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CONTENT

HUMAN RIGHTS IN OUTER SPACE: A THEORETICAL-LEGAL PROTOTYPE

Nicolae VOICULESCU[*]
Maria-Beatrice BERNA[**]

ABSTRACT

The insertion of human rights in the actions related to the cosmic space is a subject that, first of all, produces ethical-moral implications, reconfiguring the mission traditionally assumed by the individual. Through his millennial destiny - assumed even in the religious field - man is the tributary of an earthly existence. Designing the rights of the individual and, in a broad sense, the rights of humanity in a higher space such as that of the cosmos, arouses controversy over the legitimacy of human action- to go beyond its environment and to assert its rights in other coordinates. The assertion of human rights in space is primarily a pretext for rethinking the human condition and the position of man in the universe and, secondarily, a means to identify rules that ensure a legal status for the individual integrated in space. In this paper we aim to explore the legal meaning of inserting human existence in the logic of outer space from the perspective of the regulations outlined in the matter. Our analysis will model two directions of action: (1) the consequences of the paradigm shift on human rights theory; (2) identifying the legal elements that precede a space human rights law. The existing space law provides for the protection of human rights to the extent that the individual is engaged in space exploration activities - this is the current prototype for the application of human rights in space. Hence, the existence of the prototype contributes to the foundation of an independent field of study that promotes the human dimension within the exploration of outer space.

KEYWORDS: *space, human rights; legal instruments; solidarity and international cooperation;*

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Human rights in outer space: arguments in favor of a theoretical reconstruction

The exploration of outer space is a reality that belongs to the theory and practice of human rights. In the classical sense, the context of the exercise of human rights places in the foreground the individual and the terrestrial space – as the grounds for the manifestation of individual abilities, capacities and actions. Even the *jus naturale*[1] theory originally used to explain the formation and legitimation of human rights in democratic societies recognizes that the ancestral order of nature is what governs the forming and exercise of human rights. The set of circumstances that give concreteness to human rights traditionally relate to the perceptible and knowable environment; thus, outer space succumbs to the subsidiary plan of human rights analysis. It is also true that by appealing to a generous hermeneutics of *jus naturale*[2], human rights are also related to the *ideational-imperceptible plan of moral origin of the society of a certain epoch*. Eventually we retain the revival of the cosmic in the analysis of human rights under a special meaning: *the cosmic law of nature* - used as an argument for natural law in the context in which *the cosmic is the equivalent of metaphysics*, of the imperceptible moral world invoked in the above lines. In this case, the cosmic is the representative of the intrapsychic reality while the cosmic space is not taken into account in defining human rights on classical coordinates.

The insertion of the elements of cosmic law in the theory and practice of human rights is a necessity of modern times dictated by both the evolutions of technology and human aspirations. As a result of this operation, the field of human rights will be predisposed to some essential changes: (1) the human being will rethink its position in the universe,

[1] Doctrine formulated by the philosophers of ancient Greece according to which human rights are based on immutable norms and principles, derived from nature. They are distinguished by their essence from the positive law developed by the State authorities and are characterized by absolute legitimacy and full compatibility with the requirements necessary for the fulfillment of the Being within the polis (for further details on the interpretations advanced by the doctrine on natural law, see Gregory J. Walters, *Introduction: human rights in theory and practice,* Saint Paul University/ Université Saint-Paul, New Jersey &London Scarecrow Press, 1995, p. 1-17).

[2] Jacques Maritain, *On the Philosophy of Human Rights,* 1947, according to the text available at: *https://en.unesco.org/courier/2018-4/human-rights-and-natural-law.*

reconfiguring its status as a holder of human rights; in this sense the very theory of natural law involves some mutations given the fact that human nature is questioned and with it the whole foundation of human rights; (2) *in terms of content*, human rights theory will expand its scope, including other prerogatives that will result from the interaction between the individual and outer space; (3) from the point of view of the *particularities of human rights* - these will enter into a new logic that will affect *both the substance and the content of the rights*. For example, *the right to life* will have an innovative paradigm of manifestation: (1) the development of technology can change the recognition of the moment of the beginning and the end of life; (2) human access to space can be accompanied by mutations in the human genome in order to increase the adaptability of the individual to a different living environment; (3) for the guarantee of the right to life, it will be necessary to regulate the manifestations of the cosmic environment that are hostile to the health and life of the individual (prohibition of access to certain cosmic areas insufficiently known or considered to be incompatible with human life, etc.).

It is clear that the transcendence of the terrestrial space and the relocation of humanity in the cosmic space is a potentiality that determines territorial/geographical, legal, theoretical-praxiological implications on the field of human rights. First of all, the territorial element is taken into account, given that it is paramount in the debate on the construction of a *spatial*[3] *human rights law*: the paradigm shift in the classical theory of human rights is primarily determined by the change in the spatio-temporal position of the individual in space and, secondly, it is determined by the possibility of adapting pre-existing legal instruments on human rights to the new form of coexistence. In relation to the spatial re-positioning of the individual, multiple legal uncertainties crystallize: (1) the way in which the States will identify collaborative actions in order to exercise sovereignty and assume responsibilities over outer space; (2) to identify ways of exploiting the cosmic elements in accordance with the

[3] In doctrinal studies, in order to designate the set of rules applicable to the outer space of the planet Earth, two notions are used interchangeably: "space law" and "cosmic law". We note that in the United Nations regulations on the subject, the term "space law" is preferred over the notion of "cosmic law" while some doctrinal works simultaneously validate both notions (for example Modesto Seara Vazquez, *Cosmic international law,* translated by Elaine Malley, Wayne State University Press, Detroit, 1965, pp., 1-201.).

value of the Common Good, in a peaceful manner and giving priority to the rights of individuals; (3) solving the cleavage of *individual rights-collective rights* in the conditions of colonization of outer space: in the event of identifying forms of space existence is emerging the issue of legitimacy of international law in order to establish colonies and regulate relations between them, planet Earth and humans.

Beyond the "mutations" arising from concrete physical circumstances, we are obliged to recognize that access to outer space also produces changes in the *consciousness* and *morals* of humanity. The test of humanistic values becomes the central stake of the actions of the international community, distinguishing, in our opinion, the following possible scenarios: (1) the maintenance of humanistic values unaltered and their application on a consensual basis translating the same legal logic in order to validate, *mutatis mutandis*, the theory of human rights in outer space[4]; (2) the modification of the theory of humanistic values and the formulation of an adapted variant of the morality of humanity to the exigencies of the existence in the cosmic space; (3) the assertion of a new theory of humanistic values against the background of the re-evaluation of the classical theory of human rights that will produce changes on the regulations applicable to interpersonal terrestrial and space relations.

At the same time, we must take into account the *suis generis* character of outer space (we refer in particular to *immateriality* and the *absence of perceptible limitations*) which will determine a new vocation on human rights theory. Man - finite by means of its nature and corporeality - will have to adapt to the timeless cosmic that also has no clear physical limitations and identify appropriate ways to assert and exercise his rights. *The theory of relativity* does not clarify the legal research of outer space but deepens the dilemma of its conceptualization: outer space is the unlimited, infinite environment, within which objects move and subsist. [5] From a legal point of view, the immateriality of outer space has implications for the difficulty of regulation in the theory and practice of human rights according to the following reasoning: if outer space cannot

[4] For further details, please see Filling Space, Democratizing Engagement With Space, *Why is it important to consider human rights in space?*, article available at: *https://filling-space.com/2020/08/21/why-is-it-important-to-consider-human-rights-in-space/.*

[5] Albert Einstein, *La Theorie de la relativite restreinte et generale, expose elementaire* (French translation after the Fourteenth German Edition).

be defined according to physical/material standards applicable to objects/things in general then we must determine whether legal norms may be applicable to space as a whole or only to perceptible elements observable in outer space (for example, celestial bodies). Also, the insertion of man into outer space and the identification of man as a constant presence in outer space can be perceived as a precondition for ensuring regulation in this area. The repercussions on the field of human rights will be obvious: the legal norms in this matter will be the instruments that must reconcile the different and coexisting *status quo*: that of the individual (finite and perishable) and that of the universe (absolute and eternal). The situation is meant to test the philosophical foundations of the classical theory of human rights which described *the raison d'être of human rights based on the immutable character of the surrounding nature.*

Space law and human rights: normative intersectionality[6]

The binding and flexible international law applicable to human rights issues attests to their universal and global character. The first sentence of the Preamble to the Universal Declaration of Human Rights is transparent to the idea of the extensive application of human rights: *Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world* . Similarly, while reiterating the need for full respect for human rights, Article 1, paragraph 5, of the Vienna Declaration and Program of Action expressly states that, on the basis of the recognition that human rights are universal, indivisible and

[6] Originally, the notion of "intersectionality" was crystallized against the background of the development of anti-discrimination theories according to which the protection of human rights can be achieved by recognizing discriminatory criteria and admitting their combined action. Uniquely, discriminatory criteria cannot act in such a way as to lead to a flagrant/effective violation of human rights. By the expression *normative intersectionality* we designate the complementary character of the norms of space law and of the rules of human rights protection, underlining the idea according to which currently there are legal elements that can mark the beginning of an independent scientific field – *the space law of human rights*. Thus, the rules of space law developed by the UN at present need to be examined in their dynamics and in direct relation to the classical standards and guarantees adopted in the field of human rights.

interdependent, the international community must ensure a global, equal and fair protection of human rights[7]. In the doctrine[8], the constitutive norms of human rights - based on the ideas of universality, equality, inalienability and indivisibility of human rights is appreciated as sufficient evidence to demonstrate their *unlimited territorial character*. *Mutatis mutandis*, outer space can be an appropriate environment for the exercise of human rights given the comprehensive vocation of their application.

The first binding legal instrument adopted by the international community in the field of space law - the *Treaty on Principles Governing the Activity of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*[9] - recognizes the issues related to the protection and promotion of human rights in subsidiary, in view of the peaceful co-operation between Peoples and ensuring the well-being of the whole human community. The provisions of the Treaty are drawn up in accordance with the guarantees of equality and non-discrimination as regards the exploration of outer space and for the benefit of all mankind. The principle of international co-operation, the maintenance of interstate peace and the values enshrined in the Charter of the United Nations are reiterated, any manifestation of violence is expressly prohibited and rules for securing international liability are established in relation to acts which violate the values and principles established by international law in the exploration of outer space. The value of peace is analyzed in conjunction with the protection of Peoples and individuals and addressing this issue through the rules of space law has produced reverberations in all official actions undertaken by the

[7] Vienna Declaration and Programme of Action (1993), article 1 (5).

[8] Anél Ferreira-Snyman, Gerrit Ferreira, *The Application of International Human Rights Instruments in Outer Space Settlements: Today's Science Fiction, Tomorrow's Reality*, PER/PELJ, 2019, Issue 22, p. 18-24.

[9] The Treaty was adopted by General Assembly Resolution no. 2222 and based on the Declaration of Legal Principles Governing the Activity of States in the Exploration and Use of Outer Space. The Treaty was opened for signature in January 1967 by the Governments of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America and entered into force in October 1967. (according to the information available on the website:

https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html, accessed at 30 November 2021, 19:45 p.m.).

United Nations[10] experts who have proclaimed the right of Peoples to peace through a programmatic instrument: Declaration on the Right of Peoples to Peace[11]. We note that the requirements set by the UN for the development of interstate relations and contained in the UN Charter have been maintained in the regulation of matters relating to outer space, being associated, from a legal point of view, with absolute guarantees attributed to all humanity. Thus, the Declaration solemnly proclaims that *(...) the maintenance of a peaceful life for the Peoples is the sacred duty of every State (...) the Peoples of our Planet have a sacred right to peace (...)*.

The humanitarian guarantee of peacekeeping is at the core of the *Treaty on the Principles Governing the Activity of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, expressly stipulating that States Parties to the Treaty have a duty not to place objects representing nuclear weapons or any other type of weapons of mass destruction in orbit around the Earth, not to install weapons on celestial bodies and not to place weapons in outer space in any other way.

The Treaty also contains express references to the protection of astronauts in space, in this sense Article V of the Treaty being an intersectional legal instrument, bringing the scope of human rights regulations closer to the rules of space law. The meaning of the elaboration of the norms contained within the Treaty leads to the recognition of the quality of *human persons* in favor of the astronauts who explore in their activity the cosmic space. In this capacity, astronauts enjoy: the right to assistance (in case of accident or emergency landing in the territory of another State Party to the Treaty); the right to be returned safely and promptly to the State of registration of the spacecraft. In connection with these rights, States Parties to the Treaty or the Secretary-General of the United Nations shall be kept informed in regard to the phenomena occurring in outer space, including those incidental to celestial bodies which may endanger the life and health of astronauts with the purpose of monitoring and formulating appropriate measures. We note that the provisions of Article V of the Treaty constitute a *suis generis* norm which combines elements in the field of human rights protection with

[10] *Brevitatis causa* we will use the acronym *UN* in order to designate the United Nations Organisation.

[11] Approved by UN General Assembly Resolution 39/11 of 12 November 1984.

elements of space law. The former are rudimentary, merely creating the preconditions for the regulation of the human situation in outer space (protection of the right to life and health), but leaving unaddressed aspects of human protection by virtue of the human nature and not necessarily by virtue of acting in the capacity of an astronaut. Also, from the point of view of the substantial protection provided by the rules of space law, we have in mind an incomplete situation: although they are worthy of consideration, the right to peace, the right to protection of life and health, the provision of assistance in case of danger –all are only disparate aspects of human rights theory which, in order to acquire logic and systematic knowledge, must be corroborated with other prerogatives inscribed in the three generations of rights.

The concern of the international community for the protection of the individual in the activity carried out in outer space is reflected in the provisions of the *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*[12]. The Agreement develops the humanitarian provisions contained in Article V of the *Treaty on the Principles Governing the Activity of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* demonstrating interest in human rights in both the preamble (we note expressly the call for peaceful international co-operation and the declaration of feelings of humanity to be harnessed in order to achieve this goal) and in the content (emphasis on States Parties' responsibility to report on situations of danger or accident in which the crew of the spacecraft may be in order to provide assistance). The regulatory paradigm used in the Agreement is similar to that presented in the Treaty: in relation to outer space, the individual is recognized as a subject of law insofar as he has a specific socio-professional quality: that of astronaut and the object of regulation concerns mainly the right to life and health.

The norms analyzed in the above lines are the result of a preliminary approach whose objective is aimed at establishing an articulated framework of principles that would represent the foundation of the binding legal instruments that followed. The UN has systematized the main principles of space law according to the object of regulation they

[12] Adopted by UN General Assembly Resolution no. 2345, entered into force on December 1968.

assume[13]. The principles validate the values and general directions of action put forward by the international community in the UN Charter, emphasizing the importance of equality and non-discrimination, peace and cooperation, and adopting a State-oriented perspective. Personal protection of the individual is an annex of the State responsibility that entails interest insofar as the State responsibility or liability is engaged. The provisions on human rights are transparent either by referring to the clarification of the legal status of astronauts (individual perspective) or by highlighting the benefits brought to humanity that result from the exploration of outer space.

The previously mentioned rules (hard law and soft law rules) of space law replicate the primary model adopted by the UN in establishing the rules on the protection and promotion of human rights that are inserted in the UN Charter. Similar to the logic advanced in the UN Charter, the UN treaties and principles in the field of space law recognize, at a conceptual level, the issue of human rights by addressing it sequentially (human rights are considered through professional relations - the rights of astronauts). Equally, the UN Treaties and Principles do not regulate a catalog of human rights, but are established as fundamental rules in interstate interaction on space issues: international solidarity, peace and cooperation.

Normative intersectionality (understood, in the general context of the paper, as the point of intersection between the rules of space law and human rights instruments) is sustained by thematic projects developed by the United Nations Office for Outer Space Affairs that capitalize on the provisions of the UN Conventions for the protection and social inclusion

[13] Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space adopted by UN General Assembly Resolution XVIII of 13 December 1963; The Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting adopted by UN General Assembly Resolution 37/92 of 10 December 1982; The Principles Relating to Remote Sensing of the Earth from Outer Space adopted by UN General Assembly Resolution 41/65 of 3 December 1986; The Principles Relevant to the Use of Nuclear Power Sources in Outer Space adopted by UN General Assembly Resolution 47/68 of 14 December 1992;

The Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries adopted by UN General Assembly Resolution 51/122 of 13 December 1996.

of vulnerable groups (UN Convention on the Elimination of All Forms of Discrimination against Women; UN Convention on the Rights of Persons with Disabilities) and on the sustainable development goals set out in the 2030 Agenda for Sustainable Development, applying them to the exploration of outer space.

The *Space4Women Project* developed by the United Nations Office for Outer Space Affairs aims to facilitate access to outer space as well as technical education in line with the desiderata contained in Goal 4-Quality Education and Goal 5-Gender Equality enshrined within Agenda 2030. *Space4Women Project*[14] is a platform that facilitates the interconnection of experts in space exploration issues by inserting the gender dimension into these actions. The inclusive perspective of vulnerable people within issues related to space exploration is maintained by the UN Office for Outer Space Affairs with regard to people with disabilities. Pursuant to the UN Convention on the Rights of Persons with Disabilities and the UN Strategy for the Inclusion of Persons with Disabilities, and in pursuit of the objectives 4, 8, 11, 17 advanced by Agenda 2030, the UN Office for Space Affairs has developed the *Space for Persons with Disabilities Project*[15] that aims to insert the features of the protection of the rights of persons with disabilities in UN space programs. Based on the global idea of recognizing human diversity and using the values of tolerance and solidarity in shaping human consciousness with the purpose of achieving inclusion, the *Space for Persons with Disabilities Project* acts as a forum aimed at: (1) stimulating debate on the integration of people with disabilities among relevant actors in the space community; (2) strengthening education and training programs for the inclusion of people with disabilities in space exploration activities; (3) raising awareness on the development of access technologies, on the reformulation of prototypes, equipment and infrastructure elements by inserting the features derived from the adaptation to the needs of people with disabilities, etc.

[14] For further details regarding the original concept that represents the basis of the Space4Women Project, please see the link: *https://www.unoosa.org/documents/pdf/SpaceforWomen/20-06348_Space4Women_flyer_approv_4.pdf*, accessed December 2, 2021, 11:06 a.m.

[15] For more details on the Space for Persons with Disabilities Project, please see: *https://www.unoosa.org/oosa/en/ourwork/space4personswithdisabilites/index.html,* accessed December 2, 2021, 11:12 a.m.

At European Union level, the elements of space law are summarized in *Regulation 696/2021 establishing the Union Space Program and the European Union Agency for the Space Program*.[16] The Regulation places the issue of space exploration under the lenses of technical regulations, with the vocation of bringing together in a single program multiple sub-programs that converge towards the consolidation of an innovative and competitive European space sector. The space program established by the Regulation includes: the GALILEO[17] global satellite navigation system; the European joint geostationary navigation service EGNOS[18]; the Earth observation system-COPERNICUS[19]; space surveillance and tracking system - SSA[20]; GOVSATCOM[21] satellite communications service. The regulation reflects a unique normative logic, highlighting the tools needed to explore outer space without clearly drawing attention towards the manner of protecting human rights. The human factor is taken into account as a subsidiary element, the technological and informational innovations inherent in the exploration of outer space being enhanced in the context of fulfilling the needs of users/citizens to have access to

[16] Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU.

[17] The system consists of a constellation of satellites, centres and a global network of stations on the ground, offering positioning, navigation and timing services and integrating the needs and requirements of security (Article 3, paragraph 1, letter ”a” of the Regulation).

[18] The civil regional satellite navigation system under civil control which consists of centres and stations on the ground and several transponders installed on geosynchronous satellites and which augments and corrects the open signals emitted by Galileo and other GNSSs, inter alia for air-traffic management, for air navigation services and for other transport systems; (Article 3 paragraph 1, letter ”b” of the Regulation).

[19] The system is based on the existing national and European capacities, offering geo-information data and services, comprising satellites, ground infrastructure, data and information processing facilities, and distribution infrastructure, based on a free, full and open data policy and, where appropriate, integrating the needs and requirements of security (Article 3, paragraph 1, letter ”c” of the Regulation).

[20] The acronym SSA translates into *Space Situational Awareness* (article 3, paragraph 1, letter ”d” of the Regulation).

[21] The service enables the provision of satellite communications capacities and services to Union and Member State authorities managing security critical missions and infrastructures. (article 3, paragraph 1, letter ”e” of the Regulation).

efficient services. The correlative advantages of the space industry are presented through the norms contained in the Regulation as a direct consequence of the accessibility of the technical profile information by carrying out education and training activities in the field. A substantial pillar of the space program consists in ensuring the provision of skills, abilities, knowledge related to the exploration of outer space - objectives which are in turn based on openness and transparency in the dissemination of specialized information by decision makers. At the same time, while acknowledging the impact that actions concerning the exploitation of outer space and extreme weather events can have on the safety of citizens, we must pay more attention to *human security*. On these coordinates, *the human dimension of the rules of space law* is crystallized: the efforts to explore outer space must be in line with the value of solidarity so that the results obtained benefit humanity as a whole.

Concluding remarks

The analyzed norms ensure the *legal prototype of the protection of human rights in the activities of space exploration.* This primordial legal model is a rudimentary instrument that can be a source of inspiration for the expansion of the human dimension in the actions taken in outer space. The non-formal initiatives undertaken by UN experts in order to raise awareness of the peculiarities arising from the adaptation of the human being to spatial conditions are the starting point in reconciling technical legal norms with humanistic requirements. In its current form, European international and regional rules give priority to States and to the international community in matters of space exploration, bearing only a vivid concern for the individual. The evolutionary perspectives that are required refer to the development of norms that are sensitive to the human dimension and whose bivalent objective (composed on the one hand of reconciling human particularities with the conditions existing in outer space and on the other hand of ensuring the protection of the rights of the individual transposed into the cosmic environment) will determine the crystallization of a spatial law of human rights.

SELECTIVE BIBLIOGRAPHY

1. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space. 2345.
2. Albert Einstein, La Theorie de la relativite restreinte et generale, expose elementaire, (French translation after the Fourteenth German Edition).
3. Anél Ferreira-Snyman, Gerrit Ferreira, The Application of International Human Rights Instruments in Outer Space Settlements: Today's Science Fiction, Tomorrow's Reality, PER/PELJ, 2019, Issue 22.
4. Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space approved by General Assembly Resolution no. XVIII of 13 December 1963.
5. Declaration on the Right of Peoples to Peace, approved by General Assembly resolution 39/11 of 12 November 1984.
6. Filling Space, Democratizing Engagement With Space, Why is it important to consider human rights in space?, article available at: *https://filling-space.com/2020/08/21/why-is-it-important-to-consider-human-rights-in-space/.*
7. Gregory J. Walters, Introduction: human rights in theory and practice, Saint Paul University/Université Saint-Paul, New Jersey &London Scarecrow Press, 1995.
8. Jacques Maritain, On the Philosophy of Human Rights, 1947, according to the text available at: *https://en.unesco.org/courier/2018-4/human-rights-and-natural-law.*
9. Modesto Seara Vazquez, Cosmic international law, translated by Elaine Malley, Wayne State University Press, Detroit, 1965.
10. The Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries approved by General Assembly Resolution no. 51/122 of 13 December 1996.
11. The Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting approved by General Assembly Resolution no. 37/92 of 10 December 1982.

12. The Principles Relating to Remote Sensing of the Earth from Outer Space approved by General Assembly Resolution no. 41/65 of 3 December 1986.
13. The Principles Relevant to the Use of Nuclear Power Sources in Outer Space approved by General Assembly Resolution no. 47/68 of 14 December 1992.
14. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, approved by General Assembly Resolution no. 2222.
15. Vienna Declaration and Programme of Action (1993), article 1(5).

RECENT CLARIFICATIONS BY THE EUROPEAN COURT OF JUSTICE ON THE MEANING OF THE NOTION OF CONSUMER

Mihaela Georgiana ILIESCU[*]

ABSTRACT

Despite the fact that the doctrine of the concept of consumer has been given priority, and the Court of Justice of the European Union has had the opportunity to rule on numerous occasions on the interpretations given to this concept, this topic has not been exhausted yet, as practice shows that new explanations or additions are still needed.
This study aims to complement the portrait of the European consumer, in the light of recent case law of the Court of Justice of the European Union.

KEYWORDS: *consumer, average consumer, CJEU, unfair terms, contractual balance;*

Introductory considerations

Knowing that the premise from which the legal relationship starts from the right of consumption is that the parties to the legal relationship - the consumer and the professional - are in a position of inequality which has as main consequence the alteration of the contractual balance, the norms of consumer law come to counterbalance this inequality and to restore the possibility for the consumer to express a free, unaltered and informed will, thus to remedy the contractual imbalance.

The main reason for the need to clarify the notion of consumer is that in the European Union the multiple directives in the field of consumer protection do not lead to a unified conception of this notion. If the notion of consumer is a notion with a variable content, it is largely the result of the fragmentation of legal rules in Union law in general and in consumer

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law in particular[1]. It is an operational and dynamic notion, which is defined by reference to the content of each normative act in question.[2]

In this context, a significant role in the process of standardizing the application of the legal norms incident to the notion of consumer and implicitly in clarifying this notion belonged to the Court of Justice of the European Union[3]. Thus, the Luxembourg Court, by virtue of its interpretive role, had the opportunity to rule on a number of issues relating to consumer status[4].

Recently, the CJEU added new clarifications on the interpretation of the concept of consumer in European Union law. These were occasioned by requests for preliminary Judgments in the field of unfair terms addressed to the Court by a court in Romania and one in Poland. he references for a preliminary Judgment concern, inter alia, the interpretation of Article 2 (b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, that is to say, the interpretation of the concept of consumer in that directive.[5]

In the following we will present the context and the issues that were analyzed by the Court in relation to the meaning of the notion of consumer, as they emerge from the two judgments.[6]

[1] H.-W. Micklitz, «La main visible du droit privé réglementaire européen», *Revue Internationale de Droit Economique*, 2014/1, p. 5.

[2] See K. Mortelmans and S. Watson, „The Notion of Consumer in Community Law: A Lottery?", in J. Lonbay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, p. 36-57; M. Ebers, «The notion of "consumer"», in *Consumer Law Compendium*, www.eu-consumer-law.org.

[3] For a comprehensive study of the CJEU's interpretations of consumer law, see, C. Toader, F. Lecomte, *Les derniers developpements dans la jurisprudence de la Cour de Justice en matiere de droit de la consommation*, Revue des Affaires europeennes, 2014/4, p. 751-767.

[4] M. Iliescu, *Repere jurisprudenţiale europene privind conceptul de consumator,* in the „Curierul Judiciar" Journal no. 3/2018, p. 140, C.H. Beck Publishing House, Bucharest, 2018.

[5] JO 1993, L 95, p. 29, Special edition, 15/vol. 2, p. 273.

[6] Judgment of the Court (Fourth Chamber) of 9 July 2020, ECLI:EU:C:2020:537 and the Order of the Court (Seventh Chamber) of 10 June 2021, ECLI:EU:C:2021:481.

1. Judgments of the Court of 9 July 2020 in joined cases C-698/18 and C-699/18[7]

The first case has as a starting point the credit agreement having as object the granting of a personal needs loan which matured during 2015, the date on which the loan was fully repaid by the person concerned. Subsequently, considering that certain clauses of this contract were abusive, the borrower JB notified, in December 2016, the Court of Târgu Mureş with an action aimed at establishing the abusive nature of these clauses. Raiffeisen Bank relied on the exception of JB's lack of active procedural capacity, since, at the time the action was brought, the person concerned was no longer a consumer, given that, at that time, relations between the parties to the credit agreement in question had ceased, and that contract had been terminated in the previous year by its full performance.

In the second related case, KC and another party, as co-borrower, entered into a credit agreement with BRD Groupe Société Générale SA in May 2003. In March 2005, as a result of an early repayment, the loan was considered liquidated and the credit agreement was terminated. After more than ten years, in July 2016, the applicant applied to the Târgu Mureș District Court for an action for a declaration that the terms of that contract were abusive. In addition, the applicant requested the cancellation of these clauses and the refund of any amount paid under them, as well as the payment of a legal interest calculated on the amounts subject to refund. BRD Groupe Société Générale claimed that the applicant was no longer a consumer, given that, at the time the action was brought, relations between the parties had ceased and that the contract had been terminated for 11 years by early repayment.

It should be noted that the referring court does not expressly ask any questions concerning the interpretation of the concept of consumer, however, it finds that it must be determined whether Directive 93/13/EEC continues to apply after the full performance of a contract concluded by a person who has undoubtedly benefited from consumer status, at the time of the conclusion of the contract containing unfair terms.

[7] ECLI:EU:C:2020:537.

Thus, ***the issue that arises in the context presented is to establish, from a temporal point of view, the quality of "consumer"; specifically, if the natural person who has concluded a (loan) contract for extra-professional purposes, after the moment of execution of that contact, must be considered a consumer.***

In arguing its judgment, referring to the interpretation to be given to the concept of consumer, the Luxembourg Court points out that the system of protection established by Directive 93/13 is based on the idea that a consumer is inferior to a professional in terms of both bargaining power and the level of information, a situation that leads him to adhere to the conditions previously drafted by the professional, without being able to exert an influence on their content.[8] The Court considers it necessary to specify that uniform rules of law as regards the unfair terms provided for in the Directive must apply to "all contracts" between 'professionals' and 'consumers' as defined in Article 2 (b) and (c) thereof,[9] and according to Article 2 (b), "consumer" means any natural person who, under contracts covered by this Directive, is acting for purposes which are outside his trade. Following its reasoning, the Court points out that the definition of 'consumer' in Article 2 (b) of Directive 93/13 ***does not contain any element enabling the determination of when a contractor ceases to be a consumer within its meaning*** and it is therefore no longer possible to rely on the protection afforded to it by this Directive.

In accordance with the Opinion of the Advocate General[10], The Court will state that the performance of the contract in question does not

[8] Judgment of 19 December 2019, *Bondora*, C-453/18 and C-494/18, EU:C:2019:1118, section 40 and the case law cited.

[9] Judgment of 21 March 2019, *Pouvin and Dijoux*, C-590/17, EU:C:2019:232, section 19.

[10] In a detailed and well-argued statement, the Advocate General states in his Opinion that „performance of the contract does not retroactively alter the fact that, at the time of its conclusion, the consumer was in such a situation of inferiority. In such a context, unfair terms, which create a significant imbalance to which the consumer adheres, are included in the contract and continue to be the basis for transfers made by the parties to the contract during its performance." This solution is based on the fact that in most private law systems, a contract terminates as soon as all obligations under this contract are performed, but it must be borne in mind that the contract is the basis for transfers that took place during its execution. Thus, the fully executed contract remains mandatory, in the sense that it continues to be the basis for previous transfers. On the other hand, the full performance of the contract does not change the fact that, in the

retroactively alter the fact that, at the time of the conclusion of that contract, the consumer was in this inferior situation. In those circumstances, the limitation of the protection afforded to the consumer by Directive 93/13 only during the performance of the contract in question, in the sense that the full performance of this contract precludes any possibility for the consumer to avail himself of this protection, it cannot be reconciled with the system of protection established by this Directive. Such a limitation would be inadmissible, in particular in the case of contracts which are performed immediately after or at the time of their conclusion, since that would not allow consumers a reasonable period to challenge the unfair terms which may be used in such contracts. An additional argument put forward by the Advocate General is that Directive 93/13 requires Member States, as is clear from Article 7 (1) in conjunction with recital 24 in the preamble thereto, *to provide for appropriate and effective means "to prevent the continued use of unfair terms in consumer contracts"*. Such means must have a deterrent effect on professionals[11], and the interpretation that that directive ceases to apply after the performance of a contract is likely to be detrimental to the achievement of its long-term objective.

In the light of all the foregoing considerations, the Court concludes that the concept of 'consumer' in Article 2 (b) of Directive 93/13 must be interpreted as meaning that, ***the fact that a contract is performed in full does not preclude a party to that contract from being classified as a 'consumer' within the meaning of that provision.***

performance of his contractual obligations, the person who concluded that contract undoubtedly had the status of 'party to the contract'. In those circumstances, to consider that the performance of the contract precludes any possibility of declaring those terms abusive would lead to the situation in which any transfer on the basis of them would remain indisputable and final. In this context, certain contracts are executed immediately after or at the time of their conclusion. This is especially the case with the sales contract. To interpret that Directive 93/13 ceases to apply after the full performance of such a contract, would result in a party to this contract not even having the theoretical ability to bring an effective legal action before it ceases. However, nothing in that directive involves the exclusion of those contracts from its scope.

[11] See in this sense Judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98-C-244/98, EU:C:2000:346, section 28).

2. Order of the Court of 10 June 2021 in Case C-198/20[12]

New clarifications on consumer quality also affect Directive 93/13/EEC on unfair terms in contracts concluded between professionals and consumers will bring the CJEU by **order** of Case C-198/20. The particular hypothesis brought to the fore by this case is occasioned by the conclusion of a loan agreement between a bank and several natural persons MN, DN, JN and ZN, a contract concluded in order to purchase a home. Under that contract, the bank granted them a loan of 150,000 Polish zlotys, which was indexed to the Swiss franc (CHF). The loan was repaid in monthly instalments, the value of which was expressed in Swiss francs, but the payment was made in the national currency, at the selling price of the currencies shown in the exchange rate table, in force at the bank on the day of repayment. The loan was granted for a period of 30 years. The loan agreement was signed by MN, in his own name and on behalf of the other three borrowers. The key element in the factual situation is the fact that MN could not read the documents related to this contract before signing it, due to lack of time, DN read that contract only after signing it without understanding its content, and JN and ZN never read it. Following an increase in the amount of monthly loan repayment rates, as a result of increases in the exchange rate of the Swiss francs, the borrowers have entered into an addendum to the loan agreement, which modifies the method of repaying the loan, which can be done directly in Swiss francs, which came into force in December 2012. In 2018, the borrowers brought an action before the referring court requesting, in essence, the declaration of the nullity of the loan agreement in question, an action based on the abusive nature of the conversion clauses, as they did not have complete, explicitly provided information on the conditions of application of these clauses. In that context, one of the questions referred to the Court of Luxembourg by the Court of Warsaw is, in essence, whether the protection afforded to consumers by Directive 93/13 benefits all consumers or only the average consumer, who is normally informed and reasonably observant?

The Court will consider that the answer to the questions referred for a preliminary Judgment can be clearly inferred from the case-law, therefore, at a proposal from the Judge-Rapporteur and after hearing the

[12] ECLI:EU:C:2021:481.

Advocate General, it will rule on a reasoned order. In the preamble to the order, the CJEU first points out that, according to its settled case-law, Directive 93/13 defines the contracts to which they apply in relation to the quality of the contractors, depending on whether or not they act in the context of their professional activity[13] and that, as regards the concept of 'consumer' within the meaning of Article 2 (b) of Directive 93/13, it is of an objective nature and is independent of the actual knowledge that the data subject may have or of the information that that person actually has.[14] According to a formula frequently encountered in its judgments in the field of unfair terms, the Court reiterates: the consumer is in a position of inferiority to the professional, both in terms of bargaining power, as well as the level of information, a situation that determines him to adhere to the conditions established in advance by the professional, without being able to exert an influence on their content[15].

In the light of the arguments set out in Part One of the order, the Court will conclude that the classification of a person as a 'consumer' within the meaning of Article 2 (b) of Directive 93/13 does not depend on his behavior, even negligent, in concluding the loan agreement.

The Luxembourg Court will further reinforce this conclusion by stating that, on the other hand, according to its previous case-law, the situation of inequality between the consumer and the professional can only be offset by a positive intervention[16], more specifically, the national

[13] Judgment of 21 March 2019, Pouvin et Dijoux, C-590/17, EU: C: 2019: 232, section 23 and the case law cited.

[14] Judgment of 21 March 2019, *Pouvin et Dijoux*, C-590/17, EU: C: 2019: 232, section 24, and the case law cited.

[15] See, in this sense, Judgment of 21 March 2019, *Pouvin et Dijoux*, C-590/17, EU: C: 2019: 232, section 25 aș well as The *Asbeek Brusse and de Man Garabito* Judgment, C-488/11, ECLI:EU:C:2013:341, section 31, The *Šiba* Judgment, C-537/13, ECLI:EU:C:2015:14, section 22, The *Vapenik* Judgment C-508/12, ECLI:EU:C:2013:790, The *Banco Español de Crédito* Judgment, C-618/10, ECLI:EU:C:2012:349, section 39; The *Pannon GSM* Judgment, C-243/08, ECLI:EU:C:2009:350, Section 22; The Océano Grupo Editorial and Salvat Editores Judgment, C-240/98-C-244/98, ECLI:EU:C:2000:346, section 25; The *Mostaza Claro* Judgment, C-168/05, ECLI:EU:C:2006:675, section 25, as well as the *Asturcom Telecomunicaciones* Judgment, C-40/08, ECLI:EU:C:2009:615, section 29; the *Aziz* Judgment, C-415/11, ECLI:EU:C:2013:164, section 44.

[16] Judgment of 17 May 2018, *Karel de Grote - Hogeschool Katholieke Hogeschool Antwerpen,* C-147/16, EU: C: 2018: 320, section 28 and the case law cited.

court is required to assess *ex officio* the unfairness of a contractual term in order to make up for the imbalance between the consumer and the professional. That obligation of the national court does not depend on the negligent conduct of the consumer concerned. The Court did not limit, in its judgment of 30 April 2014, *Kásler and Káslerné Rábai*[17], the scope of the consumer protection regime provided for in Directive 93/13 only to average consumers, who are normally informed and reasonably observant and circumspect, but in this judgment, in particular, the Court has established the scope of the requirement that a contractual clause must be drawn up in a clear and intelligible manner.[18] In that judgment, the Court held that the referring court must take the average consumer, who is normally informed and reasonably observant and circumspect, as the criterion for assessment, only to determine whether a contractual clause has been drafted in a clear and intelligible manner.

Therefore, the Court will conclude that only in the context of the referring court's assessment of the transparency of a contractual clause should the average consumer be considered, normally informed and sufficiently attentive and informed. In the light of all the arguments put forward, the CJEU will rule that the protection provided for in Directive 93/13 benefits all consumers, not just those who can be considered an average consumer, normally informed and sufficiently attentive and informed.

Conclusions

Despite the fact that the doctrine of the concept of consumer has been given priority, and the Court of Justice of the European Union has had the opportunity to rule on numerous occasions on the interpretations

[17] C - 26/13, EU: C: 2014: 282, section 74.

[18] It held, therefore, that, as regards the particularities of the conversion into foreign currency, as specified in the contractual clause in question, it is for the national court to determine whether, having regard to all the relevant facts, including the publicity and information provided by the lender in the negotiation of a loan agreement, an average consumer, normally informed and sufficiently attentive and knowledgeable, could not only know the difference between the exchange rate for sale and the exchange rate for the purchase of a foreign currency, but to assess the potentially significant economic consequences for him of applying the exchange rate to the sale to calculate the rates at which he will ultimately be required to pay and, consequently, the total cost of his loan.

given to this concept, this topic has not been exhausted yet, as practice shows that new explanations or additions are still needed.

The latest clarifications from the CJEU complement the portrait of the consumer, adding two issues of principle, which national courts must take into account in Judgment:

1. *The party who had the status of consumer in a contract that was fully executed will be considered a consumer even after the execution of that contract and, consequently, will be able to benefit from the protection regime conferred by special legislation in the field.*
2. *The protection provided for in Directive 93/13 benefits all consumers, not just those who fall into the category of the average consumer, who is normally informed and sufficiently attentive and informed.*

BIBLIOGRAPHY

1. Gh. Piperea, *Protecţia consumatorilor în contractele comerciale [Consumer protection in commercial contracts]*, C.H. Beck Publishing House, Bucharest, 2018.
2. J. Goicovici, *Dreptul consumaţiei [The right of consumption]*, Sfera, Cluj-Napoca Publishing House, 2006
3. A.N. Gheorghe, C. Spasici, D.S. Arjoca, *Dreptul consumaţiei [The right of consumption]*, Hamangiu Publishing House, Bucharest, 2012.
4. K. Mortelmans and S. Watson, „The Notion of Consumer in Community Law: A Lottery?", in J. Lonbay (ed.), *Enhancing the Legal Position of the European Consumer*, BIICL, 1996, p. 36-57.
5. M. Ebers, «The notion of "consumer"», in *Consumer Law Compendium*, *www.eu-consumer-law.org.*
6. C. Toader, F. Lecomte, *Les derniers developpements dans la jurisprudence de la Cour de Justice en matiere de droit de la consommation,* Revue des Affaires europeennes, 2014/4, p. 751-767.

7. M. Iliescu, *Repere jurisprudenţiale europene privind conceptul de consumator,* in the "Curierul Judiciar" journal no. 3/2018, p. 140-149, C.H. Beck Publishing House, Bucharest, 2018.
8. Court Judgment (4th Chamber) of 9 July 2020, ECLI:EU:C:2020:537.
9. Court Order (7th Chamber) of 10 June 2021, ECLI:EU:C:2021:481.

THE CIVIL LIABILITY OF CIVIL SERVANTS

Petruţa-Elena ISPAS*

ABSTRACT

The civil liability of civil servants is regulated by the provisions of the Romanian Administrative Code. Given that this form of liability applies only to those persons who are appointed, under the law, in a public office, this present paper will analyze to what extent the liability of civil servants is a specific form of civil liability or, on the contrary, we must analyze this form of liability with a careful look at the quality of the person and implicitly the civil liability of civil servants must be seen as a form of liability distinct from common law civil liability.

KEYWORDS: *civil liability; public servant; public institution;*

I. Introductory aspects

The Romanian Administrative Code[1] regulates, in Article 490 et seq. the disciplinary sanctions and liability of civil servants. Although civil servants have a privileged status and enjoy increased protection provided by legal provisions, this protection should not be considered above the law. Equally, according to the provisions of the same normative act[2], "*the commission of unlawful acts by the officials provided by Article 5 let. gg)*[3]*, in the exercise of their power, attracts administrative, civil or criminal liability, as the case may be*".

Several principles applicable to legal liability specific to administrative law have been identified in the literature[4], as follows: ***the principle of legality of legal liability,*** a principle which assumes that liability can intervene only if the legal norms provide for the employment

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[1] Emergency Ordinance 57/2019 on the Administrative Code, published in the Official Gazette of Romania no. 555/05.07.2019.

[2] Article 564 (1) of the Administrative Code.

[3] Public administration staff - dignitaries, civil servants, contract staff and other categories of staff established by law at the level of central and local public administration authorities and institutions.

[4] E.E. Ștefan, *Răspunderea juridică - Privire specială asupra răspunderii în dreptul administrativ,* Prouniversitaria Publishing House, Bucharest, 2013, p. 63.

of this form of liability; ***the principle of personal responsibility,*** a principle which presupposes that the liability is incurred only to the perpetrator, and not against those persons who would be his legal successors.

This principle may also suffer from exceptions, but exceptions must be regarded as strictly and exhaustively provided by law; ***the principle of imputability of legal liability,*** a principle which presupposes that liability can be incurred only in the situation where the guilt of the perpetrator of the illicit deed that generated the application of civil liability is established; ***the principle of uniqueness of legal liability, respectively the application of the non bis in idem rule,*** according to which a sanction is appropriate for the violation of a legal norm; with regard to the latter principle, it should be noted that there are situations in which an illicit act also meets the conditions for engaging in criminal liability, in which case the two forms of legal liability may coexist without violating the above-mentioned principle.

This solution appears to be logical, considering the fact that on the one hand the civil liability has as final purpose the reparation of the damage caused to the victim by committing the illicit deed, while, on the other hand, the criminal liability aims at punishing the person who committed the deed provided by the criminal law, in order to restore the violated values as a result of the deed.

Regarding the civil liability of civil servants, it must be analyzed and seen as a form of special liability, given that the perpetrator can only be a civil servant, in other words the perpetrator is a circumstantial one.

In administrative law, the civil liability of the civil servant is in fact the tort liability of common law because, as will be analyzed in the following, the rules applicable to the patrimonial liability are the rules of common law, respectively the rules established by the provisions of the Civil Code. It is true that the liability of the civil servant has the specificity that the damage caused is the harmful consequence that is directed either against the patrimony of the public authority or institution in which the civil servant carries out his activity, or against a person of public or private law.

II. Relevant provisions. The practice of the Romanian Constitutional court related to the responsibility of civil servants

According to Article 490 (1) of the Administrative Code, *„the breach, with guilt, of their official duties by the civil servants attracts the administrative, civil or criminal liability, in the conditions of the law and of the present code".* Depending on the nature and gravity of the violated legal norms, the liability of civil servants may be engaged in any of the forms provided by the aforementioned legal provisions.

At the same time, the provisions of Article 491 (2) of the Administrative Code, according to which „ *If it is allowed, the payment of the damages shall be done from the budget of the public authority or institution provided in (1)*[5]*. If the court finds the civil servant guilty, the person will be obliged to pay damages, in solidarity with the public authority or institution*". In fact, the provisions of Article 491 (2) of the Administrative Code establish the solidarity of liability[6] between the civil servant who is guilty of committing the illicit deed and the public authority or institution within which the civil servant, author of the illicit deed, carries out his activity.

As a justification in arguing that the civil liability of the civil servant is incurred under the provisions of the Administrative Code corroborated with the provisions of the Civil Code, are also the provisions of Article 499 of the Administrative Code which stipulate the situations in which the civil liability of the civil servant is engaged, respectively: „a) for

[5] Article 491 (1) of the Administrative Code: (1) Any persons who consider themselves injured in their right or in a legitimate interest may appeal to the court, in accordance with the law, against the public authority or institution that issued the act or which refused to resolve the request for a subjective right. or legitimate interest.

[6] This aspect must lead us to the idea that the civil liability of the civil servant must be done according to the norms of common law, the principle of solidary liability being one of the principles applicable in the matter of reparation of damage. In this sense, see I.R. Urs, P.E. Ispas, *Drept civil. Teoria obligaţiilor,* Hamangiu Publishing House, Bucharest, 2015, p. 233. At the same time, it should be specified that in the matter of tort liability, according to Article 1384 (1) of the Civil Code, „*the person liable for the act of another may turn against the person who caused the damage, unless the latter is not liable for the damage caused".* Thus, the solidarity of liability must be seen in close connection with the form of liability for the deed of another, which gives the right to public authority or institution to return with recourse action against the official guilty of committing the wrongful act.

damages, produced with guilt, to the patrimony of the public authority or institution in which they work; b) for the failure to refund of money unduly granted to them within the legal term; c) for damages paid by the public authority or institution, as main party, to third parties, pursuant to a final court decision".

Regarding this legal provision, the Constitutional Court of Romania was notified with an exception of unconstitutionality[7] which was essentially motivated by the fact that the civil liability of civil servants would be unconstitutional in relation to the principle of equality before the law and public authorities, whereas there is a difference in legal treatment between employees and civil servants as regards the procedure for repairing the damage caused to the public authority or institution in which the civil servant carries out their activity. Thus, although Law no. 188/1999 assimilates the relations of the civil servants with work relations, the reparations of the damages brought to the public authority or institution by the civil servant are ordered by the issuance of an imputation order or disposition by the head of the public authority or institution or by assuming a payment commitment; whereas, according to Article 169 (2) of the current Labour Code, the patrimonial liability of the employee can be engaged only if the debt is certain, liquid and due, being ascertained by a court decision. This shows that, although these are comparable situations, the legal treatment is different, without a rational and objective justification[8].

