOVA, I.]*, Conference place and time: Budapest, Hungary, 30.10.2015 Budapest: Association of Professors for the European Hungary, pp. 78-85;

- Szekeres, B.: Gondolatok a munkavállalóhoz hasonló jogállású személyek helyzetéről - a munkajog és a polgári jog kapcsolatáról, *Miskolci Jogi Szemle*, 2016/12. (2.), pp. 561-569;
- Szekeres, B.: *Munkajogon innen - munkaviszonyon túl.*Miskolci Egyetem, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, 2018, pp. 55-68;
- Szekeres, B.: Fogalmi zűrzavar a munkajogtudományban: az önfoglalkoztatás problematikája. *Publicationes Universitatis Miskolcinensis Series Juridica Et Politica* XXXVI/2, pp. 472–484;
- Time to move up a Gear The European Commission"s 2006 Annual Progress Report on Growth and Jobs, 6;
- Veneziani, B.: The Employment Relationship. In: Hepple, B. - Veneziani, B. (ed.): *The Transformation of Labor Law in Europe. A Comparative Study of 15 Countries 1945-2004.* Hart Publishing. Oxford and Portland, Oregon. 2009.

THE EQUAL AND THE MORE EQUAL: PECULIARITIES OF THE REVENUE ACCRUED FROM LOCAL BUSINESS TAX IN HUNGARY

Péter BORDÁS*

Abstract

One of the most important sources of revenue for Hungarian local governments are local taxes. Resolutions on introducing or not introducing local taxes may be passed by the body of representatives of the self-government of the individual settlements or municipalities. The local tax sovereignty in the Hungarian system of taxation has never been complete. Thus, regarding the limitations of local taxes introduced in relation to the Covid19 pandemic, it is not their existence but rather their results and forms that require investigation. Consequently, this study, too, is going to focus on the latter aspect. Among other things, it attempts to answer the questions how the role of local taxes, specifically, that of local business tax, has been transformed in the revenue structure and in financing or funding public tasks, and how all this has been influenced by the challenges posed by the coronavirus pandemic.

Keywords: *financial autonomy, local governments in Hungary, fiscal federalism, local taxes, local business tax.*

1. Introduction

From the aspect of financial autonomy, the most significant sources of revenue for Hungarian local governments are local taxes. The currently effective package of regulations on local taxes date back to the 1990s, although the majority of its original content has been modified during the course of the past couple of decades. Resolutions on introducing or not introducing local taxes may be passed by the body of representatives of the self-government of the individual settlements or municipalities and, since the spring of 2020, it has been possible for the general assembly of the county self-government to take this power over in certain special cases. However, levying local taxes has never been without restrictions; it is currently regulated by law what kind of taxes can be collected and to what extent, with the minimum and maximum values specified as well as what kinds of exemptions and benefits are available. That is to say, local tax sovereignty in the Hungarian system of taxation has never been complete, not even in the case of the so-called "open-list settlement tax" introduced in 2015, because that had its legal limitations, too. Thus, regarding the limitations of local taxes introduced in relation to the Covid19 pandemic, it is not their existence but rather their results and forms that require investigation. Consequently, this study, too, is going to focus on the latter aspect. Among other things, it attempts to answer the questions how the role of local taxes, specifically, that of local business tax, has been transformed in the revenue structure and in financing or funding public tasks, and how all this has been influenced by the

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challenges posed by the coronavirus pandemic.[1]

2. The Cornerstones of the Hungarian Local Taxation System

There is no real consensus about what a good local tax system is like, except that it should provide as many resources for the self-government levying it as possible. Concerning this topic, however, it is worth referring to the theoretical views of C.T. Sandford, who lists as many as seven criteria regarding the introduction of local taxes. He believes that the basis for local tax should be broad and more or less evenly distributed. The burden of the tax should affect only local inhabitants. The tax collected should ensure a high and preferably stable or constant yield. Furthermore, the collection of the tax itself has got to be economical, while the tax should be fair, transparent and it should facilitate accountability at the local level.[2] Although Sandford does not include it in his list, we should still add as an important requirement the expectation that it should not be possible to charge the tax on anyone else, that is to say, restrictions on tax exporting should prevail. Local trade tax (or local business tax / tax on company sales) in Hungary (hereinafter referred to as HIPA, the original Hungarian acronym) fails to conform to the disallowance of tax exportation. The reason for this is that the enterprises and businesses include the tax burden in the pricing of their economic activities as well as in the consideration of the price of the goods they supply and the services they render. Consequently, local tax does not affect the local population. In addition, it is not evenly distributed and the mechanism of accountability is also limited.

In Hungary, an important element of the change of the political regime in the 1990s from the aspect of local financial autonomy was the passing of a bill into Law C of 1990 on Local Taxes, which regulates local tax issues.

The relevant literature on taxation identifies two distinct forms of levying local taxes.[3] In the case of the traditional closed-list form of taxing, the settlements may choose from the tax types determined by the central government. The regulation of the taxes is also governed centrally and there is only a partial chance to adjust it to the local conditions. As opposed to this, in the case of the open-list form of taxing, the central government does not determine the concrete tax types; it only lists certain restricting rules to comply with, amongst which the individual self-governments enjoy a relative amount of freedom to make choices. [4]

Hungarian tax types include property taxes, such as building tax and (development) land tax; communal taxes, such as the communal tax of private individuals (on households) and tourism tax and; finally, taxes on economic activities, such as local business tax or trade tax (tax on company sales). As of the 1990s, these were

[1] The paper was prepared in the framework of Project no. 134499 titled 'Increasing government intervention in market regulation' has been implemented with the support from the National Research, Development and Innovation Fund of Hungary, financed under the K_20 "OTKA" funding scheme.

[2] C. Thomas Sandford, *Economics of Public Finance*, 3rd edition, Pergamon Press, Oxford, 2011, p. 239.

[3] Jorge Martínez-Vázquez, Revenue assignments in the practice of fiscal decentralization. In Bosch, Núria & Durán José M. (Eds.), *Fiscal Federalism and Political Decentralization*, Edward Elgar, Cheltenham, 2008 pp. 32-33.

[4] Gábor Kecső, A helyi önkormányzatok gazdálkodásának egyes kérdései nemzetközi kitekintésben [Specific Issues in the Economic Management of Local Self-Governments in an International Perspective], *Új Magyar Közigazgatás [New Hungarian Public Administration]*, vol. 6. 2013/1, pp. 11-12.

the most significant closed-list local taxes, which have been complemented from 2015 with the open-list "municipal tax" [in Hungarian: települési adó]. One of the objectives of the latter is to provide further revenue sources for the settlements of their own in addition to the local taxes, which have become partially tied in the meanwhile, and to the transformed central financing. In practice, this means the kinds of taxes collected on farmland, water vehicles, high buildings, agricultural tractors or even household septic tanks.

In the Hungarian system, the regulation of local taxes is a crucial issue because, up until the 2010s, they constituted an average 40% of the entire amount of own revenues.[5] As a matter of course, the variance or deviation between the individual settlements has always been significant, due to the fact that this is the type of revenue that depends on local conditions to the greatest extent. These conditions comprise, for example, the following parameters: the size of the settlement, the structural composition of the population, the type and worth of real estate stock, and the extent of entrepreneurial presence. These together determine what amount of revenue the given settlement can expect to collect. Furthermore, it is also decisive what aptitudes the management of the given settlement disposes of concerning the involvement of sources (like, for example, what sort of network or relationship capital the mayor has) and how conscious its settlement development policies are.

It should be noted that, in the year 2020, 3156 of the total number of 3178 settlement self-governments in Hungary introduced or levied at least one kind of local tax or municipal tax, and there were only 22 self-governments altogether that did not choose this option.

3. The Peculiarities of Proceeds from HIPA

As regards the settlements" own revenues, the largest share of own sources has been represented by the local taxes, including the local business tax to this very day. This, however, regarding its distribution, has also been favorable for the more highly developed settlements with strong performance potentials. When we survey the available statistics, it can be seen quite clearly that the tax revenue figures of the capital city and those of the so-called "county towns"[6] have always been the highest, with those of the cities coming in second, and those of the villages (small towns or minor municipalities)[7] significantly lagging behind.[8] A legitimate question to ask is what the reason for this might be. Well, on the one hand, it is due to the fact that the industrial and commercial enterprises pursuing economic activities moved and settled primarily into cities or into industrial parks located next to the cities, especially into or around Budapest, not only because of the concentration of the skilled labor force at these locations but also because of the highly developed level of the infrastructure available. On the other hand,

[5] In the time period between 1993 and 2010, local taxes amounted to 30 to 59% of the revenues of municipalities, depending on the location and other features of the individual settlements. Source: az MTA-DE Közszolgáltatási Kutatócsoport adatbankja [Database of MTA-DE Public Service Research Group].

[6] An almost verbatim translation of *megyei jogú városok.*

[7] An almost verbatim translation of *községek*.

[8] According to the data supplied by Magyar Államkincstár [Hungarian State Treasury]: Tájékoztatás a bevezetett helyi adók szabályairól [Information on the Rules Concerning the Local Taxes Introduced]: https://hakka.allamkincstar.gov.hu/Letoltes.aspx.

we can also witness a relatively stronger lobbying activity on the part of individual cities, through which the local decision makers tried their best to "entice" companies and corporations by offering tax reductions and a circle of other benefits and exemptions to the extent allowed by law.[9] In the long run, however, certain individual self-governments of settlements with relatively low population figures also benefited from this, and enjoyed the blessings of a significant degree of local taxable enterprises. At such locations, the per capita tax revenues are also the highest (for example, in Jászfényszaru, with a population figure of 5700, where plants of the internationally recognized corporations Samsung and ThyssenKrupp are located).

This phenomenon was most prominently recognizable in the increase of the revenue coming from local business tax but the introduction of the other local taxes also displayed a similar tendency. This economic advantage seems to have been rather significant in the case of settlements with a population figure over 10,000.[10] Moreover, the introduction of local taxes in the case of villages or small municipalities in the initial stages tended to fall victim of political interests much more easily. For instance, if the amount of revenues would have been low anyway, the introduction of a building tax could result in losing the possibility of getting reelected. Furthermore, it is not a negligible fact either that, in a lot of small municipalities, certain types of tax were not introduced simply because their administrative costs would have been higher than the amount of tax collected itself.

This situation was slightly altered after the change of government in 2010, when the system of central financing was modified and the notions of tax power capability or tax paying capacity[11] [in hungarian: *adóerő-képesség*] (tax capacity estimated through the per capita local business tax yield) and mandatory expected local revenue [in Hungarian: *kötelező elvárt helyi bevétel*] (the amount that the settlement should be able to collect) were introduced, as a consequence of which almost all municipalities had no other choice but to introduce at least HIPA. In general, it can be noted that the county towns always had the highest figures for tax power capability and, as size and the degree of public administration status decreased, the lower this indicator went too. In the case of certain municipal self-governments, it is also possible that HIPA is not the most significant item because, secondly, the application of the building tax can also be highlighted or, in the case of certain touristic settlements (for example, Hajdúszoboszló, Budapest or Hévíz), the tourism tax can also be significant. Let us take a closer look then at how the revenues coming from the individual taxes shape up.

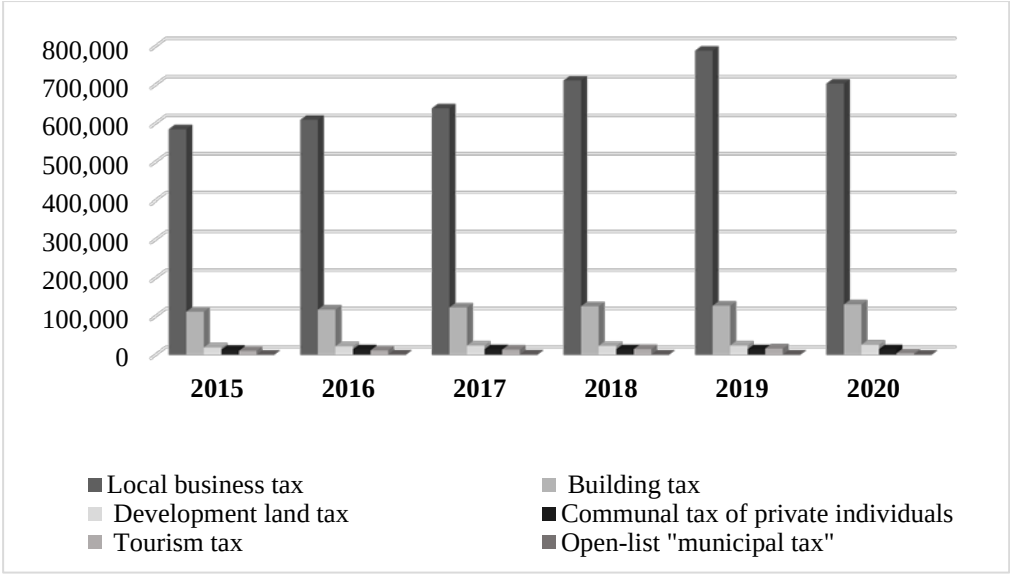
[9] Gábor Péteri, Helyi adózás: a szükséges rossz? [Local Taxation: The Necessary Evil?] *KÖZJAVAK*, vol. 1., 2015/2., pp. 32-36.

[10] MTA-DE Közszolgáltatási Kutatócsoport adatbankja [Database of MTA-DE Public Service Research Group].

[11] See: Hansjörg Blöchliger et.al., Fiscal Equalisation in OECD Countries. *OECD Working Papers on Fiscal Federalism.* 2007/3, pp. 5-9.

Figure 1 shows local government tax revenues between 2010 and 2020, and it is quite easy to notice how local business tax (identified as local tax on company sales here) is the largest component compared to the size of revenues from the other taxes.

Figure 1
Local government tax revenues in Hungary (2015-2020, million Forint)



Source: Designed by the author, based on the 2015-2019 data of KSH [Central Statistical Office] and on the 2020 data of Pénzügyminisztérium [Ministry of Finance]

A legitimate question to ask about this issue is how all this has affected the situation of the settlements concerning financing and taking care of tasks. Just because the county towns and the capital city received, or are receiving, more revenues, it does not necessarily mean that they would be able to provide public services at a higher level or that a decrease in central budget resources would be justifiable because of this. All the more so because living expenses and the related public services rendered in an urban or metropolitan environment are usually higher and more expensive. A city is supposed to cover a much broader circle of public services than a small municipality. This is also reflected in Act CLXXXIX of 2011 on the local self-governments of Hungary (hereinafter: Mötv.), with the differentiated identification of tasks detailed in it.

At the same time, it is also apparent that the higher demands of revenues have been mostly generated in the past years, after the centralization of 2010 (for example, for education, healthcare and social care), by taking care of tasks in local mass transportation, waste management and urban management. Therefore, higher local expenditures require higher local revenues

but this does not necessarily mean that the quality of these services would be higher as well. Thus, the withdrawal of a part of own revenues also eliminates this quality aspect in my opinion, and it forces a number of municipalities to settle for basic-level operation. That is to say, in practice, this means that they render the services at the minimum level and in the minimal form determined by law, and there is no possibility for developments or additional complementary services. As a matter of course, there are also winners in the system, as always. After all, there are numerous small settlements that collect significant amounts of local tax or, exactly, as a consequence of the peculiarity of financing, certain settlements may receive central budget support amounts not only according to the principle of "necessity and proportionality."

The issue of local tax revenues and capacities was closely connected to the financing system and budgetary regulations in effect after 2013. The reason for this was that the budget acts confirmed the rules concerning inclusion, that is, the correction based on local revenue capacities, which amount then was deducted from the calculated support or subsidy. For this purpose, the domestic rules and regulations identified a local tax, which was the local business tax. In the beginning, the expected revenues corresponded to 0.5% of the 2011 HIPA tax base. In the case of settlements where HIPA had not been introduced yet, the average business tax base per capita of a settlement of identical settlement category and population figure was applied. Due to this, the municipalities belonging to this latter circle were forced to levy at least this extent of business tax if the central contribution did not fully cover the costs of individual tasks and responsibilities.[12] The objective of increasing local interest this way might have been welcome; however, it failed to handle the situation properly when the majority of small settlements did not levy such a tax because they simply did not have anything to be taxed as there was no significant business or trade activity present.

The form of inclusion in recent years has been continuously transformed and modified through the introduction of complementary regulations, which differentiated the extent of decrease based on the individual tax brackets. As a consequence, 100% of the extent mentioned was deducted only if the per capita tax capacity of the municipality was over HUF 15,000. Then, in 2016, settlements were ranked and classified in 12 categories, with a separate treatment reserved for the capital city and its districts.[13] In addition, entitlement to supplements was established for the municipalities not affected by the reduction of support during the course of net financing. In 2017, another change was the introduction of the so-called solidarity contribution, which the more affluent settlements had to pay into the central budget (as of 2020, this concerned those with a per capita tax capacity over HUF 15,000).

As of 2021, the system of inclusion has been replaced with the system of supplementing and the solidarity contribution mentioned above, the objective of the latter of which is to serve in general the mechanism of equalization concerning the inequalities resulting from tax capacity among the settlements.[14] In the case of the

[12] Point 1/c of Annex 2 of Budget of 2013.

[13] 3 of Act CXXXIII of 2006: For calculatig the per capita tax capacity in Budapest, the total population figure of the districts of the capital city has to be taken into consideration as the population of Budapest.

[14] 2.2.2.1. of II. of Act XC of 2020 on the 2021 central budget of Hungary.

solidarity contribution, the threshold has increased, so it is at HUF 22,000 per capita or more of tax capacity when municipalities are under obligation to pay, which is a response to the HIPA revenues" decrease due to the effects of the pandemic. As regards the framework of supplementing, it is the municipalities with minor tax capacities that now receive support between 20 and 50%. According to the Ministry, all these changes in the past year have partially served the efforts to handle the effects of the covid19 pandemic. Let us now take a closer look at how exactly the local revenue possibilities have changed recently.

4. Withdrawal and Distribution of Funds: New Forms of Redistribution

Following the local outbreak of the coronavirus pandemic at the beginning of 2020, the extraordinary situation required a number of regulatory measures that affected the local self-governments as well. The obligation to pay tourism tax was temporarily suspended, the 40% of motor vehicle tax that remained with the municipalities became a resource for pandemic fund [in Hungarian: *járványügyi alap*], while certain self-governments lost considerable revenues due to the introduction of free parking on public premises for almost a year and to the decreasing HIPA revenues caused by the shrinkage of local economies. In response to this, the Government introduced supplements from the central budget through various compensational mechanisms. On the basis of all this, it seems quite legitimate to ask the following question: if the Government wished to compensate for the lost or missing revenues, for what purpose had they been withdrawn in the first place and what would be the result of this?

Among the changes concerning the system of self-governments, Government Decree 135/2020. (IV. 17.) needs to be highlighted here, which allowed for the establishment of economic zones on the pretext of controlling or combating the pandemic.[15] At this point, it should be noted that, according to the act on local business tax, if an area and its immediate environment achieves a special status, it is going to be the geographically responsible and competent body of representatives at the county level that can introduce the local taxes there, while the municipal government loses its right to exercise its powers to levy taxes.[16] The first example for this designation occurred through Government Decree 136/2020. (IV. 17.), which designated a special economic zone in the public administration area of the city of Göd (more specifically, the premises of the company Samsung SDI Magyarország Zrt.). As a result, the ownership of the public roads, squares and parks was passed on to the county government, which became entitled to levy and collect local taxes according to the effect of the decree mentioned above.[17] The city of Göd lodged a constitutional complaint against this decision; however, the Supreme Court

[15] In a case when the institution is designated as a top-priority investment from the aspect of the national economy, it requires at least HUF 100 billion total cost, it has an economic significance with an impact on a considerable portion of the area of the county and it serves the purpose of helping to avoid massive job losses or of implementing a new investment or the expansion of current investments.

[16] Government Decree 135/2020. (IV. 17.) on measures required for the stability of the national economy in relation to the emergency situation.

[17] Dóra Lovas, Nem alaptörvény-ellenes a gödi különleges gazdasági övezet kijelölése [The designation of a special economic zone at Göd is not unconstitutional], 2020, Közjavak blog. Available at: https://kozjavak.hu/nem-alaptorveny-ellenes-godi-kulonleges-gazdasagi-ovezet-kijelolese (Date of access: May 29, 2021).

acting on this basis also confirmed that this ruling was not unconstitutional.[18]

According to another government decree that entered into force on May 21, 2020, until December 31, 2020, and also during the emergency in 2021, tourism tax for guest nights need not be paid by the taxpayers and it need not be collected by the tax collectors. At the same time, however, the established but uncollected tax needs to be declared to the tax authority.[19] The municipal governments have been promised by the Government to receive budget support grants of the same amount as the tax not paid by the taxpayers of tourism tax. In the meanwhile, the settlements have also lost the central support issued previously as support for holiday resorts [in hungarian: *üdülőhelyi támogatás*].

At the end of 2020, a range of new restricting regulations were introduced for the year 2021 on halving the maximum rate of the business tax and on freezing the introduction of new local taxes and municipal taxes.[20] By reducing the HIPA tax burden, the Government intended to relieve the enterprises and businesses that had got into a difficult situation. However, in terms of its effect, it is not negligible that the loss of revenues affects mostly the major cities and predominantly those governed locally by the opposition, who had largely exhausted their reserves by or in 2020. As we have seen before, according to the data issued by *MÁK* [Hungarian State Treasury], the most significant local tax revenue is HIPA, which constitutes almost 80% of such revenues. In addition, as I have also mentioned above, its distribution is rather unequal.

Figure 2 illustrates the unequal proportion and distribution of HIPA in the individual settlement categories. In the legend keys at the bottom, the numbers in between brackets show the number of municipalities that belong to the individual categories. In 2020, almost one quarter (23%) of the total revenues from HIPA was collected by county towns, while another quarter, or slightly more than a quarter (27%) was earned by cities.[21] Furthermore, the majority of the municipalities levied the maximum 2% in this tax category. According to the data provided by MÁK, the total 2020 figure yield from HIPA was close to HUF 703 billion, which might even be reduced by half in 2021 because of halving the tax rate, causing a loss of HUF 2-300 billion.

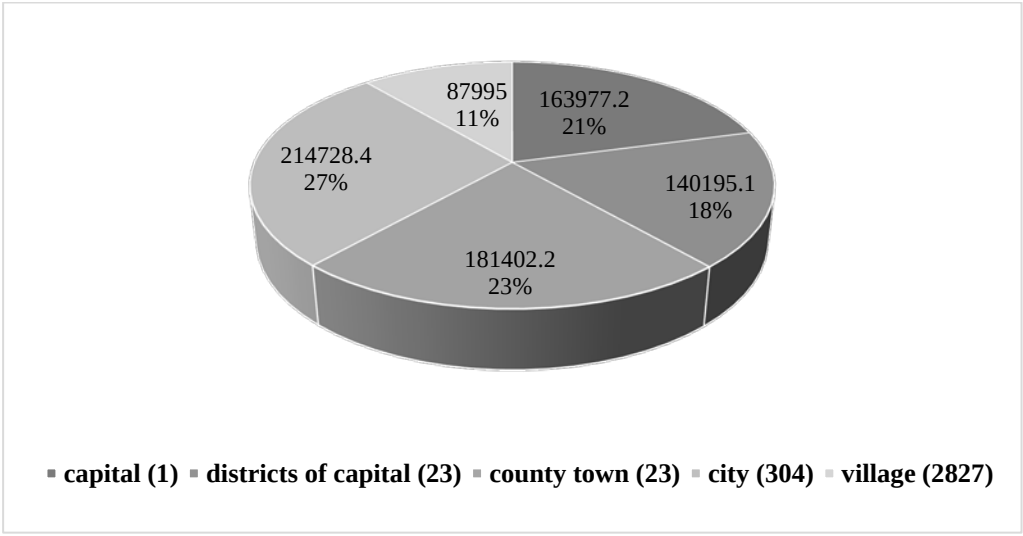
[18] Supreme Court decision on case IV/839/2020.

[19] Government Decree 140/2020. (IV. 21.).

[20] Government Decree 535/2020. (XII. 1.) on local tax measures required for easing the impact of the coronavirus pandemic on the national economy.

[21] Ilona Németh – Katalin Halkóné Berkó (Eds.), A helyi önkormányzatok adóztatási gyakorlata. [Taxation Practice of Local Self-Governments.] *Az Állami Számvevőszék elemzése. [An Analysis of State Audit Office],* Budapest, 2021, pp. 19-20.

Figure 2
Distribution of revenues from HIPA (in HUF million) broken down to settlement categories (2020)



Source: Designed by the author, based on the data of Pénzügyminisztérium [Ministry of Finance], ÁSZ [State Audit Office] 2021 and Magyar Államkincstár [Hungarian State Treasury]

Related to the withdrawal of funds and, presumably, as a response to the same, another decree issued by the central government[22] allocated support for several municipalities on the basis of criteria not revealed or agreed on in advance. This support was significant especially in the case of county towns, which would normally be affected by changes in HIPA to the highest degree anyway. Altogether, 17 out of the 23 county towns were granted such assistance, including all 12 of the pro-government municipalities. Among the districts of the capital city though, there were only two recipients, despite the fact that the loss of revenues from HIPA was very likely to affect all of them without exception. At the same time, it should also be noted that this support could be used for performing municipal tasks more liberally than usual, except in the case of a few settlements, where it was the decree itself that determined its objective. Altogether, a total amount of HUF 23.7 billion was granted an apportioned by the central budget to the county towns. Although this figure might seem considerable, it does not even come close to covering the losses of the municipalities expected to amount to several millions due to the pandemic and to the projected "tax halving" in 2021. The big question is whether this will result in further tailored forms of support or might foreshadow yet another possibility for collecting municipal debts. All the more so

[22] Appendix 1 of Government Decree 2005/2020. (XII. 24.).

because there have been certain rumors[23] around recently about how the Government would possibly ease the otherwise strict rules on raising funds or capital, thus simplifying the processes of issuing bonds or taking loans. The choice of fundraising or borrowing also emerged as a possibility for the Municipality of Budapest in an agreement made public in November 2020, which contained a resolution to work out a crisis management proposal in cooperation with Budapest Chamber of Commerce and Industry. This would allow issuing a zero-interest rate bond to be purchased by Hungarian National Bank, and the source of revenue would be used for assisting SMEs in difficulty.

5. What"s Next? Conclusions

In sum, the measures taken in relation to the pandemic and the loss of resources have not affected the municipalities in an equal fashion, and their impact may be quite different in each case. A few of the questions raised concern whether the source equalization mechanism of the motor vehicle tax would be permanently removed from the Hungarian system or a part of the resource would eventually be returned to where it is collected in the first place. Does reducing the rate of HIPA represent actual assistance for businesses indeed? We might also wonder if a system of support available specifically for local businesses and enterprises or a corporate tax reform would have proved to be a better approach in this case. At any rate, the current system of support seems to treat the resources recently lost by the municipalities and their replacement techniques in a rather unequal fashion.

Regarding the "newfangled" method of allocating support in an attempt to handle the loss of resources, Federation of Hungarian Local Governments [in Hungarian: *Magyar Önkormányzatok Szövetsége*] have expressed their disagreement.[24] The members of the federation wished to highlight, and I also consider it important to underline, that there were predominantly political considerations emerging in the allocation of funds, while halving HIPA did not in fact provide substantial assistance to businesses afflicted by the crisis. At the same time, however, all this might represent a hazard for taking care of public tasks and responsibilities in the long run. Thus, for example, the provision of proper mass transportation, road and public space maintenance, childcare in kindergartens and nurseries or, specifically, cultural, health and social benefits might be endangered, in the case of which municipalities typically used to supplement the central funding with their own resources even before. The effects of this would ultimately affect the consumers of public services if they can access said services in differing degrees of quality in different settlements, which would then also threaten the objective of the much debated efficiency gains.

As we can see, the "belt" of municipalities, which has been tightened quite considerably in the past couple of years, might be contracted even further in the future. The pandemic may influence not only local businesses but also local performance of tasks and budgetary management in the same way and, as a

[23] https://magyarnemzet.hu/belfold/kosa-lajos-napirenden-van-az-onkormanyzatok-terheinek-csokkentese-9124796/ (Date of access: May 29, 2021).

[24] https://merce.hu/2020/12/28/az-iparuzesi-ado-es-az-onkenyes-penzosztas-miatt-atlathato-kompenzacios-javaslatot-varnak-az-onkormanyzatok-a-kormanytol/ (Date of access: May 29, 2021).

consequence, drive some self-governments to a predetermined track or a collision course. Nevertheless, it is also evident that the current mechanism of the deduction and allocation of resources generates a few winners as well. This latter feature only reinforces the practice experienced in recent years about how the settlement support grants that are allocated through specifically tailored and earmarked mechanisms will continue to break the mechanism of central financing.

References

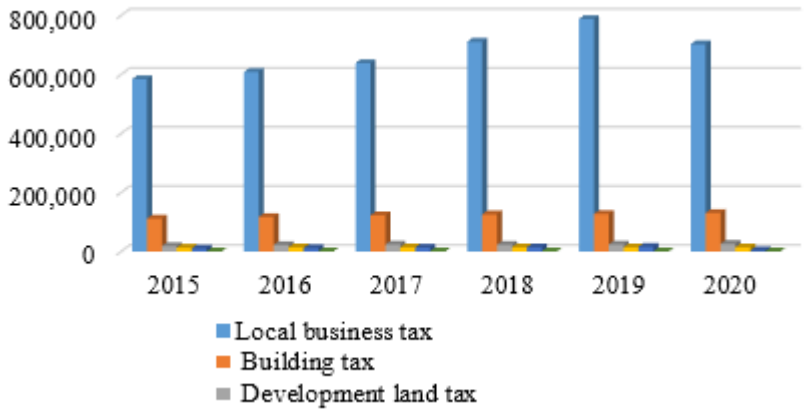
- Act CXXXIII of 2006: For calculatig the per capita tax capacity in Budapest, the total population figure of the districts of the capital city has to be taken into consideration as the population of Budapest;
- Act XC of 2020 on the 2021 central budget of Hungary;
- C. Thomas Sandford, *Economics of Public Finance*, 3rd edition, Pergamon Press, Oxford, 2011, p. 239;
- Dóra Lovas, Nem alaptörvény-ellenes a gödi különleges gazdasági övezet kijelölése [The designation of a special economic zone at Göd is not unconstitutional], 2020, *Közjavak blog*. Available at: https://kozjavak.hu/nem-alaptorveny-ellenes-godi-kulonleges-gazdasagi-ovezet-kijelolese (last access: 29. 05. 2021);
- Gábor Kecső, A helyi önkormányzatok gazdálkodásának egyes kérdései nemzetközi kitekintésben [Specific Issues in the Economic Management of Local Self-Governments in an International Perspective], *Új Magyar Közigazgatás [New Hungarian Public Administration]*, vol. 6. 2013/1, pp. 11-12;
- Gábor Péteri, Helyi adózás: a szükséges rossz? [Local Taxation: The Necessary Evil?] *KÖZJAVAK*, vol. 1., 2015/2., pp. 32-36;
- Government Decree 135/2020. (IV. 17.) on measures required for the stability of the national economy in relation to the emergency situation;
- Government Decree 140/2020. (IV. 21.);
- Government Decree 2005/2020. (XII. 24.);
- Government Decree 535/2020. (XII. 1.) on local tax measures required for easing the impact of the coronavirus pandemic on the national economy;
- Hansjörg Blöchliger et.al., Fiscal Equalisation in OECD Countries. *OECD Working Papers on Fiscal Federalism.* 2007/3, pp. 5-9;
- https://magyarnemzet.hu/belfold/kosa-lajos-napirenden-van-az-onkormanyzatok-terheinek-csokkentese-9124796/ (Date of access: 29. 05. 2021);
- https://merce.hu/2020/12/28/az-iparuzesi-ado-es-az-onkenyes-penzosztas-miatt-atlathato-kompenzacios-javaslatot-varnak-az-onkormanyzatok-a-kormanytol/ (last access: 29.05. 2021);
- Ilona Németh – Katalin Halkóné Berkó (Eds.), A helyi önkormányzatok adóztatási gyakorlata. [Taxation Practice of Local Self-Governments.] *Az Állami Számvevőszék elemzése. [An Analysis of State Audit Office]*, Budapest, 2021, pp. 19-20;
- Jorge Martínez-Vázquez, Revenue assignments in the practice of fiscal decentralization. In Bosch, Núria & Durán José M. (Eds.), *Fiscal Federalism and Political Decentralization*, Edward Elgar, Cheltenham, 2008 pp. 32-33;
- Magyar Államkincstár [Hungarian State Treasury]: Tájékoztatás a bevezetett helyi adók szabályairól [Information on the Rules Concerning the Local Taxes Introduced]: https://hakka.allamkincstar.gov.hu/Letoltes.aspx (last access: 29. 05. 2021);
- Supreme Court decision on case IV/839/2020.

Appendix 1

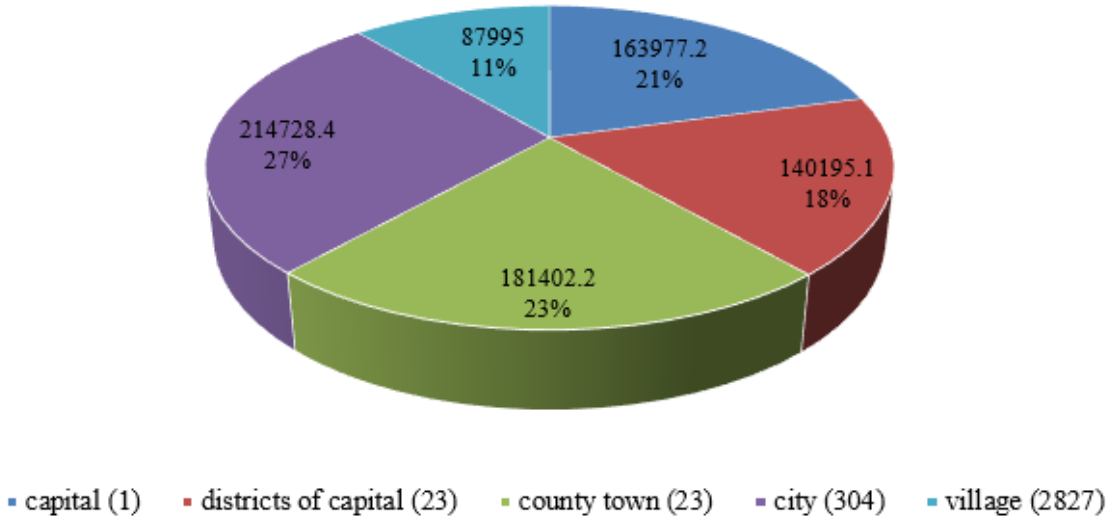
3.1.17.4. Nemzeti adólista – az adók és társadalombiztosítási hozzájárulások nemzeti osztályozásának teljes részletezése – Helyi önkormányzat (1995–) [folyó áron, millió forint]

Kód		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
D.214I_01	Helyi iparűzési adó	443,093	457,308	471,031	500,868	523,125	584,380	608,982	638,731	711,276	788,308	702904
D.29A_01	Építményadó	71,025	80,987	96,318	102,719	105,022	111,963	117,521	123,130	126,277	127,594	131117
D.29A_02	Telekadó	9,861	10,310	17,523	19,395	17,938	19,102	22,112	24,018	23,165	24,095	26178
D.59F_01	Magánszemély kommunális adója	10,124	11,099	13,161	13,175	13,002	13,451	14,589	14,765	14,621	14,566	14758
D.59F_02	Idegenforgalmi adó	5,798	6,761	7,682	8,411	9,126	10,475	11,676	13,602	14,863	16,249	3957
	Települési adó										54,910	621
							2015	2016	2017	2018	2019	2020
D.51E_03	Települési adó (jövedelmi típusú)	–	–	–	–	–	14	5	6	0	0	
D.59A_01	Települési adó (egyéb típusú)	–	–	–	–	–	227	743	816	534	453	
D.91B_02	Települési adó (vagyoni típusú)	–	–	–	–	–	217	269	273	281	224	
	Települési adó					Millió Ft	458	1017	1095	815	677	621
D.59D_01	Gépjárműadó	25,994	25,497	24,172	12,014	12,202	12,669	12,642	13,127	13,724	14,502	
D.29B_02	Gépjárműadó (helyi)	45,118	46,576	46,488	16,004	16,173	16,660	16,620	17,401	18,192	19,224	

	2015	2016	2017	2018	2019	2020
Local business tax	584,380	608,982	638,731	711,276	788,308	702904
Building tax	111,963	117,521	123,130	126,277	127,594	131117
Development land tax	19,102	22,112	24,018	23,165	24,095	26178
Communal tax of private individuals	13,451	14,589	14,765	14,621	14,566	14758
Tourism tax	10,475	11,676	13,602	14,863	16,249	3957
Open-list "municipal tax"	458	1017	1095	815	677	621



Appendix 2



capital (1)	163977.2
districts of capital (23)	140195.1
county town (23)	181402.2
city (304)	214728.4
village (2827)	87995

JUSTIFICATION OF TAXATION

Vanya PANTELEEVA*

Abstract

The development of taxation in the modern state is also related to the issue of justifying the payment of the tax by individuals. The legal obligation to pay taxes established by law must be justified. The tax is the main method for accumulating the necessary financial resources for the state. The present paper is focused on the historical emergence of the tax as a phenomenon, as a reality, as a form of accumulation of income and a method of insurance of the state, on the justification of taxation and the types of tax income.

Keywords: *taxation, types of taxes, budget, justification of taxation, history of taxation.*

1. Introduction

There are many tax researchers who claim that modern tax theory has much in common with the Roman concept. The reason for this is that, during the Roman Empire, the tax system reached a fairly high degree of sophistication. Taxation was differentiated into direct and indirect. Direct taxation covered the property and fortune of citizens, which was determined by assessment of their property. Indirect taxation in the Roman Empire was represented by the tax on crafts, customs duties, excise duties and the state monopoly on salt. There was also a general tax on purchases and sales in the amount of 1%, which was later called the cumulative turnover tax.

2. Content

After the division of the Roman Empire into Eastern and Western, the well-developed tax system began to disintegrate. The kings gradually began to lose their tax rights, which they inherited from the institutions of the empire. Gradually, revenues began to decline at the expense of increasing relief. Large landowners are authorized to collect the tax at their own expense from the persons assigned to their possessions. In this way, the tax becomes a payment in favor of the owners and possessors of land and wealth, i.e. the tax acquires the character of a private deduction. In the thirteenth century there was an expansion of royal power, which led to a significant increase in monarchical spending. Hence appears the lack of resources.

From the 16th century a new concept of the tax began to emerge and form, being established in the 17th century and reaching its apogee at the end of the reign of Louis XIV. This is the authoritarian concept of the tax.

At the base of this concept is the simplification and fairness of fiscal taxation. It is characterized by several features:

• The absolute right of the monarch to represent the state and introduce and collect taxes is affirmed. However, this right of the

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monarch is exercised within the laws of the kingdom.

• It brings to the forefront indirect taxes, which are easier to collect, and are also fairer because they affect all consumers.

At the end of the 17th century and at the beginning of the 18th century, the ideas of limiting the power of the sovereign began to emerge. In the work, "The Royal Tithing", Woben sets out the basic principles of the tax, namely that it is a reality known to all citizens of the state who must provide funds in order for it to be supported. This gradually gave rise to the idea that the tax is inextricably linked to the security and stability of the nation, stems from the existence of the state and all citizens participate in covering its costs.

During the eighteenth and nineteenth centuries, a new concept of the tax was born and established - the exchange concept, whose main ideas are represented in the work of Charles de Montesquieu - "The spirit of laws." Achieving equality between the interests of society and entrepreneurs is important for Montesquieu.[1]

In determining the principles of taxation of the exchange concept of tax, an important place is occupied by the views and formulations of Adam Smith, laid down in his well-known work "The Wealth of Nations". Smith says that „government spending for the majority of the people must be paid through taxes in cash or otherwise. In this way, with part of their income, the people contribute to the collection at the sovereign or the state of what is called state revenues."[2]

There are numerous studies of the tax in historical aspect, which inevitably outline the main characteristics of the modern tax. Contemporary authors seek to define the tax by including more elements. For example, P.M. Godme defines the tax as "a deduction made under duress by the public authorities and having the main purpose of covering public expenditures and redistributing them according to the ability of citizens to pay." According to J. Ducrot, "the tax is classically defined as a deduction on the wealth of taxpayers that the state makes in an attempt to take into account their ability to pay."[3]

2.1. Justification of taxation

The development of taxation in the modern state is also related to the issue of justifying the payment of the tax by individuals. The legal obligation to pay taxes introduced by law must be justified. The tax is formed as the main method for accumulating the necessary financial resources to provide for the state.

It is logical to ask the question, what is the reason for the state to seize part of the income of its citizens through tax? The answer to this question has been motivated in different ways. Separate ideological and theoretical concepts have been developed such as ideological are socio-psychological justifications of the tax liability. Theoretical concepts derive the organizational (state-organizational, political) basis. Both types of concepts explain taxes with the need of financial provision for the "needs" of the state.

In the early twentieth century, the American researcher Edwin Seligman, derived seven ideological views of the justification of the tax, such as: donation, support, assistance, sacrifice, debt, coercion,

[1] Charles-Louis de Montesquieu, *Spirit of the Laws*, Sofia, Science and Art, 1984.
[2] Adam Smith, *The Wealth of Nations*, Sofia, Partizdat, 1983.
[3] See V. Panteleeva, *Tax as a component of the fiscal policy of the state*, Conference proceedings of University of Ruse, 2009, p. 107.

payment of tax by the taxpayer against his will.

In the first stage, the prevailing view was that the tax was a gift from individuals to the monarch. The second stage is characterized by a humble plea from the monarch to the people for support. The third stage meets us with the idea of assistance provided to the state by the people. The fourth stage is characterized by the idea of sacrifice, which the individual brings to the benefit of the state. The fifth stage reveals the sense of duty that forms in the individual payer, and the sixth stage introduces us to the idea of coercion by the state. The seventh and final stage is characterized by the determination of the amount by the government for payment by the individual payer, without respecting his will.[4]

The payment of the tax is essentially the deprivation of a certain part of the income of the persons. The modern legal basis of the tax is derived from the theory of the nation, as a modern form of social community, which alone and as a whole, determines its needs and provides them financially. As an equal member of the state organization, everyone is obliged to pay taxes that accumulate in the state budget. The tax claim is a subjective public right of the state to receive a certain amount. At the base of this right is the fiscal sovereignty of the state. This subjective right of the state corresponds to a certain obligation on the part of juridical and natural persons to pay taxes. This obligation is constitutionally established in Art. 60, para. 1 of the Constitution of the Republic of Bulgaria: „Citizens shall be obligated to pay taxes and fees established by a law in proportion to their income and property."

As the holder of this subjective right, the state may in some cases delegate it by determining taxes to go to the municipal budget.

2.2. Types of Sources of Revenue

The doctrine distinguishes two types of sources of revenue for the state.

- Domestic sources - Gross domestic product (GDP) and national wealth of a country;

- External sources - these are financial resources received from foreign national economies.[5]

Gross Domestic Product, better known as GDP, ranks first among domestic sources of funding. GDP is "... the total value of all goods and services (goods) produced in the national economy for one year, after deducting the so-called intermediate consumption, i.e. intended for final consumption".[6]

According to the International Glossary of Finance, Gross Domestic Product (GDP) is the monetary value (at market prices) of goods and services produced in the economy over a period of time, usually a year or a quarter. The cost of replacing fixed assets is not reported. Only final consumption goods or investments are included, as the value of intermediate goods, i.e. raw materials and supplies are included in the prices of final consumer goods.[7]

We can conclude that GDP is one of the most important economic indicators. It is a comprehensive measurement of economic activity and signals the directions of all aggregates of economic activity.

[4] Seligman, E.R., *Essays in taxation*, New York, 1895, pp. 5-7.
[5] V. Stoyanov, *Theoretical and Public Finances*, Sofia, 2009, p. 218.
[6] *Ibidem.*
[7] Bannock, G, Manser, W., *The Penguin International Dictionary of Finance*, Penguin, UK, 1999.

Another source of domestic funding is the national wealth, which includes the natural resources belonging to the country.

External sources of financing represent the GDP of other countries. The accumulation of these sources happens through exports and investment of capital, loans, credits, aid and more. Usually, the funds received from external sources are uncertain, irregular and temporary.

In this regard, we can say that each country should primarily rely on its domestic sources and only ultimately rely on the help of foreign national economies. Domestic sources of financial support for the state are accumulated in public funds through several methods of raising them:

1. Tax - the application of a system of taxes;

2. Tax-like (quasi-tax) method - includes revenues from fees, fines, interest, confiscations, etc.

3. Non-tax method - the state credit, the economic activity of the state and the revenues from it, sale (privatization) or renting of state property (concession), money issue, etc.[8]

The economic activity of the state is too old a non-tax form to provide the necessary funds for the state. The specific manifestations of this activity of the state take the form of fiscal or financial monopolies, state and joint ventures, concessions and others; they form the public sector, i.e. the so-called indivisible and non-transferable property owned by the state. It is characteristic for the public sector that it usually generates and reproduces clumsiness, bureaucracy and inefficiency, both within it and within the national economy as a whole. This has caused in recent years, in accordance with the requirements of the new neoliberal concept, that it be sharply reduced (the public sector in the economy) through privatization. All Western countries, without exception, have taken similar steps since the early 1990s and are seeking to minimize the public sector in their economies through privatization. In this way, a double benefit is obtained in the sense that, first, unprofitable and inefficient state economic structures are liquidated and, secondly, budget revenues are provided, which are relied on to overcome chronic budget deficits and the huge state indebtedness caused by them.

The monetary issue is a special method for providing financial resources for the state budget. It essentially comes down to the issuance of unsecured banknotes, i.e. the banknotes put into circulation are provided to the budget and cover government expenditures. Such a monetary issue, which is called fiscal, in any case leads to inflation and disruption of money circulation with all the ensuing negative consequences. That is why financial theory has never been favorable to fiscal money supply.

The tax-like (quasi-tax) method is similar to the tax method, but the main difference between them is that while taxes are compulsory payments to the state, tax-like forms of income are voluntary payments. They serve to pay for used public goods. Non-tax revenue forms are also a method of providing financial support for government, but they are also to some extent related to taxes, albeit at a later stage in their use.

Of the above methods for accumulation of financial resources, the tax method occupies the first place. A significant part of government revenues (40-50%) is accumulated by taxes. These are revenues that go to the state budget and are

[8] V. Stoyanov, *Theoretical and Public Finances*, Sofia, 2009, p. 225.

made available to the state for its functions and government.[9]

Therefore, as we have pointed out, the main method for accumulating and securing financial resources in the state is the tax method.

2.3. Types of Tax Revenues

1. The doctrine expresses different opinions on the classification of types of tax revenues. It is indisputable, however, that the classification of tax revenues is built in accordance with the socio-economic structure of the state, legal sources, the direction of revenues and other factors.