The Constitutional Court rejected the exception of unconstitutionality as unfounded with the argument that "the provisions of Law no. 188/1999 are completed with the provisions of the labor legislation, as well as with the regulations of common civil, administrative or criminal law, as the case may be, insofar as they do not contravene the legislation specific to the civil service, according to the current Article 117 of the law. However, the legislation specific to the civil service contains

[7] The Constitutional Court was notified with the exception of the unconstitutionality of the provisions of Article Art. 84 of Law no. 188/1999, legal text that was abrogated by the entry into force of the Administrative Code, but which was taken over identically by the new regulation.

[8] CCR Decision 456/2015, para. 14, consulted on the website *https://sintact.ro/#/act/16949484/1/decizia-456-2015-r-referitoare-la-exceptia-de-neconstitutionalitate-a-prevederilor-art-85-alin-1...?keyword=raspundere%20civila%20functionar%20public%20prejudicii&cm=SRET*

different regulations than the labour legislation. The Labour Code itself, to which the author of the exception refers, establishes by Article 278 (2) that it applies "[...] by way of common law [...] to the extent that the special regulations are not complete and their application is not incompatible with the specifics of the respective employment relationships". Therefore, the infringement of the provisions of Article 1 (3) of the Basic Law cannot be upheld either[9].

III. The conditions for engaging civil liability of civil servants

The civil liability of civil servants is, unlike those employed under the provisions of the Labour Code, a tort liability, and as such, in addition to the general conditions specific to the rules of common law, the particular conditions and those arising from the specific activities performed by civil servants must be analyzed.

In view of this aspect, in the following we will briefly mention the general conditions for incurring in tort liability for the personal deed, and we will finally identify the specific conditions required by law for the civil liability of civil servants.

III.A. General conditions of tort liability[10].

1. The illicit act

The first condition that must be analyzed when the issue of engaging in tort liability is raised is the existence of the illicit deed. The wrongful act is committed either by an action or by an omission and has as a result, as a harmful consequence, the violation of a subjective civil right or a

[9] *Idem*, para. 21.

[10] For an in-depth perspective, see I. Adam, *Drept civil. Obligaţiile. Faptul juridic*, C.H. Beck Publishing House, Bucharest, 2013, p. 216-334; P. Vasilescu, *Drept civil. Obligaţii, ed. a II-a revizuită,* Hamangiu Publishing House, Bucharest, 2017, p. 591-662; P.E. Ispas, *Răspunderea pentru fapta proprie în lumina dispoziţiilor noului Cod civil român,* article published in the Volume of scientific communications „Știință și codificare în România", Institute of Legal Research of the Romanian Academy, Universul Juridic Publishing House, Bucharest, 2012, p. 139-144.

legitimate interest. As it results from the definition of the illicit deed, it can be of commission or of omission.

It is true that the contemporary legislator regulated in the Civil Code certain causes that remove the illicit nature of the deed[11]; in the presence of these cases, with the fulfilment of the legal requirements established by the legislator, the tort liability is not incurred, so that the analysis of the other general conditions is no longer justified.

As in the case of any form of civil liability, the wrongful act must be regarded as an action or inaction committed by a civil servant in the performance of his duties; the wrongful act is to be analyzed whenever there is a problem of violating a legal provision.

Regarding the illicit character of the deed, in the specialized literature it was noted with reference to the notion of "*illicit*" that by itself it evokes the idea of an impermissible, inadmissible behavior, in contradiction with a norm of conduct[12]. With regard to this specific form of civil liability, the principles applicable are those of tort liability for one's own act. Consequently, with regard to the unlawful nature of the act committed by the civil servant, we will conclude that any act which violates a rule of conduct, committed by the civil servant, and which is committed in connection with the exercise of their duties, may give rise to the incurring of tort liability of the official who caused the damage.

2. The damage

With regard to the second condition necessary for incurring tort liability, it was defined as representing the harmful consequence, be it of a patrimonial or non-patrimonial nature, of the non-observance of a person's subjective rights and legitimate interests, which, in accordance with civil law, determines the obligation of reparation from the responsible person.

[11] In this regard, see Article 1360 et seq. of the Civil Code which regulates the cases that remove the illicit character of the deed, respectively: self-defence; the state of necessity; the performance of an activity imposed or premised by law or the order of the superior; disclosure of trade secrets; the normal exercise of a subjective right; the consent of the victim.

[12] I. Adam, *op. cit.,* p. 283.

According to the provisions of the Civil Code[13], „any damage gives rise to the right to reparation". With regard to this phrase according to which any damage would give the right to reparation, some clarifications are required. When it comes to repairing the damage, we need to look at the conditions that need to be met in order to discuss the repair of "*any*" damage. Thus, the first condition and the one that interests us in the context of this paper, is that the damage must be certain. The certainty of the damage results from the actual nature of the damage. In order to be current, the damage is certain when it is certain both in terms of its existence and in terms of its extent[14].

According to the provisions of Article 1385 (2) of the Civil Code, "*it will also be possible to award compensation for future damage if its occurrence is unquestionable*". Thus, the provisions of the Romanian Civil Code recognize this certainty for a future damage, provided that its commission is unquestionable.

In addition to the current and future damage, the damage can also be possible, i.e. that damage that will be committed in the future, without its commission being certain. The latter of the damages, possible damages are not subject to reparation as long as they exceed the provisions of Article 1385 (2) of the Civil Code.

In relation to these aspects, we tend to contradict the provisions of Article 1381 of the Civil Code and to mention that any damage entitles to reparation if it has occurred or if its commission is unquestionable.

These rules must be applied regardless of whether there is incidental material damage, moral damage, but also all those expenses that the victim of the damage has incurred in order to avoid or limit the extent of the damage[15].

3. The causal link between the wrongful act and the damage

The third essential condition for engaging in tort liability is the causal link between the wrongful act and the damage. In order for this condition to be fulfilled, it is necessary that by committing the illicit deed, to cause

[13] Article 1381 of the Civil Code.
[14] I.R. Urs, P.E. Ispas, *op. cit.,* p. 228.
[15] Aspects arising from the provisions of Article 1385 (1) and (4) of the Civil Code.

the damage that tends to be repaired, in other words, the damage suffered must be the direct consequence of the wrongful act.

There can be no tort liability without causation, because although this third condition of liability does not appear to be as important as the first two; in reality, if it cannot be established that the harmful consequence is the direct consequence of the commission of the illicit act, the issue of engaging in tort liability cannot be raised.

4. The guilt

In essence, guilt, as a constitutive element of tort liability, is transposed into the subjective attitude that the person ordered by law had to repair the damage caused by his deed.

In civil law, in order to engage in tort liability, it is sufficient that the perpetrator of the wrongful act acted through fault. According to the provisions of the Civil Code, *"the author of the damage is liable for the easiest form of guilt"*[16]. It is true that the provisions of the Civil Code also contain certain references to the particular criteria for assessing guilt[17], the legal norm having the following content: "*In order to assess the guilt, the circumstances in which the damage occurred, foreign to the person of the perpetrator, as well as, where applicable, the fact that the damage was caused by a professional in the operation of an enterprise, shall be taken into account.*".

Given the specifics of civil liability that we analyze in this paper, we will refer to this condition and the analysis of the specific conditions for engaging the civil liability of the civil servant.

III.B. Specific conditions for incurring the civil liability of the civil servant

In addition to the general conditions that must be met for incurring the tort liability, with regard to the civil liability of civil servants, certain specific conditions must be met, as the civil liability of civil servants is a special form of this legal liability.

[16] Article 1357 (3) of the Civil Code.
[17] Article 1358 of the Civil Code.

In the following, we will refer exclusively to the civil liability of the officials for the illicit deeds committed in the exercise of their attributions according to the legal provisions. This form of civil liability, the patrimonial liability of civil servants, differs from tort liability under ordinary law in that, in essence, the damage caused by the wrongful act is directed either against the property of the public authority or institution to which the guilty civil servant belongs, either against a natural or legal person under private or public law.

Equally, the unlawful act must be committed by a person who has the status of civil servant in connection with his duties. If the civil servant commits an illegal act unrelated to the duties of the service, the reparation of the damage will not be made according to the rules established by the provisions of the Administrative Code, but according to the provisions of the Civil Code[18], these being the legal provisions that are considered to be right the common law in the matter of civil liability.

In other words, not every illicit act committed by a civil servant will attract his liability under the provisions of the Administrative Code, but only those deeds committed in connection with the duties of the office they hold.

The provisions of the Administrative Code[19] establish, regarding the necessary conditions in order to engage the administrative-patrimonial responsibility, that it is necessary the cumulative fulfilment of several conditions, respectively: "*a) the contested administrative act is illegal; b) the illegal administrative act is the cause of material or moral damages; c) the existence of a causal relationship between the illegal act and the damage; d) the existence of the fault of the public authority and/or of its staff*".

Thus, when analyzing the specific conditions of civil liability of civil servants, the above-mentioned legal provisions must also be taken into account because, as it results from the provisions of the Administrative Code, the fault in the damage may belong to either the public institution or its staff.

In order to involve the patrimonial liability in the administrative law, it is necessary to establish the existence of a causal link between the illicit deed and the damage, i.e. the fact that the damage is the effect; the

[18] Article 1349 et seq. of the Civil Code.
[19] Article 577 of the Administrative Code.

consequence of the illicit deed consisting in the non-execution or improper execution of the obligations deriving from the employment relationship or the work relationship. When establishing the causal relationship, illicit acts must be taken into account, consisting of both actions and inactions that violate legal norms. In order to fulfil the conditions of the patrimonial responsibility, it is necessary that the damage done be the effect of the illicit deed of the employee, committed out of "guilt and in connection with his work"[20].

The patrimonial liability necessarily presupposes the existence of the guilt or guilt of the perpetrator of the illicit deed causing damage, the liability of a person being inconceivable, in the absence of even the lightest form of guilt. From the point of view of incurring the patrimonial liability, the degree of guilt of the perpetrator of the damage is not important, the obligation to cover the damage subsisting even in the case of the slightest fault, as we showed when presenting the general conditions of tort liability.

Guilt is the subjective element of the patrimonial responsibility, unlike the other conditions that belong to the objective side of the illicit deed. This element is defined as the psychic attitude of the person towards the deed and towards its consequences, at the moment of committing the illicit deed. As previously stated, with regard to civil liability, the author is liable for any of the forms of guilt with which he would act.

As in civil matters, neither the labour legislation, nor the one specific to the administrative law, distinguishes between the forms of guilt, the commitment of the patrimonial responsibility taking place even for the slightest guilt[21] and regardless of its shape. The legislator's solution is a logical one because, unlike criminal law, where guilt is essential to engage in criminal liability.

There is a possibility to assess the concrete degree of guilt with which the civil servant acted, according to those shown in the analysis of the general conditions of liability. Equally, if there is a common fault in causing the damage, the amount of compensation due decreases

[20] I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii,* Hamangiu Publishing House, Bucharest, 2017, p. 892.

[21] For the differentiation of forms of guilt, see Article 16 of the Civil Code.

according to the share of the victim's fault, and may even lead to exoneration of liability, if it proves the serious guilt of the injured person.

At the moment of establishing the guilt, a series of criteria must be taken into account, among which the position/position held, in the case of co-authorship at the commission of the illicit deed; the actual contribution of each co-perpetrator to the occurrence of the damage, the extent to which measures have been taken or not to avoid the damage, the existence of bad faith in the commission of the act. In the case of civil servants, when establishing the guilt, the position held by the perpetrator in the hierarchy of public authority or institution must be taken into account, the role played in violating the duties of service such as, for example, the person who issued the administrative act or performance of a civil duty, who signed the prejudicial administrative act, etc.

The analysis of these elements which effectively set in motion the mechanism of tort liability is of particular importance given that, according to the provisions of the Administrative Code, ”*civil and criminal liability is incurred in accordance with specific legislation”*[22].

It is true that according to the rules regulated by the Administrative Code, regarding the administrative liability, other rules apply than those analyzed above.

Conclusions

Civil liability of civil servants is essentially a specific form of tort liability. The conditions that must be met in order to be held liable are both general conditions and conditions specific to the duties of officials.

It is true that this article is just the beginning of research on this topic that we consider interesting also from the perspective of the possibility of injury. We make this statement because the provisions of the Administrative Code establish a solidarity regarding the liability between the public institution and the official who commits the illicit deed. These specific aspects will be developed in a future paper.

[22] Article 564 (2) of the Administrative Code.

REFERENCES

1. E.E. Ştefan, *Răspunderea juridică - Privire specială asupra răspunderii în dreptul administrativ (Legal liability - Special view on liability in administrative law),* Prouniversitaria Publishing House, Bucharest, 2013.
2. I.R. Urs, P.E. Ispas, *Drept civil. Teoria obligaţiilor (Civil law. Theory of Obligations),* Hamangiu Publishing House, Bucharest, 2015.
3. I. Adam, *Drept civil. Obligaţiile. Faptul juridic (Civil law. Obligations. The legal fact)*, C.H. Beck Publishing House, Bucharest, 2013.
4. P. Vasilescu, *Drept civil. Obligaţii, ed. a II-a, revizuită (Civil law. Obligations, 2nd ed., revised),* Hamangiu, Publishing House, Bucharest, 2017.
5. I.T. Ștefănescu, *Tratat teoretic şi practic de drept al muncii (Theoretical and practical labor law treatise,),* Hamangiu Publishing House, Bucharest, 2017.
6. P.E. Ispas, *Răspunderea pentru fapta proprie în lumina dispoziţiilor noului Cod civil român (Liability for one's own deed in light of the provisions of the new Romanian Civil Code),* article published in the Volume of scientific communications "Science and codification in Romania", Institute of Legal Research of the Romanian Academy, Universul juridic Publishing House, Bucharest, 2012.
7. Legea nr. 287/2009 privind Codul civil.
8. Emergency Ordinance no. 57/2019 on the Administrative Code, published in the Official Gazette of Romania no. 555/05.07.2019.
9. CCR Decision no. 456/2015.

THE LEGAL CONSEQUENCES OF THE FACEBOOK-CAMBRIDGE ANALYTICA SCANDAL ON THE EU INFORMATION SOCIETY; THE PROPOSAL OF E-PRIVACY REGULATION

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ABSTRACT

This article seeks to analyse the evolution of personal data protection regulations in historical, legal and cultural contexts. We will dwell, on the main issue concerning the impact of the introduction of the forthcoming e-Privacy Regulation. We will analyse the existing provisions on the protection of personal data in European law, the legislation and case law of the CJEU, and discuss the legal implications of the Facebook-Cambridge Analytica scandal in relation with the proposed E-Privacy Regulation.

KEYWORDS: *data protection; E-Privacy Regulation; Data Driven World; Civil Liberties Commission;*

1. Preliminaries

The data protection reforms carried out by the European Union and the Council of Europe, are among the most extensive and complex, with countless benefits and a significant impact on individuals and companies, especially among non-specialist legal practitioners, who are confronted in their work with data protection issues.

In the past, the protection of personal data didn't had a great importance because personal data were stored in physical format, on paper, and it was difficult to reproduce and store, also the access to them was made in a cumbersome way, most of the time by a limited number of people. What has changed? How did storing and processing them become such an important topic? The answer is given to us by the very historical evolution. Today, we, as humanity, are going through an era of speed and the internet, marked by far-reaching technological developments. They allow the collection and processing in electronic format of an infinite number of personal data, implicitly their ability to analyze and process

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them. Thus, the law on data protection was seen from the very beginning as a legal framework whose purpose is to "tame" the technology, that is, its concrete regulation[1].

The right to the protection of personal data, is regarded as a modern and active right, as Advocate General Sharpston stated in the *Volker and Markus* case: *"... the facts involve two distinct rights: the 'classic' right to the protection of privacy and a more 'modern' right, named the right to data protection*[2]"; which put in place a system of weights and counter-weights to protect individuals in any situation where their personal data is processed.

In the run-up to the emergence of specific legislation in the field of data protection at European level, a new concept of privacy appeared, known in some jurisdictions as "confidentiality of information" and in others "the right to informational self-determination"[3].

For example, the German Federal Constitutional Court enshrined a right to informational self-determination as early as 1983 in its judgment in *volkszählungsurteil*[4]. At that time, the Court considered that informational self-determination derives from the fundamental right of respect for one's personality, protected by the German Constitution[5]. Thus, we are going to notice concerns about the confidentiality of information before the creation of a European legislative framework, the same reasoning were founded later in the ECHR judgment in *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland*[6], where the ECHR recognises that Article 8 of the European Convention on Human Rights "provides the right to a form of informational self-determination".

Regulation 2016/679 of the European Parliament and Council from 27 April 2016 on the protection of individual with regard to the processing

[1] Raphael Gellert, *The Risk-Based Approach on Data Protection*, Oxford University Press, 6 oct 2020, p. 7.

[2] See judgment in the CJEU of 17 June 2010 in Joined Cases C-92/09 and C-93/02 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, and the Opinion of Advocate General Sharpston, point 71.

[3] *Manual de legislație europeană privind protecția datelor*, Luxemburg: Oficiul pentru Publicații al Uniunii Europene, edition 2018, p. 21.

[4] *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)*. Bd.119, Publishing Mohr Siebeck, 2008, p. 223.

[5] *Ibidem*, p. 223-224.

[6] CEDO [MC] din 27 iunie 2017 în cauza Satakunnan Oy și Satamedia Oy/ Finlanda, nr. 931/13, pct. 137.

of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) became applicable from May 2018. The adoption of the GDPR Regulation complements the provisions of the Lisbon Treaty[7], of the provisions of Articles 16 TFEU and of Articles 7 and 8 of the Charter, precisely in order to put the principles of the old regulation into line with technological developments[8]. The Regulation, targets individuals, by ensuring a uniform level of protection throughout the Union and preventing discrepancies that hinder the free flow of data within the internal market as it is stipulated in Article 13 of the Regulation. The limits of its application shall be laid down in Article 16, "This Regulation shall not apply to matters of the protection of fundamental rights and freedoms or to the free movement of the personal data relating to activities which fall outside the scope of Union law".

Specifically, the purpose of the GDPR regulation is to impose a uniform data security law applicable to EU Member States. At the same time, any resortisant who sells goods or services to EU residents through his companies, regardless of his location, is submissive to the regulation. Thus, the Regulation has an impact on data protection requirements globally.

2. Facebook-Cambridge Analytica Scandal

In this legislative context, at the beginning of 2018, attention is drawn to the fact that millions of personal data of users of the social media platform Facebook, were collected without their consent, by the Cambridge Analytica company, to be used mainly for political

[7] The Treaty of Lisbon is a treaty amending the previous treaties (the Treaty of the European Union (TEU) and the Treaty establishing the European Community, renamed, since 2009, the Treaty on the Functioning of the European Union (TFEU)). In this context, the lack of a preamble to the Treaty of Lisbon seems natural, but some perplexities arise as to the name and even the existence itself, of a new treaty.

[8] D.M. Șandru, N. Ploiești eanu, Irina Alexe, P*rotecţia datelor cu caracter personal. Impactul protecţiei datelor personale asupra mediului de afaceri. Evaluări ale experienţelor româneşti şi noile provocări ale Regulamentului (UE) 2016/679*, Publishing Universitară, Bucureşti, 2017, p. 60-61.

advertising.[9] The data was collected through an app created in 2013 by Aleksandr Kogan, professor at Cambridge University, which consisted in a series of questions asked to the users to build the psychological profiles of them. The app not only collected the personal data of the users who filled in the questions, but also of the Facebook friends of the users. Specifically, Cambridge Analytica planned to sell the data of the American voters to firms specializing in creating and leading political campaigns; they also got involved in the campaigns for Ted Cruz and Donald Trump, providing assistance and analysis based on fraudulently obtained data. The violation of data protection policies was revealed in 2018 by Christopher Wylie, a former employee of Cambridge Analytica, in an interview with The Guardian and The New York Times. In response, Facebook apologized for the company role in data collection, and CEO Mark Zuckerberg testified before the U.S. Congress[10][11]. These stories sparked an online movement #DeleteFacebook.[12]

Shortly, after the scandal broke's out, at the European Union level, the European Parliament takes the decision to hear the Founder of Facebook in the Civil Liberties Committee. This was possible due to the legal framework created by the EU that specifically protects the right to the protection of personal data, through the GDPR Regulation 679/2016 but also through Articles 7 and 8 of the Charter of Fundamental Rights, beside the confidentiality agreements concluded by the EU with different

[9] Gerry O'Reilly, J. G. O'Reilly, *Places of Memory and Legacies in an Age of Insecurities and Globalization*, Springer Nature, 2020, p. 123.

[10] On April 17, 2018, he testified before the American Congress. In the midst of the Cambridge Analytica scandal, The Federal Trade Commission is already investigating whether or not the network violated an agreement it signed in 2011 with the FTC, pledging that it would no longer disclose confidential user information. If Facebook is found guilty, the company could be liable to the highest federal fine in U.S. history. The government could crush the company if it imposed this fine, but the question that arises is whether it will want to do so at a time when Facebook is an extremely profitable platform for politicians.

[11] Esenţialul despre audierea lui Zuckerberg în Congresul american (semneletimpului.ro)

[12] Christian Fuchs, *Social Media: A Critical Introduction*, Publishing SAGE, 10 mar. 2021, p. 221-224.

states[13]. After three hearings, the European Parliament adopts a resolution.

The resolution summarises the conclusions reached following last May's meeting between leading MEPs and Facebook CEO Mark Zuckerberg, and the three subsequent hearings. It also references to the data breach suffered by Facebook on 28 September. MEPs note that the data obtained by Cambridge Analytica may have been used for political purposes, by both sides in the UK referendum on membership of the EU and targeted the voters during the 2016 American presidential election. They highlight the urgency of countering any attempt to manipulate EU elections and to adapt electoral laws to reflect the new digital reality. Civil Liberties Chair, Claude Morales (UK) said: "This is a global issue, which has already affected our referenda and our elections. This resolution sets out the measures that are needed, including an independent audit of Facebook, an update to our competition rules, and additional measures to protect our elections. Action must be taken now, not just to restore trust in online platforms, but to protect citizens' privacy and restore trust and confidence in our democratic systems." [14] He also declared that: "This resolution makes clear that we expect measures to be taken to protect citizens' right to private life, data protection and freedom of expression. Improvements have been made since the scandal, but, as the Facebook data breach of 50 million accounts showed just last month, these do not go far enough."

FB is currently embroiled in a series of lawsuits and regulatory investigations outside of GDPR that illustrate a history of data abuse by the company. As of September 2018 the Irish data protection commissioner has been investigating FB for a security breach affecting 50 million users. In February 2019 the UK House of Commons followed suit by issuing a damaging report on the disinformation campaigns of

[13] For example, we recall the EU-U.S. Privacy Shield agreement adopted on 12 July 2016 that allowed the free transfer of data to companies certified in the U.S. In its judgment of 16 July 2020 (Case C-311/18), the Court of Justice of the European Union invalidated the adequacy decision. The EU-US Privacy Shield is therefore no longer a valid mechanism to transfer personal data from the European Union to the United States.

[14] Facebook-Cambridge Analytica: MEPs demand action to protect citizens' privacy | News | European Parliament (europa.eu).

2016 and how the company violated the 2011 FTC Consent Decree leading to the Russian interference[15].

There are several lessons of this scandal that raise rule-of-law questions. The first lesson is that we need to understand that the relationship between public and private norms is being disrupted in new ways. Within data protection law, the main wrong was seen to be Facebook's problematic consent process, whereby individuals would not understand that information they made visible to "friends " meant that it could be used by apps those friends downloaded. The private sector laws, therefore, focused on the " private" relationships but could not get at the broader public harms. This suggests that our methods for hedging private power through traditional ideas of consent and contract will not suffice[16]. The second lesson is that the complex data ecosystem that underpins so many spheres of activity is opaque. With such a fundamental failure in basic transparency it is difficult to know how this can be a space actually governed by law. The third lesson, is about the failure of some of our characteristic model of legal accountability; both the UK and Canadian regulators investigating this scandal found that Facebook was in violation of its security obligations under European and Canadian data protection law. Thus, how can accountability be ensured, on how a third party manages the data that is shared with it, if we do not have an international legal framework that achieves control and protection through its rules?

The fact that the companies were able to operate with such indifference to any consequences regarding the violation of the right to data protection, shows not just a lack of regulation but also a lack of respects for the regulations that do exist and an obvious gap in enforcement[17]. The FB scandal broke at around the same time as the arrival of the GDPR into UK law. This coincidence has had the effect of launching data regulations into mainstream consciousness as both a force for good and a regulation with effect. Indeed such has been the clamour for change that

[15] Sanjay Sharma *Data Privacy and GDPR Handbook,* John Wiley & Sons, 26 nov. 2019, p. 336.

[16] Hanoch Dagan, Benjamin C. Zipursky *Research Handbook on Private Law Theory*, Edward Elgar Publishing, 25 dec. 2020, p. 451.

[17] Normann Witzleb, Moira Paterson, Janice Richardson, *Big Data, Political Campaigning and the Law: Democracy and Privacy in the Age of Micro-Targeting*, Routledge, 6 dec. 2019, p. 198.

US legislators, lawyers and consumers have begun to ask questions as to why they are not protected by regulations similar to the GDPR .

The key point to remember, is that the only objective measures following this scandal were bring to the attention of users, the serious breaches of personal data protection through the manipulation of data without consent. Last, but not least, the way in which this data has been used has been brought to the attention of the general public, the creation of psychological profiles of the users, but even more serious is the fact that the processing and use of this data ends up manipulating their convictions, showing their powerlessness. The simple fact that a causal link has been proven between the induction of opinions and acting on them (e.g. the vote for the British citizens to leave the EU) confirms the alarming situation in which the online environment finds itself.

3. E-Privacy: from Directive to Regulation

The biggest implications of the FB scandal are the proposal for a Regulation of the European Parliament and of the Council on respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC[18].

This regulation, which is currently at the draft stage, had to apply with GDPR, respectively from May 25, 2018. The new legislation and the specifics of its interpretation will be decisive for the future of privacy, both in Europe and globally[19].

The e-Privacy Directive mainly applies to publicly available electronic communications services that include traditional telecoms providers. However, there are also rules in relation to marketing that are important to read with the GDPR. The GDPR explicitly says that the e-Privacy Directive remains in force although EU regulators are now requiring the higher GDPR level of consent to be met for processing personal data

[18] The Directive on Privacy and Electronic Communications, known as the ePrivacy Directive, lays down EU rules on how providers of electronic communications services, such as telecoms companies and internet service providers, should manage their subscribers' data. It also guarantees subscribers' rights when using these services and imposes restrictions on online tracking and sending unwanted communications.

[19] *https://www.digitalsme.eu/blog/2021/10/01/eprivacy-regulation-europe-at-a-crossroads/*

with the exception of e-Privacy for consent for accessing terminal equipment.

The European Commission has published its draft e-Privacy Regulation which if adopted will replace the existent e-Privacy Directive. The exact timing of the entry into force of the regulation is uncertain. The Regulation broadens the scope of the directive enhances, the confidentiality of communications and updates the rules on cookies and unsolicited electronic marketing.

As mentioned before the e-Privacy Directive is expected to be replaced by an e-privacy regulation in the near future. The reasons for this change are several. Think again at the fast developments and challenges in this field (such as WhatsApp and Skype) requiring a broader scope and an adaptation to the technical reality of today. A regulation being immediately applicable and enforceable in the EU member states is expected to create a level playing field for both consumers and service providers[20]. And last but not least the aim is to simplify the e-privacy rules also by ensuring consistency with the GDPR including the consequences for non – compliance.

First of all note the difference in the terms: whereas now we have an ePrivacy Directive, the newcomer is called an ePrivacy Regulation. This means that the new ePrivacy Regulation is self-executing and becomes legally binding across the EU, whereas its predecessor, the ePrivacy Directive, required local regulations for implementation with the mentioned inconsistent enforcement as one consequence. Again, just like the GDPR.

Secondly, the current ePrivacy Directive came as a complement of the EU's Data Protection Directive. It's exactly this Data Protection Directive that is being replaced by the General Data Protection Regulation or GDPR. As a consequence but also to 'improve' the current so-called 'cookie law' and, among others, include new forms of electronic communications *(IoT and more)*, the new ePrivacy Regulation complements the GDPR and in pretty much the same way strives towards uniformity across the single digital market as a Regulation instead of a Directive.[21]

[20] Elif Kiesow Cortez, *Data Protection Around the World: Privacy Laws in Action*, Springer Nature, 20 nov. 2020, p. 170.

[21] *https://www.i-scoop.eu/gdpr/eu-eprivacy-regulation/*

Why is this new e-Privacy Regulation is so important? why is it needed and how is it different?

Because electronic communication data is such a sensitive and ubiquitous subject, separate legislation has been created to give it stronger protection than that conferred by the GDPR. Surprisingly, the current draft proposal of the ePrivacy Regulation supports "legitimate interest" interpretations. It drops the explicit prohibitions on such databases that exist in the current ePrivacy Directive[22] .

The e-Privacy Regulation aims to act as *lex specialis* compared to the GDPR Regulation. As specified above, the scope of application covers the processing of data transmitted by means of electronic communications in connection with the provision and use of electronic communications services and information related to end-users' terminal equipment. Thus, ePrivacy aims to ensure the confidentiality of information circulating in the online environment, but it should be noted that it applies only to processing of data transmitted via electronic communications and containing personal data, not any kind of data.

The European Union ePrivacy regulation has been published to broaden the scope of the current ePrivacy Directive and align the various online privacy rules that exist across EU member states. The regulation takes on board all definitions of privacy and data that were introduced within the General Data Protection Regulations, and acts to clarify and enhance it. In particular, the areas of unsolicited marketing, Cookies and Confidentiality are covered in a more specific context. [23]

In principle, e-Privacy aims to ensure the protection of the content of electronic communications and metadata related to electronic communications, including content exchanged via electronic communications services, such as text messages, voice messages, video recordings, images and sounds.

In the same time, e-Privacy Regulation poses a general prohibition on interference with electronic communications data, such as by listening, tapping, storing, monitoring, scanning or through other kinds of

[22] *https://www.digitalsme.eu/blog/2021/10/01/eprivacy-regulation-europe-at-a-crossroads/*

[23] Difference between GDPR and ePrivacy regulation (privacytrust.com)

interceptation, surveillance or processing of electronic communications data, by persons other than the end - users.[24]

4. Conclusions

Given the precedent set by the Cambridge Analytica scandal, followed by the precautionary measures taken by the EU, the European Union's General Data Protection Regulation should be taken as an example for all countries to actively engage in the creation of similar legislative frameworks to protect the use and storage of personal data in order to limit future violations of the fundamental right to privacy.

The implications of the Cambridge Analytica scandal's media coverage have been seen primarily in the change of Facebook's privacy policy, but this should not be seen as a success, as there may be other ways to undermine the protection of these rights. People's literacy and how they can be aware of potential risks, including identity theft, fraud transactions etc.; private data used in social media and through connected devices in the Internet of Things (IoT) could also be the subjects of a future study[25]. The Cambridge Analytica scandal has shown that data protection is very important and cannot be left solely to companies, as social media platforms have proven not to operate in the user's best interest, therefore this will be a new topic, the European Union with the introduction of the future e-Privacy regulation is the only one globally that anticipates electronic privacy protection.

The forthcoming ePrivacy Regulation is as we have already specified *lex specialis* for GDPR. Which reminds us of the legal principle that "*principe lex specialis derogat legi generali*", which essentially means that *lex specialis*, in this case the ePrivacy Regulation, supersedes *lex generalis*, in this case GDPR (personal data protection in general). Both the GDPR and the forthcoming ePrivacy Regulation are part of the reform of the EU's data protection legislative framework, which also includes a new set of rules governing the free flow of non-personal data

[24] V. Hatzopoulos, *The Collaborative Economy and EU Law*, Bloomsbury Publishing, 22 feb. 2018, p. 89.

[25] H. Dincer, *Management Strategies to Survive in a Competitive Environment: How to Improve Company Performance*, Ed. Springer Nature, 2021, p. 194.

in the EU, which the European Commission proposed in September 2017.[26]

It should also be noted that the GDPR regulation together with the future e-Privacy regulation comes to prevent the the biggest problem of today's companies which are using data to create psychological profiles of consumers by using applications that stores informations about marketing behavior and not only. With the creation of this legislative framework, on the protection of personal data, the aggrieved data subject now has a 'weapon' at his disposal to oppose and defend himself against direct marketing, profiling related to direct marketing, the right to object to other types of profiling and automated decision-making processes; all of which require the explicit consent of the data subject.

BIBLIOGRAPHY

1. Christian Fuchs, *Social Media: A Critical Introduction*, Ed. SAGE, 10 mar. 2021.
2. Daniel Mihai Șandru, Nicolae Ploiești eanu, Irina Alexe, *Protecţia datelor cu caracter personal. Impactul protecţiei datelor personale asupra mediului de afaceri. Evaluări ale experienţelor româneşti şi noile provocări ale Regulamentului (UE) 2016/679*, Ed. Universitară, București, 2017.
3. Elif Kiesow Cortez, *Data Protection Around the World: Privacy Laws in Action*, Springer Nature, 20 nov. 2020.
4. *Entscheidungen des Bundesverfassungsgerichts (BVerfGE). Bd.119*, Ed. Mohr Siebeck, 2008.
5. Gerry O'Reilly, J. G. O'Reilly, Places of Memory and Legacies in an Age of Insecurities and Globalization, Springer Nature, 2020.
6. Hasan Dincer, *Management Strategies to Survive in a Competitive Environment: How to Improve Company Performance*, Ed. Springer Nature, 2021.
7. Hanoch Dagan, Benjamin C. Zipursky *Research Handbook on Private Law Theory*, Edward Elgar Publishing, 25 dec. 2020.
8. *Manual de legislație europeană privind protecția datelor*, Luxemburg: Oficiul pentru Publicații al Uniunii Europene, ediția 2018.

[26] *https://www.i-scoop.eu/gdpr/eu-eprivacy-regulation/*

9. Normann Witzleb, Moira Paterson, Janice Richardson, *Big Data, Political Campaigning and the Law: Democracy and Privacy in the Age of Micro-Targeting*, Routledge, 6 dec. 2019.
10. Raphael Gellert, *The Risk-Based Approach on Data Protection*, Oxford University Press, 6 oct 2020.
11. Sanjay Sharma *Data Privacy and GDPR Handbook*, John Wiley & Sons, 26 nov. 2019.
12. Vassilis Hatzopoulos, The Collaborative Economy and EU Law, Bloomsbury Publishing, 22 feb. 2018.
13. Directiva privind confidențialitatea și comunicațiile electronice sau Directiva ePrivacy,
14. Regulamentul privind viata privata si comunicatiile electronice sau e-Privacy
15. Regulamentul GDPR
16. Tratatul de la Lisabona
17. Hotărârea CEDO [MC]din 27 iunie 2017 în cauza Satakunnan Oy și Satamedia Oy/Finlanda, nr. 931/13.
18. Hotărârea CJUE din 17 iunie 2010 în cauzele conexate C-92/09 și C-93/02, Volker und Markus Schecke GbR și Hartmut Eifert/Land Hessen.
19. *https://www.i-scoop.eu/gdpr/eu-eprivacy-regulation/*
20. *https://www.digitalsme.eu/blog/2021/10/01/eprivacy-regulation-europe-at-a-crossroads/*
21. Difference between GDPR and ePrivacy regulation (privacytrust.com)
22. Facebook-Cambridge Analytica: MEPs demand action to protect citizens' privacy | News | European Parliament (europa.eu)

THE SPECIFICITY AND IMPORTANCE OF THE MOTIVATION IN THE JUDICIAL INDIVIDUALIZATION OF PREVENTIVE MEASURES

Vasile COMAN *

ABSTRACT

The paper aims to emphasize the importance and echo of the motivation of jurisdictional acts given in the operation of individualizing procedural measures, with emphasis on preventive measures in criminal proceedings. The analysis is imposed in the recent social and legal context, in which the individual freedom of the person is subjected to particular trials and must be preserved, an objective finally achievable through the analysis and rigorous argumentation of acts of disposition prepared by judicial bodies in this regard .

KEYWORDS: *freedom; preventive measures; criminal proceedings; judicial individualization;*

I. Preliminaries

The right to punish or penalize in the broadest sense, including through the imposition of preventive measures concerning individual liberty, corresponds to the obligation of the competent authority to show convincingly the premises which require this so that their purpose is achieved, taking into account equally and the fact that their consequences strike instantly and immediately in the image and dignity of the person concerned by them.

Judicial individualization is a complex operation, raised to the level of fundamental principle of criminal law, enshrined in art. 74 C.pen.[1]

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[1] C-tin Sima, *Criminal Law*, General Part, Vol. I, Hamangiu Publishing House, Bucharest, 2015, p. 9. The author emphasizes that sanctions must be adapted in relation to individuals, conduct, age, health and integration possibilities of the convicted person. Only through a good individualization can be achieved the purpose of applying the

Thorough choice of sanction and criminal liability play an essential role in preventing and controlling crime, in ensuring the social and legal order of society, and are related to several factors - explicit, related to the functioning of justice, respectively the local or international context in which it has place the process[2].

Criminal procedural law implements criminal law, their coexistence being implied. Following the legislative construction of art. 202 C.proc.pen. (purpose of preventive measures), we note that preventive measures (any) are taken primarily *for the purpose of the proper conduct of criminal proceedings*, and only if the judiciary demonstrates in court (and not after abstract assessments, "media impression", or " subjective desires ”of the unlawful or the press) reasonable suspicion that *a person* has committed a crime, which shows that the“ suspicion ”relates - first - to each individual crime, and not from the overall perspective of the prosecution, from which angle as a perception, the criminal charge always seems "more serious" than it actually is; only then, in the context, are of course taken into account the aggravating/mitigating circumstances, respectively the states of aggravation/attenuation - real or personal (egg. recidivism) incidents of the case.

The objective of any criminal trial is obviously to restore legality and the social order altered by crime, a context in which individual freedom cannot be sacrificed by diverting the angle of analysis in favour of circumstances external to the deed. Therefore, the first case of impeding the continuation of the criminal process (in any phase), contained in art. 16 para. (1) lit. a) C.proc.pen., is “*the deed* does not exist” (i.e. it does not exist in its materiality or there is a reasonable suspicion that it existed).

With regard to the purpose and conditions to be met in order to be disposed of, the legislator expressly provides that preventive measures may be ordered if there is solid evidence or evidence that there is a reasonable suspicion that a person has committed a crime and if they are necessary to ensure proper conduct of the criminal process, of preventing the abduction of the suspect or of the defendant from the criminal

sanction: re-education of the convict, his social reintegration and prevention of other crimes.

[2] Lucreţia Dogaru, *Criminology,* Pro Universitaria Publishing House, Bucharest, 2017, p. 213-214.

investigation or of the trial or of the prevention of committing another crime [art. 202 para. (1) C.proc.pen.].

The Constitutional Court has frequently ruled that the notion of "reasonable suspicion" must be closely correlated with that of "reasonable suspicion", as preventive measures, except detention, can be ordered only against the suspect or the defendant.

Unlike the evidence on which a conviction is based, which must be indisputable and from which must result, beyond any reasonable doubt, the conclusion by the defendant of the crime for which he is tried, the standard of proof necessary to acquire more procedural qualities and the provision of preventive measures is that of the ability to determine the formation of a suspicion or a "suspicion". However, the latter must be "reasonable".

As the notion of “reasonable” does not benefit from a specific definition of criminal law or criminal procedural law, the Constitutional Court held that the legislator had in mind the common, proper meaning of the term. Therefore, the meaning of the phrase "reasonable suspicion" means the existence of evidence on the basis of which, using a balanced, natural reasoning, without exaggeration, the plausible conclusion can be drawn that the suspect or defendant has committed a crime and it is necessary or not to take measures against it[3].

II. The need to motivate court decisions and jurisdictional acts by the judiciary

In the performance of their duties, the criminal investigation bodies and the judges must apply the law to certain given factual situations. This activity involves an extensive process, which includes several stages, namely the establishment on evidence of the factual situation subject to the act of justice, the interpretation of legal provisions and, finally, the identification and application of the legal provision in the specific case. All measures ordered must include a statement of reasons in fact and in law, as a guarantee of the litigants against arbitrariness.

[3] CCR decision no. 185 of March 21, 2017 regarding the exception of unconstitutionality of the provisions of art. 202 para. (1) and art. 223 para. (1) of the Code of Criminal Procedure, available on the Court's website, *www.ccr.ro.*

Prosecutors and judges are obliged to clarify the case in all aspects only on the basis of evidence, as they do not have a pre-established value, their assessment being made after examining all the evidence administered[4]. This "clarification" materializes and is contained in what we call the motivation or considerations of the act of disposition that comprises them.

The motivation must emphasize a real, punctual argumentation, using the words of the legislator, but with the framing of the deed itself in the current logic of the society, which is constantly changing. One of the necessary premises for achieving this objective is the capacity of the judicial body to see, express, adapt the factual situations to the social realities from the moment of taking the decisions (it is also one of the more favourable premises of the criminal law institution).

Regarding the motivation of judgments, the High Court of Cassation and Justice - a landmark court in the quality of judgments in general, frequently stressed the importance of motivating judgments. For example, in one case it held that the obligation to state reasons for judgments is the result of the requirements arising from the provisions of the European Convention on Human Rights, this text imposing on the court the obligation to effectively examine the arguments of the parties which verifies the observance of the rights of the parties and, at the same time, a requirement that contributes to guaranteeing the observance of the principle of good administration of justice.

Thus, the main duty of the judge invested with resolving a conflict of criminal law, is to base his conviction on the evidence administered in the case, analyzed in accordance with the provisions of art. 103 C.proc.pen., Analytical process reflected in the pronounced decision[5]. The relevance of a solution is given in the new criminal legislation, in equal measure, by keeping the analysis within the limits of the accusations formally brought by the prosecutor's office, a necessity that derives from the general provision contained in art. 371 C.proc.pen.[6]

[4] I.C.C.J., J.C.P., Criminal conclusion no. 728 of September 30, 2015, unpublished.

[5] I.C.C.J., Criminal section, Criminal decision no. 21/A of January 30, 2018, published on www.scj.ro.

[6] In a case from the relevant case law of the Prahova Court, it was observed that, regarding the defendant M., it is noted that the claim cannot be made that he is the leader of an organized criminal group, given that Ploieşti) it does not appear that such an accusation has been retained, nor is there any reference to such a crime. In other

III. Motivation of conclusions and ordinances on preventive measures

Motivation is all the more important in the case of measures or acts which have immediate effect (for example, taking, prolonging or maintaining preventive measures) and enforceable deprivation of liberty of the person (detention, pre-trial detention and house arrest), or restriction of his liberty (judicial control).

Offenses must be proved sufficiently well and reasonably, from the outset, because beyond the procedural distinctions, in terms of the effects and perception of society (and of the data subject, in particular), for example, *there is no difference between deprivation of liberty by arrest preventive and subsequent to the execution of a prison sentence*. Therefore, the care with which it is ordered to take or keep in force a preventive measure must be identical, the judicial body not being able to support us only in the comfort of the argument, often used in practice and unanimously accepted in doctrine (but established jurisprudentially), according to that "the grounds for taking a precautionary measure must not be of the same calibre as those required for a conviction"[7]. Otherwise, the statement of the injured person/whistleblower is sufficient to take/maintain a preventive measure, including pre-trial detention, with important negative personal and social consequences, to the detriment of the society (state).

Of course, the condition of motivation is also required in the case of the prosecutor's ordinances and can be deduced from the provisions of art. 286 para. (2) C.proc.pen. on the content of the ordinance. In this

words, the judge retained aspects that are not related to the case, the lack of motivation or inadequate motivation being an aspect of illegality of the jurisdictional act and implicitly a violation of the right to a fair criminal trial provided by art. 6 parag. 1 of the European Convention on Human Rights; this fact, together with other reasons, led to the admission of the appeals and the sending of the case for retrial to the first instance. - Tribe. Prahova, Criminal Section, Conclusion no. 277 of July 2, 2021, unpublished.

[7] The logic behind this idea comes from the fact that, logically, if at the time of the debate on the proposal for pre-trial detention there is evidence that would clearly result in the guilt of the defendant, his conviction would be called into question, and not the measure of pre-trial detention. – I. Muraru, E.S. Tănăsescu, *Romanian Constitution, Commentary on articles*, C.H. Beck, Bucharest, 2008, p. 219. The assertion is also valid in the case of the other preventive measures.

respect, the High Court held that, even if the presentation of the facts has a concise form, this element is not such as to lead to the conclusion that the contested order is unmotivated, *the style in which the act is motivated is not an element that to be subject to censorship by the court,* provided that its analysis shows all the elements necessary to verify the legality and validity of the solution[8].

It is true that, in practice, sometimes due to the large volume of work, it is found that the argumentation is apparently summary, but it is necessary and essential that it reflects with sufficient conciseness the essential considerations for which the judicial body considered that the alleged act requires one preventive measure or another.

IV. Remedies for failure to state reasons for the provisions on preventive measures. Specific remedy – sending the case for retrial

Lack of motivation or inadequate motivation is an aspect of illegality of the jurisdictional act, and the sanction is its annulment and resumption of the judicial conviction process. In the same sense, it is the practice of the Supreme Court that was constant in assessing that the non-existence of the motivation attracts the quashing of the decision, with the retrial of the case by the court that violated the legal provisions governing the obligation to motivate the court decision.

Judicial case law abounds in such cases, encountered especially in the case of court decisions, meaning that we will evoke as an example several cases, a relevant approach from the perspective of the exemplary motivation of the "lack of motivation" in the verified act.

The principle that must be retained following this analysis is the following - the lack of real motivation of the decision represents first of all *an aspect of illegality* and *automatically attracts the violation of the principle of double degree of jurisdiction in criminal matters established by art. 2 of Protocol no. 7 of the European Convention on Human Rights* and, as a consequence, the deprivation of the parties and subjects of the right to a fair criminal trial provided by art. 6 para. 1 of the European

[8] I.C.C.J., J.C.P., Criminal conclusion no. 734 of December 13, 2018, unpublished.

Convention on Human Rights, evoked, and as a sanction the nullity of the contested legal acts, affected by this procedural defect[9].

Even if it is not stipulated as a distinct reason for sending the case for retrial in disp. art. 425[1] C.proc.pen., In the national judicial practice it is constantly noted that the non-motivation constitutes such a case, deduced from the systematic interpretation and direct application of the mentioned conventional norms[10].

Of course, the possibility of sending the case for retrial - as an application of the more general principle with the same incidental purpose in the case of court decisions in general, is practically conditioned by the non-expiration of the measure, calculated from the date of the last verification according to art. 207-208 C.proc.pen., Sufficient to allow objectively the resumption of the trial. If the last verification of the maintained measure has expired, the non-motivation of the maintenance solution can be "sanctioned" procedurally as a reason for revocation of the measure in the application of disp. art. 242 para. (1) C.proc.pen., because the non-motivation is a "new circumstance" from which results, in this case, the illegality of the measure.