In theory, different classifications of taxes are proposed:

• depending on the source of income, they are divided into:

- income from economic activity;
- income from the population.

• According to the direction of revenues, they are:

- revenues to the republican budget;
- revenues to the municipal budget.

• Depending on whether they go directly to the budget or are redistributed, revenues are divided into:

- basic income;
- derivative revenues - such are the revenues that do not enter the budget the first time, but represent internal redistributions in this system.[10]

• According to the method of their collection, the following are divided:

- mandatory - taxes;
- voluntary- donations.

• Depending on whether the income is pre-planned or due to extraordinary non-specific activity, the following are distinguished:

- regular - revenues that provide the reserve of funds needed by the state to perform its functions - mandatory contributions, taxes, duties, fees;
- extraordinary - income from tort, fines, confiscations.

Further classification is also possible, depending on the way in which tax revenues are paid. In this case they are divided into:

- natural - today they are extremely rare;
- monetary.

• According to the object or subject of taxation, tax revenues are revenues from:

- Taxes on the person - the object is the individual. A typical representative of this type of tax is the per capita tax, determined per capita, without considering the property status or income.
- Taxes on property - real estate and movable;
- Taxes on a certain economic activity - their prototype is the natural tithe. Gradually, with the development of crafts, an occupation tax was introduced.
- Sales taxes - the realized trade turnovers from the sale of goods and services are subject to taxation;
- Income taxes - a relatively new type of tax, as income becomes subject to taxation under conditions of a high degree of development of commodity-money relations, i.e. in parallel with the emergence and development of capitalism.[11]

Theoretical interest is the differentiation of tax revenues of:

- direct and
- indirect.

This distinction of taxes is not based on a single criterion. According to John Stuart Mill and Adolf Wagner, taxes are direct, in which the payer and the taxpayer

[9] *Ibidem.*
[10] I. Stoyanov, *Finance Law*, Sofia, 2010, p. 315.
[11] V. Stoyanov, *Theoretical and Public Finances*, Sofia, 2009, pp. 262-264.

are identical, and if they are different, the taxes are indirect.[12]

Another sign of the distinction between direct and indirect taxes is whether "permanent objects or accidental events" are taxed. In the first case, taxes are direct, and in the second, indirect.

The division of taxes into direct and indirect can be deduced depending on the subject of their taxation. Thus, taxes with the object of taxation of property or income are direct, and indirect are those whose object is the production of goods and services, at the prices of which they are calculated in advance.

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 then existing Law on the Structure of the State Budget (SG, issue 54 of 15.07.2011 repealed by SG No. 15 of 15 February 2013), the regulation of the general structure and structure of the public finances with one general 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 national and local level. Public finances are considered as a unified system for providing and financing public goods and services, redistribution and transfer of income and accumulation of resources from budgetary organizations. According to §1, item 29 of the Additional Provisions of the Public Finance Act, “revenues” of the state are “cash receipts for the relevant budget year generated from: taxes, insurance contributions, other contribution, fees, fines, sanctions and penalties, confiscated assets, interest, dividends and any other income generated by financial assets, as well as any other net cash proceeds of budgetary organizations resulting from the realization and use of non-financial assets and the provision of services."

2. We accept the theoretical view that tax revenues are classified into:

A. Revenue from direct taxes:

• Income tax revenues;

• Income from property taxes;

B. Revenues from indirect taxes.

• Revenues from value added tax;

• Revenues from excises duties.

3. Conclusions

From all that has been said so far, it can be concluded that the tax is a reality, a complex multifaceted phenomenon that is immanently related to all aspects of people's lives. Joseph E. Stiglitz, in his book “Economics of the Public Sector”, outlines the five desirable characteristics of any tax system. There are five properties that define the tax system as "good":

1. Economic efficiency - the tax system should not hinder the efficient allocation of resources.

2. Administrative simplicity - the tax system should be easy to apply and relatively inexpensive.

3. Flexibility - the tax system must react quickly (in some cases automatically) to changed economic circumstances.

4. Political responsibility - the tax system must be such that people can determine for themselves how much to pay, so that the political system can more accurately reflect people's preferences.

5. Fairness - the tax system must be fair in its relative treatment of different people.[13]

The above leads to the conclusion that the actual implementation of the five properties would be a way to establish a "good" and stable tax system, which would be proof and a sure way to a well-functioning modern state.

[12] *Ibidem.*

[13] Joseph E. Stiglitz, Economics of the Public Sector, University press ″Stopanstvo″, Sofia 1996.

References

- Charles-Louis de Montesquieu, *Spirit of the Laws*, Sofia, Science and Art, 1984;
- Adam Smith, *The Wealth of Nations*, Sofia, Partizdat, 1983;
- V. Stoyanov, Theoretical and Public Finances, Sofia, 2009;
- Joseph E. Stiglitz, *Economics of the Public Sector*, University press ″Stopanstvo″, Sofia, 1996;
- I. Stoyanov, *Finance Law*, Sofia 2010;
- V. Panteleeva, *Tax as a component of the fiscal policy of the state*, Conference proceedings of University of Ruse, 2009, ISSN 2603-4123 (on-line);
- Seligman, E.R., *Essays in taxation*, New York, 1895;
- Bannock, G., Manser, W., The Penguin International Dictionary of Finance, Penguin UK, 1999.

DRONES, PRIVACY AND DATA PROTECTION

Andrei-Alexandru STOICA*

Abstract

Data protection in the robotics and drone age must be included for an overhaul as technology evolves and offers new ways that could make current laws obsolete.

This paper focuses on showcasing weak points in data protection laws that are generally seen in states such as the ones that comprise the European Union or in the United States of America, which could also be seen in other states, while also analyzing some solutions that have been implemented. To identify the key issues, the paper will take into account major incidents that took place regarding breaches of data privacy, while also trying to distinguish how international law is applicable.

Drones come equipped with different types of equipment that must comply with different sets of rules and regulations, but can hardware alone prevent breaches of data protection or should operators and manufacturers be liable for these breaches? Furthermore, the issue at hand should also be covered with regards to a growing segment of drones that come equipped with artificial intelligence.

Notwithstanding, the paper will analyze if counter-drone systems could help mitigate data protection breaches or rather if they generate an extra issue that lawmakers and manufacturers have to handle.

Keywords: *drones, privacy, international law, European law, comparative analysis.*

1. Introduction

The notion of a drone is a more colocvial termn that describes unmanned vehicles. This termn is widely used to describe any type of unmanned vehicle but the most common types are those outfitted with rotary engines on either quad-propeller based platforms or fixed wings.

This paper will focus mostly on the aerial type of unmmaned vehicles since these are the most commercially available for the general population.

The author acknowledges that camera and audio drones do exist that are based on a wheeled or continuous track, but those are used only in a controlled environment and are yet to be fully accessible to the general population and governmental agencies.

As such, a "*drone*" as a termn is used to describe any aircraft without an on-board pilot. But that is an oversimplification that masks the incredible range in shapes, sizes and capabilities that characterize today"s unmanned aircraft.

Another aspect towards identifying a drone as an unmanned vehicle is that it"s different than a model airplane/vehicle and a toy.

For this reason, models are largely flown within visual line of sight and in the presence of an operator who watches and maintains control of the airplane during flight. That alone is enough to place model airplanes cleanly outside the boundaries of "*drone.*"[1]

The drones that currently have the biggest impact on privacy are the cam-

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[1] John Villasenor, What is a drone, anyaway?, Scientific American, 12.04.2012.

drones since they can record audio, videos and can store both localy and on the cloud.

2. The usage of drones and privacy concerns.

Drones or unmanned vehicles have seen their usage grow ever since the 20th Century, when unmanned aerial vehicles were used by the U.S. Army for training purposes and as an experimental straight line rocket[2]. One of the closest equivalent of today"s drones would have been the Goliath tracked mine[3] , a small wired controlled tracked vehicle capable of delivering explosives from a long range, but while its idea was revolutionary, the fact that it had a wired connection to the operator meant that it could be easily cut off from commands and rendered inoperable.

Later on, drones got equipped with cameras for spying and got used extensively during the Cold War period to spy on nuclear programs[4]. These drones became a norm in surveillance technology that allowed armies to have eyes on objectives without putting a human in harm"s way.

The spy drones were often used against known targets and potential targets, meaning that the unmanned drones were used over the territory of foreign states and captured footage of key locations (military, economy or research). Unfortunately, programs that used drones, such as the US D-21[5] drone information that was declassified with the Freedom of Information Act[6], were terminated very early after a few runs because the drones were hard to recover once launched and could fall into a foreign state"s influence.

As an answer to the constant threat of foreign spying, the Treaty on Open Skies[7] was adopted to give all parties a direct and legal way of gathering information about military forces and activities with an open surveillance so that it will lower tensions and possibility of military escalation.

Moving towards a civilian usage of unmanned vehicles, drones have begun being a frequent sighting at special events and public gatherings, being used mainly by event organizers, activists or law enforcement agencies.

What this paper will focus on is how privacy is being handled by civilian drones and whether drones equipped with cameras must be handled in the same way as CCTV. Most states inside the Union and outside of it have already accepted that they must comply with the European Union"s General Data Protection Regulation[8] for how they handle activities on the internet, but seeing as how the European Union will implement Regulation 947/2019[9] (which deals with the

[2] Chelsea Leu, The secret history of World War II-Era drones, Wired, 16.12.2015.

[3] Military History Matters, Back to the drawing board – The Goliath tracked mine, Military-History.org, 12.07.2012.

[4] David Axe, The Mach 3 D-21 drone was a secret America Cold War spy machine, Nationalinterest.org, 7.11.2019.

[5] See note 3.

[6] National Reconnaisance Office, USA, information for the how to access information with the FOIA https://www.nro.gov/Freedom-of-Information-Act-FOIA/Declassified-Records/Special-Collections/D-21/.

[7] Entered into force on 01.01.2002, has 34 party states. As of November 2020 the U.S.A. withdrew from the treaty.

[8] Regulation 679/2016 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[9] Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft.

rules and procedures for the use of unmanned aircraft by pilots and operators, defining categories of use and a series of requirements for their use) and Regulation 945/2019[10] (which deals with the requirements of unmanned aircraft systems and the requirements to be met by designers, manufacturers, importers and distributors in order to obtain conformity markings and monitor the market for safety and interest in the competitiveness of it), manufacturers and users must learn to comply with how they handle with how data is being gathered and used by and from the drone.

While these may act as a code of conduit for European states, the latter Regulation is addressed towards third party states who would want to bring drones inside an E.U. state and could contribute towards a global mechanism to protect privacy and data. The most common regulations that cam-drones must follow are those that are similar to surveillance cameras.

The issues that arises from usage of drones can lead to violations of privacy and data protection laws. For example, the U.K. Royal Mail started in December 2020 a delivery program with drones towards remote regions[11] that will expand over time in similar fashion to the U.S. counter-part delivery system where a waiver was allowed by the national administration for drone delivery systems over houses[12].

The aforementioned situations can be seen as a blessing in disguise, mainly because it will allow faster deliveries, but will also raise the issue of how the information that the drone is gathering directly or indirectly when it will fly over a person or building.

Most current drone flights are handled by militaries, law enforcement agencies, and border agencies and have started being used in energy and agriculture infrastructure, but the former fall under a legal waiver where the drones can be handled under certain scenarios, while the latter fall under scenarios where they are used in remote regions where privacy and data protection are not a big issue.

However, one of the fundamental human rights found in the Universal Declaration of Human Rights[13] reads that *"no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."* As such, drone flights must be handled in such a way that any intrusion can be blocked or prevented.

Seeing as how the United States of America has had a lot of issues with aerial surveillance and because its law system allows the judicial precedence, it will offer an interesting insight in how drones and their operators can fail to uphold other people"s rights.

In the judicial practice of the U.S.A., the most resonating cases regarding privacy breaches in different situations that required or not a warrant are *California vs. Ciraolo*[14], *Katz vs. U.S.*[15] and *Smith vs. Maryland*[16].

[10] Regulation (EU) 2019/945 of 12 March 2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems.

[11] Charlotte Ryan, Royal Mail brings Scottish Isle closer with drone, Bloomberg, 16.12.2020.

[12] Miriam McNabb, DroneUp's waiver for flight over people is a major step for drone delivery, Dronelife.com, 07.12.2020.

[13] Adopted by the U.N.G.A. in 1948, Resolution 217A, article 12.

[14] U.S. Supreme Court, 476 US 207, 1986.

[15] U.S. Supreme Court, 389 US 347, 1967.

[16] U.S. Supreme Court, 442 US 735, 1979.

To put the cases into context, the Ciraolo case is the most definitive since it involved the use of a police helicopter to do an aerial observation of a person"s backyard without warrant, while the images had been used to successfully convict the person. The ruling was later appealed and it was found that the images were taken without a warrant and as such were in violation of the U.S. Constitution.

The ruling stated[17]:"On the record here, respondent"s expectation of privacy from all observations of his backyard was unreasonable. That the backyard and its crop were within the "curtilage" of respondent"s home did not itself bar all police observation. The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer"s observation from a public vantage point where he has a right to be and which renders the activities clearly visible. The police observations here took place within public navigable airspace, in a physically nonintrusive manner.

The police were able to observe the plants readily discernible to the naked eye as marijuana, and it was irrelevant that the observation from the airplane was directed at identifying the plants and that the officers were trained to recognize marijuana. Any member of the public flying in this airspace who cared to glance down could have seen everything that the officers observed. The Fourth Amendment simply does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye."

The other two cases argued that a warrant is also required when analyzing and intercepting a phone call in public space and inside a person"s home. This roughly translates to a requirement that a drone operator has to not use the drone to spy and record people without their consent.

Similar to the Ciraolo case, *Florida vs. Riley*[18] featured a manned aerial vehicle that was used for aerial observation of a greenhouse, while maintaining around 120 meters altitude. The Court established that it was no violation of his property and privacy laws since the greenhouse was constructed in such a way as to promote the idea that it was trying to maintain intimacy. Such a case argues that a drone operator must take into account that processing information gathered by the drone must be censored upon public release, but only if the object or person that was filmed or photographed was even indirectly not doing something to protect the privacy of himself or the property.

In another landmark case, *Dow Chemical vs. U.S.*[19] it was argued that aerial photographs using a "*standard precision aerial mapping camera*" to conduct an investigation under the Clean Air Act can be handled without a warrant if it"s in navigable space. The Court also argues that even though there are fewer concerns about privacy in the context of an industrial plant than with respect to a home, intrusion by certain technology unavailable to the public may be prohibited by the US Constitution.

All of these cases highlight that privacy is a very important aspect when flying over someone"s property, mostly because the person who may feel that his or her rights are being encroached can even resort to using armed force against the drone.

[17] See note 13, pg. 208-215.
[18] U.S. Supreme Court, 488 US 445, 1989.
[19] U.S. Supreme Court, 476 US 227, 1986.

In the case of *Boggs vs. Mereideth*[20] a person shot his neighbors drone that was midair because he felt that the drone was violating his houses airspace.

The case was dismissed on jurisdictional claims, seeing as how the airspace is being handled by the Federal Aviation Administration and it was seen as an anticipated defense derived from federal law.

While the case offers a lot of space for theory crafting, the federal government issued in December 2020 a new Rule[21] entitled Remote ID and it states that*: "Under the final rule, all UA required to register must remotely identify, and operators have three options (described below) to satisfy this requirement. For UA weighing 0.55 lbs or less, remote identification is only required if the UA is operated under rules that require registration, such as part 107".* This new addendum to the existing legislative actions have brought a new ability for operators, that is the ability to fly over people and moving vehicles varies depending on the level of risk a small drone operation presents to people on the ground, both during the day and night.

The final rule requires that small drone operators have their remote pilot certificate and identification in their physical possession when operating, ready to present to authorities if needed. This rule also expands the class of authorities who may request these forms from a remote pilot. The final rule replaces the requirement to complete a recurrent test every 24 calendar months with the requirement to complete updated recurrent training that includes operating at night in identified subject areas.

As for privacy fears, the federal body acknowledges that privacy issues could be a concern with operations over people; however, the proposed performance-based rule focuses on the risk of injury involved with operations over people and does not address privacy issues. They also stated people over whom a small unmanned aircraft flies should receive advance warning, both at public events and in closed or restricted-access sites.

This new ability offered to registered operators could lead to unwanted spying of public events or even illicit third party monitoring of police investigations, to name a few. Sadly, the F.A.A. emphasizes that privacy issues are outside the focus and scope of the rule, however, this rule does not relieve the operator from complying with other laws or regulations that are applicable to the purposes for which the operator is using the small UAS. Drone manufacturers will have 18 months from the moment the Rule was brought to public attention to begin producing drones with remote identification.

The new federal rule brings more issues than it solves, since home owners will try and use different anti-drone technology, which could potentially affect its controls or GPS and crash said drone, causing damage or even harm.

The general reaction (regardless of legal system of the state) is that attacking a drone is the equivalent of attacking someone"s property, but this is also available for the drone operator as well since he is liable of civil and/or criminal charges (for example trespassing). Compliance with the data protection requires, among other things, that you only gather and use footage fairly and lawfully.

[20] Debra Cassens Weiss, Does property owner have the right to shoot down hobbyist's hovering drone?, AMERICAN BAR ASSOCIATION JOURNAL, 14.01.2016.

[21] Part 89 issued by the F.A.A., 28.12.2020. The executive summary can be accessed at the following: https://www.faa.gov/news/media/attachments/RemoteID_Executive_Summary.pdf.

The best solution is to notify the law enforcement agencies, while states must begin drafting no-drone-zones and adopt special law enforcement policies to counter illicit drone actions.

In Europe, the situation is fairly more straightforward, because member states of the European Union and the Council of Europe must comply with Regulation 679/2016 and Treaty no. 108[22], while also have to follow the European Convention on Human Rights and its understanding of private life and property.

In the view of the European Court of Human Rights, GPS surveillance is by its very nature to be distinguished from other methods of visual or acoustical surveillance which are, as a rule, more susceptible of interfering with a person"s right to respect for private life, because they disclose more information on a person"s conduct, opinions or feelings. Having regard to the principles established in its case-law, it nevertheless finds the above-mentioned factors sufficient to conclude that the applicant"s observation via GPS, in the circumstances, and the processing and use of the data obtained thereby in the manner described above amounted to an interference with his private life[23].

The European Union later adopted Directive 2016/680[24] for protecting individuals with regard to the processing of their personal data by police and criminal justice authorities, and on the free movement of such data, and it establishes data protection principles applicable to the processing of personal data in the area of justice, such as fair and lawful processing, proportionality, accuracy, limited conservation time, and responsibility.

Thus, the European legislation is applicable to police drones as well, meaning that justice authorities can have drone footage challenged and even annulled if it was gathered in an illicit manner, while also having to store, handle and delete certain data that was gathered with drones. The same could be applied to situations in other states as well.

However, seeing as how drones are unmanned vehicles but are treated as manned and operated vehicles, it should be noted that they should comply with aviation rules guaranteeing the total aviation safety system and consequently they must be approved by a competent authority, the operator shall have a valid RPAS operator certificate, the remote pilot must hold a valid license[25].

The future of drones was set-up through the Riga Declaration on Remotely Piloted Aircraft[26] with a progressive-risk-based task for regulation of drones, meaning that public acceptance of drones has to be handled with key aspects such as public authorities implementing ways to handle illicit drone handling, geospoofing, cyber security and implementing no-fly zones. To design such a legal and administrative system, the F.A.A. and E.A.S.A. have established a somewhat common regulation[27], both of them having fairly similar rules regarding weight limitations,

[22] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1985.
[23] Uzun vs. Germany, E.C.H.R., Application no. 35623/05, 02.09.2010, paragraph 52.
[24] *OJ L 119, 4.5.2016, p. 89–131.*
[25] Ottavio Marzochi, Privacy and Data Protection Implications of the Civil Use of Drones, European Parliament, Directorate General For Internal Policies, PE 519.221, June 2015, p. 13.
[26] RIGA Declaration On Remotely Piloted Aircraft (Drones) "FRAMING THE FUTURE OF AVIATION" Riga - 6 March 2015.
[27] For reference the F.A.A.'s regulation for small drones is Part 107, and the E.A.S.A.'s equivalent is the EU Regulation 2019/947 and 2019/945.

flight periods and locations, and most importantly, airworthiness certifications for both the drone and its pilot.

To allow them to be operated, drones are normally combined with applications such as cameras or video-cameras (as the remote pilot has to see or detect what is in front of the drone to avoid a collision). They might also record the images, through software to process the video images, which might have further applications. For example, the U.S.A. has developed a mobile phone app entitled B4UFLY[28] that informs the user of no-fly zones (permanent or temporal) and even has a legislation option, so that the user can learn the rules on the go.

Other developers-manufacturers, such as DJI[29], have preinstalled a safety software inside their drones to warn the user of flying over sensitive locations and that in certain areas the user has to upload a special clearance permit or even pass an examination.

This has also become a norm for operators since the U.S.A. have implemented Remote ID, with the E.U. and U.K. implementing Drone Remote Identification Protocol (DRIP)[30] that will enable confidential handling of private information and all information designated by neither cognizant authority nor the information owner as public. It will also, enable selective strong encryption of private data in motion in such a manner that only authorized actors can recover it. If transport is via IP, then encryption must be end-to-end, at or above the IP layer, while notwithstanding it enables selective strong encryption of private data at rest in such a manner that only authorized actors can recover it.

While the U.S.A. has case laws regarding flight of manned vehicles over properties and its repercussions on privacy, Europe has the benefit of having a better legal safeguard mechanism in the scope of the European Court of Justice and the European Court of Human Rights. This means that under the privacy and private life guarantees offered by these mechanisms.

As such, the E.C.J. case *Rynes vs. Úřad pro ochranu osobních údajů*[31] retained that the application of the right to privacy and data protection to private and public spaces, which implies that EU law applies regardless of the location of the person contesting the dronerelated interference. It also stated in a preliminary ruling related to CCTV that the "*household exception*" does not apply when the personal data is gathered in public spaces.

Also, should such data be shared trough a social network or published on the internet, the exception would not be applicable and the full guarantees provided by the Directive would apply. Furthermore, it is likely that the capturing and processing of personal data carried out by drones in public spaces would not be covered by the "household exemption" and hence such processing would be subject to data protection law.

However, the most common exception to data protection and privacy of drones will remain that of intelligence services, who fall outside of the E.U. competences, including when these imply the collection of data through drones.

[28] Link for description and download https://www.faa.gov/uas/recreational_fliers/where_can_i_fly/b4ufly/.
[29] Link for the features of the integrated software https://www.dji.com/flysafe/introduction.
[30] S. Card, Ed., A. Wiethuechter, R. Moskowitz, Drone Remote Identification Protocol (DRIP) Requirements, Ietf.org, 19.11.2020.
[31] Case C-212/13, 11.12.2014.

Another issue, that legislation does not address, is the fact due to their size, drones can collect data without being recognized and therefore individuals who are being watched or monitored are not aware of this and can not only collect personal data such as videos with or without sound but also transfer the gathered data at the same time as the subject is being watched.

A more dystopian view on the usage of drones was brought up as a possible data protection risk that is the so called ""*profiling*"" of personal data[32]. This can roughly mean that a drone can be used for marketing purposes, identifying customers based on their previous purchases.

Moreover, selling companies could use the sold drone, loaded with video-cameras, GPS and face recognition for tracking and identifying their existing and potential customers based on the cars they drive and their addresses, in order to perform targeted advertising. This information could later be sold, traded or transferred in a similar matter to how Google Adware or Facebook uses its information gathered with their algorithms.

Article 8 of the European Convention of Human Rights includes the notion of personal data, this being outlined in the case *S. and Marper v. U.K.*[33] personal data is linked with the right to respect for private and family life are guaranteed by article 8 of the Convention.

As such, states must ensure that personal data is not easily accessible by unauthorized third parties. This means that states must ensure that a household exception can be applied, when private individuals perform personal and family life related activities and that if the data collected is then shared or uploaded on online platforms via the internet, this exception cannot be applied and the rules provided by data protection laws have to be followed.

In the case of drones, operators must be aware that they are not covered by the household exception when they use the drone in public spaces for leisure or hobby activities. If such activities are performed on private property then the household exception is applicable, but it has limitations depending on where it is used or at what altitude. The maximum allowed altitude for leisure/hobby flights is around 400 feet or approximately 120 meters[34].

Furthermore, based on the G.D.P.R., drones must be developed and manufactured with data protection as a core design choice, meaning that manufacturers develop the hardware and software, but the operator is responsible for the way the drone was used.

These specifications that fall under the guidelines for manufacturers, are meant to provide a minimum standard of data protection, which would make the drone industry fall in line with the new regulation and therefore respect privacy and data protection rights of individuals, at least from hardware and software perspective.

The second aspect that drones may have already preinstalled, is that data protection as a default setting thanks to legislative guidelines, but as it stands it fails from a real time sharing aspect, meaning that streaming services from outside of the state where the drone is being handled may require a third party data protection mechanism for protection.

Notwithstanding, in public places, individual privacy is similar to the concept of non-privacy because by entering a public place and remaining there, there is an

[32] Florin Costinel Dima, Drone technology and human rights, University of Twente, 6.07.2017, p. 27-28.
[33] European Court of Human Rights, 30562/04 and 30566/04, 4.12.2008, para. 68-69.
[34] Airmap, The rules you need to know to fly recreational drones, Airmap.com, updated as of 23.07.2019.

implication that one is aware they will be seen or recognized, and that one"s behavior may be scrutinized by anyone in that public sphere who may draw inferences from the individual"s behavior[35], meaning that drone operators must apply the *„reasonable expectation of privacy"*[36] where private life considerations may arise once a systematic or permanent record of material from the public domain comes into existence.

The most important aspect of data protection introduced by the European Union G.D.P.R. is forbidding automated decision making. Under article 22 of the G.D.P.R.[37], consent is needed when decisions are solely automated and have a legal or similarly significant effect on people and if such automated decision making is not authorized by law. This means that information gathered or generated by drones must be filtered by the operator in such a way that it cannot be shared without consent or without a human review and validation.

In 2019 the U.K. police used an automated facial recognition software in public space and caused an uproar because of it was not clear who can be placed on the watch list, nor was it clear that there are any criteria for determining where the cameras could be deployed[38]. The system was challenged in the case of *R vs. CC South Wales*[39] where the Court ruled that *"too much discretion is currently left to individual police officers"* and the Court also held that the police did not sufficiently investigate if the software in use exhibited race or gender bias.

Such a case argues how easily drones can be placed in public space and cause a privacy problem in which the operator could never be found to be held responsible.

However, the Amsterdam Drone Declaration[40] established a focus on local needs and initiatives and a push towards integrated smart mobility and fair access to all dimensions of public space.

Smart mobility under data protection must be understood as a set of guidelines that any drone operator should know and abide. For example, the U.K."s independent authority for data protection, the ICO[41], outlined that operators should let others know before they start recording, and also should keep the data in a safe space inside the drone.

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[35] European Court of Human Rights, Costello-Robers vs. U.K., 89/1991/341/414, 23.02.1993, para. 35-36.

[36] As seen in the E.C.H.R. in the case of P.G. and J.H. vs. U.K., 44787/98, 25.09.2001.

[37] Article 22 contents:"1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2. Paragraph 1 shall not apply if the decision:

(a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;

(b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or

(c) is based on the data subject's explicit consent.

3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place."

38 Kate Cox, Police use of facial recognition violates human rights, UK court rules, ArsTechnica, 8.12.2020.

[39] EWCA Civ 1058 C1/2019/2670.

[40] E.A.S.A., Drone Declaration, Amsterdam, 28.11.2018.

[41] Information Commissioner's Office, Your data matters – drones - https://ico.org.uk/your-data-matters/drones/.

While these outlines are general and beneficial to any type of drone operator, the fact that drones have a tendency to malfunction due to hardware or software issues or have accidents due to human errors leads to another possible type of data protection breach.

Civilian drone incidents have been documented by mass-media[42] where drones have crashed on the White House lawn or collided with a small manned aircraft at Quebec"s airport. These incidents raised issues where the operator should have been prosecuted, but not all cases can be resolved since not operators are licensed or have their drones registered.

These cases can also lead to the drones being recovered by third parties who may extract the information stored on the drone, information that was not yet filtered by the operator and as such could spell a breach in a person or a company"s private data. This also works both ways, since[43] other incidents such as trafficking drugs or terrorism conducted with drones could be intercepted in a way to deter potential high risk crimes.

As such, modern problems require modern solutions.

3. Possible solutions for protecting data and privacy.

Solutions vary based on how local administrations and governmental agencies are able to handle and intervene to prevent drones from breaching property and privacy laws.

The most common and useful solution is to declare zone as no-fly zones and as such limit drone access to the designated areas and sanction those who do not commit to respecting said regulations.

For example, the United Kingdom[44] established no-fly zones designated as *danger areas* where it is often used for activities such as fighter pilot training, live ammunition training or weapons and systems testing (including GPS jamming exercises). Other zones are designated as *prohibited* or *restricted* and are clearly established by the air administrative authority. What is important is that person who are interested can request that their property or business area be declared as unsafe spaces for drone flights.

Usually, the air space regulations prohibit drones from flying close to airports, large cities, sensitive industrial sites, nuclear facilities, military bases, prisons and natural reserves.

Administrations can temporary declare no-fly zones[45] while a special event or holiday is being played out. For example, France declared that the area designated for the *Tour de France* be considered a no-fly zone during the event.

In Europe, Eurocontrol[46] allows drone users who are interested in operating their unmanned aerial vehicle on the territory of another state to check the guidelines for safety and no-fly zones via an online tool

[42] Igor Kuksov, Air alert: 8 dangerous drone incidents, Kaspkersky.com, 21.10.2019.

[43] Worldwide drone incidents charted by Dedrone.com, accessible at https://www.dedrone.com/resources/incidents/all.

[44] Applying UK Air Navigation Order CAP393, no fly zones as of 01.01.2021: https://www.noflydrones.co.uk/.

[45] For example France's temporary no fly zones: https://dronerules.eu/ro/recreational/news/france-new-map-with-no-fly-zones-and-maximum-altitudes-for-recreational-drones.

[46] A link to the online tool that offers said information: https://www.eurocontrol.int/tool/uas-no-fly-areas-directory-information-resources.

that showcases 19 states who have submitted updated information in this regard.

From an international point of view, third parties have developed internet tools[47] that follow the I.C.A.O. guidelines, the U.S. F.A.A. guidelines and other states aerial recommendations. The tools allow interested parties to check free use zones and prohibited zones in almost any state around the world, but they must also check with the state they want to fly in or transit with the drone for temporary modifications or drone type bans.

Other solutions to prevent privacy invasions may come in the form of anti-drone devices or systems.

Broadly speaking, counter-drone systems are either fixed on the ground, mobile on a ground vehicle, hand-held by a single person, or mounted on another drone.

Finding a drone by either radar or radio frequencies can be done and such devices are accessible to the general population, but other types of anti-drone systems may be out of reach or illegal. Such devices may include GPS spoofers, anti-drone ammunition, radio jamming, lasers, microwave rays or even kamikaze drones.

For the most part, counter-drone systems are expensive, out of reach of almost all people, most businesses, and some governments. Securing the skies against the possibility of a threat must be weighed against the cost of acquiring and then using the system and as such care must be taken to make sure that the drones targeted pose a threat and are not just errant hobbyists unaware that they are piloting their toy into contested skies[48].

Also, counter-drone systems may cause other collateral damage to authorized users, meaning that for example a radio jammer or GPS spoofing technique could unintentionally interrupt communications of other small airplanes or helicopters or even other drones. This could be interpreted as a criminal conduct regarding laws that prohibits willful or malicious interference to communications.

In the U.S.A., the aviation authority stated in 2016[49] that: „Unauthorized UAS detection and counter measure deployments can create a host of problems, such as electromagnetic and Radio Frequency (RF) interference affecting safety of flight and air traffic management issues. Additionally, current law may impose barriers to the evaluation and deployment of certain unmanned aircraft detection and mitigation technical capabilities by most federal agencies, as well as state and local entities and private individuals. There are a number of federal laws to consider, including those that prohibit destruction or endangerment of aircraft and others that restrict or prohibit electronic surveillance, including the collection, recording or decoding of signaling information and the interception of electronic communications content.”.

Later, the federal aviation authority from the U.S. did a follow-up study in 2018[50] concluded that drone detection systems should be developed so they do not adversely impact or interfere with safe airport operations, air traffic control and other air navigation services, or the safe and efficient operation of the national air service. Also, the study showed that the costs of

[47] ICAO no fly zones drone world website https://www.arcgis.com/apps/webappviewer/index.html?id=9e674cbad86f4f8c86d1854dec6a5fb5.

[48] Kelsey Atherton, Anti-drone tech’s tangled regulatory landscape, Brookings.edu, 02.10.2020.

[49] F.A.A. letter to the Office of Airports Safety and Standards in the Department of Transportation, 26.10.2016.

[50] F.A.A. letter to the Office of Airports Safety and Standards in the Department of Transportation, 19.07.2018.

having a permanent counter-drone system is very high and could become obsolete by the time it"s installed and operational.

Most legislative actions in the U.S. will however be reviewed after 31st of December 2022 when the modernization of law enforcement agencies and military structures will probably end and it will allow a more commercialized defense mechanism to be accessible to the general population[51].

A more current solution is being handled in India with the *Digital Sky*[52] platform that will allow only those drones that comply with the no-fly and no-take-off protocols. These protocols have to be implemented software-wise by the manufacturers and will allow drones to operate in areas demarcated as green and yellow zones, permitting them to fly over most of India.

This means that for green and yellow zones, operators will get automatic clearance from the platform and for red demarcated zones, the security agencies will receive specific clearance request. All data and information is uploaded to the Digital Sky platform so that there is no scope for arguments to the contrary at a later stage.

The platform will also permit state agencies to identify and intercept the drone and to bring the alleged offender to justice can be left to the discretion of the judiciary.

Analyzing how the counter-drone strategy is being handled in most states where drones play a big part in the economy, it can be concluded that currently only law enforcement agencies (to some extent) and military operators are allowed to use anti-drone systems.

For example, the U.S.A. has adopted a Memorandum Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems[53]. Under these guidelines agencies will adopt protective measures necessary to mitigate credible threats from unmanned aircraft or unmanned aircraft systems to the safety or security of covered facilities or assets.

Agencies who are interested in obtaining clearance to use counter-drone systems then a request will be issued to the Department of Justice. Other states can lodge requests for their own events on U.S. soil.

The memorandum also addresses privacy concerns and any clearances will only be given after consultation with the official for privacy. A component may only intercept, acquire, access, maintain, use, or disseminate communications in a manner consistent with privacy laws and cannot be issued if its sole purpose is the monitoring activities or the lawful exercise of rights.

A component should consider and be sensitive at all times to the potential impact protective measures may have on legitimate activity by unmanned aircraft and unmanned aircraft systems, including systems operated by the press. State agencies components may maintain records of communications to or from unmanned aircraft or unmanned aircraft systems intercepted or acquired under authority of data protection acts.

If a drone is caught using a counter-drone measure, then that drone is seized alongside any other systems that it was being connected to. The agencies involved can issue warnings, disrupt controls of operators and even resort to the use of force to stop the drone.

Other noteworthy defense mechanisms, which have been used to protect from unwanted drone activities were

[51] Jonathan Rupprecht, 7 big problems with counter drone technology, jrupprectlaw.com, 5.01.2021.
[52] *Piyush Gupta*, *Anti*-drone technology – a 'simple' answer?, Roboticslawjournal, 12.10.2020.
[53] U.S. Attorney General, 13.04.2020.

deployed in Netherlands and the U.K.[54], were in the form of hawks that could be used to hunt drones since they act in a similar fashion to other small birds, but having a hawk at home could be cumbersome for most.

4. Conclusions

Privacy and data protection concerns will remain as long as drones can be easily accessible on the market and also as long as these drones are manufactured without supervision from either a state angency or legal limits established by the state.

Having a control on the quality of drones allows a slew of other mitigating facts that can ensure that privacy and data protection fall in order and will require less intervention from military agencies or law enforcement.

Having mandatory registrations for any audio-camera drones is another way to ensure protection. This is why offering flyer-IDs[55] regardless of age is a way to protect privacy since it allows a person to have a fundamental basic on the rules of flying and data protection.

Also, adding a time valability to this ID is a futureproofing measure as to ensure that the person is always learning about legislative and administrative measures adopted.

Seeing as how basic drone flying laws are common between states, having the operator and/or flyer ID valid in other states is a measure that could develop trust in drone communities.

Basic rules for drone operators should include that if the drone is fitted with a camera or listening device, then the operator must respect other people"s privacy whenever the vehicule is being used. Consent must be obtained whenever another person or property is being filmed or photographed, and if that cannot be obtainted, then data laws must be applied to how the information will be distributed.

Furthermore, the operator must be clearly seen when he is out with the drone as to be easily be identified both as the operator and the drone owner. The operator must store images safely and delete anything you don"t need. If the recorded images are for commercial use, than it will need to meet further specific requirements as a data controller.

While U.S. Supreme Court actions allow persons to secure their properties regarding their airspace columns, other states did not take into account updating property laws in regards to drones, and as such should update their legislative measures on how a person can obtain an administrative measure from a local or national public authority in regards to protecting their privacy and property from unwanted drone flights.

As more and more drone transportations will be green-lighted so will airspace rutes be formed over private properties.

Also, legislators should craft simple, duration-based surveillance legislation that will limit the aggregate amount of time the government may surveil a specific individual. Such legislation can address the potential harm of persistent surveillance, a harm that is capable of being committed by manned and unmanned aircraft.

[54] Ben Sampson, Engineers flight test hawks for drone captures, Aerospacetestinginternational.com, 10.07.2019.

[55] For refrence U.K testing for flyer ID regulation as of December 2020: https://register-drones.caa.co.uk/drone-code/getting-flyer-id.

The most lackluster legal measure is that of responsibility of operators and enforcement measures.

Law enforcement angecies lack the required equipment to protect people from unwanted drone harassment.

The E.U. have more recently been conducting tests of anti-drone weapons that can be used by specialized divisions of law enforcement agencies[56], while having the European airspace agencie"s approval. A similar approach had begun in U.K. with the forming of a specialized team inside the national police force that can investigate illicit use of drones[57].

Other measures should require that that technology such as geofencing and auto-redaction, may make aerial surveillance by drones more protective of privacy than human surveillance[58].

From another perspective, drone privacy violations could also translate into new types of witness evidence, but this will also translate to new procedural law provisions that have to permit such feats.

Privacy concerns were raised and had to be handled in how agencies conducted air monitoring during the Covid-19 Pandemic. For example, in the U.S.A. the F.A.A. regulations regarding drone flights do not cover data protection beyond the general rule that it must be protected[5960]. As such, data protection agencies have to adopt regulatory norms for drones and have to enforce these norms.

One such legislative action that could be applied to other states is the Californian Paparazzi Law amendment to their Civil Code[61]. This law declares that drones cannot fly above residences and invade privacy and was adopted in 2014 as a reaction to journalists invading the private life of celebrities while they were in a private environment but with walled gardens.

The journalists often employed drones to take pictures or record videos of said celebrities and this sparked a lot of outcry. The law is applicable to anyone, and can benefit from protection regardless of fame, and will protect the property, regardless of open spaces on the property.

Other mechanics that could protect the data and privacy could be represented by a killswitch built inside the drone, which could delete its storage contents if it crashed, get highjacked or sold, as to ensure that the third party does not access to sentitive information or data.

Regardless of any type of data protection measure, nothing can be enforced without proper equipement and specialized personel in the administrative authorities.

The best way to protect data and privacy can be two-fold: either create guidelines for manufacturers to insert special safety and killswitch related protocols inside the drone, thus shifting the responsibility towards the operator who has to use said protocols to their furthest extent, or the second paradigm, allowing the market to be outfitted with anti-drone

[56] Samuel Stolton, EU police forces to employ anti-drone guns "illegal" in the US, euractiv.com, 26.05.2020.

[57] National Police Chief's Council, DAC Lucy D'Orsi discusses criminal use of drones, npcc.police.uk, January 2019.

[58] Gregory McNeal, Drones and aerial surveillance: Considerations for legislatures, Brookings.edu, Report, November 2014.

[59] Ann Thompson, As drones become more common, privacy concern arise, Wvxu.org, 12.10.2020.

[60] Chaim Gartenberg, Social-distancing detecting "pandemic drones" dumped over privacy concerns, TheVerge, 23.04.2020.

61 Joshua Azriel, Restrictions against Press and Paparazzi in California: Analysis of Sections 1708.8 and 1708.7 of the California Civil Code, UCLA Enterntaiment Law Review, 2017.

technology and equipping state agencies with the required devices to both counter drones and to counter-counter-drone technologies.

Regardles of choice, a state has to adopt legislation for abuses from any side.

References

- John Villasenor, *What is a drone, anyaway?*, Scientific American, 12.04.2012;
- Chelsea Leu, The secret history of World War II-Era drones, Wired, 16.12.2015;
- Military History Matters, *Back to the drawing board – The Goliath tracked mine*, Military-History.org, 12.07.2012;
- David Axe, The Mach 3 D-21 drone was a secret America Cold War spy machine, Nationalinterest.org, 7.11.2019;
- Treaty on Open Skies – 1992;
- Regulation 679/2016 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data;
- Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft;
- Regulation (EU) 2019/945 of 12 March 2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems;
- Charlotte Ryan, Royal Mail brings Scottish Isle closer with drone, Bloomberg, 16.12.2020;
- Miriam McNabb, DroneUp"s waiver for flight over people is a major step for drone delivery, Dronelife.com, 07.12.2020;
- Universal Declaration of Human Rights – 1948;
- U.S. Supreme Court, 476 US 207, 1986;
- U.S. Supreme Court, 389 US 347, 1967;
- U.S. Supreme Court, 442 US 735, 1979;
- U.S. Supreme Court, 488 US 445, 1989;
- U.S. Supreme Court, 476 US 227, 1986;
- Debra Cassens Weiss, Does property owner have the right to shoot down hobbyist"s hovering drone?, American Bar Association Journal, 14.01.2016;
- Part 89 – Federal Aviation Administration, published on 28.12.2020;
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1985;
- E.C.H.R., Application no. 35623/05, 02.09.2010;
- Directive 2016/680 for protecting individuals with regard to the processing of their personal data by police and criminal justice authorities, and on the free movement of such data;
- Ottavio Marzochi, Privacy and Data Protection Implications of the Civil Use of Drones, European Parliament, Directorate General For Internal Policies, PE 519.221, June 2015;
- Riga Declaration On Remotely Piloted Aircraft (Drones) – 6.03.2015;
- Part 107 – Federal Aviation Administration;
- S. Card, Ed., A. Wiethuechter, R. Moskowitz, *Drone Remote Identification Protocol (DRIP) Requirements*, Ietf.org, 19.11.2020;
- E.C.J., Case C-212/13, 11.12.2014;
- Florin Costinel Dima, *Drone technology and human rights*, University of Twente, 6.07.2017;
- E.C.H.R., Applications30562/04 and 30566/04, 4.12.2008;
- E.C.H.R., Application 89/1991/341/414, 23.02.1993;
- E.C.H.R., Application 44787/98, 25.09.2001;

- Kate Cox, Police use of facial recognition violates human rights, UK court rules, ArsTechnica, 8.12.2020;
- R vs. CC South Wales, EWCA Civ 1058 C1/2019/2670;
- Amsterdam Drone Declaration – 28.11.2018;
- Igor Kuksov, Air alert: 8 dangerous drone incidents, Kaspkersky.com, 21.10.2019;
- Kelsey Atherton, Anti-drone tech"s tangled regulatory landscape, Brookings.edu, 02.10.2020;
- F.A.A. letter to the Office of Airports Safety and Standards in the Department of Transportation, 26.10.2016;
- F.A.A. letter to the Office of Airports Safety and Standards in the Department of Transportation, 19.07.2018;
- Jonathan Rupprecht, *7 big problems with counter drone technology*, jrupprectlaw.com, 5.01.2021;
- *Piyush Gupta*, *Anti*-drone technology – a "simple" answer?, Roboticslawjournal, 12.10.2020;
- Memorandum Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems, U.S. Attorney General, 13.04.2020;
- Ben Sampson, *Engineers flight test hawks for drone captures*, Aerospacetestinginternational.com, 10.07.2019;
- Samuel Stolton, EU police forces to employ anti-drone guns "illegal" in the US, euractiv.com, 26.05.2020;
- National Police Chief"s Council, *DAC Lucy D"Orsi discusses criminal use of drones*, npcc.police.uk, January 2019;
- Gregory McNeal, Drones and aerial surveillance: Considerations for legislatures, Brookings.edu, Report, November 2014;
- Ann Thompson, As drones become more common, privacy concern arise, Wvxu.org, 12.10.2020;
- Chaim Gartenberg, Social-distancing detecting "pandemic drones" dumped over privacy concerns, TheVerge, 23.04.2020;
- Joshua Azriel, Restrictions against Press and Paparazzi in California: Analysis of Sections 1708.8 and 1708.7 of the California Civil Code, UCLA Enterntaiment Law Review, 2017.

THE COORDINATION OF SOCIAL SECURITY SYSTEMS AFTER BREXIT - DISPOSITIONS APPLICABLE FROM 1 JANUARY 2021 AND POTENTIAL LEGISLATIVE CHANGES

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Abstract

The European Union"s secondary law includes several regulations and dispositions concerning the social security rights enjoyed by nationals of the EU Member States, nationals of Iceland, Norway, and Liechtenstein (as states which are part of the European Economic Area), Switzerland, stateless persons, and refugees who reside in one of these states, as well as citizens from third-party states, if they legally reside on the EU"s territory and have exercised their freedom of movement.

As a consequence of the United Kingdom"s withdrawal from the EU, it has become necessary to clarify the legal status and social security rights that individuals falling into one of the aforementioned categories enjoy, whether they be British citizens whose contributions have been paid in an EU Member State, or citizens of an EU Member State whose contributions have been paid in the UK. The Withdrawal Agreement concluded between the United Kingdom and the European Union covers the cross-border situations in existence at the end of the transition period, which concluded on 31 December 2020. The Trade and Cooperation Agreement between the EU, Euratom, and the UK, which was signed on 30 December 2020, contains provisions regarding the coordination of social security systems between the parties to the Trade and Cooperation Agreement, largely borrowing from the existing EU legislation on the matter, but also diverging from it in some aspects. This article will analyse the relevant provisions of the Withdrawal Agreement, those of the Trade and Cooperation Agreement, as well as potential legislative changes concerning the coordination of social security systems.

Keywords: *Social security – Brexit – Regulation (EC) nr. 883/2004 on the coordination of social security systems – Trade and Cooperation Agreement – Withdrawal Agreement.*

1. Introduction

The free movement of persons is one of the four fundamental freedoms of the European Union"s internal market, alongside the free movement of goods, capitals, and services,[1] and it represents a key aspect of the European citizenship.[2] When a person works in a state that is different from their state of origin, or when they"re detached or posted to another state,

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[1] EU law provisions regarding the four freedoms of movement also apply to the three states (Norway, Iceland, and Liechtenstein) that are part of the European Economic Area alongside the EU Member States, as well as in Switzerland's case, by way of a series of bilateral agreements concluded between the state and the EU. For more on the free movement of persons, see Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic, Bucharest, 2016.