Regarding the remedy of retrial of the case by the court, in a case having as object the verification of the legality and validity of the preventive measure of pre-trial detention and its maintenance at the notification of the court with the indictment, the case being in the preliminary chamber procedure. 3422/P/2021 of 20.10.2021 of the Prosecutor's Office attached to the Ploieşti District Court, the judge of the preliminary chamber within the appeal panel of the Prahova Tribunal held that "in the minute and the operative part of the conclusion preliminary ruling must expressly state, and necessarily, whether or not it

[9] In this sense, for example, Criminal Decision no. 97 of March 10, 2021 of the Prahova Court, Criminal Section, unpublished; Criminal decision no. 238 of June 17, 2020 of the Prahova Tribunal, Criminal Section, unpublished; Criminal conclusion no. 19 of 13.01.2021 of the Prahova Court, Criminal Section, unpublished.

[10] In the case of the measure of pre-trial detention, it has been appreciated in the doctrine that its disposition is governed not only by procedural provisions, but also by constitutional norms or conventional regulations, which impose a series of guarantees of respect for the person's freedom and security. – N. Volonciu et al., *The new Code of Criminal Procedure commented*, 2nd ed., Hamangiu Publishing House, Bucharest, 2015, p. 531. In the same sense, more broadly, see S.G. Barbu, *The constitutional dimension of individual freedom*, Hamangiu Publishing House, 2011, p. 127-141, respectively p. 230-242.

finds the legality and validity of the preventive measure in question, this first provision (partial conclusion) having a direct influence on the following provisions, namely the maintenance of the measure, or not - by replacing or revoking it. This finding of the preliminary chamber judge requires an applied and minimal analysis of the evidence and the factual situation, specific to preventive measures, not being sufficient to take legal texts directly in the decision, a practice contrary to the right to a fair trial in the autonomous sense assigned by the European Court of Human Rights which requires, in context, that both the defence and the prosecution understand the decision of the court.

In the practice of the High Court of Cassation and Justice, it was decided that the obligation to motivate a decision, regardless of its nature, must be understood as a logical syllogism, capable of intelligibly explaining the decision taken.

Applying these theoretical considerations to the present case, the Panel of the Preliminary Chamber of the General Court notes that although the introductory part of the conclusion shows that the legality and validity of the preventive measure of pre-trial detention is pending, defender, as well as by the Public Ministry, further the judge of the preliminary chamber no longer analyzes in motivation these aspects and, nor does he pronounce under this aspect, in any way, going directly to the application of the provisions prev. of art. 242 para. (2) C.proc.pen., Fact that attracts the illegality of the contested conclusion.

On the other hand, the Panel of the Preliminary Chamber of the General Court first finds that in the report with a proposal to take the measure of arrest, in conclusion no. 80/01.10.2021 to the judge of rights and freedoms within the Ploieşti Court (for rejecting the taking of the preventive measure), but also in Decision no. 410 of 04.10.2021 of the Prahova Tribunal (for taking the measure in the context exercised by the prosecutor's office), the analysis is concentrated around the ground for pre-trial detention prev. of art. 223 para. (2) C.proc.pen.[11]. Instead, in the

[11] Article 223 para. (2) C.proc.pen. provides that "The measure of preventive arrest of the defendant may be taken even if the evidence shows a reasonable suspicion that he committed an intentional crime against life, a crime that caused bodily injury or death of a person, a crime against national security provided by the Criminal Code and other special laws, a crime of drug trafficking, of carrying out illegal operations with precursors or other products likely to have psychoactive effects, a crime of non-compliance with the regime of weapons, ammunition, nuclear and explosive materials

contested decision, the judge of the preliminary chamber within the Court also speaks of art. 223 para. (1) lit. d) C.proc.pen., the separate ground for non-incidental arrest in question and which provides that "The measure of pre-trial detention may be taken (...) and there is one of the following situations: (...) d) there is a reasonable suspicion that, after movement of the criminal action against him, the defendant has intentionally committed a new crime or is preparing to commit a new crime".

This unjustified procedural addition attracts the illegality of the jurisdictional act that contains it. It is observed in tab 6 of the u.p. file, that the ordinance for initiating the criminal action is from 1.10.2021, and from the criminal record file of the defendant, there are no aspects to support the motivation prev. of art. 223 para. (1) lit. d) C.proc.pen.; moreover, the considerations of the conclusion do not include the arguments that would justify the retention of this text of law.

Regarding the validity of the conclusion, the Panel of the Preliminary Chamber of the Tribunal finds that in changing the preventive measure of arrest with judicial control, the provisions of art. 242 para. (2) C.proc.pen., Which stipulate that "The preventive measure shall be replaced, ex officio or upon request, with a lighter preventive measure, if the conditions provided by law for its taking are met and, following *the evaluation of the concrete circumstances of the cause* and the procedural conduct of the defendant, it is appreciated that the easier preventive measure is sufficient to achieve the purpose provided in art. 202 para. (1)". The reference of the legislator to the evaluation of the concrete circumstances of the deed, i.e. to the real circumstances of the deed (along with those regarding the defendant - "the procedural conduct of the defendant" in terms of the legislator), expresses the thorough analysis of the measure, which the judge must make 207 para. (2) C.proc.pen. being explicit in this regard.

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and explosive precursors restricted, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of coins, stamps or other valuables, blackmail, rape, unlawful deprivation of liberty, tax evasion, outrage, judicial outrage, a crime of corruption, a crime committed by computer systems or means of communication or another offense for which the law provides for a prison sentence of 5 years or more and, on the basis of an assessment of the seriousness of the act, the manner and circumstances of other circumstances concerning his person, it is found that his deprivation of liberty is necessary to remove a state of danger to public order".

Moreover, in the situation of replacing the preventive measure of pre-trial detention with the measure of judicial control, according to the provisions of art. 242 para. (2) C.proc.pen., Evoked, must be justified the fulfilment of the procedural conditions for taking the lighter measure, especially the sufficiency of the measure to achieve the purposes provided by art. 202 para. (1) C.proc.pen.

Or, examining the conclusion, the Pre-Trial Chamber of the Tribunal finds that the judge's reasoning and analysis of the concrete circumstances of the case are missing, the pre-trial judge shows generically that the measure of judicial control is sufficient at this procedural moment "From the body of evidence administered in the case in question so far", without a corroborated reference to the evidence administered in the file. There is also talk in motivating the procedural conduct of the defendant which justifies the replacement of the measure, without highlighting what aspects of the defendant's conduct were taken into account.

The statement of reasons also states that "(...) *at the time of the analysis of the present application*, in relation to the documents and works of the case, the judge considers that the grounds that determined the pre-trial detention are no longer required (...) ", Although no such request is identified and resolved in the device, the measure being verified ex officio.

Recently, the Romanian Constitutional Court, in its decision on the wording of the reasoning following the court's decision, emphasizes that this undermines the right to a fair trial, and notes that "the *reasoning of court decisions fulfils several* important functions: demonstrate that its judgment is legal, just and correct, *in fact and in law*, is an official basis for the solution, inspires a sense of social trust and *constitutes a democratic control of the administration of justice*, strengthens the principle of res judicata and presumption of innocence, is the basis for the execution of the judgment, *as well as its contestation in a higher court*"[12].

[12] Criminal conclusion no. 460 of 29.10.2021 of the Prahova Tribunal, Criminal Section, unpublished, by which, pursuant to art. 425[1] alin. (7) pt. 2 lit. b) C.proc.pen. The panel of the preliminary chamber of the Tribunal admitted the appeal declared by the Prosecutor's Office attached to the Ploiesti Court to the decision pronounced on 25.10.2021 by the judge of the preliminary chamber of the Ploiesti Court, the respondent being the defendant C., sent to trial for committing a crime of alleged rape committed in 2011. It completely annulled the contested decision and sent the case for

On the other hand, failure to state reasons for a proposal to take the preventive measure requested may lead to *the rejection of the application*. Thus, in a case from the jurisprudence of the Prahova Tribunal, it was found that through the act of notification - indictment no. 291/D/P/2020 to the PICCJ - DIICOT S.T. Ploieşti, the case prosecutor requested the taking of the measure of preventive arrest, among others, against the defendant P, sent to court for committing the crimes of pimping and the establishment of an organized criminal group.

Analyzing the request, the judge of the preliminary chamber noted that the prosecutor's motivation is non-existent, although the attribute of the quality of magistrate implicitly requires otherwise, being mandatory "consideration" to argue the need and fulfil the legal conditions for any request to a court and even by the request/proposal that includes the requested claim. That being said, in this case, it is requested to take a preventive measure, without motivating in any way this judicial approach, not being indicated even the basis of the arrest[13]. Failure to state reasons for a request foresees, in a natural and common sense manner, entails its rejection by the legal body to which it is addressed, so that it has ordered the rejection of the prosecutor's request"[14].

V. Conclusions

The fair criminal process (according to the jurisprudence of the ECHR) highlights and revolves around *concrete and effective rights*; or, this continuous objective cannot be achieved in the absence of a *concrete and effective motivation* (regardless of the type of solution provided), i.e. applied to the case, with the individual capitalization of the evidence administered, to the detriment of the *usual reasons currently practiced* in domestic procedural law: stereotype, repetitive, devoid of factual substance and probative syllogism.

retrial for the reasons set out above. Following the resumption of the trial, the measure of preventive arrest of the defendant was argued.

[13] Only before the Tribunal, through the sitting prosecutor, the provisions of art. 223 para. (1) lit. a) CPC, but not supported by the evidence administered in question.

[14] Criminal conclusion no. 82 of March 24, 2021 of the Prahova Court, Criminal Section, unpublished, final under the analyzed aspects.

The magistrate (the judge, in particular) is not a reciter of legal texts, and a logical-legal reasoning necessarily involves the analysis of the social side on the issue of law subject to trial (vision on social values, constantly evolving). A modern, European judge will fully clarify the legal situation, even with the "risk" of expressing uncomfortable truths, and a way out of the "old-fashioned" judge's motivational patterns. The principle of finding out the truth (fundamental principle of the criminal process - art. 5 C.proc.pen.) And the progress of the Law, necessarily impose this.

The protection of the person's freedom requires the effective observance in practice of the legal framework created by the legislator for this purpose, constantly seen in the light of the jurisprudence derived from the application of incidental norms, the objective being the same - the need to defend against taking and maintaining unjustified preventive measures, respectively taking them when this is really required. This desideratum contributes indirectly to the preservation of the presumption of innocence and can be achieved, and verified, by the quality of drafting the legal acts underlying the judicial provisions.

BIBLIOGRAPHICAL REFERENCES

1. C-tin Sima, *Criminal Law, General Part*, Vol. I, Hamangiu Publishing House, Bucharest, 2015.
2. L. Dogaru, *Criminology*, Pro Universitaria Publishing House, Bucharest, 2017.
3. N. Volonciu et al., *The new Code of Criminal Procedure commented*, 2nd ed., Hamangiu Publishing House, Bucharest, 2015.
4. S.G. Barbu, *The constitutional dimension of individual freedom*, Hamangiu Publishing House, 2011.
5. I. Muraru, E.S. Tănăsescu, *Romanian Constitution, Commentary on articles*, C.H. Beck, Bucharest, 2008.
6. Jurisprudence of the High Court of Cassation and Justice, *www.scj.ro.*
7. ECRIS, the jurisprudence portal of the courts.

CONSIDERATIONS ON THE PARTIES OBLIGATIONS AS DERIVED FROM THE FRANCHISE AGREEMENT

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ABSTRACT

*This article aims to analyze the obligations of the parties to the franchise agreement in order to assess the extent to which the freedom to contract and the balance of the parties' performances are found in this contract as regulated by the Govern Ordinance no. 52/1997 regarding the legal regime of the franchise. Also, based on the conclusions, proposals are submitted **de lege ferenda** in order to improve the legal regime of the franchise, useful for professionals-traders, but also for legal professionals.*

KEYWORDS: *franchise; franchisor; franchisee; royalty; pilot unit; unamortized investment; franchise network; deed of adherence;*

I. ARGUMENT

It is beyond any doubt that, by the entry into force of the Govern Ordinance no. 52/1997 on the legal regime of the franchising, the impact on the activity of professionals was significant, especially in terms of the possibility of facilitating the transposition into the local environment the business models that have proven their efficacy in other countries.

Of course, this normative act has been and is a very useful tool both for entrepreneurs and companies in the local business environment, as well as for the multinational companies that intend to enter the Romanian market, especially in order to implement and develop business models with cross-border element.

Thus, the producers of goods and services have the opportunity to transfer, on a contractual basis, the know-how of their business to another natural or legal person selected based on certain criteria, so that the latter can develop the same business using the methods, procedures, the brand, the producer's technology and following its instructions and even

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multiply the success of the business, inclusively in terms of profit, clientele and geographical area considered.
This business mechanism is of American inspiration and it was generated as a reaction of the American companies to the antitrust legislation of the time, in the sense that the concentration of capital was banned and, as a result, the products were not sold by the producers, this operation being carried out by other companies[1]. By granting a franchising, the franchisor is obliged to take all the measures of contractual and business precaution, so that, at the end of the franchising, for any reason, his business, seen as a whole (profit, clientele, professional secrets/commercial) not to be harmed.

Thus, the franchisee must adhere to a system of pre-established rules and act only on the basis of the contractual conditions established by the franchisor.

In this sense it is provided by the Article 1, 3rd paragraph from the Govern Ordinance no. 52/1997, according to which the franchisee is a professional, natural or legal person, selected by the franchisor, who adheres to the principle of the franchise network homogeneity, as it is defined by the franchisor.

It should also be noted that the franchisee has obligations towards the franchisor, inclusively after the termination of the franchise agreement and, apparently, a significantly lower negotiation power and influence of the business decisions than the franchisor, although the legal text refers to the financial & legal independence and of the two parties (*the meaning of this independence will be analysed below*).

One of the governing principles in the field of the contracts is that of the contractual freedom, according to which the parties are free to conclude any contract and to determine their content within the limits imposed by law, public order and morals, according to the Article 1169 from the Civil Code.

It is also known that during a contract, changes may occur in circumstances that may make it excessively onerous to perform obligations for one of the parties, such as for the franchisee. We consider here the hardship clause or *the imprevision*, as this concept is regulated by the Article 1271 from the Civil Code.

[1] St.D. Cărpenaru, *Romanian Commercial Law*, 7th ed., Universul Juridic Publishing House, Bucharest, 2019, p. 587.

Given the above, the main purpose of this article is to analyze the obligations of the parties as provided by the franchise agreement from the perspective of the need for a contractual balance, which is thus an effect of the freedom to contract, whether or not we are in the presence of a deed of adherence and to submit proposals *de lege ferenda*. This, of course, without neglecting the actual benefits and opportunities generated by a franchise agreement.

II. THE FRANCHISING. CONCEPT. GENERAL TRAITS

As a legal concept, the franchising is a system of marketing products and/or services and/or technologies, based on a continuous collaboration between legally or financially independent natural or legal persons, through which a person, called franchisor, grants another person, called franchisee, the right and imposes the obligation to operate a business, in accordance with the concept of the franchisor. This right authorizes and obliges the franchisee, in exchange for a direct or indirect financial contribution, to use the trademarks of products and/or services, other protected intellectual or industrial property rights, know-how, copyrights, as well as distinctive signs of the traders, benefiting from a continuous contribution of commercial and/or technical assistance from the franchisor, within and during the franchise agreement concluded between the parties for this purpose (Article 1, 1st paragraph from the Govern Ordinance no. 52/1997) .

Thus, *first of all*, the franchising is a system of trading products and/or services and/or technologies, respectively a **technique of promoting and selling services, the products** of a professional who has managed to develop a successful business and who it is, in most cases, in the situation of expanding the activity, inclusively in other countries.

Undoubtedly, such a situation is a certain opportunity for the franchisee (or beneficiary, as the franchisor was called, inadequately until the amendment of Govern Ordinance no. 52/1997 by the Law no. 179/2019, because such a qualification presented the risk of inter-pretation that the franchisee would not have substantive obligations related to the success of the business), natural or legal person, who must hold the capacity of a professional (according to the Article 3 from the Civil Code) and who, through the selection made by the franchisor,

adheres to the principle of the franchise network homogeneity, as defined by franchisor.

Although the legal text does not set out in detail the general or indicative criteria to be met by the franchisee, we reasonably deem that such criteria (having in view also the provisions of the Article 15 from the Govern Ordinance no. 52/1997) could regard, in relation to the specificity of the franchising, the technical & financial resources involved in some certain business projects that have proven to be effective in the market, an adequate business reputation and, possibly, some quality management certifications to support the sustainable adherence to the franchising. Such requirements would be the natural extension of the financial and legal independence of the franchisee.

Certainly, such an approach cannot impede, as a legal provision, the adherence to the franchising of a professional who has a less relevant business exposure, but who can convince the franchisor through the potential for development and other personal qualities. Finally, the final choice is the franchisor's one, with all the associated risks.

Secondly, the franchisor grants the franchisee the right and, in a correlative manner, imposes on him the obligation to operate a business, according to the franchisor's concept.

There is no doubt that the architecture of the business model is a precondition for the franchisee adherence to the franchising, the latter not having the possibility to propose to the franchisee revisions of this business model. The franchisee may or may not adhere to the franchising, fact that is justified by the logic and the purpose of the franchising.

At the same time, we consider that the legal text should have concerned the granting of the right to operate a business and the imposition of the correlative obligation to capitalize on and sustainably develop this business.

The current wording is confusing and practically establishes a content overlap between the law and the correlative obligation. However, the correlative right and obligation cannot be identical (i.e. they cannot concern both the operation of the business), but they must be mutually reinforcing, respectively one may be the legal cause of the other. Thus, it is natural to be granted to the franchisee the right to operate the business, he (the franchisee) then having the obligation to capitalize properly and sustainably grow that business, according to the terms of the franchise agreement. We consider that *de lege ferenda* the revision in this respect

of the Govern Ordinance no. 52/1997 would bring a greater clarity and legal traceability to the normative text.

Thirdly, there must be a **continuous collaboration** (commercial and/or technical) between the franchisee and the franchisor.

We appreciate that this aspect is the essence of the franchise agreement and should have been provided in the form of a *substantial assistance* from the franchisor inclusively within the pre-contractual phase.

Then, the continuous collaboration between the franchisor and the franchisee is based on the financial and legal independence of the parties, a wording that is beneficial from the following perspectives: it emphasizes the obligation of a significant involvement of the franchisee in the implementation and sustainable development of the business, giving relevance to the synallagmatic character of the franchise contract; it emphasizes the need for the necessary resources for the franchisee so that the execution of the franchise agreement is optimal; the areas of the contractual liability and the contract risk are emphasized, in the sense that each party is liable for its own fault, but also the fact that a possible failure of the franchisee may generate at least a reputational risk for the franchisor, with an additional precaution to the franchisor that the instructions given to the franchisee in any form must be documented, legal and appropriate to the business environment in which the franchisee operates, because if the franchisee proves that he followed the franchisor's instructions but they were not adequate franchisor we reasonably deem that the franchisor is liable. In the same line, we consider that the franchisee is liable if the franchisor proves that the franchisee has not complied with his legal, documented and appropriate instructions.

Thus, we consider *de lege ferenda* that the text of Govern Ordinance no. 52/1997 to provide that it is of the responsibility of the franchisor that the instructions sent to the franchisee in any form have to be documented, legal and appropriate, throughout the franchise agreement, inclusively within the pilot unit. This is an element of the contractual balance.

Fourthly, the franchisee must use the trademarks for products and/or services, other protected intellectual or industrial property rights, know-how, copyright, owned by the franchisor, in exchange for a royalty paid by the franchisee to the franchisor.

III. THE ANALYSIS OF THE PARTIES OBLIGATIONS

III.1. The franchisor's obligations

A first set of obligations for the franchisor may be limited to those preconditions for the commencement of the proceedings for the negotiation and signing of a franchise agreement, namely:

a) to be a professional

This fact means that the franchisor, natural or legal person, must be organized in one of the corporate forms provided by the Companies Law no. 31/1990 or to have one of the capacities mentioned by the Govern Emergency Ordinance no. 44/2008 on the development of economic activities by authorized natural persons, individual enterprises and family enterprises.

b) to be the owner of the rights over a registered trademark or of any other intellectual or industrial property right;

This aspect can also be attested to the franchisee by presenting the documents certifying these conditions in the pre-contractual phase, but at this moment, the franchisor must actually hold these rights in his patrimony.

c) the rights must be exercised for a period at least equal to the duration of the franchise agreement

This condition is a natural consequence of those in letter a) and b), in the sense that the rights on which the existence of the franchising and the execution of the franchise contract must have a certain duration, unaffected by conditions, deadlines, burdens during the term of the franchise contract to be concluded;

d) to own and operate a commercial activity, for a certain period, prior to the launch of the franchise network

This requirement is the basis for the subsequent signing of a franchise agreement according to the concept defined by the franchisor, which presupposes the prior existence of a business model that has proven its viability.

A second set of obligations for the franchisor concerns the **pre-contractual phase** of the franchise agreement, as follows:

a) the provision to the potential franchisee of an information disclosure document, which must contain specific data regarding:

- the history and experience of the franchisor;
- details on the identity of the franchise management;
- the litigation history of the franchisor and his management;
- the initial amount that the franchisee must invest;
- the mutual obligations of the parties;
- the copies of the financial results of the franchisor from the last year;
- the possession of the information on the pilot unit.

We consider *de lege ferenda* that the legal text should have provided that this information is minimal and it can be supplemented with others, upon the request of the franchisee. Undoubtely, this is not an impediment for the franchisor in this regard either.

To the same extent, we appreciate that the requirements no. 1 and 3 should be limited to a certain period, so that the provision of information (personal data) is not excessive in relation to the GDPR and the business secrecy is not affected.

b) until the beginning of its franchise network, the franchisor will efficiently operate a business concept, for a period of at least one year, in at least one pilot unit.

This obligation is new and has the main role of testing the franchisor-franchisee compatibility, the viability of the business model, the capabilities of both parties, especially in the area of the a sustainable development of the franchising.

Depending on the object of the franchise, the term of 1 year may be inappropriate or inapplicable and, therefore, we recommend *de lege ferenda*, that, depending on the type of franchising (services, distribution, production) and the complexity of the business model, the level of its compatibility with the local business environment (aspect that may derive from feasibility studies carried out by independent consultants), at the next revision of the Govern Ordinance no. 52/1997, to establish a minimum duration of 6 months for the operation of a/some pilot units and, respectively of a maximum of 1 year for the more complex

franchising, of course with the definition of some measurable criteria/parameters in this respect.

The main argument is that some franchisors may lose business interest in the case of franchising tested in other countries, without minimum testing periods and with a low degree of complexity (e.g. the distribution franchise).

In the contractual phase, the franchisor has the following obligations:

a) to make public the relevant information in the pre-contractual phase, according to the Art. 2 from the Govern Ordinance no. 52/1997

It is an obligation regarding the transparency and good faith that must exist during the negotiations and during the lifetime of the franchise contract.

b) to effectively transfer to the franchisee the trade mark of the products and/or services and/or technologies, the know-how or another special franchise experience, as well as any other intellectual property rights

This obligation is complex in the sense that it covers any aspect of the franchising, is indispensable for the proper execution of the franchise agreement and must be performed both proactively by the franchisor and as soon as a request from the franchisee arises.

c) to provide the franchisee with initial training, as well as permanent commercial and/or technical assistance, throughout the existence of the contractual rights, inclusively during the pre-contractual phase

Similar to those mentioned in letter b), we appreciate that this obligation can be proactively fulfilled by the franchisor, as well as soon as a request from the franchisee appears. We mention that the aspect of the franchisee's supply can be included here, if it is provided within the franchise contract and especially in the case of a distribution franchising.

d) to use personnel and financial means to promote its brand, research and innovation, ensuring the development and viability of the product, the common identity and the reputation of the franchise network

This obligation appears as a guarantee of the proper functioning of the franchising for the retention of the customers and for ensuring a robust development.

e) to notify the franchisee with sufficient notice of the intention not to renew the contract at the expiration date or not to sign a new contract

This obligation is a manifestation of the franchisor's good faith and contractual balance. However, in order to prevent cases where such an intention may be abusive or untimely, *de lege ferenda*, a fair compensation may be provided for the franchisee, especially in the event that the franchisee has not recovered his investment. By way of effect, a franchise agreement may be considered extended after the expiry of the contractual term only if there is an express agreement of the parties and the tacit extension of the contract is not applicable here.

f) to collect the royalty/exclusivity fee/network entry fee, according to the franchise agreement

III.2. The franchisee's obligations

Prior to the pre-contractual phase, the franchisee must have the professional, managerial and financial capacities required by the franchisor.

In the pre-contractual phase, the franchisee has the obligation to be actively and fully informed, so that the decision to adhere the franchising system is documented.

During the franchise agreement, the following obligations are incumbent on the franchisee:

a) to capitalize on the trademarks of the products and/or services and/or technologies, the know-how transmitted according to the franchise agreement and to the law

This obligation represents the necessary consideration of the franchisee, which ensures the proper execution of the franchise agreement and certifies the capacities that were initially required by the franchisor.

b) to ensure, through appropriate publicity, that he is a financially independent person in relation to the franchisor or other persons

The purpose of this obligation is to provide transparent information to the public regarding the separate responsibilities of the franchisor and the franchisee, in order to maintain the reputation and common identity of the franchise network. Although the franchisee adheres to the pre-established rules of the franchise, the manner of their execution is the responsibility of the franchisee.

We appreciate that this requirement can also be achieved by inserting information on the franchisor's website, so that it is visible to anyone interested.

c) to develop the franchise network and to maintain its common identity, as well as its reputation

The content of this obligation lies in the implementation of all resources and capabilities (managerial/financial) of the franchisee for the execution of the franchise according to the contractual clauses.

d) to provide the franchisor with any information likely to facilitate the knowledge and analysis of the performance and the real financial situation, in order to ensure an efficient management in connection with the franchise;

This requirement is likely to prevent any risk and to ensure the smooth cooperation of the parties for the common purposes.

e) not to disclose to third parties the know-how provided by the franchisor, both during the entire franchise contract and subsequently

The essence of the obligation is to highlight the loyalty to the franchisor by protecting the business and the professional secrecy.

f) to pay to the franchisor the royalty/exclusivity fee/network entry fee, according to the franchise agreement;

g) to comply with the exclusivity and non-competition clauses (after the termination of the franchise agreement)

Such an obligation is fair to the extent that the relevant periods are reasonable, in relation to the specificity of the business, the area in which the business is conducted, are accepted by the franchisee, do not generate direct or indirect losses for him and therefore do not significantly limit his freedom to contract.

IV. The hardship clause

During the franchise agreement, exceptional circumstances may arise that may make the performance of the contract excessively onerous for one of the parties, which would make it unfair to oblige the debtor to perform that obligation; in such a situation, the Court may determine either the adaptation of the contract to distribute equitably between the parties the losses and benefits deriving from the change of circumstances or may order the termination of the contract, at the time and under the conditions it establishes (the Article 1271 2nd paragraph from the Civil Code). Such clause also appears in the international trade contracts.

If the franchisee is in such a situation and considering that his freedom to negotiate and influence the contractual decisions is clearly inferior to those of the franchisor, we consider *de lege ferenda* that the Govern Ordinance no. 52/1997 could regulate such a situation in the sense that the Court, **on the basis of the hypotheses described by the Art. 1271, 3rd paragraph from the Civil Code**, to issue a decision regarding the franchisee's request in a short time (e.g. 7 days), taking into account for the franchisee certain remedies such as reducing the payment obligations or reimbursing it by the franchisor in a certain amount and time, especially if the franchisee is in a situation where he cannot recover his investment.

Such a proposal is intended to give the franchisee the **vocation** to some benefits that can compensate the lack of adequate rights/ mechanisms of control and decision within the franchise agreement.

V. The legal characteristics of the franchise agreement

In view of those mentioned in this article, it can be stated that the following legal features are applicable to the franchise agreement: thus, it is a synallagmatic contract, onerous, commutative, consensual, with successive execution[2].

We also consider it an **act of adherence** because:

(i) the contractual freedom, in relation to the franchisee, is almost non-existent, in the sense that the franchisee must adhere to rules pre-

[2] S. Angheni, *Commercial law. Treaty,* C.H. Beck Publishing House, Bucharest, 2019, p. 685.

established by the franchisor. Of course, this is determined by the purpose and the essence of the franchising seen as a way to multiply the franchisor's business. The adherence to the franchising is also a business opportunity for the franchisee, provided that the franchisee must be extremely rigorously documented prior to adhering and have a clear representation of the associated risks;

(ii) there is no certain guarantee that the duration of the franchise agreement will be set so that the franchisee will recover its investment.

VI. Conclusions

Beyond the definite advantages, franchising is an act of adherence for the franchisee.

We reasonably believe that the materialization of the proposals mentioned in this article, out of which we emphasize the impact of the hardship clause on the franchisee, a more detailed depiction of franchisee's capacities, the reduction of the testing period in the pilot unit, providing an appropriate indemnity for the franchisee when the franchising is no longer continuing and the franchisee has not recover his investment, can be of real benefit to franchising professionals and the business community in general.

BIBLIOGRAPHY

1. Angheni S., *Commercial law*. *Treaty*, C.H. Beck Publishing House, Bucharest, 2019.
2. Baias F., Chelaru E., Constantinovici R., Macovei I. (coordinators), *The New Civil Code. Commentaries on articles, Articles 1-2664*, C.H. Beck Publishing House, Bucharest, 2012.
3. Cărpenaru St.D.*, Treaty of Romanian Commercial Law, 6th edition updated,* Universul Juridic Publishing House, Bucharest, 2019.
4. Nemeș V., *Commercial law, 2nd edition revised*, Hamangiu Publishing House, Bucharest, 2015.

AVATARS OF COLLECTIVE LABOUR AGREEMENTS IN PRE-MODERN TIMES

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ABSTRACT

Since the modern era, amidst the intensification of the conflict between the bourgeoisie and the proletariat, one of the basic solutions for social peace has been the collective labour contract – a legal instrument designed to keep both capitalist exploitation and proletarian revolutionary activism under control. In pre-modern times, in the absence of collective contracts, their economic and social functions were performed by other institutions and organisations, which operated in turn in the ancient economy, the feudal agrarian economy and the guild system of medieval manufacturing. Through them, the mechanisms of access to and evolution in the labour market, prices and quality of products, and some forms of social protection were regulated.

KEYWORDS: *antiquity; guild; collective labour agreement; Middle Ages; feudalism;*

Introduction

The 19th century was essentially the period in which the "working class" was formed in its modern forms. With the forging of the proletarian class identity, a number of elements which today seem quite natural became part of the structure and collective mindset of Western society: the legal regulation of employment contracts (individual and later collective), the insurance system (for accidents at work and occupational diseases), trade union organisation and legislation on labour disputes, etc. These emerged as solutions for social balance, in the context of the shift of the idea of equality from its liberal legal meaning to its economic meaning, under the influence of left-wing ideas (from socialist utopias to the doctrine of Saint-Simonist progressivism, and then to Marx's elaborate historicist-revolutionary ideology), as well as those subsumed by social Catholicism.

The need for collective labour contracts was felt in modern industrial society as a result of the deepening conflict between the bourgeoisie,

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which owned the means of production, and the proletariat, which had to sell its labour power in order to survive. The essence of this conflict (which was also present in previous eras) was the gap between the *natural price of labour* and its *market price*. In a market economy based on a spontaneous balance between supply and demand, it was common for those who worked to be paid less than they needed to survive, in which case wage demands could degenerate into revolts against the unequal social order. In order to preserve the *Establishment*, the modern state was forced to intervene in the economic mechanisms, mediating an 'agreement' between employers' organisations and proletarian trade unions, whereby the vagaries of the competitive market were borne fairly by both sides, mitigating the pauperisation of the working class. This is how the modern collective agreement came into being.

Before the industrial era, when the atomisation of labour had not yet occurred under the impact of liberal rationalism and individualism, when the idea of class struggle had not yet entered the public consciousness, relations between the organisers of the production of goods (be they owners of land, workshops, commercial or transport enterprises) and the actual producers of these goods took various contractual forms and were based on a series of institutions which played both an economic and a social role, protecting the poor. Through those avatars of the collective labour contract, the general conditions of access to the various professions, the quality and price standards of products and the frameworks of peace and social solidarity were regulated.

The "labour contracts" of the ancient world

Work is a constant in human history, and more: the ancient Greeks believed that even the gods were obliged to work. However, this obligation (both human and divine) has always been unevenly distributed, with the greatest and most unpleasant efforts falling predominantly on those without wealth. Landowners, warriors, clerics, and city administrators, though not exempt from any kind of gainful activity, did not live by the 'sweat of their brow', their resources coming from property rights and social status privileges. According to historians and anthropologists, as soon as the division of labour generated wealth

inequalities, (physical) labour became and remained indefinitely the quasi-exclusive task of the poor.

Over time, poverty made slavery possible, with deprivation extending beyond material goods and abolishing personal freedom itself. We learn this as early as the *Code of Hammurabi* (written in 1760 BC), which clearly stipulates that anyone who owes a debt and cannot pay it must sell himself, his wife, his son, or his daughter into slavery; only after three years of slave labour will those affected regain their freedom (Article 117). By such a rule of law, the loan contract is transformed into a bonded labour contract. The same collection of laws also mentions the first form of contractual relationship between a lender (free man) and a beneficiary: "If a builder has built a house for a man and has not done his work properly, and the house he has built has collapsed, thus causing the death of the owner, that builder shall be killed. If this causes the death of the son of the owner of the house, the builder's son will be killed (...). If this destroys the property, he shall replace whatever is destroyed; and since he did not do well the house which he built and it collapsed, he shall rebuild the house which collapsed at his own expense" (Articles 229, 230 and 232)[1]. In the "branch contract" governing house building, responsibility for product quality was on the economic side, while criminal liability and capital punishment occupied the other side of the social scale in a civilisation dominated by the legal paradigm of the talion.

Closer to the spirit of the present day was the regulation of employment contracts in Roman law, in the form of the *locatio operarum*. Under this type of contract, free men willingly sold their labour force to elites willing to pay a certain price (usually as low as possible) for various physical services. Only domestic work (for which no special skills or training were required) was the subject of the lease (e.g., the upkeep of sumptuous mansions, their private bathrooms and gardens, work in preparation for parties, interior decoration work, etc.). In contrast, all work of an intellectual nature (carried out by educated people such as doctors, teachers, or lawyers) was agreed by the parties under the auspices of the so-called 'contract of mandate'.[2].

[1] *The Code of Hammurabi,* Translation by Ovidiu Tămaș, 2nd revised edition, Proema Publishing House, Bucharest, 2009, p. 62-63.

[2] Cf. Tatiana Mihailov, *Historical overview of labour regulation in Roman law*,

A similar view of work was held by the Greeks of classical antiquity, who distinguished between the work of the productive class and that of the military and administrative elite[3]. In both of the landmark civilisations of ancient Europe, the idea of contract labour was, of course, limited to free men, while slaves were obliged to work as much as their masters demanded, without being able to "negotiate" any conditions, in their unfortunate position as mere "talking tools". However, when exploitation became unbearable, even the slaves reacted: most often, they would slack off, pretending to work, but there were also instances when they would run away from their masters or even organise riots.

General contract rules in the economy of the Middle Ages

After Roman law dissipated among the ruins of the empire, mixing with barbaric laws and religious norms that defined the order of medieval Christian kingdoms, labour relations were reinterpreted from a theological perspective, receiving either the positive mark of human creativity or the negative mark of damnation: "Medieval man thus has the vocation of being the master of a desacralized nature, of earth and animals. But Adam, instigated by Eve, herself corrupted by the serpent, i.e., by evil, committed sin. Henceforth, two beings dwell in him, the one made 'in the image and likeness' of God and the one banished from earthly paradise after committing original sin, condemned to suffering – in the form of manual labour for the man and the torments of the flesh for the woman (...). The interpretation of the condemnation to work in Genesis dominates the anthropology of the Middle Ages (...). On the one

https://www.universuljuridic.ro/privire-istorica-asupra-reglementarii-muncii-in-dreptul-roman/, seen on 01.10.2021.

[3] The cities of ancient Gecia were organised (or at least aspired to be organised) on the principle of *oikeiopragy*. According to this principle, each man had a dominant soul function, according to which he became capable of carrying out a particular activity, without interfering in matters that were not his by birth and upbringing. Thus, the virtue of reason (wisdom), which was proper to the class of rulers – *archons* and philosophers – was at the basis of law-making; the virtue of courage (specific to the military, *phylakes*) was the basis of the activity of warriors; finally, the appetitive part of the soul had the virtue of temperance, which was proper to the category of craftsmen, producers of goods (*demiurgos*), in the broad sense.

hand, the emphasis is on work as a curse and punishment; on the other, on the potential of work as an instrument of redemption and salvation"[4].

In order to pay for his original sin or, as the case may be, to ennoble himself through creation, medieval man has work as his specific mode of action. But this is carried out differently depending on the place of residence. A huge rural world, with small settlements of free peasants, but above all with serf villages ruled by knights and nobles of various ranks, stands in contrast to several dozen large European cities, to which are added smaller fairs, forming the motley urban civilisation. In the two environments, the medieval era made it possible to structure two types of economy: an agricultural one, relatively closed, with autarchic tendencies, where labour is both a resource and a 'currency'; the other crafty and commercial, open to the rest of the world and based on money.

In the rural economy, the feudal system based its wealth mainly on the work of the peasants, who were bound to the land and had to pay the lords the *dijma* (or tithe) in produce (i.e., one tenth of the production obtained on the plots given over) and in labour (the so-called "corvee" on the feudal reserve, for one day a week), as well as the *census* (in money). The free peasant population – owners of small estates or concessionaires of some of the landed estates – had a better economic status: the free peasants paid some taxes to the state and/or the church and were also obliged to defend themselves and to build and maintain roads. All the feudal institutions mentioned (tithe, corvee, census) played the role of general contractual clauses (collective contracts) in the relationship between the landowner and the agricultural worker. In the 19th century, after the laws for the peasantry's expropriation, the field of agricultural labour and tenancy was regulated by the *system of agricultural bargains*, which was quite enslaving, especially as large foreign tenants interfered in the relationship between the landlord and the Romanian peasant, creating an additional link of exploitation[5].

[4] Jacques Le Goff (coordinator), *Omul medieval*, Polirom Publishing House, Iași, 1999, p. 7-8.

[5] In 1907, Ion Luca Caragiale wrote a true study of rural sociology for the German newspaper "Die Zeit", showing how the great peasant uprising came about. In that article, Caragiale x-rayed land ownership and agricultural labour relations at the end of the 19th century and the beginning of the 20th century in the following terms: "All peasants are ploughmen; they cultivate their small estates and their large and medium-sized properties. These small landlords (about 5 million souls out of a population of

As for the pre-modern urban economy, a dynamic environment of manufacturing production and money-based trade is gradually taking shape within it: 'the merchant mentality dominates, shapes sensibilities and behaviours (...); many craftsmen are partly merchants: the salaried craftsman sells his skill, the landlord rents land or rents a room, the lawyer sells his knowledge of law, the teacher – his knowledge, the unskilled worker – his physical strength, the juggler – his skill, the prostitute – his body. Their *ministries*, their trades are ordered according to a system of reciprocal exchange which some (the theologians) call the common good, and others (the bourgeois) the market, according to a fair price worked out daily, in money, at the hall or place of employment"[6].

The urban economy based on money – likened by some scholars of the time to blood in a body – is where modern-style labour relations are structured, relations devoid of the securing atmosphere of the family group or the senior, paternalistic "morality"; the incipient capitalist market is subject only to the clock in the cathedral tower, which divides the day (and night) into working hours. In those hours marked by the ringing of bells, all the inhabitants of the burgh (Christians and non-

about 6 million) are not able to produce enough from their properties; for, on the one hand, the needs of living and the debts have increased and are increasing all the time; and on the other hand, their lands have shrunk and are constantly shrinking, passing in fragments to their children by inheritance according to common law (...). On the other hand, the large and the medium-sized estates have no more strength for their extensive culture than the arms of the peasants. They demand portions of land to work and produce as much as they can according to their power. They pay for the leased portions, either in money and labour, as in Moldova, according to local custom; or in kind, as in Muntenia. In this case, the peasant works the land, and the produce is shared with the large landowner, as provided for in a certain agreement, reinforced by communal authority. The peasant is also bound by this covenant because the small estate has no pasture for his cattle; the pasture is owned exclusively by the large estate. Agricultural covenants, although they are civil obligations, are enforced, if necessary, by the authorities, *manu militari*, like the so-called 'hard labour' in criminal law. (Corporal coercion was abolished in 1881 by the law amending the previous barbarous law. In law it no longer exists; but in fact it used to apply. This is a truth which no one could deny, just as no peasant would dare to plead the abolition of corporal restraint by law, knowing full well that he would then expose himself to corporal punishment, abolished even more recently by the Constitution of 1866)." (I. L. Caragiale, *1907 din primăvară până'n toamnă*, Bucharest, "Adevărul" Printing Press, 1907, *http://cimec.ro/Carte/1907/1907.htm*.

[6] Jacques Le Goff (coordinator), *op. cit*., p. 139.

Christians, nobles and commoners, freelancers, etc.) produce their capital, which they then use to increase their business or publicly display their level of prosperity. The city of the late Middle Ages changes the traditional scale of values, repositioning them on a basis other than religion, although religion does not completely disappear from the equation: on the contrary, through the *Protestant ethos*[7], it lays the ethical foundations of capitalism. But capitalism is by no means a safe space, as fortunes can disappear as quickly as they were built. Neither the craftsman, nor the merchant, nor the large landowner is immune from the enormous risks of the market economy; still less is the unskilled worker, the apprentice or the peasant who has recently migrated to the burgh to join the urban mirage full of hope.

For the urban poor – those most dependent on the 'wheel of fortune' to find a job – but also for the middle classes (craftsmen, tradesmen, doctors and apothecaries, teachers, artists, lawyers, and moneylenders), forced to live side by side in a confined space, the urban world could be 'tamed' by creating confraternities on multiple bases: professional (guilds and associations), parochial, cultural, age-based, etc. These trans-class associative forms were to play similar roles to the integrating (and at the same time discriminating) mechanisms of rural feudal society, where clear differences were maintained between the world inside the castle walls and the world outside them. For example: "The purpose of the guilds was to protect the producer and his production from all forms of danger, to solve the various problems that arose in the relationship between craftsmen-guildsmen-journeymen or in the relationship between guilds-towns-central authority. By means of well-crafted Statutes and Regulations, the procedure for joining the guild and for "promotion", the obligations of the members, the relations between them, the means of protection they enjoyed in relation to the central power, the benefits of belonging to a guild and others were regulated (...). Gradually, a genuine employment relationship is born, with all its constituent elements, from

[7] At the beginning of the 20th century, the German sociologist Max Weber considered that the capitalist economy developed in the West was underpinned not so much by the scientific and technological advances of the modern era (some of which were present in China, for example, at least a millennium earlier), but by a new spirit of action, a new work ethic that valued dedication to one's profession, unremitting effort, austerity, and discipline. (*Die protestantische Ethik und der ‚Geist' des Kapitalismus*, 1904/05).

the "general regulation" – "collective contract" –, "individual contract" of employment, to the social protection measures it offers"[8].

The economic system framed by the guilds had a number of economic and social virtues that we would later find in modern labour and social protection legislation in industrial society. Thus, guilds played a role in vocational training and career development (from apprentice to journeyman and master), in enforcing quality standards and setting the optimum volume of goods on the market (so that guild members had a steady flow of work and a guaranteed fair price for their products), in preventing overproduction and unfair competition, and in maintaining solidarity among those who practised a particular trade[9].

In the medieval world of the guilds, there was natural competition between the various crafts, with each professional category wanting to 'come out ahead' in the community; there was also competition between craftsmen, journeymen and apprentices, each at his own level, but this was by no means tantamount to a 'struggle', with any intention of challenging or usurping the authority of those who had reached the top of the guilds: "whereas it was intended, at least, that every apprentice and journeyman should eventually become a master, economic life was not

[8] Narcisa Cozea, *Legiferarea relațiilor de muncă în secolele XIX–XX: repere juridice în procesul de consolidare a dreptului muncii*, in: Yearbook of the Institute of History "G. Barițiu" from Cluj-Napoca, Series Humanistica, vol. XIII, 2015, p. 289-290.

[9] A comprehensive study on the functions of the medieval guilds, as they appear in the internal regulations, by Ioan Marian Țiplic: *The arms-producing guilds of Sibiu, Brasov and Cluj. 14th-16th centuries*, Lucian Blaga University of Sibiu Publishing House, 2001. The author structures these functions into the following categories: (a) *economic* (ensuring a sufficient production, of the right quality and at the right prices, providing raw material for all guild members); (b) *social* (the celebrations occasioned by the election of a new guild master or the welcoming of a new member; granting of repayable loans from the guild's 'treasury', in money or raw materials, to members in financial or health difficulties; monitoring of members' morality and severe punishment of any misconduct); c) *political-military* (construction and maintenance of sections of the fortress wall, bastions and towers of medieval towns; arming and permanent training of members in peacetime, as well as effective fighting in the event of enemy attack; participation in the administration of the city's affairs, either by influencing the rulers or directly by being involved in administrative decisions); d) *religious* (services on certain feasts specific to the profession and the patron saint; maintenance of their own pews in churches; processions of all kinds – from feasts to funerals – with compulsory attendance).

governed by the split between a propertyless proletariat, living only by the labour of its hands, and a prosperous class of owners who oppressed their employees (...). Because a guild considered itself a brotherhood, it also assumed other important social tasks: 'The guild choir, the organisation of prayers and services for deceased brethren, and the ceremonies and performances during great holidays were also guild functions, as were the organisation of the banquet, the regulation of work and wages, the relief of fellow guild members who were in a state of illness or misfortune, and the right to participate in the government of the town"[10].

All the functions assigned to the guilds describe a society of subsidiarity, in which, beyond natural differences in physical and intellectual endowment and beyond economic status, members had cooperative and supportive rather than conflictual relationships. Conflict was not absent; some secular medieval writings (both literary and official) bear witness to intergenerational tensions, rivalry between great families of the patrician burghs, occasional clashes between market districts, and after the outbreak of the Reformation - the long and painful rift between Catholics and Protestants. But at its core, pre-modern urban society had not reached the prevalence of what, in the 19th century, would bear the resounding and ominous name of "class struggle"[11].

After the French Revolution of 1789, the guilds were abolished (by the *Chapelier Law* of 1791), as they were considered emblems of the Old Regime. In support of this measure, revolutionary leaders invoked total freedom of labour and capital. In fact, however, it was not so much a freedom of enterprise that was achieved as an absolute deregulation of labour, making possible the cruellest exploitation of workers. Whereas

[10] Thomas Storck*, Breslele Evului Mediu: Un exemplu de subsidiaritate practică, https://www.marginaliaetc.ro/ breslele-evului-mediu-un-exemplu-de-subsidiaritate-practica/,* seen on 12.10.2021.