[2] Introduced through the Treaty of Maastricht, which was signed in 1992 and came into force in 1993. For more on this subject, see Augustin Fuerea, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, Bucharest, 2016, p. 68, and Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Sixth Edition, Oxford University Press, 2015.

an issue of particular interest is that of the social security system they will contribute to, with the obvious risk being that of having to contribute to two (or more) such systems. The coordination of social security systems is thus essential to ensuring that the persons exercising their freedom of movement are guaranteed social security protection when moving from one Member State to another, and that they don"t lose accrued benefits. To that purpose, EU law on the subject matter follows four principles: non-duplication (persons in cross-border situations are subject to the legislation of a single state), non-discrimination (they must enjoy the same rights as the citizens of the state to whose legislation they are subject), aggregation (periods of work carried out in different EU Member States all count towards contributory benefits), and exportability (benefits earned in one Member State carry over to another, when the beneficiary moves).[3]

As long as the United Kingdom was a Member State of the European Union, it complied with the organisation"s legislation in this matter, following the four principles, but the British state"s departure from the Union means that EU law will no longer apply to it. 1 January 2021 marked the end of the transition period introduced by the Withdrawal Agreement[4] concluded between the EU and the UK. The contents of said Agreement ensure that citizens finding themselves in a cross-border situation at the end of the transition period will continue to be protected in accordance with EU legislation on the matter of social security, for as long as the cross-border situation continues without interruptions. In the case of cross-border situations occurring, between the EU and the UK, from 1 January 2021 onwards, the applicable provisions are those contained in the Trade and Cooperation Agreement,[5] signed on 30 December 2020 by the two parties, which includes a Protocol on the matter of social security, governing newly occurred cross-border situations.

2. Historical aspects and current EU secondary legislation on the matter of social security coordination

The UK"s position on the matter of free movement of workers (and, implicitly, aspects related to the social security awarded to cross-border workers) and border control has been one influenced, in part, by its status as an island state,[6] a status which was invoked to explain its decision to opt out of the Schengen acquis. At the time, the UK"s argument was that the possibility of strictly controlling its borders, a possibility awarded by it being an island, was too valuable to forego in favour of joining the Schengen

[3] Meghan Benton, 'Reaping the Benefits? Social Security Coordination for Mobile EU Citizens,' *Policy Brief Series*, Issue No 3, Migration Policy Institute, Brussels, 2013, p. 3.

[4] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), OJ C 384I, 12.11.2019, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29 (accessed on 20 March 2021).

[5] Trade and Cooperation Agreement between the European Union and European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG (accessed on 20 March 2021).

[6] Yves Jorens, Grega Strban, "New Forms of Social Security for Persons Moving Between the EU and the UK?", in Nazaré da Costa Cabral, José Renato Gonçalves, Nuno Cunha Rodrigues (Eds.), *After Brexit. Consequences for the European Union*, Palgrave Macmillan, 2017, p. 271.

Area. The UK"s objection was solely focused on the issue of the elimination of border controls on persons, and the risk it would supposedly pose, while considering the elimination of internal frontiers with respect to goods, services, and capitals a desirable and advantageous development.[7] Despite signing the Single European Act,[8] which "contributed to the Community"s competence to adopt legislation in the field of social policy" and set the stage for the future adoption of the Community Charter of the Fundamental Social Rights of Workers in 1989, the UK chose not to adopt the Charter, and later chose to opt out of the Social Chapter annexed to the Maastricht Treaty, in the form of a Protocol which "provided the EU with greater legislative competences and enhanced the role of the social partners and collective agreements at EU level".[9] The UK started following the EEC"s legislation on this matter in the late 1990s, when the Treaty of Amsterdam[10] consolidated all the existing dispositions on Social Policy in a single title.

At present, according to the UK"s national provisions, employees and employers both are liable to pay UK National Insurance contributions (NICs), if they are resident, present, ordinarily resident, or have a place of business (in the case of employers) on the UK"s territory. While the UK was a member of the European Union, employees who were nationals of an EU Member State, Norway, Iceland (as members of the EEA), or Switzerland had their social security rights protected under EU legislation. After the UK"s withdrawal from the EU, this must naturally change.

At the supranational level, there have been provisions on the coordination of social security systems ever since the European Economic Community (today, the European Union) started its existence, with the signing of the Treaty of Rome, in 1957.[11] At the time, the Council (the legislative institution) adopted two regulations concerning the matter of social security for cross-border workers: Regulations No 3/1958 and 4/1958.[12] Ever since, dispositions on this subject matter have expanded, with the EU"s institutions aiming to adopt legislation that would offer as thorough protection as possible for the persons exercising their right to freedom of movement. The EU legislation does not replace national legislation on the matter of who is insured, what benefits they receive, and under what conditions, focusing on aspects like the cumulation of periods when the person has been insured on the territory of a Member State, when calculating benefits.

The two 1958 regulations were replaced by Regulation (EEC) No 1408/71[13] and its corresponding Implementing

[7] Elspeth Guild, "The Single Market, Movement of Persons and Border", *The Law of the Single European Market*, Catherine Barnard, Joanne Scott (eds.), Hart Publishing, 2002, p. 298.

[8] The Treaty was signed in 1986 and came into force in 1987.

[9] Yves Jorens, Grega Strban, *op. cit.*, p. 273.

[10] The Treaty was signed in 1997 and came into force in 1999.

[11] The Treaty came into force in 1958, alongside the Treaty establishing the European Atomic Energy Community, which had also been signed in 1957, in Rome.

[12] Regulation No 3 concerning the social security of migrant workers and Regulation No 4 establishing the methods of implementation and completing the dispositions of Regulation No 3 concerning the social security of migrant workers.

[13] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

Regulation (EEC) No 574/72.[14] The most recent legislative acts on the matter, which replaced the ones adopted in the 1970s, are Regulation (EC) No 883/2004[15] and its implementing act, Regulation (EC) No 987/2009,[16] which came into force in 2010.

Regulation (EC) No 883/2004 on the coordination of social security systems in the EU was modernised and implemented through Regulation (EC) No 987/2009 on coordinating social security systems, which repeals Regulation (EEC) No 574/72. According to Regulation (EC) No 883/2004, social security contributions are payable in a single Member State, usually the one where the person is working, thus ensuring that people exercising their freedom of movement are not liable to pay double contributions. Special dispositions apply to detached workers (persons employed in one Member State, but sent to work in another), and multi-state workers (persons working in two or more Member States), as well as other exceptional situations, like those of self-employed workers. The Regulation contains six titles and eleven annexes. Title I, "General provisions", lists a series of definitions, the persons and matters covered by the act, and the principles upon which the coordination of the security systems is founded – equality of treatment, aggregation of periods of insurance, employment, self-employment or residence, waiving of residence rules, and prevention of overlapping of benefits. Title II, "Determination of the legislation applicable", states the core principle of the matter – persons to whom the Regulation applies are subject to the legislation of a single Member State of the EU. The text then sets out the rules according to which said legislation is determined. Title III, "Special provisions concerning the various categories of benefits," legislates the titular types of benefits, such as sickness, maternity, and equivalent paternity benefits, and pensions. Title IV, "Administrative Commission and Advisory Committee," regulates the Administrative Commission for the Coordination of Social Security Systems and other procedural aspects. Title V, "Miscellaneous provisions", addresses matters such as the cooperation between Member States of the EU, the protection and processing of personal data, the collection of contributions and recovery of benefits (which can be effected in another Member State than that to whose institutions the contributions are due), the rights of the institutions responsible for providing the benefits. Title VI of the Regulation contains "Transitional and final provisions."

Regulation (EC) No 987/2009 on coordinating social security systems contains five titles and five annexes. Title I, "General provisions," covers definitions of the terms used within the regulation, rules on the cooperation between the institutions responsible for social security at the EU"s and the Member States" level, and dispositions concerning the determination of residence, the aggregation of periods of contributions, and the prevention of overlapping of benefits. Title II, "Determination of the legislation applicable", sets out a list of criteria, so that

[14] Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

[15] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. The regulation also applies with regards to the EEA and Switzerland.

[16] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems. The regulation also applies with regards to the EEA and Switzerland.

persons falling under the scope of the regulation will be subject to the legislation of a single Member State. Title III, "Special rules concerning the various categories of benefits", contains dispositions on matters such as sickness, maternity and equivalent paternity benefits; benefits in respect of accidents at work and occupational diseases; death grants; invalidity benefits and old-age and survivours" pensions; unemployment benefits; family benefits. Title IV, "Financial aspects", regulates the reimbursement and recovery of the costs of benefits, while Title V, "Miscellaneous, transitional and final provisions" regulates the entry into force of the act, and issues such as medical examinations, administrative checks, and currency conversion.

3. Provisions of the Withdrawal Agreement and of the Trade and Cooperation Agreement

The Withdrawal Agreement concluded between the European Union[17] and the United Kingdom regulates, in Title III, the matter of the coordination of social security systems post-Brexit. The persons covered by its dispositions[18] include:

a) Union citizens (and their family members and survivours) who, at the end of the transition period, are either subject to the legislation of the United Kingdom, or who reside in the United Kingdom and are subject to the legislation of a Member State at the end of the transition period";

b) United Kingdom nationals (and their family members and survivours) who, at the end of the transition period, are subject to the legislation of a Member State, or who reside in a Member State, and are subject to the legislation of the United Kingdom;

c) Union citizens and United Kingdom citizens (and their family members and survivours), who are employed or self-employed on the territory of the other part to the Agreement, while being subjected to UK law and EU law, respectively;

d) stateless persons, nationals of third countries, and refugees (and their family members and survivours),if they reside on the territory of one of the parts to the Agreement, and are in one the previously mentioned situations, and fulfil the requirements of Council Regulation (EC) No 859/2003 (14), in the case of third-country nationals;

e) persons (and their family members and survivours) who don"t fall within any of the previous categories, but who fall within the scope of Article 10 of the Agreement.

The persons mentioned will be covered by the dispositions of EU law "for as long as they continue without interruption to be in one of the situations set out in that paragraph involving both a Member State and the United Kingdom at the same time."

According to the Withdrawal Agreement, the dispositions contained in Article 48 TFEU, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council will continue applying to the aforementioned categories of persons.[19]

In terms of special situations covered by the Agreement,[20] it is mentioned that the EU"s dispositions on "aggregation of periods of insurance, employment, self-employment or residence, including rights

[17] All relevant dispositions apply similarly in the case of Euratom, as per Art. 7 of the Withdrawal Agreement.

[18] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), OJ C 384I, 12.11.2019, Art. 30.

[19] *Ibidem,* Art. 31.

[20] *Ibidem,* Art. 32.

and obligations deriving from such periods" will continue to apply to persons in cross-border situations (and their family members and survivors) if, despite not fitting one of the categories identified in Article 30, they were subject to the legislation of the other party to Agreement, at the end of the transition period. In these persons" cases, the periods completed both before and after the end of the transition period will be aggregated, according to Regulation (EC) No 883/2004.

The EU legislation on social security will continue to apply, even after the transition period, to persons who, before its end, "had requested authorisation to receive a course of planned health care treatment pursuant to Regulation (EC) No 883/2004, until the end of the treatment," as well as persons who are on a stay at the end of the transition period in a Member State or the United Kingdom, for the duration of that stay. The Withdrawal Agreement regulates the family benefits awarded, after the end of the transition period, to persons who are in a cross-border situation and who have family members residing on the territory of the other part to the Agreement.[21] The EU"s provisions on such benefits will continue to apply for as long as the persons concerned fulfil the conditions of the two regulations on the subject.

EU legislation on the matter of social security will also continue to apply to nationals of Norway, Iceland, Liechtenstein, and Switzerland, provided that those states conclude corresponding agreements with the UK and with the EU, which apply to Union citizens and British citizens respectively.[22]

Concerning the matter of administrative cooperation, the Withdrawal Agreement provides that the UK shall have the status of observer in the Administrative Commission, where it may send a representative, if the items on the agenda concern the British state, and that it shall also take part in the Electronic Exchange of Social Security Information (EESSI).[23] The EU provisions on reimbursement, recovery and offsetting will continue to apply in the case of the persons mentioned in Article 30, as well as those situations which occurred before the end of transition period, or which occurred after but involve the persons covered by Articles 30 and 32.[24]

Should Regulations (EC) No 883/2004 and (EC) No 987/2009 be amended or replaced after the end of the transition period, the new dispositions shall apply wherever the two regulations are mentioned within the Agreement.[25] This means that the UK will be held to enforce regulations that it did not have a hand in elaborating and adopting, and it also means that the persons falling under the scope of the Withdrawal Agreement will enjoy a level of protection similar to that of citizens of EU Member States.

As the dispositions of the Withdrawal Agreement only cover the cross-border situations in existence at the end of the transition period, with small exceptions, it was necessary for the EU and the UK to negotiate and conclude a different agreement concerning situations that would arise from 1 January 2021.

In December 2020, EU and UK negotiators agreed on a Trade and Cooperation Agreement which came into

[21] *Idem*.
[22] *Idem*, Art. 33.
[23] *Idem*, Art. 34.
[24] *Idem*, Art. 35.
[25] *Idem*, Art. 36.

force on 1 January 2021 and which covers several important aspects of the parties" relationship after Brexit. The matter of the coordination of social security systems between the EU"s Member States and the UK was addressed through a Protocol annexed to the Agreement, thus ensuring that the UK will apply the same conditions, in this matter, for all EU Member States, avoiding discrimination between their citizens. Titled "Protocol on social security coordination", and comprising of 5 titles and 8 annexes, it includes provisions regarding the applicable legislation to cross-border situations (maintaining the principle that individuals are to be subject to the legislation of a single state),[26] aggregation of insurance periods, exportability of benefits, and the equal treatment of workers. The Protocol will be in effect for 15 years, or until it is extended by mutual agreement,[27] or terminated by either party.[28] It must also be noted that the Protocol only covers the UK"s relationship with the EU"s Member States, while the relationship with the European Free Trade Association states[29] must be regulated through bilateral agreements.

The Protocol mostly replicates the existing rules on social security coordination, and it specifies that affected workers will be subject to the legislation of only one state, determined in accordance with the Protocol, thus avoiding double imposition of taxes and contributions or the lack of a layer of social security. However, there are some differences, compared to the applicable EU regulations, and some protection measures are absent.

In the case of persons working in the UK for EU companies, the Protocol provides that the employers are liable to pay National Insurance contributions and account for their employees" National Insurance contributions. UK companies, regardless of not being resident in the EU, will pay employer social security contributions and account for the social security contributions for all of their EU-based employees. In terms of reciprocal healthcare arrangements, it"s stated that persons travelling between the EU and the UK will be covered under their existing European Health Insurance Card (EHIC), or equivalent such as a Provisional Replacement Certificate (PRC), with the UK likely replacing, in the future, EHICs with a UK Global Health Insurance Card (GHIC).

The Protocol also addresses the matter of detached workers.[30] In the case of cross-border situations occurring, between the EU and the UK, from 1 January 2021 onwards, employers will be able to detach workers to the territory of the other party to the agreement and have their contributions paid in the state of origin for up to 24 months. After that point, the social security legislation of the host state will apply, unless the EU Member States and the UK conclude a new agreement on the matter. This means that persons sent by UK employers to work in the EU for periods of up to 24 months, and not to replace another detached worker, will remain liable to contribute to the UK social security system, on the condition that the

[26] Trade and Cooperation Agreement between the European Union and European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG (accessed on 20 March 2021), Protocol on social security coordination, Art. SSC. 10.

[27] *Idem*, Art. SSC. 70.

[28] *Idem*, Art. SSC. 69.

[29] Iceland, Liechtenstein, Norway, and Switzerland.

[30] *Idem*, Art. SSC. 11.

Member State to which the worker was sent agrees to these rules. If it did not, the person in question would be at risk of dual contribution liability, and employers would become liable to foreign social security, being subject to the legislation in both the UK and the state to which they were sent to work in.

A provision contained by the EU"s regulations, but not by the Protocol, is one according to which a detached worker can continue contributing to the social security system of their state of origin, in exceptional circumstances, usually for a period of up to 60 months, on the condition that the other state approves it. In addition, family benefits are excluded from the Trade Agreement, affecting some detached workers.

Different from detached workers, posted workers are sent to work for a different entity (that usually forms part of the same group as the employer in the state of origin); they fall under the legislation regarding the free movement of services, not the free movement of persons, and the Agreement does not cover them. Consequently, a worker posted from the UK to an EU Member State, to work for an EU entity, will pay contributions according to the legislation of the host state, and might continue to be liable to pay contributions in the UK as well. As a transitional measure, Member States of the EU may request to continue the existing posting system for a period of up to 15 years (with the possibility to end it sooner than initially requested), during which the posted workers will contribute to the social security system of the UK. Consequently, the treatment of posted workers will not be uniform, considering the possibility that Member States have to either retain the existing system or not, and if they do retain it, they can do so for different lengths of time.

Another subject covered by the Protocol is that of multi-state workers – persons who conclude most of their work in the UK, but also spend at least 5% of their working time in one or more of the EU Member States, and vice versa. According to the Protocol, that worker contributes to the social security system of the state where they are habitually resident, on the condition that at least 25% of their working time is spent or their remuneration earned in that jurisdiction. If that condition is not fulfilled, there are several tests which will be performed to determine the state where that person will be liable to social security contributions. Unlike the case of detached workers, EU Member States cannot opt out of these dispositions. The Protocol does not extend to Norway, Iceland, Liechtenstein, and Switzerland on this issue, and the matter of multi-state workers must be regulated through bilateral agreements between these states and the UK.

The Protocol doesn"t cover all types of benefits that the EU regulations do, and does not, thus, provide the same level of protection. An Annex to the Protocol lists all the benefits that are excluded, divided into special non-contributory cash benefits, long-term care benefits, and payments awarded to meet expenses for heating in cold weather. Each Member State, and the UK respectively, has decides which benefits it wishes to exclude from the scope of the Protocol. For example, Bulgaria has decided to exclude social pension for old age, France has excluded the disabled adults" allowance, and Ireland has excluded jobseekers" allowance. The United Kingdom has excluded, among others, the winter fuel payment, carer"s allowance, the state pension credit, and income-based allowances for jobseekers.

As far as determining which legislation is the one applicable, the Agreement states that people will be subject to the legislation of the state on whose territory they are employed or self-

employed. Civil servants are subject to the legislation of the state employing them in its administration. Persons who don"t fit in any of the previous categories are subject to the legislation of their state of residence. Special provisions, similar to the ones previously applicable, are also laid in place for persons working on board vessels at sea flying the flag of a different state, and for flight and cabin crew members.

4. Potential legislative changes

On 13 December 2016 the Commission put forward a proposal[31] to revise the current legislation regarding the coordination of social security systems (specifically, Regulations 883/2004 and 987/2009). The Commission"s proposal focuses on facilitating labour mobility and cooperation between the authorities of the Member States, and updates the existing provisions in four main areas: unemployment benefits, long-term care benefits, access of economically inactive citizens to social benefits, and social security coordination for posted workers. Under current rules, jobseekers can export their unemployment benefits for a minimum period of 3 months; this period is raised to a minimum of 6 months, in the Commission"s proposal, offering better protection to jobseekers. Concerning frontier workers (persons who work in a different state than the one where they live, and who go to their state of residence at least once a week), the proposal states that unemployment benefits would be paid by the Member State where they worked for the last 12 months.

Simultaneously, Member States" interests are protected through a proposed provision regarding a minimum amount of time (3 months) that someone would have to work on the territory of a state, before they could claim unemployed benefits, upon becoming jobless, that take into account previous experience in another Member State. The Commission"s proposal also clarifies that "Member States may decide not to grant social benefits to mobile citizens which are economically inactive citizens – this means those who are not working nor actively looking for a job, and do not have the legal right of residence on their territory. Economically inactive citizens have a legal right of residence only when they have means of subsistence and comprehensive health coverage."

In the case of posted workers, the proposal provides tighter administrative rules, which are meant to ensure that national authorities can adequately verify the social security status of said workers, and can cooperate with the authorities of the other Member States in order to address potentially unfair practices or abuse.

The Commission"s proposal does not introduce any changes to the rules on export of child benefits, with the parent"s host state (i.e. the state where the parent works) remaining responsible for paying the child allowances. Despite the fact that social benefits in general, and child benefits in particular,[32] were among the topics raised during the debate which preceded the UK"s vote on its withdrawal from the European Union, it can be noticed that the EU Member States and its institutions continue to display support for the coordination of social security

[31] Details at: https://ec.europa.eu/social/main.jsp?langId=en&catId=849&newsId=2699& furtherNews=yes (accessed on 20 March 2021). For more on this proposal and its connection to the UK's withdrawal from the EU, see Augustin Fuerea, "Brexit - limitele negocierilor dintre România și Marea Britanie", *Revista de Drept Public*, nr. 4/2016, Universul Juridic, Bucharest, p. 111-112.

[32] According to the Commission's data, less than 1% of child benefits in the EU are exported from one Member State to another.

systems at an EU level, and for ensuring that all individuals exercising their freedom movement are protected as well as possible.

A provisional agreement, regarding the project, was reached between the Commission and the European Parliament in 2019, under the auspices of the Romanian Presidency of the Council, and the proposal continues to be negotiated between the EU"s institutions.

5. Conclusions

The EU"s dispositions on the coordination of social security systems constitute a guarantee that citizens of the Union"s Member States, as well as other persons covered by its primary and secondary law, can exercise their freedom of movement while having their rights fully protected, and without risking a situation where the legislation of more than one state becomes applicable to them, creating an obligation to contribute to several social security systems. In short, the free movement of people could not function optimally without these EU rules in place. The Union"s institutions also make sure to periodically reexamine and revise these rules, so that they accurately reflect the current social, political, and economical context, and offer the highest protection possible, at the time, to the persons falling subject to this legislation.

As long as the UK was a member of the EU, and willing to participate in measures concerning social policy matters, its citizens also enjoyed this level of protection, when working in another Member State, and, simultaneously, citizens from those states also enjoyed the same privileges (and were held by the same obligations) when working in the UK. Despite the UK"s initial reluctance to transfer competences in this area to the supranational level, time proved that doing so was advantageous both to its citizens and to its economic operators, both categories benefiting from the clarity and the simplified procedures provided by the EU"s applicable legislation. This is confirmed by the fact that, even after having withdrawn from the Union, the UK agreed to prolong the effect of said legislation with regards to cross-border situations already in existence at the end of the transition period (31 December 2020). In addition, the UK agreed to annex the Protocol on Social Security Coordination to the Trade and Cooperation Agreement, a Protocol which largely duplicates EU legislation on the subject. For now, the UK"s withdrawal from the Union has not brought any advantages to its citizens, in the area of social policy, and has instead led only to the loss of some benefits and advantages, considering the EU"s Member States have the possibility, under the terms of the Protocol, to opt out of certain measures, while other possibilities guaranteed by the EU"s Regulations are entirely absent from the Protocol"s text. Moreover, if the EU"s social policy legislation no longer applies to it, the UK must conclude separate agreements with the three EEA members who are not part of the EU, which gives those states the possibility to negotiate more advantageous terms for themselves, possibly to the detriment of UK citizens.

At a time when cross-border workers are more and more numerous, and such situations are likely to arise with a greater frequency than ever before, the loss of a mechanism that ensures a smooth and efficient coordination of social security systems does not bring any considerable advantages, suggesting that, at least on this specific issue, withdrawal from the European Union is a decisions brings clear disadvantages to the citizens and economic operators of the withdrawing state.

References

- Barnard, Catherine; Scott, Joanne (eds.), *The Law of the Single European Market*, Hart Publishing, 2002;
- Benton, Meghan, "Reaping the Benefits? Social Security Coordination for Mobile EU Citizens," *Policy Brief Series*, Issue No 3, Migration Policy Institute, Brussels, 2013;
- Craig, Paul; de Búrca, Gráinne, *EU Law: Text, Cases, and Materials, Sixth Edition*, Oxford University Press, 2015;
- Da Costa Cabral, Nazaré, Renato Gonçalves, José, Cunha Rodrigues, Nuno (Eds.), *After Brexit. Consequences for the European Union*, Palgrave Macmillan, 2017;
- Fuerea, Augustin, "Brexit - limitele negocierilor dintre România și Marea Britanie", *Revista de Drept Public*, nr. 4/2016, Universul Juridic, Bucharest;
- Fuerea, Augustin, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic, Bucharest, 2016;
- Fuerea, Augustin, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, Bucharest, 2016;
- Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), OJ C 384I, 12.11.2019, available at https://eur-lex.europa.eu/legal-content/EN/TXT/ ?uri=CELEX%3A12019W%2FTXT%2802%29 (accessed on 20 March 2021);
- Trade and Cooperation Agreement between the European Union and European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG (accessed on 20 March 2021);
- Regulation No 3 concerning the social security of migrant workers;
- Regulation No 4 establishing the methods of implementation and completing the dispositions of Regulation No 3 concerning the social security of migrant workers;
- Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971;
- Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74, 27.3.1972;
- Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. The regulation also applies with regards to the EEA and Switzerland, OJ L 166, 30.4.2004;
- Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009.

PRECAUTIONARY AND PROVISIONAL MEASURES IN CIVIL PROCEEDINGS

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Abstract

In this article, we deal with issues related to precautionary and provisional measures in civil proceedings, such as: notion, classification, conditions to be met cumulatively in order to instate such measures, the court competent to resolve a set-up request, the settlement procedure, the enforcement of measures, the annulment of measures under the law, as a penalty for failing to fulfil an obligation, lifting the measures, capitalising on the seized goods, special provisions on the distraint imposable on civilian ships, designation and role of a distraint trustee/provisional trustee, the scope of provisional measures in matters of intellectual property rights regulated as a novelty in the Code of Civil Procedure.

Keywords: *precautionary and provisional measures in civil proceedings, distraint, garnishment, judicial lien, distraint instated on civilian ships, provisional measures in matters of intellectual property rights.*

1. Introduction

„A civil proceeding can be defined as the activity carried out by a Court of Law, the parties involved, other persons or bodies taking part in the trial, for the purpose of obtaining or recognising the subjective rights or other legal situations brought before the Court, as well as for the purpose of a mandated enforcement of Court Rulings or other titles, in accordance with the procedures set forth by the law." [1]

The principles of a civil proceeding make up the basic rules for the entire civil proceeding, both during its trial stage and during its mandated enforcement stage.

The fundamental principles of a trial are: the principle of free access to justice, the right to a fair trial, which must be resolved within an optimal and predictable deadline, the legality principle, the equality principle, the disposability principle, the principle of good faith, the right of defence principle, the contradiction principle, the orality principle, the immediacy principle, the publicity principle, the continuity principle, the principle of conducting the civil proceeding in Romanian and the judge"s active role in uncovering the truth.

Our aim, in this article, is to discuss certain aspects related to the precautionary and provisional measures that can be ordered during a civil proceeding, in observance of the legal provisions in place and the principles governing such civil proceedings, aspects related to notion, classification, the instatement conditions, the instatement procedure, capitalising on the seized assets, lifting and annulling the precautionary measures imposed, special

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[1]Gabriel Boroi, Mirela Stancu, *Civil Trial Law*, 2nd Edition, revised and supplemented, Hamangiu Publishing House, Bucharest 2015, p. 3.

provisions on the distraint imposable on civilian ships and provisional measures in matters of intellectual property, analysing, for this purpose, the legal provisions, the doctrine and the relevant jurisprudence in this field.

2. Content

According to the General Law Theory, ,,the law system is the result of unifying all law branches and institutions." [2]

When it comes to the notion of *law branch*, the specialised doctrine has defined this concept as ,,the bulk of all judicial norms regulating the social relationships in a certain social life domain, based on a specific regulation method and on certain common principles." [3]

In the Romanian legal system, the positive law is divided into public and private law. The Public Law includes law branches such as Constitutional Law, Criminal Law, Administrative Law, Financial Law, Procedural Law, Labour and Social Security Law, while the Private Law sphere includes Civil and Commercial Law.

With regards to the topic chosen to be developed in this paper, we"ve mentioned above, that the Procedural Law falls within the scope of Public Law, without specifying if we refer to Criminal Procedural Law, Civil Procedural Law or both.

Placing the Civil Procedural Law in the public or in the private law sphere has generated various controversies and opinions, as ,,the civil procedure contains legal norms that bring it closer to the public law side (those concerning the organisation and functioning of courts), but also legal norms that bring it closer to private law (those related to legal actions, the right to plead). " [4]

Besides, we want to point out that, the rules established by civil procedural law are applicable not only to litigations related to subjective civil rights, pure private law litigations, but they represent the common law in procedural matters as well and, as such, they are also applicable to administrative law cases, to financial and criminal law matters, the latter being law branches that fall exclusively within the scope of public law.

With this regard, art. 2 of the Code of Civil Procedure stipulates: (1) The provisions of this Code make up the common law procedure in civil matters. (2) Besides, the provisions of this Code shall also apply to other matters, insofar as the laws regulating such matters, do not stipulated anything to the contrary.

Moreover, the Contentious Administrative Law no. 554/2004, stipulates, in its transitional and final provisions, in art. 28, paragraph (1), the following: the provisions of this law shall be supplemented by the provisions of the Civil Code and by those of the Code of Civil Procedure, to the extent that such provisions are not incompatible with the specific power relations existing between the public authorities, on the one hand and the persons whose rights or legitimate interests had been prejudiced, on the other hand.

Similarly, Law no. 207/2015, on the Code of Fiscal Procedure stipulates, in its art. 3, paragraph (2), the following: in maters not regulated by the provisions of this Code, the provisions of the Civil Code and those of the Code of Civil Procedure, republished

[2] Nicolae Popa, *General Law Theory*, 6th Edition, C.H. Beck Publishing House, Bucharest, 2020, p. 87.

[3] Nicolae Popa (coordinator.), Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *General Law Theory, Seminary Notebook. 3rd* Edition, C.H. Beck Publishing House, Bucharest, 2017, p.44.

[4] *Idem*, p. 45.

shall apply, insofar as they may be applicable to the relations existing between public authorities and taxpayers/ payers.

Moreover, the provisions of the Code of Civil Procedure represent the common law in terms of procedure, in case of insolvency as well; thus, Law no. 85/2014 on insolvency prevention procedures and insolvency procedures stipulates, in its art. 342 paragraph (1) the following: the provisions of this law shall be supplemented, insofar as they do not stipulate anything to the contrary, by those of the Code of Civil Procedure and by those of the Civil Code.

By *Civil Procedural Law* we understand the set that includes ,,the judicial norms regulating the organisation and development of the activity of solving cases related to subjective civil rights and legal situations protected by law, as well as the enforcement of enforceable titles." [5]

A civil action is the bulk of all procedural means stipulated by law, for the protection of the subjective right claimed by one of the parties or for the protection of another legal situation, as well as to insure the parties" defence in a trial.

By *subjective right* we understand ,,a subject"s capacity to claim or defend a certain right, that is legally protected, against third parties." [6]

The Code of Civil Procedure regulates, in its 4th Book, named *Special Procedures*, the 4th Title – *Precautionary and Provisional Measures*, some aspects related to distraint – general provisions and special provisions for the distraint of civil ships, garnishment, judicial lien and provisional measures in matters of intellectual property rights.

Thus, the Code of Civil Procedure regulates three precautionary measures, namely distraint, garnishment and judicial lien. At the same time, the provisional measures in the matter of intellectual property rights are also regulated, provisional measures that are not precautionary measures, but specific measures for the protection of the above-mentioned rights, regardless of their patrimonial or non-patrimonial content.

,,Precautionary measures are procedural means meant to render unavailable, a debtor"s seizable assets (in the case of distraint and garnishment) or the assets making up the subject matter of a procedure (in the case of judicial lien) to prevent their debasement or their disappearance (in case of real assets) or the reduction of the debtor"s patrimonial assets (in case of personal assets)." [7]

2.1. Distraint

A distraint measure consists of rendering unavailable the debtor"s movable and/or immovable seizable assets, that are still in his/her possession or in the possession of a third party, for the purpose of capitalising on them when the creditor of a certain amount of money obtains an enforceable title, according to art. 952 - 959 of the Code of Civil Procedure.

The conditions that must be met in order to instate a distraint measure are stipulated in art. 953 of the Code of Civil Procedure, where we can identify three situations in which a distraint measure can be ordered; therefore, we can also identify

[5] Andreea Tabacu, *Civil Procedural Law – national and international legislation*, doctrine and jurisprudence, Universul juridic Publishing House, Bucharest, 2015, p. 8.

[6] Nicolae Popa, *op.cit.*, 2012, p. 30.

[7] Gabriela Răducan, Mădălina Dinu, *Civil Procedure Sheets for the admission to Magistracy or Lawyering Activities*, 4th Edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2016, p. 327.

specific conditions to be met for each of these situations.

Thus, the first such situation is presented in art. 953, paragraph (1), namely: A creditor that does not have an enforceable title, but whose receivable is confirmed in writing and exigible, may ask for the instatement of a distraint over the debtor"s movable and immovable assets, if they can prove that they have filed a Suing Petition in Court. They can be ordered to pay a bail set forth by the Curt.

Consequently, when it comes to the first situation, the following conditions must be cumulatively met for the instatement of a distraint:

1. The receivable must be confirmed by a written document, which would not represent an enforceable title under the law;
2. The receivable must be exigible;
3. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case, having, as subject matter, the payment of the money for which the distraint measure is requested;
4. The Creditor may be ordered to pay a bail, with the posting of that bail being optional and the amount of such bail being set forth by the Court;
5. The distraint can only be instated over the debtor"s movable and/or immovable seizable assets, which are still in his/her possession or in the possession of a third party.

The second situation in which a distraint measure can be ordered, is presented in art. 953, paragraph (2) of the Code of Civil Procedure, namely: A creditor whose receivable is not confirmed by a written document, shall also have the same right, if they can prove that they have filed a Suing Petition in Court and they submit, along with the distraint request, a bail amounting to half of the claimed sum.

If we read the above-mentioned text, we realise that, for to the second situation in which a distraint can be instated, the following conditions must be cumulatively met:

1. The creditor"s receivable must not be confirmed by a written document;
2. The creditor"s receivable must be exigible;
3. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case, having, as subject matter, the payment of the money for which the distraint measure is requested;
4. The creditor must also prove that they have posted a bail equal to half of the receivable claimed in the litigation; in this case, both the posting and the amount of the bail shall be mandatorily determined by lawmakers;
5. The distraint can only be instated over the debtor"s movable and/or immovable seizable assets, which are still in his/her possession or in the possession of a third party. The seizable nature of an asset shall be determined in accordance with the exiting provisions in place in the filed of mandatory attachment – art. 727 of the Code of Civil procedure.

The third situation is stipulated in art. 953, paragraph (3) of the Code of Civil Procedure, which states: The Court may order a distraint measure even if the receivable is not exigible yet, if the debtor has reduced, via their actions, the guarantees provided to the creditor or if they have failed to provide the guarantees promised or, when there is a risk that the debtor would avoid the seizing measures or they would conceal or scatter their wealth. In such cases, the creditor must prove the fulfilment of the other conditions stipulated in paragraph (1)

– the first situation – and they must post a bail in the amount set forth by the Court.

Thus, the necessary conditions that must be cumulatively met to instate a distraint measure in the third situation, are the following:

1. The creditor"s receivable must be confirmed by a written document, which would not represent an enforceable title under the law;
2. The creditor"s receivable must be exigible;
3. The creditor must prove that the debtor has reduced, via their actions, the guarantees provided to the creditor or that they have failed to provide the guarantees promised or that there is a risk that the debtor would avoid the seizing measures or they would conceal or scatter their wealth;
4. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case;
5. The creditor must post a bail, in the amount set forth by the Court; in this case, the posting of the bail is mandatory, but its amount shall be left at the Court"s discretion;

We consider it useful to underline the provision of art. 1.417 paragraph (1) of the Civil Code, according to which: the Debtor shall forfeit the benefit of making the payments upon the deadlines agreed upon if they are in default or in insolvency declared under the law and if they reduce, via their actions, either on purpose or due to gross negligence, the guarantees set up in favour of the Creditor, or when they fail to institute the guarantees promised.

When it comes to the procedure of instating a distraint measure, the application for such measure must meet the general conditions stipulated in art. 148 of the Code of Civil Procedure, as well as the conditions presented in art. 194 of the Code of Civil Procedure.

„ A request to instate a precautionary or a provisional measure may be formulated both directly and incidentally, within an on-going trial [art. 30, paragraph (6) of the New Code of Civil Procedure] or as an accessory application [art. 30, paragraph (4) of the New Code of Civil procedure], if it is requested via the very Suing Petition filed on the merits of the case."[8]

The Court competent to resolve such a request, for the instatement of a distraint measure, shall be the Court competent to try the case on its merits. If the request to instate a distraint measure is submitted via the Suing Petition filed on the case merits, it shall be entrusted to the Court charged with the settlement of the case merits, but the distraint request shall be resolved before the first hearing of the merits litigation, according to art. 203, paragraph (2) of the Code of Civil Procedure.

The Court shall urgently decide on such matter, in Council Chambers, without subpoenaing the parties, by way of an enforceable ruling, setting forth the maximum amount for which the distraint measure is approved, as well as the amount of the bail and the deadline for its posting, if applicable.

Failure to post the bail within the set deadline, shall lead to the annulment of the distraint under the law. Such annulment shall be confirmed by a final court ruling, issued without subpoenaing the parties. The

[8] Gabriel Boroi, Octavia Spineanu-Matei, Andreia Constanda, Carmen Negrilă, Veronica Dănăilă, Delia Narcisa Teohari, Gabriela Răducan, Dumitru Marcel Gavriș, Flavius George Păncescu, Marius Eftimie, *The New Code of Civil procedure. Comments by article*, Vol. II. Art. 527-1133, Hamangiu Publishing House, Bucharest, 2013, p. 490.

judicial bail concept is regulated by the provisions of art. 1.057-1.064 of the Code of Civil Procedure.

The Ruling issued on the restraint request shall be communicated by the Court to the creditor, right away and it shall be communicated by the bailiff to the debtor, when the measure is enforced. The issuance of such ruling may be postponed by maximum twenty-four hours, and the substantiation of the decision made, must be provided within maximum 48 hours of its issuance.

„The bailiff shall only communicate the enforceable ruling to the debtor if the above-mentioned ruling orders the instatement of a distraint measure; if the Court rejects the creditor"s request for the instatement of such measure, the ruling shall not be communicated."[9]

Such ruling may only be challenged by appeal, within five days of its communication, before the Court hierarchically superior to the one that issued it. Such an appeal shall be tried urgently, most likely by quickly subpoenaing the parties.

In all cases when the competent first instance court is the Court of Appeal, the remedy method shall be a recourse.

A distraint measure shall be enforced by the bailiff, in accordance with the rules applicable to mandatory enforcements, which shall be applied appropriately, without any other authorisation or consent being needed with this regard.

In case of immovable assets, the bailiff shall travel, as quickly as possible, to the place where such assets are located. The bailiff shall place the seizable assets under restraint, only to the extent that this is necessary to recover the receivable. In all cases, the distraint measure shall be enforced without any prior writ or notification to the debtor.

A distraint measure applied to an asset subject to any publicity formalities, shall immediately be registered in the Land Book, in the Trade Registry, in the *National Movable Publicity Registry* (Electronic Archive of Security Interests) or in any other public records, as the case may be. Such registration shall render the distraint legally binding to anyone who gains any rights over the property in question, after the registration.

The interested party shall have the right to contest the enforcement method of any distraint measure.

The Court may order a distraint measure lifted, upon the debtor"s request, if such debtor provides, in all cases, a sufficient (personal or real) security. Such request shall be resolved in the Council Chambers, with a quick subpoenaing of the parties, by way of a ruling that can only be challenged by way of appeal, within five days of its issuance, before the court hierarchically superior to the one that issued it. Such appeal shall by tried urgently.

Besides, if the main application, based on which the precautionary measure was ordered, is later annulled, rejected or declared outdated, by a final court decision, or its author no longer requests its judgement, the debtor may ask for such precautionary measure to be lifted by the same court that instated it. The court shall rule on such a request via a final ruling, issued without subpoenaing the parties.

The seized assets shall only be capitalised on, once the creditor obtains an enforceable title, represented by a final Court Decision ordering the debtor to pay the money claimed by the creditor.

[9] Gabriela Răducan, Mădălina Dinu, *op.cit.*, p. 329.

2.2. Special provisions on the distraint imposable on civil ships

The creditor may ask for a distraint to be instated on civilian ships, under the conditions described above and in observance of the international conventions applicable to the distraint of ships, that Romania is part of.

With this regard, we mention the International Convention for the Unification of Certain Rules on the Arrest of Sea-going Ships signed in Brussels on May 10, 1952, that Romania adhered to, under Decree no. 40/1991 on Romania"s accession to the International Convention for the Unification of Certain Rules on the Arrest of Sea-going ships, signed in Brussels on May 10, 1952, respectively, under Law no. 91/1995 on Romania"s accession to the International Convention for the Unification of Certain Rules on Arrest of Sea-going ships, signed in Brussels on May 10, 1952.

According to art. 1, point 1 of the International Convention for the Unification of Certain Rules on the Arrest of Sea-going Ships, a ,,maritime claim" means a claim or a receivable arising out of one or more of the following: (a) damage caused by any ship either in collision or otherwise; (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship; (c) salvage; (d) agreements related to the use or hire of any ship whether by charterparty or otherwise; (e) agreements related to the carriage of goods in any ship whether by charterparty, under a bill of lading or otherwise; (f) loss of or damage to goods including baggage carried in any ship; (g) general average; (h) bottomry; (i) towage; (J) pilotage; (k) goods or materials wherever supplied to a ship for her operation or maintenance; (1) construction, repair or equipment of any ship or dock charges and dues; (m) wages of Masters, Officers, or crew; (n) Master"s disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner; (o) disputes as to the title to or ownership of any ship; (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship; (q) the maritime mortgage or security.

On the same time, according to art. 1, point 2 of the same Convention, ,,arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

The procedure to instate a distraint measure on civilian ships requires, in urgent cases, the possibility to formulate the instatement request, even before a Suing Petition is submitted to a Court, on the case merits. In this case, the creditor for whom the distraint measure is granted, shall have the obligation to submit the above-mentioned suing petition before the competent court or to take the necessary steps to convene an arbitration court within maximum twenty days of the precautionary measure"s approval. A distraint request shall be triad urgently, in the council chambers, with the Court subpoenaing the parties. The Ruling of the Court is enforceable and it can only be appealed within five days of its issuance.

Failure to submit the Suing Petition, on the case merits, within the above-mentioned 20-day deadline, shall lead to the annulment of the distraint. Such an annulment shall be confirmed by a final Court Ruling, issued with the Court subpoenaing the parties.

The Court competent to resolve a request for the instatement of a distraint measure over a civilian ship shall be the tribunal of the region where the ship is located (the Constanta Tribunal or the Galati Tribunal), regardless of the court where the Suing Petition has been or is about to be submitted on the case merits.

No distraint measures can be instated over a civilian ship that is on the verge of leaving. A ship is considered to be on the verge of leaving, once the commander of that ship has, onboard, all the certificates, the ship"s documents, as well as the departure permit, handed to him/her by the Harbour Master, according to art. 963 of the New Code of Civil Procedure.

A voyage authorisation may be issued by the same Court that ordered the distraint measure, upon the request of the creditor holding a claim over that ship, upon the request of a co-owner of the ship or even upon the debtor"s request, while also setting forth all the pre-emptive measures that might be necessary, depending on the circumstances. Such a request shall be tried urgently, in the Council Chambers, with the court subpoenaing the parties. The Ruling shall be enforceable and it shall only be appealed within five days of its issuance.

The ship shall only be allowed to leave, once the approval ruling is transcribed in the records kept by the relevant maritime authority and an adequate observation is inserted in the ship"s nationality document.

The expenses incurred with such a voyage shall be borne by the party that requested its approval.

The ship lease for a court-mandated voyage, may be added to the sale price, after all the voyage expenses are deducted.

A transfer of the distraint may be approved for justified reasons, upon the debtor"s or the creditor"s request, as the case may be; the court that ordered the distraint shall have the right to swap one seized ship for another.

The creditor, who is the legitimate owner of the Bill of Lading, may seize the merchandise on the ship, listed in such Bill of Lading. If the ship"s distraint is not requested, the creditor shall have to ask for the vessel to be unloaded as well.

A precautionary distraint measure shall be enforced by the Harbour Master of the port where that ship is located, who shall arrest the vessel in question. In this case, the Harbour Master shall not issue the documents needed for the ship"s navigation and it shall not allow the vessel to leave the port or the berth. The interested party shall have the right to challenge the way the distraint is enforced, by contesting such enforcement before the tribunal serving the place where the ship is located, according to art. 967 of the Code of Civil Procedure.

In order to guarantee the port traffic and the civil security while the ship is arrested, the tribunal serving the place where the vessel is located (the Constanta or the Galati Tribunal), may issue a Presidential Order, to instate emergency measures; in this case, the provisions of art. 997 and the following, of the Code of Civil Procedure shall apply accordingly.

A temporary halt of the ship, in the absence of a Court Decision, may also be ordered by the Harbour Master, under the conditions of the special law.

Thus, according to art. 132 of Government Decree no. 42/1997, on sea transport and on the transportation carried out on interior navigable ways, as modified under Emergency Government Decree no. 74/2006, Harbour Masters may prevent any ship from leaving a port or another place of stoppage located on the national navigable waters, upon a request coming from the Romanian Naval Authority, the Port Administrations and/or the Navigable Ways Administrations, from other public state authorities or from certain economic agents, if the ship"s owner or operator or the owner of the merchandise transported by the ship, has debts towards the above-mentioned authorities or economic agents. Such a departure interdiction cannot last for more than twenty-four hours counted from submission of the ship"s departure approval

request. Once this period expires, the ship shall only be detained if the claimant provides the Harbour Master with an enforceable ruling with this regard, issued by a Court of Law. Such detention can cease if the ship"s owner or the owner of the merchandise transported on the ship, as the case may be, proves that they have set-up sufficient guarantees to cover the receivable claimed and such guarantees have been accepted by the person who requested the ship"s detention.

2.3. Garnishment

According to art. 970 of the Code of Civil Procedure, a precautionary garnishment can be instated over amounts of money, securities or other movable intangible seizable assets owed to the debtor by third parties or set to be owed in the future based on certain existing legal relationships, under the conditions set forth, for the instatement of precautionary distraint, in art. 953 of the Code of Civil procedure – the three situations presented above.

As we"ve said before, the provisions regulating the instatement of precautionary distraint, as well as those related to the settlement of such request, the enforcement of the measure, the annulment and lifting of a distraint, shall apply, accordingly, to garnishment as well.