[11] The controversial concept of "class struggle" was theorized in Marxist philosophy, from the angle of historicism, as the "motor" of the transition from one order to another; the clearest form of this struggle was captured by Marx and Engels in the realities of 19th century industrial society, which pitted the interests of the big bourgeoisie against those of the proletariat. A more refined analysis of the class struggle can be found, however, in the French sociologist and philosopher Raymond Aron (*La lutte de classe. Nouvelles leçons sur les sociétés industrielles*, Éditions Gallimard, Paris, 1964; Romanian transl..: *Lupta de clasă. Noi prelegeri despre societățile industriale*, Polirom, Iași, 1999).

the medieval professional organisations had provided their members with a predictable training and development path (from apprentice to craftsman) and a system of social protection based on subsidiarity, the freedom proclaimed by the liberal radicalism of the Revolution brought with it child labour from the age of five, the physical degradation of young people – subjected to efforts beyond their powers – the burdensome work of women in textile workshops and all other forms of capitalist exploitation.

Lacking the protection of the guilds and without any support from the liberal state, proletarians in all industries and services begin to understand their identity and feel a sense of class solidarity. They notice that they are victims of accidents at work and that their lives are cut short by countless occupational diseases, while their bosses enjoy health, comfort, rest, and long life. Through the squalor of the workers' slums, through the noise and pollution of industrial machinery, the seeds of revolt are sprouting. The class struggle will take on, on the one hand, a moderate, demanding form (led by the trade unions) and, on the other, a radical, revolutionary one, aimed at abolishing private property.

Conclusion

The Antiquity and the Middle Ages are seen by historians and jurists as eras of ruthless exploitation of poor social classes by large landowners and manufacturers. In contrast to the industrial era, when collective labour contracts, insurance and other political and legal instruments of social protection were established, pre-modern times are considered 'inferior' in terms of the general regulation of labour relations. However, for the free people of antiquity, as for the various medieval productive categories, there were numerous institutions with integrating and exploitation-limiting functions. Of these, we believe that the most remarkable was the guild, whose economic, social, politico-military, and religious functions gave shape to a society based on subsidiarity – a value that we cultivate so much in today's European Union.

BIBLIOGRAPHY

1. Raymond Aron, *La lutte de classe. Nouvelles leçons sur les sociétés industrielles*, Éd. Gallimard, Paris, 1964; trad. rom.: *Lupta de clasă. Noi prelegeri despre societățile industriale*, Polirom, Iași, 1999.
2. I.L. Caragiale, *1907 din primăvară până'n toamnă*, București, Tipografia ziarului "Adevărul", 1907, http://cimec.ro/Carte/1907/1907.htm.
3. *Codul lui Hamurrabi*, Traducere de Ovidiu Tămaș, ed. a II-a revizuită, Ed. Proema, București, 2009.
4. Narcisa Cozea, *Legiferarea relațiilor de muncă în secolele XIX–XX: repere juridice în procesul de consolidare a dreptului muncii*, în: Anuarul Institutului de Istorie "G. Barițiu" din Cluj-Napoca, Series Humanistica, tom. XIII, 2015.
5. Gina Ioan, *Doctrine economice contemporane*, Universitatea "Danubius" din Galați, f.a.
6. Jacques Le Goff (coordonator), *Omul medieval*, Ed. Polirom, Iași, 1999.
7. Tatiana Mihailov, *Privire istorică asupra reglementării muncii în dreptul roman*, *https://www.universuljuridic.ro/privire-istorica-asupra-reglementarii-muncii-in-dreptul-roman/*
8. Thomas Storck, *Breslele Evului Mediu: Un exemplu de subsidiaritate practică*, *https://www.marginaliaetc.ro/ breslele-evului-mediu-un-exemplu-de-subsidiaritate-practica/*
9. I.M. Țiplic, *Breslele producătoare de arme din Sibiu, Braşov şi Cluj. Secolele XIV-XVI*, Ed. Universității „Lucian Blaga din Sibiu", 2001.

SETTLEMENT OF LABOUR DISPUTES FOR MILITARIES

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ABSTRACT

The militaries may be dissatisfied with some unilateral documents issued by their employing institution. These may relate to disciplinary sanctioning, civil liability, amendment or termination of work relations. In this case, those involved are given the possibility to turn to the competent administrative proceedings court. As a rule, it is obligatory to follow the prior procedure. As a rule, the trial is carried out according to the common law rulings.

KEYWORDS: *militaries; administrative proceedings court; prior procedure;*

1. Introductive considerations

The jurisdiction activity or trial has as object the settlement, by the competent bodies, in conformity to the procedure mentioned in the normative act, of the conflicts/disputes (trials, files) appeared between the subjects of juridical relations, concerning both the rights and the obligations of such relations.

The parties in administrative disputes are the militaries and their employers.

With respect to the *competent divisions* of the courts competent to solve the administrative disputes, such divisions of the same courts are competent to solve it.

Law no. 80/1995 related to the by-law of militaries[1], with respect to appeal of disciplinary sanctions (art. 35^{11} final par.; art. 35^{12}), determines the procedural material competence of administrative proceedings courts.

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[1] Published in the official journal no. 155 of 20th May 1995, subsequently amended.

2. Bodies competent to solve the labour disputes

With respect to the settlement of labour conflicts (disputes), we shall consider further on the situation of militaries. This category includes the *professional militaries* (officers, warrant officers, under-officers), subject to Law no. 80/1995, and the *soldiers and professionally graded*, subject to Law no. 384/2006.[2]

With respect to professional militaries, considering that they are public officers as well, and the special law does not stipulated the competent court, the labour conflicts (disputes) of militaries are solved by administrative proceedings courts[3].

The solution is also valid with respect to material liability of militaries, ruled by Government Ordinance no. 121/1998 related to material liability of militaries[4]. Considering that this norm is applicable as well to civil employees of military units, it results that the administrative proceedings courts are also competent to solve their labour conflicts[5].

For the soldiers and professionally graded, although they are also militaries – the rule mentioned is no longer valid.

This "employment contract" was qualified as "particular individual employment contract"[6].

The soldiers and professionally graded, not being public officers, carrying out their activity under employment contracts, the solving of their labour conflicts is related to labour jurisdiction (the first court being represented by the division, panel specialised in conflicts of labour and social security).

[2] Published in the official journal no. 868 of 24th October 2006, subsequently amended.

[3] High Court of Cassation and Justice, administrative and tax court, judgement no. 1680/2005, *apud* E. Albu, *Jurisprudence of the High Court of Cassation and Justice. Administrative and tax court. 2005*, Lumina Lex Publishing House, Bucharest, 2006, p. 398 and the following; Bucharest Court of Appeal, 7th civil division and for work conflicts and social security, judgement no. 682/R/5 February 2009, in "Romanian magazine of labour law" no. 2/2009, p. 171-173.

[4] Published in the official journal no. 328 of 29th August 2008.

[5] Ș. Beligrădeanu, *on unjustified diversity of legal regulation related to material competence of courts in the field of work conflicts*, in "Law" no. 10/2009, p. 90-91.

[6] *Ibidem,* p. 92-93.

3. Rules of proceedings

3.1. Administrative proceedings institution

The administrative proceedings Law no. 554/2004[7] rules, among others:

- prior procedure (prior to the notification of court);
- term of filing the action;
- procedure for solving files;
- remedy at law against the judgements on the merits (second appeal);
- extraordinary remedies at law;
- enforcement of judgements etc.

3.2. Prior procedure

Law no. 554/2004 institutes an obligatory administrative proceedings, prior to notification of court, exercised in the form of a prior or hierarchical second appeal, consisting in, before turning to competent administrative proceedings court, the person considering that has been breached a right or a legitimate interest by an individual administrative act addressed to it must require the issuing public authority or superior hierarchical authority, if any, the total or partial annulment of it. Art. 7 par. (1) of the law above mentioned stipulates the obligatory nature of prior administrative procedure, however, it awards the aggrieved party the right to exercise it, between the prior second appeal (*administrative complaint submitted to issuing authority*) and hierarchical second appeal (*administrative complaint submitted to superior hierarchical authority, if any*). The person considering itself aggrieved may exercise both forms of administrative second appeal (concomitantly or successively) however, in this case, the term to notify the court starts on the date of receiving the first answer or expire of the first term of answer[8].

Both second appeals (*previous and hierarchical*), generally ruled by art. 7 of Law no. 554/2004, as conditions for bringing an action to justice,

[7] Published in the Official Journal no. 1154 of 7th December 2004, subsequently amended.

[8] D.C. Dragoş, *Administrative proceedings law. Commentaries and explanations*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2009, p. 223.

are subject to some rules of non-contentious administrative proceedings, not being confused with special administrative jurisdictions, which, according to art. 21 par. (4) of Constitution, are facultative and free.

The prior complaint for unilateral administrative acts may be introduced, within 30 days, as of the date when the aggrieved person takes notice, by other way, of the contents of document, however, not later than 6 months as of the date of issue of document. Both the 30-day term and the 6-month term are prescription terms. It is solved within 30 days as of registration.

The breach of such terms is sanctioned by rejection of complaint for late filing[9].

Special procedures, assimilated to prior procedure stipulated by Law no. 554/2004, are instituted to militaries, in case of disciplinary sanctioning, including termination, on this ground, of labour relations.

According to art. 80 of the *Regulation of military discipline*[10], any disciplinary sanction, starting with a warning and up to a severe sanction, may be hierarchically appealed.

The military dissatisfied with the sanction applied pursuant to committing deviations from military discipline may address to the commander/direct head of the one issuing the sanction decision, by written report arguing his action. It has the obligation to appoint an investigation board, in charge to propose a new decision. By this decision, one may take the measure of maintaining or annulment of disciplinary sanction or another sanction may be enforced[11].

The term for filing the report is of 2 business days as of the communication of decision related to enforcement of disciplinary sanction. The submission of report suspends the enforcement of sanction.

The decision may be appealed at the competent administrative proceedings court, according to Administrative Proceedings Law no. 554/2004 (art. 80 of the Regulation of military discipline)[12].

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[9] G. Bogasiu, *Administrative proceedings law. Commentated and annotated,* 3rd ed., amended and completed, Universul Juridic Publishing House, Bucharest, 2018, p. 314.

[10] Approved by Order no. M.64/2013 (published in the Official Journal no. 399 of 3rd July 2013)

[11] Al. Țiclea, A. Duțu, *Jurisdiction of labor relations. Legislation, doctrine and jurisprudence,* Universul Juridic Publishing House, Bucharest, 2021, p. 980.

[12] *Ibidem.*

3.3. Terms for notification of court

By art. 11 of Law no. 554/2004 two categories of terms are ruled for the notification of administrative proceedings court, namely:

- a prescription term of 6 months pursuant to which the right to action is annulled [art. 11 par. (1)];
- one-year time limit, applicable only for solid reasons and which cannot be overcome pursuant to the intervention of some causes of interruption or suspension of prescription considered at par. (1) [art. 11 par. (2)].

3.4. Trial procedure in first court and decision (judgement) and nature of it

The trial procedure in administrative proceedings court is subject to special norms stipulated by Law no. 554/2004, completed by the norms of common law stipulated by the Code of civil proceedings[13], under the conditions and within the limits set forth by art. 28 of law, to the extent that they are not incompatible to the specificity of power relations between public authorities, on the one hand and persons aggrieved in their legitimate rights or interests, on the other hand.

Therefore, the military, dissatisfied with the answer received on prior complaint or receiving no answer during the legal term, may notify the competent administrative proceedings court, for total or partial annulment of the act deemed illegal, recovery of the damage caused and, if any, compensation for morale damages. The person considered aggrieved in a legitimate right or interest by non-settlement of a petition or unjustified refusal to solve a petition as well as for the refusal of execution of a certain administrative operation necessary to exercise or protect its legitimate right or interest may also turn to the administrative proceedings court[14].

The plaintiff shall attach to file a copy of the appealed document or, if any, the answer with the refusal of solving his petition. If no answer is received to his complaint, he shall attach to file the copy of petition,

[13] Republished in the Official Journal no. 247 of 10th April 2015, subsequently amended.

[14] Art. 8 of Administrative proceedings law.

certified by the number and date of registration at the public authority, as well as any other writ evidencing the accomplishment of prior procedure. If the plaintiff files complaint against the authority that refuses to enforce the administrative act issued pursuant to favourable solving of his petition or prior complaint, he shall attach to file as well the certified copy of this document[15].

According to art. 17 par. (1) of Law no. 554/2004, the petition submitted to court in open session, in the panel determined by law. The statement of defence is obligatory and will be submitted to court at least 15 days before the trial term.

In the administrative proceedings field, the burden of evidence[16] belongs to the defendant, the legislator offering the plaintiff a facility in producing evidence. After receiving the file, the court orders, according to the disposals of art. 13 par. (1) of Law no. 554/2004, the summoning of parties. The issuing public authority shall submit with the statement of defence the appealed document with the entire documentation on which it relies, as well as any other papers necessary for the settlement of the case. The court may ask the issuer any other papers necessary for the settlement of the case.

The same steps will be taken for the refusal to solve the petition related to a legal right [art. 13 par. (4)].

If the public authority fails to submit within the term set forth by court the papers required, the head of it shall have the obligation, by interlocutory decision, to pay to the state, as judicial fine, 10% of minimum national wage for each day of unjustified delay [par. (4)].

According to art. 240 par (1) Code of civil proceedings, it is ordered that, for first court judgement, the trial takes place before the judge, in the council chamber, with the summoning of parties. The explanation of this disposal resides in the need of completing the trial within a shorter term. In the council chamber, the judge determines shorter terms, even for the next day [art. 241 par. (1)][17].

In the settlement of labour conflicts are also applicable the *procedural incidents*: *waiving judgement* (art. 406 Code of civil proceedings);

[15] Art. 12 of Administrative proceedings law.

[16] However, in the labour conflicts, the defendant has also the burden of evidence.

[17] M. Tăbârcă, *Civil procedural law*. 2nd ed., Vol. I, *General theory*. Solomom Publishing House, Bucharest, 2017, p. 243-244.

waiving the claimed right (art. 408 and the following of Code of civil proceedings); *suspension of trial* (art. 411-413 C Code of civil proceedings); *superannuation* (art. 416 and the following of Code of civil proceedings), *as well as the settlement of trial by judicial transaction* (art. 2267 and the following of Civil code, art. 438 and the following of Code of civil proceedings) etc. [18].

The settlement of labour conflict is materialised in the court *decision* (judgement), the document with „power of law" (*iuris dictio*).

The decision by which the file is solved by the first court is called *judgement* [art. 424 par. (1) Cod of civil proceedings]; the one passed in the second appeal is called decision [art. 424 par. (3) Cod of civil proceedings].

By art. 18 of Law no. 554/2004 one determines the general data of the judgement passed by the administrative proceedings court.

3.5. Second appeal

The institution of second appeal has is legal ground in the disposals of art. 20, art. 10 par. (2), art. 14 par. (4) and art. 15 par. (3) of Law no. 554/2004, disposals completed by common law, respectively the Code of civil proceedings (art. 483-502) [19].

According to art. 20 par. 1 of Law no. 554/2004, "the judgement passed in first court may be subject to second appeal within 15 days as of communication".

The court superior to the court judging the merits is competent to solve the second appeal. The courts of appeal are competent, if the court passes a judgement on the merits or the High Court of Cassation and Justice if the merits have been judged by the courts of appeal, administrative and tax division of it.[20]

[18] Al. Ţiclea, *Labour law treaty. Legislation. Doctrine. Jurisprudence,* 10th ed., updated Universul Juridic Publishing House, Bucharest, 2016, p. 1084.

[19] I. Rîciu, *Administrative proceedings procedure. Theoretical issues and jurisprudential references,* Hamangiu Publishing House, Bucharest, 2012, p. 376.

[20] V. Vedinaş, *Administrative code. Novelties. Comparative examination. Explanatory notes,* Universul Juridic Publishing House, 2020, p. 294.

Pursuant to analysing art. 20 par. (3) of Law no. 554/2004 it results that, in case of admission of second appeal, the court has the following possibilities:

- *to quash the judgement and organise a new trial on merits*;
- *to quash only once by sending the appealed judgement*, in two express and limitative cases stipulated by art. 20 par. (3), namely:
- when the first court passed a judgement without judging the merits;
- if the trial took place in default of the party illegally summoned both for production of evidence, and debate on the merits.

3.6. Review

Article 21 of Law no. 554/2004 institutes a reason of review which adds to the disposals of Code of civil proceedings (in art. 509). This consists in passing final judgements by breaching the priority of the right of European Union ruled by art. 148 par. 2, corroborated by art. 20 par. 2 of Romanian Constitution (par. 1).

This reason consists in the *passing of judgements remained final, by breaching the priority of European Union* (par. 1).

The judgements that do not consider the merits are subject to review (par. 2). It is an essential distinction opposite to the review of common law, admitted against a "judgement passed on the merits or considering the merits" (art. 509 par 1 Cod of civil proceedings).

According to art. 21 par. 3 of Law no. 554/2004, "the review petition is entered within one month as of communication of final judgement and it is urgently solved.

4. Conclusions

It follows from the foregoing that:

- the parties in administrative disputes are the militaries and their employers;
- through Law no. 80/1995 the procedural material competence is assigned to administrative proceedings courts;
- regarding the terms for notifying the court, we note that they are established two categories of terms: a prescription term of 6 months pursuant and a term one-year time limit;

- the trial procedure in administrative proceedings court is subject to special norms stipulated by Law no. 554/2004, completed by the norms of common law stipulated by the Code of civil proceedings;

- the institution of second appeal has is legal ground in the disposals of art. 20, art. 10 par. (2), art. 14 par. (4) and art. 15 par. (3) of Law no. 554/2004, disposals completed by common law, respectively the Code of civil proceedings (art. 483-502); at the same time it is established, through art. 2 of Law no. 554/2004, the review, which adds to the reason provided by Code of civil proceedings.

REFERENCES

1. Al. Țiclea, A. Duțu, *Jurisdiction of labor relations. Legislation, doctrine and jurisprudence,* Universul Juridic Publishing House, Bucharest, 2021.
2. Al. Ţiclea, *Labour law treaty. Legislation. Doctrine. Jurisprudence,* 10th ed., updated Universul Juridic Publishing House, Bucharest, 2016.
3. D.C. Dragoş, *Administrative proceedings law. Commentaries and explanations*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2009.
4. G. Bogasiu, *Administrative proceedings law. Commentated and annotated,* 3rd ed., amended and completed, Universul Juridic Publishing House, Bucharest.
5. I. Rîciu, *Administrative proceedings procedure. Theoretical issues and jurisprudential references,* Hamangiu Publishing House, Bucharest, 2012.
6. M. Tăbârcă, *Civil procedural law,* 2nd ed., Vol. I, *General theory*. Solomom Publishing House, Bucharest, 2017.
7. Ş. Beligrădeanu, *on unjustified diversity of legal regulation related to material competence of courts in the field of work conflicts*, in "Law" no. 10/2009, p. 90-91.
8. Virginia. Vedinaș, *Administrative code. Novelties. Comparative examination. Explanatory notes,* Universul Juridic Publishing House, 2020.
9. Code of civil proceedings.
10. Law no. 80/1995 related to the by-law of militaries.

11. Administrative proceedings law no. 554/2004.
12. Government Ordinance no. 121/1998 related to material liability of militaries.
13. Order no. M.64/2013 related the Regulation of military discipline.

MEDIATION OF LABOR DISPUTES IN THE UNITED STATES

Iulian HAGIU[*]

ABSTRACT

The institution of mediation has been known in American history for over a century and a half. We have been talking about mediation since 1838. Then, at the initiative of President Martin Van Buren, the first mediation facilitated by the Government in the event of a major strike took place. Obviously, we cannot talk about mediation in the current sense. Nevertheless, it is a first step.
In order to support and promote mediation, the involvement of the state is very important. Labor disputes are practically the first to be resolved through mediation. In 1918, the American Conciliation Service was born within the Department of Labor. The establishment of this service was considered the birth of mediation at the federal level.
In the American legal system, the notion of Labor Law is used, which in our legal system corresponds to the notion of collective labor law, and Employment Law regulates the relations between the employer and the employee. Most of the time these terms are used alternately.

KEYWORDS: *mediation; arbitration; conflicts of rights; conflicts of interest;*

The beginnings of mediation in the United States

In the first half of the 19th century, mediation became popular in Florida, Texas and California. In 1926, the National Mediation Council was established. Ten years later, amid economic growth, 4,231 mediations took place, so that in 1945 23,121 mediations were registered. In 1947, the Federal Mediation and Conciliation Service appeared. In the 1960s, amid protests against the Vietnam War and the expansion of civil rights, alternative forms of conflict resolution, and in particular mediation, experienced widespread development. During this period, the

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first Center for Mediation and Conflict Resolution, established by the Ford Foundation, appeared in New York.

In 1972, the Society for Conflict Resolution Professionals was established. At the same time, the Department of Justice is founding in Kansas City and Los Angeles, pilot mediation programs are being implemented to try to relieve the courts of petty cases. After 1980, the concept of ADR (Alternative Dispute Resolution) appeared, and in 1982 the Academy of Family (Conflict) Mediators was established. The 1990s represent the period of maximum expansion of mediation in particular and of ADR in general. Also, during this period, new types of mediation began to be imposed ("Peer mediation", "On-line mediation" etc.). Mediation is the most popular form of ADR, its use for conflict resolution being a mandatory clause in most contracts.

In the United States, alternative dispute resolution techniques have reached practical relevance, becoming a new standard in the practice of law. Alternative techniques (especially mediation) have entered the current activity. Lawyers who ignore the possibility of using ADR can be disciplined. Also in the US, the rules of professional conduct have been changed to oblige lawyers to be informed about the various existing ADR techniques and to take them into account when advising their clients: In a matter that involves or should involve litigation, a lawyer should inform the client about alternative forms of dispute resolution, forms that could reasonably be pursued in order to resolve the dispute legally or to achieve the legally pursued objective[1].

A. The regulatory system

Labor Law represents in the American legal system what in our legal system corresponds to the notion of *collective labor law*, respectively refers to the relations between employer and union, collective bargaining, collective agreements and strike, while employment law regulates relations between employer and employee. Often, the terms are used interchangeably. *Employment law* is a complex set of federal and state

[1] A. Gorghiu (coord.), *Medierea - Oxigen pentru o societate modernă*, Universul Juridic Publishing House, Bucharest, 2013, p. 218-220.

regulations, and is largely a new concept, despite being based primarily on traditional principles[2].

There are four types of legal rules regularly applied in employment relationships, namely:

1. national or federal constitutional provisions defining the rights of employers and employees, in particular public sector employees;
2. the rules, regulations and decisions of the administrative authorities;
3. judicial practice in the common law system and the doctrine in the matter;
4. the rules contained in the agreements concluded following collective bargaining with trade unions in units[3].

With regard to public sector employees, specific regulations are adopted at both federal and Member State level.

B. Resolving conflicts of interest[4]

a. Resolving conflicts of interest in the private sector

National statutes[5] governing collective rights in the private sector have a limited scope, as the scope of the National Labor Relations Act and the Labor Relations Management Act is extended and national regulations on trade union relations and unitary management they are often replaced by federal statutes.

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[2] R.N. Covington, Professor of Law Vanderbilt University, *Employment Law, in a nut shell*, 3rd ed., Thomson West, 2009. p. 5.

[3] We emphasize that in the units where unions are formed, the rules of the collective agreement negotiated between the union and the employer prevail, which includes a level of rights at least equal to that established by federal law.

[4] For a similar approach to resolving conflicts of interest in the US, see L. Dima, Conflicts of Interest - Collective Labor Conflicts (1). Comparative study of the regulations from the Romanian legislation and from the legislation of other states, in Annals of the University of Bucharest no. II/2003, p. 108-111.

[5] *The main federal statutes on collective rights are*: 1. The National Labor Relations Act (NLRA), as amended by the Labor Management Relations Act (LMRA), applicable most private sector employers; 2. The Railway Labor Act, which regulates the relationship between trade unions and employers in the air and rail industry: 3. The law on the transmission and disclosure of information in the employment relationship governing trade union activities.

The law on labor relations at national level[6] is *the main piece of legislation* governing the field of collective bargaining in the private sector. This law expressly provides for the right of employees *to participate in collective bargaining*[7], to join *trade unions* and *the right to strike.* The normative act provided for the establishment of an independent federal agency - the National Commission on Labor Relations[8] -, having as attributions the hearing of employers and employees in conflicts between them, which fall under the law, and determining the trade union organization that will represent employees in collective bargaining. The decisions and other regulations of this committee largely complement the provisions of the law.

Under this federal regulation, in the private sector, employers and representative trade unions are required to meet within a reasonable time and to negotiate in good faith the issues of wages, working hours and working conditions. The case-law has ruled that, before the expiry of a collective agreement in force, each party has an obligation to notify the other party of its intention to amend the terms of the contract. The party intending to amend the terms of the contract is obliged to meet with the other party to negotiate the proposed amendments and to notify the Federal Mediation and Conciliation Service and the State Conciliation Service of the bargaining in progress.

These bodies have the right to investigate the bargaining and to provide the parties with the services of a mediator. The parties may seek recourse to the mediator in the event that they fail to resolve the disputes arising through the bargaining. The mediator often proposes a solution accepted by the parties that has never been proposed at the negotiating table.

The parties have the possibility to resort to *the arbitration procedure of the conflict of interests*, but this is rarely encountered in practice. As

[6] The National Labor Relations Act - NLRA - was originally issued by Congress in 1935 on the basis of its power to regulate interstate commerce. See US Constitution Art. 1, Section 8.

[7] No collective agreements are concluded in the US at the national or sectoral level to establish a general framework for lower-level negotiations. *Bargaining at the employer level is by far the dominant trend,* while among several employers, it has been used in important sectors such as steel, mining, transportation, it has greatly diminished its importance, so that bargaining can be canceled later.

[8] National Labor Relations Board - NLRB.

regards the inclusion of an arbitration clause in conflicts of interest in collective agreements, The National Labor Relations Commission has ruled that such clauses are not binding as they do not relate to the application of a collective bargaining agreement.

b. Resolving conflicts of interest in the public sector

Federal employees. The National Labor Relations Act has always exempted federal, national or local public employees from the application of its provisions. The national statutes were limited to the prohibition of the organization of strikes or collective bargaining by these categories of persons and provided for sanctions for their violations. Regulations adopted at both federal and Member State level guarantee *public sector* employees the right to collective bargaining.

The Congress passed the Labor Relations Act and the Federal Labor Management Service Act[9], as part of Title VII of the Civil Service Reform Act of 1978. The law states that unionization and the organization of collective bargaining by federal employees is in the public interest and provides legal protection employees to participate in negotiations to defend their interests and facilitate the amicable settlement of working conditions issues.

Through this statute, several agencies have been established: "Office of Personnel Management"[10], "Merit Systems Protection Board", "Federal Labor Relations Authority", "Federal Service Impasses Panel", which can take a series of measures for resolving conflicts that occurred during negotiations between an agency/state/public unit and the representatives of its employees.

[9] This law prohibits a number of practices, being generally the same types of prohibited activities by the Law on Labor Relations at National Level - NRA. A state agency must remain neutral in its relations with employees; it may not refuse to assist or negotiate in good faith with a trade union, nor may it refuse to co-operate in resolving disputes. Likewise, an agency cannot apply a new regulation that conflicts with a previously negotiated provision or with the law itself. One of the provisions gives federal employees' unions the right to be present at hearings during investigations, similar to the rights enjoyed by private sector employees.

[10] OPM operates primarily as a human resources agency of the Federal Government. It performs a number of tasks such as administering health insurance programs for federal employees and consulting with agencies on how to implement these programs as early retirement plans.

In order to conclude an agreement, the exclusive representative of the employees and the agency has the obligation to meet and negotiate in good faith. An agreement concluded following collective bargaining between an exclusive representative and an agency is binding when it has been approved by the head of the agency or when it has not been approved or rejected within 30 days of its conclusion.

The conventions concluded following the negotiations must also provide for a procedure for examining complaints. The law stipulates that the representative may lodge a complaint on behalf of an employee or group of employees, and also that any employee may lodge a complaint and request its resolution without the intervention of the sole representative, although the latter must be given the opportunity to be present to the solution. The final step in attempting to resolve complaints must be binding arbitration.

In the public sector, too, employees may request, if they fail to resolve the dispute amicably, *the assistance of a mediator*, through *federal or state conciliation services.*[11]

If the collective bargaining did not lead to the conclusion of the collective labor agreement, and the mediation and investigation procedures were completed, the parties opened the way to arbitration of interests.

Arbitration procedures differ from state to state. The arbitrators may have the power to decide any way of resolving the dispute or only to choose the proposal made by one of the parties or to adopt one of the recommendations made by the investigator.

There are a number of major differences between the implementation of these arbitral awards and those in the private sector. Arbitral awards in most cases in the federal public sector are subject to review by *the Federal Labor Relations Authority*, while the National Labor Relations Committee (NLRB) does not have such jurisdiction.

Employees in the national or local public sector. In general, public sector employees do not enjoy all the collective rights granted to those in the private sector. Several states allow strikes to be organized by certain

[11] In some states, mediation must be requested by either party, while in other states mediation may be requested by both parties. In some states, the right of administrative bodies empowered to implement federal or state regulations to take the initiative to provide mediation services is regulated.

categories of employees, and California has noted that the state lacks the power to completely ban strikes that do not endanger public health or safety.[12]

As a rule, the right to strike is still forbidden. Instead, national statutes mainly provide for mediation, fact-finding and arbitration in various forms and combinations, as ways of resolving disputes arising during negotiations.

C. Resolving conflicts of rights

With regard to the settlement of conflicts of rights, we must also distinguish between rights that arise from collective bargaining agreements or violations of federal or Member State regulations and rights in individual employment contracts.

Individual rights in the context of collective rights. The impact of the regulations on collective rights on the individual rights of employees is mainly the following:

- the provisions of the Law on labor relations at national level (NLRA) protect employees against the violation by the employer or trade union of legal rights;
- in the units in which trade unions are set up, the terms and conditions of employment of trade union employees are established not as a result of individual bargaining, but as a result of collective bargaining carried out by the trade union on behalf of the whole group. The rights acquired by the employees under the agreements concluded following collective bargaining are subject to arbitration in the event of their violation;
- due to the fact that the union, during collective bargaining, enjoys the exclusive right to represent employees, the federal courts have imposed on the representative unions the obligation to represent in good faith.

Most collective agreements establish a system for the interpretation and application of the clauses of the convention and for the settlement of

[12] Covington R.N., Professor of Law Vanderbilt University, *Employment Law, in a nut shell*, third edition, Thomson West, 2009, p. 519 şi urm.

disputes arising therefrom: *"a grievance procedure"* which culminates in arbitration with binding effects.

This common procedure is an attempt to provide a prompt, organized, and systematic way to challenge an employer's decisions. Collective agreements contain various provisions on decisions that can be challenged, but most recognize this possibility in a wide range of issues: discipline, dismissals, the right to work, pay, pay and holidays, additional benefits, etc.

Once the employer has taken a decision on a matter affecting one or more employees, the dissatisfied employee may challenge it by filing a "complaint." Depending on the procedure provided for in the agreement, the complaint may be filed by an employee, a group of employees or the organization of employees.

Almost all agreements concluded as a result of collective bargaining provide for the involvement of an impartial arbitrator to hear and decide on complaints registered during the application of the negotiated agreement. The details of arbitration for the settlement of complaints differ considerably depending on the conventions. An arbitrator may be authorized to decide on any dispute arising during the term of the Convention or may be limited to the understanding, application or interpretation of the agreement. Some agreements concluded following collective bargaining withdraw certain aspects from the authority of the arbitrator or set other limits on the decisions that may be taken by him.

If either party to a negotiated agreement that provides for an arbitration clause refuses to submit a complaint to the arbitration proceedings, the other party may use an action in a federal or national court to compel the other party to participate by issuing an arbitration award obligation to fulfill the promise made by the arbitration clause.

Once a valid agreement has been reached on the submission of a complaint to arbitration, any dispute between the parties over its terms must be submitted to arbitration.

A decision to arbitrate a particular complaint may be refused only if it can be argued with certainty that the arbitration clause is not capable of any interpretation covering the dispute in question. Doubts must be interpreted in favor of application.

Certain agreements concluded following collective bargaining are signed by a permanent arbitrator who will decide on complaints lodged during the period in which the agreement is valid, but most require an ad

hoc arbitration. In the latter case, the parties shall mutually elect an arbitrator to decide on one or more complaints registered during the term of the Convention.[13]

Arbitration hearings are generally less formal than court proceedings. The rules on evidence are flexible and the parties themselves enjoy greater control over the proceedings than they had in court. Referees have different periods of time to prepare their opinion and decision. The decision shall be drawn up in writing and shall contain the presentation of the complaint, a summary of the evidence adduced, the arguments of the parties, the reasons and the decision taken.

Conclusions

In the opinion of the authors of specialized literature[14], *mediation* is not perceived as just a solution of release, of relief of the courts. She is much more than that. It must be seen, first and foremost, as a means of ensuring social peace, by forming fair conduct among citizens, by cultivating a spirit of tolerance and fairness in interacting with members of society.

Mediation of labor disputes involves the proposal of solutions by each party, employee-employer, as well as the mediator, who can make recommendations for a resolution of the labor dispute as soon as possible. Mediators do not have the power to require the parties to resolve disputes in a certain way, they cannot establish new working conditions and they cannot force them to follow certain procedures for resolving those disputes, but they can suggest that they resort to the arbitration procedure.

As far as the United States is concerned, in 1997, the Alternative Dispute Resolution Act requires each federal destructive court to adopt rules that allow the use of alternative dispute resolution (ADR) techniques in all civil proceedings. An extremely important thing that really makes the difference between Europe, especially Romania and the United States, is the fact that out of all the federal civil cases in the

[13] D.L. Leslie, Ch.O. Gregory, Professor of Law University of Virginia, *Labor Law, in a nut shell*, fifth ed., Thomson West, 2008, p. 620.

[14] C. Constantin, *Legislația medierii. Note, comentarii și explicații,* Ed. Universul Juridic, București, 2013.

United States, about 98% of them choose to use alternative conflict resolution techniques, thus failing to instance.

Starting from the certainty that mediation is a success in the USA and that most disputes are resolved before reaching the courtroom, we can look with optimism at the future impact of mediation in our country. It is important that the local legal environment has the necessary openness and encourages this way of resolving disputes amicably. Mediation needs time and results to impose itself on us. The first steps have taken place, but we must not fall into the trap of reporting the results that will be obtained in Romania, with those currently being achieved in the USA.

REFERENCES

1. C. Constantin, *Legislația medierii. Note, comentarii și explicații,* Ed. Universul Juridic, București, 2013.
2. R.N. Covington, Professor of Law Vanderbilt University, *Employment Law*, *in a nut shell*, third ed., Thomson West, 2009.
3. A. Gorghiu (coord.), *Medierea - Oxigen pentru o societate modernă,* Ed. Universul Juridic, Bucureşti, 2013.
4. D.L.Leslie, Ch.O. Gregory, Professor of Law University of Virginia, *Labor Law, in a nut shell*, fifth ed., Thomson West, 2008.
5. M. Sîrbu, D.M. Croitoru-Anghel, *Medierea conflictelor*, Ed. Universul Juridic, Bucureşti, 2013.
6. M. Sîrbu, *Metodele ADR în contextul european şi internaţional - Curs universitar*, Ed. Universul Juridic, Bucureşti, 2020.
7. N. Voiculescu, *Medierea conflictelor*, Ed. Universității „Titu Maiorescu", București, 2007.

THE CONTROVERSY IN THE CASE LAW REGARDING THE RETENTION OF SUBMITTING CIRCUMSTANCES IN THE CASE OF THE CRIME OF ASSIMILATED SMUGGLING OFFENCE PROVIDED BY ART. 270 PAR. 3 OF LAW NO. 86/2006

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ABSTRACT

Through this article, we want to analyze a legal issue that has generated a different practice, namely, if the assimilated crime of smuggling is provided by art. 270 para. 3 of Romanian Law no. 86/2006 on the Customs Code is or is not an offense regarding the state border of Romania and whether it is allowed to retain the mitigating legal circumstance provided by art. 75 para. 1 letter d) of the Penal Code in case of complete coverage of the material damage caused by its commission. Another issue that we want to address is the possibility of retaining the mitigating judicial circumstance provided by art. 75 para. 2 letter a) of the Penal Code consists of the offender's efforts to remove or reduce the consequences of the crime in the conditions in which it is not allowed to retain the mitigating legal circumstance provided by art. 75 para. 1 letter d) of the Penal Code. These aspects are of significant importance in the individualization of the punishment since, by taking into account such circumstances, the noteworthy limits of the sentence provided by law for the offense committed are reduced by one-third.

KEYWORDS: *legal and judicial mitigating circumstances, assimilated smuggling offense, reduction of sentence limits, full payment of damages, dangerous offense;*

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I. INCIDENTAL LEGISLATION

According to Article 270 para. 3 of Law no. 86 of 10 April 2006 on the Customs Code of Romania "the collection, possession, production, transport, taking over, storage, delivery, disposal and sale of goods or merchandise to be placed under a customs procedure knowing that they originate from smuggling or are intended to be smuggled shall be assimilated to the offense of smuggling".[1]

According to art. 75 para. 1 letter d) of the Penal Code constitutes a legal mitigating circumstance "full coverage of the material damage caused by the crime, during the penal investigation or trial, until the first trial term, if the perpetrator has not benefited from this circumstance within 5 years before committing the deed. *The mitigating circumstance does not apply in the case of committing the following offenses*: against the person, aggravated theft, robbery, piracy, fraud by computer systems and electronic means of payment, outrage, judicial outrage, abusive behavior, crimes against public safety, crimes against public health, crimes against religious freedom and respect due to deceased persons, against national security, against the fighting capacity of the armed forces, crimes of genocide, against humanity and war, *crimes against the state border of Romania*, crimes against the legislation on preventing and combating terrorism, crimes of corruption offences, those against the financial interests of the European Union, offenses concerning non-compliance with the regime of explosives and restricted explosives precursors, nuclear or other radioactive materials, on the legal regime of drugs, on the legal regime of drug lords, on the legal regime of doping substances, on money laundering, on civil aviation activities and those that may endanger flight safety and aviation security, on witness protection, on the prohibition of fascist, racist or xenophobic organizations and symbols and the promotion of the cult of persons guilty of crimes against peace and of humanity, of organs trafficking, tissues or

[1] A. Stancu, *Dynamic elements in contemporary business law*, published in Volume „Contributions to the 9th International Conference" Perspectives of Business Law in the Third Millennium Adjuris - International Academic Publisher, 2019.

cells of human origin, of preventing and combating pornography, and of those in the adoptions procedure"[2].

According to art. 75 para. 2 letter a) of the Penal Code may constitute a judicial mitigating circumstance the efforts made by the offender to remove or reduce the consequences of the crime.

II. It is a crime assimilated by smuggling provided by art. 270 para. 3 of Law no. 86/2006 on the Customs Code a crime regarding the state border of Romania? It is allowed to retain the mitigating legal circumstance provided by art. 75 para. 1 letter d) of the Penal Code in case of assimilated smuggling offense?

A first issue that provoked controversy in the practice of the courts was whether or not the offense assimilated by smuggling is a crime regarding the state border of Romania.

In the practice of the courts, two opinions were expressed regarding the classification of the crime assimilated by smuggling within the crimes regarding the state border of Romania.

On the one hand, the opinion was expressed that the crime of smuggling in the assimilated form cannot be classified as a crime regarding the state border of Romania.

It has been held that offenses relating to the State border are found in the Special Part of the Penal Code in Chapter II of Title III entitled 'Offences relating to State authority and the State border,' in art. 262-265.

We note that the offense of smuggling is not included among the offenses relating to the smuggling offense.

We also note that Law No 187/2012 on implementing the Penal Code does not amend Law No 86/2006 regarding the Customs Code[3].

In addition, no amendments are made to Government Emergency Ordinance No 105 of 27 June 2001 on Romania's state border, except Articles 70-71, 73-74, which have been repealed[4].

[2] Law no. 286/2009 regarding the Romanian Penal Code, published in the Official Gazette no. 510 of July 24, 2009.

[3] *Law no. 86/2006 regarding the Customs Code*, published in the Official Gazette no. 350 of April 19, 2006.

[4] Government Emergency Ordinance no. 105 of June 27, 2001 on the Romanian state border, published in the Official Gazette no. 352 of June 30, 2001.

The conclusion to be drawn from the above texts is that if the legislator had wanted the offense of smuggling to be included among the violations relating to the state border, nothing would have prevented him from doing so. It was held that the legislature wished that this offense should retain its separate regime given the unique relations it protects concerning the administration of taxes, duties, contributions, and other amounts due to the consolidated budget of the state.

Considering that the legislator understood to be expressly provided in the Special Part of the Penal Code as crimes regarding the state border, only the fraudulent crossing of the state border, the trafficking of migrants, the facilitation of illegal stay in Romania, and evasion of removal measures from the territory of Romania, there is no possibility to extend this category of crimes to others that are not expressly provided in the Special Part, as this was not the express will of the legislator.

In support of this interpretation was also taken into account the material element of the objective side represented by the omission from the payment of taxes, duties, contributions, and other amounts due to the consolidated state budget of goods and merchandise that entered the country in violation of legal provisions legal status of the border. It was thus considered that it did not constitute a crime on the state border even about the main lawful object; therefore, there is no possibility to extend and apply a penal rule regarding a situation that is not expressly regulated, even if this situation is similar, with the one described by the respective norm. For these arguments, it was appreciated that smuggling is not a typical crime regarding the state border of Romania.

Taking into account the fact that the crime of assimilated smuggling cannot be classified as a crime regarding the state border of Romania, nor the provisions of art. 75 para. 1 letter d) of the Penal Code cannot be extended to the offenses provided by the Customs Code.[5]

The penal law is of strict interpretation so that the inapplicability of the mitigating legal circumstance is provided by art. 75 para. 1 letter d) of the Penal Code refers strictly to the offenses listed in this regulation law, without making any extension.

It was also found that the crimes at the state border mainly concern the restriction of the movement of persons, while the crime of smuggling

[5] Al. Boroi, M. Gorunescu, I. Barbu, B. Vîrjan, I. Nistor, *Business Criminal Law*, 7th ed., C.H. Beck Publishing House, 2021, p. 299.

concerns the movement of goods and capital and their evasion of customs duties.

In the light of this interpretation, it was concluded that the effects of the mitigating legal circumstance were retained and applied if the damage caused by the offense of smuggling was fully covered in the course of the criminal prosecution or trial, up to the first trial, if the offender had not benefited from this circumstance in five years before the offense.

In order to retain this legal mitigating circumstance, we have identified a series of final court decisions, as follows:

By the penal decision no. 786 of November 12, 2018, the Iași Court of Appeal considered that the defendant's appeal is grounded in retaining the mitigating circumstance provided by art. 75 para. 1 letter d) of the Penal Code in the conditions he had paid the damage in total since the criminal investigation phase. He also pointed out that in the conditions in which the crime is provided by art. 270 para. 3 of Law no. 86/2006 does not appear among the offenses regarding the state border expressly provided in the Penal Code as being exempted from applying this mandatory legal mitigating circumstance; the first instance should have retained it. Taking this mitigating circumstance into account, the judicial review court proceeded to a new individualization of the sentence[6].

By the penal sentence no. 294 of April 23, 2020, the Piatra Neamt Court retained mitigating circumstances provided by art. 75 para. 1 letter d) of the Penal Code, the full acquittal by the defendant of the damage during the criminal investigation, reason for which he reduced by one third the punishment limits for the crime provided by art. 270 para. 3 of Law no. 86/2006. By the penal decision no. 830 of October 1, 2020, the Bacau Court of Appeal rejected as unfounded the defendant's appeal[7].

By the penal sentence no. 30 of February 5, 2020, the Barlad Court detained each of the three defendants accused of committing the offense provided by art. 270 para. 3 of Law no. 86/2006 the mitigating circumstance provided by art. 75 para. 1 letter d) of the Penal Code by fully covering the damage, reducing the punishment limits by one-third. By the penal decision no. 845 of October 30, 2020, the Iași Court of Appeal rejected the appeals declared by the three defendants as

[6] Iași Court of Appeal, penal decision no. 786 of November 12, 2018, unpublished.
[7] Bacau Court of Appeal, penal decision no. 830 of October 1st, 2020, unpublished.

unfounded. In its recitals, the judicial review court held that the court of the first instance correctly applied the sentences to each of the three defendants by holding the mitigating circumstance due to the full payment of the damage.[8]

By the penal sentence no. 1396 of May 7, 2021, the Baia Mare Court held that the defendant covered the entire material damage according to the document submitted to the file and considered that this circumstance constitutes a mitigating legal circumstance, applying to the provisions of art. 75 para. 1 letter d) of the Penal Code. As a result, it gave efficiency to the requirements of art. 76 para. 1 of the Penal Code. The solution of the first instance was maintained by decision no. 1112 of September 29, 2021, of the Cluj Court of Appeal, the defendant's appeal was rejected.[9]

By the penal decision no. 60 of February 14, 2020, the High Court of Cassation and Justice did not reject from *de plano* the impossibility of retaining the mitigating legal circumstance in the conditions of full payment of the material damage caused in this case. The Supreme Court held that "regarding the defendant's claim according to which the punishment applied is illegal since the courts of the first instance did not retain the mitigating circumstance provided by art. 75 para. 1 letter d) of the Penal Code and have not reduced the legal limits of the punishment; the court cannot receive it. For the provisions mentioned earlier to be incidental, it is necessary to cover the material damage caused by the crime. During the criminal investigation or trial, until the first trial term, or, in the case, the defendant paid the damage on January 25, 2019, after the first trial term on June 14, 2018 ".[10]

On the other hand, the opinion was expressed according to which the crime of smuggling in the assimilated form can be classified as a crime regarding the state border of Romania.

We started from the content of the provisions of art. 3 of Law no. 86/2006 on the Customs Code regarding the scope. Thus, it was taken into account that the customs territory of Romania includes the region of the Romanian state, delimited by the state border of Romania, as well as the territorial sea of Romania, delimited according to the norms of the

[8] Iași Court of Appeal, penal decision no. 845 of October 30, 2020, unpublished.

[9] Cluj Court of Appeal, penal decision no. 1112 of September 29 2021, unpublished.

[10] High Court of Cassation and Justice, penal decision no. 60 of February 14, 2020, unpublished.

international law and the Romanian legislation in the matter. The customs territory of Romania also includes the airspace of the region of the country and the territorial sea.

Also, the meanings are given by the Government Emergency Ordinance no. 105/2001 of some expressions in Chapter I entitled "General provisions."

According to the provisions of art. 1 para. 1 letter l) of the Government Emergency Ordinance no. 105/2001, the border crime is defined as the deed provided by law as a crime committed for illegally crossing the state border of persons, means of transport, goods, or other merchandise.

According to art. 8 para. 4 of the same normative act, the crossing of the state border of means of transport, goods, and other goods are made in compliance with the customs regime's laws.

By corroborating the previously enacted legal texts, it was concluded that the goods are introduced or removed from the country without the concrete observance of the legal provisions regarding the state border.

The basis of this interpretation were the considerations of the decision no. 32/2015 pronounced by the High Court of Cassation and Justice - the panel for resolving some legal issues in which it was held that "the legal object of the crime provided by art. 270 para. 3 of Law no. 86/2006 on the Romanian Customs Code assimilated to the crime of smuggling is a complex one because it defends both the regime of administration of taxes, fees, contributions, and other amounts due to the consolidated state budget, as well as the state border regime".

By decision no. 556 of September 19, 2017, published in the Official Gazette of Romania no. 967 of 6 December 2017, the Constitutional Court held that the meaning of the notion of "smuggling", as interpreted by the High Court of Cassation and Justice - Panel for resolving legal issues in penal matters by Decision No. 32 of 11 December 2015[11] „it is clear and unmistakable, namely that it concerns any unlawful introduction or removal from the country of goods to be subject to a

[11] High Court of Cassation and Justice - panel for resolving legal issues, decision no. 32 of December 11, 2015, published in the Official Gazette of Romania no. 62 of January 28, 2016.

customs procedure, regardless of their value, i.e., regardless of whether they come from the commission of a contravention or an offense."[12]

The considerations of Decision, No 106 of 25 February 2020, were published in the Official Journal of Romania No 407 of 18 May 2020, in which the Constitutional Court held that "(...) the immediate consequence of the offense provided for in Article 270 para. 3 of Law no. 86/2006 consists in a state of danger for the customs procedure and for the confidence in the goods that are introduced into the commercial circuit, the assimilated offense in question being an offense of danger and not of result".[13]

It has been concluded that the offense of smuggling provided for in Article 270 para. 3 of Law no. 86/2006 it is not possible to retain the mitigating legal circumstance of complete coverage of the material damage caused by the offense provided for in Art. 75 para. 1(d) of the Penal Code, as it falls within the broader scope of crimes concerning the State border of Romania.

In the sense of the impossibility of retaining this legal mitigating circumstance, we have identified a series of final court decisions, as follows:

In the considerations of the penal decision, no. 474 of 11 June 2020, the Craiova Court of Appeal held that the possible coverage of the damage referred to in Art. 75 para. 1(d) of the Penal Code is not a mitigating legal circumstance, this circumstance being excepted in the case of the offense of smuggling.

The Suceava Court of Appeal held in the considerations of the decision no. 1163 of 16 December 2020 that the mitigating legal circumstance consisting in the full coverage of the damage caused by the assimilated smuggling offense cannot be retained in the case of state border offenses.[14]

The Cluj Court of Appeal ruled in the same sense by penal decision no. 80 of 26 January 2021, by which it admitted the public prosecutor's appeal and rejected the judgment of the first instance for wrongly

[12] Constitutional Court, decision no. 556 of September 19, 2017 published in the Official Gazette of Romania no. 967 of December 6, 2017.

[13] Constitutional Court, decision no. 106 of February 25, 2020 published in the Official Gazette of Romania no. 407 of 18 May 2020.

[14] Suceava Court of Appeal, decision no. 1163 of December 16, 2020, unpublished.

retaining the mitigating circumstance provided for in Article 75 para. 2(a) of the Penal Code.

The Court of Appeal of Galati ruled by penal decision no. 741 of 7 June 2019, it was impossible to retain and apply the mitigating legal circumstance provided for in Article 75 para. 1(d) of the Penal Code in the case of full payment of the damage caused by the offense of smuggling.

Also, by the penal decision no. 295 of March 23, 2021, the Constanta Court of Appeal considered that the first instance illegally held the mitigating legal circumstance provided by art. 75 para. 1 letter d) of the Penal Code and concluded that it should be removed.

III. It is possible to retain the mitigating judicial circumstance provided by art. 75 para. 2 letter a) of the Penal Code in the conditions in which the retention of the mitigating legal circumstance is provided by art. 75 para. 1 letter d) of the Penal Code in case of complete coverage of the material damage caused by committing the crime of assimilated smuggling?

In the judicial practice, the question was whether the denial of retaining the mitigating legal circumstance was provided by art. 75 para. 1 letter d) of the Penal Code in the case of complete coverage of the material damage caused by committing the crime of assimilated smuggling also prevents the retention of the judicial mitigating circumstance provided by art. 75 para. 2 letter a) of the Penal Code consisting of the efforts made by the offender to remove or reduce the consequences of the offense.

We have identified two views on this issue of law.

On the one hand, it was held that, in the case of an offense falling within the category of those for which the retention of the mitigating legal circumstance is prohibited, the retention of the judicial one is also forbidden

In this regard, we have identified several court decisions, as follows:

By the penal decision no. 1163/2020 The Suceava Court of Appeal held that since the legislator prohibited the retention of this circumstance as a mitigating legal circumstance, obvious that the same possibility cannot be capitalized as a judicial mitigating circumstance provided by

art. 75 para. 2 letter a) of the Penal Code consisting of the efforts made by the offender to remove or reduce the consequences of the crime. It was also shown that it is illogical for the legislator not to allow in the case of border crimes the retention of the mitigating legal circumstance when the defendant fully pays the damage until the first trial, but to allow the retention of the judicial mitigating circumstance with the same effects, reduction by 1/3 of the limits of punishment if the defendant only makes efforts to pay the damage.

In the same vein, in its reasoning for penal decision no. 80 of 26 January 2021, the Cluj Court of Appeal held that if the full coverage of the damage cannot constitute a mitigating circumstance, even less can the coverage of part of the damage constitute a mitigating circumstance.[15]

On the other hand, it was held that the provisions of Article 75 para. 1(d) of the Penal Code are of strict interpretation and do not influence the application of judicial mitigating circumstances.

In the penal decision no. 741 of June 7, 2019, the Galati Court of Appeal held that nothing prevents the court from assessing the defendant's behavior to cover the damage caused as an effort to remove or reduce the consequences of the crime according to art. 75 para. 2 letter a) of the Penal Code. He also noted that there could be no sign of equality between a defendant who covers the damage caused to the state budget and another defendant who is passive and does not make any effort to remove or reduce the consequences of such a crime. Consequently, in complete agreement with the first instance court, the Court considered that the payment of the damage by the defendant justifies the retention of the judicial mitigating circumstance provided by art. 75 para. 2 letter a) of the Penal Code with the consequence of reducing the punishment by one-third according to art. 76 para. 1 of the Penal Code.[16]

In a similar vein, given that the defendants have made efforts to remove or mitigate the consequences of the offense, the Constanta Court of Appeal, in penal decision no. 295 of 23 March 2021, considered it

[15] Cluj Court of Appeal, penal decision no. 80 of January 26, 2021, unpublished.
[16] Galati Court of Appeal, penal decision no. 741 of June 7, 2019, unpublished.

appropriate to retain the judicial mitigating circumstance in Article 76 para. 2(a) of the Penal Code.[17]

The latter interpretation is also supported in the specialized doctrine.

Thus, the opinion[18] was maintained according to which "the non-fulfillment of the legal conditions (...) for retaining the incidence of the mitigating legal circumstance provided by art. 75 para. 1 letter d) of the Penal Code does not exclude the possibility of retaining the incidence of the judicial mitigating circumstance stipulated by art. 75 para. 2 letter a) of the Penal Code."

It was also argued in another opinion[19] that 'there is nothing to prevent the court from taking into account, on an optional basis, the judicial circumstance, in so far as it considers that the conditions of existence are met, having the ability to assess the offender's subsequent conduct as a factor, which suggests that the punishment should be reduced ".

IV. CONCLUSIONS

Considering that even after the pronouncement of Decision no. 32/2015 of the High Court of Cassation and Justice - panel for resolving legal issues by which it was held that the lawful object of the crime of smuggling is a complex one and including the state border regime, the non-unitary practice persists at the national level, we consider necessary the intervention of the Supreme Court by pronouncing a solution in an appeal in the interest of the law to unify the practice regarding the classification of the crime of assimilated smuggling.

Furthermore, we consider necessary the clarification by the Supreme Court on the possibility of retaining the judicial mitigating circumstance provided by art. 75 para. 2 letter a) of the Penal Code in the conditions in which it is not allowed to retain the mitigating legal circumstance provided by art for some categories of offenses. 75 para. 1 letter d) of the Penal Code.

[17] Constanta Court of Appeal, penal decision no. 295 of March 23, 2021, unpublished.

[18] M. Udroiu, *Synthesis of Penal Law. The General Part*, ed. 2. Vol. II, C.H. Beck Publishing House, 2021, p. 655.

[19] F. Streteanu, D. Nițu, *Penal Law. The General Part. University course,* Vol. II, Universul Juridic Publishing House, București, 2018, p. 412.

In our opinion, starting from the fact that the penal law is of strict interpretation, and the Penal legislator did not understand to include the crime of smuggling among the crimes regarding the state border, we appreciate that this crime does not fall within the wider scope of state border offenses.

Therefore, we consider that it is allowed to retain the mitigating legal circumstance provided by art. 75 para. 1 letter d) of the Penal Code consisting in the full coverage of the material damage caused by the commission of the crime.

We also appreciate that the impossibility of retaining the mitigating legal circumstance provided by art. 75 para. 1 letter d) of the Penal Code does not influence the retention of the judicial mitigating circumstance stipulated by art. 75 para. 2 letter a) of the Penal Code, the latter entering into the discretion of the court, as conferred by the legislator.

BIBLIOGRAPHY

1. Law no. 286/2009 on the Romanian Penal Code.
2. Law no. 86/2006 on the Customs Code.
3. Government Emergency Ordinance No 105 of 27 June 2001 on Romania's State Border.
4. Constitutional Court, Decision No 556 of 19 September 2017 published in the Official Gazette of Romania No 967 of 6 December 2017.
5. Constitutional Court, Decision No 106 of 25 February 2020 published in the Official Gazette of Romania No 407 of 18 May 2020.
6. High Court of Cassation and Justice - Division for the resolution of questions of law, Decision No 32 of 11 December 2015, published in the Romani’s Official Gazette No 62 of 28 January 2016.
7. High Court of Cassation and Justice, Penal Decision No 60 of 14 February 2020, unpublished.
8. Bacau Court of Appeal, penal decision no. 830 of 1 October 2020, unpublished.
9. Iasi Court of Appeal, penal decision no. 845 of 30 October 2020, unpublished.

10. Cluj Court of Appeal, decision no. 1112 of 29 September 2021, unpublished.
11. Suceava Court of Appeal, decision no. 1163 of 16 December 2020, unpublished.
12. Cluj Court of Appeal, penal decision no. 80 of 26 January 2021, unpublished.
13. Galati Court of Appeal, penal decision no. 741 of 7 June 2019, unpublished.
14. Constanta Court of Appeal, penal decision no. 295 of 23 March 2021, unpublished.
15. A. Stancu, *Dynamic elements in contemporary business law,* published in the Volume „Contributions to the 9th International Conference" Perspectives of Business Law in the Third Millennium Adjuris - International Academic Publisher, 2019.
16. Al. Boroi, M. Gorunescu, I. Barbu, B. Vîrjan, I. Nistor, *Penal Business Law,* 7 ed., C.H. Beck Publishing House, 2021.
17. M. Udroiu, *Synthesis of Penal Law. The General part,* 2 ed., Vol. II, C.H. Beck Publishing House, 2021.
18. Fl. Streteanu, D. Nițu, *Penal Law. The General part. University course,* Vol. II, Universul Juridic Publishing House, Bucharest, 2018.

THE IMPORTANCE OF REGULATING THE STATE'S CRIMINAL CIVIL LIABILITY

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ABSTRACT

In order to ensure the observance of the generic legal duty not to cause harm to another, to comply with a socially accepted behavior or with the law, but also to sanction the committed illegal acts, the social reality imposed that in the situation of committing illegalities committed by civil servants there is the possibility of bringing the state to civil liability, as a guarantee of compliance with the moral and legal imperative to repair the damage caused.

In these conditions, the regulation of state liability corresponds both to a preventive behavior, in the sense that it has the role of discouraging non-compliant conduct by state representatives, contrary to law, but also to a sanctioner in the event of wrongdoing, compensating the victim by compensating.

This type of liability has multiple applicability in the sphere of practical activity, the evolution of social life determining the need to attract the responsibility of the state in order to have a basis for respecting the rights of those harmed by committing illegal acts.

KEYWORDS: *tortious civil liability; state liability; subjective liability; objective liability unlawful acts;*

The necessity of the existence of the idea of responsibility derived from the social realities, being a living institution[1], which has evolved over time, being based on the violation of legal norms that caused harm to citizens by committing harmful actions or inactions, but also on the imperative of the state to comply with positive obligations[2], of a general nature, aiming at unconditional application[3], in the sense of respecting

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[1] I. Adam, *Tratat de drept civil. Obligațiile. Vol. II. Responsabilitatea civilă extra-contractuală. Faptul juridic licit*, Ed. C.H. Beck, București, 2021, p. 175.

[2] D.-L. Rădulescu, *Raporturile juridice de muncă. Discriminarea multiplă*, Ed. Didactică și Pedagogică SA, București, 2021, p. 3.

[3] D.-L. Rădulescu, *Respect for the principles of equal treatment in employment relationships*, article published in Universul Strategic, Revista universitară de studii strategice interdisciplinare și de securitate Universul strategic no. 1/2021, p. 151, available online at *http://iss.ucdc.ro/revista-pdf/us45.pdf*, accessed on 14.11.2021.

equality between all citizens and the legal and unitary application of legal norms, but also of the customs indispensable for the normal functioning of any society, in the situation where it is incorporated in a legal form.

Thus, the situations identified in real life by which natural or legal persons were harmed by acts of state officials, committed with guilt determined the outline of the importance of a state liability, in order to have a guarantee, in the sense that the victim will be properly rewarded the damage suffered, taking into account that often the perpetrator did not have sufficient financial resources to pay compensation, which led to an impossibility to enforce the judgment establishing the conditions of civil liability.

Attracting the responsibility of the state is an institution that has undergone profound changes, which have gone from the theory that the state is not responsible in any situation to that it is responsible for the actions of its officials, which carries out activities involving the exercise of public authority, which have harmed citizens, which generates its liability.

At the beginning of the formation of the state, the notion of incurring liability in case of committing an illegal act was associated with the idea of revenge[4], and to provoke an evil similar to the perpetrator, without the existence of a proportionality or the possibility of analyzing a potential liability of a person other than the perpetrator, confusing civil and criminal liability[5].

Subsequently, the liability for the violation of the rules of law was closely linked to the criminal action, which, however, was exclusively of a patrimonial nature, in the sense that it consisted in the payment of a sum of money to the victim, this having the character of a punishment[6].

During the French Revolution, the idea of an absolute state, led by a sovereign endowed with sacred powers, was replaced by the conception that power emanated from the people and not from an absolute sovereign, the state institutions beginning to be perceived as structures put at the service of citizens, whose role is to protect their rights and freedoms, and

[4] E. Molcuț, *Drept privat roman,* ediție revăzută și adăugită, Ed. Universul Juridic, București, 2007, p. 333.

[5] C. Stătescu, C. Bîrsan, *Tratat de drept civil. Teoria generală a obligațiilor*, Ed. Academiei Republicii Socialiste România, București, 1981, p. 139.

[6] E. Molcut, *op. cit*., p. 253.

the idea of vindictive justice has been replaced by that of individual responsibility[7] for the deeds committed.

However, the documents issued by these institutions could not be subject to the control of the legality of the courts, proof that, in reality, compared to attracting a possible state liability, the situation was unchanged from the previous period, the actions or inactions of public institutions could not leads to the application of sanctions for possible damages created against citizens.

The social context determined the existence of an increasing number of requests by which citizens expressed their dissatisfaction with various acts performed by public institutions, which led to the shaping of a form of holding the state liable for wrongdoing, but this theory actually corresponded to a period in the sense that in the situation where it is found that a representative of the state, in the exercise of his powers, committed an act for which the conditions for finding a form of civil liability were met, it was not the it was appreciated to have a mandate from the state to carry out activities that involved the exercise of state authority, and they were liable for wrongdoing as a representative, given that the state could not function independently, but only through the activity of individuals .

The thesis of the irresponsibility of civil servants is maintained until the 19th century[8], gradually evolving towards a new conception that outlined a separate responsibility of the state from that of civil servants.

The evolution of the theory of direct state responsibility was based on the fact that it provides public services to citizens, and for any wrongdoing committed through actions or inactions that caused damage in the performance of this activity and needed to be repaired, a form of guilt caused by a failure of the state in the provision of public services that entailed a direct responsibility of it, which was not conditioned by proving the guilt of civil servants for attracting it.

From the earliest times, the theory of the irresponsibility of the state for the damages caused due to its activity was outlined, in the beginning, the state was confused with the sovereign, who concentrated in his hands

[7] G.M. Mara, *Prejudiciul nepatrimonial cauzat prin eroarea judiciară*, Ed. Universul Juridic, București, 2020, p. 31.

[8] L. Pop, *Tratat de drept civil. Obligațiile, Vol. III. Raporturile obligaționale extracontractuale*, Ed. C.H. Beck, București, 2020, p. 625.

all the powers, being inconceivable that the subjects could hold him accountable. the leader for any kind of deed, an aspect that gave rise to barbarism and a discretionary power of the sovereign, who was considered God's messenger on earth and who could exercise his duties without limitations, provided that the origin of his power was sacred.

Irresponsibility was not only about attracting the responsibility of the state, which was seen as omnipotent, but also of its officials, because otherwise it would have meant that the monarch chose people who were not worthy of the position held, holding positions of responsibility, which was inconceivable for those times.

Thus, any type of liability that would have been based on a possible fault of the sovereign in managing the affairs of state leadership could not be accepted because it would have involved a will to cause harm to his subjects, which was total incompatible with the conception of that period.

Under these conditions, the possible abuse of officials could be framed at most in the situation of force majeure or a fortuitous case, being prevented any kind of measures to repair the damages committed by actions or inactions of the state, the social reality favoring committing acts that had to be based on the whim, anger or vengeful desire of the supreme head of state, respectively the monarch, who was considered the only one who could decide on the life and property of his subjects.

The historical context, but also the religious conceptions of the time determined that the irresponsibility of the state should be based on the divine power of the leader, but also on the non-existence of procedures to allow courts to analyze whether the state or its officials can be held accountable actions or inactions, with guilt that would cause harm to citizens.

In the 15th century, the transition to the creation of administrative bodies began to take place, which, however, were directly dependent on the sovereign, being created various public services to manage sectors of activity, necessary for the normal functioning of society, determined the transition to the transfer of responsibilities to public institutions, no longer being concentrated all power in the hands of the sovereign.

However, during this period the principle of state irresponsibility was still applicable, being considered against any legal or moral norms for a citizen to question the decisions of the sovereign and the institutions

directly subordinated to him, any contrary interpretation affecting the divine power of the ruler.

Recognition of the responsibility of the state is clearly the most important achievement in this historical evolution, representing a significant progress towards shaping theories of objective and subjective responsibility.

The theory of subjective liability is based on the need to prove that the commission of an injury is an unlawful act that caused damage, but the most important is to prove the guilty attitude of its perpetrator, meeting these conditions leads to liability and generates liability.

The first to support this theory was Mazeaud in France, who during the French Revolution argued that guilt is the foundation of civil liability, arguing that the existence of civil liability cannot be dissociated from guilt given that justice and morality necessarily imply a distinction between the illicit deed committed with guilt and the innocent deed, being obligatory the analysis of the conduct of the civil servant in order to verify the fulfilment of this condition.

Subjective liability was developed within the theory of guilt or civil guilt, created in order to overcome the stage of irresponsibility of the state and sanctioning illegal acts committed by state officials, who acted against the law, in violation of the obligations of prudence and diligence in the activity but with the obligation to prove guilt in committing the deed, trying in fact an application of tortious civil liability in the case of the state.

The trend in the modern period has been to objectify civil liability[9], in the sense of shifting the emphasis from the idea of the couple to the idea of risk in carrying out the activity or guarantee that is activated in the event of committing an illegal act, for the protection of the victim's rights, contrary to the concept developed by subjective theory, objective responsibility or risk theory, it resides in the result produced, respectively in the damage created, without the need to prove the guilt or the intention in committing the deed.

Within this form of responsibility was outlined the theory based on the concept that the person of the guilty official or his conduct is not rele-

[9] I. Adam, *Drept civil. Obligațiile. Faptul juridic licit în reglementarea NCC*, Ed. C.H. Beck, București, 2013, p. 161.

vant, so the existence of state responsibility is not conditioned by proving a fault of the official in carrying out professional activities.

Thus, it is not necessary to have a guilty official, that is to say, a person within the State in charge of whom an unlawful act is attributed to him, the liability of the State being made even in the situation where the unlawful act can be attributed to a certain person, but also in case the direct responsibility of the state would be attracted, without the existence of an individualized person who would have violated the legal norms. In these conditions, it is necessary to meet three conditions, namely the existence of an unlawful act, the result, respectively of the damage caused, but also the causal link between the act and the damage, without analyzing the condition of guilt, which implies a distance from the person to the perpetrator, in the sense that his conduct at the time of the deed has no relevance as long as a harmful result has occurred.

This theory, based on the existence of a risk in the conduct of business, was outlined in the middle of the nineteenth century, during the Industrial Revolution, in which a great emphasis was placed at the state level on the development of industry, but also machines[10], which involved a considerable number of accidents, which caused damage, but for which it was difficult to prove who was guilty of the wrongful act given that the design of these machines was complicated and the victim did not have a concrete possibility to know the mechanism operation and concrete indication of the guilty person, which led to an impossibility to receive compensation for the damage created.

In this social context, the theory of objective liability was developed, the victim no longer being obliged to prove the guilt of the perpetrator of the wrongful act, thus facilitating the recovery of the damage.

The arguments underlying the need to outline this theory took into account the idea that anyone carrying out an activity in their own interest must suffer the consequences caused by it, and the greater the economic power of the agent, the greater the damage caused, from reasons of equity, the responsibility imposed on him is greater.

In addition, if the injured person had been obliged to prove the guilt of the perpetrator, a state of danger would have been caused for the normal development of social life, especially in the conditions where if in the

[10] L.R. Boilă, *Răspundere civilă delictuală obiectivă,* ed. 2, Ed. C.H. Beck, București, 2014, p. 53.

exploitation of an activity be harmed those who worked, legal and moral rules required compensation for the damage caused.

The theory of strict liability or risk theory arose from the need to repair the damage for those victims who suffered certain damages, but who, in the case of applying the subjective theory, could not have benefited from compensation because they did not have sufficient leverage to proof of guilt in committing the wrongdoing.

This form of liability is important given that it removes any analysis of subjectivity at the time of the harmful act, in the sense that it is irrelevant whether the wrongful act was committed through negligence or guilt, but to prove liability only the existence of the act, damage caused by committing it and the causal link between the two.

The most significant reason for the liability regime is in fact the need to insure the victim for the damage suffered, so it is preferable to adopt a form of liability that does not necessarily involve the demonstration of guilty conduct, contrary to law by the perpetrator, because this situation would favor the lack of state responsibility, in many cases.

At the same time, it is necessary to make a clear delimitation in the situation of an illegal act between civil and criminal liability, the two having different purposes, but essentially representing ways of sanctioning to defend the violated subjective right and restore the rule of law.

The distinction between subjective and objective theory is, in fact, the removal of the proof of guilt, but also of the analysis of the risks inherent for carrying out an activity, consequences of a normal exploitation of an activity, for which the perpetrator must not answer, in contrast with abnormal, exceptional risks that exceed a reasonable limit and that attract liability if they have caused damage, but common elements include the commission of an unlawful act, damage caused by it and causation, guilt being an indispensable component in attracting responsibility of the author[11].

[11] G. Boroi, L. Stănciulescu, *Instituții de drept civil în reglementarea noului Cod civil,* Ed. Hamangiu, București, 2012, p. 247.

Conclusions

The state, guarantor of the fundamental rights of any natural and legal person, has a primary duty to protect citizens, by respecting their rights, an issue related to the democratic essence of society and which is current given the growing situations of attracting responsibility.

If at the beginning of the formation of the state, against the background of the lack of differences between civil and tort liability, given the social, moral and religious context of the time, it was not outlined and could not conceive of regulating a form of state liability to be attracted In certain situations provided by law, over time this institution has become necessary and indispensable for the normal functioning of a modern state.

Thus, its importance lies not only in ensuring a just reparation for the damage caused to the injured person by the commission by a State official of an unlawful act causing damage, including a causal link, but also in the creation of a mechanism applicable to preventing and sanctioning conduct contrary to legal norms during the exercise of official duties.

BIBLIOGRAPHY

1. I. Adam, *Drept civil. Obligațiile. Faptul juridic civil în reglementarea NCC*, Ed. C.H. Beck, București, 2013.
2. I. Adam, *Tratat de drept civil. Obligațiile, Vol. II. Responsabilitatea civilă extracontractuală. Faptul juridic civil*, Ed. C.H. Beck, București, 2021.
3. L.R. Boilă, *Răspunderea civilă delictuală obiectivă,* ed. 2, Ed. C.H. Beck, București, 2014.
4. G. Boroi, L. Stănciulescu, *Instituții de drept civil în reglementarea noului Cod civil*, Ed. Hamangiu, București, 2012.
5. G.M. Mara, *Prejudiciul nepatrimonial cauzat prin eroarea judiciară*, Ed. Universul Juridic, București, 2020.
6. E. Molcuț, *Drept privat roman,* ediție revăzută și adăugită, Ed. Universul Juridic, București, 2007.
7. L. Pop, I.-Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile*, Ed. Universul Juridic, București, 2012.

8. L. Pop, *Tratat de drept civil. Obligațiile, Volumul III. Raporturile obligaționale extracontractuale*, Ed. C.H. Beck, București, 2020.
9. D.-L. Rădulescu, *Raporturile juridice de muncă. Discriminarea multiplă*, Ed. Didactică și Pedagogică SA, București, 2021.
10. D.-L. Rădulescu, *Respect for the principles of equal treatment in employment relationships*, article published in Universul Strategic, Revista universitară de studii strategice interdisciplinare și de securitate Universul strategic no. 1/2021, p. 142-152.
11. C., Constantin, C. Bîrsan, *Tratat de drept civil. Teoria generală a obligațiilor*, Ed. Academiei Republicii Socialiste România, București, 1981.

TAX EVASION. CAUSES OF UNPUNISHMENT FROM THE PERSPECTIVE OF LAW NO. 55/2021

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ABSTRACT

Article 10 of Romanian Law No. 241/2005 on preventing and combating tax evasion has raised numerous debates, but also multiple controversies in practice, already since the adoption of this law, thus undergoing changes over time, with the legislator constantly vacillating between the desire to drastically punish those who commit tax evasion offences, and the desire to quickly recover the damage caused by the commission of such offences. Hereinafter, the current provisions of Art. 10 of Law No. 241/2005 on preventing and combating tax evasion will be analysed from the perspective of the latest amendments brought by Law No. 55/2021, pointing out the issues arising in judicial practice as a result of these legislative interventions, the conditions for the applicability of Art. 10 at present, as well as some interpretation problems that may arise during the criminal proceedings, including the presentation of some special cases where the provisions of Art. 10 may not be rendered effective.

KEYWORDS: *tax evasion; damage; cause of unpunishment; applicability;*

1. Introductory Considerations

Tax evasion is a current and concrete issue, constantly changing in terms of the ways by which it is being committed, being an area that requires special attention in approaching its investigation and, at the same time, requiring the rigor of specialist knowledge.

Defining the notion of tax evasion is a difficult endeavour, given the complexity of the phenomenon, but, in a first perspective, it may be explained as "an illegal arrangement where liability to tax is hidden or

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ignored, i.e., the taxpayer pays less tax than he is legally obligated to [...]"[1].

From a theoretical point of view, in a simplistic definition, tax evasion consists in a natural person or a legal entity evading the payment of duties and taxes. Beyond this definition, and from a different, more laborious perspective, "tax evasion is the way in which economic subjects respond to tax pressure[2], when it exceeds a certain threshold considered necessary for starting, maintaining and developing business or any gainful activity, as well as in connection with their current wealth or revenues"[3].

Continuing the same idea, it should be underlined that, although tax evasion tends, already from the analysis of its definition, to resemble underground economy, it does in fact denote the boundary between underground and official economy[4]. However, it is considered that, although it represents a fine line between the two types of economy, tax evasion lays the foundations of the one characterized by the lack of compliance with the rules imposed.

It is considered that this phenomenon is mainly based on the attitude of taxpayers[5] in relation to the payment of taxes due to the State, namely that there is an "unjustified withholding" of the revenues obtained through their work, therefore new solutions for optimisation, more or less compliant with the legal regulations in force, will always be searched for, whereby they manage to evade, in whole or in part, the payment of tax liabilities incumbent on them.

Continuing the same idea, it may be noted that the phenomenon of evasion affects two important levels within the balance of society, the economic level - creating dysfunctions in competition, and the social

[1] Such as tax evasion has been defined in the glossary of terms of the Organisation for Economic Co-operation and Development.

[2] Which is understood to mean the share of tax revenues collected in the consolidated State budget on the basis of related taxation, represented by sales, wealth, income, and so forth.

[3] As Dr E. Dinga also points out in the article *"Theoretical Considerations on Tax Evasion vs. Tax Fraud"*.

[4] *Ibidem*.

[5] Holder of the tax liability - self-employed persons, individual or family enterprises, companies, autonomous administrations, national research and development institutes, cooperatives, and so forth. - as well as the persons acting on behalf of the holder.

level - influencing the increase of tax liabilities borne by other taxpayers, respectively.

When it comes to the phenomenon of tax evasion, the underlying causes are deemed to be multiple and, at the same time, complex.

Being one of the most discussed causes, *tax pressure* is defined as an excessiveness of tax liabilities, the increase of which is directly proportional to the commission of the tax evasion offence. It is thus found that the higher the taxes and duties are, the lower the tax revenues are, and taxpayers are more determined to adopt an evasive behaviour.

The *attitude of taxpayers* with regards to the tax liabilities incumbent on them represents another underlying cause for the commission of these offences, precisely as a result of the insufficient tax and civic education of taxpayers who adopt such disobedience to the legal provisions imposed.

On the other hand, *the tax law system appears to be incomplete*, allowing interested parties, through the interpretation of the inaccuracies and ambiguities identified in legal texts and in the content of other provisions, to try to evade the payment of tax liabilities, with the endeavour being, more often than not, successful.

To conclude the foregoing, *tax evasion* may be qualified as a weakness of the tax administration and the rule of law[6]. Thus, situations such as the order of a small pecuniary sanction, or the minimum risk of being identified, can be seen as an invitation to commit tax evasion offences.

The *effect of imitation*, contagion, qualified by specialists as having a particular force, should not be overlooked either in relation to the causes of tax evasion. For definition purposes, we will refer to the certain situation where a compliant taxpayer, who obeys the law and pays the taxes and duties due to the State exactly, observes the "benefits" enjoyed by another with an evasive behaviour - reduced costs, increased profit. The former will be tempted to adopt the same attitude in relation to the tax liabilities incumbent on him, having the firm belief that the lack of sanctions for the other will be enforceable against him as well.

All of the foregoing are negative implications with a direct effect, including on free competition, efficiency, transparency and fairness that

[6] As Dr E. Dinga also points out in the article *"Theoretical Considerations on Tax Evasion vs. Tax Fraud"*.

should exist between commercial agents[7], thus affecting the smooth running of a democratic society.

2. Considerations Regarding the Legal Institution Treated

The new regulation of the provisions of Art. 10 of Law No. 241/2005 on preventing and combating tax evasion may give rise to the idea that our judicial system has an evolutionary trend, which aligns to the new world current sanctioning the acts of tax evasion, in a different manner than old currents, which opted for the enforcement of harsh, custodial sentences.

As a matter of fact, if we observe the chronology of the changes brought to the provisions of Art. 10 of Law No. 241/2005 on preventing and combating tax evasion, we may find that currently more emphasis is placed on recovering the damage caused to the State budget, rather than on sanctioning the individual who committed acts of tax evasion.

Obviously, such a claim cannot lead us to the idea that the individual is protected by the laws of the State to commit such criminal acts, on the contrary, the Romanian legislator has sought to create a milder climate for people who are at their first contact with the criminal law from the perspective of the facts sanctioned under Law No. 241/2005.

In the same sense we also find the claims of the Constitutional Court which, in the content of Decision No. 101/2021 establishes that *the rule criticised does not represent an invitation to violate the law, but includes in itself a form of civil sanction, so that the one who affected the integrity of the public budget will have to pay the damage actually suffered by the State budget, increased by 20 %, on which interest and penalties will be paid. This increase is a form of civil sanction that punishes the deviation from the rules of law.*

After numerous amendments, objections of unconstitutionality that were rejected by the Constitutional Court regarding the new form of the provisions of Art. 10 of Law No. 241/2005, on 31 March 2021, Law No. 55/2021 amending and supplementing Law No. 241/2005 on preventing and combating tax evasion was enacted.

[7] "*Universul Juridic"* Journal, No. 1, January 2016, p. 39.

In its updated form, Art. 10 of Law No. 241/2005 has the following structure:

- Par. (1) In case of committing a tax evasion offence referred to in Art. 8 and 9, if during the criminal investigation or trial, the damage caused is covered in full, and its value does not exceed Euro 100,000, in the equivalent of the national currency, the penalty with a fine may be applied. If the damage caused and recovered under the same conditions is up to Euro 50,000, in the equivalent of the national currency, the penalty with a fine shall be applied.
- Par. (1^1) In case of committing one of the tax evasion offences referred to in Art. 8 and 9, if during the criminal investigation or during the trial and until the ruling of a final court order, the damage caused by committing the act, increased by 20 % of the basis for calculation, plus interest and penalties, is covered in full, the act is no longer punished, with the provisions of Art. 16 par. (1) let. h) of Law No. 135/2010 on Criminal Procedure Code, as further amended and supplemented, being applicable.
- Par. (1^2) The provisions of this article shall apply to all defendants even if they have not contributed to the coverage of the damage referred to in par. (1) and (1^1).
- Par. (2) The provisions referred to in par. (1) shall not apply if the perpetrator has committed another offence laid down under this law within 5 years from the commission of the act in respect of which he benefited from the provisions of par. (1).

Although the manner in which the new amendments are applied and implemented seems, in appearance, simple, in essence, judicial practice has shown us that the legal text, in the manner above, may take various interpretations.

In this regard, we recall, by way of example, case no. 1059/98/2018 where the Bucharest Court of Appeal requested the High Court of Cassation and Justice to pronounce a preliminary ruling in order to settle a legal matter.

In the above-mentioned case, the question referred to the High Court was *whether interest and penalties apply to the damage caused by the commission of the act, increased by 20 % of the basis for calculation, or interest and penalties are calculated only to the damage caused by the commission of the act*.

The panel for the settlement of legal matters within the High Court of Cassation and Justice, admitting the notification set forth by the Bucharest Court of Appeal decided, in the meeting dated 29 September 2021, that "*the interest and penalties referred to in Art. 10 par. (1^1) of Law No. 241/2005 on preventing and combating tax evasion only apply to the damage caused by the commission of the act, without taking into account the increase by 20 % of the basis for calculation.*

Going further, we find that, in the current regulation, for the provisions of Art. 10 of Law No. 241/2005 on preventing and combating tax evasion to become relevant, a number of 4 (four) conditions should be met, these being:

- a damage is caused with the commission of the act;
- the defendant covers the damage caused;
- the repair of the damage is made during the criminal investigation or during the trial;
- the person investigated has not benefited, over the last 5 years, from the provisions of par. (1) of Art. 10, should one want to apply these.

In relation to the foregoing, we point out, however, an omission of the Romanian legislator who, in the last form of Art. 10 of Law No. 241/2005, sanctions more drastically the attempted tax evasion laid down by Art. 8 of Law No. 241/2005 than the same offences committed in consumed form, found in the content of the same latter article.

Pursuant to Art. 8 of Law No. 241/2005:

- par. (1) It constitutes an offence, and is punishable by imprisonment from 3 to 10 years and the prohibition of certain rights or by a fine, the establishment in bad faith by the taxpayer of duties, taxes or contributions, resulting in obtaining, without right, amounts of money by way of reimbursements or refunds from the general consolidated budget or compensations due to the general consolidated budget.
- par. (2) It constitutes an offence, and is punishable with imprisonment from 5 to 15 years and the prohibition of certain rights or by a fine, the association in order to commit the act set forth in par. (1).
- par. (3) The attempt of the acts referred to in par. (1) and (2) shall be punished.

According to the definition established by the Criminal Code, the attempt consists in the execution of the intention to commit the offence, execution which was however interrupted or did not produce its effect.

Basically, from the interpretation of the above legal texts we observe the fact that the author of an attempted act may not use the cause of unpunishment laid down by the new form of Art. 10 of Law No. 241/2005.

Thus, from this point of view, although the author of the attempted act referred to in Art. 8 of Law No. 241/2005 did not produce in fact any kind of damage, he will be sanctioned much more drastically than the author of the same act committed in consumed form and which meets the conditions of typicality referred to in the same Art. 8.

This omission of the legislator is of such nature as to violate the principle of proportionality of the application of criminal penalties, but also the provisions of Art. 1 par. (5) of the Constitution, in terms of requirements on clarity, accuracy and predictability of the law.

The legislator's option of reviewing the personal character of the benefit of the provisions of Art. 10 of Law No. 241/2005 established by Decision No. 9 of 15 March 2017, pronounced by the High Court of Cassation and Justice, we consider cannot be achieved in violation of the conditions on clarity, accuracy and predictability of the law, because it would have as consequence the impossibility of establishing the scope of the defendants who benefit from the provisions of Art. 10 of Law No. 241/2005 from the perspective of the perpetrators investigated for committing offences, under the form of attempt, of those referred to in Art. 8 of Law No. 241/2005 on preventing and combating tax evasion, and such situation is likely to create inequities in terms of the proportionality of punishments that may be applied to the persons committing acts of tax evasion, in particular in relation to the perpetrators of such acts in the form of attempt.

We appreciate that in this regard, the Romanian legislator will have to intervene and make changes in order to restore the balance from the perspective of proportionality of punishments, by actual reference to the manner in which they were committed, and to the actual damage caused.

3. Conclusions

Reality has proven that the establishment of high punishment limits does not lead to a reduction of the evasion phenomenon, just as the identification of milder alternatives does not lead to an open intention of the persons committing such offences to pay the entire damage caused to the State budget.

The Romanian society of today has great difficulty in understanding the concept of regulating causes of unpunishment, mitigation of punishment, etc., being accustomed to the old sanctions and forms of custodial sentences, which seemed more "correct", but without taking into account, upon the issuance of such considerations, the perspective of double gain as well.

From the perspective of double gain, the current form of the provisions of Art. 10 of Law No. 241/2005 is beneficial to all parties. First of all, the perpetrator gains an increased motivation to benefit from the advantages of this new format, in the context in which he becomes forced to make efforts to remove all the consequences of his deeds. On the other hand, the judicial system would benefit in terms of reducing the time dedicated, but especially the costs necessary to cover all endeavours that take place in the criminal investigation and/or in the trial of such acts of criminal nature. Last but not least, the State budget is fully supplied with the amount subject to the offence, or even supplemented by the percentage of 20 %, as laid down by the last form of Art. 10 of Law No. 241/2005, if the person investigated opts for a total benefit of the cause of unpunishment laid down by the law on preventing and combating tax evasion.

We could say this is one of the few cases where the interests of the judicial bodies and those of the perpetrators of such offences converge, with their purpose being, in the end, a common one.

From this perspective, we can conclude that the amendment of the provisions of Art. 10 of Law No. 241/2005 on preventing and combating tax evasion, and the current regulation, will encourage, in the future, the compensation of the damages caused to the State budget, and this should be, ultimately, the main purpose pursued by the legislator by establishing criminal sanctions, applicable to offences against the State's capital.

BIBLIOGRAPHY

1. Constitution of Romania, published in the Official Gazette no. 767/30.10.2003.
2. Criminal Code - Law no. 287/2009, published in the Official Gazette no. 510/24.07.2009 and entered into force on 01.02.2014.
3. Criminal Procedure Code - Law no. 135/2010, published in the Official Gazette no. 486/15.07.2010 and entered into force on 01.02.2014.
4. Law No. 241/2005 for preventing and combating tax evasion, published in the Official Gazette no. 672/27.07.2005.
5. Law No. 55/2021 regarding the amendment and completion of Law no. 241/2005 on preventing and combating tax evasion, published in the Official Gazette no. 332/04.01.2021.
6. D. Dediu, *Tax evasion. Judicial practice*, Universul Juridic, Publishing House, Bucharest, 2018.
7. E. Ene-Corbeanu, *Tax evasion*, Hamangiu Publishing House, Bucharest, 2020.
8. A. Tatoiu, *Tax evasion. A legal-economic approach*, Universul Juridic Publishing House, Bucharest, 2020.
9. B. Virjan, *The criminal offence of Tax evasion,* 3rd ed., C.H. Beck Publishing House, Bucharest, 2020.
10. C. Voicu, G.C. Militaru, I. Ardeleanu, *Investigation of Tax Evasion as criminal offence,* Superior Council of Magistracy, Bucharest, 2015.

CONSIDERATIONS ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN RELATION TO THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN THE TRANSITIONAL PERIOD AND AFTER 1 JANUARY 2021

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ABSTRACT

The United Kingdom of Great Britain and Northern Ireland's departure from the European Union has created a series of grievances on many levels, with real and serious effects on the economy of this country and the other countries with which it had trade relations, the free movement of people and much more. Substantial changes are also to be found in international judicial cooperation in criminal matters, with the clarification that the institution of the European arrest warrant is to be found in a different form in the relationship between the United Kingdom and Romania, and the procedure for recognising and enforcing on Romanian territory certain judgments pronounced by the judicial authorities of the United Kingdom returns, in practice, with a few exceptions, to an old form of international cooperation provided for in the European Convention on the Transfer of Sentenced Persons, adopted in Strasbourg on 21 March 1983, and in the protocols to the Convention signed subsequently.

KEYWORDS: *transitional period; Council Framework Decision 2008/909/JHA; European Convention on the Transfer of Sentenced Persons;*

I. Preliminary remarks

As of 1 January 2021, the United Kingdom of Great Britain and Northern Ireland has definitively withdrawn from the European Union. In this regard, we consider it useful to recall that until this date, the United Kingdom was in a transitional period for one year, i.e. from 31 January 2020 until 31 December 2020, when the British State retained all the

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rights and obligations of an EU Member State, even if it was no longer represented in the European Union institutions.

Thus, it should be noted that for the transitional period, the European Union, and the European Atomic Energy Community, on the one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand, have signed the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community[1]. On reading the content of this Agreement, we noted that the ongoing cooperation actions in criminal matters were essentially based on the same acts as during the period when the British State was a Member State[2]. In concrete terms, we recall only by way of example that this Agreement provided that in the United Kingdom, as well as in Member States in situations involving the United Kingdom, Council Framework Decision 2002/584/JHA[3] continued to apply during the transitional period in respect of European arrest warrants where the requested person was arrested before the end of the transitional period for the purpose of executing a European arrest warrant, irrespective of the decision of the executing judicial authority that the requested person should remain in detention or be provisionally released; Council Framework Decision 2005/214/JHA as regards decisions received before the end of the transitional period by the central authority or competent authority of the executing State or by an authority of the executing State which does not have competence to recognise or enforce a decision but which transmits the decision ex officio to the competent authority for enforcement[4]; Council Framework Decision

[1] Published in the Official Journal of the European Union L 29/7 of 31 January 2020.

[2] Title V, called "*Ongoing police and judicial cooperation actions in criminal matters*", Article 62 "*Ongoing judicial cooperation actions in criminal matters*" of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

[3] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, published in OJ L 190, 18.07.2002.

[4] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, published in OJ L 76, 22.3.2005.

2008/909/JHA[5] as regards judgments received before the end of the transitional period by the executing State's competent authority or by an authority of the executing State which does not have competence to recognise or execute a decision but which transmits the decision ex officio to the competent authority for enforcement and for the purposes of Article 4 paragraph (6) or Article 5 paragraph (3) of Framework Decision 2002/584/JHA, if the Framework Decision is applicable under Council Framework Decision 2002/584/JHA on the European arrest warrants, etc.

From 1 January 2021, since the transitional period ended on 31 December 2020, as indicated above, the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand, entered into force[6].

II. The question of law

While for the transitional period the European Union and the United Kingdom of Great Britain and Northern Ireland have expressly provided the conditions under which international judicial cooperation in criminal matters is to be carried out, the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand[7], have not regulated the enforcement on the territory of a Member State of the European Union of custodial sentences or measures involving deprivation of liberty imposed by the courts of the United Kingdom of Great Britain and Northern Ireland, with the exceptions provided in Article 81 paragraph 1 letter f[8] and art. 84 letter b[9] of Title VII, called *'Surrender'*, of the Agreement.

[5] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, published in OJ L 327, 05.12.2008.

[6] Published in the Official Journal of the European Union L 444/14 of 31.12.2020.

[7] Which we will hereafter refer to as the "Agreement".

[8] According to Article 81 para. 1 lit. f) of Title VII of the Agreement, with the marginal demarcation *"Other grounds for non-execution of the arrest warrant", "The execution of the arrest warrant may be refused: if the arrest warrant has been issued for*

Specifically, we note that the ***Council Framework Decision 2008/909/JHA of 27 November 2008*** on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union ***will no longer apply to international judicial cooperation in criminal matters between the United Kingdom and Romania from 1 January 2021.***

Thus, as a matter of priority, we note that this form of international judicial cooperation in criminal matters was regulated, up to and including 31 December 2020, by the Romanian legislator in the content of Law no. 302/2004 on international judicial cooperation in criminal matters[10], Title VII, with the marginal title "*Provisions on cooperation with the Member States of the European Union in the application of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union*", the provisions of this title being obviously

the purpose of enforcing a custodial sentence or detention order and the requested person remains in the executing State, is a national or a resident of that State, and that State undertakes to enforce the sentence or detention order in accordance with its national law; if the consent of the requested person is required for the transfer of the custodial sentence or detention order to the executing State, the executing State may refuse to execute the arrest warrant only after the requested person consents to the transfer of the custodial sentence or detention order".

[9] Art. 84 letter b of Title VII of the Agreement, entitled "*Guarantees to be given by the issuing State in special cases",* provides that *"The execution of the arrest warrant by the executing judicial authority may be subject to the following guarantees: if the person who is the subject of an arrest warrant for the purpose of prosecution is a national or resident of the executing State, surrender may be subject to the condition that the person, after being heard, shall be returned to the executing State to serve there the custodial sentence or detention order passed against him in the issuing State. If the consent of the requested person is required for the transfer of the penalty or detention order to the executing State, the guarantee that the person concerned is returned to the executing State to serve his or her sentence shall be subject to the condition that the requested person, after being heard, consents to be returned to the executing State*".

[10] Published in the Official Gazette of Romania, Part I no. 594 of 1 July 2004, in force since 30 August 2004, republished in the Official Gazette of Romania, Part I no. 411 of 27 May 2019.

supplemented, where appropriate, by the provisions laid down in the other titles and chapters of the aforementioned law.

In this regard, we recall a case decision handed down on appeal by the High Court of Cassation and Justice[11] which held, as a matter of priority, that the provisions of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of one hand, and the United Kingdom of Great Britain and Northern Ireland, of the other hand, are applicable between Romania and the United Kingdom, and that, pursuant to Article 62 para. (1) letter (f) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, "*In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts shall apply as follows: Council Framework Decision 2008/909/JHA (52) shall apply: in respect of a judgment received before the end of the transitional period by the competent authority of the executing State or by an authority of the executing State which does not have competence to recognise and enforce the judgment but which forwards the judgment ex officio to the competent authority for enforcement*".