,,A specification must be made, in relation to the content of a Garnishment request. Thus, art. 971, paragraph (2) stipulates the following: in case of a bank garnishment request, the creditor must not necessarily identify, in its content, the third parties targeted by such request. *Per a contrario*, we can conclude that, when a garnishment request is submitted against third parties other than a bank, it is mandatory to indicate the garnished third party, in the garnishment request." [10]

2.4. Judicial lien

A judicial lien consists of rendering unavailable the assets that are the subject-matter of a litigation or other assets under the law, by entrusting them for protection to a lien trustee, until the trial is resolved by an enforceable judgment.

As a rule, a lien is instated over assets making up the subject mater of a merits litigation, and the measure may be instated over the totality of such assets or over a part of them, over tangible and/or intangible assets, such as shares in limited liability or in share companies. As an exception, a lien may also be instated over goods that do not make up the subject matter of a merits litigation, in the situations and under the conditions stipulated by law.

Thus, as a rule, whenever there is a litigation over the ownership or over another main real right, over the possession of a movable or an immovable asset, or over the use or administration of a jointly-owned good, the Court may approve the instatement of a judicial lien, upon the interest party"s request, if such a measure is necessary to preserve the respective right.

By "*the interested party*" we understand either one of the litigating parties or a third party, such as a creditor of the litigating parties, who asks for a judicial lien to be instated, via the oblique action regulated in the Code of Civil Procedure, in art. 1.560-1.561.

As an exception, a judicial lien may be approved, even without a trial:

1. Over an asset that the debtor offers for their release;
2. Over an asset in relation to which, the interest party has serious reasons to fear

[10] Gabriel Boroi, Mirela Stancu, *op.cit,* p. 379 - 380.

that it would be stolen, destroyed or altered by its current holder;

3. Over certain movable assets making up the creditor"s guarantee, when the creditor reveals the debtor"s default or when they have serious reasons to suspect that the debtor would avoid a mandatory enforcement or that the said assets would be stolen or deteriorated.

In the exceptional cases mentioned above, the party that obtained the instatement of a judicial lien shall have the obligation to file a Suing Petition with the competent court, to take the necessary steps to convene an arbitration court or to ask for the enforcement of the enforceable title, within maximum twenty days of the precautionary measure"s approval; otherwise, the judicial lien shall be annulled under the law. Such an annulment shall be confirmed by a final Court Ruling, issued without subpoenaing the parties.

The court competent to rule on a request related to the instatement of a judicial lien, shall be the court charged with trying the case on its merits (when there is a trial pending – the rule) and the court serving the region where the assets is located (when there is no trial pending – the exception).

When it comes to the procedure employed to instate a judicial lien, the request for such a lien shall be tried urgently, with the court subpoenaing the parties.

If the request is upheld, the court shall be able to force the plaintiff to pay a bail – setting forth the amount and the posting deadline of such bail – other the penalty of having the precautionary measure annulled under the law.

The Judicial lien shall be registered in the Land Book, in the Trade Registry, in the National Movable Publicity Registry (*formerly known as the Electronic Archive of Security Interests*) or in any other public records, as the case may be. The Court ruling resolving the request to instate a judicial lien can only be challenged by appeal, within five days of its issuance, before the court hierarchically superior to the one that issued it. Its issuance may be delayed by maximum twenty-four hours, and the substantiation of the decision made, must be provided within maximum forty-eight hours of its issuance.

In all cases when the competent first instance court is the Court of Appeal, the remedy method shall be a recourse.

If the lien request is upheld, the asset shall be entrusted, for protection, to a lien trustee – namely, to a person jointly appointed by the parties and, if the parties cannot come to an agreement with this regard, to a person appointed by the court, who might be the very holder of the asset in question. For this purpose, the bailiff notified by the interested party, shall travel to where the location of the asset set to be placed under lien, to handed over to the lien-trustee, based on a handover report. A copy of this report shall be provided to the court that approved this lien measure.

The lien-trustee shall be entitled to carry out all preservation and administration activities, to cash in any incomes or amounts owed and to pay any current debts, as well as any debts certified by an enforceable title. Besides, with the prior authorisation of the Court that appointed him/her, the lien trustee shall be entitled to alienate the asset, if it cannot be preserved or if the alienation is obviously necessary for other reasons; besides, he/she shall be allowed to participate in trials related to the asset placed under lien, on behalf of the litigating parties, if he/she has been previously authorised to do so.

If a person other than the holder of the asset is appointed lien -trustee, the court shall determine an amount as remuneration for the activity performed, while also setting forth the payment methods; thus, the provisions of Title V of the Civil Code – having the marginal designation of

„*Administrating other people"s assets*" shall be come applicable.

„Once the trial is completed, the lien-trustee shall must hand over the asset, along with its fruits, including any income collected, to the party to whom the property was assigned by Court Decision, and if the lien - trustee was himself/ herself a party to the proceedings, and he won the case, then he/she shall keep the assets and its fruits."[11]

In urgent cases, the court will be able to appoint, by final ruling issued without subpoenaing the parties, a provisional trustee, until the judicial lien request is resolved.

2.5. Provisional measures in matters of intellectual property rights

The provisions of art. 978 – 979 of the Code of Civil Procedure regulate the provisions measures needed to protect one"s intellectual property rights, regardless of their patrimonial or non-patrimonial content and regardless of their origin. The provisional measures needed to protect other non-patrimonial rights are regulated by art. 255 of the Civil Code.

If the owner of an intellectual property right or any other person who uses such intellectual property right with the owner"s consent can credibly prove that their intellectual property rights are the target of a current or an imminent illicit action, that threatens to cause them a prejudice that would be hard to repair, they can ask the Court to order certain provisional measures.

When it comes to the admissibility of a request to instate provisional measures in matters of intellectual property rights, a reading of the legal provisions in place reveal the following: a) the plaintiff must be the owner of the intellectual property right in question; these measures may also be requested by any other person exercising the intellectual property right, with the owner"s consent; b) the intellectual property right must be the target of a current or an imminent illicit breaching action; c) there is a risk that a prejudice might be caused, that would be difficult to repair, d) the measures ordered must be provisional in nature; the case merits must not be pore-judged." [12]

The Court may specially forbid the breach or it may order the provisional cessation of such breach or, it may order the implementation of the necessary measures to preserve the evidence

Thus, Law no. 8/1996 on copyright and its related rights, stipulates, in its art. 188: (1) The holders of the rights recognised and protected under this law may ask the courts or other competent bodies, as the case may be, to recognise their rights and to confirm their violation and they may claim compensations for the reparation of the prejudices caused. The same requests may also be made for and on behalf of the holders of these rights, by management bodies, by anti-piracy associations or by other persons authorised to use the rights protected under this law, in accordance with the mandate granted to them for this purpose. When an action has been initiated by the rights holder, the persons authorised to use the rights protected under this law may intervene in the trial, requesting the reparation of the prejudice caused to them; (2). In determining the compensations due, the court shall take into account: a) either criteria such as the negative economic consequences suffered, particularly lost

[11] Gabriel Boroi, Mirela Stancu, *op.cit.*, p. 382.

[12] Gabriel Boroi, Octavia Spineanu-Matei, Andreia Constanda, Carmen Negrilă, Veronica Dănăilă, Delia Narcisa Teohari, Gabriela Răducan, Dumitru Marcel Gavriș, Flavius George Păncescu, Marius Eftimie, *op.cit.*, pp. 533 – 534.

gains, benefits unjustly obtained by the perpetrator and, where appropriate, elements other than economic factors, such as the moral damages caused to the right"s holder; b) or the granting of compensations equal to three times the amounts that would have been legally due for the type of use that made-up the object of the illicit action, if the criteria provided under letter a) are not applicable; (3) If the copyright holder or one of the persons mentioned in paragraph (1) can credibly prove that their copyright is the target of a current or an imminent unlawful action, and that such action is likely to cause them a prejudice that would be difficult to repair, they may ask the court to take certain provisional measures. The court may order in particular: a) the prohibition of the violation or its temporary cessation; b) the necessary measures to ensure the preservation of evidence; c) the necessary measures to ensure the repair of the prejudice; To this end, the court may order precautionary measures against the movable and immovable assets of the person alleged to have breached the rights recognised under this law, including a freeze of their bank accounts and other assets. For this purpose, the competent authorities may order the communication of bank, financial or commercial documents or they may provide for appropriate access to pertinent information; d) Collecting or handing-over, to the competent authorities, all the goods in respect of which there are suspicions regarding the breach of a right protected under this law, in order to prevent them from being placed on the market; (4) The applicable procedural provisions are contained in the dispositions of the Code of Civil Procedure, related to the provisional measures in matters of intellectual property rights.

Besides, Law no. 64/1991 regarding the patents for invention, stipulates, in its art. 66, as follows: (1) If the holder of a patent for invention held between March 6, 1945 and December 22, 1989 or the persons holding an industrial property right protected by a patent granted by the Romanian state and the legal successors of such persons, whose patrimonial rights conferred by the patent have been infringed by the abusive exploitation of the invention in question, without the consent of the proprietor or by any other act of infringement of such rights, or any other person exercising the industrial property right with the consent of the proprietor, can credibly prove that their industrial property right, protected by such patent is the target of a current or an imminent unlawful action, and that such action is likely to cause them a prejudice that would be difficult to repair, they may ask the court to take provisional measures; (2) The court may order in particular: a) the prohibition of the infringement or its temporary cessation; b) the necessary measures to ensure the preservation of evidence. The provisions of Government Emergency Decree no. 100/2005 on ensuring the observance of industrial property rights, approved with amendments by Law no. 280/2005, with its subsequent amendments and supplements are also applicable here; (3) The applicable procedural provisions are contained in the dispositions of the Code of Civil Procedure related to provisional measures in matters of intellectual property rights; (4) Such provisional measures may also be ordered against an intermediary whose services are used by a third party to infringe a right protected by this law.

In case of prejudices caused by the written or the audio-visual media, the court may not order a temporary cessation of the prejudicial action unless the prejudices caused to the plaintiff are serious, if the action is not obviously justified, according to art. 75 of the Civil Code, and if the measure ordered by the court does not

appear to be disproportionate in relation to the prejudices caused. The provisions of art. 253 paragraph (2) of the Civil Code shall remain applicable.

The court shall resolve the request according to the provisions related to presidential orders, which shall apply accordingly, namely art. 997 and the following of the Code of Civil Procedure.

If the request is made before the Suing Petition is filed on the case merits, the decision ordering the provisional measure shall also set the time limit for the said Petition to be filed, under the penalty of having the measure ordered terminated under the law.

The measures taken prior to initiating a court action for the protection of an infringed right shall cease under the law, if the applicant fails to notify the court within the above-mentioned time limit, but not later than 30 days after their instatement.

If these measures can cause a prejudice to the opposite party, the Court may order the plaintiff to post a bail, in the amount set by the court; otherwise, the measure ordered shall cease under the law.

Upon the interested party"s request, the plaintiff shall have the obligation to repair the prejudice caused by the precautionary measures taken, if the court action initiated on the merits of the case, is dismissed as unfounded. However, if the plaintiff is not at fault or the blame can be put on him only to a minor extent, taking into account the concrete circumstances of the case, he/she may refuse to pay the compensations ordered or he/she may ask for their reduction.

If the opposite party does not ask for liquidated damages, the court shall order the release of the bail, at the plaintiff"s request, by decision issued after subpoenaing the parties. Such a request shall be tried in accordance with the provisions related to Presidential Orders, which shall apply accordingly.

If the defendant opposes the release of the bail, the court shall set a deadline for initiating the court action on the merits of the case, which may not be longer than thirty days counted from the date the Court Decision was issued, under penalty of having the measure that rendered the bail amount unavailable, lifted.

3. Conclusions

The Code of Civil Procedure regulates, in its 4th Book, named *Special Procedures*, the 4th Title – *Precautionary and Provisional Measures*, some aspects related to distraint – general provisions and special provisions for the distraint of civilian ships, garnishment, judicial lien and provisional measures in matters of intellectual property rights.

At the same time, the provisional measures in the matter of intellectual property rights are also regulated, provisional measures that are not precautionary measures, but specific measures for the protection of the above-mentioned rights, regardless of their patrimonial or non-patrimonial content.

A distraint measure consists of rendering unavailable the debtor"s movable and/or immovable seizable assets, that are still in his/her possession or in the possession of a third party, for the purpose of capitalising on them when the creditor of a certain amount of money obtains an enforceable title, according to art. 952 - 959 of the Code of Civil Procedure.

A precautionary garnishment can be instated over amounts of money, securities or other movable intangible seizable assets owed to the debtor by third parties or set to be owed in the future based on certain existing legal relationships, under the conditions set forth, for the instatement of

precautionary distraint, in art. 953 of the Code of Civil Procedure.

A judicial lien consists of rendering unavailable the assets that are the subject-matter of a litigation or other assets under the law, by entrusting them for protection to a lien trustee, until the trial is resolved by an enforceable Court Decision.

The provisions of art. 978 – 979 of the Code of Civil Procedure regulate the provisions measures needed to protect one"s intellectual property rights, regardless of their patrimonial or non-patrimonial content and regardless of their origin. The provisional measures needed to protect other non-patrimonial rights are regulated by art. 255 of the Civil Code.

References

Treaties, courses

- Boroi Gabriel and Stancu Mirela, *Civil Procedural Law*, 2nd Edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2015;
- Boroi Gabriel, Spineanu-Matei Octavia, Constanda Andreia, Negrilă Carmen, Dănăilă Veronica, Narcisa Teohari Delia, Răducan Gabriela, Gavriș Dumitru Marcel, Păncescu Flavius George and Eftimie Marius, *The New Code of Civil Procedure. Comments by Articles.* Vol. II. Art. 527-1133, Hamangiu Publishing House, Bucharest, 2013;
- Ciurea Andreea, *Civil Procedure Sheets*, 3rd Edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016;
- Popa Nicolae, *General Law Theory*, 4th Edition, C.H. Beck Publishing House, Bucharest, 2012;
- Răducan Gabriela and Dinu Mădălina, *Civil Procedure Sheets for the admission to Magistracy or Lawyering Activities*, 4th Edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2016;
- Tabacu, Andreea, *Civil Procedural Law – national and international legislation*, doctrine and jurisprudence, Universul juridic Publishing House, Bucharest, 2015;

Legislation

- Decree no. 40/1991 on Romania"s accession to the International Convention for the Unification of Certain Rules on the Arrest of Sea-going ships, signed in Brussels on May 10, 1952;
- Emergency Decree no 74/2006 modifying and supplementing Government Decree no. 42/1997 on naval transport;
- Government Decree no. 42/1997 on maritime transport and transportations on inner navigable ways;
- Law no. 134/2010 on the Code of Civil Procedure;
- Law no. 287/ 2009 on the Civil Code;
- Law no. 8/1996 on copyright and other related rights;
- Law no. 64/1991 on patents for invention;
- Law no. 91/1995 on Romania"s accession to the International Convention for the Unification of Certain Rules on the Arrest of Sea-going ships, signed in Brussels on May 10, 1952;
- Law no. 554/2004 on the Contentious Administrative;
- Law no. 207/2015 on the Code of Fiscal Procedure;
- Law no. 53/2003 on the Labour Code;
- Law no. 85/2014 on insolvency prevention procedures and insolvency procedures.

EXPLORING EXISTING AND POTENTIAL NORMATIVE SOLUTIONS FOR AN EU-WIDE LEGAL FRAMEWORK FOR SECURITY OF INFORMATION IN THE CONTEXT OF DEFENCE AND SECURITY PROCUREMENT

Simion-Adrian PURZA[*]

Abstract

In the current international environment, an effective implementation of national security objectives is to a great extent dependant on the ability of national governments to ensure the highest possible degree of confidentiality to information used in strategical, as well as tactical decisions. Ensuring security of information has been a conundrum for all international organisations seeking to reach varying degrees of coordination, cooperation or integration. As the most ambitious of all, thus far, the EU has raised the bar even higher, especially in terms of desired cooperation in defence and security, where the drive for integrated defence procurement takes centre stage. Consequently, the issue of sharing (classified) information between the Member States and their relevant authorities is of fundamental importance. Against this backdrop, this paper seeks to identify potential regulatory solutions for the management of classified information that would effectively contribute to the final objective of integrating defence and security procurement, as envisaged by the Defence Procurement Directive 2009/81/EC. An essential prerequisite in this respect is to determine what legal solutions could better serve this purpose, starting from normative instruments already implemented at various levels in the EU institutional mechanism. To this end, the paper is based on a two-phased theoretical approach: (1) the material segment – the characteristics of an effective integrated system for security of information (within the scope of defence procurement integration) and (2) the procedural segment – how to apply a potential solution at EU level (by what means). Ancillary research questions are aimed, first, at understanding the current state of play of the EU regulatory framework pertaining to handling classified information, in terms of granting security clearances to both individuals and legal persons (private, as well as public).

Keywords: *security of information, classified information, defence procurement, EU integration.*

1. Introduction

Information, understood in its widest possible definition, is a critical part of any decision-making process and even more so for strategic planning and action in the realm of national security. The delicate balancing act of ensuring security of information has been a conundrum for all international organisations seeking to reach varying degrees of coordination, cooperation or integration, such as the UN or NATO. As the most ambitious of all, thus far, the EU has raised the bar even higher, especially in terms of desired cooperation in defence and security. Consequently, the issue of sharing (classified) information between the

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Member States and their relevant authorities took centre stage.[1]

The main hypotheses of this paper are based on the idea that a highly coordinated (if not unitary) regime for classified information among EU Member States[2] – for the purpose of defence procurement integration – could be achieved following the same rationale used for the gradual integration of defence and security matters into the EU institutional mechanism (still an ongoing process).[3] The key starting point is the contention that, albeit some positive feedback, the fit-for-purpose provisions of Directive 2009/81/EC[4] on security of information have proved to be of little effect in terms of enabling and encouraging cross-border tendering. It should also be reiterated that, in general terms, despite an initial positive feedback from the member states and the various stakeholders after the publication of the Defence Procurement Directive, the most recent report on its effectiveness[5] underlines its limited overall impact, in terms of both legal harmonization and concrete results for the EU defence industrial base.

Although debatable, it can be said that the EU has established a proprietary and functional framework for dealing with classified information, covering both its institutional actors, as well as its dynamics with the member states and among themselves, when dealing with EU classified information. What is, then, the missing link for establishing an integrated and functional framework for the protection of classified information that would also benefit the integration of defence procurement – i.e. what needs to change?

An evaluative study conducted by the Commission in 2016 has shown that 61% of contracting authorities strongly agreed or agreed that the Defence Directive"s provisions on security of information are sufficient to ensure the protection of classified information.[6] The same study revealed that, among business respondents, a "relative majority" of 33% expressed a favourable view, while "only" 9% disagreed.[7] Based on these statistical iterations and additional interview-based feedback, the Commission seems content with the effectiveness of the security of information provisions in the Defence Procurement Directive.

On this point, if the benchmark is the contribution that the Directive effectively brings to opening defence procurement for the EU market, then the appropriateness of the security of information provisions must be weighed considering their concrete contribution towards achieving this goal. Therefore, as long as the provisions are only

[1] For an EU perspective on the relevance of information-sharing, *see* MK Davis Cross, 'Security Integration in Europe. How Knowledge-Based Networks are Transforming the European Union' (The University of Michigan Press, 2014) 49-72.

[2] For a discussion on the need for an EU-wide integrated regime for security of information, see M Trybus 'Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context' (Cambridge University Press, 2014), pp. 393-394.

[3] See SA Purza, 'Setting the Scene for Defence Procurement Integration in the EU. The Intergovernmental Mechanisms' (2018) 4 European Procurement & Public Private Partnership Law Review 257, 260.

[4] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, Official Journal of the European Union, L 216, 20.8.2009 (hereinafter "Defence Procurement Directive").

[5] Commission Staff Working Document: Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, SWD (2016) 407 final, p. 94.

[6] SWD (2016) 407 final, *op.cit.*, p. 77.

[7] Ibid.

considered sufficient from the point of view of the contracting authorities (and even the industry, although to a lesser extent), but they do not actually facilitate increased market access and equal opportunity, then it must be ascertained that their appropriateness is at least questionable. In this respect, the market access barrier created by the lack of a harmonised regime for access to and protection of classified information is a strong argument as to the insufficient effectiveness of the Defence Directive"s provisions on security of information.

Although outside the field of regulatory competence of the EU, the protection of classified information has been dealt with at an *ad-hoc* basis, while gradually undergoing a process of harmonisation between the main institutional actors of the EU. This evolutionary experience could provide (normative) solutions for a wider and more substantive integration of the protection of classified information at EU level, for the benefit of harmonised procurement aimed at integrating the markets for defence and security products and services.

Thus, the overarching interrogation of this paper seeks to identify potential avenues for future regulatory solutions for the management of classified information (beginning with security clearances) that would effectively serve the final objective of integrating defence and security procurement, as envisaged by the Defence Procurement Directive. An essential prerequisite in this respect is to determine whether there is legal basis to enact new EU legislation that would alleviate (or even solve) the issues pertaining to security of information. The objective is therefore that of a principled discussion with no pretention to elaborate concrete normative solutions – which could form the object of a subsequent study.

Determining if and what (regulatory) solution can be implemented is based on a two-phased theoretical approach to the issue: (1) the material segment – the characteristics of an effective integrated system for security of information (within the scope of defence procurement integration) and (2) the procedural segment – how to apply the envisaged solution at EU level (by what means). Ancillary research questions are aimed, first, at understanding the current state of play of the EU regulatory framework pertaining to handling classified information, in terms of granting security clearances to both individuals and legal persons (private, as well as public).

Aside from literature and legislative analysis, the research is complemented by an examination of the relevant case-law of the European Court of Justice dealing with security of information at large. The examination seeks firstly to find indications as to the underlying principles that the Court has defined in this field, especially in the logic of striking a balance between (national) security interests and democratic access to information. Secondly, the analysis might reveal a confirmation or critique of potential regulatory solutions that have been implemented or should be implemented in the field of security of information at EU level.

2. Defining the main concepts

The protection of classified information is an essential prerequisite for contracting authorities, but it also bears significance for the industry – national security interests and commercial confidentiality requirements dovetail, especially in fields such as defence and security. To put the issue in context, it is important to underline that, in the field of defence procurement, potential tenderers often require access to classified information

while the contracting authorities seek a solid guarantee of the reliability of said tenderers regarding their ability and will to safeguard the necessary level of confidentiality. Therefore, on the one hand, there is a specific need emanating from the industry, and on the other, a (potentially) contending need of the member states, stemming from national security.

In moral or sociological terms, confidence building is key in any endeavour pertaining to the protection of classified information. Various legal instruments have been developed by national or international legislators to ensure that this notion gets empirical validation and a concrete system of accountability is in place. Nonetheless, the fundamental issue is whether the originating source of the information feels enabled and safe enough to entrust said information onto one or more third parties, and more so to accept the possibility of it being subsequently distributed. Confidence building is not just an abstract moral issue, as it is also manifested in the relation between EU bodies and institutions, the most relevant case being that of the negotiations between the European Parliament and the Council on access to classified information handled by the latter.[8]

Amongst various other considerations, the foremost legal and operational principles in the field of security of information are authorization or clearance (subject to meeting a set of requirements) and need-to-know. They represent two sides of the same coin, as interdependent and cumulative conditions to be met in order that a person (private or legal) is granted access to documents and materials containing classified information. Of course, the classification policy employed by the national authorities of each state also bears important significance, but it goes further into the inner workings of security of information mechanisms and beyond the scope of this analysis.[9]

"Authorization" or "clearance" is a type of formal validation granted to a person, natural or legal, in confirmation of their capacity to handle classified information, based on the requirement to meet strict criteria and subject to evaluation thereof.[10] This can be regarded as the first line of defence in security of information and a universal tool used to control access and contain the risks of unwarranted disclosure of information.

"Need-to-know" is to a great extent a self-explanatory notion. In context, it can be defined as a principle according to which a person can have access to classified information only if knowledge of said information is needed in carrying out their duties.[11] Establishing the existence of the need-to-know in a particular situation is generally the attribute of the originator of the information or, in some cases, the holder. This concept is widely used at national and international level,[12] either intrinsically, as a

[8] D Galloway, 'Classifying secrets in the EU' (2014) 52 3 Journal of Common Market Studies 668, 681.

[9] For details on what classification policy entails (tailored for NATO) *see* A Roberts, 'Entangling Alliances: NATO's Security of Information Policy and the Entrenchment of State Secrecy' (2003) 36 Cornell International Law Journal 329, 332-340.

[10] A Roberts (2003), *op.cit.*, pp. 338-339.

[11] A Roberts (2003), *op.cit.*, p. 337; s*ee* also R Dover, MS Goodman, C Hilldebrand (eds), 'Routledge Companion to Intelligence Studies' (Routledge, 2014) 258; B Driessen, 'Transparency in EU Institutional Law: A Practitioner's Handbook' (2nd ed, Kluwer Law International, 2012) 32.

[12] For an EU-level example, *see, inter alia*, Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, OJ 2014 C 95/1, article 4.4.(a).

transversal notion, or expressly stated in legal or administrative acts as a mandatory prerequisite for access to information.

For clarity of argument, basic concepts such as "classified information", "security of information" or "sensitive information" should be defined herein. These notions have been defined on numerous occasions and in various contexts but have retained their underlying meanings throughout. For that reason, an in-depth comparative analysis of the various definitions, although an interesting debate, would not provide any meaningful contribution to the present analysis. Therefore, for the purposes of this paper, it is most appropriate to recourse to legal definitions that have been provided within EU legislative acts (where available) and relevant policy documents.

"Classified information" has been defined[13] as "any information or material, in any form, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union, or of one or more of the Member States, and which bears" one of the EU or corresponding classification markings.[14] The Defence Procurement Directive provides a similar definition, albeit more complex and from a national security perspective: "any information or material, regardless of the form, nature or mode of transmission thereof, to which a certain level of security classification or protection has been attributed, and which, in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, requires protection against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise" (article 1.8). [15]

On the other hand, "sensitive information" is a more elusive concept. It can be understood as a quality or characteristic of documents or information whose unauthorised disclosure is liable to bring prejudice to private or public interests, in the general sense. Therefore, it is not inherently different from classified information, the distinctive element residing solely in terminology, as classification can be regarded as the formal or administrative confirmation of the sensitive nature of a document or a piece of information. Still, doctrine has at times referred to sensitive information as a distinct category (other than classified) that warrants some level of confidentiality (such as commercial information or personal data) but does not bear a formal security classification[16] or as unclassified information with controlled dissemination.[17] Nonetheless, the notion has received a formal, legal definition in Regulation 1049/2001 on public access to

[13] Article 2 of the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, Official Journal of the European Union C202, 8.7.2011, hereinafter 'Member States' Agreement on classified information'.

[14] Other EU legal acts have provided similar definitions, such as, *inter alia*: Council Decision of 23 September 2013 on the security rules for protecting EU classified information, Official Journal of the European Union L 274, 15.10.2013, article 2.1.; Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information, Official Journal of the European Union L 72, 17.3.2015, article 3.1.

[15] For a doctrinal perspective, *see, inter alia*, D Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50 Common Market Law Review 423, 425-426; Galloway (2014), *op.cit.*, p. 672.

[16] Galloway (2014), *op.cit.*, p. 672.

[17] D Curtin, 'Overseeing Secrets in the EU: A Democratic Perspective' (2014) 52 Journal of Common Market Studies 684, 686 and 691.

EU documents,[18] which effectively equates it with classified information (the wording of the Regulation refers to "sensitive documents" and "classified documents"). Building on this approach and considering that the differentiation proposed by doctrine is of no consequence for the analysis made in this paper, any further reference to "sensitive information" should be considered equivalent to "classified information" if not expressly stated otherwise.

Against this background and seen in the context of the Defence Procurement Directive, "security of information" can be described as both a characteristic and a set of requirements. Thus, it can be regarded as "the ability and the reliability of economic operators to protect classified information"[19] or as a set of "measures and requirements necessary to ensure the security of such information",[20] the two perspectives bearing equal relevance.

Focusing on the field of procurement for defence and security, the most pressing issues from the perspective of the contracting authorities, when dealing with industry representatives, are national security clearances (or authorisations, needed to access classified information pertaining to this field) and the criteria used for granting them, as well as ensuring appropriate means of protection and control of the security of information throughout its lifecycle. Considering the aim to push for integration in this field, the cross-border dimension of the two bears considerable significance. As the Commission concluded, the "lack of a harmonisation of national security clearance systems can create problems and market access barriers."[21]

The Defence Procurement Directive is the keystone of defence procurement integration in the EU. Its central position is tributary to both its daringly ambitious goal as well as to its absolute novelty to date. As such, the red thread of its philosophical approach and key concept is *integration*, on the backdrop of which each individual normative instrument is sized and adjusted. In this respect, by resorting to an analogy with the harmonising drive of internal market law in general, Trybus underlines the similar impetus of the Defence Directive, which seeks to "bridge the gap" between the internal market objectives of the EU and what he describes as the "legitimate concerns of the Member States", including those pertaining to public security.[22]

This read thread is applied – albeit unevenly – to security of information as well. To this end, the recitals of the Directive outline the symbiotic link between procurement in the fields of defence and security and security of information requirements – paragraphs (9), (20) and (47) – while hinting the urgency (or usefulness, in a blander interpretation) of "an Union-wide regime on security of information". Although the Directive does not reach that level of ambition, it nonetheless transposes the overall approach towards the importance of security of information concerns in provisions that allow contracting authorities to include requirements pertaining to security of information in various key elements of the procurement procedure,

[18] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal of the European Union L145, 31.5.2001, article 9.1.

[19] M Trybus (2014), op.cit., 43-44.

[20] Directive 2009/81/EC, article 22.

[21] SWD (2016) 407 final, *op.cit.*, p. 77.

[22] M Trybus (2014), op.cit., p. 280.

such as conditions of performance, selection criteria or exclusions.

As with complex issues in general, where opposing interests are confronted, compromise was often used to agree on various solutions pertaining to the publicity and transparency of the procedure, while safeguarding security concerns. The Commission Staff Working Document presenting the impact assessment of the future Defence Directive showcased numerous such compromises in terms of security of information, starting with the possibility to disclose sensitive information pertaining to the procurement procedure only to the successful bidder, at a later stage – which the document considered to be "best-suited, since it allows safeguarding security of information while still ensuring equality of treatment and a fair level of transparency".[23]

3. The EU regulatory perspective

Owing to their exclusively economic scope, significantly narrower than today"s comprehensive agenda, the initial European Communities had neither the incentive nor the legal justification to set up rules on protecting classified information.[24] Somewhat unsurprisingly, the exception to this rule was provided by domains such as defence and security, particularly related to aspects of nuclear safety under the Euratom Treaty.[25]

Further on, advances in cooperation on military and civilian management operations,[26] as well as in tackling criminal matters (with a focus on transnational terrorism), have prompted exponential evolutions in the management of classified information within the EU. Therefore, it can be said that the EU"s step by step involvement in defence and security matters, albeit by way of an intergovernmental approach,[27] has also served as the driving force behind initiatives focused on the protection of classified information.

In this respect, it is relevant to note that the EU has previously shown the political will power and the necessary means to respond to legitimate concerns voiced by its partners in terms of security of information. A case in point is the largely debated initiative promoted in 2000 by High Representative Javier Solana, seeking to provide reassurances to NATO on the protection of classified information it exchanged in its cooperation with the EU, which was on a strong path of consolidation at that time.[28]

The road to harmonization still faces many challenges, brought on especially by the Member States" different perspectives on how classified information should be managed, a fact that had been taken into consideration by the Defence Procurement

[23] Commission of the European Communities, 'Commission Staff Working Document – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security – Impact Assesment', Brussels, 5.12.2007 SEC(2007) 1598, pp. 47-48, available at: https://secure.ipex.eu/IPEXL-WEB/dossier/document/SEC20071598FIN.do [last accessed 8 January 2021]; see also M Trybus (2014), op.cit., p. 364.

[24] D Galloway, 'Classifying secrets in the EU' (2014) 52 3 Journal of Common Market Studies 668 and 675.

[25] ibid.

[26] ibid 674.

[27] SA Purza, 'Setting the Scene for Defence Procurement Integration in the EU. The Intergovernmental Mechanisms' (2018) 4 European Procurement & Public Private Partnership Law Review 257, 260.

[28] Rosén, G. (2015), 'EU Confidential: The European Parliament's Involvement in EU Security and Defence Policy', Journal of Common Market Studies 53:2, pp. 388-389.

Directive but to no conclusive solution. For example, one such element of distinction was the position of Sweden and the United Kingdom, which practically invalidated the principle of originator control[29] in situations where there is a request for the content of a classified document to be made public or to be sent to judicial authorities.[30] In such a scenario, public authorities are required and empowered to assess whether disclosure is in the public interest, thus disregarding the obligation to obtain the agreement of the originator.

David Galloway has astutely observed that the EU was required to have an original approach to regulating the management of classified information, since the Treaties lacked the proper legal basis for binding rules in this field.[31] Moreover, article 352 TFEU paragraph 4 expressly prohibits the Union from relying on the mechanism established by this article to attain objectives pertaining to the Common Foreign and Security Policy (CFSP) while also reiterating the limitations to adopt acts, enshrined in article 40 TEU. Thus, there was no possibility of having a unified legislative instrument addressing the protection of classified information. For that reason, the EU institutions, guided by the driving force of the Council, have adopted a sectoral approach, seeking to implement measures that would ensure an adequate level of protection for information deemed classified, focused on their own specific administrative procedures and processes.[32]

The EU"s relationship with classified information has been split between two imperatives which carry varying weights both within the Union itself (different perspectives of the executive and parliamentary branches) and those of the public (NGOs and lobby groups especially). Thus, the EU is tasked with conciliating democratic governance (which entails extended access to sensitive information for the public) with efficient political action (which for its part might require a heightened level of discretion). A renewed legislative response could be a way to respond to both imperatives, that is to ensure the exercise of the fundamental right of access to information while also to provide a clear and effective framework to legitimately protect classified information.

In her paper on how the EU deals with classified information,[33] Deirdre Curtin asserts that adopting general rules on how the EU Council shares classified information with the European Parliament is "a matter of broader democratic concern". Extrapolating from this conclusion, it could be argued that the need for an EU-wide regime for clearance and access to classified information for industry representatives – seen as *sine qua non* for taking part in defence and security procurements – also touches on issues pertaining to democratic governance, in the context of common market rules and observing the need to ensure an effective benefit of the possibilities afforded by the Defence Procurement Directive. On this issue, research has underscored the contrast between the EU"s approach towards intra-community transfers, which benefit from an EU Directive, and the recognition of security clearances, which has yet to be regulated at a similar level.[34]

[29] For more details on the principle of originator control *see Curtin* (n 15) 691.
[30] Galloway (2014), *op.cit.*, p. 674.
[31] *See* Galloway (2014), *op.cit.*, pp. 675-676.
[32] Ibid.
[33] *Curtin* (n 15) 696.
[34] M Trybus (2014), op.cit., p. 362.

One issue identified by doctrine, also building on the perspective of legitimate access, is that a lack of substantive classification criteria leads to intentional or unintentional abuse of power by the EU institutions – the Council in particular – when exercising their discretion in granting low-level classified status to information (such as "restricted").[35] This practice can effectively limit or ban otherwise relevant information from legitimate public knowledge, in the disadvantage of both individual citizens as well as NGOs or the industry. Similar issues concern the way national governments make use of their prerogative to declare information of a certain type or pertaining to a specific sector as classified on the lowest possible level, but which still makes it undisclosable to third parties, thus providing a valid reason to apply the Article 346 TFEU exemption or at least inhibit the participation of (some) tenderers.

The analysis on relevant EU legislation provided further on seeks to identify and explain specific instruments of governance regulated at EU level for the management of classified information, with a focus on the degree to which the competent authorities of the Member States are involved in the process and how the distribution of tasks and authority is made. The documentary results should in turn provide a basis for evaluating if the mechanisms in place satisfy the Member States" desire to exercise an adequate level of control. To this end, the scope of the legal framework analysis includes a selection of legal/procedural instruments specially tailored for the needs of the EU institutional framework pertaining to handling classified information. The analysis is predicated *inter alia* on the notion that the Commission has had an early leading role in terms of security of information, but its position has been taken by the Council, especially considering its competences and those of the Member States in areas such as the CFSP and the Common Security and Defence Policy (CSDP).[36]

3.1. The EU regulatory perspective

The first iteration in terms of regulating the management of classified information within the EU came as an early onset, by means of Regulation (Euratom) No 3 implementing Article 24 of the Treaty Establishing the European Atomic Energy Community, a regulation which is still in force.[37] Viewed in the context of modern-day regulatory initiatives, it can be regarded as a landmark achievement in a field of profound reluctance on the part of the Member States, and, even more so, as the blueprint for future rules.[38]

Still, in the interest of objectivity, it should be underscored that the adoption of the Euratom Regulation had benefited from several favourable circumstances, such as the limited number of Member States that had to come to an agreement at the time, inspired, moreover, by the obvious and stringent need for close cooperation, following the aftermath of the Second World War. The fact that the regulation had a limited sectoral scope also came as an advantage, thus streamlining each Member States" calculations on the potential strategic and security impact of the new rules.

[35] *Curtin* (n 15), 690.
[36] Curtin, D. (2013), op.cit., p. 424.
[37] Published in the Official Journal of the European Communities no. 406/58, hereinafter 'Euratom Regulation'.
[38] Curtin, D. (2013), op.cit., p. 427.

The main issues under consideration of the still germinating Community legislator at the time of the Euratom Regulation were the defence interests of the Member States, as explained by the only argumentative paragraph of the very concise preamble. It is interesting to note, on this point, that the preamble, as well as the normative text of the regulation[39] make no reference to the interests of the Community, as opposed to subsequent legislation that has incorporated the notion of Community/Union interests.

The underlying goal of the regulation was to empower the Commission to manage security measures applied to sensitive information, acting as a supervisory body in matters pertaining to both the content of the information as well as its dissemination. That is why the scope of the Euratom Regulation includes the two main dimensions of security of information, i.e. security grading and protective measures, which cover both information acquired by the Community, in its capacity as a standalone collective body, and that which is communicated by the Member States.[40]

Article 24.1. of the Treaty establishing the European Atomic Community[41] mandates the Council to regulate issues pertaining to security of information, following a proposal from the Commission, including a system of security gradings and complementary security measures. It is noteworthy that the Commission is entrusted with a significant margin of discretion traditionally afforded exclusively to national governments – the ability to decide on the appropriate classification (grading) level for sensitive information.[42] This courageous transfer of an inherently national prerogative to the supranational level gives additional weight to the novelty and long ranging impact that the Euratom rules have had in the field of security of information within the EU.

A general assessment of the Euratom Regulation reveals that its normative structure is based on a tailored assimilation of the fundamental principles, processes and authority instruments that define protection of classified information (indicated *supra*). The main considerations underpinning the Regulation are evident from its brief preamble, which focuses on the pre-eminence of the defence interests of the Member States, the central role of the Commission and the reach of its security measures, intended to cover both the subject matter of the information and its distribution regimen.

The provisions of Articles 1 through 5 of the Euratom Regulation, regarding its scope, have a threefold approach, providing criteria to discern according to subject matter and personal capacity, while also touching on the interaction with the dedicated regulations of the Member States. In terms of subject matter, the Euratom Regulation covers both the various security levels or gradings and their respective protective measures, which apply to information communicated by Member States within the framework of the Treaty and to that acquired *ad novum* by the Community. All information that is subject to protective measures is considered under the common denomination "Euratom Classified Information".

Article 5 provides guidelines regarding the interaction between the

[39] *See, inter alia,* article 10 of the Euratom Regulation.
[40] Article 1.1. of the Euratom Regulation.
[41] *See* Consolidated Version of the Treaty Establishing the European Atomic Energy Community, OJ 2016 C 203/1, hereinafter 'Euratom Treaty'.
[42] Article 24.2. of the Euratom Treaty.

Euratom Regulation and other sector specific normative instruments enacted either at Community level or by the national authorities of the Member States. The main principle in this respect is that the rules within the Regulation are to be construed as minimum requirements in terms of the protection of classified information. As such, the Community and the Member States are provided with a limited prerogative to supplement the framework with new rules tailored for the needs of their jurisdictions. The limited aspect is indeed puzzling, as it is formulated somewhat counterintuitively, in that while it opens the possibility to adopt "appropriate provisions of their own" it also excludes complementary provisions that would "adversely affect the uniform treatment of Euratom classified information", without providing adequate criteria to discern between acceptable and unacceptable provisions. Thus, it seems difficult to envision any type of complementary rule, adopted at national level, that would not, to some extent, affect the prescribed uniform regime.

In terms of one of the fundamental building blocks of security of information – the clearance process – the Regulation establishes the primacy of the two essential (pre)conditions for access to classified information – prior authorisation and need-to-know.[43] While the need-to-know ("need to be informed") is only briefly explained by reference to the official duties of the person seeking access, the authorisation procedure is described in detail, touching upon granting authority, recognition and the distribution of competences between Community bodies and the Member States. The authority to grant clearances is shared by the Security Bureau and the relevant authorities of the Member States. Nevertheless, the Member States retain fundamental control in granting clearances, as the Security Bureau is afforded only a slim margin of appreciation in this respect.

Once granted, the authorisation is provided with universal recognition, i.e. it is opposable to all other bodies of the Community, as well as the Member States. This is as an important step forward in terms of the Member States investing confidence and abandoning their innate reluctancy towards sharing their prerogatives and instruments of control in matters pertaining to classified information. Although it would be far-fetched to consider this a milestone, it is nonetheless an indication as to the national authorities" willingness to stretch their own limitations in the interest of cooperation, when there is a strong political will and pragmatic incentives to do so.

3.2. The EU Council Model Rules

In a pragmatic acknowledgment of the need to exchange classified information, EU Member States resorted once again to the intergovernmental framework as a panacea for solving predicaments that held back effective cooperation. Therefore, an overarching covenant was negotiated and implemented under the title "Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union".[44]

While at first glance this Agreement on classified information would appear as nothing more than a fit-for-purpose international cooperation document, its underlying value should not be

[43] Article 14.1. of the Euratom Regulation.

[44] Published in the Official Journal of the European Union, C 202, 8 July 2011, hereinafter 'Agreement on classified information'.

underestimated. It establishes a basic legal framework of general rules applicable to the protection of European Union Classified Information (EUCI) during its exchange between the Member States, on one hand, and the EU institutional body (as a whole), on the other. This represents a cornerstone firstly because it enshrines the Member States" formal recognition of the EU institutional model for the protection of classified information, thus overcoming their initial reluctancy[45] by applying similar protection measures as those provided by national laws and regulations. Secondly, it marks the determination of the Member States (and, conversely, that of their national authorities) to apply a complementary and supranational model for the classification and protection of information. Thus, this Agreement represents a form of consensus between all Member States, under the guidance of the EU, on sensitive issues pertaining to classified information. Moreover, it can be perceived as a much-needed first iteration in terms of a formalised, systemic approach towards regulating classified information in the EU, to which more in-depth rules quickly followed suit.

It is worth noting that, at the time the Agreement came into force, the EU had already developed a mechanism for the protection of EUCI, starting with internal protection regimes developed by the Commission as early as 1986[46] and decisions of the Secretary-General of the council, starting with 1995,[47] followed by Council Decisions to date.[48] In this respect, doctrine has pointed out that the Council explicitly sought to promote and institute its self-devised rules as a uniform solution for the EU as a whole (institutions and Member States alike).[49] The said reluctance of the Member States to formally adhere to the EU mechanism for handling classified information, despite the latter"s sensible record of accomplishment until 2011, is in itself indicative as to complex underpinnings of such a decision.

According to Article 1 of the Agreement on classified information, its scope is twofold, in the sense that it covers two main categories of classified information according to its originator, namely: originating in the EU institutional mechanism (institutions, agencies, bodies or offices) and originating in the Member States. From an operational point of view, the Agreement covers information related to the interests of the EU, i.e. information that is classified according to EU standards, communicated either between the Member States themselves or between EU institutions and the member states.

On the backdrop of the general framework provided by the Agreement on classified information, the analysis will further touch upon one of the main pillars of

[45] Galloway (2014), *op.cit.*, p. 674.

[46] Ibid.

[47] Decision 24/95 of the Secretary-General of the Council of 30 January 1995 on measures for the protection of classified information applicable to the General Secretariat of the Council (not published); Decision of the Secretary-General of the Council/High Representative for the Common Foreign and Security Policy of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council (Official Journal of the European Communities, C 239, 23 August 2000).

[48] Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations (Official Journal of the European Communities, L 101, 11 April 2001); Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information (Official Journal of the European Union, L 141, 27 May 2011); Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information (Official Journal of the European Union, L 274, 15 October 2013).

[49] Curtin, D. (2013), op.cit., pp. 437-438.

EU legislation in terms of the protection of classified information, represented by the latest iteration of the Council Decision on protecting classified information (i.e. Council Decision 2013/488/EU on the security rules for protecting EU classified information[50]).

Of all the regulatory documents pertaining to security of information in the EU, Council Decision 2013/488 is the most comprehensive and, as such, could be regarded as somewhat of a standard for all other rules enacted by various institutions – in this respect, recital (7) provides that EU bodies and agencies should apply the basic principles and minimum standards laid down in the Decision.[51] This notwithstanding, the analysis reveals that the system of rules it enforces has inherent vulnerabilities stemming from the safeguards afforded to national authorities, coupled with the high level of expectations they thus create for the Member States.

From the outset, it should be noted that the scope of the Decision, however complex, is intrinsically curtailed by the limited regulatory reach afforded by its legal basis – Article 240(3) TFEU, the provisions of which enables the Council to act only in procedural matters or for the adoption its own rules of procedure. This does not necessarily mean that the normative power of the Decision is limited to the activities of the Council or its various bodies, nor does it preclude the applicability of its provisions to actions of the Member State or its national institutions, whether within the Council itself or on national territory.

The Council Decision"s status as a standard for other norms of EU institutions pertaining to the protection of classified information is confirmed by the breadth of its scope, as defined by Article 3.1., which also includes Member States, as mentioned *supra*. This is especially evident when seen in comparison to the similar normative act of the Commission (i.e. Commission Decision 2015/444) which is expressly limited *ratione personae* and *ratione loci* to Commission staff and premises, respectively.

The normative structure of Council Decision 2013/488 is built on the foundation of the well-established universal legal and operational principles of originator consent (for altering the classification level – Article 3.2.), need-to-know and security clearance (Article 7.1.).

According to Article 4.3., classified information originating from Member States and with a national classification level already ascribed is protected by means of the equivalency principle, which determines the necessary protection measures according to the requirements applicable to EUCI. This provision applies not only to classified information introduced by the Member States in the EU Council or its General Secretariat, but also to that which is introduced "into the structures or networks of the Union". This last phrase seems to indicate that the equivalency principle is deemed to have a transversal application throughout the institutional architecture of the EU, even though the scope of the Decision is, as mentioned above, limited to the activities of the EU Council and its General Secretariat. This potential normative conflict should be clarified by cross-referencing the relevant provisions of the various regulatory instruments enacted by EU institutions in this field. The prerogatives afforded to the originator of the information, in application of the aforementioned principle, are wide-reaching

[50] Council Decision of 23 September 2013 on the security rules for protecting EU classified information, Official Journal of the European Union, L 274, 15.10.2013 (hereinafter "Council Decision 2013/488").

[51] *See* Curtin, D. (2013), op.cit., p. 13.

and have a significant impact throughout the life-cycle of EUCI.

The corner stone of any system for security of information – personnel security – is regulated in detail throughout the Council Decision, with implementing rules provided in Annex I. The three fundamental caveats that must be respected for an individual to be granted access to EUCI are: to have the need-to-know established by the competent authority; to have the appropriate security clearance; to have been duly briefed on the responsibilities incumbent upon the person in connection with handling classified information.

Although Article 7.3. of Council Decision 2013/488 grants the General Secretariat of the Council (hereinafter "GSC") the power to authorise its personnel to access EUCI, it is nonetheless dependant on the result of the vetting procedure carried out by the National Security Authorities (hereinafter "NSA") – or other competent authorities – of the Member States, according to Article 4, corroborated with Articles 7, 16 and 18 of Annex I to the Council Decision. Thus, NSAs are primarily tasked with providing *de facto* security checks, according to the applicable national laws and regulations. This is both a burden of responsibility, as well as an essential leverage tool afforded to the Member States in the decision process as to whom is granted access to EUCI.

The leverage is indeed substantial. The "investigative and administrative procedures" – as coined by Article 1 of Annex I to the Council Decision – are built around the results of the security investigations conducted by the NSAs, which are decisive for approving or rejecting authorisation requests. The standards used by NSAs are essentially those established by national laws and regulations, although indicative criteria are provided in Article 7 of Annex I. The investigation results either in the issuance of a Personnel Security Clearance (PSC) – by the national authorities of the Member State for their own nationals –, either in the provision of "assurance" to the GSC that the individual concerned can be subsequently granted authorisation to access classified information. Thus, according to Article 18(a) of Annex 1, the GSC Appointing Authority is vested with the option (not obligation) to grant authorisation when the security check is positive, while it is expressly prohibited from granting authorisation when the result of the check is negative. Conversely, if the NSA withdraws the assurance given with regard to a person, the GSC has the obligation to withdraw said person"s authorisation for access to EUCI.

The prerogatives of the Member States in connection with the decision making process and the involvement of their NSAs in this respect are further consolidated through the establishment of a Security Committee. This collegiate body, defined in Article 17 of the Council Decision, is tasked with examining and assessing "any security matter within the scope of [the] Decision" and making recommendations to the Council. It is composed of representatives of the NSAs and its meetings are also attended by a representative of the Commission and the EEAS. From a hierarchical point of view, the Committee takes instructions primarily from the Council but it can also be convened at the request of the Secretary-General of the Council or of an NSA. Although the wording of Article 17 provides that the Security Committee"s central role is to "make recommendations on specific areas of security" – thus suggesting a consultative position – its standing in the overall mechanism established by the Decision is of a significant relevance, as it contributes with insights and recommendations in key moments of the decision-making process.

In terms of integration, Article 21 of Annex I to the Council Decision institutes a regimen of interinstitutional validity for authorisations for access to EUCI. Thus, the GSC is directed to accept authorisations granted by any other institution, body or agency of the EU – provided it is valid – with regard to any person working within the secretariat, irrespective of his or her assignment. This automatic recognition of authorisations is relevant, on the one hand, because it streamlines cooperation between institutions and fosters personnel mobility, contributing to enhanced operational capacity and, on the other hand, because it promotes a model of mutual institutional trust between bodies that have different – albeit complementary – roles in the Union.

Another interesting provision that could be construed as a discreet yet solid contribution to the supranational dimension of the system of prerogatives pertaining to security of information is the exceptional power of the Secretary General of the Council to grant access to EUCI to persons that have not been submitted to the prescribed security vetting procedure. According to Article 36 of Annex I, this possibility is limited to "very exceptional circumstances", which are not defined *per se* or linked to specific criteria, but only described through a non-exhaustive list of examples: "missions in hostile environments", "periods of mounting international tension", "the purpose of saving lives". Furthermore, access cannot be granted above the "EU SECRET" grading. Like the case of automatic validation of an existing authorisation, this is another situation in which the control and supervision attributes of the Member States are superseded by the supranational prerogatives of the EU. It should be noted that such an occurrence is of an exceptional nature and it cannot be construed as an unwarranted intrusion into the exclusive competences of the Member States in issues of national security. However, it could be argued that the rather vague description of what would constitute a "very exceptional circumstance" leaves room for potential dissenting perspectives between national authorities and the GSC.

The provisions of Council Decision 2013/488 dedicated to industrial security cover both the pre-contractual negotiations, as well as the entire lifecycle of classified contracts entered into by the GSC. From a personal point of view, the scope of said provisions includes contractors and subcontractors, so on a preliminary account it would seem that the regulations are generous in covering a wide range of possibilities.

Similar to standards developed in the field by the European Defence Agency[52], the Council Decision establishes a series of legal and contractual instruments aiming to ensure awareness and control of security related issues within a classified contract: the Security Classification Guide (SCG), the Security Aspects Letter (SAL) and the Programme/Project Security Instructions (PSI). The three are complementary and interconnected in providing standards for the contract awarding and execution phases.

Albeit consistent efforts throughout the Council Decision to ensure proper consideration and protection of the interests of Member States pertaining to national classified information and/or EUCI, the provisions on the transfer of the latter to contractors located in third states breaks this consistency. Thus, Article 30 of Annex V provides that EUCI shall be transferred to contractors and subcontractors located in

[52] For details on standards for the security of information developed by the European Defence Agency, *see* SA Purza, *op.cit.*pp. 261-265.

third states based on "security measures agreed between the GSC, as the contracting authority, and the NSA/DSA of the concerned third State". This solution, based on the individual action and assessment of the GSC, significantly departs from previous ones, which ensured some form of control or participation of the Member States, either through guidelines adopted by the EU Council or through the involvement of the Council Security Committee in key inflexion points of various procedures entailing classified information. The aforementioned solution could prove problematic for the security interests of the member states related to EUCI, considering that, According to Article 2.1. of the Council Decision, this type of classified information is by definition liable to cause prejudice to the interests of the Member States. Since there are no criteria provided to discern between the EUCI that can be shared, one could ask how the principle of originator consent is observed. This issue is particularly relevant in cases where contractors from third states are involved, with different approaches to security of information.

In terms of governance, the Council Decision seeks to achieve a much-needed balance between the prerogatives of the Member States and the margin for action afforded to the GSC for it to carry out its functions. In effect, the interweaving of exclusive and shared competences, as well as areas of direct cooperation, come together to create an original framework complete with the types of normative complexities one would expect in a *sui generis* construct such as the EU. Aside from providing the tools necessary to ensure that the goal of the Council Decision is reached, this mechanism also serves as a driving force for synchronicity at EU level in the field of security of information. The procedural and normative instruments devised to this end operate on two complementary yet distinct layers: technical/administrative and political, with varying degrees of effectiveness.

The Council Decision has a unitary approach to the operational and administrative tasks pertaining to the management of EUCI in terms of functions, as well as in terms of institutions, which are designed to be mirrored in the national systems of each Member State, as well as by the GSC. Thus, the competent authorities within the GSC and the Member States are tasked with establishing corresponding authorities for information assurance (for electronic means of communication, including operation tasks), cryptographic approval and distribution and security accreditation (Articles 10.8 and 10.9).

A key denominator in terms of distributing governance prerogatives is the algorithm applied with respect to the principle of originator consent. While it is abstract in nature and is not intended to give priority to the interests of either actors involved in the protection of EUCI, it is nonetheless a significant source of influence – whether direct or indirect – for the Member States because it affords them the possibility to control what happens to EUCI considered to have originated from them (e.g. Article 3 of Annex III to the Council Decision).

4. The Search for Middle Ground: CJEU Case-Law on Security of Information

The involvement of the Court of Justice of the European Union (CJEU) in matters pertaining to sensitive information has seen an early onset, with the EURATOM Treaty expressly mandating the Court to set the terms applicable to licenses or sub-licences granted by the Commission, in situations where the latter was unable to

come to an agreement with the licensee.[53] Building on the relevant jurisprudence developed since, this section provides a concise analysis of CJEU case law (covering both the Court *per se* and the General Court) that has ruled on issues pertaining to the protection of and access to classified information, both at EU and member state level.

The case-law is analysed in chronological order, with emphasis on the evolution of relevant principles, where applicable, and takes into consideration both situations pertaining to access to information, in general, and those pertaining to defence and security related information, in particular. This dual approach is based on the consideration that mechanisms granting public access to information managed by EU institutions represent a primary hazard for the confidentiality of said information and arguments in favour or against increased confidentiality and the way they have been received or developed by the Court provide relevant insight as to how security of information works from an institutional perspective.

In a 1999 case relating to parliamentary access to EU documents, [54] the Court examined some of the key concepts related to access to information, including the meaning of the notion "public interest with regard to international relations". The examination was made in the context of the request made by a Member of the European Parliament to access a report drafted by the Working Group on Conventional Arms Export of the Council – the CJEU confirmed the initial ruling of the Court of First Instance,[55] which granted access to the document in question. Thus, the Court of First Instance implicitly included in the general concept of "public interest with regard to international relations" information related to the "exchanges of views between the Member States" on issues relative to third countries, which, on account that they contain "formulations and expressions which might cause tension with certain non-member countries" can be exempted from public access.[56] The Court of First Instance and, subsequently, the CJEU, therefore confirmed the Council"s assessment on the extent to which protection should be granted to information exchanged with the Member States on issues falling within the general scope of international relations.[57] Another relevant guiding interpretation that resulted from this case is the distinction made between access to documents and access to information. Thus, the principle of access is not limited to documents *per se*, as individual, identifiable material objects, but is naturally extended to include the more abstract notion of "information", which is contained by documents.[58]

In its judgment in the widely cited case of Sison v. Council,[59] the CJEU made important advances in clearing out the dense web of concepts and thus further streamlined the approach to be taken regarding the margin of appreciation afforded to the institutions in the protection of confidential documents and information. In this case, the Court was called to review an appeal

[53] Article 12 of the Euratom Treaty.

[54] Judgment of 6 December 2001, *Council v. Hautala,* C-353/99 P, ECLI:EU:C:2001:661 (hereinafter "C-353/99 P".

[55] Judgment of 19 July 1999, *Hautala v. Council*, T-14/98, ECLI:EU:T:1999:157 (hereinafter "T-14/98").

[56] T-14/98, para. 73-74.

[57] See, also, Rosén, G. (2015), op.cit., p. 389.

[58] T-14/98, para. 87-88; C-353/19, para. 23.

[59] Judgment of 1 February 2007, *Sison v. Council*, C-266/05 P, ECLI:EU:C:2007:75 (hereinafter "C-266/05 P".

brought against the judgment delivered by the Court of First Instance of the European Communities on 26 April 2005 in joined cases T-110/03, T-150/03 and T-405/03,[60] which found in favour of the Council"s decision to refuse access to documents and information requested by the applicant in connection with the adoption of a series of Decisions of the Council on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. The applicant had requested *inter alia* disclosure of the identity of the States which had provided certain documents in that connection.[61]

In the initial ruling, the Court of First Instance upheld the need for classified information to be adequately protected against inappropriate dissemination when it is received from national authorities of Member States or those of third States, by reference to the need to protect the position of the EU in "international cooperation concerning the fight against terrorism".[62] The Court also explicitly gave weight to the third States" desire for their identity not to be disclosed and to the inherent secret or confidential nature of a particular type of information - concerning persons suspected of terrorism.[63] Furthermore, both the Court of First Instance[64] and the CJEU[65] explicitly confirmed the Council"s approach on the statement of reasons for non-disclosure, thus validating the latter"s option to provide only a brief statement of reasons, without additional information that might have been liable to breach the confidentiality they were aiming for. From a right of access perspective, the Court"s approach in this judgment has been considered as conservative, owing to the arguably limited margin of examination the CJEU had afforded itself.[66]

Furthermore, the CJEU confirmed the full applicability and effectiveness of the originator consent principle, as a tool to ensure that sensitive information is not made publicly available when the member or third state which sent it to the EU institutions opposes disclosure. Moreover, it confirmed the applicability of this principle to both the disclosure of a document"s content and to information regarding its very existence or its origin.[67] Thus, in interpreting the security exception of Regulation 1049/2001, the CJEU established a wide margin of appreciation for the EU institutions as well as the Member States, when exercising the principle of originator control. The classified nature of the document and the information it contains can also be extended to the identity of the originating Member State (or third state) and even to the very existence of such document. The

[60] Judgment of 26 April 2005, *Sison v. Council*, T-110/03, T-150/03 and T-405/03, ECLI:EU:T:2005:143 (hereinafter "T-110/03").

[61] See T-110/03, para. 2-4.

[62] See, also, Labayle, H. (2010), 'Principles and procedures for dealing with European Union Classified Information in light of the Lisbon Treaty', European Parliament – Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, pp. 7-8, available at: https://www.statewatch.org/media/documents/news/2010/may/ep-classified-information-study.pdf [last accessed: 15.03.2021].

[63] T-110/03, para. 80-81.

[64] T-110/03, para. 62-63.

[65] C-266/05 P, para. 82.

[66] Neamtu, B, Dragos, D. (2019), 'Freedom of Information in the European Union: Legal Challenges and Practices of EU Institutions', in Dragos, D., Kovač, P., Marseille, A. (eds.) (2019), 'The Laws of Transparency in Action. A European Perspective', Palgrave MacMillan, p. 41.

[67] C-266/05 P, para. 86, 101-102.

proportional character of such measures to protect the security of information has also been confirmed against the backdrop of additional difficulty incumbent on the applicant if a high degree of discretion were to be applied.[68]

In 2005, the European Commission brought an action against Germany for its failure to fulfil obligations because of its exemption from duty of imports of military materials, spanning a 4-year period.[69] In its defence, Germany argued that Article 346 TFEU (Article 296 EC at the time of the proceedings) allowed derogation from the application of the Common Customs Code, "where the imports are of equipment exclusively intended for military purposes, and where the objective is the protection of the essential interests of its security".[70] Furthermore, Germany made a without prejudice payment, failing to detail which imports and what periods it covered, arguing that the relevant information was confidential and that the system for processing information in customs declarations is liable to cause "serious damage to the essential security interests of Member States".[71]

In this case, the Court recognised the existence and overall effectiveness of the "obligation of confidentiality" imposed on both Member States" nationals and EU institutions" staff, as an instrument "capable of protecting the essential security interests of the Member States." Thus, it could be argued that, in this instance, the CJEU considered that the various approaches towards the protection of the security of information employed by the Member States and the institutions are capable of ensuring the requisite level of protection, notwithstanding the (most probable) elements of distinction, both form a procedural and principled point of view.[72] Nonetheless, the Court made its own assessment of the potential that third-party access to information of a certain type might damage the interests of Member States in respect of either security or confidentiality. This examination and subsequent conclusion of the Court arguably go against the very essence of what Article 346 TFEU intended - which is to afford the Member States a sufficiently wide enough margin of appreciation in such issues, to properly safeguard their national security interests as they see fit. The risk of this type of overriding action by the Court should be managed in any future regulation on an EU-wide regime for security of information.[73]

It is also interesting to note, in the fashion of the analysis made by Martin Trybus on this case,[74] the argument put forth by some Member States – among which, chiefly, Germany – that they were under no obligation to supply the information that the Commission needed to examine and prove an infringement of the provisions of the Treaties. Thus, based on the provisions of Article 346 TFEU, Germany claimed the Commission"s action was inadmissible due to the former"s prerogative to abstain from disclosing information, which would substantiate the case of the latter – a genuine situation of *probatio diabolica*. Of course,

[68] C-266/05 P, para. 103.

[69] Judgment of 15 December 2009, *Commision v. Germany*, C-372/05, ECLI:EU:C:2009:780 (hereinafter "C-372/05").

[70] C-372/05, para. 19.

[71] C-372/05, para. 25, 58-59.

[72] C-372/05, para. 74.

[73] C-372/05, para. 75.

[74] Trybus, M., *Buying Defence…*, p. 132.

the Court was not persuaded by this line of argumentation.

In a preliminary ruling concerning the interpretation of the provisions of EU law on freedom of movement, the Court made an assessment of the need to safeguard the classified nature of information pertaining to public and national security, in the context of the fundamental rights granted by the Charter in terms of effective judicial protection.[75] It argued that Member States need to do more in the way of ensuring an appropriate balance between non-disclosure and access to effective judicial review. Thus, while not challenging the prerogative of national authorities to withhold information pertaining to state security, it nonetheless set higher standards for what an appropriate conduct would be in relation to a person whose rights might be affected by administrative decisions based on classified information. By all accounts, this cannot be interpreted as undermining the possibility of national authorities to ensure effective protection of sensitive information by means of ascribing to it a classified (secret) nature, since, as already underlined, this point was not an issue in this case. Rather, it remains to be ascertained whether the additional requirement described by the Court in order to satisfy the right for effective judicial protection – i.e. the mandatory scrutiny by the judiciary of the proportionality of the authorities" non-disclosure decision – is liable to produce, in the medium to long terms, situations in which the security of sensitive information might be affected to a lesser or more serious degree.

Going further, the Court also confirmed a widely accepted reasoning of the national authorities contending that the evidence supporting a decision on grounds of national security could in itself be liable to "compromise State security in a direct and specific manner".[76] Thus, the obligation of national authorities to disclose, to the interested person, the grounds and evidence on which a decision is based (refusing a citizen of the European Union admission to a Member State on public security grounds) is limited to "that which is strictly necessary", with due account to the necessary confidentiality of the evidence in question.[77]

The reluctance of Member States to confide trust in each other"s national security authorities, in terms of handling classified information, has seen confirmation in a judgment against Austria in a case concerning its failure to fulfill its obligations related to public service contracts, which entailed the protection of essential security interests.[78] The CJEU once again proved that it is playing its part in ensuring that the need for security against transnational crime and terrorism, albeit tangible and urgent, does not become an umbrella for abuse of rights by the authorities of Member States, that would irrevocably turn the balance away from the founding principles of the common market and even the individual rights and freedoms, as guaranteed by the EU legal order.

In the cited case, the CJEU has approached the issue of classified information by using its well-established narrow or strict interpretation, based on the all-encompassing principle of proportionality. Thus, it argued that the non-disclosure provision of Article 346(1)(a)

[75] Judgment of 4 June 2013, *ZZ*, C-300/11, ECLI:EU:C:2013:363, para. 65 (hereinafter "C-300/11").
[76] C-300/11, para. 66.
[77] C-300/11, para. 69.
[78] Judgment of 20 March 2018, *Commission v. Austria (State printing office)*, C-187/16, ECLI:EU:C:2018:194, para. 68 (hereinafter "C-187/16").

TFEU does not apply indiscriminately to any type of information that a Member State might consider to be sensitive.[79] The Court even went so far as to assess the degree in which a facility under some form of control by a Member State is in fact better suited to ensure the confidentiality of sensitive information in a works contract than other companies operating in said Member State or others. In this respect, it argued that the necessary degree of confidentiality of information could be guaranteed by means of special arrangements imposed through private-law contractual mechanisms. It should be noted that the case under consideration did not entail high-level classified information. [80]

In a recent case[81] the General Court the General Court has recognised some limitations to its powers to examine and decide on the institutions" refusal to grant access to information. Thus, the General Court is mandated to assess only if the procedural rules and the duty to state reasons have been complied with and whether the facts have been accurately described. It follows, then, that in substantive terms only finding "a manifest error of assessment or a misuse of powers by the institution" would be grounds for censoring the institution"s decision to refuse access.[82] Case T-31/18 is exemplary in this respect, as the Court has established the pre-eminence of the need to protect operational information held by the institutions, *in casu* the European Border and Coast Guard Agency (FRONTEX).[83]

5. Conclusions

The research at the heart of this paper was based on the overarching idea that the provisions of the Defence Procurement Directive proved inapt to furnish a functional framework for managing the various security of information concerns and, thus, an alternative solution should be sought with a view to obtain a highly coordinated (if not unitary) regime for classified information among EU Member States.

Along these lines, the research has firstly sought to establish whether there are sufficient reasons to conclude that the EU has, thus far, managed to establish a proprietary and functional framework for dealing with classified information, covering both its institutional actors, as well as its dynamics with the member states and among themselves. On this point, the examination of the provisions of the EURATOM Regulation and those of Council Decision 2013/488 has shown that the inherent limitations of the EU"s approach to a sectoral/procedural dimension in defining rules and regulation for security of information has not impeded it from tackling more substantive aspects, such as granting clearances or their automatic recognition at EU institutional level.

This conclusion is based, on one hand, on the fact that the rules prescribed by the EURATOM Regulation for the protection of classified information have stood the test of time and have proven – even if for this reason alone – their ability to respond to the specific needs of the Member States and the Community as a whole. As shown, these

[79] C-187/16, para. 72.
[80] C-187/16, para. 84-85.
[81] Judgment of 27 November 2019, *Izuzquiza and Semsrott v. Frontex*, T-31/18, ECLI:EU:T:2019:815, para. 25 (hereinafter "T-31/18").
[82] T-31/18, para. 65.
[83] T-31/18, para. 91, 112.

rules touch on the fundamental issues underpinning security of information and have therefore proven that multinational consensus can be reached and effectively implemented. Secondly, the basic elements of the solutions enacted by the EURATOM Regulation have been subsequently confirmed in the relevant Council Regulations which, and the instruments provided therein have been tested and validated by the CJEU in various circumstances.

Thus, the analysis of the rules and procedures set up by the EU for the protection of classified information has outlined that the Union has taken this imperative security need very seriously since its very inception. Moreover, it has proven consistency and determination in monitoring, evaluating and improving the mechanisms in place, in close coordination with the relevant authorities of the Member States. Current regulations and procedures duly observe the fundamental legal and operational principles, instruments and requirements pertaining to the protection of classified information (on clearance, physical protection, administrative measures, management etc.) largely implemented by Member States – while reserving a margin of criticism, voiced *supra* in individual cases, where relevant. The question remains if this conclusion bears enough weight in the rationale of the Member States to encourage them to move forward towards an EU-wide legal and procedural mechanism for the management of classified information that would provide the tools needed for unimpeded access by potential tenderers to defence and security contracts in any member state at any time.

Furthermore, the aptitude of the EU institutional framework to provide the requisite level of security of information has been acknowledged by doctrine, albeit by specific reference to the experience of the Commission in handling professional secrecy in the context of competition cases.[84] In the same line of reasoning, another paper concluded that the internal rules-based system implemented by the EU has proved effective in providing a level of protection for classified information similar to that given in member states.[85]

This positive perspective has been – to some extent – confirmed by the case-law of the CJEU, as shown in the relevant section. Thus, some points of concern notwithstanding, the Court has shown that the basic concepts and principles related to security of information have been astutely adopted and implemented by the EU institutional framework and have stood the test of judicial scrutiny, including in the context of access to information, which is particularly demanding.

In the more challenging realm of identifying potential avenues for future regulatory solutions for the integrated management of classified information, which would ultimately serve *inter alia* the specific purpose of defence procurement integration, the main issue of contention is the legal basis for any such initiative. An analysis made by Deirdre Curtin has concluded, in general terms, "that there is no separate treaty based legal basis for adopting Union wide rules on the classification of documents".[86] From a strict, *ad litteram*, normative perspective, this conclusion holds true, as the TEU and the TFEU do not contain an explicit mandate for the Union to regulate in this field.

[84] M Trybus (2014), *op.cit.*, p. 130.
[85] Galloway (2014), *op.cit.*, p. 682.
[86] D. (2013), op.cit., pp. 433-436.

Nevertheless, the same analysis explores various indirect legal foundations that might be used to substantiate a regulatory initiative in this respect. It should be noted, at this point, that in Opinion 2/00 (EU:C:2001:664, paragraphs 5 and 6), the CJEU emphasised that to proceed on an incorrect legal basis is liable to invalidate the act concluding the agreement, and that that is liable to create complications both at EU level and in international law.

In the same spirit of intellectual debate and normative exploration, the research presented in this paper has hinted to some potential solutions for an EU-wide legal framework for the protection of classified information, whether in broader or more specific terms. These possibilities are presented herein, with the understanding that they require further and more in-depth research, which can form the topic of a future paper on the matter.

Before proceeding to the potential avenues of regulatory action, it is important to note that this research has revealed specific requirements pertaining to the protection of classified information, some of which have been adopted in security policies across the spectrum, ranging from civil to military organisations. Among these, the following concepts have stood out as legal and operational instruments used by national authorities to guarantee an effective level of control and protection and should thus be mandatorily included in any normative initiative in the field: security screening and authorisation; originator consent/control; physical security (premises and cyber); as a corollary to control mechanisms, the ability to invoke legal responsibility, from civil/administrative liability to prosecution under criminal law.

One way to act is still tributary to classical intergovernmental means of cooperation, considering that CFSP, CSDP – fields in which security of information is particularly relevant, especially in terms of defence and security procurement – are still outside the community acquis and out of the scope of EU regulatory instruments. In this respect, a potential solution could have a one-fold or two-fold approach. Thus, the one-fold solution envisages the Council adopting a Decision that tasks the Commission with establishing an open-ended (starting from a minimal base ensuring fundamental functionalities) EU-wide system for coordinating security of information mechanisms through an individual body set up within the European Defence Agency, having a separate governing body, comprised of designated representatives of each MS, mandated to decide on the pathway for the evolution of the mechanism for security of information tailored for defence and security procurement. The two-fold solution[87] would presume the creation of an adequate legal basis in an intergovernmental conference, within the co-decision framework and then use the mandate thus conferred to enact a normative instrument pertaining to the regime of classified information.[88] Additional research is required as to the advantages/disadvantages of each option and, more importantly, their applicability and effectiveness.

It is important to note that the solution of creating a legal framework through an international agreement should be subjected to the CJEU"s autonomy test. Thus, if the proposed solution would be completely outside the EU legal order (a consideration that should also face scrutiny), then it should

[87] *See* Curtin (2014), *op.cit.*, p. 693.

[88] The idea of a Directive that would regulate an EU-wide regime for security clearances has been mentioned by doctrine, *see* M Trybus (2014), *op.cit.*, p. 393.

be determined whether it is liable to affect the EU"s jurisdictional legal order, as defined by the concept of autonomy aiming at preserving the unity of the EU legal order and the uniform application of its rules.[89] In this respect, an original solution could be to circumvent the lack of legal basis in the Treaties by using an intergovernmental legal vehicle to which the EU can adhere.[90]

In any case, any regulatory solution should avoid ambiguous formulations, whatever the difficulties in managing various interests and sensitivities. Otherwise, the normative thread could be pulled in a direction that would potentially go against the interests of the stakeholders, amongst which national authorities of the Member States feature prominently. Thus, the wording of the regulation should be clear and concise, to avert the possibility that its scope and application be subjected to the interpretation of the CJEU.[91]

Whatever the avenue, it is without question that the art of compromise has been effectively used in solving complex issues pertaining to security of information, as proven by the relevant provisions of the Defence Procurement Directive, the system of Interinstitutional Agreements and the case-law of the CJEU on denial of access to sensitive information. In this respect, it is useful to note that a possible way towards compromise would be to limit the scope of the prescribed normative instrument to a clearly defined segment or sector. Along these lines, the fact the EURATOM Regulation had a limited sectoral scope – as shown in section 3.1. of this paper – also came as an advantage, thus streamlining each Member States" calculations on the potential strategic and security impact of the new rules.

References

- M Trybus "Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context" (Cambridge University Press, 2014);
- Neamtu, B, Dragos, D. (2019), "Freedom of Information in the European Union: Legal Challenges and Practices of EU Institutions", in Dragos, D., Kovač, P., Marseille, A. (eds.) (2019), "The Laws of Transparency in Action. A European Perspective", Palgrave MacMillan;
- MK Davis Cross, "Security Integration in Europe. How Knowledge-Based Networks are Transforming the European Union" (The University of Michigan Press, 2014);
- R Dover, MS Goodman, C Hilldebrand (eds), "Routledge Companion to Intelligence Studies" (Routledge, 2014) 258; B Driessen, "Transparency in EU Institutional Law: A Practitioner"s Handbook" (2nd ed, Kluwer Law International, 2012);
- JW van Rossem, "The Autonomy of EU Law: More is Less?" (2013) in RA Wessel and S Blockmans (eds), Between Autonomy and Dependence (Asser Press, 2013);
- D Galloway, "Classifying secrets in the EU" (2014) 52 3 Journal of Common Market Studies 668;
- D Curtin, "Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?" (2013) 50 Common Market Law Review 423;

[89] JW van Rossem, 'The Autonomy of EU Law: More is Less?' (2013) in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (Asser Press, 2013) 15-17 and 19.

[90] van Rossem (2013), *op.cit.*, p. 20.

[91] *See, inter alia*, Judgment of the Court (Grand Chamber) of 18 December 2007, *Sweden v. Commission*, C-64/05 P, ECLI:EU:C:2007:802, para. 33.

- D Curtin, "Overseeing Secrets in the EU: A Democratic Perspective" (2014) 52 Journal of Common Market Studies 684;
- Rosén, G. (2015), "EU Confidential: The European Parliament"s Involvement in EU Security and Defence Policy", Journal of Common Market Studies 53:2;
- A Roberts, "Entangling Alliances: NATO"s Security of Information Policy and the Entrenchment of State Secrecy" (2003) 36 Cornell International Law Journal 329;
- SA Purza, "Setting the Scene for Defence Procurement Integration in the EU. The Intergovernmental Mechanisms" (2018) 4 European Procurement & Public Private Partnership Law Review 257;
- Labayle, H. (2010), "Principles and procedures for dealing with European Union Classified Information in light of the Lisbon Treaty", European Parliament – Directorate General for Internal Policies, Policy Department C: Citizens" Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, pp. 7-8, available at: https://www.statewatch.org/media/documents/news/2010/may/ep-classified-information-study.pdf;
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, Official Journal of the European Union, L 216, 20.8.2009;
- Council Decision of 23 September 2013 on the security rules for protecting EU classified information, Official Journal of the European Union L 274, 15.10.2013;
- Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information, Official Journal of the European Union L 72, 17.3.2015;
- Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal of the European Union L145, 31.5.2001;
- Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, OJ 2014 C 95/1;
- Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, Official Journal of the European Union C202, 8.7.2011;
- Regulation (Euratom) No 3 implementing Article 24 of the Treaty Establishing the European Atomic Energy Community, Official Journal of the European Communities no. 406/58;
- Consolidated Version of the Treaty Establishing the European Atomic Energy Community, OJ C 203/2016 ;
- Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, the Official Journal of the European Union, C 202, 8 July 2011;
- Decision 24/95 of the Secretary-General of the Council of 30 January 1995 on measures for the protection of classified information applicable to the General Secretariat of the Council (not published);
- Decision of the Secretary-General of the Council/High Representative for the Common Foreign and Security Policy of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council (Official Journal of the European Communities, C 239, 23 August 2000);
- Council Decision 2001/264/EC of 19 March 2001 adopting the Council"s security regulations (Official Journal of the European Communities, L 101, 11 April 2001);

- Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information (Official Journal of the European Union, L 141, 27 May 2011);
- Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information (Official Journal of the European Union, L 274, 15 October 2013);
- Council Decision of 23 September 2013 on the security rules for protecting EU classified information, Official Journal of the European Union, L 274, 15.10.2013;
- Commission Staff Working Document: Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, SWD (2016) 407 final;
- Commission of the European Communities, "Commission Staff Working Document – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security – Impact Assesment", Brussels, 5.12.2007 SEC(2007) 1598;
- Judgment of 6 December 2001, Council v. Hautala, C-353/99 P, ECLI:EU:C:2001:661 ;
- Judgment of 19 July 1999, Hautala v. Council, T-14/98, ECLI:EU:T:1999:157 ;
- Judgment of 1 February 2007, Sison v. Council, C-266/05 P, ECLI:EU:C:2007:75;
- Judgment of 26 April 2005, Sison v. Council, T-110/03, T-150/03 and T-405/03, ECLI:EU:T:2005:143;
- Judgment of 15 December 2009, Commision v. Germany, C-372/05, ECLI:EU:C:2009:780 ;
- Judgment of 4 June 2013, ZZ, C-300/11, ECLI:EU:C:2013:363;
- Judgment of 20 March 2018, Commission v. Austria (State printing office), C-187/16, ECLI:EU:C:2018:194;
- Judgment of 27 November 2019, Izuzquiza and Semsrott v. Frontex, T-31/18, ECLI:EU:T:2019:815;
- Judgment of the Court (Grand Chamber) of 18 December 2007, Sweden v. Commission, C-64/05 P, ECLI:EU:C:2007:802, para. 33.

THE CONCEPT OF EMPLOYEE IN HUNGARIAN LAW IN LIGHT OF ITS BROAD INTERPRETATION IN EUROPEAN UNION LAW

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Abstract

The present paper analyses the broader concept of the employment relationship and the legal status of the employee in Hungarian labour law. In the relevant Hungarian regulation, the employment relationship can be established by a special private law contract, the employment contract, which contract is regulated by several employment-specific provisions. In the Hungarian legal system there is no alternate way to enter the "employee" status, therefore the employment-specific rights and obligations stem only from the employment contract. The employment relationship has some special legal characteristics, although from an economic point of view it is similar to other legal relationships regulated by civil law rather than labour law. The link between these similar legal relationships is the fact that a person is working under another person"s instructions and is paid for their tasks performed. However, the subordination is present only in the employment relationship, so according to the paper"s hypothesis it is important to determine the legislative framework of the employee (worker) status and the rights aiming at protecting the employee as well. The analysis focuses on the governing Hungarian labour law regulations and some aspects of the corresponding judicial practice compared to some recent developments in the regulation and legal interpretation of the European Union.

Keywords: *Employee, employees" rights, employment contract, Hungarian labour law, subordination.*

1. Introduction

"Employee means any natural person who works under an employment contract" [paragraph (1) of section 34 of Act I of 2012 on the Labour Code (hereinafter: LC)]. Without doubt, labour law deals with many complicated or complex concepts and rules that can have different interpretations in theory and in practice. Perhaps it is mainly caused by the "mixed" nature of labour law regulations.[1] Consequently, considering Hungarian law — as well as the regulations of the European Union and other regulations on an international scale —, it is not accidental in this field of law, which is "mixed" in nature, that the use and the interpretation of certain concepts are hindered by major changes and developments, besides the aforementioned complicatedness and complexity. In addition, the particularly dual structure of labour law legislation — i.e., it is classified on the border between contract law and the

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[1] György Kiss, "*Foglalkoztatás gazdasági válság idején. A munkajogban rejlő lehetőségek a munkajogviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok)*", *Állam- és Jogtudomány*, Vol. 55. Issue 1 (2014), p. 39-42. and 63-64.

legal rules excluding diversity[2] — generates further questions regarding its level as well.

In contrast, the concept of employee — as it stands in a short form in the LC — is different, at first glance. The concept is not particularly complicated, the accuracy of its theoretical and practical interpretation cannot be disputed, and employment contracts and collective agreements in fact cannot rule differently from this static prescript. Moreover, the LC tends to define from various aspects the hypotheses of the legal status of employees working in accordance with the LC, such as the personal or material scope, or the employment of legally incapacitated employees.[3] Even so, I believe that the analysis of the concept of "employee", which is the starting point of this study, is important from a theoretical and legislative point of view, as well as on a practical level, because this concept — besides the above mentioned differences — is obviously influenced by the tendencies of legislation, legal literature and legal interpretation,[4] and novel perspectives will likely affect the ideas of the Hungarian labour law as well. I will discuss the relevant part of the EU"s labour law in a separate chapter, but I feel it necessary to mention here that a proposal for a directive on the creation of a unified concept has been adopted,[5] which is likely to bring about changes in the Hungarian labour law as well. In addition to assessing the developments of the EU"s social policy, I examine the terms and concepts of the Hungarian law. To the hypotheses and results of the research, I add international developments that may seem irrelevant from the point of view of the Hungarian law, but they are not if considering the current situation of the labour market. Moreover, since the borders of countries do not limit labour force, it is very important to clarify what is or what should be meant by an apparently simple basic term.

Consequently, this study concentrates on the complex and dynamic understanding of the concept of "employee", demonstrating in a new way the system of employment relationships, or more precisely, the legal structures of persons who work for somebody else in exchange for payment.[6] However, the conditions — those regarding age in particular — of becoming an employee within the meaning of the LC

[2] Tamás Prugberger and György Nádas, Európai és magyar összehasonlító munka- és közszolgálati jog, Wolters Kluwer, Budapest, 2015, p. 27-31.

[3] Nóra Jakab, *A munkavállalói jogalanyiság munkajogi és szociális jogi kérdései, különös tekintettel a megváltozott munkaképességű és fogyatékos személyekre*, Bíbor, Miskolc, 2014, p. 108-116.

[4] For the Hungarian legal literature, see typically Tamás Gyulavári, "*Uber sofőrök és társaik: munkavállalók vagy önfoglalkoztatók?*", *Jogtudományi Közlöny*, Vol. 74. Issue 3 (2019), p. 114-118., Tamás Gyulavári, "*Az Európai Bíróság és a gordiuszi csomó: az Uber applikáció vagy taxitársaság?*", *Munkajog*, Vol 2. Issue 2 (2018), p. 8-12., Tamás Gyulavári, "*Internetes munka a magyar jogban – Tiltás helyett szabályozás?*", *Pro Futuro*, Vol. 8. Issue 3 (2018),p. 83-95., Nóra Jakab and Henriett Rab, "*A munkajogi szabályozás foglalkoztatási viszonyokra gyakorolt hatása a szociális jogok és a munkaerőpiac kapcsolatának függvényében*", *Pro Futuro*, Vol. 7. Issue 1 (2017), p. 26-40., Erika Kovács, "*Regulatory Techniques "Virtual Workers"*", *Magyar Munkajog E-folyóirat/Hungarian Labour Law E-Journal*, Vol. 5. Issue 2 (2017), p. 1-15., Attila Kun, *Munkajogviszony és a digitalizáció – rendszerszintű kihívások és kezdetleges Európai Uniós reakciók*, in: Lajos Pál and Zoltán Petrovics (eds.), *Visegrád 15.0. A XV. Magyar Munkajogi Konferencia szerkesztett előadásai*, Wolters Kluwer, Budapest, 2018, p. 412-415., Ildikó Rácz, "*Munkavállaló vagy nem munkavállaló? A gig-economy főbb munkajogi dilemmái*", *Pécsi Munkajogi Közlemények*, Vol. 10. Issue 1 (2017), p. 82-97.

[5] Proposal for a Directive of the European Parliament and the Council on transparent and predictable working conditions in the European Union. Brussels, 21 December 2017. COM(2017) 797 final (hereinafter: Proposal) p. 13.

[6] György Kiss, *"A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében*", *Jogtudományi Közlöny*, Vol. 68. Issue 1 (2013), p. 1-2. and 4-7.

are not involved in this research, because they have been widely discussed in the Hungarian literature,[7] and because my research is limited to the question of this status, namely whether it can be defined or not, and if yes, then who are involved in this group which is endowed with the rights determined in the LC, also considering the extensive approach of the EU and other countries.[8] I do not aim to extend my analysis to a global or international level,[9] as that would be beyond the frame of my study. Instead, I draw general conclusions, starting with the Hungarian legal situation and examining the EU"s recent legal developments.

2. The importance of the legal status of employees

Continuing the above mentioned introductory thoughts, it is necessary to mention that at first glance it may not be evident who can be considered an "employee" and who is self–employed.[10] In fact, paragraph (1) of section 42 of the LC resolves this apparent contradiction, as the LC defines the employment contract, at least in an implicit way,[11] by determining the essence of work contracts[12] and thus establishing that an employee is any person who works in an employment relationship determined by the LC.[13] It is supported by the legislator"s clear definition of the *essentialia negotii* of work contracts,[14] and the catalogue of prevailing rights and duties of such legal relationships suggests that no employee exists without an employment contract[15] and the rights and duties coming

[7] Nóra Jakab, *A margón és azon túl: Az intellektuális és pszichoszociális élő emberek cselekvőképességéről*, Novotni, Miskolc, 2013 and Jakab, ibid. 2014, p. 131-214.

[8] It means the need for extending the personal sphere protected by labour law. See: Miriam Kullmann, "*Work-Related Securities: An Alternative Approach to Protect the Workforce?*", *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 38. Issue 4 (2018), p. 399-400 and 409-412.

[9] Regarding this perspective, it is Recommendation no. 198 of the International Labour Organisation (hereinafter: ILO) that has primary importance and approaches the basic legal protection of employees through the conceptual elements of the legal relationship. However, this legal document can hardly become relevant in international legislation, due to its soft law character. See Tamás Gyulavári, *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán*, Pázmány Press, Budapest, 2014, p. 35-37. In my opinion, despite the latter concern, this international labour law guidance, intended to be comprehensive, can help orientation regarding international conceptualisation.

[10] Gyulavári, ibid. 2014, p. 61-67., Kiss, ibid. 2013, p. 11-13. and Tamás Prugberger, "*Az önfoglalkoztatás intézménye a nyugat-európai és a magyar munkajogban*", *Magyar Jog*, Vol. 61. Issue 2 (2014), p. 65-71.

[11] For this concept see Zoltán Petrovics, *A biztonság árnyékában. A munkajogviszony megszüntetésével szembeni védelem alapkérdései*, doctorate (Ph.D.) dissertations, Eötvös Loránd University, Faculty of Law, Doctorate School of Law at ELTE University, Budapest, 2016, p. 35.

[12] Kolos Kardkovács (ed.) and Anna Kozma and György Lőrincz and Lajos Pál and Róbert Pethő, *A Munka Törvénykönyvének magyarázata*, HVG-ORAC, Budapest, 2016., p. 115-120.

[13] Despite this naturally strong conceptual bond, there is difference between employee and employment relationship; although it is not sharp contrast due to the above mentioned contextual connection.

[14] Lajos Pál, *A munka értéke, avagy a szőlőmunkás egy dénárja*, in: Zoltán Bankó and Gyula Berke and Erika Tálné Molnár (eds.), *Quid juris? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára*, Curia of Hungary, University of Pécs, Faculty of Law, National Committee of Labour Law Judges, Budapest – Pécs, 2018,p. 337.

[15] It is confirmed by the qualifying marks explained in the joint directive of the Ministry of Employment Policy and Labour and the Ministry of Finance no. 7001/2005. (MK 170.) [hereinafter: Joint Directive 7001/2005. FMM-PM] that deals with the characteristics to be examined when classifying employment contracts and the principle of adjudication based on essence.

from the employee status determine the type of the legal relationship. Consequently, the employee concept of the LC is determined in an indirect way, and it has delineated the legal entity of any working person, on the condition that the legal relationship is within the meaning of the LC. Therefore, a question to answer — at least hypothetically — is what rules are applied for the legal status of the employees who do a work that is identical with the work of this group, but have an irregular legal status, for example self–employed workers, platform workers, etc.

At this point, however, it is arguable that according to the converse it is not evident that there is a real employment contract between the parties, and yet the subordinate party works for the other party for payment. Moreover, although the legal definition of employment relationships can be deduced from the analysis of the aforementioned connections, it is not convincing to connect the existence of the employee status exclusively to the employment contract concept of the LC. Not to mention a dogmatic difficulty that the terms of employment contract and employment relationship can sharply separate from each other,[16] even though the only real *causa* of an employment relationship is the employment contract.[17] As a result, it is still necessary to answer the question — which is apparently and "traditionally" already answered — whether the rights[18] guaranteed by the LC belong to this relatively narrow circle of persons only or, considering the aforementioned dilemmas, there is a more extensive interpretation of the law for these terms. Hereinafter I will seek the answer.

All this means that the labour law regulations are to be applied only in the case of persons who have this status, and every other worker[19] is excluded from this presumably more efficient kind of legal protection, strictly speaking from the point of view of labour law. Although it is the contractual intention and the contractual principle to be considered dominant when determining legal relations,[20] I believe that in this round it is the interpretation of the law instead, because the contractual principle, which is applied in the judicial practice too, has the same basis,[21] though, having a different legal dogmatic origin.

To sum it up, it is clear that as a result of the employment concept of the LC, which covers a rather narrow circle, the legislator has created a sort of arbitrary distinction between the persons who work in some kind of hierarchy, although highlighting the freedom of contract as the organising

[16] In fact, based on section 44 of the LC, an employment relationship can be established even without a lawfully concluded employment contract, although this rule appears to be only subsidiary besides the main rule of the obligatory conclusion of the contracts in writing.

[17] Kozma and Lőrincz and Pál and Pethő, ibid., p. 115.

[18] In fact, the guarantees of the social security provisions, which are strongly connected to it, are also questionable. See Tamás Gyulavári, "*A gazdaságilag függő munkavégzés szabályozása. Kényszer vagy lehetőség?*" *Magyar Munkajog E-folyóirat*, Vol. 1. Issue 1 (2014), p. 12-13.

[19] It does not include the persons employed in the public sector, as they are undoubtedly qualified as "employees" in this sense.

[20] Bill no. T/4786. on the Labour Code, p. 83 and 85., https://www.parlament.hu/irom39/04786/04786.pdf (8 July 2021).

[21] Regarding the most recent practice of the Curia of Hungary, see judgment no. BH2018.13. In point 42 of this judgment, the Curia of Hungary establishes that the contract between the parties shall not be judged based on its name, but of its content (Joint Directive 7001/2005. FMM-PM) and what has to be examined most importantly when judging the legal relationship between the parties is whether their contractual intention was aimed at establishing the employment relationship. The above mentioned qualifying marks can help this examination.

principle.[22] Of course, it is true that it would also be arbitrary if I handled every relationship related to working the same way, based on the same characteristics, but it is exactly my aim to demonstrate this potential diversity of terms and to make suggestions regarding the future.

To highlight this artificial contradiction, I take as an example the opinion number 384/2/2008. TT. of the Consulting Committee for the Prevention of Discrimination on the interpretation of the principle of equal wages for the same work. In connection with this principle, which is considered to be one of the fundamental rules for legal protection in the field of employment,[23] the Committee claims that the principle of equal wages for the same work cannot be discarded for the sole reason of the conceptual — legislative — difference between the legal relationships of working legal entities.

It is also clear from this parallel that the contractual principle is necessarily limited by restrictions that in fact reflect the legislator"s intentions in relations to labour market processes and therefore this kind of discrimination is arbitrary. However, on the other side of the legitimacy dilemma are the clear rules of the LC that I have cited several times and go beyond the freedom of contract of the parties on the one hand and impose strict substantive criteria on the other, when it comes to classifying the legal relationships of workers. In addition, it is not disputable, of course, that all employment relationships fall within the material scope of Act CXXV of 2003 on Equal Treatment and on the Promotion of Equal Opportunities, regardless of their conceptual classification,[24] from which it can be concluded that certain fundamental rights are applicable even in the case of legal relationships that are excluded from the scope of the LC.