Therefore, taking into account that the judicial authorities in the United Kingdom have sent to the competent Romanian authorities a request for recognition of a Romanian citizen's conviction decisions prior to 31 December 2020 (i.e. during the transitional period), in conjunction with Article 153 para. 2 of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, called "*Scope of application*", according to which "*This Title shall also apply in relation to States with which Romania has concluded a treaty containing provisions similar to the Framework Decision*", the High Court found that the provisions of Article 166 para. 3 of Law no. 302/2004 on international judicial cooperation in criminal matters, republished are applicable, which is why the object of the judicial procedure for recognition and enforcement of the judgment was to verify the conditions laid down in Article 167 and, if they were met, to enforce the judgment transmitted by the issuing State, namely the United Kingdom.

[11] Decision no. 102/A of 26 March 2021 of the High Court of Cassation and Justice, Criminal Division, unpublished.

We also note by way of information that during the transitional period, following the examination of relevant judgments, we found that in general the courts applied the provisions of Law no. 302/2004 on international judicial cooperation in criminal matters in relation to the United Kingdom, without, however, expressly stating all the provisions mentioned above.

As far as the current period is concerned, we have not been able to identify judicial practice so far pending at Supreme Court level in order to be able to give the High Court's opinion on the procedure to be applied in relation to the British State.

Therefore, following the examination of specialised websites[12] and participation in the webinar "*Impact of Brexit in judicial cooperation in criminal matters*"[13], we note that the new judicial procedure for the recognition and enforcement of a judgment given by the UK judicial authorities will be carried out in accordance with the provisions of the ***1983 European Convention on the Transfer of Sentenced Persons***[14] and, where applicable, those of the Additional Protocol to the Convention[15] and the Protocol amending the Additional Protocol to the Convention[16].

[12] For example, see https://www.eurojust.europa.eu/sites/default/files/2021-01/judicial_cooperation_in_criminal_matters_eu_uk_from_1_january_2021.pdf.

[13] 23 March 2021, participation in the webinar "*Impact of Brexit in judicial cooperation in criminal matters*" - CR/2021/27, *Speaker*: Mr. David DICKSON, Hight Court Prosecutor, Edinburgh, Ms. Joana Ferreira, Prosecutor; International Cooperation in Criminal Matters, Office of the Prosecutor General, Lisbon, Ms. Tania Schröter, Deputy Head of Procedural Criminal Law Unit, DG Justice and Consumers, European Commission, Brussels, organised on the online platform Zoom.

[14] By Law No 76/1996, in force since 19 July 1996, published in the Official Gazette, Part I, No. 154 of 19 July 1996, the Romanian Parliament ratified the European Convention on the Transfer of Sentenced Persons, adopted in Strasbourg on 21 March 1983.

[15] According to the data provided by the Council of Europe on its official website, this Protocol was ratified by Romania on 7 December 2001 and entered into force on 1 April 2002, while the United Kingdom ratified it on 17 July 2009, and it entered into force on 1 November 2009. See https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=167.

[16] According to the data provided by the Council of Europe on the official website, this Protocol is not signed by Romania, and the British state signed it on 07.10.2021. See https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=222.

The aim of this Convention is specifically to reintegrate a sentenced person into society so that foreign nationals who are deprived of their liberty as a result of a criminal offence can serve their sentence in their social environment of origin[17].

In our opinion, it is also of interest for the pending study that, according to some authors[18], Law no. 302/2004 on international judicial cooperation in criminal matters is "*particularly harmonised*" with the provisions of the 1983 European Convention on the Transfer of Sentenced Persons.

Moreover, it is noted that according to Art. 4 para. 1 of Law no. 302/2004 on international judicial cooperation in criminal matters, its provisions apply on the basis of and for the enforcement of the rules on judicial cooperation in criminal matters contained in the international legal instruments to which Romania is a party, which it supplements in unregulated situations.

Conclusions

In conclusion, we note that, as of 1 January 2021, the provisions of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand, are applicable between Romania and the United Kingdom, for the situations expressly regulated and indicated above, as well as the provisions of the European Convention on the Transfer of Sentenced Persons, ratified by Law no. 76/1996, and of the Additional Protocol to the European Convention on the Transfer of Sentenced Persons.

In addition, we note that, under Article 153 para. (2) of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, called "*Scope of application*", "*This Title shall also apply in relation to States with which Romania has concluded a treaty containing provisions similar to the Framework Decision*".

[17] F.R. Radu, *Drept european și internațional penal*, C. H. Beck Publishing House, Bucharest, 2013, p. 123.

[18] F.R. Radu, *Cooperare judiciară internațională și europeană în materie penală. Îndrumar pentru practicieni,* Wolters Kluwer Publishing House, Bucharest, 2008, p. 110.

Thus, given that the provisions of the European Convention on the transfer of sentenced persons are similar to those laid down in the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, in our opinion, from a systematic interpretation of all the above-mentioned legal provisions, it follows that, under certain conditions, the provisions of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, also apply. However, it remains to be seen what the case law guidelines will be in this matter.

III. REFERENCES

1. Boroi, I. Rusu, M. I. Rusu, *Tratat de Cooperare judiciară internațională în materie penală,* Ed. C.H. Beck, Bucharest, 2016.
2. A. Stancu, *The institution of extradition - the modality of international judicial cooperation in criminal matters. Titu Maiorescu University International Conference 19-21 November 2015*; ISSN 2248-0064; ISBN 978-3-9503145.
3. F.R. Radu, *Drept european și internațional penal,* C. H. Beck Publishing House, Bucharest, 2013.
4. F.R. Radu, *Cooperare judiciară internațională și europeană în materie penală. Îndrumar pentru practicieni,* Wolters Kluwer Publishing House, Bucharest, 2008.
5. The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.
6. The Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on one hand, and the United Kingdom of Great Britain and Northern Ireland.
7. The European Convention on the Transfer of Sentenced Persons, adopted at Strasbourg on 21 March 1983.
8. The Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial

sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.
9. Law no. 302/2004 on international judicial cooperation in criminal matters.
10. Law no. 76/1996 on the ratification of the European Convention on the Transfer of Sentenced Persons, adopted in Strasbourg on 21 March 1983.
11. https://www.eurojust.europa.eu/sites/default/files/2021-01/judicial_cooperation_in_criminal_matters_eu_uk_from_1_january_2021.pdf.
12. https://www.coe.int/en/web/transnational-criminal-justice-pcoc/transfer-of-sentenced-persons-council-of-europe-standards
13. https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:22020A1231(01)&from=RO.
14. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=112.
15. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=222.
16. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=167.

THE CONCURRENCE BETWEEN MANSLAUGHTER AND NON-OBSERVANCE OF THE LEGAL SECURITY AND SAFETY AT WORK MEASURES CULPABLY COMMITTED. THEORETICAL AND JUDICIAL PRACTICE ASPECTS

George NICA *

ABSTRACT

In this article, the author thoroughly examines the problem of the ideal concurrence between manslaughter and the non-observance of the legal measures of safety and health at work, committed culpably. Both the doctrinal guidelines and the judicial practice in this matter are analyzed, including aspects derived from the case law of the European Court of Human Rights. The legal provisions are critically assessed, including from the perspective of constitutionality, in the light of the recent case law of the Constitutional Court, while certain proposals of lege ferenda are being formulated.

KEYWORDS: *manslaughter; non-observance of the legal measures of safety and health at work; ideal concurrence; judicial practice;*

Introductory considerations

Manslaughter is regulated by art. 192 of the current Criminal Code, in the contents of which the aggravated version from art. 178 para. 2 of the Criminal Code of 1969 - professional manslaughter - and the aggravated version of the last paragraph on the plurality of victims were taken from the standard previous regulation. Also, for the aggravated version from art. 192 para. 2 Criminal Code the solution of the concurrence of offences was explicitly regulated, in the event where the non-observance of some legal provisions or of some provision represents in itself an offence. The legislator therefore abandoned the aggravated versions of paragraphs 3 and 4 of the former regulation, replacing them by establishing the application of the rules for sanctioning the concurrence of offences. Thus, for example, in case of committing an act of mans-

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laughter by a driver with a blood alcohol content that exceeds the legal limit, manslaughter and the offence provided by art. 336 para. 1 of the Criminal Code will be concurrently applicable. Therefore, the thesis of the complex (absorbing) crime, adopted by Decision no. I of January 15th, 2007 given in the resolution of an appeal in the interest of the law by the High Court of Cassation and Justice - United Sections, is no longer valid.[1]

In the previous regulation, the aggravated version from art. 178 para. 3 of the Criminal Code of 1969 provided for a greater punishment when manslaughter was committed by a driver of a mechanically propelled vehicle, having a blood alcohol content that exceeds the legal limit or is in a state of intoxication, and by the aggravating version from art. 178 para. 4 of the same code, manslaughter committed by a person in the exercise of a profession or trade and who was in a state of intoxication was sanctioned.

Therefore, the current regulation of the aggravated provisions of art. 192 para. 2 Criminal Code is not a coincidence, the legislator not agreeing with the interpretation previously reached by the Supreme court, which had decided that: 1) driving on public roads a vehicle or tram by a person with a blood alcohol content exceeding the legal limit and who commits manslaughter on the occasion constitutes the single, complex offence of manslaughter, provided in art. 178 para. 3 thesis I of the Criminal Code of 1969, in which the offence provided in art. 87 para. 1 of the Government's Emergency Ordinance no. 195/2002 on traffic on public roads, in force at that time, is absorbed; 2) manslaughter in the same circumstances, committed by a driver having a blood alcohol content below the legal limit, but who is in a state of intoxication proven clinically or by any other means of proof, constitutes the sole offence of manslaughter, provided of art. 178 para. 3 Thesis II of the Criminal Code of 1969; 3) manslaughter in the same circumstances, committed by a driver with a blood alcohol content below the legal limit, but whose intoxication has not been established by any other means of proof,

[1] G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *Codul penal. Comentariu pe articole [Criminal Code. Comments per articles]*, 2nd version, revised and completed, C.H. Beck Publishing House, Bucharest, 2016, p. 535-536.

constitutes the sole offence of manslaughter provided in art. 178 para. 2 of the Criminal Code of 1969[2].

This interpretation of the Supreme Court was possible in the context of the lack of explicit regulation for the solution of the concurrence of offences between manslaughter and driving a vehicle under influence, as provided in art. 87 para. 1 of the Government's Emergency Ordinance no. 195/2002. In the current regulation, however, such an interpretation could no longer be given by the courts of law, not even by the High Court of Cassation and Justice (the Panel for settling appeals in the interest of the law or the Panel for settling legal issues in criminal matters), but only by the court of constitutional control (currently the Constitutional Court), in the event of finding the total or partial unconstitutionality of the legal text that establishes the solution of the concurrence of offences.

In our opinion, one could also discuss the possible unconstitutionality of the phrase "*or of the precautionary measures*" from the content of art. 192 para. 2 of the Criminal Code, in the light of the recent case law of the contentious constitutional court regarding the qualitative conditions of the law, imposed both by the Constitution and by the Convention for the Protection of Human Rights and Fundamental Freedoms. In this sense, through the Decision no. 405/2016[3], the Constitutional Court found that "the provisions of art. 246 of the Criminal Code of 1969 and of art. 297 para. 1 of the Criminal Code are constitutional insofar as the phrase "*fulfils in a defective manner*" from their content means "*fulfils by breaching the law*". The Court held that the phrase in question was not stated by the legislator with sufficient precision as to allow the citizen to adapt his conduct accordingly, so as to be able to foresee, to a reasonable extent, in relation to the circumstances of the case, the consequences that would could result from a certain deed and correct one's conduct. Thus, the Court held that the defect in carrying out an act must be established only by reference to the primary legislation, respectively laws, as formal acts of the Parliament, as well as ordinances or emergency ordinances of

[2] Decision no. I of January 15th, 2007, given by the High Court of Cassation and Justice - United Panels in the file no. 17/2006 - referral in the interest of the law, published in the Official Gazette no. 81 dated February 1st, 2008.

[3] Published in the Official Gazette no. 517 dated July 8th 2016.

the Government. In the same sense, by Decision no. 518/2017[4], with the same reasoning, the Constitutional Court found that "the provisions of art. 249 para. 1 of the Criminal Code of 1969 and of art. 298 of the Criminal Code are constitutional insofar as the phrase "*its defective fulfilment*" from their content means "*fulfilment through breaching of the law*". Likewise, we are of the opinion that it might be the case for a possible non-compliance with the constitutional requirements provided in art. 1 para. 5 and art. 21 para. 3 of the Constitution and as regards the phrase "*of the obligations and measures established regarding safety and health at work*" from the content of art. 350 para. 1 of the Criminal Code, especially in the context in which the marginal name of the offence refers to **legal** measures of safety and health at work.

Thus, it would not surprise us that, by future decisions of the Constitutional Court, it should be noted that the provisions of art. 192 para. 2 of the Criminal Code are constitutional insofar as the phrase "*or of the precautionary measures*" means "*or of the precautionary measures established **by law***", and the provisions of art. 350 para. 1 of the Criminal Code are constitutional insofar as the phrase "*obligations and measures established with regard to safety and health at work*" means "*obligations and measures established **by law** on safety and health at work*".

Theoretical aspects

The first aggravated version provided in art. 192 para. 2 of the Criminal Code refers to manslaughter as a result of non-compliance with legal provisions or precautionary measures for the exercise of a profession or trade or for performing a certain activity. In practice, this variant of manslaughter is the most common, the doctrine denominating it "professional or special manslaughter"[5]. As a rule, these are traffic accidents, caused by non-compliance with the rules on traffic on public roads, or work accidents, caused by non-compliance with labour protection rules. The variant can also be found in practice by breaching other technical rules on the exercise of a profession, such as, for example, those relating to the medical profession (medical malpractice). When

[4] Published in the Official Gazette no. 765 dated September 26th 2017.

[5] O.A. Stoica, *Drept penal. Partea specială [Criminal Law, Special Part]*, Ed. Didactică și Pedagogică, Bucharest, 1976, p. 80.

non-compliance with a legal provision is itself an offence (for example, driving without a license, driving a vehicle under the influence of alcohol or other substances, or a crime related to labour protection), there will be a concurrence of offences between manslaughter in this aggravated variant and the respective offence. In the event that the issue of professional misconduct arises, the incurrence of criminal liability is not automatic, in the sense that it does not result from the mere performance of a regulated activity. In these cases, the existence of guilt in the form of negligence will have to be proved, as it cannot be presumed.[6] In practice, it was decided, for example, that the deed of the doctor who fulfilled his specialized duties and performed surgery, but the victim died due to another undiscovered disease, does not meet the constitutive elements of the offence of manslaughter because guilt is missing[7].

Manslaughter as a result of non-compliance with legal provisions or precautionary measures for the exercise of a profession or trade or for performing a certain activity regulated by the provisions of art. 192 para. 2 Criminal Code represents an aggravated form of the offence, punished more severely, respectively with imprisonment from 2 to 7 years compared to the punishment of imprisonment from one to 5 years provided for the simple form.

Two conditions are required to retain this aggravated form. The first condition is that the culpable deed be committed while the agent actually carries out a profession, a trade or a certain activity. Therefore, it will be necessary to identify in practice those precautionary measures which the agent is required to comply with. If the deed is not committed during the exercise of the profession, trade or activity regulated by legal norms, then there will be no correlative obligation to comply with such provisions, and the offense of manslaughter in the basic form regulated by the provisions of art. 192 para. 1 of the Criminal Code will be considered, if the existence of a fault in the result of the deed is found. The second condition is the existence of legal provisions or precautionary measures for the exercise of the profession, trade or activity in which the deed was committed, such as, for example, the rules on road safety provided by the Government's Emergency Ordinance no. 195/2002, the norms regarding

[6] G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *op. cit.*, p. 537.

[7] Bucharest Court of Appeal, Ist Criminal Panel, Decision no. 722/2000.

safety and health at work, the quality of constructions, etc. In any case, in order to take into account the breaching of certain rules, they must be regulated, have a formal existence, regardless of the source of their enforceability, respectively normative or individual acts.[8]

If the non-observance of the legal provisions or of the precautionary measures constitutes in itself an offence, the concurrence of the offences between manslaughter, in the aggravated form provided by art. 192 para. 2 Criminal Code, and the act of breach of the duty of care, shall be considered. This solution is explicitly provided by the last sentence of art. 192 para. 2 of the Criminal Code, which establishes that, when the breach of the legal provisions or of the precautionary measures constitutes in itself an offence, the rules regarding the concurrence of the offences apply. However, there are exceptions to this rule, for example the relationship between manslaughter in the aggravated form of art. 192 para. 2 Criminal Code and the offence of nonfeasance of duty, the two having an almost identical content, the essential difference between them being the result produced by the guilty conduct, respectively the damage of the rights or legitimate interests of a person in the case of nonfeasance of duty and the death of the victim in the case of manslaughter[9].

The solution of the concurrence of offences is also expressly regulated in the case of bodily injury that occurs as a result of non-compliance with legal provisions or measures of precaution or to carry out an activity, according to the provisions of art. 196 para. 5 Criminal Code.

Therefore, we can conclude that the legislator of the new Criminal Code, seeing the interpretation that the High Court of Cassation and Justice gave to the old legal provisions contained in art. 178 para. 3 of the Criminal Code of 1969, through the Decision no. I/2007 given for the settlement of the appeal in the interest of the law, felt the need to clarify this legal situation, in the sense of explicitly sanctioning, according to the provisions relating to the concurrence of offences, guilty conduct that affects both social values related to the protection of life and the bodily

[8] S. Bogdan, D.A. Şerban, *Drept penal. Partea specială. Infracţiuni contra persoanei şi contra înfăptuirii justiţiei [Criminal law. The special part. Offenses against the person and against the administration of justice]*, 2nd ed., revised and completed, Universul Juridic, Bucharest, 2020, p. 104-105.

[9] *Idem*, *op. cit.*, p. 105.

integrity of persons, as well as those who protect the proper conduct of activities regulated by law, such as labor relations.

In the judicial practice, numerous cases of manslaughter have been pointed out as a result of traffic accidents, in certain situations this offence concurring with certain traffic offences, such as driving a vehicle without a driving license, provided by art. 335 Criminal Code, or driving a vehicle under the influence of alcohol or other substances, provided by art. 336 Criminal Code.

In the case of work accidents, most of the time manslaughter shall be considered in concurrence with the offences specific to this field, respectively those regulated by art. 349 and art. 350 of the Criminal Code and which are part of Chapter IV - Offences relating to the regime established for other activities regulated by law, of Title VII - Offences against public safety, in the special part of the Criminal Code. Given that we talk about offences of a different nature, we will be in the presence of a heterogeneous concurrence of offences.

Justification for considering the concurrence between manslaughter stipulated by art. 192 para. 2 Criminal Code and the offence stipulated by art. 350 para. 1 and 3 of the Criminal Code (negligent non-compliance with the legal measures of safety and health at work) can be argued, first of all, through the nature of these offences, which have a different legal object. While, through manslaughter the legislator chose to protect the social values related to the person's life, by regulating it in contents of the special part of the Criminal Code, Title I - Offences against the person, Chapter I - Offences against life, through the offence stipulated in art. 350 Criminal Code the social values related to ensuring the safety and protection of the health of the workers within the development of the labour relations are protected, by the obligation to observe the legal measures established in this respect.

In order to be able to consider the offence stipulated in art. 350 Criminal Code, it is necessary to have a prerequisite situation consisting in the formal enactment of certain obligations and measures regarding safety and health at work. Article 7 para. 1 of the Law on safety and health at work no. 319/2006 provides in a generic way the aspects covered by these measures: ‘’a) ensuring the safety and protection of the workers' health; b) prevention of occupational risks; c) information and training of workers; d) ensuring the organizational framework and the means necessary for safety and health at work”.

We point out that not any non-compliance with the legal measures of safety and health at work meets the constitutive elements of the offence provided by art. 350 of the Criminal Code, but only that conduct which creates an imminent danger of a work accident or occupational disease[10], since what is as issue is therefore an essential requirement of the material element that is part of the objective side of the offence.

The demise of the victim is the more serious result that can be reached or not, following the culpable non-compliance with the obligations or the measures established in connection with the activity carried out, manslaughter being a result offence, while the offence provided by art. 350 para. 1 and 3 Criminal Code is a dangerous offence, for its consideration being only necessary to create an imminent danger of an accident at work or an occupational disease.

Carrying out the offences provided by art. 349 and 350 of the Criminal Code can often lead to the production of a result, such as personal injury or death of the victim, but it is not absorbed as a result of these offences, which remain dangerous, but fall within the category of an offence against life or bodily integrity, committed in ideal concurrence with the offence provided by art. 349 or art. 350 Criminal Code.[11]

In the doctrine and in the judicial practice, it has been constantly stated that the offences that enter into a formal or ideal concurrence under the conditions of art. 38 para. 2 Criminal Code can all be committed, even all of them, by negligence[12]. One such example is manslaughter following the non-compliance with the labour protection

[10] According to art. 5 of Law no. 319/2006, published in the Official Gazette of Romania, Part I, no. 646 of July 26th, 2006, the legal definitions of these notions are the following: letter g) work accident - violent injury to the body, as well as acute occupational intoxication, which occur during the work process or in the performance of duties and which cause temporary incapacity for work for at least 3 calendar days, disability or death; letter h) occupational disease - the condition that occurs as a result of exercising a trade or profession, caused by harmful physical, chemical or biological agents characteristic of the workplace, as well as by overstressing various organs or systems of the body in the work process; letter l) serious and imminent danger of injury - the concrete, real and current situation which lacks only the triggering opportunity to cause an accident at any time.

[11] G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *op. cit.*, p. 1170.

[12] F. Streteanu, D. Nițu, *Drept penal. Partea generală [Criminal law, General Part]*, vol. 2, Ed. Universul Juridic, Bucharest, 2018, p. 103.

rules relating to agricultural work. Likewise, there is an ideal concurrence of offences and not a single offence if the bodily integrity of two persons has been produced as a result of driving the vehicle without observing the traffic rules. Also, the formal concurrence of offences should not be confused with the concurrence of legal texts or qualifications. In this case, being a plurality of norms, we are in the presence of an apparent plurality of offences, only one of the rules being applicable.[13]

Also, the time of the occurrence of the two offences that make up the ideal concurrence is different. Manslaughter takes place at the time of the result required by law, namely the death of the victim, which may occur at a date later than the action or inaction of the perpetrator (for example, if the victim, in serious condition, is transported to hospital and, after a period, dies), while the offence provided by art. 350 para. 1 and 3 Criminal Code usually takes place instantaneously, i.e. the moment of breaching the obligations and established measures regarding safety and health at work, which in practice often coincides with the creation of the imminent danger of an accident at work or occupational disease. Even if it is possible to avoid an accident at work by an employee in the vicinity of the danger, this hypothesis does not protect from liability the person who, through his guilty deed, created the imminent danger, because the avoidance occurs later, due to an action outside the subjective element of the perpetrator.

From the perspective of the case law of the European Court of Human Rights, we note that the provisions of art. 4 of Protocol no. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right not to be tried or punished twice) does not apply in the case of the ideal concurrence of offences, i.e. when one and the same criminal act constitutes two distinct offences. This case-law of the European Court of Justice was established by the decisions given in the cases of *Oliveira v. Switzerland* of 30 July 1998, *Gradinger v. Austria* of 19 May 1994 and 23 October 1995, *Ponsetti and Chesnel v. France* of 14 September 1999 and *Zigarella v. Italy* of 3 October 2002.[14]

[13] C. Sima, *Drept penal. Partea generală [Criminal law, General Part]*, vol. II, Ed. Hamangiu, Bucharest, 2015, p. 51.

[14] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Vol. I. Drepturi și libertăți [European Convention on Human Rights. Comment on articles. Vol. I. Rights and freedoms]*, Ed. ALL Beck, Bucharest, 2005, p. 1155-1162.

The evolution of judicial practice. Comments

The consideration of the concurrence of offences between manslaughter and non-compliance with legal measures of safety and health at work has been a constant practice, both in older and the more recent case law.

Thus, in judicial practice it was decided that there is a concurrence of offenses if there was also the loss of the life of one or more persons, in the case of the non-compliance with the provisions of the labour protection rules on mechanized agricultural works, according to which the defendant was obliged to warn the service personnel or the machine operators, as well as those around the power unit about the intention to perform manoeuvres[15].

It was also decided that we are in the presence of the offence of non-compliance with the legal measures of safety and health at work in the situation where "it results from the documents of the file and especially from the individual employment contract, as well as from the job description that the defendant was employed as a driver and his main duties were to ensure the proper functioning of the vehicle both before the start of the trip and during the trip and to comply with the rules of travel on public roads in accordance with the Road Regulations in force. The defendant was fulfilling these duties when he was driving the vehicle he received, even if it was outside the normal working hours, because at that time he was during the work process within the meaning of art. 24 para. 1 of Law no. 90/1996 (correspondent of art. 38 of Law no. 319/2006), and by breaching the labour safety norms he led to the occurrence of the accident resulting in two victims." [16] We are of the opinion that the court of law took the right decision when ruling that the deed of the defendant is the object of the offence stipulated by art. 37 of Law no. 90/1996, which became art. 38 of Law no. 319/2006.

[15] Supreme Court, criminal decision no. 1475/1979, in V. Dobrinoiu et al., *Noul Cod penal comentat. Partea specială [New criminal code commented, Special Part]*, 2nd ed., Ed. Universul Juridic, București, 2014, p. 795.

[16] Vaslui Tribunal, criminal decision no. 78 dated 22nd of April 2009, cited in G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *op. cit.*, p. 1169-1170.

In the same sense, the case law has ruled that the deeds of the defendant who, on 12.11.2011, while carrying out his activity as manager of the workplace (site manager) within SC DII SRL, on the one hand, did not comply with the obligation regarding occupational safety and health established by the decision of the company's administrator, a measure also provided by art. 22 of Law no. 319/2006, respectively to follow the subordinate workers regarding the application of the work norms, as well as the observance of the instructions and the legislation of labour safety throughout the carried out activities, to remove from the workplace those individuals who did not observe instructions and legislation in the field of safety at work and not to subject subordinate workers to the risk of injury and, on the other hand, failed to comply with the collective protection measures against the collapse of the banks provided for in the provisions of the Government's Ordinance no. 300/2006, although the person in charge had at his disposal panels to support the banks provided by the company, facts that led to the death of the victim as a result of the collapse of one of the banks of the canal and the creation of an imminent danger of an accident at work, typical elements of the offences of manslaughter and non-compliance with legal security and health measures at work[17].

Likewise, the deeds of the defendant who, on 16.12.2009, around 14:00, following the non-compliance with the obligations and measures established regarding safety and health at work, fired a gun on a group of dogs, in these circumstances deadly shooting the victim TLA who had gotten out of the car that was interposed between the defendant and the group of dogs, meet the constitutive elements of the offences provided by art. 38 para. 2 of Law no. 319/2006 and art. 178 para. 2 Criminal Code from 1969, with the application of art. 33 lit. b) and art. 34 Criminal Code of 1969, the two acts being committed in the form of the ideal concurrence of crimes.[18]

[17] Bucharest Court of Appeal, 2nd Criminal Panel, decision no. 119/27.01.2016, in A.V. Iugan, *Codul penal adnotat. Partea specială. Jurisprudență națională 2014-2020 [Annotated criminal code. The special part. National jurisprudence 2014-2020]*, Ed. Universul Juridic, Bucharest, 2020, p. 56.

[18] T. Toader, *Drept penal român. Partea specială [Romanian Criminal Code. Special part]*, 7th ed., Ed. Hamangiu, Bucharest, 2012, p. 53.

In another situation, the common fault of the employer (pursuant to art. 37 of Law no. 319/2006) and of the employee (pursuant to art. 38 of Law no. 319/2006) was noted, establishing that the deed of the defendant U.M. who, while driving a service vehicle (forklift) without ISCIR authorization, on the main alley of SC F. Romania SA, hit with the blades of the forklift the left rear wheel of the car driven by another employee, which got overturned, the impact resulting in the death of another person employed by the same company, meets the constituent elements of the offences stipulated in art. 178 para. 2 Criminal Code of 1969 and art. 38 para. 1 of Law no. 319/2006, in ideal concurrence. At the same case, the deed of the defendant ZC, who, as director of SC Z. SRL Brănești, did not take the legal measures regarding the authorization of his employee, UM, in order to obtain from ISCIR the necessary forklift authorization for handling the forklift that he was using, meets the constitutive elements of the offence stipulated in art. 37 para. 1 of Law no. 319/2006.[19] In this situation, we believe that, in principle, the employer cannot be held liable for the offence of manslaughter, because there is no causal link between his deed, which remains a dangerous one, and the result produced (killing the victim), which is the immediate result of handling of the forklift by the employee in a defective manner.

At the same time, we are of the opinion that, in certain situations, the employer could also be liable for manslaughter, for example if the latter had explicitly ordered or had become aware of the illegal action of the employee who had previously not driven such a vehicle. In this case one can speak of a common fault of the employer and the employee, both being aware of the lack of the necessary authorization and the total lack of experience of the employee regarding the handling of the vehicle. Indeed, it can be argued in such a case that the employer could and should have anticipated that the handling of a forklift by an unauthorized employee with no practical experience, in a perimeter where there were other persons, could lead to particularly dangerous consequences.

As the legal person can be the active subject of both offences analyzed, it can therefore also be held criminally liable for the concurrence of offences between manslaughter and non-compliance with

[19] Craiova Courthouse, criminal decision no. 104 dated 07.12.2010, cited in G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *op. cit.*, p. 1171.

legal measures of safety and health at work. Thus, in practice it was decided that a joint stock company may be liable for the offence of manslaughter and for the offence provided by art. 37 of Law no. 319/2006 in the event of an accident at work resulting in the death of an employee, as a result of non-compliance with the legal provisions on safety and health at work.[20]

However, in disagreement with the doctrine and judicial practice in this matter, the recent decisions of the Bucharest Military Court of Appeal revealed a contrary opinion regarding the existence of the ideal concurrence between manslaughter in the aggravated version of art. 192 para. 2 Criminal Code and non-compliance with legal measures for safety and health at work stipulated by art. 350 para. 1 and 3 Criminal Code.

Thus, in one case, the court of first instance considered that the deed of the defendant, who, as a driver who was on a mission with the service vehicle, in which he was transporting several military colleagues, without properly insuring, initiated a U-turn manoeuvre, on a national road, when it collided sideways with another vehicle that was regularly driven in the same direction, resulting in the death of a soldier, a passenger in the vehicle driven by the defendant, meets the constituent elements of the offences stipulated by art. 192 para. 1 and 2 Criminal Code and art. 350 para. 1 and 3 of the Criminal Code, with the application of art. 38 para. 2 Criminal Code (Bucharest Military Tribunal, Criminal Sentence no. 90 of July 16th, 2019). In the defendant's appeal, the court of judicial control considered that "the legislator granted a legal order of preference, depending on the importance given to the social value protected by the law. And because human life was considered - as it is natural - a more important social value than ensuring the legal development of certain professions, it was given a special regulation, with higher protection, art. 192 also including the expression of the legislator's will to sanction manslaughter as a result of the breaching the legal provisions for carrying out an activity. Failure to comply with the traffic rules by illegal U-turn does not in itself constitute an offence but a contravention, so that we do not find ourselves in front of the ideal concurrence provided by art. 192

[20] Brașov Courthouse, Criminal panel, decision no. 310/2012, final, cited in A. Ilie, *Răspunderea penală a persoanei juridice. Jurisprudență rezumată și comentată [Criminal liability of the legal person. Case law summarized and commented]*, Ed. C.H. Beck, Bucharest, 2013, p. 164.

para. 2 final thesis of the Criminal Code. In these conditions, breaching the rules regarding traffic on public roads by committing contraventions that have as result the consequence provided by art. 192 of the Criminal Code, meets only the constitutive elements of the offence stipulated by art. 192 para. 2 Thesis I of the Criminal Code or para. 3, as appropriate. It will therefore order the acquittal of the defendant for committing the offence provided by art. 350 para. 1 and 2 of the Criminal Code." (*Bucharest Military Court of Appeal, Decision no. 65 of November 14th, 2019)*[21].

We cannot agree with such a solution, considering that its motivation is completely unsatisfactory, coming into clear contradiction both with the legal provisions and with the constant case law on the matter. There is practically a confusion between the concurrence of texts and the ideal concurrence of offences, with the consequence of considering the offence stipulated by art. 192 para. 2 of the Criminal Code as a complex offence that absorbs the offence stipulated by art. 350 para. 1 and 3 of the Criminal Code. The solution is primarily an illegal one, under the rule of the current regulation, which requires the acknowledgement of the concurrence of offences. As we have shown above, a discussion can be made on the incident legal texts, but only in the area of constitutionality, since the courts can only apply the legal provisions until a possible decision of the Constitutional Court which could find the unconstitutionality of the provision of art. 192 para. 2, Thesis II of the Criminal Code, which requires the acknowledgement of the concurrence of offences.

In this sense, it is worth mentioning the fact that, by Decision no. 304 of June 9, 2020[22], the Constitutional Court rejected the exception of unconstitutionality of the provisions of art. 350 of the Criminal Code, this

[21] In the same sense there are the decisions no. 3 of January 23, 2020 and no. 18 of March 12, 2020, given by the Bucharest Military Court of Appeal, both with the motivation that "*the constitutive elements of the offence stipulated in art. 350 Criminal Code are implicitly included in the content of the offence of manslaughter committed in the aggravating variant provided in par. 2 in art. 192 Criminal Code It is, therefore, a complex offence of manslaughter that absorbs, in this case, the deed provided by art. 350 C. pen.".*

[22] Given in the file no. 218D/2018 (case file no. 200/753/2017/a1 – Bucharest Military Tribunal, file undergoing the preliminary chamber procedure at the moment when the Constitutional Court was informed), not yet published – www.ccr.ro.

being invoked even by a defendant tried in a file of the Bucharest Military Court of Appeal, acquitted on appeal for the offence stipulated by art. 350 para. 1 and 3 of the Criminal Code.

In all these situations, the deeds of the defendants are characterized by guilt in the form of actionable negligence (negligence), since they could not foresee the dangerous result of their deeds, although they had to and could foresee it. Thus, in the given example, the defendant did not foresee that by performing the manoeuvre of U-turn, on the spot, without properly assuring his manoeuvre, a serious traffic accident could occur. The defendant should have and could have foreseen the consequences of his deed, a conclusion derived from the fact that, using the objective criterion, a trained and prudent driver, with the same professional experience as the defendant, knowing the obligations he had, could anticipate that by performing a U-turn manoeuvre, without properly assuring his manoeuvre, at night, a traffic accident could occur. The defendant has, in this situation, a direct and clearly established guilt in the improper exercise of his duties, but also an actionable negligence regarding the result of the traffic accident, which he could have prevented.

We consider that the defendant, who was during his work schedule and in the exercise of the duties of driver, trained at work and in charge of leading the unit with the transport of employees, must show greater diligence in relation to the compliance with the traffic rules. He will have to comply with the legal provisions of the Government's Emergency Ordinance no. 195/2002 not only as a simple citizen holding a driving license, but especially as an employee of the unit as a driver, bearing the responsibility for the safe transport of employees, as well as for the integrity of the vehicle of the employing unit. In these conditions, the defendant's deed of not complying with the legal provisions regarding traffic on public roads, provided by the Government's Emergency Ordinance no. 195/2002, if this culpable attitude has created an imminent danger of a work accident or occupational disease, it affects the legal object of the offence stipulated by art. 350 of the Criminal Code, having the obligation to comply with these obligations primarily in terms of the work duties he has. Indeed, since he received training at work, regarding the compliance with the rules on traffic on public roads, these obligations also become measures established by the employer on occupational safety and health. Moreover, it would be a lack of fairness and consistency to consider that an employee as a driver cannot be criminally

liable for committing the offence stipulated by art. 350 of the Criminal Code, when he breaches the traffic rules provided by the Government's Emergency Ordinance no. 195/2002, while any other employee be criminally liable for committing this offence if he disregards certain obligations or measures established by orders, regulations, decisions, job description, etc. The employee with driver duties is not only a simple offender when he breaches traffic rules, because he also breaches safety and health measures at work regarding which he received training from the employer and thus becomes the perpetrator of the offence stipulated by art. 350 of the Criminal Code.

There are also some mentions to be made regarding the procedural aspect of repairing the damages caused by committing, in concurrence, the offences of manslaughter in the aggravating form stipulated by art. 192 para. 2 of the Criminal Code and the non-compliance with the legal measures for safety and health at work stipulated by art. 350 of the Criminal Code. In fact, it is only a question of repairing the damage caused by committing the offence of manslaughter, since only this is an offence of result. According to the Decision no. 1/2016 given by the High Court of Cassation and Justice - the Panel for the settlement of appeals in the interest of law[23], in case of civil liability insurance for damages caused by vehicle accidents, the insurance company has the quality of the responsible party in the civil lawsuit and has the obligation to repair by itself the damage caused through the offence, within the limits established by the insurance contract and by the legal provisions regarding the compulsory civil liability insurance. In order to give this decision, the supreme court held that, in the case of car accidents, which led to the death of the victim, the civil liability insurer has the direct obligation, according to art. 54 para. 1 of Law no. 136/1995, within the limits provided by the legal provisions, for the reparation of the damage caused to the civil party by the offence of manslaughter committed by the insured, including the payment of the amounts representing moral damages.

The civil liability of the employer will be established on the basis of the tortious civil liability of the principal for the act of the person in charge, proving the existence of all the conditions of the tortious civil liability being necessary. In older judicial practice it has been decided

[23] Published in the Official Gazette no. 258 dated 6th of April 2016.

that, as the accident occurred due to driving on one's own initiative and without an authorization of the forklift by the defendant, whose duties were not related to driving that machine, for which qualification and training is required, the commissioning company may not be a responsible party in the civil lawsuit. This direction was criticized in the doctrine, acknowledging that, in order to acknowledge the principal's responsibility, it is necessary that there is a causal or connected link between the exercise of the position by the person in charge and the damaging deed, in the sense that the position supplied the instrument of the illicit deed or had offered the occasion which facilitated its carrying out. However, even if the defendant, as a mechanical locksmith, was not entitled to use the electric forklift with which he injured the victim, it is no less true that he was able to drive that vehicle only by taking advantage of an opportunity that arose in the company where he was employed in the exercise of his position. In these conditions, it was considered as obvious the fault in the supervision of the enterprise, which could not be defended from the civil liability incumbent on it as principal[24].

In our opinion, a distinction must be made, on a case-by-case basis, from the perspective of the causal link (one of the conditions of tortious civil liability) between the guilty act of the principal (guilt in supervising the employee) and the damage caused by the deed of the agent, and to prove it is necessary to take into account the concrete circumstances of the deed, all the circumstances in which it was committed, with the detailed analysis of all the evidence administered in the case. Thus, if the employer was aware of the repeated actions of his employee, practically agreeing, even in a tacit way, with these illegal practices, it appears obvious the need to hold the principal accountable for the deed of the agent. On the other hand, if the evidence provided shows that it was an isolated deed of the employee, who at one point took advantage of the lack of supervision from his superiors, who, under all circumstances, would not have accepted his actions, the employer cannot be held liable for the dangerous result and, consequently, for the damage.

[24] G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *op. cit.*, p. 1171.

Topical issues

Finally, we consider it necessary to talk about the relationship between the offence provided by art. 350 of the Criminal Code and the offence of undermining the fight against diseases, in the alternative variant provided by art. 352 para. 2 Criminal Code, as this text was amended by the Government's Emergency Ordinance no. 28/2020. Thus, through art. 352 para. 2 Criminal Code the deed of non-compliance with the measures regarding the prevention or control of infectious diseases is incriminated, if the deed resulted in the spread of such a disease. Article 352 para. 5 Criminal Code regulates an aggravated variant of the offence, respectively if by the deed from par. 2 bodily injury or death of one or more persons has occurred. Also, art. 352 para. 4 Criminal Code sanctions the culpable commission of the offence provided in art. 352 para. 2 of the Criminal Code, while art. 352 para. 7 Criminal Code regulates an aggravated variant of this deed, respectively the occurrence of bodily injury or death of one or more persons.

Following the amendment of the text of article 352 of the Criminal Code through the Government's Emergency Ordinance no. 28/2020 for the amendment and completion of Law no. 286/2009 on the Criminal Code[25], a number of obligations and measures have been established, some at national level and others at local level, by the competent authorities, in order to prevent the spread of the new SARS-CoV-2 virus, all of which are practically regulations in the field of occupational safety and health. An example in this sense is represented by *Order no. 3577/831/2020 of 15th of May 2020 on measures to prevent contamination with the new coronavirus SARS-CoV-2 and to ensure that work is carried out at the workplace in conditions of safety and health at work during the alert period*[26]. As the name of the normative act shows, its content regulates several obligations and measures incumbent on employers and employees, both in the public and private sectors. It is therefore possible to raise the issue of the legal classification of the deed of non-compliance with these obligations and measures.

[25] Published in the Official Gazette no. 228 dated 20th of March 2020.

[26] Published in the Official Gazette no. 403 dated 16th of May 2020. The normative act is a joint order of the Ministry of Labor and Social Protection (no. 3577) and of the Ministry of Health (no. 831).

In our opinion, in order to make a correct legal classification, it is necessary to analyze what immediate consequence (part of the objective side of the offence) produced the committed deed. If the deed resulted in the spread of the new SARS-CoV-2 virus among employees, we will be in the presence of the crime of undermining the fight against disease stipulated by art. 352 para. 2 of the Criminal Code, committed intentionally or through fault, as the case may be. Depending on the more serious result, if any, the aggravating from art. 352 para. 5 Criminal Code (if the deed was committed intentionally, in this case the offence being a pre-intentional one) or the one from art. 352 para. 7 Criminal Code (if the act was committed through fault). It can be observed that the alternative variant from art. 352 para. 2 Criminal Code is a result one. Therefore, in order to acknowledge the offence, the causal link between non-compliance with the measures enacted and the spread of the disease must be proved.

At the same time, the offence provided by art. 352 Criminal Code has a special character in relation to the offence of non-compliance with the legal measures of safety and health at work provided by art. 350 of the Criminal Code, because the first is an offence against public health, this being the protected social value, while the second is a general regulation, valid for all areas of activity.[27]

If, however, the deed of non-compliance with the measures regarding the prevention or control of infectious diseases, during the exercise of the duties or during the activity at work, did not result in the spread of the disease, but only an imminent danger of professional illness was created for other employees, we will be in the presence of the offence of non-compliance with the legal measures of safety and health at work provided by art. 350 of the Criminal Code, the deed remaining a dangerous one, the causal link resulting *ex re*.

De lege ferenda proposals

In our opinion, a discussion can be made on the double aggravation of the sanction that will be applied in the situation of the acknowledgement

[27] The offence provided by art. 352 Criminal Code is found in the Criminal Code, the special part, Title VII, Chapter V - Offences against public health, while the offence provided by art. 350 Criminal Code is found in Chapter IV - Offences relating to the regime established for other activities regulated by law, of the same title.

of the concurrence of offences according to art. 192 para. 2 Thesis II Criminal Code. Indeed, through the aggravation provided by art. 192 para. 2 Thesis I Criminal Code, the deed of manslaughter is punished more severely (imprisonment from 2 to 7 years, compared to the simple version which provides for imprisonment from one to 5 years) when it is committed as a result of non-compliance with legal provisions or precautionary measures for the exercise of a profession or trade or for performing a certain activity, while the obligation to acknowledge the ideal concurrence of offences comes to sanction once again the same guilty behavior, pursuant to art. 39 Criminal Code. This leads to a double aggravation of the sanction for the same social harm, respectively to a greater punishment for the aggravated form of the offence of manslaughter, followed by the obligatory increase of this by acknowledging the concurrence of offences with the non-compliance of legal measures of security and health at work. Or, this procedure of aggravating the punishment can create problems in the field of art. 4 of Protocol no. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right not to be tried or punished twice). Thus, in the case *W.F. v. Austria*[28], the European Court of Human Rights held that the claimant had caused a traffic accident at a time when he was driving under the influence of alcohol. For this reason, he was convicted both of the offense of drunk driving under the Austrian Highway Code and of aggravated bodily injury. The aggravation of the latter of the offence was acknowledged in view of the fact that the claimant was intoxicated. Article 4 of Protocol no. 7 prohibits the sanctioning of a person for a behavior for which he had previously been convicted or acquitted. The Court does not dispute that, by using the notion of ideal concurrence, States may sanction the same deed twice, provided that the two deeds differ through the purpose of the sanction or in the object which is protected. In the present case, the Court found that the acknowledgement of the aggravating circumstance for the offence of culpable bodily harm covered exactly the same social harm as the traffic code offence for which the claimant had already been convicted. In such a situation we are not in the hypothesis in which two offences have some common elements, but also different elements, but in the situation in which one offence is completely absorbed in the content of the other. Therefore,

[28] CEDO, 3rd Panel, decision W. F. v. Austria, 20th of May 2002, 38275/97.

imposing two criminal sanctions in such a situation is contrary to the *non bis in idem* principle.

Practically, the previous Romanian regulation, from art. 178 para. 3 Criminal Code of 1968 was in the same situation, which led, as we have shown above, to the intervention of the High Court of Cassation and Justice by giving a decision in settling the appeal in the interest of the law. Our conclusion is that the solution of acknowledging the ideal concurrence between manslaughter and the offence provided by art. 350 para. 1 and 3 of the Criminal Code is not a wrong one in itself, but rather an excessive one from a sanctioning point of view, the regulation being able to intervene, *de lege ferenda*, either by regulating the solution of the concurrence of offences between the simple form of manslaughter and the breaching of prudential norms at work, or by regulating the aggravated version of manslaughter, without acknowledging the concurrence. This would make it possible to avoid the double sanctioning of the same antisocial behavior, giving effect to the *non bis in idem* principle.

Conclusions

Acknowledging the concurrence between manslaughter in the aggravated variant provided by art. 192 para. 2 Criminal Code and the offence of non-compliance with the legal measures of safety and health at work provided by art. 350 para. 1 and 3 Criminal Code is justified both by the current explicit legal regulation and by their distinct legal content, materialized by the different social values harmed, the moment of taking place and the consequences produced, as well as by the majority of the case law of Romanian courts and the case law of the European Court of Human Rights.

De lege ferenda, we consider that the double sanctioning of the same guilty behavior should be avoided, through the application of the rules of the concurrence of offenses between the aggravated variant of manslaughter and the non-observance of the obligation of prudence.

We are also of the opinion that improvements could be made to the texts of art. 192 para. 2 Thesis I Criminal Code and art. 350 para. 1 of the Criminal Code, in the light of the recent case law of the Constitutional Court regarding the quality conditions of the law.