To sum it up, it is evident that the employee status is a central element of the concept of employment, and since these are usually judged based on similar conceptual criteria, it is definitely appropriate to infer from the former to the latter. Another important consequence of the aforementioned regulatory and legal interpretation principles is that the qualification as an employee is of great importance for the legal status of the person performing the work in general, for every right that the worker has, as well as for the form and content of the contract. Even so, the idea of the freedom of contract can overshadow these aspects, as the contractual autonomy of the parties is limited in this sense, and it is also important that the definition of the employee status is a central conceptual element of employment. Therefore, I will take into account this interpretation hereinafter.

3. Autonomy of the subjects of the legal relationship — a cause or an effect?

Before discussing a potentially new concept, or at least the question of definability at EU law level, I will briefly outline the duality between the freedom of contract of employees and the specific type constraint governing labour law.[25] In my opinion, both the above reasoning and the

[22] Gyula Berke and György Kiss (eds.), *Kommentár a munka törvénykönyvéhez*, Wolters Kluwer, Budapest, 2014, p. 192-194.

[23] Conventions no. 100, 111 and 156 of the ILO.

[24] Gyulavári, ibid. 2018 (*Internetes munka…*), p. 92-93.

[25] György Kiss, "*Új foglalkoztatási módszerek a munkajog határán – az atipikus foglalkoztatástól a szerződési típusválasztási kényszer versus típusválasztási szabadság problematikájáig*", *Magyar Jog*, Vol. 54. Issue 1 (2007), p. 7-8.

extension of the conceptual scope — as well as the personal scope as a result — of the employment relationship are a matter of today"s scientific discourse, which, according to some, makes this dilemma virtually obsolete due to the idea of the freedom of contract prevailing in labour law, and, according to others, forces the parties to form an employment relationship within a strict framework and in this respect the legal cogency is in fact based on the already mentioned conceptual system of the LC. We can also say that the freedom of contract within the LC competes with that outside the LC, so although the parties are free to decide on their legal relationship, its content is significantly limited by the law, thus it is almost automatically designated who can be an employee and who cannot.

The basic paradigm of labour law regulation is that although the LC leaves no room for dispositivity in many cases and regulates the conduct of the parties towards each other or the way, in which they make their legal declarations with imperative norms that exclude differing, it is not dominant considering the overall character of the regulation.[26] Consequently, one of the important sources of the regulation of the employment relationship is the employment contract itself, which in this sense can be supplemented by the collective agreement,[27] and overall, the LC regulates the contractual relations of the parties using a kind of special authorization. Therefore, all this falls within the field of private contractual autonomy,[28] i.e., the agreement between the employer and the employee is free within the legal framework, with a few exceptions. In fact, the LC presupposes that the intention of the parties at the time of concluding the contract is aimed at concluding the contract and establishing an employment relationship, since the status of employer and employee can only be established this way, and it is established *ex lege*, if there is a consensus between them regarding the scope of duties and the basic wage. In other cases, however, no one may assume the position of employer or employee.

However, the latter context points to a potential contradiction too, as the freedom of contract — based on the classic employee status in relation to the rights of the parties — is in fact limited to a free agreement within the LC, but since it is of outstanding importance, the legislator has only settled the basic criteria regarding the contracting and has left room for the parties for settling numerous points in agreement. Of course, this does not mean that the parties cannot agree on elements outside the LC, but it does mean that a differing agreement cannot be brought within the scope of the LC. In this regard, it will gain importance what conceptual elements and specific features of legal status are attached to the employee status, since the mere fact that the parties do not conclude an employment contract but a different type of agreement does not mean without doubt that they intend to ensure the most basic labour guarantees. However, as I have pointed out several times above, the "employee" can only gain its status through the legal legitimacy of the employment contract, but the question is whether the nature of the work or the relationship between the parties as a conceptual criterion excludes the classification of a looser dependency this way. It does not, according to the principle of the freedom of contract, but the personal and material scope of the LC does, as we do not necessarily consider as a decisive factor the substantive reality of

[26] Kiss, ibid. 2014, p. 59-60 and 72-75.
[27] Kozma and Lőrincz and Pál and Pethő, ibid., p. 67.
[28] György Kiss, *Munkajog*, Osiris, Budapest, 2005, p. 89-90.

individual legal relations and legal statuses, but the exclusivity of the employment. In my opinion, this is exactly one of the disputed situations that may have been resolved by the conceptual category of the "person similar to an employee" in the LC,[29] but its absence points to the conclusion that the concept of "employee" must be interpreted restrictively. In connection with the importance of this legal status, it is necessary to mention that the number of persons working in this form is quite great and that such a regulation would have created a great opportunity for the expansion of labour law regulations.[30]

To sum it up, the private autonomy that is complemented with the parties" freedom of contract is both a cause and an effect, because within the framework of the LC the parties do enjoy a high level of freedom, but not the freedom of shaping the employee status. It is significant, because even using the principle of adjudication based on essence; it is not necessarily possible to clearly identify the conceptual features that characterize only the persons who work under or outside the scope of the LC (regularity, availability, remuneration, etc.). In any case, the LC and the judicial practice are strict and consistent in this respect, but for further reflection, I will briefly review the employee concept of the EU law that is (almost) at a directive level and highlight the possibility of a broader approach to the legal understanding of the employee status.

4. The possibility of creating a uniform employee concept at directive level

Considering the previous examples of labour law in the framework of EU social policy, it seems that a unified regulation is in fact impossible and, in many cases, undesirable as well. Even so, the common labour and constitutional traditions, as well as EU labour law rules together form a solid base that is further strengthened by the relevant case law of the Court of Justice of the European Union (hereinafter: CJEU), which provides a common, consistent and recurring definition of this concept.[31] All this seemed to be quite a starting point when the EU decision–maker decided to create a single concept, and this basis was further strengthened by the legislative desire that cross–border, rapid and significant changes in the labour market actually urged a common interpretation of the concept, for which it was necessary to have a regulation at the directive level to serve as a compass.

If we compare the recently adopted definition[32] with the one that has been recently overwritten,[33] we can immediately draw two conclusions. On the one hand, it is clear that although such a concept in itself is of great importance for the employment

[29] Kiss, ibid. 2013, p. 11-13.

[30] Attila Kun, *Az új munka törvénykönyve*, in András Jakab and György Gajduschek (eds.), *A magyar jogrendszer állapota*, MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, Budapest, 2016, p. 406.

[31] Martin Risak and Thomas Dullinger, *The concept of "worker" in EU law. Status quo and potential for change (Report 140)*, ETUI aisbl, Brussels, 2018, p. 26-39. https://www.etui.org/Publications2/Reports/The-concept-of-worker-in-EU-law-status-quo-and-potential-for-change (8 July 2021).

[32] Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union – Analysis of the final compromise text with a view to agreement Paragraph (2) of Article 1 [28 April 2019] https://data.consilium.europa.eu/doc/document/ST-6188-2019-ADD-1/en/pdf, Directive (EU) 2019/1152 (20 June 2019) of the European Parliament and Council on transparent and predictable working conditions in the European Union (hereinafter: Directive (EU) 2019/1152), paragraph (2) of Article 1.

[33] Proposal p. 13, and point *a)* of paragraph (1) of Article 2.

rules of the Member States, it actually gets its real meaning in conjunction with the concept of employer and employment relationship,[34] since the former has an extensive interpretation, while the latter, understood as the result of the former, is a real novelty. On the other hand, compared to the previous concepts of the Directive,[35] such a regulation can be a radical innovation, as it can regulate basic labour law concepts at the supranational level, i.e., in some cases contrary to national law, but at least not in exactly the same way, which, on the one hand, faithfully reflects the current social aspirations of the European Union,[36] and on the other hand, highlights the contradictions in current practice.

Presumably, this was the intention of the legislator, i.e., throughout the codification process the European Commission sought to create a concept that is truly widely applicable and consistently enforceable and that can provide a positive impetus to the functioning of the labour market, in particular raising the level of legal protection. It is not disputed that if such a uniform use of a term were to become permanent in the EU law, then the Member States would have their hands tied in terms of its interpretation, and in that case restrictive interpretations, such as those developed by the Hungarian law, would have to be reconsidered. It is not a question either that such a regulation in itself would lead to difficulties due to its power and significance as a novelty, so it is worth outlining the judicial practice behind the concept.

The CJEU has and will continue to have a key role to play in this unification process, as the concept, which originally intended to be introduced by the Directive"s Proposal, is largely based on its consistent legal interpretation on the one hand,[37] and on the, other the final text almost entirely identifies consistent European case law as the source of the concept, though doing it in essence and in an implicit way only.[38] The significance of this step is undisputable, even though in this wording the developments of the CJEU may necessarily fall behind the employment contract as interpreted based on national law, as well as behind the employees who are employed under that contract.[39] Even if, in my opinion, these circumstances alone make it more difficult to achieve the goals set by Directive (EU) 2019/1152, I find it remarkable that the case law of the European Court is emphasized in the wording of Directive 2019/1152 in connection with creating such a key concept of employment law that spans

[34] Points b) and c) of paragraph (1) of Article 2 of the Proposal.

[35] See for example the concept based on paragraph (1) of Article 1 of Directive 91/533/EEC of the Council (14 October 1991) on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, which includes paid employees who are employed in accordance with national law, or see paragraph (2) of Article 2 of Directive 96/71/EC of the European Parliament and Council (16 December 1996) concerning the posting of workers in the framework of the provision of services (hereinafter Directive 96/71/EC) that connects the concept of employee to the Member States' laws (manifesting a functional approach from the viewpoint of *posting*).

[36] Sára Hungler, "*Nemzeti érdekek és szociális integráció az Európai Unióban: az Európai Jogok Szociális Pillérének kísérlete az integrációra*", *Állam- és Jogtudomány*, Issue 2 (2018), p. 39-42.

[37] Proposal p. 13.

[38] According to the definitive text, i.e., paragraph (2) of Article 1 of Directive 2019/1152, any person to whom the Directive is to be applied shall have an employment relationship or an employment contract based on the national law, but the case law of the CJEU in this matter shall be taken into consideration.

[39] Although it cannot be certainly concluded from the wording, but the new directive text gives this impression by referring to the national law of Member States as primary source and incorporates the case law of the CJEU as a sort of subsidiary source.

the law of the Member States. Of course, it is easier at this moment to see the difficulties or challenges of this conceptualization as a sort of positive benefits, but since the employee concept of the CJEU is still evolving because of an evolutionary interpretation of the law, the problem remains the same.[40] That is to say, how to define in a uniform way, in a way that can be accepted by the national legislators and that can also be applied advantageously from the point of view of the labour market, which group of people is entitled to the most fundamental labour law rights.

As the final version of the directive can be seen as a major step backwards in this respect,[41] we are in a difficult position when it comes to judging the concept, but I believe that its substance can remain with an open reference to CJEU practice. It is also presumable that the Member States are reluctant to use the original approach due to the conceptualization that is somewhat different from the traditional understanding — though similar in its essence[42] — and developed by the judicial practice to be extensive. This reluctance is understandable in some perspectives, such as the economic and labour market differences between the Member States, but in other aspects, it is incomprehensible. In my opinion, all the EU decision-maker tried to codify a law enforcement solution that is no longer necessarily 100% up-to-date, but is certainly better at "following" economic changes than the exclusive dominance of national rules, when it comes, for example, to the — often not even physical[43] — movement of the labour force across the Member States. To put in other words, the original concept of the Directive was intended only to make the common understanding of labour law in the Member States to find solutions to the labour market, which are already largely present in national law in some form but may not be uniformly regulated or practised from the point of view of labour law and social policy. As a further concern, in addition to the "incomprehensibility" of the Member States" reluctance, I recall that if the Member States reach a consensus on the need for a common and particularly strong regulation of transparent and predictable working conditions,[44] then how can it be argued that the part of the Directive which designates the recipients of these rights should not enter into force?

Of course, to answer this question, one would say that although the common intention of the Member States encompasses the employees" fundamental rights, the States would feel that their legislative freedom would be undermined if they could not decide who should be the recipients of these rights. However, I do not find this answer convincing enough, because if the Member States" legal perceptions do not differ from the traditional employee concept when applying Directive (EU) 2019/1152, then this Directive will become obsolete in

[40] Risak and Dullinger, ibid., p. 40-41.

[41] Bartłomiej Bednarowicz, "*Workers' rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?*", U Law Analysis – Expert insight into EU law developments [28 April 2019], http://eulawanalysis.blogspot.com/2019/04/workers-rights-in-gig-economy-is-new-eu.html (8 July 2021).

[42] Because the work performed for another person, under their control (on a regular basis), in return for remuneration reflects mutatis mutandis the essence of the traditional idea of the employment relationship.

[43] Martin Risak, *Fair Working Conditions for Platform Workers. Possible Regulatory Approaches at the EU Level*, Friedrich Ebert Stiftung, Berlin, 2018, p. 5-7 and 12-19., http://library.fes.de/pdf-files/id/ipa/14055.pdf (8 July 2021).

[44] It is suggested by the regulations of Directive (EU) 2019/1152 regarding the probationary period (Article 8) and regarding the quasi protection of employees from dismissal (Article 18).

many aspects, as the difficult applicability of the original, nearly three–decade long rules can be supported by — among others — a drastic change in the forms of work,[45] and thus the question of the way and the methodology of the regulation will remain. In my opinion, the Member States want to create a specific structure of labour law for the protection of the employees" rights that is essentially lacking in its fundamental nature, because — for the most part — it remains unclear to which persons these rights shall belong.

Despite all these contradictions in the application and interpretation of the law, it is therefore worth briefly addressing the concept developed by the CJEU. Without giving details on the origins or the reasons, there is a general criticism of the concept, namely that it has virtually no regulatory basis or that it can be applied primarily in connection with the right of free movement of workers, and it is difficult to be considered as a general employee concept.[46] At the same time, judicial interpretation has from time to time necessarily revealed cases in which the CJEU had to use a uniform interpretation,[47] thus creating a kind of compromise between the autonomy of the Member States" regulations and the responses to specific practical problems. Its immediate consequence is that the concept itself reflects compromises, as it cannot necessarily cover every category of persons working for remuneration, but still seems to represent in a sufficiently abstract way the conceptual components, which are traditionally cited in relation to the employee concept, thus creating the theoretical and practical foundations of the "uniform" use of the concept. The core of the concept is regular work for another person, under their control, in return for remuneration,[48] and these conceptual elements, on the one hand, truly reflect the traditional approach, but on the other hand, they highlight that it is difficult to judge individual legal relationships on a case-by-case basis, therefore, again, this concept can be considered as an employee concept at the level of EU law only through compromises. It should be noted that the original text of the Proposal for a Directive (EU) 2019/1152 in fact would have solved this problem in a short way by revolutionizing the common use of the concept, as no further legitimacy would be needed in the case of a directive-level concept.

Although the legitimacy base of the concept developed in the judicial practice is indeed questionable,[49] it may be misleading to refer to this concept as a kind of legal definition, as the CJEU originally used it as guide for the cases processed exclusively by the CJEU, and in my opinion it early became obvious that the importance of the common use of the concept goes beyond this.

[45] Valerio De Stefano and Antonio Aloisi, *Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers*, p. 2-6., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125866&download=yes (8 July 2021).

[46] Risak and Dullinger, ibid., p. 17-20.

[47] See typically judgment no. C-270/13. Iraklis Haralambidis v Calogero Casilli [ECLI:EU:C:2014:2185] of the CJEU announced on 09.10.2014, judgment no. C-232/09. Dita Danosa v LKB Līzings SIA [ECLI:EU:C:2010:674] of the CJEU announced on 11.11.2010, points 45-51 and the final conclusions.

[48] Judgment no. C-66/85. Deborah Lawrie-Blum v Land Baden-Württemberg [ECLI:EU:C:1986:284] of the CJEU announced on 07.03.1986, points 12-22.

[49] Stefano Giubboni, "*Being a worker in EU law*", *European Labour Law Journal*, Vol. 9. Issue 3 (2018), p. 225 and 234.

Nothing shows this duality better than that, although it took nearly four decades[50] to recognise the importance and common value of the concept at legislative level, the European Commission has openly undertaken harmonisation,[51] however, in the end, it had to step back from pressure from Member States to revolutionise the concept of employee through direct regulation. Although, the practice of CJEU remained the final legal basis and model for the Member States, holistic modernisation in this respect was lacking. In terms of content, perhaps the regularly recurring nature of work and work under the direction of others should be emphasised.[52] Since they – even starting from the Hungarian practice – are really such special features of employment relationship that they can be crucial when judging the legal relationship of a given person.[53] In any event, the CJEU, using these conceptual elements establishes an employment relationship, either for purely private law,[54] or for a type of legal relationship that is otherwise barely labour relationship[55], which is therefore a guarantee for a sufficiently broad interpretation of the law and an approach different from the current Hungarian legal conception. The concept is less dogmatic and rigid, and focuses more strongly on the person carrying out the work and the rights attached to her or his legal status,[56] which may also be a different approach from the current ones. It should be noted that even the original concept the Proposal for the Directive (EU) 2019/1152 could be criticized, since in terms of its content components, it would indeed have provided a high degree of freedom to interpret the term "employee", but it was not structurally detached from the traditional concept, which can be traced back to the imbalance in the parties" contractual position.[57] This is because working under the direction of another raises the issues of legal status of the self-employed, those who do not work for only one employer, or do entirely online, platform work, etc. since Directive (EU) 2019/1152 intended primarily to bring the legal relationship of those working this way within the scope of the legislation.[58] As the text of the Proposal for the Directive has changed in the meantime, and as the reference to European judicial practice alone is likely to be less important than the stand-alone legislation analysed earlier, the step backwards on the legislative side may delay a dynamic interpretation of the concept, and it will perhaps cover only the legal relations of those working in the traditional form, leaving open, of course, the possibility of conceptual extension on the basis of the CJEU legal interpretation cited.

Although, regulating the legal relations of platform workers at EU level in itself raises legitimacy concerns,[59] in my view, a consistent, extensive interpretation of the concept of employee can only benefit national legislatures and labour markets if it

[50] The relevant test, which is still applicable to this day, was established by the CJEU in 1986 in judgement Lawrie-Blum, cited above.

[51] This can be applied only to this Directive, but thus implicitly to all areas of law governed by EU law.

[52] György Lőrincz, "*Kommentár a Munka Törvénykönyvéről szóló 2032. évi I. törvényhez. Munkajogi SCI-FI*", *Munkajog*, Vol. 2. Issue 4 (2018), 8-9.

[53] Although in the case of the self-employed, working for others may also be questionable.

[54] Judgment no. C-232/09.

[55] Judgment no. C-270/13.

[56] Kullmann, ibid., 402-408.

[57] Otto Kahn-Freund, *Labour and the Law*, Stevens and Sons, London, 1977, p. 6.

[58] Proposal p. 13-14.

[59] Risak, ibid., p. 10-11. and p. 13-17.

actually covers all currently known legal relationships of employment, moreover, it induces such flexible regulation that perhaps "looks to the future" to eliminate such legal dogmatic anomalies as the present ones. However, all this has in practice returned to the competence of the Member States and to the area of consistent, legal developing legal interpretation of the CJEU. I only mention the new *posting directive* [60] which also contains a quasi-concept of worker, but it does not attempt to achieve legal harmonisation, since by the nature of the *posting* regulation it is essential that the conceptual definition would cover only the specific cases of working between the Member States, consequently, it leaves scope for the standards of the Member States.[61] In any case, the fundamental right to free movement of workers links these rules of the Directive to those discussed above, although, the approach is, of course, different.

5. Conclusion

„Employee means any natural person who works under an employment contract."[62] Referring to what was written in the introduction, whether at first glance, is this quoted concept as clear as the concept outlined there? Although the comparison is somewhat hypothetical, as Directive (EU) 2019/1152 by taking a significant step backwards, merely refers to the CJEU"s *concept of "worker"*, yet I believe that a scientific discourse on employee (or worker) status might not be more relevant. It is clear that actors of the labour market are gradually, but firmly, going beyond the legal dogmatic boundaries based on pure theoretical foundations artificially created by the legislator in order to be able to carry out their economic activities in the most useful, efficient (legal) form for them. This process may even lead to that the legislator, placing the often seemingly redundant labour law rules entirely on a private law basis, even more definitely opens the door to absolute private law will autonomy and contractual freedom based on it, which could affect our current knowledge and thinking on labour law from two directions.

On the one hand, the level of the protection of employees in the traditional (social) sense may decrease significantly; on the other hand, the employment relationship or the concept of employee within a strict legal framework may be pushed into the background. According to the present situation, the EU"s labour and social law aspirations are intended to provide conflicting answers to the former phenomenon, while in the latter case labour law thinking may already be at a disadvantage compared to economic reality. Although, in my opinion, the recognition of these connections can really put some parts of the Hungarian labour law system on new funds, I do not think that we need to talk only about real novelties or a 180-degree turnaround right now. However, we can talk about a different, new (labour) legal point of view, since in my opinion the above mechanisms do not contradict each other, but should act as complements to each other (that is, stable social protection combined with effective contractual but not strict status-dependent contractual freedom).

[60] Directive (EU) 2018/957 of the European Parliament and of the Council (28 June 2018) amending Directive 96/71 /EC concerning the posting of workers in the framework of the provision of services.

[61] Paragraph (2) of Article 2 of Directive 96/71/EC links the concept of worker to the legislation of the Member State concerned.

[62] Paragraph (1) of section 34 of the LC.

In my view, it follows from the above that a creative attitude of legislators and law enforcers is needed to understand and resolve the dilemma outlined in this study, because in many respects it may seem that we want to solve a – for the time being – non-existent or only marginally present problem with legal instruments that are either at our disposal, only in the traditional way, or not in the right place. Nevertheless, the divergent national and EU – and international – approaches certainly culminate in breaking down the strict, dogmatic barriers, which may not, of course, lead to the legal impossibility or narrowing employee status, but to the extension of the personal scope of labour law rules, strengthening basic social protection instruments. Naturally, the search for new paths is always risky and uncertain, so it can be argued that the traditional toolbox may in fact be appropriate to achieve the goal, but this would necessarily result loosening the traditional catalogue of criteria (such as FMM-PM Joint Directive 7001/2005). Namely, the new regulatory paths may not be entirely new in fact, but hitherto unknown branches of the old ones, as it was already observed in labour law during the period of atypical employment, but the legislative support of self-employment as a legal status allows a similar conclusion. In any case, a dynamic conception of the concept of employee could certainly be part of this solution instead of the current static approach.

Finally, I would like to point out that it is conceivable that due to the apparent withdrawal of Directive 2019/1152 and the small presence of various "modern" types of legal relationships in Hungary, the thought experiment of the present study is distant. Just as the idea of introducing, an "intermediate" legal status has already arisen during the codification of the current LC and as we regard the content components of labour relationship, similarly, we may soon take the not-too-big step of replacing "employee" status with "worker" status in response to real, dynamic changes in this concept in the labour market. In conclusion, I believe that it is perhaps time to unfold the other side of the idea of contractual freedom, which is central to LC and to general labour law thinking today, that is, not only in the strictly "employment relationship" but also in the "legal relationship of work" in general, to give the contracting parties the opportunities offered by the labour law toolkit. The 21st century labour market changes are likely to make this phenomenon inevitable in the coming years.

References

- Bartłomiej Bednarowicz, "Workers" rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?", U Law Analysis – Expert insight into EU law developments [28 April 2019], http://eulawanalysis.blogspot.com/2019/04/workers-rights-in-gig-economy-is-new-eu.html (8 July 2021);
- Gyula Berke and György Kiss (eds.), Kommentár a munka törvénykönyvéhez, Wolters Kluwer, Budapest, 2014;
- Valerio De Stefano and Antonio Aloisi, Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers, p. 1-22., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125866&download=yes (8 July 2021);
- Stefano Giubboni, "Being a worker in EU law", European Labour Law Journal, Vol. 9. Issue 3 (2018), p. 223-235;

- Sára Hungler, "Nemzeti érdekek és szociális integráció az Európai Unióban: az Európai Jogok Szociális Pillérének kísérlete az integrációra", Állam- és Jogtudomány, Issue 2 (2018), p. 36-52;
- Tamás Gyulavári, "Uber sofőrök és társaik: munkavállalók vagy önfoglalkoztatók?", Jogtudományi Közlöny, Vol. 74. Issue 3 (2019), p. 104-118;
- Tamás Gyulavári, "Az Európai Bíróság és a gordiuszi csomó: az Uber applikáció vagy taxitársaság?", Munkajog, Vol 2. Issue 2 (2018), p. 8-12;
- Tamás Gyulavári, "Internetes munka a magyar jogban – Tiltás helyett szabályozás?", Pro Futuro, Vol. 8. Issue 3 (2018),p. 83-95;
- Tamás Gyulavári, "A gazdaságilag függő munkavégzés szabályozása. Kényszer vagy lehetőség?" Magyar Munkajog E-folyóirat, Vol. 1. Issue 1 (2014), p. 1-25;
- Tamás Gyulavári, A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán, Pázmány Press, Budapest, 2014;
- Nóra Jakab, A munkavállalói jogalanyiság munkajogi és szociális jogi kérdései, különös tekintettel a megváltozott munkaképességű és fogyatékos személyekre, Bíbor, Miskolc, 2014;
- Nóra Jakab, A margón és azon túl: Az intellektuális és pszichoszociális élő emberek cselekvőképességéről, Novotni, Miskolc, 2013;
- Nóra Jakab and Henriett Rab, "A munkajogi szabályozás foglalkoztatási viszonyokra gyakorolt hatása a szociális jogok és a munkaerőpiac kapcsolatának függvényében", Pro Futuro, Vol. 7. Issue 1 (2017), p. 26-40;
- Otto Kahn-Freund, Labour and the Law, Stevens and Sons, London, 1977;
- Kolos Kardkovács (ed.) and Anna Kozma and György Lőrincz and Lajos Pál and Róbert Pethő, A Munka Törvénykönyvének magyarázata, HVG-ORAC, Budapest, 2016;
- György Kiss, "Új foglalkoztatási módszerek a munkajog határán – az atipikus foglalkoztatástól a szerződési típusválasztási kényszer versus típusválasztási szabadság problematikájáig", Magyar Jog, Vol. 54. Issue 1 (2007), p. 1-14;
- György Kiss, Munkajog, Osiris, Budapest, 2005;
- György Kiss, "Foglalkoztatás gazdasági válság idején. A munkajogban rejlő lehetőségek a munkajogviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok)", Állam- és Jogtudomány, Vol. 55. Issue 1 (2014), 36-76;
- György Kiss, "A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében", Jogtudományi Közlöny, Vol. 68. Issue 1 (2013), p. 1-14;
- Erika Kovács, "Regulatory Techniques „Virtual Workers"", Magyar Munkajog E-folyóirat/Hungarian Labour Law E-Journal, Vol. 5. Issue 2 (2017), p. 1-15;
- Miriam Kullmann, "Work-Related Securities: An Alternative Approach to Protect the Workforce?", International Journal of Comparative Labour Law and Industrial Relations, Vol. 38. Issue 4 (2018), p. 395-412;
- Attila Kun, Az új munka törvénykönyve, in András Jakab and György Gajduschek (eds.), A magyar jogrendszer állapota, MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, Budapest, 2016, p. 385-414;
- Attila Kun, Munkajogviszony és a digitalizáció – rendszerszintű kihívások és kezdetleges Európai Uniós reakciók, in: Lajos Pál and Zoltán Petrovics (eds.), Visegrád 15.0. A XV. Magyar Munkajogi Konferencia szerkesztett előadásai, Wolters Kluwer, Budapest, 2018, p. 389-416.
- György Lőrincz, "Kommentár a Munka Törvénykönyvéről szóló 2032. évi I. törvényhez. Munkajogi SCI-FI", Munkajog, Vol. 2. Issue 4 (2018), 1-16;
- Lajos Pál, A munka értéke, avagy a szőlőmunkás egy dénárja, in: Zoltán Bankó and Gyula Berke and Erika Tálné Molnár (eds.), Quid juris? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára, Curia of Hungary, University of Pécs, Faculty of Law, National Committee of Labour Law Judges, Budapest – Pécs, 2018,p. 335-356;

- Zoltán Petrovics, A biztonság árnyékában. A munkajogviszony megszüntetésével szembeni védelem alapkérdései, doctorate (PhD) dissertations, Eötvös Loránd University, Faculty of Law, Doctorate School of Law at ELTE University, Budapest, 2016;
- Tamás Prugberger, "Az önfoglalkoztatás intézménye a nyugat-európai és a magyar munkajogban", Magyar Jog, Vol. 61. Issue 2 (2014), p. 65-71;
- Tamás Prugberger and György Nádas, Európai és magyar összehasonlító munka- és közszolgálati jog, Wolters Kluwer, Budapest, 2015;
- Ildikó Rácz, "Munkavállaló vagy nem munkavállaló? A gig-economy főbb munkajogi dilemmái", Pécsi Munkajogi Közlemények, Vol. 10. Issue 1 (2017), p. 82-97;
- Martin Risak, Fair Working Conditions for Platform Workers. Possible Regulatory Approaches at the EU Level, Friedrich Ebert Stiftung, Berlin, 2018, http://library.fes.de/pdf-files/id/ipa/14055.pdf (8 July 2021);
- Martin Risak and Thomas Dullinger, The concept of „worker" in EU law. Status quo and potential for change (Report 140), ETUI aisbl, Brussels, 2018, https://www.etui.org/Publications2/Reports/The-concept-of-worker-in-EU-law-status-quo-and-potential-for-change (8 July 2021);
- Act I of 2012 on the Labour Code;
- Bill no. T/4786. on the Labour Code, https://www.parlament.hu/irom39/04786/04786.pdf (8 July 2021);
- Convention no. 100 of the International Labour Organization;
- Convention no. 111 of the International Labour Organization;
- Convention no. 156 of the International Labour Organization;
- Directive (EU) 2019/1152 (20 June 2019) of the European Parliament and Council on transparent and predictable working conditions in the European Union;
- Directive 2018/957/ EU of the European Parliament and of the Council (28 June 2018) amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services;
- Directive 91/533/EEC of the Council (14 October 1991) on an employer"s obligation to inform employees of the conditions applicable to the contract or employment relationship;
- Directive 96/71/EC of the European Parliament and Council (16 December 1996) concerning the posting of workers in the framework of the provision of services;
- Joint directive of the Ministry of Employment Policy and Labour and the Ministry of Finance no. 7001/2005. (MK 170.);
- Judgment no. BH2018.13. of the Curia of Hungary;
- Judgment no. C-232/09. Dita Danosa v LKB Līzings SIA [ECLI:EU:C:2010:674] of the CJEU announced on 11.11.2010;
- Judgment no. C-270/13. Iraklis Haralambidis v Calogero Casilli [ECLI:EU:C:2014:2185] of the CJEU announced on 09.10.2014;
- Judgment no. C-66/85. Deborah Lawrie-Blum v Land Baden-Württemberg [ECLI:EU:C:1986:284] of the CJEU announced on 07.03.1986;
- Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Brussels, 21 December 2017. COM(2017) 797 final, https://data.consilium.europa.eu/doc/document/ST-6188-2019-ADD-1/en/pdf. (8 July 2021);
- Recommendation no. 198 of the International Labour Organisation.

COMPARATIVE ANALYSIS OF THE FRENCH AND CZECH REGULATION OF THE TAXATION OF DIGITAL COMPANIES

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Abstract

The aim of this paper is to give a brief introduction to digital taxation, by referring to the supranational legislation and the problems arising from its loopholes, such as double taxation, tax erosion and tax avoidance. Due to the fact that it is difficult to create a binding, widely accepted legal instrument on a global and even on a European level, national legislations targeting digital companies are worth considering. Therefore, the paper aims to point out the most important aspects of such a regulation, focusing on the French and the Czech law. The importance of the French law on digital taxation is significant, as it is the first attempt at national level in Europe to offer a solution for the issue. The Czech law was chosen to represent a Central European perspective of digital services, as it could be an example for other states in Central and Eastern Europe in the future.

Keywords: *international tax law, digital servies tax, double taxation, European Union directive, tax harmonisation.*

1. Introduction

The technological innovations of the 20th century brought radical changes in economic life, which have challenged not only businesses but also legislators. The previous economic regulation that was based on the physical market presence, but the so-called "brick and mortar" economy no longer provides a sufficient basis to address the challenges posed by the globalization of the economy. These issues raise questions in a number of areas of law, such as data protection, the protection of interests, jurisdiction or supervision. The most important legal aspect for the present research paper is the examination of problems related to tax regulation, as differences in national regulations can cause several problems at international level.

The problems arise from the worldwide expansion of online companies that do not require presence production. Digital companies providing cross-border services take advantage of gaps and loopholes of inconsistent national regulations, which states seek to resolve between themselves through bilateral agreements. However, the expansion of digital companies is advancing at a faster pace than legislation, so the issues of double taxation, double non-taxation, tax evasion and tax avoidance could be more difficult to be solved by agreements that are binding for two states each. Even though the problem has been recognized at a higher level and there are comprehensive proposals (formulated by the OECD or the European Union), they do not have a coercive nature.The BEPS Action Plans issued by the

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OECD primarily offer a solution strategy to eliminate harmful tax practices, such as double taxation, double non-taxation, tax evasion and tax avoidance.

We believe that national regulations targeting specifically digital companies and offering modern solutions for digitalization could be a great example for a consistent and harmonized multilateral regulation. These national examples, however, could sparsely be found. Among these, the French and Czech regulation should be highlighted: through the comparison of these two tax policies and the examination of their compliance with the draft directive of the European Union, we aim to point out the possible directions for future digital taxation.

Although several states – such as the United Kingdom, Italy or Spain – are drafting legislation to introduce a digital services tax, along with the French legislation, that was the first to be adopted in Europe, we have chosen the tax regulation of the Czech Republic, a state that represents well the countries of the Central European region. The presentation of the draft directive of the European Union is inevitable, since, as we have pointed out above, this is primarily the source of law which, although it has not entered into force, is taken into account by the legislators when drafting national regulations.

The focus of the paper is on the comparison of national legislations. The national laws are going to be compared regarding taxpayers, tax subject, tax base, tax rate and the system of tax benefits and exemptions. Besides the motivations for lawmaking, we also list the international responses to them (from third countries), pointing out the complexity of the problem. After examining the regulations, we try to find an answer to the question of whether it is necessary or possible to create a harmonized supranational legislation, or whether it is possible that the solution rather resides in the adoption of unilateral national laws.

2. The phenomenon of the digital economy and related tax issues

Economic activities based on the use of digital technologies are collectively referred to as the digital economy,[1] which results in day-to-day online connections between billions of people, businesses, devices, data, and processes. This interconnection is mainly made possible by the Internet and other ("smart") digital technologies. The digital economy is constantly evolving and is essentially undermining traditional frameworks for building businesses, collaborating with each other and acquiring services.[2]

Certain researches distinguish three areas of the digital economy,[3] which can be summarized as follows. The first component is the infrastructure of the e-business through which the various economic processes are executed. These include

[1] It shall be noted, however, that digital economy does not have a clarified, generally accepted definition. The notion itself appeared in the liternature in the 1960s, and certians use it as a synonym for 'internet economy' or 'web economy'. The notion gained real meaning from the 1990s, when the use of internet spread rapidly. See: IMLAH, Bill: The Concept of a 'Digital Economy', Oxford Digital Economy Collaboration Group, 2 September 2013. Available: https://web.archive.org/web/
20131022003036/http://odec.org.uk/the-concept-of-a-digital-economy/ (2020.05.10.)

[2] What is digital economy? Unicorns, transformation and the internet of things. *Deloitte*, 2020. Available: https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html (2020.05.10.)

[3] Mesenbourg, T.L.: Measuring the Digital Economy, U.S. Bureau of the Census, Suitland, Maryland (USA), 2001, pp. 3-5.

various telecommunication networks and devices, as well as human resources. The second component is the e-business itself, which includes all the processes that an organization conducts on telecommunication devices, such as sales, advertising, or logistics. Thirdly, e-commerce shall be mentioned, which means the sale of goods and services through computer network. Computer networks are connected and communicate with each other in an interactive way.

The economic processes carried out through Internet have brought elements to the economy that the formerly operating, so-called traditional economic model did not make possible: platforms like Amazon, Uber, Airbnb are able to connect between economic operators in different parts of the world – there had not been the mere possibility of this before the spread of the Internet. Moreover, it has created a "virtual reality" that does not require ~~neither~~ either physical presence ~~n~~or cash payment. In addition, fewer tangible assets, existence and expansion in more and more countries are needed.[4]

The digital economy brought changes not only for economic actors – the analysis of which goes beyond the scope of this paper – but also poses new challenges for legislators. As digitalisation is a cross-border phenomenon,[5] restructuring international regulation and financial law (taking into account the nature of services, considerating consumer interests first) is essential.[6]

Key issues related to the taxation of digital companies include double taxation, double non-taxation, tax evasion and tax avoidance.

The opportunity to enter the market has increased significantly, given that it has a relatively low cost compared to the previous traditional market model, allowing a wider range of participants to engage in the digital economy.The previous regulation was based on the so-called "brick and mortar" economy,[7] which is physically present on the market with production units, shops and warehouses. However, technological development and digitalisation, have radically transformed the economy, which raises the following problems. First, a foreign seller or service provider does not pay the tax of its profits in the country where the customers are located, but in the service provider"s country of residence or another "source country" where the service activity is performed by the company. Secondly as a consequence, not only the taxpayer"s domicile, but any country where the taxpayer maintains production sites in a broad sense, including data centers or R&D departments, may claim tax under its own legislation.[8] Thirdly, due to the extremely rapid growth of the digital sector, an increasing share of Internet companies" business income from cross-border sales or services may not be taxed eventually.

[4] Armstrong, Brian: The digital economy is becoming ordinary. Best we understand it, *The Conversation*, 24 January 2020. Available: https://theconversation.com/the-digital-economy-is-becoming-ordinary-best-we-understand-it-130398 (2020.05.10.).

[5] Chohan, Usman W.: Some Precepts of the Digital Economy, Critical Blockchain Research Initiative (CBRI) Working Papers, 2020. pp. 4-6.

[6] Nagy Zoltán: A digitalizáció hatása a pénzügyi piac szabályozására, *Miskolci Jogi Szemle*, Vol. 15., No. 1., 2020, pp. 24-25.

[7] The term referrs to the fact that the production of these companies are carried out in a physical form.

[8] OECD: Tax Challenges of Digitalisation: Comments Received on the Request for Input, PWC – Comment, Part II, 25 October 2015., p. 2, 195 para. 1.5.

The presence of digital companies thus poses unprecedented challenges to both the economy and law, envisioning a reconsideration of tax law rules. Such a category is, for instance, the principle of "place of value creation", which seeks to justify the validity of the right to tax based on where and in which country the digital company provides the service. The core activities of value creation are mostly user-generated content and data collection, which can be strongly linked to intangible assets.[9] Since it is a rather new concept, its notions are not completely developed, and neither the value created nor the the place of its production can be clearly defined, therefore, the states do not consider taxation based on this principle mandatory.[10]

Businesses, which include digital companies, are subject to corporate tax. Corporate tax shall be paid not only by companies governed by domestic law or operating from domestic sources, but also by any company, possibly foreign, which has a permanent establishment in the country and manufactures the product there. According to the literature, companies under domestic law have legal personality, although which entities (associations, foundations, churches) are considered as such by the state varies from country to country.[11] However, a common element of all regulations is the definition of the tax object to which the taxation itself is directed: this is the business activity that the company carries out. This is problematic to define ~~it~~ in the case of a digital company, since it is difficult to clarify what kind of activity they do, what kind of product they produce, and where they carry out their activity. Due to online connection, a digital company can operate in all continents of the world, but this does not necessarily require an actual physical presence.[12] In this case, in which country shall corporate tax be paid? Is it where the place of business is located, or is it where business is done or where they are digitally present?

The problem is further shaded by the fact that local tax rules do not offer a sufficient solution for the cross-border activities of digital companies. The determination of tax policy is a significant component of state sovereignty, however, cooperation between regulations at national level is essential in order to avoid certain loopholes or inconsistencies. Nevertheless, legislators are trying to find a solution that does not undermine this sovereignty at all, while it takes into account factors such as economic growth, employment rates, competitive neutrality and non-discrimination.[13] Accordingly, bilateral agreements seek to resolve disputes by sharing regulatory competences (even though these conventions do not set out specific rules for digital activities). In most cases, however, digital companies are not present in just two states, so a higher level of

[9] Stevanato, Dario: Are Turnover-Based Taxes a Suitable Way to Target Business Profits?, *European Taxation*, November 2019, pp. 544-545.

[10] Schön, Wolfgang: Ten Questions about Why and How to Tax the Digitalized Economy, *Bulletin for International Taxation*, April-May 2018, pp. 278-280.

[11] Harris, Peter: Corporate Tax Law: Structure, Policy and Practice, Cambridge University Press, 2013, pp. 22-31, 35-37.

[12] It shall be noted as an example that certain companies, such as Google or Facebook, are present in more than fifty countires all over the world. Source: https://about.google/locations/?region=north-america&office=mountain-view; https://www.theguardian.com/technology/blog/2010/jul/22/facebook-countries-population-use (2020.09.12.).

[13] Marján Attila: Az Európai Unió gazdasága, HVG Kiadó Rt., Budapest, 2005, p. 335.

supranational regulation is needed.[14] The Organization for Economic Co-operation and Development (hereinafter referred to as: OECD) and the European Union are trying to addressthis issue.

As it had been pointed out above, digital companies operate in two or more countries, so a supranational level of regulation could provide a proper solution to their tax problems. While the OECD tends to issue proposals, model conventions and guidelines,[15] the European Union has the means to set binding rules, although rulemaking is rather slow due to the tax sovereignty of the Member States.

The right to tax is a key issue for digital companies because – even though the Union delegates corporate tax regulation to national level – the problems they raise cannot be linked to one or two states and cannot be resolved by national laws. The issue of double taxation, that is presented below, typically involves two states, since in this case, two states equally claim the corporate tax. Similarly, action by several states is required to resolve tax evasion, as a result of which no tax is paid to any states. Currently, there is no regulation at international nor EU level that would clearly define how these regulatory competences shall be shared between Member States, as the Union seeks to respect the sovereignty of taxation. However, insistence ~~to~~ on sovereignty would make it more difficult to create uniform regulations and it also blocks legal harmonization and, in the long run, integration. It should be noted that the issue of national sovereignty versus integration is also a political and economic dilemma that arises not only in relation to taxation.[16]

3. Attempts to solve the problem of digital taxation

3.1. European Union

The initiative of the European Union is worth mentioning: it does not address problems of digital taxation (double taxation, tax evasion or tax avoidance) one by one but – similarly to BEPS – digital services as a whole. In 2018, a proposal for a common system of digital service taxes was drafted, but it has not yet entered into force.[17] The most important objectives and provisions could be summarized as follows.

The subject matter of the draft directive extends to digital companies, for which user participation is a basic input that generates revenue, that is to say, these companies would not be able to exist in their current form without user consent. Such services include, for instance, the placement of advertisements, the provision of broadcasting services, the collection and transmission of data, which are carried out for remuneration. The proposal specifically targets large companies with worldwide revenues of more than € 750 million and € 50 million in the EU. Since the proposal considers user participation as value

[14] OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013. pp. 9-11. Available: http://dx.doi.org/10.1787/9789264202719-en (2020.09.12.).

[15] OECD: Who we are. Available: https://www.oecd.org/about/ (2020.09.13.).

[16] Faulhaber, Lilian V.: Sovereignty, Integration and Tax Avoidance in the European Union: Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance, *Columbia Journal of Transnational Law*, 2009-2010, pp.221-224.

[17] It should be noted that the European Union also envisaged the introduction of digital services tax in its forthcoming draft recovery budget, but refers back to the provisions of the 2018 draft directive for the details, so the 2018 proposal will be discussed in the paper and not the 2020 budget plan. See: EUROPEAN COMMISSION: The EU budget powering the recovery plan for Europe Communication from the Commission, Brussels, 27.5.2020., COM(2020) 442 final.

creation, it indicates the location of users as the place of taxation.[18]

According to the literature, this draft directive raises several concerns.Firstly, it does not address the issue of tax competences – although the EU would only have the right to regulate indirect taxation, this draft cannot be considered as a means of indirect taxation, as it would not collect the tax from final consumers but clearly from the company. Consumers could not be considered as a stable base for taxation, as one of the basic principles of taxation is activity based taxation.[19]

Secondly, the idea of determining the tax base on the basis of the financial capacity of the company, instead of the company"s income or profits, might bring up issues of discrimination . This taxation method does not take into account capital assets invested as means of targeting surplus profits but focuses exclusively on turnover, which in itself does not necessarily constitute a reliable solvency indicator. It is possible that the costs of the business exceed the income, generate a loss, or the profit is not sufficient to meet the tax obligations. In such cases, the financial capacity of the company is not a relevant category, as the tax can only be paid to the detriment of the capital.[20] The provisions of the draft also raise the issue of discrimination, as it clearly distinguishes between companies: not only by targeting digital companies, so that those carrying out the same or a similar activity offline (in other words, not by digital means) would not be taxable, but also by taxing the highest-income companies, which puts them at a disadvantage compared to companies that are present on the market but do not reach a certain income threshold.[21] In order to avoid discrimination, it would be important for decision-makers to justify the need for setting an income threshold criteria, especially because the tax would mainly affect American companies rather than European ones.[22]

Thirdly, the proposal does not include a specific action plan for the elimination of double taxation and tax evasion.It mostly seeks to coordinate the proposal with existing instruments, that are bilateral and multilateral agreements.

Fourthly, the adoption of the proposal for a directive is also hampered by the need for unanimous support from the Member States. Some points harm the interest of certain Member States: some, such as France, Italy or Spain, seek to introduce their own digital services tax, while in other countries these kind of aspirations are rather put into the shade.[23] Member States also fear

[18] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 3 (1), 4 (1)-(4), 5 (1).

[19] The OECD-BEPS directive is based on the principle of value creation: it essentially indicates the place where the economic activity is carried out. In our opinion, consumer participation should not be considered an economic activity, as Google or Facebook users use the services of these interfaces for their own benefit, there is usually no movement of assets between the digital company and users, so using services is not an economic activity for users. Source: Becker, Johannes – Englisch, Joachim: Taxing Where Value is Created: What's 'User Involvement' Got to Do With It?, *Intertax*, Vol.47/2. 2019, pp.161-171.

[20] Stevanato, Dario: ibid., pp.538-540.

[21] Károlyi Balázs – Szudoczky Rita: Progressive Turnover Taxes under the Prism of the State Aid Rules: Effective Tools to Tax High Financial Capacity or Inconsistent Tax Design Granting Selective Advantages?, *European State Aid Law Quarterly*, 2020/3, pp.253-255.

[22] Károlyi Balázs – Szudoczky Rita: The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax, *Intertax*, Vol. 48/1. 2020., p.54.

[23] Gough, Simon – Polacco, Giuliana –Dorin, Sophie – Turrado, Montserrat – Bongaerts, Willem – Sikora, Bartlomiej: Digital Services Tax: Overview of the progress of implementation by EU Member States, *Bird&Bird*,

that their fiscal sovereignty would be threatened, therefore they argue against the proposal that it would interfere strongly with market conditions, which are not allowed by the EU Treaties. It has been argued that the EU can only monitor the functioning of the market but it certainly cannot shape it.[24] Although the EU proposal has not yet been adopted, in any case, the fact that there is a recognition at Community level of the need for a regulation on the taxation of digital companies is extremely forward-leaning.

3.2. The French model: the GAFA regulation

On 11 July 2019, for the first time in Europe, the French Parliament adopted a law on the taxation of digital companies. The so-called GAFA tax primarily targets the four largest dot.com (digital) companies – Google, Apple, Facebook and Amazon.[25]

The French state, exercising its sovereignty, aims to decide on its own tax matters. However, it was pointed out during the parliamentary debate that the law serves as a kind of C-plan, behind international and European Union regulations, which, as previously presented, have not entered into force yet. Therefore, the French Government does not wish to take away the competences of the higher-level legislators but seeks to temporarily fill the legal gap.[26] Consequently, if there were international or EU rules, they would take precedence over the French rules.[27]

Although the bill has already been adopted, negotiations are still ongoing with the OECD, but the United States (which participated in the negotiations through its Trade Representative (USTR)) suspended negotiations with France on 17 June 2020, due to the disadvantage that the regulation would bring to American companies; moreover, they also envisioned drastic taxation of French import products. The case also provoked resistance from Google and Amazon: the companies called the French provisions a brutal break with the previous, long-standing rules, which, according to them, result in a discriminatory tax.[28] It should be noted, however, that the tax is not limited only to American companies: about 50% of the 120-150 companies involved are American, 30% European, and 20% Asian. According to some French experts, the introduction of a tax targeting large US companies would severely affect emerging European and even French companies, as it

July, 2020. Available: https://www.twobirds.com/en/news/articles/2019/global/digital-services-tax-overview-of-the-progress-of-implementation-by-eu-member-states (2020.09.16.).

[24] Greggi, Marco: La tassazione dell'economia digitale nel contesto europeo: la proposta di direttiva sulla Digital Services Tax, in: Persiani, Alessio: La tassazione dell'economia digitale tra sviluppi recenti e prospettive future, Neu-Nuova Editrice Universitaria, Rome, 2019, p.103.

[25] Le Parlement adopte définitivement la « taxe Gafa », contestée par les Etats-Unis. Available: https://www.lemonde.fr/economie/article/2019/07/11/le-parlement-francais-adopte-definitivement-la-taxe-gafa-contestee-par-les-etats-unis_5488135_3234.html (2020.09.21.)

[26] Sadowsky, Marlyne: French perspectives on the Digital Services Tax (DST), *Tijdschrift voor Fiscaal Recht*, May 2020, p.427.

[27] Rapport de la commission mixte paritaire chargée de proposer un texte sur les dispositions restant en discussion du projet de loi portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, n° 2080, 26 June 2019. Available: http://www.assemblee-nationale.fr/dyn/15/rapports/1737/l15b2080_rapport-fond# (2020.09.21.)

[28] La taxe numérique française « discriminatoire » selon Google, Facebook, Amazon. Available: https://www.lemonde.fr/international/article/2019/08/20/la-taxe-numerique-francaise-discriminatoire-selon-google-facebook-amazon_5500850_3210.html (2020.09.21.).

could retard their development – thereby damaging the state"s own economy.[29]

3.3. The Czech proposal

On 18 November 2019, the Czech government submitted a draft bill to the Parliament on the taxation of digital companies. This move seems ambitious, not only because the French law could be the only precedent but also because the proposal is expected to provoke fierce protests and sanctions by the United States. The need for national regulation in this case also emerges from the lack of regulation at EU level. The Czech government emphasized that the bill would fill a gap and it was designed specifically to take into account Central European economic conditions.[30] The Czech Ministry of Finance justified the introduction of the digital tax on the grounds that it would be compatible with the regulation of the taxation of companies operating in different ways, whether digitally or in presence, therefore, the company"s way of operating would not favor or disadvantage certain market participants. However, finding the right balance is not easy, as digital companies would be at a disadvantage compared to other offline companies as long as all states where these companies operate on a digital platform do not introduce a similar tax at the same tax rate.[31] It can be concluded that the digital services tax, although its primary purpose is to compensate for a market-distorting phenomena, is in fact market-distorting itself due to global activity, as long as states act unilaterally with their national regulations instead of setting up a common multilateral approach.

It should be noted that, according to the United States, it is not national regulation that is needed, but collective action, while temporary digital taxes, which vary from country to country, only complicate market conditions. The US, as in the case of France, has warned the Czech Republic that if a tax targeting US companies is introduced, it will also tighten import regulations on Czech products in response. From the American part, it has been argued that the tax threatens the competitive business environment: not only is it discriminatory, as it targets only large companies, but it also has a market-distorting effect as it imposes a disproportionate burden on foreign companies.[32] As a result, for both France and the Czech Republic, the question of how much it is worth introducing this tax arises: the amount the states would gain from it may be significant, but they could also lose at least as much in the future as a result of strict US trade regulations.[33]

3.4. The French and the Czech (draft) regulation in the light of the draft directive of the European Union

The two national regulations presented above are going to be compared and their

[29] Marques, Nicolas: La taxation française des services numériques un constat erroné, des effets pervers, Institut Économique Molinari, Paris-Brussels, 2019, p.29.

[30] Žurovec, Michal: Návrh zákona o digitální dani míří do Sněmovny, Ministerstvo financí České republiky,18 November 2019. Available: https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2019/navrh-zakona-o-digitalni-dani-miri-do-sn-36638 (2020.10.07.).

[31] Hrabčák, Ladislav – Popovič, Adrián: On certain issues of digital services taxes, *Financial Law Review*, No. 17 (1)/2020., pp.63-64.

[32] Wágner Tamás Zoltán: A digitális adók kérdése, különös tekintettel a cseh szabályozásra, *Külügyi Műhely*, 2020/1., pp.112-116.

[33] Česko plánuje digitální daň, Američané se zlobí, Svět průmyslu, 11 April 2020. Available: https://svetprumyslu.cz/2020/04/01/cesko-planuje-digitalni-dan-americane-se-zlobi/ (2020.10.07.).

compliance with the draft directive of the European Union will be examined on the basis of the following comparative criteria: taxpayers, tax subject, tax base, tax rate, tax benefits and tax exemption system.

Taxable persons are natural persons, legal persons or unincorporated partnerships and other organizations which, due to the pursuit of a taxable activity, realize the facts of the tax liability by themselves. A taxable activity is an economic activity carried out on a regular basis in order to get remuneration.[34]

In accordance with the above-mentioned, the scope of the EU draft directive extends to certain categories of digital service companies (higher income companies).[35] By setting the threshold, the Union seeks, on the one hand, to create legal certainty by forcing undertakings to keep separate records of their income from the activities covered by the tax in question. On the other hand,it excludes start-ups and small businesses whose income is clearly below a certain threshold, as they would be disproportionately burdened by the payment of such a tax. The tax liability applies regardless of whether the company is established in a Member State or in a third country.[36]

The issue of the taxable person is closely related to the place of taxation, which – as we have pointed it out above – would be the place of residence of the consumers. The definition of residence depends on the activity: in the case of advertising companies, it is the Member State in which the consumer is present at the time the advertisement is viewed; in the case of consumer interconnection companies, it is the Member State where the consumer concludes the transaction; in the case of the transmission of collected data, it is the Member State of residence shall be the Member State where the consumer was present when the data were collected.[37]

The French law also sets out the conditions for a company"s income: it deals with companies whose income exceeds € 750 million at an international level and € 25 million in France. We can see that the threshold for global action is the same as that set out in the draft directive of the EU, and the threshold for a country is half that of the EU. This is essentially compatible with the EU draft. Businesses, regardless of their form or location, can be subject to the tax if they are established in accordance with French commercial law. The link between the company and taxation is also established by the user: the company is considered to be subject to the law if the user communicates with it via a terminal that is located in France.

The law, like the EU directive, which generally targets digital, non-physical companies, defines the activities that can be used to identify which entities become subject to the digital tax. These activities are the following:

- providing a digital interface[38] through electronic communication that allows users to communicate with other users, in particular for the delivery of goods or the supply of services. However, this activity is not taxable if the interface is

[34] Herich György: Adótan, Penta Unió, Budapest, 2019, p.28.

[35] Of which the annual income exceeds € 750 million worldwide and € 50 million in the European Union, as it had been pointed out previously.

[36] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 4.

[37] Kofler, Georg – Sinnig, Julia: Equalization Taxes and the EU's 'Digital Services Tax', *Intertax*, Vol.47., No.2., 2019, pp.191-192.

[38] Connection surface between two systems. Source: Gál Tibor: Interfésztechnikák, Szak Kiadó, 2010, p.3.

available to users only for the use of digital content, communication services or payment services.

- services provided to advertisers or their agents for the purpose of placing advertising messages on a digital interface based on data collected from users using such interfaces. Such services include, but are not limited to, services required for the storage and distribution of advertising messages, the monitoring of advertising activity, and the management and transmission of user data.[39]

Similarly to the French and the EU regulation, the Czech draft bill also links the payment of digital tax to the company"s revenue: revenue from global operations shall exceed € 75 million and revenue from operations in the Czech Republic shall exceed CZK 100 million (~ € 3.7 million), unless the revenue from the operation in the Czech Republic does not reach 10% of the whole European revenue in Europe.[40]

Regarding taxpayers, we can conclude that both national regulations are in conformity with the conditions of the Union: the maximum global revenue is set at € 750 million, while national revenue understandably varies from country to country. It should also be emphasized that in none of the cases does the economic form matter in the selection of taxable persons; what is important is the nature of the activity; the directive outlines the scope of the service, thus, it sets the scope to those operating solely on the digital platform. National regulations specify in detail the services to which the digital tax is intended to apply: these are mostly advertising or data collection activities.

The object of the tax is the element or activity that gives rise to the obligation to pay the tax.. Corporate tax is an income type tax, which means that the income-generating activity carried out by enterprises will be subject to the taxation.[41]

According to the EU proposal, taxable income includes revenues from the supply of certain digital services, which can be summarized as follow. First,, this includes the placement of an advertisement on the digital interface that targets the users of the interface. In this case, the tax liability also applies if the digital interface is not owned by the entity that is responsible for placing the advertisement. (Thus, it is not the owner of the interface, but the person placing the advertisement, who is considered a taxable person.) Secondly,, the supply of multilateral digital interfaces to users, which enable users to find and contact others and which may facilitate the direct sale or supply of related products and services between users, is a taxable activity. The tax liability does not include investment services.[42] Thirdly, the transfer of data collected from the activities of users of digital interfaces, with the exception of the transfer of data by a trading venue, a regular internaliser[43] and a financial service provider regulated under

[39] Loi No. 2019-759, Article 1, II-III.

[40] Vládní návrh ZÁKON o dani z digitálních služeb, (Draft bill for digital services tax), Article 15-16.

[41] Herich György: ibid., p. 28.

[42] Receiving and transmitting orders related to one or more financial instruments; execution of orders on behalf of clients; trading with own accounts; portfolio management; investment advice; placement of financial instruments with a commitment to purchase the instrument; placement of financial assets without a commitment to purchase the asset; operation of multilateral trading facilities; operation of organized trading facilities. Source: 2014/65/EU directive on markets in financial instruments, Annex I., point A (1)-(9).

[43] An investment firm that executes its orders on its own account in an organized, regular and significant order, outside of a regulated market and a multilateral trading facility. Source: 2014/65/EU directive, Article 4 (1), point 20.

Community law, should be treated as a tax object.[44]

As for the French law, the activities covered by the digital tax have already been mentioned above, since it designates taxable persons on the basis of the activity. These activities are essentially related to the provision of digital interfaces, the advertisements placed on them and the collection of data. Digital taxes do not cover activities that are subject to EU legislation.

The Czech proposal considers the following activities to be taxable: the use of a multilateral digital platform with 200,000 users; targeted advertising on a digital platform amounting to CZK 5 million; and the sale of data collected from users of digital services with a revenue of CZK 5 million. The date of the taxable activity is the day on which the identities of all the users involved in the transaction are revealed.[45] This provision is interesting because it takes the subject of digital taxation from a different perspective than the EU directive or French law: although it makes almost the same activities taxable as the other two regulations – targeting advertising and data collection – it defines the minimum amount of income generated by the activity. Revenue was determined under EU and French provisions only in relation with the taxable person when setting the minimum amount of annual revenue for digital companies at international and EU/national level. As the scope of taxable activities is essentially the same in both the French and the Czech legislation, it can be concluded that they are also in conformity with the draft directive concerning the subject matter of the tax.

The tax base is the basis for the tax liability in value or quantity, after which the amount of tax can be calculated using a tax rate. The tax base is calculated taking into account all taxable income and profits.[46]

The harmonization of the corporate tax base at EU level[47] is not a new idea: a Common Consolidated Corporate Tax Base (CCCTB) has been drafted, but Member States have ultimately failed to reach a consensus, mainly because of insisting on tax sovereignty. Applying the tax base would have originally been optional,[48] which indicates how difficult it would be to introduce such a rule, due to the different interests of Member States. It would be less beneficial for countries with smaller industries, such as Luxemburg and Malta, while countries with a stronger manufacturing industry, like Germany and France, would be more favourable.[49]

Other issues are double taxation and erosion of the tax base. The EU draft directive mentions that the EU has already taken steps to harmonize the regulation of tax bases, but these are still difficult to outline properly. In any case, the preamble mentions that, in order to avoid double

[44] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 1 and 3 (1), (3), (4).

[45] Vládní návrh Zákon o dani z digitálních služeb, (Draft bill for digital services tax), Article 34-36.

[46] Définition Assiette Fiscale ou assiette de l'impôt. *ERECApluriel,* 2020. Available: https://www.erecapluriel.fr/definition-assiette-fiscale-ou-assiette-de-limpot/ (2020.10.10.)

[47] It shall be emphasized that the digital services tax is different from corporate tax, however, regulation on corporate tax might be a reference point for the regulation of digital services tax.

[48] Galántainé Máté Zsuzsanna: Problémák és újabb törekvések az Európai Unió társasági adózásában, Ph.D. dissertation, Győr, 2008, pp. 143-145.

[49] Kocsis Gabriella: EU: napirenden a közös konszolidált társaságiadó-alap, *Deloitte*, 2020. Available: https://www2.deloitte.com/hu/hu/pages/ado/articles/kozos-konszolidalt-tarsasagiado-alap.html (2020.10.10.)

taxation, for companies whose income is subject to both corporation tax and digital tax, Member States should be allowed to deduct digital tax from the corporate tax base, regardless of whether both taxes are payable in the same country or in other Member States.[50] The draft also highlights that one of its key objectives is to eliminate the erosion of national tax bases. The phenomenon of tax base erosion is particularly prevalent in the case of multinational companies, as states where the profits are made do not obtain the tax base, since it is transferred to tax havens which offer more favorable conditions for taxation.[51]

The French law provides that the amount of income obtained by the taxpayer during the year (excluding VAT) constitutes the tax base. This does not include the amount that the company receives in exchange for providing the digital interface.[52] This provision could be paralleled with the part of the legislation that lists the activities under which a digital company is subject to the law when defining taxable persons. A company that makes the interface available to users for the purposes of digital content, communication services or payment services is not considered a subject of a digital tax. As we pointed out earlier, these activities are not taxable, therefore, they cannot be included in the tax base either. The impact study of the law also shows that only that part of global turnover which was carried out in France is included in the tax base.[53]

The Czech bill is based on similar principles: the Explanatory Memorandum emphasizes that a proportionate share of the activity carried out in the Czech Republic should be considered as the tax base.[54] We can conclude that both regulations are compatible with EU objectives. By considering only profits made in the given country as a tax base, they seek to prevent tax base erosion and to tax locally collected income.

The amount of payable tax is determined by using the tax rate, which is usually the percentage of the tax base.[55] The draft directive of the EU set the uniform tax rate at 3%.[56] A uniform tax rate is needed at EU level in order to avoid distortions in the single market, and the 3% percentage is justified by the Commission because it strikes the right balance between tax revenues and the different effects on businesses of different profit margins following the introduction of digital services taxes.[57]

The French law operates with the 3% tax rate as well.[58] As it is known from the parliamentary reports, it was France who

[50] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Explanatory Memorandum, 1 (27).

[51] Peng, Wei: Multinational Tax Base Erosion Problem of the Digital Economy, *Modern Economy*, March 2016., pp.347-348.

[52] Loi No. 2019-759, Article 1, I-II.

[53] Étude d'impact de la loi No.2019-759, March 2019., p.20.

[54] Vládní návrh Zákon o dani z digitálních služeb, (Draft bill for digital services tax), Explanatory Memorandum, 2.4.

[55] Taux d'imposition, *Moneyland*. Elérhető: https://www.moneyland.ch/fr/taux-imposition-definition (2020.10.17.).

[56] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, Article 8.

[57] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018, (35).

[58] Loi No. 2019-759, Article 1, II.

proposed to the European Commission not only a common, long-term rule requiring the taxation of digital services at Community level, but also a rate of 3% of the tax base. Therefore, it is reasonable that, in absence of a directive, the French law introduces the same tax rate.[59]

According to the original Czech draft, the tax rate on digital services was 7%, but this was extremely high compared to the EU directive and has provoked strong protests in the Czech parliament. As the bill has not yet been adopted, its content is subject to change;in June 2020, for example, the tax rate was reduced to 5%.[60] It should be emphasized that not every provision of the EU proposal or the French law was therefore taken over when the Czech law was drafted, but as the EU directive is not in force, the Czech bill does not conflict with any other supranational legal source. Nevertheless, the national rules that set different criteria make the regulation highly inconsistent, which is problematic because they target the same taxpayers and tax the same activity. In our opinion, the application of different tax rates could be dangerous because it could lead to a phenomenon similar to tax havens, and it is conceivable that large digital companies would reduce their activities in some countries due to unfavorable conditions for them.

The setting of tax rates is presumably related to the amount of tax revenue that the state needs. The two above-mentioned countries have different economic potentials: France aims to put some pressure on high-income digital companies by introducing the tax, and to prevent digital companies from operating in tax havens. The Czech Republic, on the other hand, is in great need of tax revenue; some research has shown that the introduction of a digital service tax would generate about 5 billion Czech korunas (~ 185 million euros) in revenue for the state, which would be one of the largest sources of tax revenue.[61] In France, tax revenue is expected to be € 350 million per year, almost double of the Czech tax revenue.[62] It should be noted, however, that there are significant differences between the economies of the two countries: while France is one of the world"s leading economies,[63] the economy of the Czech Republic is far behind it. The potential revenue from the digital service tax is therefore disproportionate to the economic performance, so it can be concluded that it would be more advantageous for the Czech Republic to introduce this tax.[64]

Regarding the current regulations, we have mentioned certain "benefits", advantages caused by the inconsistency and non-harmonization of different national rules. These are the loopholes that, as we have seen above, can lead to some states acting as tax havens, and countries with less favorable regulations for companies that

[59] No. 496, Rapport fait au nom de la commission des finances sur le projet de loi, adopté par l'Assemblée Nationale après engagement de la procédure accélérée, portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, 15 May 2019, p.38.

[60] Update 1-Czech coalition agrees 5% digital tax aimed at global internet giants, *Reuters*, 10 June 2020. Available: https://www.reuters.com/article/czech-internet-tax-idUSL8N2DN4MC (2020.10.17.)

[61] Hrabčák, Ladislav – Popovič, Adrián: ibid.., p.64.

[62] Assemblée nationale, Première séance du lundi 08 avril 2019, Compte rendu. Available: http://www.assemblee-nationale.fr/15/cri/2018-2019/20190208.asp#P1691407 (2020.10.22.).

[63] France is the 7th strongest economy in the world, based on the GDP. Source: The Top 20 Economies in the World, Investopedia, 18 March, 2020. Available: https://www.investopedia.com/insights/worlds-top-economies/#7-france (2020.11.01.).

[64] However, it shall also be considered that the Czech tax rate is higher than the French one.

lose significant revenue due to tax evasion. However, a clear distinction must be made between tax advantages under which the legislature allows certain taxable persons to pay only a certain proportion of the tax calculated. This can only be ordered for specific purposes, such as investment incentives, small business development, or catching up with lagging areas. The tax credit can be used in the form of a tax withholding, thus, the taxpayer must pay a certain percentage of the tax, as prescribed by law.[65] We can speak of a tax exemption if the taxable person would otherwise be liable to pay tax but the law completely exempts it from the obligation to pay for some reason.[66]

Concerning the digital services tax, we cannot really find a taxpayer receiving a tax benefit or tax exemption, as the purpose of this tax is precisely to tax large companies that operate worldwide and thus generate extraordinary income.

A distinction must be made between benefit and exemption, although they result in essentially the same situation, where a person is not obliged to pay tax.. Thus, for example, Czech law does not impose a tax liability on companies of which – even though they would meet the legal requirements based on their scope of activity and the amount of their income – the income from their activities in the Czech Republic does not reach 10% of their income in the European Union.[67] Also, companies with less than € 750 million at international level and € 50 million at EU level, € 25 million in France and 100 million CZK in the Czech Republic will not be subject to the digital tax. In this case, we can consider these companies as not being covered by the legislation, as they would not have been originally liable to pay the tax, the fact that they are not taxed is not because the legislation exempts them for some reason, but because the legislation does not even target them. We think that it is reasonable why the regulations do not set a category that would be subject of tax benefits, as they are large companies that do not require state support to generate revenue and do not require investment-increasing rules in the sector, given the extremely high income (EUR 750 million).

4. Concluding remarks

By analyzing the proposal for an EU directive and then comparing the French and Czech regulations presented in the study we aimed to answer the question of whether it is possible to create a harmonized legislation at international level and how to eliminate harmful tax practices of digital companies. Taxation of digital companies that provide services without physical presence is extremely difficult. The current national regulations are not prepared for this, the supranational – European Union or international – law is not harmonized, and the enforceability and questionable binding nature of these laws also cause problems. However,these companies often operate with harmful tax practices, due to the lack or inconsistency of regulation.

The comparison of the two national and EU legislations could lead to the following conclusions. First,we can highlight that the scope of the regulation covers roughly the same companies: each

[65] Simon István (ed.): Pénzügyi jog II., Osiris kiadó, Budapest, 2012, pp.260-263.

[66] Kagan, Julia: The Meaning of Tax Exempt, Investopedia, 9 July 2020. Available: https://www.investopedia.com/terms/t/tax_exempt.asp (2020.10.21.)

[67] Vládní návrh Zákon o dani z digitálních služeb, (Draft bill for digital services tax), Article 15 (1) c). It shall be noted that this provision might potentially be contrary to the prohibition of discrimination.

rule sets an annual minimum income that is high enough to be worth taxing, although this varies by country. What they have in common is that the worldwide income of a taxable company must reach € 750 million a year. In our opinion, it is conceivable that the Union may refer to the competence of a State to determine how much of a company"s worldwide revenue should accrue in that State, due to the different economic situations of the Member States.

Secondly, a similar issue may arise regarding the tax rate, which may also vary in the different regulations. This is presumably due to the fact that some states need more tax revenue, so imposing a higher tax may result in the same activity being taxed more in one state than in another. As we have pointed out above, different rules may even lead some states to become tax havens for digital services, so we believe that setting a common tax rate would certainly be more advantageous and would also reduce the chances of tax evasion.

Thirdly, the argument that the United States has envisaged the introduction of new, stricter customs rules against states considering the introduction of a digital tax is in favor of a uniform regulation. If the European Union acts uniformly to tax digital companies, the US may reconsider these provisions as an extremely important economic and strategic partner of the Union.

Fourthly, we can summarize the responses to the problems of taxation of digital companies, namely, double taxation, double non-taxation, tax avoidance, and tax evasion.. Regarding double taxation, it can be said that not only a common rule at EU level could offer a solution, and also in this case the problem would be easier to solve. Rules at national level could offer an effective solution to the issue if they all made the same activity taxable – this, as we have seen, could easily be solved – as this would also divide the revenue among states and it would not be necessary that all states conclude a bilateral treaty with each other. Double non-taxation, which comes from loopholes of regulation, that is to say, from the fact that the gap between national laws is not filled by a supranational regulation could also be avoided if the same activities were consistently taxed in all countries. As mentioned earlier, the problem of tax evasion could easily be avoided by introducing a common, uniform tax rate. Lastly, a transparent tax return system would be a solution against illegal tax evasion.

In our opinion, in order to systematically tax digital companies, it is absolutely necessary to introduce a uniform legislation at a European Union level, or to create national rules that are also harmonized with each other, which also take into account the economic peculiarities and the taxation systems of each country. However, since it is extremely difficult to find a compromise in the issue, mostly because of the different economic situations of the states, it can be assumed that this will not happen in the near future. Therefore, we believe that in the future, national legislation will offer a solution to the problems arising from the taxation of digital companies. Harmonization of legislation, such as the definition of the same taxpayers and tax subjects, and the introduction of a common tax rate, then are crucial for effective and consistent action.

References

- Becker, Johannes – Englisch, Joachim: Taxing Where Value is Created: What"s "User Involvement" Got to Do With It?, *Intertax*, Vol.47/2. 2019;
- Chohan, Usman W.: Some Precepts of the Digital Economy, Critical Blockchain Research Initiative (CBRI) Working Papers, 2020;
- Faulhaber, Lilian V.: Sovereignty, Integration and Tax Avoidance in the European Union: Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance, *Columbia Journal of Transnational Law*, 2009-2010;
- Gál Tibor: Interfésztechnikák, Szak Kiadó, 2010;
- Galántainé Máté Zsuzsanna: Problémák és újabb törekvések az Európai Unió társasági adózásában, PhD dissertation, Győr, 2008;
- Greggi, Marco: La tassazione dell"economia digitale nel contesto europeo: la proposta di direttiva sulla Digital Services Tax, in: Persiani, Alessio: La tassazione dell"economia digitale tra sviluppi recenti e prospettive future, Neu-Nuova Editrice Universitaria, Rome, 2019;
- Harris, Peter: Corporate Tax Law: Structure, Policy and Practice, Cambridge University Press, 2013;
- Herich György: Adótan, Penta Unió, Budapest, 2019;
- Hrabčák, Ladislav – Popovič, Adrián: On certain issues of digital services taxes, *Financial Law Review*, No. 17 (1)/2020;
- Károlyi Balázs – Szudoczky Rita: Progressive Turnover Taxes under the Prism of the State Aid Rules: Effective Tools to Tax High Financial Capacity or Inconsistent Tax Design Granting Selective Advantages?, *European State Aid Law Quarterly*, 2020/3;
- Károlyi Balázs – Szudoczky Rita: The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax, *Intertax*, Vol. 48/1. 2020;
- Kofler, Georg – Sinnig, Julia: Equalization Taxes and the EU"s "Digital Services Tax", *Intertax*, Vol.47., No.2., 2019;
- Marján Attila: Az Európai Unió gazdasága, HVG Kiadó Rt., Budapest, 2005;
- Marques, Nicolas: La taxation française des services numériques un constat erroné, des effets pervers, Institut Économique Molinari, Paris-Brussels, 2019;
- Mesenbourg, T.L.: Measuring the Digital Economy, U.S. Bureau of the Census, Suitland, Maryland (USA), 2001;
- Nagy Zoltán: A digitalizáció hatása a pénzügyi piac szabályozására, *Miskolci Jogi Szemle*, Vol. 15., No. 1., 2020;
- Peng, Wei: Multinational Tax Base Erosion Problem of the Digital Economy, *Modern Economy*, March 2016;
- Sadowsky, Marlyne: French perspectives on the Digital Services Tax (DST), *Tijdschrift voor Fiscaal Recht*, May 2020;
- Schön, Wolfgang: Ten Questions about Why and How to Tax the Digitalized Economy, *Bulletin for International Taxation*, April-May 2018;
- Simon István (ed.): Pénzügyi jog II., Osiris kiadó, Budapest, 2012;
- Stevanato, Dario: Are Turnover-Based Taxes a Suitable Way to Target Business Profits?, *European Taxation*, November 2019;
- Wágner Tamás Zoltán: A digitális adók kérdése, különös tekintettel a cseh szabályozásra, *Külügyi Műhely*, 2020/1.

Legal sources

- 2014/65/EU directive on markets in financial instruments;
- Étude d"impact de la loi No.2019-759, March 2019;

- European Commission: The EU budget powering the recovery plan for Europe Communication from the Commission, Brussels, 27.5.2020., COM(2020) 442 final;
- Loi No. 2019-759;
- No. 496, Rapport fait au nom de la commission des finances sur le projet de loi, adopté par l"Assemblée Nationale après engagement de la procédure accélérée, portant création d"une taxe sur les services numériques et modification de la trajectoire de baisse de l"impôt sur les sociétés, 15 May 2019;
- OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013;
- OECD: Tax Challenges of Digitalisation: Comments Received on the Request for Input, PWC – Comment, Part II, 25 October 2015;
- Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM/2018/0148 final, 2018/073 (CNS), Brussels, 2018;
- Vládní návrh ZÁKON o dani z digitálních služeb, (Draft bill for digital services tax).

Online sources

- http://www.assemblee-nationale.fr/15/cri/2018-2019/20190208.asp#P1691407;
- http://www.assemblee-nationale.fr/dyn/15/rapports/1737/l15b2080_rapport-fond#;
- https://about.google/locations/?region=north-america&office=mountain-view;
- https://svetprumyslu.cz/2020/04/01/cesko-planuje-digitalni-dan-americane-se-zlobi/;
- https://web.archive.org/web/20131022003036/http://odec.org.uk/the-concept-of-a-digital-economy/;
- https://www.erecapluriel.fr/definition-assiette-fiscale-ou-assiette-de-limpot/;
- https://www.investopedia.com/insights/worlds-top-economies/#7-france;
- https://www.investopedia.com/terms/t/tax_exempt.asp;
- https://www.lemonde.fr/economie/article/2019/07/11/le-parlement-francais-adopte-definitivement-la-taxe-gafa-contestee-par-les-etats-unis_5488135_3234.html;
- https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2019/navrh-zakona-o-digitalni-dani-miri-do-sn-36638;
- https://www.moneyland.ch/fr/taux-imposition-definition;
- https://www.oecd.org/about/;
- https://www.reuters.com/article/czech-internet-tax-idUSL8N2DN4MC;
- https://www.theguardian.com/technology/blog/2010/jul/22/facebook-countries-population-use;
- https://www.twobirds.com/en/news/articles/2019/global/digital-services-tax-overview-of-the-progress-of-implementation-by-eu-member-states;
- https://www2.deloitte.com/hu/hu/pages/ado/articles/kozos-konszolidalt-tarsasagiado-alap.html;
- https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html;
- https://theconversation.com/the-digital-economy-is-becoming-ordinary-best-we-understand-it-130398.

CRIMINAL INTERVENTION AND RISKS OF CURRENT SOCIETY: MANIFESTATIONS AND PROBLEMS OF PUNITIVE EXPANSION IN NEW AND TRADITIONAL AREAS OF CRIMINALITY

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Abstract

The exchange of global economic flows and the high degree of development of technological processes have turned globalisation and technical progress into the current pillars of our society. The advantages and opportunities they offer are twofold, since they can both improve the quality of life and serve as an opportunity for unlawful and, specifically, criminal conduct.

The concept of risk has consequently assumed a leading role in shaping the social model of advanced modernity. At the same time, it has given rise, as a normative reaction, to a demand for security on the part of citizens, which in the sphere of Criminal Law is manifested in an expansive tendency in its scope of intervention.

However, the risks we are currently facing have different origins and characteristics, so that the expansive response of Criminal Law is neither unified, nor does it pose the same problems. Thus, based on the characteristics of today"s society and the risks that threaten it, this paper is based on the differentiation of the expansive currents of Criminal Law developed on the basis of new preventive needs. Specifically, it is possible to identify two punitive trends: one, whose function is to respond to new forms of criminality arising in the light of technical and scientific progress; the other, which affects and intensifies criminal intervention in traditional areas of delinquency, linked to marginalisation and social exclusion. Having set out this framework, we will analyse some of the main manifestations of both currents in the Spanish Criminal Code and the problems of legitimisation and attribution of criminal responsibility that they raise.

Keywords: *Criminal Law, social model, risks, punitive intervention, Criminal Policy.*

1. Introduction

This paper addresses the protection that Criminal Law currently grants to society. Its objective is to analyse the political-criminal discourse that has developed on the current social bases and present some of the problems posed by the penal regulation that has given recognition to this Criminal Policy since the adoption of the Spanish Criminal Code in 1995 and the successive reforms that have been expanding its content[1]. Criminal Law is attributed a crime-preventive purpose to protect society. It is, in essence, an instance of social control that establishes its mechanisms for controlling social conflicts. However, it differs from other instances of social control (family, education, social networks, etc.) due to its high degree of formalisation. Criminal offence is a conduct that expresses intolerable social harm and, consequently, requires the most severe state

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response in terms of affecting the rights and freedoms of citizens, fundamentally personal freedom.

Historically, Criminal Law has found its main object of protection in interests of an individual nature, derived from its development within the framework of the Liberal State of the 19th century (life, health, physical integrity, property, honour...). This has conditioned both the criminal policy of its time and the nature and structure of the offences whose commission harms or endangers these legal interests. However, if Criminal Law fulfils a social protection function, it is easy to deduce that it is the specific model of society that will define the scope of protection for the maintenance of peaceful coexistence. Obviously, the characteristics that define the societies of post-industrial countries are very different from those on which classical Criminal Law was based at that time. We are witnessing an unprecedented economic, technological, political, cultural, and social revolution that has put existing legal mechanisms to the test in the face of new realities and, in particular, in the face of the conflicts that arise in this remodelled society. However, as the characteristics of the current social model give rise to new areas of protection, there are growing doubts as to whether criminal intervention is still compatible with the principles that legitimise it.

Within the framework of these considerations, this paper will start with the main defining features of the post-industrial social model and the factors that contribute to the formation and entrenchment of the public"s perception of insecurity or fear. This will lay the necessary foundations for analysing how they have been translated into a political-criminal discourse differentiated according to the origin of the risk and its specific characteristics, which has conditioned Spanish criminal legislative policy too. Some of the examples in which this Criminal Policy is manifested will allow us to expose the main problems faced by Criminal Law in the 21st century. In doing so, this work contributes to the open debate in the specialized doctrine on the legitimacy of criminal expansion in each case, and its compatibility with the indispensable principles and guarantees of any criminal intervention.

2. Some keys to understanding today"s society

2.1. Risk society, knowledge society and exclusion society

As stated in the introduction, it is not possible to understand the Criminal Policy that has guided the reforms of the Spanish Criminal Code over the last 25 years without considering the social scenario in which it has developed. This is the result of the profound changes that have shaped the way we understand and relate to the world.

Briefly, the exchange of global economic flows and the development of technological processes have enabled the development of weightless and intangible activities characteristic of the global economy[2]. This produces both benefits and opportunities, as well as generating risks, new or more potentially damaging than those known in the past. Consequently, we live in a "risk society", where the processes of globalisation and technological progress affect the way we understand interpersonal

[2] Colina Ramírez, E.I. Sobre la legitimidad del Derecho penal en la sociedad del riesgo. Barcelona: J.M. Bosch, 2014, 52.

relationships and the physical-spatial space in which they unfold[3].

Derived from above, today"s society is also set up as a "knowledge society", due to the leading role that new information and communication technologies play in it. ICTs are fundamental tools for social development that aspire to the global democratisation of knowledge. A paradigm of this is the Internet, the global network, where space and physical barriers disappear, and access to information is instantaneous, despite the physical distance between the event or sender of the information and its receiver. We live in the physical world, but also in the virtual world, which is as real as the physical world[4].

There is another facet of the current social model, which defines it as a society of exclusion or a "two-tier society"[5]. The positive effects of the opening up of economic networks, favoured by new technological channels, have a well-defined geographical scope. But they maintain, or even aggravate, social inequalities between countries and within their borders. The outbreak of the 2008 economic crisis is a good example of what the global economic order based on the rules of neoliberalism has led to and what it has meant in social terms. Today, the health crisis caused by Covid-19 has also shown that those who are suffering the most from the economic and health consequences are the most disadvantaged groups, as well as the poorest countries in terms of access to vaccines.

2.2. The birth of the insecurity society or fear community

The social scenario that has just been synthetically described is the basis for understanding another defining feature of the social system of our time. Economic development and technological progress are giving rise to risks that may even threaten the whole of humanity. They are latent risks, since it is difficult to specify when they will be translated into concrete damage, their magnitude and place of production, as they are not subject to physical limits[6]. It is also complex to establish a direct relationship between the victim and the origin of the damage, given the complexity of the production and management processes, as well as the exact mechanism and cause of the damage. Given these factors, the citizen acquires the impression of invisibility in the face of the danger, its agent and the extent of its repercussions[7].

Thus, the "community of fear"[8] or the "society of felt insecurity"[9] emerges. Obviously, the insecurity that a society manifests depends on the extent to which it

[3] Beck, U. La sociedad del riesgo. Hacia una nueva modernidad. Barcelona-Buenos Aires-Mexico: Paidos, 1998, 25. Beck understands risk in a realistic or objective sense, i.e. assessed according to objective parameters of scientific knowledge.

[4] Almonacid Lamelas, V. & Sancliment Casadejús, X. "El impacto de las TIC en la configuración clásica del derecho. Especial referencia al principio de territorialidad". Revista de Tecnología, Ciencia y Educación, 4 (2016): 13.

[5] Bergalli, R. "Libertad y seguridad. Un equilibro extraviado en la modernidad tardía". In El Derecho ante la globalización y el terrorismo, coordinated by M. Losano y Muñoz Conde, F. Valencia: Tirant lo Blanch, 2004, 71.

[6] See Silva Sánchez, J.M. La expansión del Derecho penal. Aspectos de Política criminal en las sociedades postindustriales. Montevideo – Buenos Aires: BdeF, 2006, 27; Mendoza Buergo, B. "Gestión del riesgo y política criminal de seguridad en la sociedad de riesgo". In La seguridad en la sociedad del riesgo. Un debate abierto. Edited by C. Da Agra, J. Domínguez, P. Hebberecht & A. Recasens. Barcelona: Atelier, 2003, 69.

[7] The invisible nature of risk in the technological society is one of the theses Beck puts forward to explain his theoretical model of the "community of fear". In this sense, see La sociedad del riesgo…, op. cit., 28 y 59.

[8] Beck, U. *La sociedad del riesgo*…, op. cit., 56.

[9] Silva Sánchez, J.M. *La expansión del Derecho penal*…, op. cit., 32.

is at the mercy of these "modern" risks. But it is also profoundly conditioned by citizens" subjective perception of risk, which influences what they are willing to tolerate[10]. What factors contribute to the formation and entrenchment of the social sense of insecurity?

First, the knowledge and information society contains a paradox of its own. The generation of scientific knowledge, subject to strict rules of testing and verification, gives rise to new areas of ignorance and potential risks[11]. Knowledge offers security, but also uncertainty. On the other hand, the danger of the introduction of false or insufficiently verified news or information into the global network has devastating effects on citizens" perception of risk. Today"s society is a society of information and communication, but this does not determine either the quality or the veracity of its content.

Second, changes in everyday life occur at a dizzying speed, leaving the individual with little time, and sometimes capacity, to adapt and assimilate them. This heightens the sense of fear about the repercussions on their professional work, private life, or leisure time[12].

Thirdly, the media play a very important role in shaping people"s perception of reality. The proliferation of programmes that magnify the dangers we have to live with and the sensationalist way of dealing with the news widen the gap between objective risk and people"s subjective feeling of fear.

Fourth, economic power groups have a strong influence on the generation and dissemination of information through their control of the media. For their part, political parties also contribute to shaping public opinion, since the discourse of the power groups is ascribed to a certain political ideology. But political parties are also recipients of public opinion. The demand for security appeals to the political power for quick and apparently effective action, which is introduced into the political agenda of all parties as a fundamental electoral weapon.

The variables analysed are key to establishing the equation between risks and citizens" perception of security/insecurity, as we have seen. However, the social significance of the risks derived from globalisation and technological progress, on the one hand, and the existence of social inequalities and exclusion, on the other, is quite different. And it could be said that some of the influencing variables described above would have a greater impact on the latter social aspect. In the latter case, we are dealing with the citizen"s fear of being a direct victim of crime, in the framework of a political, economic, and social context that is already very agitated by essential issues (employment, access to health care, social benefits, housing, etc.). It is not the insecurity generated by the secondary or collateral consequences of technical, scientific or financial progress, but the insecurity that arises as a direct result of these processes in the generation and stratification of poverty and marginalisation. The risk arises from the "other" who is not the same as us, because he or she is a non-included in the system. The fog surrounding the perpetrator/victim and cause/harm relationship in a complex web of tasks, functions and chains of responsibility clears to make way for a face-to-face between the citizen and this visible and easily

[10] Colina Ramírez, E.I. *Sobre la legitimidad del Derecho penal*…, op. cit., 36.

[11] See Mendoza Buergo, B.: "Gestión del riesgo y política criminal…", op. cit., 68.

[12] Similar to this, noting the increasing difficulty of adapting to societies that are constantly accelerating, Silva Sánchez, J.M. *La expansión del Derecho penal*…, op. cit., 32.

identifiable "other". And so, the citizen is less willing to tolerate these dangers with which he or she has to live.

It is enough to review the selection of daily news items to see which ones capture the attention of the media and, in their role of shaping public opinion, of the public. They are particularly violent and bloody, with an excessive use of drama, morbidity, and even bad taste[13]. This emphasises the apparent seriousness of the situation and the need to act forcefully in the face of it. To a greater or lesser degree, the citizen internalises the language of communication, which introduces value judgements from the moment a news item is selected[14]. The importance of the role of information in this area lies in instilling in citizens a certain perception of the phenomenon of crime, modulating their attitude towards it[15], regardless of its real incidence according to seriously elaborated statistics[16]. Moreover, it consolidates the impression that the apparent increase in crime is caused by someone different or alien to the majority of citizens[17], especially immigrants, drug addicts, the unemployed, beggars, the socially maladjusted, the mentally ill, etc., who are socially identified as the culprits of public fear. The above discourse is once again used by the power groups and political parties to support their political action programmes, in the same terms as mentioned above. Security is demanded and consequently security is offered, a balm for social fear and the key to political success.

3. Risk, security, and Criminal Policy

On the basis of the social mosaic presented, an analysis will be made of the political-criminal trends that have been the basis of the reforms of the Spanish Criminal Code since its promulgation in 1995. It is possible to identify two main trends: one, oriented towards the "modern" risks of today"s society; the other, focused on the punishment of poverty and marginality.

3.1. The expansion of "modern" criminal law in the face of risk society

The binomial of risks derived from progress/citizen insecurity has brought the implementation of preventive policies by the State into the social and political landscape. Obviously, the greater the distortion between objective risk and subjective feeling of insecurity, the greater the demand by citizens for public action to avoid the actual harm of a possible threat. Even ahead of the birth of the threat of harm itself. A "preventive State" or a "vigilant State"[18] appears, which anticipates the danger in order to prevent it from arising[19].

In the field of Criminal Law, previous public policies have given rise to the so-called phenomenon of the "expansion of Criminal Law". In fact, this phenomenon spills over into other areas of criminal intervention, but here the approach is as follows: economic and technical

[13] See Soto Navarro, S. "La influencia de los medios en la percepción social de la delincuencia". *Revista de Ciencia Penal y Criminología*, 07-09 (2005): 12-15 (http://criminet.ugr.es/recp).

[14] Fuentes Osorio, J. "Los medios de comunicación y el Derecho Penal". *Revista Electrónica de Ciencia Penal y Criminología*, 07-16 (2005): 5 (http://criminet.ugr.es/recp).

[15] Hassemer, W. *Persona, mundo y responsabilidad. Bases para una teoría de la imputación en Derecho Penal*, Valencia: Tirant lo Blanch, 1999,19.

[16] See the research by Benito Sánchez, D. *Evidencia empírica y populismo punitivo. El diseño de la política criminal*. Barcelona: J.B. Bosch, 2020, *passim*.

[17] Fuentes Osorio, J. "Los medios de comunicación…", op. cit.,17.

[18] Silva Sánchez, J.M., *La expansión del Derecho Penal*…, op. cit., 138-139.

[19] Mendoza Buergo, B. "Gestión del riesgo y política criminal…", op. cit. 75.

development produces new areas of risk that affect new interests of protection or interests that were previously protected but are threatened by new forms of aggression. It is justified, then, that Criminal Law should review its contents and adapt them to the circumstances of a world that is very different from that of barely half a century ago.

According to the above, several areas of criminal expansion can be identified in relation to the "modern" risks of the globalised and technified society[20].

A first group focuses on the phenomenon of the globalisation of criminality in the commission of crimes. Here the "risk" lies primarily in the transnational or aterritorial nature of its commission, as well as in the greater material resources offered by the organisation for the perpetration of the offence. In addition to the increased penalties for certain offences when committed within the framework of a criminal organisation, the main manifestations of this group of expansion are, in my opinion, two: the criminalisation of the offences of belonging to an organisation and criminal group (Articles 570 bis and 570 ter, respectively), and the provision for the criminal liability of legal persons (Article 31 bis) and other groups without legal personality (Article 129).

A second group brings together a catalogue of offences in which very different legal interests are protected. However, they share common elements: a) in general, the collective or supra-individual nature of the protected legal interests and its protection against conduct that endangers them, without the need to actually harm them; b) the subsidiary nature of criminal protection compared to the protection offered by other legal sectors; c) the gradual assumption in criminal typification of the administrative mode of management, i.e., preventing conduct that only cumulatively generates damage[21]. A large part of the content of economic Criminal Law belongs to this heterogeneous group. Among others, offences relating to the market and consumers (Articles 278 to 288 of the Criminal Code), corporate offences (Articles 290 to 297), environmental protection (Articles 325 to 331), offences relating to the protection of flora and fauna (Articles 332 to 227), or urban planning offences (Articles 319 and 320).

A third group of offences incriminate the dangers arising from technical and scientific progress: genetic manipulations (Articles 159 to 162), use of nuclear energy and ionising radiation (Articles 341 to 345) and some offences against public health (Articles 364 and 365). In addition to these offences affecting health and/or the very existence of mankind, cybercrime can also be included in this group[22]. In a broad sense, it covers a wide range of situations of criminal relevance. In some cases, due to the fact that the use of computers or ICTs offers a new channel for committing traditional offences (fraud, coercion, threats, disclosure of secrets, harassment, child pornography, crimes against intellectual property, terrorism, hate speech, etc.) in which

[20] It is not possible to draw a clear dividing line in each case, but the initial systematisation proposed by Mendoza Buergo is followed here (*El Derecho Penal en la sociedad del riesgo*, Madrid: Civitas, 2001, 41-42), complemented by this paper´s author with provisions introduced in the Spanish Criminal Code following successive reforms.