BIBLIOGRAPHY

1. A. Ilie, *Răspunderea penală a persoanei juridice. Jurisprudență rezumată și comentată [Criminal liability of the legal person. Case law summarized and commented]*, Ed. C.H. Beck, Bucharest, 2013.
2. A.V. Iugan, *Codul penal adnotat. Partea specială. Jurisprudență națională 2014-2020 [Annotated criminal code. The special part. National case law 2014-2020]*, Ed. Universul Juridic, Bucharest, 2020.
3. C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Vol. I. Drepturi și libertăți [European Convention on Human Rights. Comment on articles. Vol. I. Rights and freedoms]*, Ed. ALL Beck, Bucharest, 2005.
4. C. Sima, *Drept penal. Partea generală [Criminal law, General part]*, vol. II, Ed. Hamangiu, Bucharest, 2015.
5. F. Streteanu, D. Nițu, *Drept penal. Partea generală [Criminal law, General part]*, vol. 2, Ed. Universul Juridic, Bucharest, 2018.
6. G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *Codul penal. Comentariu pe articole [Criminal Code. Comments per articles]*, 2nd ed., revised and completed, C.H. Beck Publishing House, Bucharest, 2016.
7. O.A. Stoica, *Drept penal. Partea specială, [Criminal code, Special Part]*, Ed. Didactică și Pedagogică, Bucharest, 1976.
8. S. Bogdan, D.A. Şerban, *Drept penal. Partea specială. Infracţiuni contra persoanei şi contra înfăptuirii justiţiei [Criminal law. The special part. Offences against the person and against the administration of justice]*, 2nd ed., revised and completed, Ed. Universul Juridic, Bucharest, 2020.
9. T. Toader, *Drept penal român. Partea specială [Romanian Criminal Code. Special Part]*, 7th ed., Ed. Hamangiu, Bucharest, 2012.
10. V. Dobrinoiu et al, *Noul Cod penal comentat. Partea specială [The new Criminal code commented. Special part],* 2nd ed., Ed. Universul Juridic, Bucharest, 2014.
11. Constitutional Court, Decision no. 405/2016, published in the Official Gazette no. 517 dated 8th of July 2016.

12. Constitutional Court, Decision no. 518/2017, published in the Official Gazette no. 765 dated 26th of September 2017.
13. High Court of Cassation and Justice - United Panels, Decision no. I dated 15th of January 2007, given in the file no. 17/2006 - appeal in the interest of the law, published in the Official Gazette no. 81 dated February 1st, 2008.
14. High Court of Cassation and Justice - Panel for the settlement of the appeals in the interest of law, Decision no. 1/2016, published in the Official Gazette no. 258 dated 6th of April 2016.
15. Bucharest Court of Appeal, 1st Criminal Panel, Decision no. 722/2000.
16. Bucharest Military Court of Appeal, Decision no. 65 dated 14th of November 2019.
17. Bucharest Military Court of Appeal, Decision no. 3 dated 23rd of January 2020.
18. Bucharest Military Court of Appeal, Decision no. 18 dated 12th of March 2020.
19. Law no. 319/2006 – on security and health at work, published in the Official Gazette of Romania, 1st Part, no. 646 dated 26th of July 2006.
20. Government's Emergency Ordinance no. 28/2020, for modifying and completion of Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 228 dated 20th of March 2020.
21. Order no. 3577/831/2020 of 15 May 2020, on measures to prevent contamination with the new SARS-CoV-2 coronavirus and to ensure that work is carried out in conditions of safety and health at work, during the state of alert, joint order of the Ministry of Labor and Social Protection (no. 3577) and of the Ministry of Health (no. 831), published in the Official Gazette no. 403 of 16 May 2020.
22. www.ccr.ro – official website of the Constitutional Court.
23. www.scj.ro – official website of the High Court of Cassation and Justice.

SHORT CONSIDERATIONS ON OBSOLESCENCE – CONDITIONS, PROCEDURE AND EFFECTS –

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ABSTRACT

The conditions of obsolescence can be deduced from the provisions of art. 416 para. 1 C. civ. proc. according to which: "Any request for summons, rejudgement, appeal, review, revision and any other request for reform or withdrawal shall lapse by law, even against the incapacitated, if it remained in default for reasons attributable to the party, for 6 months. Therefore, the party is not to blame if the procedural document was to be performed ex officio. The sanction of obsolescence becomes incidental by the express will of the law, although the forced execution does not determine a substantive judicial activity proper, because it intervenes after the pronouncement of a decision.
The general character of the provisions of art. 416 para. (1), makes the obsolescence to target any kind of action, without distinguishing between its nature or character. Therefore, the obsolescence operates in the same way in the case of real actions, civil status actions, as well as with regard to any other actions, even if they would be declared by law imprescriptible.

KEYWORDS: *obsolescence; civil process; obsolescence conditions; obsolescence effects; termination;*

I. Introductory aspects regarding civil procedural acts

Court documents are the most important acts of judicial procedure, producing various effects. The main act of the court is the sentence by which the conflict is resolved. The other acts of the court prepare the final solution or resolve certain incidents in the judicial procedure. Given the different finality of court acts, a distinction can be made between decision acts, communication acts and procedural documentation acts.

The decision acts include the actual court decisions, those that resolve the conflict between the parties, but also the decisions taken by the court regarding some procedural incidents or the impetus of the civil process (court conclusions by which various measures are taken regarding the administration of evidence, admission or rejecting an exception, etc.).

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The communication documents are those by which the court notifies the parties about certain measures (summoning the parties or other participants, reinstating the case, summoning for the interrogation, etc.).

The documents of procedural documentation are those through which some manifestations of will of the parties or other participants are recorded (witness statement, expertise performed by experts - accountants, technicians, etc.).

The procedural act precedes the act of documentation. This category of acts is less known in our doctrine of procedural law.

The documents of the parties are numerous and pursue different purposes. Some seek to promote claims before the court, others a simple defense, the invocation of a procedural incident or even the temporary or final cessation of the trial. The documents of the parties are also divided into:

- acts by which claims are promoted in court; these are: the lawsuit, the counterclaim, the bail application;
- acts of disposition: waiver of right or trial, transaction and others.

The acts of third parties broaden the procedural framework regarding the subjects of the process or its object. These are: the preparation and submission of the expert report, the testimony of the witness, the request for annulment of a fine made by a witness or an expert, the documents drawn up by the guardianship authority, at the request of the court and others.

The acts of the enforcement bodies are intended to carry out the provisions contained in an enforceable title (summons, seizure, adjudication act).

In civil proceedings, the judge cannot judge without being invested by a request of the party. The principle "*ne procedat ex officia*" i.e. "the judge is not notified ex officio", appeared in the era of Romanian law. The invested judge has the obligation to resolve all the claims of the parties.

The request represents the procedural means by which a natural person, legal entity, or public institution, requests to the court the protection of its rights and legal interests. It includes in its content both the requests by which the capitalization of some claims in court, the ascertainment of some acts or facts, as well as those by which the parties wish to exercise procedural rights, the resolution of some procedural incidents, the postponement of the case, the administration of evidence rights contained in an enforceable title.

In a narrower sense, the request means the formulation of a claim before the court, in order to satisfy it. But the request is not synonymous with the claim and should not be confused.

II. The concept of obsolescence. Conditions

Obsolescence appears as a sanction that refers to the entire procedural activity, not only to a concrete procedural act.[1]

Obsolescence is a procedural sanction that determines the extinction of the judicial activity due to the request remaining in the works, due to the fault of the party, for 6 months, as well as when it intervenes during the civil execution.[2]

The conditions of obsolescence can be deduced from the provisions of art. 416 para. 1 C.proc.civ., according to this text: "Any request for a summons, appeal, rejudgement, review, revision and any other request for reform or withdrawal shall lapse by law, even against the incapable, if it remained in default for reasons attributable to the party, time for 6 months".

Thus, the first condition of obsolescence refers to the object of this sanction which concerns only the procedural acts that generate a judicial activity of substance or an activity of solving the legal means of appeal.

The second condition refers to the cause remaining in work for 6 months.

The last condition is that the case remains unjudged due to the fault of the party. This condition emphasizes the character of a procedural sanction of obsolescence.

The obsolescence sanctions the disinterest shown by the parties in defining the judicial activity and is based on a presumption of abandonment of the trial, by remaining the litigation in vain, the law does not explicitly determine when the obsolescence term begins to run. This, in

[1] G. Boroi, M. Stancu, *Civil procedural law*, 4th ed., revised and added, Hamangiu Publishing House, Bucharest, 2017, p. 121.

[2] G. Durac, *Civil procedural law. Fundamental principles and institutions. Contentious procedure*, Hamangiu Publishing House, Bucharest, 2014, p. 193.

doctrine, begins to flow from any procedural provision taken by the court in the investigation of the case.[3]

The obsolescence term is subject to interruption and suspension.

In the matter of civil procedure, only one case of interruption of the obsolescence term is regulated, namely, according to art. 417 C. proc. "the obsolescence is interrupted by the fulfilment of a procedural act made in order to judge the process by the party that justifies an interest". In other words, any party to the proceedings, whether the plaintiff, the defendant, the intervener or any other party to the proceedings, may contribute to the interruption of the obsolescence. But is a simple request for persistent judgment likely to interrupt the course of obsolescence? We find the answer even in the text of art. 417 C. proc. civ., which clearly states that the obsolescence is interrupted by the performance of a procedural act. Starting from the definition of procedural acts - "procedural acts - any manifestation of will and any legal operation made during and within the civil process by the court, parties or other participants in the process, in connection with the exercise of rights or fulfilment of procedural obligations, respectively in order to produce legal effects in the procedural field, it is noted that the simple request for insistence by which the party expresses its will and as such asks the court to note that it wishes to continue the trial of the case, i.e. to maintain its claims, is able to interrupt the course of obsolescence. In order to be considered by the court, the request for urgency must be in writing, containing some of the essential elements of the request for a summons, such as the surname and name, identification data, quality of the person introducing it, their signature, but also the expressed mention that they maintain the continuation of the settlement of the cause under judgement.

From the economics of the text of the law, we deduce that the request for insistence introduced in order to interrupt the obsolescence term does not require the statement of reasons, so it does not have to be motivated to be admitted by the court.

Another issue that arises regarding the 6-month term, the legal obsolescence term is represented by the moment from which this term starts to run and what is its duration in time. Therefore, by way of

[3] V.M. Ciobanu, M. Nicolae (coord.), *The new Code of Civil Procedure commented and annotated, vol. I. Art. 1-526,* 2nd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2016.

example, if the date of the last act in the file pending before the court is 01.03.2021, and the parties became aware of this last act on 10.03.2021, in any way of acknowledging - from the case file or by communication, the obsolescence term is fulfilled in 6 months from this date, respectively 10.09.2021. Therefore, until this date, the party either carries out acts in the case brought before the court and submits them to the file for information to the court and the parties, and thus interrupts the course of obsolescence, or makes a request for perseverance by the date when the expiration date would be met, respectively no later than 10.09.2021 inclusive, according to the example given.

Also, a special situation is the one in which the court notifies itself ex officio and summons the parties in order to question the obsolescence. Thus, between the term at which the obsolescence was fulfilled and the term granted for solving the request or notification in connection with the obsolescence, it cannot be retained as an interruptive term of the obsolescence. In this situation, in order for the interruption of the obsolescence to take effect, the request of the interested party must be made within the legal term of 6 months. This issue was resolved by the High Court of Cassation and Justice, by Decision no. 1380/2016.

Another question that arises is whether the other parties to the trial may object to the request for insistence. In practice, in most cases, the request for insistence is made by the petitioner, i.e. by the applicant, as an interested party to exercise his right to trial. Thus, a request for a summons left in default for 6 months, due to the plaintiff, who makes before the expiration of this term, a request for insistence on the continuation of the trial, will be submitted to the debate of the parties, in contradiction, according to the rules imposed by the principle adversarial proceedings, as an essential rule in civil proceedings. The adversarial nature consists in the possibility conferred by law on the parties to discuss and combat any element of fact or law of the civil process. This principle dominates the entire dispute settlement activity. Adversariality imposes the requirement that no measure be ordered by the court before it is put into adversarial discussion by the parties, in order to exercise the right of defense.

Of course, as provided by the text of the law in art. 420 C.civ. proc. the obsolescence is established ex officio or at the request of the interested party, based on the documents in the file, the most important being the deadline when the obsolescence started to run, as well as the deadline when the obsolescence was completed and as a result prove the inter-

vention of the obsolescence, as long as neither party proves that it was in any way required to make a request for insistence or to perform acts that prevent the obsolescence of the request.

The obsolescence term is suspended as long as there is an optional suspension of the trial; art. 413 C. proc. the civil court orders that the optional suspension of the trial lasts until the decision pronounced in the case that determined the suspension remained irrevocable. Then, the term of obsolescence resumes its natural course.

Article 412 C. proc. regulates the cases of legal suspension of the trial. Thus, the trial will resume with the request for reopening made with the appearance of the persons in question: heirs, guardian, syndic judge, etc. The suspension of the trial determines the suspension of the obsolescence term.

A last case of suspension of the obsolescence term is found in art. 418 para 3 C. proc. when "the party is prevented from prosecuting it for duly justified reasons, as well as in other cases expressly provided by law.

Another situation is regulated by art. 416 para. 2 C. proc. civ., when the obsolescence term does not run as long as, without the fault of the party, the request has not yet reached the competent court to judge it or a trial term cannot be set ".

The obsolescence term is suspended as long as there is an optional suspension of the trial; art. 418 C. proc. the civil court orders that the optional suspension of the trial lasts until the decision pronounced in the case that determined the suspension became final. Then, the obsolescence date resumes its natural course.

In conclusion, it is observed that there is a major difference between the interruption of the obsolescence course and the suspension of the obsolescence course. The first mentioned, respectively the interruption of the obsolescence course operates by performing a simple act or request made within the term of 6 months, by the interested party, while the suspension of the obsolescence course operates, beyond the will of the parties.

III. Obsolescence procedure

The obsolescence procedure is relatively simple, being determined by the nature of the norms that enshrine it in order to avoid prolonging the processes. The expiration, as well as the nullity "is ascertained ex officio

or at the request of the interested party" (art. 416 paragraph 1 of the Civil Procedure Code). This text apparently contradicts the provisions of art. 423 para. 1 which emphasizes that obsolescence operates by law.

The right to invoke obsolescence belongs to the interested party, which is usually the defendant. Before being ascertained by the competent court, the obsolescence must be discussed by the parties. The provisions of art. 423 C. proc. obliges the judge to summon the parties as a matter of urgency and to order the clerk to draw up a report on the procedural documents related to the obsolescence. The invocation of the obsolescence is a procedural exception, and once admitted, the acts performed up to that moment in the respective case, remain without effect. Why did the legislator consider the summoning of the parties to be mandatory? We consider that it took into account the principle of adversariality, but also orality as provided by C. proc. civ, each party having the right, at this stage of the civil process, to support and prove their arguments regarding the intervention of the obsolescence of the application.

The obsolescence of the summons cannot be raised for the first time in the appellate court, this is a feature of the obsolescence. But, if the obsolescence was invoked in the first instance, which rejected it, the exception is judged on appeal. And yet why can't the obsolescence be raised for the first time in the appellate court? And what is the sanction that the obsolescence was not raised in the court of first instance? As the appellate court is a court for resolving the appeal, to which the party dissatisfied with the solution pronounced by the first instance appeals, it cannot judge the obsolescence regarding the initial request for summons, which should have been judged in the process of appeal fond. The sanction of the fact that the obsolescence was not raised before the court of first instance is the revocation.

The obsolescence can be pronounced after the verification by the competent court of the conditions provided by law: summoning the parties, and if the obsolescence was invoked after the first day of appearance following the reinstatement, the parties must no longer be expressly summoned, but must know deadline.

The decision finding the obsolescence is subject to appeal, the term is 5 days from the pronouncement (art. 421 para. 2 C. proc. Civ.) And the court pronounces a decision whenever it finds the obsolescence ex officio or at the request of the interested party.

If the court finds that the obsolescence has not operated, a decision is issued that can be challenged together with the merits of the case (art. 421 para. 1 of the Civil Procedure Code), and the decision establishing the obsolescence of the appeal is irrevocable.

IV. Effects of obsolescence

According to the provisions of art. 422 para. 1. C.proc.civ, the obsolescence results in the fact that all procedural documents, as well as the evidence administered in that court, do not produce their effects.

The obsolescence has the effect of extinguishing the civil process, in the phase in which it is together with all the acts performed in the case.[4] By extinguishing the civil process, the parties are put back in the situation prior to the introduction of the request.[5]

The claimant may bring a new action if in the meantime the right of action has not expired.

The extinction of the civil process also determines the extinction of the effect of interruption of the request for summons, as well as its other effects. The delay, made by the request for summons, no longer operates, and the defendant is considered in good faith. A rational solution would be the possibility of promoting new civil actions, it has the same object legal cause and between the same parties.

The obsolescence also generates the obligation to bear occasional court costs, these must be borne, upon request, by the party guilty of the case remaining in default (plaintiff, appellant, reviewer, etc.). The obsolescence does not only affect the procedural documents but also the parts of the process, regardless of their quality. The sanction also applies to persons lacking the capacity to exercise.

The irradiation of the obsolescence on the procedural documents and on the parties is the main consequence of the indivisibility of the civil process and it is an application of art. 419: "if there are several plaintiffs or defendants together, the request for obsolescence or the interrupting

[4] I. Leș, *The New Code of Civil Procedure. Commentary on articles, vol. I*, C.H. Beck Publishing House, Bucharest, 2011.

[5] I. Deleanu, *Treaty of civil procedure, vol. I and II*, Universul Juridic Publishing House, Bucharest, 2013.

procedural act of obsolescence of one also uses the others" results the rule of indivisibility of obsolescence.

The expiration has as effect the inefficiency of the procedural acts fulfilled until the date of fulfilling the term provided by art. 422 para. 1, but also of the documents drawn up after the obsolescence, no procedural act can be fulfilled anymore, the litigation being extinguished by obsolescence.

There may also constitute moments from which the obsolescence begins to run, the resolution of the president to receive the request in which the stamping was ordered, the conclusion by which the case was suspended due to their absence, or if the parties do not insist in court after the postponement requested by them.

V. Conclusions

The method of calculating the procedure term is expressly determined by law; these are established on years, months, weeks, days and hours, the system adopted by the Romanian legislator is the most advantageous and is imposed, especially in the case of terms with a relatively short duration, the law does not distinguish between imperative and prohibitive terms.

Any procedural deadline has a starting point and a fulfilment point; between them is interposed the Civil Procedural Law that regulated and the sanctions that are applied in case of a time interval that is in fact, the substance of the term.

Due to their particularly important role, the procedural sanctions contribute to an optimal administration of justice, being a guarantee of the restoration of the rule of law, as well as of the contested subjective rights.

The sanction of non-compliance with the legal terms is provided by art. 185 C. proc. civ., according to which in the case of non-exercise of the means of appeal or of non-fulfilment of the procedural acts within the legal term, the revocation occurs, with some exceptions. Thus, when the law provides otherwise or when the party proves that he was prevented by a circumstance above his will, a request for rescheduling is submitted within 15 days from the cessation of the impediment.

Obsolescence is a sanction that relates to the entire procedural activity, but one of the effects it produces is the extinction of the procedural acts

made in that court. In Latin, "*perimare*" "*Peremtum*" means to distinguish, to annul, to abolish, to extinguish.

Finally, it should be mentioned that in the Old C. proc. we find the obsolescence at art. 248 para. 1 - Any request for a summons, appeal, retrial, appeal, review and any other request for reform or revocation shall lapse by law, even against the incapable, if it has remained in default due to the fault of the party for one year. The party is not considered guilty, when the procedural act was to be performed ex officio. Thus, in the new civil procedure, the legislator reduced the term in which the obsolescence operates from one year to 6 months, considering it as a reasonable term in which the party can manifest its will to insist, to continue, the action brought before the court. By shortening this period in which obsolescence can occur, there is a faster withdrawal of the courts.

We also find the obsolescence in art. 697 et seq. from C. proc. in the matter of forced execution. From the definition given by the legislator "If the creditor, through his fault, allowed 6 months to pass without fulfilling an act or step necessary for the forced execution, which was requested, in writing, by the bailiff, the execution expires by right"- it results that in order to operate the obsolescence, the creditor must not have performed any act or approach that was requested. This form "requested in writing" is not imperative because the creditor has the possibility to make and submit documents to the enforcement file on his own initiative, being the interested party to satisfy his claims in this procedural phase, without the intervention of the bailiff to request them in writing. Of course, by extrapolation we can believe that, in the event that the bailiff has not addressed in writing to the creditor, within the term of 6 months, the execution of an act, the fault of non-work would pass to his first task. Obviously, even in this situation, a simple request for perseverance from the creditor is enough to interrupt the course of obsolescence. The conditions for finding obsolescence in this procedural phase are the same, namely: the parties are summoned by the enforcement court, and the enforcement court issues a decision. As a sanction, the obsolescence entails the annulment of all the executed acts performed, a new forced execution can be started based on a new request for forced execution, within the prescription term. If part of the claim has been recovered by the expiration date, the enforcement acts performed shall not be revoked in respect of such acts. In order to establish the obsolescence, the debtor has

the possibility of filing a lawsuit, before the enforcement court, to request to find that the procedural sanction of obsolescence has occurred.

In a future procedural regulation it should be specified that the non-exercise of a procedural right within the term entails the revocation of the exercise of that right.

BIBLIOGRAPHY

1. A. Constanda, *Sanctions in civil proceedings*, Hamangiu Publishing House, Bucharest, 2007.
2. G. Boroi, M. Stancu, *Civil procedural law*, 4th ed., revised and added, Hamangiu Publishing House, Bucharest, 2017.
3. G. Durac, *Civil procedural law. Fundamental principles and institutions. Contentious procedure*, Hamangiu Publishing House, Bucharest, 2014.
4. I. Deleanu, *Treaty of civil procedure, vol. I and II*, Universul Juridic Publishing House, Bucharest, 2013.
5. I. Leș, *The New Code of Civil Procedure. Commentary on articles, vol. I,* C.H. Beck Publishing House, Bucharest, 2011.
6. I. Leş, *Treaty of civil procedural law,* C.H. Beck Publishing House, Bucharest, 2010, p. 215.
7. P. Pop, M. Nicolae, *Procedural sanctions in civil proceedings, Universul Juridic Publishing House*, 2016, p. 193.
8. V.M. Ciobanu, M. Nicolae (coord.), *The new Code of Civil Procedure commented and annotated, vol. I. Art. 1-526,* 2nd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2016.

DISCRIMINATION IN EMPLOYMENT RELATIONS. EVOLUTION OF REGULATIONS

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ABSTRACT

Discrimination in legal employment relationships implies the existence of differential treatment applied by an employer or even another employee against another employee of the same employer, by not recognizing the protected criteria provided in international, European or national law regarding non-discrimination, in order to restriction, removal of the use or exercise of fundamental rights. The article examines aspects of defining discrimination, protected criteria, as well as elements aimed at proving illegal conduct in this area, with reference to the European and national regulatory framework and interpretations of case law. Opinions are included on the forms of discrimination, the concept of objective justification, as well as the case of positive discrimination.

KEYWORDS: *discrimination, rights, criteria, directives, institutions;*

Introduction

Discrimination, in legal employment relationships, is based on the application of differential treatment to certain employees, who find themselves in a comparable situation in terms of duties. However, this general rule allows an employer to be treated as discriminatory and to apply the same treatment to employees who do not find themselves in comparable situations, with different responsibilities in the work process, but with similar effects of exclusion of their rights.

We can appreciate that discrimination, as a phenomenon, is found in multiple areas of social life, as a real "problem at the level of the entire international community"[1]. If we refer to the case of discrimination in legal employment relationships, we can see that the regulation in this

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[1] D.-M. Marinescu, *The discrimination - a risk factor for social security in the European Union*, article published in Proceedings The 15th International Scientific Conference Strategies XXI. „Strategic Changes in Security and International Relations". Vol. XV, Part 1, p. 59-68, Bucharest, April 11-12, 2019, „Carol I" National Defence University, Security and Defence Faculty.

area is constantly evolving, being permanently influenced not only by the new requirements of society, but also by the interpretations of the relevant rules made through the courts European. In this respect, the protected criteria also underwent an evolution, starting from what was considered to be the hard core of nationality, religion or ethnicity to elements related to sexual orientation, disability or age, being a continuous evolution.

Moreover, certain laws of the nation states, such as that of Romania, allow an extended application of the criteria, which means that any act that could lead to effects similar to discrimination based on an expressly introduced criterion, will be considered as a form of differentiated treatment against employees, thus influencing the limits of employers' conduct. We can see that the evolution of non-discrimination rules in the case of employment relationships is imperative, at least in terms of the presence of a specific relationship of subordination between employees and employers, which influences the evidence and thus the recognition of fundamental rights.

Initially, the regulations on non-discrimination[2] on access to labour supply have been found in the international legislative framework[3], later European[4] and nation states.

Last but not least, national courts have examined discrimination in a non-uniform manner, generally using the CJEU's interpretations, especially in cases of indirect discrimination involving collective inequalities of treatment against minorities or groups considered to be disadvantaged.

Analysis of the concept of discrimination

The definition that the legislator gave to discrimination refers to any act or deed[5], which will have the effect of giving rise to a situation of

[2] D.-M. Marinescu, *The evolution of the concepts of equal opportunities and migration in the legislation of the European Union*, article published in Proceeding ale Conferintei Științifice Internaționale "Global Security and National Defence", p. 490-494, Universitatea Națională de Apărare "Carol I", Școala Doctorală, 25-26 iunie 2020.

[3] A. Popescu, *Dreptul internațional și european al muncii,* ed. 2, Ed. C.H. Beck, București, 2008, p. 340-341.

[4] A. Fuerea, *Drept comunitar al afacerilor*, Ed. Universul Juridic, Bucureşti, 2006, p. 26.

difference, exclusion, restriction or preference over the rights or freedoms of persons who find themselves in comparable situations. Discrimination is analyzed in terms of the recognition by the employer of protected criteria, in application of the principles[6] which substantiates the work processes.

However, the existence of discrimination will also be linked to the difference in treatment applied by the employer to a certain employee, respectively an unfavorable treatment compared to that enjoyed by another employee in a comparable situation. However, this provision aimed at discrimination is not absolute, being allowed by the legislator those situations according to which a differential treatment applied to employees who have the same attributions can be legal, when the conditions of a case of objective justification are met. For the purposes of the law, apparently discriminatory conduct may be considered objectively justified when a differentiated treatment of an employee is not an arbitrary practice[7], being related to an objective need.

On the other hand, there is a reverse situation related to discrimination, different from that which required the mandatory highlighting of a comparable situation and different treatment applied to employees with similar responsibilities. In this case, it will be recognized the situation in which certain employees in different situations, with different duties, are treated identically, as a rule, the courts[8] allowing the extension of the interpretation of the concept of discrimination from the requirement of the existence of a comparable situation.

With regard to both cases of analysis of discrimination, both the identification of the comparable situation and the application of identical treatment, the burden of proof, as a mechanism for the protection of victims, is reversed in litigation. From the point of view of conclusive evidence in discrimination disputes, proof of a comparable situation will

[5] M. Carlsson, D.-O. Rooth**,** *Evidence of ethnic discrimination in the Swedish labor market using experimental data, Labour Economics*, Vol. 14, Issue 4, 2007, p. 716.

[6] L. Onica-Chipea , *Dreptul muncii. Curs universitar,* ed. a II-a revazuta si adaugita, Ed. Pro Universitaria, București, 2013, p. 32.

[7] J.F. Renucci, *Tratat de dreprt european al drepturilor omului*, Ed. Hamangiu, București, 2009, p. 153.

[8] Interpretation of the ECJ in question C-106/83.

be possible, including by reference to studies[9] statistics, especially in the case of indirect acts of discrimination, for example regarding the share of female employees in a given employer. In the case of reporting an act of wage discrimination, the application of different standards in the event of similar attributions of employees, the identification of the person in the employer's structure in a situation comparable to the victim, his job, are not easy elements tried.

Related to the analysis of potential acts of discrimination, the conduct of employers will be reported to the non-recognition of protected criteria. To this end, the relevant European provisions have been transposed into national law, with criteria relating to race, nationality, ethnicity, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV infection or disadvantaged category.

However, unlike European law, national law allows for an extension of the scope, the criteria not being restrictive, including any other such elements that would produce similar effects of exclusion, restriction or preference. As for the rights or freedoms that may be subject to acts of discrimination, they can be found in the sphere of sexual, ethnic, racial, religious, social, political, cultural, etc. minorities.

The extension of the scope of discrimination allows the analysis of even the neutral practices of employers which are apparently not based on the protected criteria by which the law expressly contains them, given that they aim to introduce illegal differential treatment and an effect restricting, removing the recognition, use or exercise of the fundamental rights and freedoms of the victim, within the legal employment relationships. In this sense, any criterion, even not found in the regulatory norm, which promotes the different treatment applied to an employee and excludes legal equality, in the non-recognition of the principle of non-discrimination, can be considered as the basis of discriminatory conduct[10] in legal employment relationships.

[9] N. Drydakis, M. Vlassis, *Etnic discrimination in the greek labour market: occupational acces, insurance and coverage and wage offers*, The Manchester School, Vol. 78, Issue 3, 2010, p. 201.

[10] Ș.I. Traian, *Tratat teoretic și practic de drept al muncii*, Universul Juridic, București, 2014, p. 83.

From the point of view of forms of discrimination, European and national law generally refers to direct and indirect cases. In the case of direct discrimination, employers apply unequal treatment[11], based on the criteria of discrimination included in the law, to an employee, in order not to grant, restrict or remove the recognition, use or exercise of his rights, compared to another employee with similar responsibilities. Basically, direct discrimination is based on acts or deeds of an employer, related to the criteria of discrimination, but made with direct intention, leading to situations of exclusion, difference, restriction or preference.

The acts of indirect discrimination are linked to the conduct of employers which produce effects similar to direct discrimination, although apparently they would not have an illegal purpose. In both direct and indirect discrimination cases, the illegal conduct of employers concerns either a single employee or categories of persons, which precludes the assessment that only a natural person can be a victim of discrimination.

European law on non – discrimination

In European secondary law, the concept of non-discrimination has been clearly defined and the discrimination criteria introduced, mainly through the provisions of the Directives 1999/70/CE[12], 2000/43/CE[13], 2000/78/CE[14], as well as 2004/113/CE[15].

Of course, rules on non-discrimination were also found in the provisions of the European Treaties, supplemented by secondary law, subsequently the institution of discrimination being taken over and transposed also in the national legal systems of the Member States.

For example, in Romania, the norms of non-discrimination in legal labour relations are found starting with the constitutional provisions, respectively articles no. 16 par. 1 and 41 par. 1 of the Romanian

[11] A. Ștefănescu , *Munca la domiciliu si telemunca. Drept intern si comparat*, Ed. Universul Juridic, București, p. 53.

[12] Directive 1999/70/EC on the framework agreement on fixed-term work.

[13] Directive 2000/43/EC on racial equality.

[14] Directive 2000/78/EC on equal treatment in employment.

[15] Directive 2004/113/EC on the implementation of the principle of equal treatment between men and women.

Constitution, in the provisions of articles 5, 6, 159 of the Labour Code, but also within the special legislation, OG no. 137/2000 and Law no. 202/2002[16].

In relation to this sensitive area of regulation, the legal protection mechanisms necessary to recognize the principle of equal treatment in employment relations become a priority in the regulatory process, starting from the international and European regulatory space, with subsequent influences on national legislative systems.

In this respect, the Council Directive[17] 2002/73/EC[18] defines discrimination as the situation in which a person is treated less favourably, on the basis of sex, than another person in a comparable situation.

The provisions of the normative act identify the acts of discrimination as determining effects of difference, exclusion, restriction or preference, on criteria of race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV infection or belonging to a disadvantaged category.

The way in which European secondary legislation is regulated is different from that used in the legislation of national states, provided that the protected criteria are recognized. Thus, under European law, the criteria are limited, unlike the scope of national regulations, which contain non-limiting criteria and which have had the possibility to maintain including non-discrimination rules existing before the transposition of European mechanisms. National laws thus recognize any criteria, other than those which are imperative, when the purpose of employers' conduct is to restrict or remove the recognition, use or exercise of the fundamental rights and freedoms of victims.

On the other hand, the Council Directive 2002/73/EC[19] defines indirect discrimination as the situation in which a provision, criterion or

[16] Law no. 202/2002 on equal opportunities and treatment between women and men.

[17] Council Directive 2002/73/EC on the application of the principle of equal treatment between men and women as regards access to employment, training and promotion and working conditions.

[18] The normative act modifies the provisions of the Council Directive 76/207/CEE.

[19] Council Directive 2002/73/EC on the application of the principle of equal treatment between men and women as regards access to employment, training and promotion and working conditions.

practice, apparently neutral of an employer, not directly related to a protected criterion, which causes effects similar to direct discrimination.

Unlike direct discrimination, in the case of indirect discrimination, the necessary condition for the existence of unlawful conduct will relate to the requirement of the absence of a practice justified by a legitimate aim, if the possibilities of achieving those objectives become adequate and necessary.

In the same sense, indirect discrimination concerns active or passive forms of conduct of employers, compared to persons in comparable situations, with the effect of favouritism, unjustified disadvantage or subjection to unfair or degrading treatment, including in the case of a group or a community.

With regard to the concept of positive discrimination, it eliminates the potential situation of discrimination, although it contains actions contrary to the promotion of the principle of equal treatment, in order to provide a protection mechanism to a category of people defined as disadvantaged compared to the majority. The legislator thus allows favourable legal provisions, applicable to persons considered disadvantaged, as a set of measures and advantages additional to the general ones, in order to establish a similar degree of access to rights, with the recognition of the principle[20] non-discrimination.

The differentiation of the forms of discrimination is explained by the fact that, in the case of the direct one, the illegal treatment is directed, intentionally, against a certain employee, being based on the protected criteria, and in the indirect one the unfavourable treatment is apparently non-discriminatory and difficult to prove. Discrimination was sometimes considered an attitude of non-recognition by the legislator or employers of the effects of acts restricting the rights of employees.

Moreover, the European legislator also recognized certain forms ancillary to the direct ones[21] or indirect, respectively harassment[22], sexual or psychological harassment, victimization or discrimination by association. For example, conduct that involves the differentiation,

[20] N. Roș, *Dreptul muncii. Curs universitar*, Ed. Pro Universitaria, București, 2017, p. 37.

[21] L.M.Muscalu, *Discriminarea în relațiile de muncă*, Ed. Hamangiu, București, 2015, p. 17.

[22] C. Sâmboan, *Demnitatea în muncă*, Ed. C.H. Beck, București, 2017, p. 282.

exclusion or restriction based on sex, against the principle of equality between men and women or the exercise of fundamental rights and freedoms, constitutes sexual harassment, as opposed to psychological harassment related to the mental pressure to which a certain person is subjected employee.

On the other hand, the mechanisms for limiting acts of discrimination in the workplace involve the obligation for employers to introduce in the internal regulations the potential disciplinary sanctions applicable to the perpetrators of these acts, but also the one related to informing employees on the matter, for example with reporting to the legal remedies allowed in case of inequalities[23] of treatment.

Conclusions

Initially, the concept of non-discrimination referred to the principle of equality, and later protected criteria were established which formed the hard core of the measures put in place.

States have chosen to implement the specific provisions of national law in principle as constitutional rules, which aimed, for example, to ensure a level playing field in the labour market.

Subsequently, the constitutional provisions at the level of guiding principles were extended and detailed in the content of organic laws or other normative acts of lower level. Last but not least, at European level, the provisions on non-discrimination have been constantly evolving, including in terms of interpretation, as a result of the analysis that European courts have made of equality. Basically, the concept of non-discrimination was thus extended, the jurisprudence determining[24] a transfer of interpretation to the national courts of the States.

We can see that the role of jurisprudence was not limited to recognizing the principle of equality, being protected freedoms, such as conscience, which exceeded the unique condition related to respect for the dignity of employees.

However, in the case of employment relationships, the concept of equality became insufficient, having a general impact and being linked to

[23] M.-C. Preduț, *Codul muncii - comentat*, Ed. Universul Juridic, București, 2016, p. 33.

[24] Attempts to limit or prohibit racism and sexism are broadly linked to the concept of non-discrimination, starting from the principle of equality to issues of dignity.

the identification of comparable situations, while an act of discrimination could be recognized and the lack of similar situations, based on the existence of protected criteria.

On the other hand, in the case of an analysis of the facts of unequal treatment, the courts did not confine themselves to certain direct conduct on the part of employers, taking into account the presumption of discrimination which potential victims could raise, taking into account the purpose of seemingly illegal conduct.

At European level, interpretations of case law have had a significant impact, given that there were differences and alternative ways of recognizing protected criteria. In this regard, in the case of race, France, for historical reasons, did not accept a definition in national law, but allowed the prohibition of racial acts, being interested in limiting the issuance of statistics on citizens of a certain ethnicity. Discrimination should thus not lead to a reverse phenomenon, the definition of ethnic groups and the emergence of rejection by the majority.

On the contrary, the acceptance of the criterion of nationality referred to a definition concerning the granting of the right of residence in European states, the limitation mechanisms being thus limited, often citizenship and nationality being confused in the case of access to job offers.

REFERENCES

1. Magnus Carlsson, Dan-Olof Rooth, *Evidence of ethnic discrimination in the Swedish labor market using experimental data*, Labour Economics, Volume 14, Issue 4, 2007.
2. Marinescu, Delia-Mihaela, *The discrimination - a risk factor for social security in the European Union*, article published in Proceedings The 15th International Scientific Conference Strategies XXI. „Strategic Changes in Security and International Relations". Volume XV, Part 1, pp. 59-68, Bucharest, April 11-12, 2019, „Carol I" National Defence University, Security and Defence Faculty.
3. Marinescu, Delia-Mihaela*, The evolution of the concepts of equal opportunities and migration in the legislation of the European Union*, article published in Proceeding ale Conferintei

Științifice Internaționale "Global Security and National Defence", pp.490-494, Universitatea Națională de Apărare "Carol I", Școala Doctorală, 25-26 iunie 2020.

4. Muscalu Loredana Manuela, *Discriminarea în relațiile de muncă*, Ed. Hamangiu, București, 2015.
5. Nick Drydakis, Minas Vlassis, *Etnic discrimination in the greek labour market: occupational acces, insurance and coverage and wage offers*, The Manchester School, Volume 78, Issue 3, 2010.
6. Onica-Chipea Lavinia, *Dreptul muncii. Curs universitar. Editia a II-a revazuta si adaugita,* Ed. Pro Universitaria, București, 2013.
7. Preduț Marius-Catalin, *Codul muncii - comentat*, Ed. Universul Juridic, București, 2016.
8. Renucci J.F., *Tratat de dreprt european al drepturilor omului*, Ed.Hamangiu, București, 2009.
9. Roș Nicolae, *Dreptul muncii. Curs universitar*, Ed. Pro Universitaria, București, 2017.
10. Ștefănescu Ion Traian, *Tratat teoretic și practic de drept al muncii*, Universul Juridic, București, 2014.
11. Ștefănescu Ana, *Munca la domiciliu si telemunca. Drept intern si comparat*, Ed. Universul Juridic, București.
12. Sâmboan Cristina, *Demnitatea în muncă*, Ed. C.H. Beck, București, 2017.

THE PROCEDURAL STEPS REQUIRED TO ENFORCE THE PECUNIARY AWARDS RENDERED UNDER THE AUSPICES OF ICSID IN ROMANIA

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ABSTRACT

Through the present study we propose to reconsider the solutions adopted in case law, which, based on the thesis of "assimilation" of the regime of the enforcement of the pecuniary International Centre for Settlement of Investment Disputes (ICSID) awards. noted the following in regard with the procedural steps to be taken to enforce these awards: (i) suppression of any exequatur procedure of the awards; (ii) the awards may be enforced directly in accordance with national rules on the enforcement of judgments.

We consider that this course of actions preserves to a greater extent the balance between the effects of the relevant provisions of the ICSID Convention and corresponds to a natural succession of the steps to be taken for the enforcement of pecuniary awards.

A negative effect of the interpretation we propose concerns the time frame in which the enforcement of pecuniary awards will be carried out, which will increase following the introduction of an "additional" stage, namely the procedure of "recognition and enforcement" of the award, provided by the provisions of article 54 (2) of the ICSID Convention.

KEYWORDS: *International Centre for Settlement of Investment Disputes; arbitral award; pecuniary obligations; recognition and enforcement of arbitral awards; forced execution; competence; Romanian jurisdiction;*

I. Introduction

When the debtor does not perform voluntarily[1] the provisions of the ICSID[2] awards, their enforcement becomes a necessity for the creditor.

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[1] By way of example, we recall that the Romanian State voluntarily executed the award rendered in ICSID Case No. CIRDI nr. ARB/10/13 *[Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania]*. Please see, in this regard: C.J. Carswell, L. Ilie, A. Iordache, R. Daneș (Reed Smith LLP), *Romania*, GAR Investment Treaty Arbitration, august 2020, p. 14, available at: *file:/// C:/Users/939006/Downloads/ITA_2020_RomaniaChloe%20Carswell%20and%20Lucian%20Ilie%20(2).pdf* (consulted on 12 November 2021).

[2] By „*ICSID*" or the „*Centre*" we refer to the International Centre for Settlement of Investment Disputes, an international institution constituted under the edges of International Bank for Reconstruction and Development.

ICSID Convention[3] does not limit the possibilities of the creditor, who will be able to pursue the satisfaction of his rights in any of the Contracting States[4], including in Romania, according to the special regime established by the Convention. Its option is not limited to the Contracting State which has been a party to arbitration or to the Contracting State of the investor which has been a party to arbitration, having the freedom to choose the most favourable jurisdiction.[5].

The choice of the most favourable jurisdiction will be determined mainly by the information on the debtor's available assets[6] however, an important factor will always remain the approach of the authorities of the State in which the enforcement is sought (including its courts) regarding the enforcement of the ICSID awards on its territory. In the case of the Romanian State, the identification of such an approach is not easy, the process of the enforcement of such awards representing the object of the non-unitary practice of the courts during the last decade.

By way of example, we recall the different procedures by which the effects of the ICSID awards rendered in ICSID Cases No. ARB/05/13 *[EDF (Services) Limited v. Romania]* and ARB/12/25 *[Marco Gavazzi and Stefano Gavazzi v. Romania]* were pursued. While in the first case [7] The Romanian State obtained the recognition and the granting of enforcement of the arbitral award, corresponding to the exequatur procedure, in the second case[8], a bailiff, acting on behalf of Marco and Stefano Gavazzi, obtained a direct granting of the enforcement of the

[3] By „*ICSID Convention*" we refer to the Washington Convention the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965, entered into force on 14 October 1966. ICSID Convention was ratified by Romania by the State Council Decree no. 62 dated 30 May 1975, published in the Official Bulletin no. 56 dated 7 June 1975.

[4] By „*Contracting State*" we refer to the States that are Parties of ICSID Convention.

[5] Please see: UNCTAD, *Dispute Settlement. International Centre for Settlement of Investment Disputes. 2.9 Binding Force and Enforcement*, United Nations, New York, Geneva, 2003, p. 11, available at: *https://unctad.org/es/system/files/official-document/edmmisc232add8_en.pdf* (consulted on 15 November 2021).

[6] *Ibidem.*

[7] Please see: Bucharest Tribunal, Third Civil Division, Sentence no. 446 dated 23 March 2010.

[8] Please see: Bucharest Tribunal, Third Civil Division, Procedural Order dated 24 September 2018 (case file no. 26727/3/2018).

arbitral award, as a step of the enforcement procedure, without going through any prior procedure[9].

The effects of the non-uniform practice on the procedural steps that should be taken to enforce such awards were also reflected in the parallel enforcement proceedings regarding the award rendered in ICSID Case No. ARB/05/20 *[Ioan Micula, Viorel Micula and others v. Romania]* in Romania[10], respectively: (i) one of the claimants-investors initiated a proceeding in which he sought the recognition and the granting of the enforcement of the arbitral award, corresponding to the exequatur procedure, which he subsequently waived[11]; and, in parallel, (ii) a bailiff, acting on behalf of four of the claimants-investors in the same arbitration, obtained a direct granting of the enforcement of the arbitral award, without going through any prior procedure[12].

The merely reading of these divergent solutions raises multiple questions related to the approach of the Romanian courts on the procedural steps that should be taken to enforce ICSID awards, the jurisdiction of the courts involved, the procedures that should be applied before them, the checks to be performed by the courts at each procedural stage, the regime of appeals against judgments, etc.

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[9] For details on the differences between the procedure for granting the enforcement, as a stage of the enforcement procedure, and the procedure for granting the enforcement of a foreign arbitral award, corresponding to the exequatur procedure, please see: B. Dumitrache, *Încuviințarea executării (hotărârii arbitrale străine): o sintagmă cu două înțelesuri,* Romanian Arbitration Review no. 4 from 2020, p. 63-86; N.-H. Țiț, *Încuviințarea executării silite,* Universul Juridic, Bucharest, 2018, p. 86-90.

[10] The claimants-investors from the ICSID Case No. ARB/05/20 sought the enforcement of the obtained award in several jurisdictions such as Belgium, Luxembourg, Sweden, France, the United States of America, the United Kingdom and Romania.

Please see: R. James, *The implications of the green light to enforcement of the Micula brothers' ICSID award in the UK,* available at: *https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/the-implications-of-the-green-light-to-enforcement-of-the-micula-brothers-icsid-award-in-the-uk.*

[11] Please see: Bucharest Tribunal, Fourth Civil Division, Sentence no. 642 dated 28 May 2014.

[12] Please see: Bucharest Tribunal, Fourth Civil Division, Procedural Order dated 24 March 2014 (case file no. 9261/3/2014); Judgment of the General Court (Second Chamber, Extended Composition) of 18 June 2019, Joined Cases T-624/15, T-694/15 and T-704/15, European Food SA and Others v European Commission, EU:T:2019:423, para. 22.

However, the present study is limited to the examination of two of them, namely: (i) the establishment of the procedural steps necessary for the enforcement of the pecuniary ICSID awards in Romania; respectively (ii) establishing the jurisdiction of the courts involved in these procedural steps; the other issues remain to be addressed in separate studies.

II. Analysis of the legal framework

The establishment of the procedural steps that must be followed in order to enforce a pecuniary ICSID award in Romania can be done based on the interpretation of the provisions of article 54 from Chapter IV *[Arbitration]*, Section VI *[Recognition and Enforcement of the Award]* (arts. 53-55) of the ICSID Convention.

Summarizing the provisions of the ICSID Convention on the recognition and enforcement of the arbitral awards, we note that: (i) article 53 provides for the binding and final nature of the arbitral awards for the parties of the arbitration; (ii) article 54 establishes the general obligation of the Contracting States to recognize the arbitral awards rendered under the Convention and to ensure the enforcement of pecuniary obligations resulting from such awards; and (iii) article 55 recognizes the right of States to invoke immunity from execution against the execution of the arbitral awards rendered under the Convention[13].

Interpretation of the provisions of article 54 of the ICSID Convention is not a simple task. As noted by the doctrine[14], the text contains many ambiguities, some of the main causes of its indistinctness being, in essence: (i) the use of different terms exclusively in certain language versions of the ICSID Convention - the English version (official version) of the ICSID Convention uses two different terms, respectively "*enforcement*" *[article 53 (1) and article 54 (1) - (2)]* and "*execution*" *[article 54 (3) and article 55]*, unlike the versions of the Convention in French (official language), Spanish (official language) and Romanian

[13] Please see: A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, ICSID Review - Foreign Investment Law Journal, Vol. 2, Issue 2, Fall 1987, p. 287-334, *https:// doi.org/10.1093/icsidreview/2.2.287*, p. 288.