[21] Martínez-Buján Pérez, C. *Derecho Penal Económico y de la empresa. Parte General*. 5ª edición. Valencia: Tirant lo Blanch, 2016, 88.

[22] Cybercrime also fits into the two previous groups, since the use of ITC´s can serve as channel or instrument for the commission of the offence.

different legal interests are protected, mostly of individual nature (property, personal freedom, sexual freedom, privacy, etc.). In other cases, what is incriminated is a new criminogenic reality, in which Criminal Law assumes the protective role of the computer resource itself. An example of this are the offences of computer damage (Article 264) and denial of service (Article 264 bis). Also, the offences of hacking, computer intrusion or interception of data (Articles 197 bis and 197 ter), in which a new type of legal interest is protected, namely computer freedom.

Many of the incriminations representative of the modernisation of Criminal Law that have been highlighted have their origin in an international normative instrument that seeks the approximation of national criminal laws. Initially, the attempts by states to seek a common response to common problems are to be welcomed. But it also opens up the debate as to whether the expansion of criminal law into new areas or areas that have traditionally been alien to it is not affecting the foundations of its own legitimacy. Added to this are the specific substantive and procedural problems particularly posed by the crimes that guide "modern" Criminal Law, such as that relating to the determination of the applicable Criminal Law when it is not possible to apply the principle of territoriality in the face of borderless crime.

In accordance with the principle of proportionality, criminal intervention is legitimised to the extent that it is an *ultima ratio* response for the protection of legal interests. According to this principle, the criminal protection afforded to legal interests of a collective nature, far from the individual referent on which liberal Criminal Law was built, raises the question of whether genuine criminal legal interests are really being protected, or on the contrary certain institutional functions traditionally protected by Administrative Law[23]. This is where the discourse on the legitimacy of a large part of economic and business Criminal Law comes into play. In addition to this, precisely, the subsidiary nature of criminal intervention and the coexistence of sanction regimes, with the consequent possibility of incurring in a *bis in idem* or a double sanction prohibited for the same conduct in the criminal and administrative spheres.

Even recognising the need to protect social realities of collective nature previously outside the scope of Criminal Law (environment, reasonable use of land...), the equalisation of the penalties to which the legislator sometimes resorts to punish situations with different effects on the protected legal interest is questionable. Thus, for example, certain conducts affecting the environment are punished with the same penalty whether they cause actual damage or "may cause damage" (Articles 325.1 and 326.2, 326 bis). This can only be understood from the perspective of the precautionary principle that guides Administrative Law, which has a wider scope of application than criminal prevention. There are also cases in which the same penalty is applied to the completion of the offence and to certain preparatory acts for the subsequent commission of the offence, such as the protection of computer freedom (Article 197 ter), computer-related damage (Article 264 ter), child grooming (Article 183 bis) or the counterfeiting of non-cash means of payment (Article 400), among others. On the other hand, the criminalisation technique followed in some cases clashes with the rule of law, in particular with the mandate of clarity or specificity of criminal legislation, due to the

[23] Silva Sánchez, J.M. *La expansión del Derecho Penal*…, op. cit.,123, 138-141.

frequent use of normative elements or blank criminal laws, which require a strict standard of constitutionality to be met.

3.2. The expansionist punitive trend in the face of social exclusion and marginalisation

Criminality that has its origins in poverty and, on a larger scale, in social marginalisation, is not new. What is really "new" in relation to the apparent "risks" generated by the exclusion society is the current way of perceiving and understanding this criminality, in accordance with the influencing factors outlined previously. Security is demanded and security is offered. And what is the better way to achieve both objectives than through the criminal justice system, the State"s most repressive instrument. The current political-criminal trends in citizen security in Spain and other countries, focused mainly on the popular vote, fit into this context.

The content of these political-criminal guidelines is a faithful reflection of the "law and order" and "zero tolerance" policies that began in the United States in the early 1990s and rapidly spread to other countries[24]. The basis of these policies lies in the gradual destruction of the welfare State following post-industrial and neoliberal postulates. Thus, the progressive widening of the economic inequality gap and the social insecurity it generates find their counterpoint in the criminalisation (or rather, re-criminalisation) of poverty and marginalisation. The priority action of the public authorities therefore consists of repressing the disturbances of the "populace" through a policy of uncompromisingly dealing with the delinquency that disturbs the tranquillity of the middle and upper classes, since the latter make up the bulk of the electoral body.

This drift towards a progressive hardening of the criminal response in traditional areas of delinquency linked to poverty and social exclusion can be clearly seen in the successive reforms of the 1995 Spanish Criminal Code. The common element in all of them is the introduction of legal provisions that seek to isolate the offender from society for as long as possible. Examples of this are: (a) the introduction of revisable permanent imprisonment (2015 reform); (b) the reduction of the minimum limit of the custodial sentence from six months to three months (2003 reform), despite the null preventive effectiveness they exert; (c) the incorporation of the aggravating circumstance of qualified recidivism, which allows the sentence to be increased by one degree regardless of the concurrence of another or other aggravating circumstances (2003 reform); d) the provision of a regime of aggravating penalties for habitual and repeated offences (2003 and 2010 reforms), and subsequently for minor offences of minor theft and minor theft of use of motor vehicles or mopeds (2015 reform).

Apart from these legal provisions, the policy of law and order and zero tolerance can also be seen in the abolition of misdemeanours that took place with the 2015 reform. The LO 1/2015, of 30 March, repealed Book III of the Criminal Code, where misdemeanours were defined. The suppression was apparently justified by the legislator for reasons of minimum intervention, but in reality it has produced a

[24] See, mainly, Wacquant, L. *Las cárceles de la miseria*. Buenos Aires: Manantial, 2000,101-156. See also Wacquant, L. "La tormenta global de la ley y el orden: sobre neoliberalismo y castigo". In *Teoría social, marginalidad urbana y Estado penal. Aproximaciones al trabajo de Loïc Wacquant*. Edited by I. González Sánchez (203-228). Madrid: Dykinson, 2012.

generalised hardening of the criminal response, particularly in relation to small-scale property crime[25]. The 2015 reform has consolidated a particularly repressive and detailed regulation of minor theft, the prototype of petty crime, increasing the penalty for petty minor theft[26] (heir to the old misdemeanour) and incorporating new aggravations of the penalty that have also increased the penalty. The same fate has befallen street vending, in the context of offences against intellectual and industrial property. Moreover, in this case, the legislator has displayed a deficient legislative technique. In consideration of the characteristics of the perpetrator and the small amount of profit obtained, an alternative penalty is provided for to the attenuated or mitigated criminal offence (one to six months" fine or community service of thirty-one to sixty days). However, depending on the penalty imposed, the offence will be minor or less serious according to the classification established in Article 33 of the Spanish Criminal Code, with the substantive and procedural consequences resulting from it[27].

The political-criminal ideology that underlies the previous regulation has long opened up a heated debate in the specialised doctrine as to whether the legislative reforms of the last two decades have given rise to a Criminal Law focused on fighting against another who is not a citizen, but an enemy. Thus, there is talk of a Criminal Law of the enemy, which is largely rejected by the specialised doctrine. From the set of legal provisions that have been highlighted above, one can observe an intensification of the use of custodial sentences with a primary purpose of neutralising the offender, sometimes with neo-retributionist roots according to the (subjective) general opinion of the citizen. This calls into question whether this type of penal regulation is compatible with the resocialising orientation of custodial sentences in Article 25.2 of the Spanish Constitution.

Furthermore, these legal provisions go down the dangerous path of forgetting the *ultima ratio* nature of *Ius Puniendi* and the criterion of proportionality that legitimises it. Solving the problem of social differences caused by the global society by re-criminalising poverty does not seem to be the right way to go, and appropriate preventive social policies should be adopted for this purpose. The Spanish criminal legislator has distanced itself from this idea, since the progressive dismantling of the Welfare State has been accompanied, in an inversely proportional relationship, by an extensive and intensive punitive interventionism that does not produce dissuasive or resocialising effects. What it does produce is a placebo effect on the citizen, since it conveys the impression that something is being done to solve the structural problem behind the discourse of citizen security, above all because of the electoral advantage it offers.

4. Conclusions

This paper concludes that the Criminal Policy of a given historical moment can only be understood from the social foundations on which it is developed. In this sense, it has

[25] See Faraldo Cabana, P. Los delitos leves. Causas y consecuencias de la desaparición de las faltas. Valencia: Tirant lo Blanch, 2016, passim.

[26] Article 234.2 punishes with the upper half of the penalty of the minor offence in cases that are usually committed in clothes shops or supermarkets: "when in the commission of the act the alarm or security devices installed on the stolen goods have been neutralised, eliminated or rendered useless by any means".

[27] Martínez Escamilla, M. "La venta ambulante en los delitos contra la propiedad intelectual e industrial", InDret-Revista para el análisis del Derecho, 1 (2018), 11.

been analysed that the risks arising from the social fabric of post-industrial countries do not have the same meaning and characteristics. Nor do the set of factors that condition the citizen"s perception of insecurity have the same impact. Thus, the aim of this paper has been to show the double face of citizen insecurity and the risks that have caused it.

First, the risks that have genuinely driven the development of a "modern" Criminal Law are those deriving directly from the productive processes of economic globalisation and technological progress. This is the area in which Criminal Law has taken on a necessary extensive role, not without difficulties and problems that arise when it comes to making the protective function of Criminal Law compatible in the light of a society that is different from the one on which classical Criminal Law was based. The compatibility of criminal incrimination with the principles of legality, proportionality and culpability that determine the canon of constitutionality of criminal intervention is one of the fundamental challenges facing specialised doctrine and the work of judicial bodies.

Secondly, social threats rooted in marginalisation and social exclusion have emerged as a perverse effect of the above processes. However, they do not represent new risks for Criminal Law. What is new in the political-criminal discourse that responds to them is the gradual hardening of repression in this area, with an extension and intensification of custodial sentences. This punitive interventionism is dominated by "more of what is already known", with a clearly neutralising purpose, to the detriment of the aspiration of re-socialisation proclaimed in Article 25.2 of the Spanish Constitution. This is not the modernisation of Criminal Law to which we should aspire, that is difficult to fit into the framework of a Social and Democratic State under the Rule of Law such as Spain.

References

- Almonacid Lamelas, V. & Sancliment Casadejús, X. "El impacto de las TIC en la configuración clásica del derecho. Especial referencia al principio de territorialidad". *Revista de Tecnología, Ciencia y Educación*, 4 (2016): 11-32;
- Beck, U. *La sociedad del riesgo. Hacia una nueva modernidad.* Barcelona-Buenos Aires-Mexico: Paidos, 1998;
- Benito Sánchez, D. Evidencia empírica y populismo punitivo. El diseño de la política criminal. Barcelona: J.B. Bosch, 2020;
- Bergalli, R. "Libertad y seguridad. Un equilibro extraviado en la modernidad tardía". In *El Derecho ante la globalización y el terrorismo,* coordinated by M. Losano y Muñoz Conde, F. (59-77). Valencia: Tirant lo Blanch, 2004;
- Colina Ramírez, E.I. Sobre la legitimidad del Derecho penal en la sociedad del riesgo. Barcelona: J.M. Bosch, 2014;
- Faraldo Cabana, P. Los delitos leves. Causas y consecuencias de la desaparición de las faltas. Valencia: Tirant lo Blanch, 2016;
- Fuentes Osorio, J. "Los medios de comunicación y el Derecho Penal". *Revista Electrónica de Ciencia Penal y Criminología*, 07-16 (2005): 1-51 (http://criminet.ugr.es/recp);
- Hassemer, W. Persona, mundo y responsabilidad. Bases para una teoría de la imputación en Derecho Penal, Valencia: Tirant lo Blanch, 1999;
- Jakobs, G. "Derecho Penal del ciudadano y Derecho Penal del enemigo". In *Derecho Penal del enemigo*. 2ª edición. Coauthors Jakobs & Cancio Meliá (12-85). Cizur Menor: Aranzadi, 2006;

- Martínez Escamilla, M. "La venta ambulante en los delitos contra la propiedad intelectual e industrial", *InDret-Revista para el análisis del Derecho*, 1 (2018): 1-37;
- Martínez-Buján Pérez, C. *Derecho Penal Económico y de la empresa. Parte General*. 5ª edición. Valencia: Tirant lo Blanch, 2016;
- Mendoza Buergo, B. "Gestión del riesgo y política criminal de seguridad en la sociedad de riesgo". In *La seguridad en la sociedad del riesgo. Un debate abierto*. Edited by C. Da Agra, J. Domínguez, P. Hebberecht & A. Recasens (67-89). Barcelona: Atelier, 2003;
- Mendoza Buergo, B. *El Derecho Penal en la sociedad del riesgo*, Madrid: Civitas, 2001;
- Silva Sánchez, J.M. La expansión del Derecho penal. Aspectos de Política criminal en las sociedades postindustriales. Montevideo – Buenos Aires: BdeF, 2006;
- Soto Navarro, S. "La influencia de los medios en la percepción social de la delincuencia". *Revista de Ciencia Penal y Criminología*, 07-09 (2005): 1-46 (http://criminet.ugr.es/recp);
- Wacquant, L. "La tormenta global de la ley y el orden: sobre neoliberalismo y castigo". In *Teoría social, marginalidad urbana y Estado penal. Aproximaciones al trabajo de Loïc Wacquant*. Edited by I. González Sánchez (203-228). Madrid: Dykinson, 2012;
- Wacquant, L. *Las cárceles de la miseria*. Buenos Aires: Manantial, 2000.

CONSIDERATIONS ON YOUNG PRISONERS – BETWEEN SOCIAL REINTEGRATION AND RECIDIVISM

Cristina DUMITRAN*

Abstract

The article presents some consideration on the efficiency of the social reintegration policies of young detainees, as part of the multidimensional evaluation process. Even though there have been elaborated policies for reducing the causes which generate criminality and relapse, their efficiency has not been evaluated until now, the only mean through which this has been done being the statistical one. Contrary to the expectancies, statistically, the relapse rate of Romania is constant in recent years. In the analysis, recidivists and non-recidivists" convicts aged from 16 to 29 who fit the NEET criteria (Not in Education, Employment or Training) have been taken into account. The article highlights the social problems encountered by those who have gone through imprisonment and those who have benefited from social services and social reintegration programmes ran in the penitentiary and from post-incarceration services. The conclusion is that Romania has the means of reducing the relapse, but they are not well enough lawfully integrated in a coherent and constant process.

Keywords: *youth, social reintegration policies, criminality, recidivism.*

1. Introduction

Crime and increasing the recidivism rate in particular, are one of the most acute problems of the 21st century. With the evolution of society (economic, cultural, industrial, technological, etc.) and with the positive effects transposed in terms of progress, inevitably appear the negative effects, among which are the increase of crime, the decrease of the security degree of citizens, the decrease of the authority of social control institutions, the appearance of a subculture of crime. Even though there have been developing policies to reducing the causes which generate crime and recidivism, their efficiency has not been evaluated until now, the only mean through which this is the statistical one. Contrary to the expectancies, statistically, the relapse rate of Romania is constant in recent years.

There is recidivism when, after the final Coupled with the statistical situation of age related crimes, it is noted that currently, in the custody of the penitentiary system:

- 1,07% are minors aged between 14 to 18 (236 minors, being 17 less now than in 2019);
- 3,44% are young people aged between 18 to 21 (759 young people, 90 less than in 2019) – according to the age delimitation from the low on the execution of sentence no.. 254/2013[1];
- 23,61% are adults aged between 21 and 30 (5198 inmates, compared to 5515 in the custody of the penitentiary system in 2019); - 32,82% are adults aged between 31 and 40 (7224 detainees, increasing by 588 compared to 2019).

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[1] According to the art. 42, Law no. 254/2013, "young people are convicted persons under the age of 21".

Linking the state of recidivism with present ages, it is inferred that the share of recidivists is found among people aged in the two groups: 21-30 years old and 31-40 years old. Thus, the probability of producing the first deed was at a young age, as defined in the Law no. 350/2006– Youth Law, art. 2.

Taking into account only the statistical data, it appears that the young people we refer to (18-29 years old), they once again lived the experience of incarceration and the same time they also benefited from the social services, from the educational programs and approaches of social reintegration carried out in the penitentiary and from the services specific to the post-detention period. The reality that these young people have relapsed in an increased percentage, raises issues of reflection on the effectiveness of strategies and policies for the social reintegration of detainees, making it necessary to critically analyze and rethink policies.

The research was limited to this age group not only from the perspective of its importance as a category for the future of any society, but also, because from a legal point of view, with the implementation of the new Criminal Code in 2012, legal frameworks of same facts have changed and the research would no longer be relevant.

Additionally, it was taken into account, as a reference to the current situation - the year 2019, when the law of the compensatory appeal (how is knows in public space)[2] was abrogated by Law no. 240/2019, because the effects it produced in the period 2017-2019 are still felt today. decision of a sentence of imprisonment of more than one year and until rehabilitation or the fulfillment of the rehabilitation term, the convict again commits an intentional or outdated offence, for which the law provides for imprisonment of one year or more.

Society"s perception over the phenomenon of recidivism is an indicator of the failure of the justice system, which endangers security and public order. Studies have shown that the onset of delinquency occurs, in most cases, in early adolescence.

According to the statistical data provided by the database of the National Administration of Penitentiaries, the structure of detainees by to the criminal category, is as follows: of the 22,010 detainees (increasing by 6,06% compared to 2019):

- 37,75% are recidivists (slightly lower by 1,2% compared to 2019) and
- 27,05% non-recidivists with a criminal record (increasing by 2,2% compared to 2019).

In the Criminal Code, crimes during the period of the minor are not considered as recidivism. In this way, about the 27,05% non-recidivists with a criminal record can be considered to have committed crimes during the period of the minor or deeds for which they received the suspension of the sentence and supervision.

In this context, it was initiated a specific analyze within the Project co-funded from Human Capital Operational Program 2014-2020, POCU/380/6/13/125031 - "Support for doctoral candidates and post-doctoral researchers: *DECIDE - Development through entrepreneurial education and innovative doctoral and post-doctoral research*".

[2] Law no. 169/2017 - law of the compensatory appeal, for the amending and completion of Law no. 254/2013 regarding the enforcement of punishments and freedom-privative measures laid out by judiciary bodies during the criminal cause.

2. Content

According to the art. 3, Law no. 254/2013 "(1) The purpose of the execution of sentences and educational measures constraining liberty is to prevent the appearance of new crimes.(2) The execution of sentences and educational measures depriving of liberty is aimed at forming a correct attitude towards the rule of law, towards the rules of social coexistence and towards work, in order to reintegrate detainees or interned persons into society[3]".

Preparation for the release of detainee begins on the first day of detention. Therefore, the chances of its inclusion in society depend on the quality of social reintegration services provided in the prison.

In the specialized literature, the phrase social reintegration means restoring the person to a state of functional balance before conviction[4].

If we take into account the factors that generate crime:

- poverty,
- low level of education,
- lack of a qualification and a job,
- lack of shelter,
- the entourage,
- genetic factors, etc[5],

the social reintegration of the detainee in the pre-detention environmental condition is not exactly optimal, but will be used by virtue of generalizing its meaning and assimilating it with the process of social inclusion, which "represents the set of multidimensional measures and actions in the fields of social protection, employment, housing, education, health, information-communication, mobility, security, justice and culture, aimed at combating social exclusion and ensuring the active participation of people in all economic aspects, social, cultural and political aspects of society". The social and criminal approaches and policies that are carried out with the detainees in detention to achieve this goal, were set out in the diary of the previous edition of the conference. However, although Romania has made progress in involving all parties responsible for reducing crime, few successful stories have been reported.

For example, the keystone was in the period 2017-2019, when, following Law no. 169/2027, the prison population reached unique negative levels in history. Thus, if in 2013 the number of detainees was 33,424, in 2019 there were months when their number was 18,900 detainees. The decrease in the number of detainees is not directly correlated with the decrease in the number of crimes and the reduction of crime.

According to Law no. 169/2017, it is stated that when calculating the executed punishment, regardless of the regime of executing the punishment, it should be taken into consideration, as a compensatory measure, the execution of punishment in improper conditions, a case in which, for every 30 days of detention in improper conditions, even if these are not consecutive days, 6 more days are added and considered executed.

Releases from prison as a form of compensation for poor detention have generated much controversy, including from human rights organizations: "*Both full-term*

[3] Law no. 254/19.07.2013 on the execution of penalties and the custodial measures ordered by judicial bodies during the criminal trial, Official Gazette of Romania no. 514/14.08.2013.

[4] According Social Assistance Law no. 292/2011, art. 6, alin dd), the *process of social integration* represents the interaction between the individual or group and the social environment, through which a functional balance of parties is achieved.

[5] C. Dâmboeanu, "*Fenomenul recidivei în România*". Calitatea vieții, XXII, nr. 3, București 2011, p. 295-312.

release, much too hasty as a result of the enforcement of the compensatory appellate law, and the conditional release of convicts who had not proven themselves rehabilitated or ready to be reinserted, an excess stimulated by the lack of sufficient detention space, do nothing but encourage the criminal phenomenon. The availability of this release option induces the idea that offenders might easily escape after committing a crime, no matter how serious the crime may be. Thus, they end up committing new crimes, in fact more and more serious crimes, having more new victims as a result of these crimes, and finally, returning to prison after their much sooner release, without the chance to be fully rehabilitated and socially reinserted. Accordingly, it is quite likely that prisons will be overcrowded as a direct result of hasty early release".

By applying Law no 169/2017, there were many situations in which detainees were released prematurely, without having achieved the objectives set at the beginning of the sentence. These objectives were specifically focused on the process of re-education, change and building new values. Thus, they did not have the necessary resources for integration into society. In this case, we are talking about integration into a society in which each individual complies with the rules and contributes to collective well-being through his actions.

According to the enforcement law, each detainee is assessed during detention, in order to identify intervention needs and vulnerabilities. Depending on the results obtained, an individualized plan of measures shall be drawn up.

These are prioritized according to risk, in the three areas: educational, psychological and social domain. The steps are staggered in time, throughout the execution of the sentence. In this way, if the detainee goes through all the steps in the years he spends in the prison, it is assumed that at the end of the sentence, the risks of recidivism are diminished.

So, from the 14,000 inmates who benefited from early release based on the enforcement of this law, more than 900 of them returned behind bars for committing serious violent offences - murders, rapes and robberies, in the same period: 2018-2019.

The vicious circle appears: no completed studies, no qualifications, no prospect of a job that will ensure a decent living, without developed skills and abilities, without a work education (discipline), stigmatized by society, sometimes without a family or its support, the only chance for released prisoner is to return to the environment in which he started his criminal career and obtained material benefits easily.

An analysis of the educational level of inmates revealed serious problems[6]:

- 3,49% have completed higher education studies;
- 0,64% have post highschool;
- 8,62% have attended highschool (9-12 school years);
- 10,44% have a qualification in a profession (92,1% of them being in the age group 30-60 years, so that only 7,9% of detainees under 30 years old have a qualification);
- 62,66% of them did not have a job upon arrest, while only 22% were involved in different domains of activity.

Some young detainees allege that they did not work during their detention, although they wanted to do it.

According to the enforcement law, "work" in the penitentiary is a right, not an obligation. Being a right that they can access or not, the specialists show that statistically, over 50% of detainees eligible to work in

[6] Statistical situation at 01.03.2021, effectively detaine: 22,010.

prison, refuse, understanding that legally, they have the right to accept or not this activity. Thus, those who are individualized in the maximum safety or closed regime, where the freedom of movement/exit from the rooms is restricted, appreciate work as a way to overcome these limits. When they reach semi-open or open regimes, where freedom of movement is increased, interest in work decreases in direct proportion. They consider it degrading to work, follow a schedule and have discipline in this regard and claim that they have never done so before. From this point we can talk about the" subculture" of prison, about models, values and interests that are specific to this environment.

As a benchmark for understanding the perpetuated stances through patterns of detainees, we show that:

- 59,68% did not complete the gymnasium cycle, being in the I-VIII classes segment (out of the 13151 detainees in this situation, 4323 are under 30 years old, representing 72,57% of the young detainees);
- 6,74% are illiterate.

The statistical radiograph shows the low interest of young people in school and qualifications, sine-qua-non conditions in accessing a satisfactory job and increasing employment opportunities.

35% of those released prematurely under Law 169/2017, were enrolled in penitentiary school (primary and secondary school) but did not finish. Studies on samples of detainees show that those who had the highest chances of re-integration into society are those who benefited from social capital: family, friends, well-meaning people, who offered them support and employment, work.

On the other hand[7], specialists highlighted the difficulties that young liberated people face: stigmatization (society was not prepared to repress them and give them "*a second chance*"), low education level, disinterest, background, lack of material resources necessary for subsistence until the moment of employment, the lack of a domicile and the necessary documents for the employment file.

The specialist said that the chances of re-integration increase if: the detainee has a qualification, wants to change himself, has the capacity for self-control, has a middle age, is physically and mentally healthy, maintains contact with the family, is not recidivist, has a previous work experience, worked in detention and has a permanent residence.

In this context, the chances of reintegration are difficult to predict.

One of the most recent directions of analysis of recidivism is that of "the criminal career" that begins in youth, develops and consolidates in detention and provides a dynamic picture of an individual"s criminal activity by analyzing its trajectories, frequency, duration, stability over time and, finally, its cessation. Also in this context, it is talking about "*self-fulfilling prophecy*" who is a concept in the social sciences, which defines the situation in which someone expects, based on a hypothesis or an intuition, an event, usually negative, changes their behaviour depending on his/her beliefs, the result is that the "prophecy" is fulfilled. Thus, if the detainee does not believe in the possibility of reintegration into society, this will happen, regardless of the favorable context that would be created.

[7] Țica, Gabriel, "*Recidivism și excluziune socială*", Editura Universității din Oradea, Oradea, 2016, p. 201-2014.

3. Conclusions

In fact, the reality is that it is not known exactly who are those offenders which will relapse and what are the factors that cause them to repeatedly deviate from the law.

In the prison system, a tool to assess the risk of recidivism of detainees has been implemented, but in present it is not relevant for making decision on psychological, educational and social interventions or for conditional release.

The minimum package of social reintegration programs held in prisons for periods of 3-6 months" maximum and does not ensure person-centrated intervention and change.

Another aspect that raises issues in addition to the duration of intervention, is related to the moment when the detainee is included in the program. Thus, if the detainee has to execute a sentence of 7 years for rape and in the first year is included in the program for sex offenders (which has 24 sessions – 6 months), by the end of the 7 years, it loses its efficiency.

On the other hand, the detainees claim that the social reintegration programs don"t help them at all, the only reason they participate is to get credits, rewards and early release, the motivation being extrinsic.

In conditional release commissions, the detainee"s presence at these programs and activities is taken into account, but the progress he has made as a result of his participation is not evaluated. One of the questions that should be asked would be "what change has occurred since the program?"

Released, in most cases, the detainee has the same problems as before imprisonment, but exacerbated, with a network of friends formed in the prison and, eventually, with consolidated skills and knowledge for practicing new crimes.

The lack of unified database for institutions, in which these elements are centralized, is the main obstacle in achieving an overview of individuals, predicting the risk of recidivism and assessing the effectiveness of how criminal and social policies respond to crime.

Given the above elements and statistical data on juvenile delinquency, we can appreciate that the purpose of the execution of the prison sentence is only partially achieved: preventing new crimes (during detention). The achievement a correct attitude towards law and order and social reintegration of ex-offenders remains a goal.

References

- Law no. 254/19.07.2013 on the execution of penalties and the custodial measures ordered by judicial bodies during the criminal trial, Official Gazette of Romania no. 514/14.08.2013;
- Government Decision no. 157/2016 on the approval of the Regulation on implementing the provisions of the Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, published in the Official Journal of Romania, Part I, no. 271 of April 11, 2016;
- Law no. 286 /2009 on the Romanian Criminal Code;
- Law no.169/2017, for the amending and completion of Law no. 254/2013 regarding the enforcement of punishments and freedom-privative measures laid out by judiciary bodies during the criminal cause;
- Law no. 240/2019 for abrogation of Law no. 169/2017;
- Law no. 350/2006 – Youth Law;

- Social Assistance Law no. 292/2011;
- National Administration of Penitentiaries, Annual Activity Report 2018, p. 8;
- Dâmboeanu,Cristina, "*Fenomenul recidivei în România*". Calitatea vieții, XXII, no 3, București 2011;
- Țica, Gabriel, "*Recidivism și excluziune socială*", Editura Universității din Oradea, Oradea, 2016;
- http://cks.univnt.ro/uploads/cks_2019_articles/index.php?dir=1_criminal_law&download=CKS_2019_criminal_law_019.pdf;
- http://cks.univnt.ro/uploads/cks_2019_articles/index.php?dir=1_criminal_law&download=CKS_2019_criminal_law_020.pdf;
- https://www.g4media.ro/apador-ch-cere-abrograrea-legii-recursului-compensatoriu-efectul-specific-vizibil-si-cu-adevarat-negativ-este-dublarea-numarului-celor-eliberati-la-termen.html.

MORE ABOUT THE TRIAL AND DISPOSAL OF CASES WITHIN REASONABLE TIME UNDER THE BULGARIAN CRIMINAL PROCEDURE CODE

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Abstract

In the Bulgarian theory of criminal procedure, the issue of trial and disposal of cases within reasonable time has emerged as relevant. In the first place, therefore, the lack of an objective and thorough study of it testifies. Secondly, it must be said that where it is concerned, this is in so far as it expresses different views on the progress of the process. With all this, however, it is not possible to reach the essence of the question and answer whether the consideration and resolution of cases within a reasonable time is a normative requirement or a principle of criminal proceedings. For this reason, with this report an attempt is made to check theoretically the possibility regulated in Art. 22 of the Bulgarian Criminal Procedure Code to be raised in an independent principle of the Bulgarian criminal proceedings. To achieve this goal, a critical analysis has been made for the compatibility of the envisaged situation, both with some of the main principles of the criminal process and with its tasks, including those institutions that shape its modern democratic image.

Keywords: *criminal proceedings, reasonable time, right of protection, European court of Human right, case-law, criminal law.*

1. Introduction

In the new Criminal Procedure Code of the Republic of Bulgaria (CPC)[1], the legislator enriched (expanded) Chapter Two - "Basic Principles". It also regulated the requirement to resolve criminal cases within a "reasonable time". Thus, according to Art. 22, para. 1 of the CPC: “The court shall try and dispose of the cases within „reasonable time”. In para. 2 of Art. 22 of the CPC, it is explicitly stated that: "the prosecutor and investigative bodies shall be obligated to secure the conduct of pre-trial proceedings within the time limits set forth in this code." This ammendment of the procedural law continues to give grounds to some established in the Bulgarian procedural theory authors to treat the requirement for "reasonable time" as a principle of modern criminal proceedings. Here is what Margarita Chinova shares on the issue, for example: "… the obligation to consider cases within a reasonable time is so significant that it is raised in a basic leading procedural position - the principle of criminal proceedings."[2] A similar opinion is expressed in the case law of the Constitutional Court of the Republic of Bulgaria. In Decision №10 of 28.09.2010 of the Constitutional Court the following was reproduced: „… the current CPC with Art. 22 assigns respective responsibilities to the bodies of the criminal process, raising the consideration and resolution of the criminal cases within a "reasonable time" as a basic

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[1] In force - 29.04.2006.

[2] M. Chinova, *Pre-trial proceedings on CPC – theory and practice*, Sofia., Ciela, 2013, p. 34.

principle of the criminal process. Most involved in the problem are those bodies that perform the functions of supervision at the relevant stage of the process - the prosecutor in the pre-trial phase and the court in the judicial phase… ".

2. Content

The perception of the obligation to resolve criminal cases within a "reasonable time" as a principle of the Bulgarian criminal process, in a sense has a legal basis in terms of the systematic place of Art. 22 of the CPC, namely, Chapter Two, which lists the basic principles. However, the systematic place of a provision does not always (automatically) reveal its essence. It is by nature an indication (direction) for this, therefore as an argument the systematic place appears - formal and insufficiently convincing in itself! For this reason, it is imperative that the proclamation of a given legal position as a principle be justified ideologically and conceptually, and not pro forma - by placing it among other (already) established in jurisprudence legal principles. The opinions cited above in favor of the principled character of Art. 22 of the CPC take into account, on the one hand, namely its systematic place in the code, and on the other hand, the notion that in this way the Bulgarian CPC is fully and in the most satisfactory way synchronized with the rule for hearing criminal cases within a "reasonable time" under Art. 6, item 1 of the ECHR.[3] It is worth mentioning here that this publication does not discuss the need and usefulness of such synchronization with the provisions of the ECHR, but only - how logical, effective and justified it is to do so by raising the "reasonable time" requirement in principle in the Bulgarian criminal trial!? In other words, it is not disputed whether, de lege lata, the resolution of criminal cases within a 'reasonable time' is conceived and explicit as a principle, but whether this does not overestimate and favor the idea of ending criminal proceedings a case in an indefinite, but definable (reasonable) procedural term before the idea for the qualitative (correct) completion of the criminal proceedings. Moreover, there are many theoretical obstacles to the provision of Article 22 of the Criminal Procedure Code to manifest and develop as a classical legal principle of the system of basic principles of the Bulgarian criminal process. The main arguments in this direction are set out and developed below.

First of all, emphasis must be placed on the fact that the legislator puts different content into the requirement of a "reasonable time" depending on the addressee to whom it applies. According to Art. 22, para 1 of the CPC, the court must consider and decide the case within a "reasonable time". According to paragraph 2 of the same article, the prosecutor and the investigative bodies are obliged to ensure the conduct of the pre-trial proceedings within the terms provided for in the CPC. Therefore, in the first case, the work of the court is bound by a "reasonable time", which is clearly not defined, neither in absolute nor in relative terms, nor according to any legal criteria. And in the second case, the bodies of the pre-trial proceedings should be guided by the clear and explicitly fixed in the CPC deadlines, ie. the term deliberately described in the law is preferred to the ad hoc "reasonable time". It is also not clear whether the deadlines set for the pre-trial proceedings in the Criminal Procedure Code are "reasonable" in facto. Another thing, however, is clearly absurd, the same legal principle leads to two opposites in meaning and content results!

[3] M. Chinova, G. Mitov, *Short course of lectures on criminal proceedings*, Sofia., Ciela, 2021, p. 125.

It is no coincidence that the requirement to conduct criminal proceedings within a "reasonable time" under the ECHR is regulated as a subjective right of the accused and not as a legal principle. Thus, it turns out to be a recognized and guaranteed by the Convention possibility of the accused to possess, and to require observance of a certain counter-behavior by the state. It is in this way that uncontroversial regulation of public relations concerning the duration of criminal proceedings is ensured. Therefore, human rights theory assumes that the purpose of the "reasonable time" guarantee in criminal cases is to "avoid a situation in which a person with pressed charges has remained in a state of uncertainty for too long about his or her destiny."[4] Consequently, the right to have criminal cases heard within a "reasonable time" is part of the accused's right to a defense, and in particular one of his rights of defense. The inclusion of this right in Art. 6, item 1 of the ECHR represents the strengthening of the principle of protection of the accused, and not the implementation of some new and independent principle of the criminal process!

From the literal interpretation of Art. 22 of the CPC, it is clear that the legislator does not define the term "reasonable time". There are no clear criteria by which participants in the process can assess and verify whether and to what extent a given deadline is "reasonable". Then, for what reason does a vague situation arise in principle of the criminal process, ie. in a leading idea for constructing and developing the institutes of criminal procedure? The question is rhetorical! The role of legal principles in the continental legal system is also essential for law enforcement as an activity. In the absence of a law, or in the presence of an unclear law (in interpretation), the judge is obliged to resolve the legal dispute in a way that best corresponds to the basic principles of law.[5] Hence, Article 22 of the Criminal Procedure Code cannot (effectively) serve to fill in and overcome any ambiguities in the course of criminal proceedings, since it is itself unclear. Then where is his principled character?

The guiding criteria for determining the reasonableness of a procedural time-limit have been developed in the case law of the Strasbourg Court. In „König v Germany "[6], the reasonableness of the length of the proceedings was considered to be determined by the following three factors: the complexity of the case, the behavior of the person concerned (the accused) and the behavior of the competent public authorities. The reasonableness of the term ipso jure is always a function of specific factual and legal circumstances, and the more complex and diverse these circumstances are, the more extensible the 'reasonable time' can be, and vice versa. Another issue is that the assessment of the existence and complexity of the mentioned circumstances is relative and depends on the experience, knowledge and professionalism of the state bodies involved in the criminal proceedings. Such a direct connection with the discretion of the competent procedural authorities reveals a risk of arbitrariness, both in determining the amount of the "reasonable" time limit and in resolving the issue of its expiration, respectively violation. It turns out that there is no obstacle for the same subject to lead the

[4] Harris, O'Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela, 2015, p. 523.

[5] R. Taschev, *General theory of law*, Sofia., Sibi, 2010, p. 222.

[6] HUDOC.

process (to accuse) and to define which term is "reasonable", ie. to decide whether the right of the accused to a trial within a "reasonable time" has been violated in the absence of a legal template for this! It is here that it is appropriate to point out that the ECHR is interpreted and applied not arbitrarily and literally, but in compliance with a reasonable ratio of proportionality between the means used and the objective pursued.[7] It should also be borne in mind that the practice of the ECtHR is ambiguous. In a number of cases with a similar subject matter, the court has rendered radically different court decisions. The borrowing of institutions and practices indefinite in content is dangerous because it makes the Bulgarian criminal process eclectic. On this occasion, it is worth paying serious attention to the following statement of Ivan Salov: "The main defect of our current criminal procedure system is its uncertainty and, accordingly, its opportunistic development and eclecticism..."[8] Here is an example that confirms the above. According to M. Chinova: "… in its case law, the European Court of Human Rights first determines the length of the relevant period by determining the starting and ending point, and then decides whether this period is reasonable. Reasonableness is assessed not in the abstract, but in view of the circumstances of the particular case."[9] It is clear from the citation that the uncertainty in the content of the concept of "reasonable time" leads to its confusion with the concept of relevant period of time. The term is always a numerically defined period of time for the realization of something. According to the author, however, the duration and reasonableness of the period are determined separately for each case, but not with the help of numbers, but by the circumstances of the case, ie. it is not exactly a term, but a time. So, in fine the vague period of time becomes reasonable, if it is reasonable! In practice, we come to a useless tautology - "reasonable time" is "reasonable" because it is "reasonable"!

Furthermore, it follows from the fact that under the Convention the examination and resolution of criminal cases within a "reasonable time" is the right of the accused, that both its existence and its content are not judged presumably or by the conduct of public authorities, as is the case under Bulgarian law. As a general rule, subjective rights are provided for and determined by volume in the law and by the legislator. And their exercise depends on the will of the subject who owns them. The right to defense of the accused must also be implemented in the law by the legislator, for fear of being left objectively unrecognized and unsecured. Nowadays, in Art. 55 of the Criminal Procedure Code, which lists the rights of defense of the accused, the right to criminal proceedings cannot be found within a "reasonable time"! The accused is nevertheless able to derive this right directly from the Convention by invoking Art. 5, para 4 of the Constitution of the Republic of Bulgaria. In this sense, it is untenable to claim that as a principle Art. 22 of the CPC may give rise to subjective rights, resp. legal obligations.[10] It is sufficiently to remind that no legal principle, including that expressed in Art. 22 of the CPC, cannot have a decisive role as a source of subjective rights. The legal principle is first of all a way of arguing.

[7] Harris, O'Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela, 2015, pp. 3-27.

[8] I. Salov, *Actual issues of the criminal process*, Sofia, Nova Zvezda, 2014, p. 43.

[9] M. Chinova, G. Mitov, *Short course of lectures on criminal proceedings*, Sofia, Ciela, 2021, p. 127.

[10] M. Chinova, G. Mitov, *Short course of lectures on criminal proceedings*, Sofia, Ciela, 2021, pp. 34 -35.

It "expresses an idea, not a norm "[11], i.e. does not describe specific behavior that can / should be performed in a specific factual situation.

For greater objectivity, it should be mentioned that the ECtHR is inclined to treat the requirement of a trial within a "reasonable time" not only as a subjective right of the accused, but also as a legal guarantee. According to him, the requirement "emphasizes the importance of justice without delay, which could threaten its effectiveness and reliability."[12] From the views of the court it is easy to be left with the impression that faster a proceeding is more efficient and reliable it is! In other words, there is a tendency in jurisprudence to equate reasonableness with rapidity. In my opinion, raising such "reasonableness" in principle is harmful because it exaggerates the benefits of procedural economy and infiltrates rapidity among the tasks of the process. The pursuit of rapidity "stakes" the procedural error and "poisons" the need for a proper conclusion of the criminal case. In the same sense, Simeon Tasev states: "… procedural economy and rapidity in the proceedings should not be in conflict with the ultimate goal of the process - a lawful and fair process."[13] Making the requirement for a trial within a "reasonable time "in principle is subject to criticism in several other aspects.

First, the idea of "reasonable" (fast) proceedings does not correspond to the immediate task of criminal proceedings. According to Art. 1, para 1 of the CPC in each criminal case must be ensured the disclosure of the crimes, exposing the guilty and proper application of the law. Nowhere is it a question of quick (reasonable) detection of the crime, quick (reasonable) exposing of the guilty and quick (reasonable) application of the law. This is because in the criminal process the unconditional disclosure of the objective truth and the correct application of the law is a main priority! Therefore, any principle of criminal procedure should be in line with this priority. Not coincidentally, Stefan Pavlov points out that: "… according to the concept lying down in the Criminal Procedure Code, the basic principles of the criminal process are the basic guidelines on which the entire procedural system is built in order to ensure the implementation of its tasks."[14] From all that has been said so far, it can be summarized that it seems more logical and legally argumented not to set the timely completion of the criminal case as a principle, but as a practical result in the pursuit of the tasks of the process. Nikola Manev takes a similar position, arguing that: "it should not be forgotten that rapidity, a reasonable time for hearing the case is not so much a goal or principle in the criminal process but a result of the action of a well-worked state machine, criminal law enforcement and criminal justice… "[15]

Secondly, the basic principles of the criminal process of the Republic of Bulgaria are built in a complete system, in which they are mutually secured and conditioned. That is why, it is accepted in theory that they function in organic unity,[16] ie. without contradicting each other. Therefore, if it is accepted that the resolution of criminal cases within a "reasonable time" is a principle, it must be accepted, and that it is organically compatible with the other principles of

[11] R. Taschev, *General theory of Law*, Sofia., Sibi, 2010, p. 213.
[12] HUDOC, H v France; Stögmüller v Austria.
[13] S. Tasev, *On denial of justice*, Sofia, Legal magazine „property and law", no. 7/2013, p. 9.
[14] S. Pavlov, *Criminal proceedings of the Republic of Bulgaria – common part*, Sofia, Sibi, 1996, p. 61.
[15] N. Manev, *Development of the reform of the criminal process*, Sofia, Ciela, 2018, p. 73.
[16] S. Pavlov, *Criminal proceedings of the Republic of Bulgaria – common part*, Sofia, Sibi, 1996, p. 65.

Chapter Two of the Criminal Procedure Code. The implementation of a comparative verification, however, convinces otherwise. For example, there is no organic compatibility between the principle of objective truth and that of resolving criminal cases within a "reasonable time". According to Art. 13, para 2 of the CPC, the disclosure of what has actually happened / occurred in the objective reality is not made dependent on any procedural term, even on a "reasonable" one. The objective truth must be established regardless of the expiry of the procedural time limits, as long as the statute of limitations for criminal prosecution has not expired. The Bulgarian CPC does not recognize the termination of the criminal proceedings due to the expiration of a "reasonable" procedural term - arg. Art. 24 CPC. In my opinion, the court is obliged to decide the criminal case and when the proper procedural deadlines have expired, the opposite will mean a denial of justice! Moreover, some of the criteria for a "reasonable time" de lege lata apply as preconditions for extending the time-limits. For example, the factual and legal complexity of the case is grounds for extending the term for pre-trial investigation - arg. Art. 234, para 3 of the CPC.

Thirdly, the theory confirms the understanding that the principles of the criminal process are applied "through the organization of the separate procedural stages and institutes determined by them ". Therefore, if it is assumed that in Art. 22 of the CPC contains a principle, it must, in order to be applied, should model certain stages and institutes of the CPC. Even the most superficial review of the law denies the veracity of such a statement. Where the regulations of the pre-trial proceedings provide deadlines, they are in a pre-determined amount by the legislator, and it is not a question of a "reasonable term" - arg. Art. 234; Art. 242, para 4; Art. 243, para. 4 and para 5 of the CPC. The same applies to the court phase - arg. Art. 247 a, para. 2, item 1; Art. 308; Art. 318 of the Criminal Procedure Code, etc. It is interesting to note that the requirement of a "reasonable time" does not determine the appearance of even section two of Chapter Fifteen of the CPC, which regulates: the calculation of time limits, compliance with time limits, extension of time limits and their recovery. The legislative approach to use a fixed ex lege period with the possibility of extension if necessary deserves support because, except bringing clarity, it disciplines and motivates the competent state authorities.

3. Conclusions

In conclusion, the following five conclusions can be made:

- firstly, the place of Art. 22 of the PPC in the system of basic principles is controversial and problematic;

- secondly, it is imperative the legislator to clarify the concept of "reasonable time";

- thirdly, understood as a guarantee against unjustified delay of the criminal proceedings, the requirement for a "reasonable term" has a place in the Criminal Procedure Code as a subjective right of the accused, respectively a legal obligation of the competent procedural bodies;

- fourthly, it is not always possible to equate the fast (reasonable) criminal process with the productive (lawful) criminal process;

- fifthly, a reasonable criminal trial is not one that ends quickly, but one that ends with a criminal conviction fully consistent with the objective truth and the law.

What has been said in conclusion can serve de lege ferenda as a ground for revoking Art. 22 of the CPC. Simultaneously, and as a presumption to supplement Art. 55 of the Criminal Procedure Code with a new right of the accused to a trial within a "reasonable time".

References

- S. Pavlov, Criminal proceedings of the Republic of Bulgaria – common part, Sofia, Sibi, 1996;
- R. Taschev, General theory of Law, Sofia, Sibi, 2010;
- M. Chinova, Pre-trial proceedings on CPC – theory and practice, Sofia, Ciela, 2013;
- M. Chinova, G. Mitov, Short course of lectures on criminal proceedings, Sofia, Ciela, 2021;
- N. Manev, Development of the reform of the criminal process, Sofia, Ciela, 2018;
- I. Salov, Actual issues of the criminal process, Sofia, Nova Zvezda, 2014;
- S. Tasev, On denial of justice, Sofia, Legal magazine „property and law“, no. 7/2013;
- Harris, O'Boyle, Warbrick, Bates, Buckley, Law of the European Convention on Human Rights, Sofia, Ciela, 2015;
- Darryl K. Brown, Jenia Iontcheva Turner, Bettina Weisser, The Oxford Handbook of Criminal Process, 2019;
- https://hudoc.echr.coe.int.