[14] Please see: G.A. Bermann, *Understanding ICSID Article 54*, ICSID Review, (2020), p. 1-33, *http://doi.org/10.1093/icsidreview/siaa020*, p. 7-8.

which use only one single term, namely "*exécution*", "*ejecución*" and "*executare*" *[article 53-55]*, (ii) the uncertain meaning of the obligation of the Contracting States to ensure the enforcement of the award "*as if it were a final judgment of a court in that State*" *[article 54 (1)]*.

As a preliminary point, we note that the provisions of article 54 (1) of the ICSID Convention establishes a unitary regime with regard to the recognition of the awards rendered under the Convention, on the one hand, and a divided regime with regard to their enforcement, on the other hand. Although those provisions establish the general obligation of the Contracting States to recognize any award rendered under the Convention, in respect with their enforcement, they provide, in a more restrictive manner, that: "*[e]ach Contracting State (...)* ***enforce*** *the* ***pecuniary obligations imposed by that award*** *within its territories as if it were a final judgment of a court in that State*" [emphasis added]. Thus, two distinct legal regimes will have to be considered with regard to the enforcement of the awards rendered under the Convention, as follows: (i) the regime of enforcement of pecuniary awards; and (ii) the regime for the enforcement of non-pecuniary awards (such as awards declaring rights and obligations or those which provide for specific performance[15])[16]. In the following, we will refer exclusively to the regime of the enforcement of the pecuniary awards, since, until now, the Romanian case law has not been confronted with the enforcement of other categories of awards.

The specificity of the regime of the enforcement of the pecuniary award pronounced under the auspices of ICSID consists in the fact that the Contracting States will have to ensure its enforcement "*as if it was a final judgment of a court in that State*".

According to the majority Romanian case law[17], these provisions of article 54 (1) of the ICSID Convention assimilates pecuniary awards to

[15] By way of example, we recall that non-pecuniary arbitral awards were rendered by ICSID arbitral tribunals in cases such as ICSID Case No. ARB/01/3 *[Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic]*.

[16] Please see: L. Reed, J. Paulsson, N. Blackaby, *Guide to ICSID Arbitration*, Second Edition, Kluwer Law International, Alphen aan den Rijn, 2011, p. 183.

[17] Please see: Bucharest Tribunal, Third Civil Division, Procedural Order dated 24 September 2018 (case file no. 26727/3/2018), Bucharest Tribunal, Fourth Civil Division, Procedural Order dated 24 March 2014 (case file no. 9261/3/2014), Bucharest

final domestic judgments, so that they will not be treated as foreign jurisdictional acts. Based on the "*assimilation*" thesis, it was considered that: (i) any exequatur procedure is abolished for pecuniary awards; (ii) pecuniary awards may be enforced directly in accordance with national law on the enforcement of judgments. We mention that this orientation of the case law is not based exclusively on a textual argument, but it respects a line of interpretation developed over time in the Romanian and international doctrine[18]. However, we note that the "*assimilation*" thesis was not sufficient to retain the jurisdiction of the county court (*i.e.* judecătorie), as an enforcement court, the tribunal being the one that "*played*" the role of enforcement court in the identified cases, both in the stage of granting enforcement and in the enforcement challenge stage.

Although the importance of the quoted phrase is, beyond any doubt, cardinal in the context of the enfocement of the pecuniary awards rendered under the auspices of ICSID, we do not consider that it should be absolutized, being debatable whether it was meant to determine the regime of enforcement of pecuniary awards in all its elements, by its full equivalence with that of the final domestic judgments (even with the notable exception of the jurisdiction of the enforcement court).

First of all, as a principle, the international doctrine identifies the following two effects of the phrase "*as if it were a final judgment of a court in that State*" found in the provisions of article 54 (1) of the ICSID Convention: (i) provides that the enforcement of pecuniary awards may be refused only in cases where the enforcement of a final domestic judgment may be refused (if any)[19] and, in a complementary way; (ii) points out that the enforcement the of pecuniary awards must be ensured, with the exclusion of any judicial review of the awards, once their

Tribunal, Third Civil Division, Sentence no. 1556 dated 24 November 2014; Bucharest Court of Appeal, Fourth Civil Division, Decision no. 1483 dated 21 October 2019.

[18] Please see: I.P. Filipescu, *Drept internațional privat. Vol. II*, Actami, Bucharest, 1997, p. 261; I.P. Filipescu, *Drept internațional privat. Vol. II*, Actami, Bucharest, 1999, p. 532; V. Roș, *Arbitrajul comercial internațional*, Official Gazette Independent Company, Bucharest, 2000, p. 610; G.A. Bermann, *Understanding ICSID Article 54*, ICSID Review, (2020), p. 1-33, *http://doi.org/10.1093/icsidreview/siaa020*, p. 17-18.

[19] Please see: C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention. A Commentary*, Second Edition, Cambridge University Press, 2009, p. 1142.

authenticity has been established[20]. Therefore, it seems that the phrase quoted should not be interpreted in a broad sense, as a reference for determining the whole regime of the execution of the pecuniary awards, but rather in a narrow sense, only as a reference for the reasons why the enforcement of a pecuniary award could be refused by the courts of the Contracting States. The restrictive interpretation is consistent with the lack of a uniform regulation in the ICSID Convention of the ground on which the enforcement of awards could be refused.[21]. Thus, possible grounds for refusing to enforce of pecuniary awards under the Convention will have to be determined, on a case-by-case basis, by reference to possible grounds for refusing to enforce final domestic judgments of the Contracting State in which the enforcement is sought.

Secondly, the "*assimilation*" thesis of the regime of the enforcement of the pecuniary awards (even with the notable exception of the competence of the enforcement court) is difficult to reconcile with the provisions of article 54 (2) of the ICSID Convention, which make express reference to the procedure for "*recognition and enforcement*" of the arbitral awards. The difficulty stems from the fact that such an equivalence would lead to the futility of regulating (also) by Convention a (prior) procedure for the "*recognition and enforcement*" of the pecuniary awards.[22].

According to the provisions of article 54 (2) of the ICSID Convention, in order to obtain the recognition and enforcement of an award in the territory of a Contracting State, the interested party must: (i) apply to the competent court/authority and (ii) submit a copy of the award certified by the Secretary General of ICSID. The rules found in the Convention are succinct, providing only a few points of reference regarding this procedure.

With regard to the first condition, Romania has designated the tribunals as materially competent courts for resolving requests for "*recognition and enforcement*" of the awards rendered under the auspices of

[20] *Idem*, p. 1141 și A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, ICSID Review - Foreign Investment Law Journal, Vol. 2, Issue 2, Fall 1987, p. 287-334, *https://doi.org/10.1093/icsidreview/2.2.287*, p. 317-318.

[21] Please see: G.A. Bermann, *Understanding ICSID Article 54*, ICSID Review, (2020), p. 1-33, *http://doi.org/10.1093/icsidreview/siaa020*, p. 4-5.

[22] *Idem*, p. 8.

ICSID[23]. However, we emphasize that the list of courts/authorities designated by the Contracting States is not unequivocal in relation to the competent Romanian courts. Considering that we have not identified official sources that would publicly offer a version of the list in Romanian, we will resort to its interpretation in English, the passage indicating the competent Romanian courts being the following: "*Bucharest Court and the District Courts by circumstance*". It is not clear whether the text refers to county courts, tribunals or courts of appeal, the High Court of Cassation and Justice being the only court that cannot be reasonably taken into consideration in respect to the English wording. In our opinion, the interpretation in the sense that the tribunals are the courts designated by the Romanian State should be accepted taking into account the following arguments: (i) county courts must be excluded as there is no county court whose name can be translated from Romanian into English as "*Bucharest Court*" (i.e. there is no Romanian court called the Judecătoria București); and (ii) courts of appeal must be excluded as any reference to courts of this category would be expected to use the specific English term, namely "*Court of Appeal*", and not the general term "*Court*".

As regards the second condition, it has not raised any problems in practice so far. The parties involved in the arbitration shall receive certified copies of the awards upon their communication. Also, the parties have the possibility to request at any time additional copies to the Secretary General of ICSID, pursuant to the provisions of article 11 of the ICSID Convention.

Based on the examination of the fulfilment of these two formal conditions, the pecuniary award rendered under the auspices of ICSID will take effect on the territory of the requested State. Recognition is the official confirmation of the authenticity of the award, having the following effects: (i) the acquisition of *res judicata* authority in the territory of the requested State; and (ii) taking a preliminary step to the enforcement of the award[24]. Enforcement is the official confirmation of

[23] Please see: CIRDI, *Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention (Art. 54(2) of the Convention)*, ICSID/8-E, available at: *https://icsid.worldbank.org/sites/default/files/documents/ICSID8.pdf* (consulted on 12 November 2021).

[24] Please see: UNCTAD, *Dispute Settlement. International Center for Settlement of Investment Disputes. 2.9 Binding Force and Enforcement*, United Nations, New York,

the enforceability of the pecuniary award in the territory of the requested State[25].

We note that Romania has not regulated by internal norms the procedure according to which the "*recognition and execution*" of the awards rendered under the auspices of ICSID will be carried out, based on the provisions of article 54 (2) of the Convention. Such an internal regulation could have been useful in clearly establishing the rules of procedure (contentious or non-contentious) that will be applied to the procedure regarding the application for "*recognition and enforcement*" of awards. This need was noticed for a long time in the Romanian doctrine by O. Căpățână, who emphasized the following aspects: "*The Washington Convention (...) removes the intermediate stage of control of judgments from other states in terms of their international regularity (...) we find significant the regulation established by art. 54 § 2 which, in order to obtain the recognition and enforcement of a judgment in the territory of a Contracting State, is limited to requiring the interested party to submit a certified copy thereof before the competent national court (...) No other procedure preceding the measures of enforcement is provided for in the Washington Convention, of course it is up to the law of the requested State to establish appropriate regulations*"[26]. In addition, the international doctrine states that, at the time of drafting the ICSID Convention, there were expectations that Contracting States should adopt internal regulations regarding the procedure of "*recognition and enforcement*" of awards, expectations based on the provisions of article 69 of the Convention[27].

Although it does not enjoy a detailed regulation, some observations regarding the nature of the procedure established by the provisions of article 54 (2) of the ICSID Convention are permitted even by the text of

Geneva, 2003, p. 12, available at: *https://unctad.org/es/system/files/official-document/edmmisc232add8_en.pdf* (consulted on 15 November 2021).

[25] Please see: A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, ICSID Review - Foreign Investment Law Journal, Vol. 2, Issue 2, Fall 1987, p. 287-334, *https://doi.org/10.1093/icsidreview/2.2.287,* p. 320-321.

[26] Please see: O. Căpățână, *Litigiul arbitral de comerț exterior*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1978, p. 152-153.

[27] Please see: C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention. A Commentary*, Second Edition, Cambridge University Press, 2009, p. 1146.

the Convention. In our opinion, a relevant aspect is that this procedure, although it has the effect of recognizing and granting the enforcement of the award on the territory of a Contracting State, which refers *prima facie* to the features of an exequatur procedure, it does not imply the verification of the regularity of the award rendered under the auspices of ICSID, but the simple examination of its authenticity, on the basis of the certification offered by the Secretary General of ICSID [28]. This raises the question whether the "*recognition and enforcement*" procedure should be classified as an exequatur procedure, whether simplified or not, on the basis of its effects similar to exequatur, or whether it should be clearly distinguished from the exequatur procedure, on the basis of the difference in substance of the verifications involved in each of the two proceedings (*i.e.* the verification of the regularity of the award, in the exequatur procedure, vs. the verification of the authenticity of the award, in the "*recognition and enforcement*" procedure). However, the answer to this question exceeds this study, which is why the question will be addressed separately.

Beyond the exact establishment of its nature, we consider that it is reasonable to qualify the procedure of "*recognition and execution*" of the awards, established by article 54 (2) of the ICSID Convention, as an independent procedural step in the process of enforcing the arbitral awards. The material competence to resolve the request for "*recognition and execution*" of the award belongs to the tribunals, in accordance with the designation made by the Romanian State. The purpose of the proceedings is to recognize the effects of the judgment in the requested State, in particular its *res judicata* authority and its enforceability. Its effects place this procedural stage before the execution of the execution procedure of the sentence.

Thirdly, the "*assimilation*" thesis of the regime of the enforcement of the pecuniary awards (even with the notable exception of the competence of the enforcement court) is difficult to reconcile with the provisions of article 54 (3) of the ICSID Convention, which contain rules of private

[28] Please see: A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, ICSID Review - Foreign Investment Law Journal, Vol. 2, Issue 2, Fall 1987, p. 287-334, *https://doi.org/10.1093/icsidreview/2.2.287*, p. 320.

international law regarding the rules applicable to the enforcement of arbitral awards.

This inconsistency stems mainly from the interpretation of the English version of the ICSID Convention. On the one hand, article 54 (1) of the ICSID Convention provides that: "*[e]ach Contracting State (...) enforce the pecuniary obligations imposed by that award*". On the other hand, article 54 (3) of the ICSID Convention provides that: "*[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sough* ".

As a principle, the term "*execution*" used in drafting the provisions of article 54 (3) of the ICSID Convention is understood as a reference to coercive measures that may be taken against the property of a debtor who refuses to comply with the provisions of the judgment voluntarily[29]. In our opinion, this term should be interpreted as subsuming the enforcement procedure under Romanian law, starting from its moment of onset (*i.e.* the notification of the competent bailiff) and until the moment of satisfaction of the pursued claim.

Thus, it is difficult to argue that the provisions of article 54 (1) of the ICSID Convention would be meant to determine the entire regime of the enforcement of the pecuniary awards, given that (also) in the ICSID Convention a special text was reserved for establishing the rules applicable to the procedure of their execution, namely article 54 (3) of the Convention.

Beyond the relationship between the provisions of article 54 (1) and (3) of the ICSID Convention, in our opinion, the application of the provisions of article 54 (3) of the ICSID Convention in cases where the requested State would be the Romanian State, lead to the idea that, following the successful procedure of "*recognition and enforcement*" of the award, the creditor will be able to follow the procedural steps specific to the enforcement procedure regulated by the Romanian Code of Civil Procedure.

[29] Please see: Committee on International Commercial Disputes of the New York City Bar Association, *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered under the ICSID Convention*, ICSID Review - Foreign Investment Law Journal, Vol. 27, Issue 1, Spring 2012, p. 207-230, *https://doi.org/10.1093/icsidreview/sis021,* p. 213.

The creditor will thus be able to notify the competent bailiff, in order to open the file for the enforcement of the pecuniary award, based on the provisions of article 665 of RCCP. The bailiff will be able to address, further, to the competent enforcement court, which is, as a rule, the county court (*i.e.* judecătorie), according to article 651 (1) of RCCP, In order to obtain the granting of the enforcement of the pecuniary award, based on the provisions of article 666 of RCCP. On this basis, the claims pursued will be able to be satisfied using the execution modalities provided by the Romanian Code of Civil Procedure.

III. Conclusions

In our opinion, the arguments presented above may constitute a ground for the reconsideration of the case law, which, based on the thesis of "*assimilation*" of the regime of the enforcement of the pecuniary ICSID awards, noted the following in regard with the procedural steps to be taken to enforce these awards: (i) suppression of any exequatur procedure of the awards; (ii) the awards may be enforced directly in accordance with national rules on the enforcement of judgments.

Our conclusion is that for the execution of the pecuniary sentences pronounced under the auspices of ICSID in Romania it is necessary to go through the following steps: (i) obtaining the copy/copies of the award certified by the Secretary General of ICSID *[article 54 (2)]*; (ii) the "*recognition and enforcement*" of the award, at the request of the interested person, by the competent tribunal, on the basis of verification of the authenticity (and not the regularity) of the award *[article 54 (2)]*; (iii) the notification of the competent bailiff by the creditor, in order to open the enforcement file, according to article 665 of RCCP *[article 54 (3)]*; (iv) obtaining the granting of the enforcement, at the request of the bailiff addressed to the enforcement court, which, as a principle, is the county court (*i.e.* judecătorie), according to article 651 (1) of RCCP, pursuant to article 666 of RCCP *[article 54 (3)]*; (v) carrying out enforcement by the means of execution provided for in the Code of Civil Procedure *[article 54 (3)]*. All these procedural steps find their basis in the provisions of article 54 (1) of the ICSID Convention, which establishes the general obligation of Contracting States to ensure the

execution in their territory of pecuniary obligations imposed by arbitral awards.

At this time, we do not wish to comment on the nature of the procedure for "*recognition and enforcement*" of the awards, indicated at point (ii) but we consider that the possible qualifications are: (i) either it is a genuine exequatur procedure; (ii) either it is a simplified exequatur procedure; (iii) either it is a preliminary procedure, with effects similar to the exequatur, but which differs substantially from the exequatur procedure, in that it is limited to the verification of the authenticity of the arbitral award, without involving verification of its regularity (specific to the exequatur procedure).

We consider that this course of actions preserves to a greater extent the balance between the effects of the relevant provisions of the ICSID Convention and corresponds to a natural succession of the steps to be taken for the enforcement of pecuniary awards, as noted by A. Broches: "*Article 54(1) establishes enforceability. Article 54(2) prescribes how enforceability must be invoked and Article 54(3) deals with the execution stage of enforcement*"[30].

A negative effect of the interpretation we propose concerns the time frame in which the enforcement of pecuniary awards will be carried out, which will increase following the introduction of an "*additional*" stage, namely the procedure of "*recognition and enforcement*" of the award, provided by the provisions of article 54 (2) of the ICSID Convention.

BIBLIOGRAPHY

1. ***Romanian doctrine:***

Monographs:

- O. Căpățână, *Litigiul arbitral de comerț exterior*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1978;
- I.P. Filipescu, *Drept internațional privat. Vol. II*, Actami, Bucharest, 1997;

[30] Please see: A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, ICSID Review - Foreign Investment Law Journal, Vol. 2, Issue 2, Fall 1987, p. 287-334, *https://doi.org/10.1093/icsidreview/2.2.287, p. 320-321.*

- I.P. Filipescu, *Drept internațional privat. Vol. II*, Actami, Bucharest, 1999;
- V. Roș, *Arbitrajul comercial internațional*, Official Gazette Independent Company, Bucharest, 2000;
- N.-H. Țiț, Încuviințarea executării silite, Universul Juridic, Bucharest, 2018;

Articles:

- B. Dumitrache, *Încuviințarea executării (hotărârii arbitrale străine): o sintagmă cu două înțelesuri*, Romanian Arbitration Review no. 4 from 2020;

2. International doctrine:

Monographs:

- C.H. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention. A Commentary*, Second Edition, Cambridge University Press, 2009;
- L. Reed, J. Paulsson, N. Blackaby, *Guide to ICSID Arbitration*, Second Edition, Kluwer Law International, Alphen aan den Rijn, 2011;

Articles:

- A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, ICSID Review - Foreign Investment Law Journal, Volume 2, Issue 2, Fall 1987, pp. 287–334, *https://doi.org/10.1093/icsidreview/2.2.287*;
- Committee on International Commercial Disputes of the New York City Bar Association, *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered under the ICSID Convention*, ICSID Review - Foreign Investment Law Journal, Volume 27, Issue 1, Spring 2012, pp. 207–230, *https://doi.org/10.1093/icsidreview/sis021*;
- G.A. Bermann, *Understanding ICSID Article 54*, ICSID Review, (2020), pp. 1-33, *http://doi.org/10.1093/icsidreview/siaa020;*

3. Romanian case law:

- Bucharest Tribunal, Third Civil Division, Sentence no. 446 dated 23 March 2010;
- Bucharest Tribunal, Fourth Civil Division, Procedural Order dated 24 March 2014 (case file no. 9261/3/2014);
- Bucharest Tribunal, Fourth Civil Division, Sentence no. 642 dated 28 May 2014;
- Bucharest Tribunal, Third Civil Division, Sentence no. 1556 dated 24 November 2014;
- Bucharest Tribunal, Third Civil Division, Procedural Order dated 24 September 2018 (case file no. 26727/3/2018);
- Bucharest Court of Appeal, Fourth Civil Division, Decision no. 1483 dated 21 October 2019;

4. The European Court of Justice case law:

- Judgment of the General Court (Second Chamber, Extended Composition) of 18 June 2019, Joined Cases T-624/15, T-694/15 and T-704/15, European Food SA and Others v European Commission, EU:T:2019:423;

5. ICSID Cases:

- ICSID Case No. ARB/01/3 *[Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic]*;
- ICSID Case No. ARB/05/20 *[Ioan Micula, Viorel Micula and others v. Romania];*
- ICSID Case No. ARB/12/25 *[Marco Gavazzi and Stefano Gavazzi v. Romania]*;
- ICSID Case No. ARB/05/13 *[EDF (Services) Limited v.. Romania]*;
- ICSID Case No. CIRDI nr. ARB/10/13 *[Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania]*;

6. Sites:

- UNCTAD, *Dispute Settlement. International Center for Settlement of Investment Disputes. 2.9 Binding Force and Enforcement*, United Nations, New York, Geneva, 2003,

available at: *https://unctad.org/es/system/files/official-document/edmmisc232add8_en.pdf;*

- CIRDI, *Designations of Courts or Other Authorities Competent for the Recognition and Enforcement of Awards Rendered Pursuant to the Convention (Art. 54(2) of the Convention)*, ICSID/8-E, available at: *https://icsid.worldbank.org/sites/default/files/documents/ICSID8.pdf;*
- C.J. Carswell, L. Ilie, A. Iordache, R. Daneș (Reed Smith LLP), *Romania*, GAR Investment Treaty Arbitration, august 2020; available at: *file:///C:/Users/939006/Downloads/ ITA_2020_RomaniaChloe%20Carswell%20and%20Lucian%20Ilie%20(2).pdf;*
- R. James, The *implications* of *the green light to enforcement* of *the* Micula *brothers*' ICSID *award* in *the* UK, available at: *https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/the-implications-of-the-green-light-to-enforcement-of-the-micula-brothers-icsid-award-in-the-uk.*

ROMANIAN MINISTRY OF FOREIGN AFFAIRS AND EXTERNAL REPRESENTATION. TIMELINESS AND PERSPECTIVE

Titi SULTAN *

ABSTRACT

Article 102 of the Romanian Constitution states that "the Government, according to the government program accepted by the Parliament, ensures the achievement of the domestic and foreign policy of the country and exercises the general leadership of the public administration." As a rule, the Ministry of Foreign Affairs is the main mechanism called upon to meet the foreign policy objectives of each state. The foreign diplomatic service is subordinated to the Foreign Affairs Ministry, even if the ambassadors are appointed and recalled by the Romanian President. Both the head of state and the head of the government have their own limited mechanisms to assist them in the exercise of constitutional prerogatives in terms of foreign policy (usually foreign affairs advisers). Recently, the role and participation of the Foreign Ministry in organizing and carrying out international relations has increased greatly, both bilaterally and multilaterally, and developing what is commonly called diplomacy at the highest level. At the implementation level, specialized structures for multilateral relations have been set up, both within the ministries of foreign affairs and other ministries and institutions with external powers (departments, directorates-general, directorates, services, special advisers, etc.).

KEYWORDS: *international relations; foreign policy; diplomacy; parliamentary control; negotiations; external representation; national interest;*

The Romanian Foreign Affairs Ministry, as a specialized body of central public administration, under the government's authority, ensures the fulfillment of the foreign policy of the Romanian state, including the participation in the process after Romania's EU and Euro-Atlantic integration.

In order to achieve these objectives, the Ministry of Foreign Affairs exercises the function of representation, by which it seeks to ensure, on behalf of the State or the Government of Romania, representation

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internally and externally in its field of activity; it defends and promotes the national interests of Romania, Initiate international activities aimed at developing relations with all States, ensure the promotion of Romania's interests in international organizations, protect abroad the rights and interests of the Romanian state, of Romanian citizens and legal persons, initiate, negotiate or participate in the negotiation of international treaties and other agreements for Romania, Alone or together with other ministries, he proposes to the Government the signing, ratification, approval or acceptance of international treaties, accession or denunciation, exchange instruments of ratification, etc.

The Ministry of Foreign Affairs also operates the Government's agent for the European Court of Human Rights, with the rank of Director General, subordinate to the Minister of Foreign Affairs, who coordinates a Directorate-General for the Government's activity. The powers of the Government Agent for the European Court of Human Rights shall be determined by order of the Minister of Foreign Affairs.

The Ministry shall operate, in the direct coordination of the Minister, the Government Officer for the Court of Justice of the European Union, the General Court of the European Union and the Court of Justice of the European free Trade Association, Through which the Romanian State is legally represented before the Court of Justice of the European Union, the General Court of the European Union, the other institutions of the European Union and before the Court of Justice of the European free Trade Association.

The Ministry of Foreign Affairs, through the export Control Department, acts as the national authority in the fields of export control of dual-use items, export control, import control and other military-related operations.

The specific work of the Ministry is carried out by diplomatic and consular staff, whose status, rights and obligations are laid down in the Law no. 269/2003, on the status of the diplomatic and consular staff of Romania, as amended and supplemented later.[1]

Diplomatic and consular staff are active in the central administration. Diplomatic and consular staff shall operate in the central administration or the external service.

[1] Published in the Romanian Official Gazette No 441 of 23 June 2003.

The foreign service of the Ministry of Foreign Affairs comprises diplomatic missions, consular offices and cultural institutes.

Within the coordination of the Ministry of Foreign Affairs, its activity is:

- Fulbright Commission, a bi-national, non-profit organization that manages the educational and scientific exchanges between the Romanian governments and the US;
- The European Institute of Romania, a public institution with legal personality.

At the same time, the Ministry of Foreign Affairs has a very important role in coordinating, together with the Ministry of European Affairs, the activities related to Romania's participation in the European Union.

In this context, the Government Decision No 16 of 12.01.2017[2] provides for a number of main functions of the Ministry of Foreign Affairs with particular emphasis in the field of international relations and diplomacy.[3]

[2] Published in the Official Gazette of Romania No 44 of 16 January 2017.

[3] Of these we illustrate: 1. defends and promotes the national interests of Romania externally; 2. initiate and support international activities aimed at developing peaceful relations and cooperation with all States, based on the fundamental principles and the rules in force of international law; Published in the Official Gazette of Romania No 44 of 16 January 2017; 3. promote at international level the values of democracy, the rule of law, respect for human rights and fundamental freedoms, peaceful collaboration and human solidarity; 4. contribute to the promotion of Romania's national interests in international organizations and structures; 5. follow, analyze and report on developments in international relations and coordinate bilateral and multilateral cooperation activities; 6. defend abroad the rights and interests of the Romanian state, of the Romanian citizens and of the Romanian legal persons, in accordance with Romanian law and applicable international law, as well as international practice; 7. initiate and/or participate in the negotiation of treaties and other documents of international cooperation, including of the Treaties concluded at European Union level and those concerning the amendment of the fundamental treaties of the European Union, In accordance with Act No 590/ 2003 on Treaties and Law No 276/ 2011 on the procedure by which Romania becomes a party to the Treaties concluded between the European Union and its Member States, on the one hand, and third States or international organizations, on the other; 8. prepare or, as appropriate, cooperate with ministries or other public authorities of the specialized central public administration in the preparation of draft regulatory acts related to Romania's external relations; 9. liaise with diplomatic missions and consular posts in Romania in accordance with international law and international practice; 10. organize, direct and control the work of the diplomatic missions and consular posts of Romania; 11. participate in the implementation and implementation of the European Union's

The Minister of Foreign Affairs is responsible for the conduct of foreign affairs either under the control of the Head of State or of the Parliament, depending on the President's involvement in foreign affairs; the Minister of Foreign Affairs runs the state's foreign affairs and is an intermediary between States and between the Heads of State.

There is the rule of international law, according to which the Minister of Foreign Affairs has full powers in all fields within his remit; he represents the state, as well as the Government in international relations, without the need for special powers.

The Minister of Foreign Affairs has got a wide range of attributions, including: He maintains contacts, discusses Romania's mutual interests with other States and their diplomatic agents (he listens to their proposals or approaches and gives them answers); he speaks and conducts negotiations; ensure that the provisions of the treaties are faithfully implemented; appoint some diplomatic agents and consular officials sent abroad, direct them and give them the necessary instructions to carry out their missions; notify foreign states of the appointment or recall of diplomatic agents and consular officials; receive and present to the head of state foreign diplomatic agents; deal with the enforcement of the immunities and privileges of foreign diplomatic agents and consular officials; it provides for the drafting of documents emanating from the head of state in the field of foreign affairs (peace, alliance, trade and navigation treaties, foreign policy statements; replies to foreign documents received); it ensures that the archives, diplomatic correspondence, original treaties and conventions are preserved, etc.

A national project and a premiere for Romania set up the Romanian presidency at the Council of the European Union. This first mandate took place from 1 January to 30 June 2019, at the end of the legislative and institutional cycle at EU level, exactly in the middle of the semester, which required prioritization in order to reach decisions accepted by all EU Member States.

The reflection on the future of the EU materialized at the informal summit of Heads of State and Government in Sibiu on 9 May 2019, after

common foreign and security policy and coordinate, at national level, Romania's participation in the common security and defense policy, as well as in the civilian and military missions under the aegis of the European Union; 12. ensures the representation of Romania at the Foreign Affairs Council.

which the EU-level adopted the Union's strategic agenda for 2019 - 2024. The Ministry of Foreign Affairs has acted to promote objectives and principles such as: Maintaining unity and cohesion, promoting concrete projects that restore citizens' confidence in the EU, strengthening the European project and deepening European integration, based on full respect of its fundamental principles and values.

The activity of the Ministry of Foreign Affairs included a number of activities that were carried out through Romanian diplomatic offices by holding five local presidents (in Iran, Kuwait, Quatar, Kazhastan, and RPD Korea), the organization of around 250 meetings, together with a series of cultural events, contributing to the presidency's success.

For the purpose of cooperation between Parliament and the Government in the field of European affairs, Law No 373 of 18 December 2013[4] was adopted, in which we retain a number of significant aspects concerning the regular information of the Parliament by the Ministry of Foreign Affairs on the significant aspects concerning Romania and the European Union, Parliamentary control on Romania's representation in the European Council, as well as the regular communication of documents by the government to the Parliament, etc.[5]

Furthermore, Article 36 of Law No 96/2006 on the Statute of Deputies and Senators[6] governs the fact that Deputies and Senators examine draft legislative acts and consultative documents of the European Union under constitutional rights concerning parliamentary control of the Government and the constitutive treaties of the European Union.

It was not rare that the Commission or some of its members expressed stronger or, on the contrary, more nuanced positions than those of the Presidency, the Government or the Ministry of Foreign Affairs in relation to some international events, this is also because the MPs have greater freedom of expression derived from their very position as representatives

[4] Published in the Official Gazette of Romania No. 820 of 21 September 2013.

[5] According to the provisions of Article 8 of Law No 373 /2013, the Government shall periodically transmit to the two Parliament Chambers the following three documents: 1) information on the results of the participation in the European Council; 2) periodic reports on the activity and results of Romania's participation in the decision-making process of the European Union, at Council level; 3) six-monthly reports on the fulfillment of obligations to transpose European Union law into national law.

[6] Published in the Official Gazette of Romania No 49 of 22 January 2016.

of the nation, but also from representatives of the political groups in power and in opposition.

A significant chapter in the activity of parliamentary control is the hearing during joint meetings of the two commissions of persons appointed to carry out foreign missions as ambassadors. In addition, a procedure for the hearing of the persons proposed to be appointed ambassadors was drawn up in the Foreign Policy Committees. This document also States that during the hearing the candidate being heard will have to present some considerations on Romania's foreign policy in general and in the geopolitical space of which the country to which he is to be accredited is a Member, in particular; The knowledge of the country in which the person is to be accredited and the history of Romania's relations with the country in question will be considered: the main aspects of the political, economic, social, legal and cultural life of the respective state in the context of its relations with the other States of the world; the candidate will specify how he understands to promote and develop Romania's relations with this country: if necessary, he will present aspects of his personal life which can contribute to the fulfillment of his mission: He will make appreciation of the present situation in Romania and present his perspective option on the ways in which the Romanian state will fulfill its obligations.

Seen in a general context, the government's information to Parliament is a condition for exercising parliamentary control over it.

As it results from a study carried out by the Interparliamentary Union, in most of the States examined, the constitutional rules on the Executive's duty to tell the Parliament about the activity they are doing are generally compulsory, and on this basis a permanent control on the Executive is to be exercised.[7] In some countries, parliamentary procedures concerning information to Parliament are subject to specific extensions and effects.

The parliaments of the world are increasingly connected to international bodies, including the Interparliamentary Union, the Parliamentary Assembly of the Council of Europe, the European Parliament, the NATO Parliamentary Assembly, etc. these forms of parliamentary diplomacy are intended to harmonize the work of national parliaments with that of

[7] See Les Parlaments dans le Monde, Union Interparlementaire, 1995, page 1399 and next.

international bodies, in addition to which they are accredited or have cooperative relationships.

For the States of Central and Eastern Europe, the presence of foreign parliamentary delegations at the meetings of these international organizations is related to the perspective of integration into the European and Euro-Atlantic structures, which has not only a political significance, but which makes its implementation, without parliamentary support, to become a mere utopia.

The work of external delegations shall be questioned either in the plenary of Parliament, one of the Chambers or in a parliamentary committee, as a rule the committee on Foreign Policy, in all cases under the supervision of the Permanent Bureau connecting the delegations and Parliament.

Information received from foreign parliamentary delegations is also sources for new decisions on legislative, control or parliamentary diplomacy.

As for the means of carrying out parliamentary control, we can remember that each year, the Foreign Parliamentary relations Department of both Chambers draws up a joint program, approved first by the Foreign Affairs Committees of the Chambers and then by the Permanent offices. This is a means of control because both the Foreign Policy Committees and the permanent offices have the possibility to amend the joint program. This control concerns both the political component of the program and its financial component, as it is part of Parliament's budget.

These actions, which are principally set out in an annual external relations program, shall be detailed for each activity. A note shall then be made to be submitted to the Standing Bureau for approval, which may decide on the composition or mandate of the delegation, restrict the delegation, uphold or reject the appropriateness of the action, the presentation of the mandate and the fulfillment of that mandate. A report on the work carried out and the course of action shall be drawn up after each action and forwarded to the Standing Bureau.

If the members of delegations attending parliamentary committee meetings do not report on the work done, then the Permanent Bureau shall draw their attention, and if this happens again, it may even impose sanctions on the MPs concerned. Such information is necessary because it can also pre-figure elements requiring future action and the permanent bureau must decide whether to accept it or not.

The questions and interpellations addressed to some dignitaries in the Ministry of Foreign Affairs - ministers, state secretaries, directors, etc. are important, as these parliamentary control means get more information on the Executive's foreign policy actions, Or to clear up certain accusations in certain media concerning the work of the Ministry of Foreign Affairs.

Another means of carrying out the parliamentary control policy is the hearing of the persons proposed to be appointed ambassadors of Romania abroad, following which the Foreign Affairs Commissions of the two Parliament Chambers give consultative approval.

The main purpose of this hearing shall be to establish a dialog enabling, on the one hand, the knowledge of the proposed person and its capacity to carry out the task assigned to him or her, and, on the other hand, the applicant to receive suggestions for his or her future work. To that end, the procedure of the hearing shall include:

1. The proposal of the Ministry of Foreign Affairs and a large curriculum vitae of the person to be heard shall be circulated to the members of the committees at least three days before the hearing;
2. The President of the meeting warned the person heard that concealing data and information or presenting it in a distorted manner in order to mislead the commissions will cause the opinion to be withdrawn, and the Ministry of Foreign Affairs will take appropriate action;
3. The candidate heard shall briefly give reasons as to:
   a) Romania's foreign policy in general and in the geopolitical space of which the country in which it is to be accredited is a part, in particular;
   b) The degree of knowledge of the country in which they are to be accredited and the history of Romania's relations with this country.

The Joint Commission for Foreign Policy also monitors the way in which the Ministry of Foreign Affairs, the other ministries and institutions with competence in the field ensure the implementation of Romania's foreign policy objectives and the use of means and resources to achieve these objectives.

At the same time, the Commission's competence includes aspects concerning the general strategy of Romania's foreign policy and the

governance program in the field of foreign policy, national sovereignty and independence, protection of Romanian citizens abroad, the participation of Romania in international governmental organizations, the relations of Romania with other States in the field of political life, economic and social.

So far, the two foreign affairs commissions have done remarkable work on legislative activity, Euro-Atlantic integration, foreign relations, but also on the control of the Government's activity.

Conclusions

Foreign policy activities are not the exclusive preserve of the Ministry of Foreign Affairs. In the globalized world in which we live a particular role, "public diplomacy" is taking on an increasingly important role as a complementary instrument of official diplomacy, not only useful but also very effective.[8]

With the increasing complexity of relations between States, the expansion of areas for co-operation, the number of government institutions in each country with specific international responsibilities has also increased. Apart from the trade ministries (responsible for organizing foreign economic relations) and the ministries of defense (direct links and military attachés), an increasing number of government structures have acquired foreign responsibilities in their specific field of activity. This trend has been particularly pronounced with regard to the Member States of the European Union, including in the process of enlargement. Moreover, in all EU Member States or candidate countries there are specific government structures (departments, ministries, etc.), usually separate from foreign ministries, but with close links with them.

This trend tends to reduce the role of foreign ministries, particularly in the case of EU Member States, which to a large extent become highly technical institutions to the detriment of the political side and which usually place their international infrastructure (external diplomatic service) at the disposal of other ministries carrying out diplomatic activities autonomously. This trend seems irreversible in the European

[8] T. Meleșcanu, *Diplomacy, Romania's foreign policy, 1992-1996; 2017-2019, Vol. I,* POLITICAL QUADRANT Publishing House, Bucharest, 2019, p. 32.

context, due to the blurring of the border between internal and external policy (in particular, as regards relations between Member States).

The reduction in the role of foreign ministries should not be confused with an "erosion" of the role of the state in interstate relations, although there is a certain link. In essence, part of the role of the foreign ministries was taken over by other institutions, also of the State, as a result, on the one hand, of the widening of the fields of international cooperation and, on the other hand, of the significant increase in specialization in fields, which no longer makes it possible for a career diplomat to be well trained both in political, security and environmental protection, trade, communications or respect for fundamental human rights, to list only some of the current topics of international relations.[9]

Ministries of Foreign Affairs, however, remain the main internal structures for the day-to-day management of relations with other States and maintain a coordinating role in each country in this area. The other internal institutions operating abroad have created their own structures, a kind of foreign minimessists. In many countries there is the practice of secondment of career diplomats to foreign ministries, which helps to harmonize and harmonize approaches to international relations and provides foreign ministries with a monitoring role.

In conclusion, Romania's fundamental foreign interests do not change fundamentally, but there is a need to adapt or even transform, as appropriate, the tactical objectives and the concrete means of achieving them, all the more so since, in principle, Romania's foreign policy must be based on increased institutional transparency, predictability, continuity and coherence and on the fulfillment of the commitments made.

BIBLIOGRAPHY

1. The Constitution of Romania (republished), published in the Official Gazette of Romania No. 767 of 31 October 2003.
2. Government Decision No. 16 of 12.01.2017 on the organization and functioning of the Ministry of Foreign Affairs, published in the Official Gazette of Romania No. 44 of 16 January 2017.

[9] A. Năstase, *Representation of Romania in the European Union within the context of internal and European regulations,* Publishing the Official Gazette, Bucharest, 2013, p. 28.

3. Law No. 373 of 18 December 2013 on cooperation between Parliament and the Government in the field of European affairs, published in the Official Gazette of Romania No. 820 of 21 September 2013.
4. Law No. 590/2003 on the Treaties, published in the Official Gazette of Romania No 23 of 12 January 2004.
5. Law No. 96/2006 on the status of Deputies and Senators, published in the Official Gazette of Romania No. 49 of 22 January 2016.
6. I.M. Anghel, *Diplomatic and Consular rights*, vol. 2, Lumina Lex Publishing House, Bucharest, 2002.
7. A. Năstase, *International organization,* University of Valahia, Targoviste, 2001.
8. T. Meleșcanu, Diplomacy, foreign policy of Romania, 1992-1996; 2017-2019, vol. I, policy DIAL publishing house, Bucharest, 2019.
9. A. Năstase, *Representation of Romania to the European Union in the context of the internal and European regulations*, Publishing House Official Gazette, Bucharest, 2013.
10. See *Les Parlaments dans le Monde,* Union Interparlementaire, 1995
11. M.-R. Ungureanu, *Always loyal. Diplomatic notes for a modern Romania (2005-2007),* Polirom Publishing House, Iaşi, 2006.
12. T. Baconschi, *The key connection. Diplomatic testimony,* Old Court Publishing House, Bucharest, 2013.
13. W. Martens, *A Europe and the other,* Metropol Publishing House, Bucharest, 1995.
14. H. Kissinger, *Diplomacy,* Publishing House ALL, Bucharest, 2008.

REFLECTIONS ON THE AESTHETIC DAMAGE. COMPARATIVE LAW ASPECTS

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ABSTRACT

The social progress dominated by the idea of legal liability has led to highlighting the condition of compensation, as the most important condition for triggering any liability in tort. We find that civil society is increasingly pointing the spotlight at the perspective of the victim, who is awaiting full and immediate remedy, regardless of the type of damage suffered. This study covers the definition of the concept of aesthetic damage in general related to the provisions of the New Civil Code. This paper includes the opinions expressed in the literature on the concept of aesthetic damage, and the indissoluble link between it and civil liability.

KEYWORDS: *damage; bodily; aesthetic; legal liability; conditions of legal liability;*

1. General considerations on the forms of compensation

The New Civil Code capitalizes on the case-law solutions and the opinions expressed in the legal literature but also the previous legal regulations, respectively the provisions of art. 998 et seq. Civil Code of 1865 so that the provisions of art. 1385-1386, expressly regulate the principles of civil liability as follows: the principle of full compensation of the damage and the principle of compensation in kind.

To review their applicability in the case of aesthetic damage compensation, we present the definitions identified in the specialized legal literature that determined the content of the principle of full repair of the damage as follows: "… means the removal of all harmful consequences of an unlawful and culpable act, whether patrimonial or non-patrimonial, i.e. the full reparation of the damage, in order to restore, as far as possible, the initial situation."[1] It has been shown that the

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[1] I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale* (Civil Liability for Moral Damages), Dacia Publishing House, Cluj-Napoca, 1979, p. 37.

principle of full compensation of the damage requires a "complete removal of the damage caused".[2]

On the principle of reparation in kind of the damage, the specialized literature noted that: "(…) means the repair of the damage using the means the most appropriate to its nature, form and seriousness."[3] ; ”(…) i.e., reparation by those means and modalities which, considering its specificity, are to the greatest extent capable of leading to its removal and to the restoration of the initial situation of the victim or injured - constitutes a principle resulting from the very essence of civil liability, which actually consists in the obligation to make full reparation for the damage caused to another."[4]

The principle of reparation by equivalent is expressly regulated in art. 1386 paragraph 1, provisions that provide that this principle applies in two situations, namely: when the reparation in kind is not possible or when the victim is not interested in obtaining compensation for the damage in kind.

The development of the company has led to the widening of the category of reparable damages so that the bodily harms, in the judicial practice and also in the specialized literature, have a distinct place, of damages that may seek compensations. Thus, the New Civil Code provides express provisions (see art. 1387) regarding bodily harms, although their exact definition is not provided. The features specific to this class of damage have been found in the legal literature presumed to be as follows from the legal provisions: ”a) are those negative patrimonial and non-patrimonial consequences of an illicit act likely to affect the bodily integrity or the health of a person; b) medical care, interventions, treatments, medication, etc. is required; c) as a rule, such injuries affect the work capacity of the victim, by diminishing or even losing it, which also implies the decrease of earnings."[5]

[2] *Ibidem*.

[3] *Ibidem*, p. 38.

[4] *Ibidem.*

[5] Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *New Civil Code - commentary on articles,* edition 2, Publishing House C.H. Beck, Bucharest, 2014, p. 1553.

2. The concept of aesthetic damage in general

According to the field of human personality, the legal literature made a classification of the damages[6]: injuries caused to the physical personality; damage caused to the emotional personality; damage caused to the social personality. It has been estimated that the damages caused to the physical personality also include the aesthetic damage (pretium pulchritudinis), and the loss of amenity, youth, etc.[7]

Regarding the aesthetic damage, we note that this is an expression of the bodily injury which requires compensation, taking into account the provisions of art. 1381 et seq. from the new Civil Code. The legal literature mentioned that the aesthetic damage ”(…) includes the amount of injuries and harms that affect one of the most important attributes of the human person, namely the physical harmony or appearance. Specifically, the aesthetic damage refers especially to mutilation, disfigurement or scars caused to the human person, to the negative consequences that they have or can have on his possibilities to assert himself fully in life, and the psychic sufferings that such situations can cause. "[8] It has been shown that "The compensation for the reparation (compensation) of the aesthetic damage is sometimes called the prix de la beauté or pretium pulchritudinis."[9]

Regarding the assessment of the aesthetic damage and any other moral damage, it is a measure that cannot be considered exactly in money, for which it is the judge's responsibility to estimate the extent of the damage and the form of compensation due to the victim. It has been specified in the doctrine that bodily injuries often have both a patrimonial element and a non-patrimonial or moral one; and their repair is done by assessing and establishing the pecuniary value of the patrimonial element, usually by medico-legal expertise, while for the repair of the non-patrimonial element the legal regulations in force do not provide express provisions

[6] *Ibidem*, p. 78.
[7] *Ibidem*.
[8] *Ibidem*, p. 82.
[9] *Ibidem*, p. 83.

so that the establishment of monetary compensations is made by the judge.[10]

We appreciate that the above-mentioned task is difficult enough to accomplish without the judge having at hand any "helpful tools", which falls within the extent of the issue examination that should be performed by the judge; which could be "approaches" and the methods "necessary or at least useful to lead to the formation of an opinion on the assessment of the damage caused but also on the monetary compensation due to compensate for the damage suffered by the victim.

The High Court of Cassation and Justice by Decision no. 1130/21.02.2012 (taking into account at that time the provisions of the Civil Code of 1865) provides criteria for assessing the extent of aesthetic damage but also recreational, understood as forms of bodily harm as follows: ”Aesthetic damage and loss of amenity meet in a common point, both are subsumed into the broader category of the bodily harm. In this respect, both injuries are characterized by injuries to health or bodily integrity. From a subjective point of view, both aesthetic damage and loss of amenity involve physical and mental suffering. Unlike loss of amenity, the aesthetic damage is limited to those injuries that defeat the physical harmony of the person. Only injuries likely to affect the aesthetics of the individual justify the compensation. In the case of aesthetic damage, the cause of mental suffering is also reviewed differently. If, in the case of loss of amenity, the injuries affect all the actions that a normal life entails, the aesthetic damage especially influences certain segments of the social life. Mutilation, scarring, disfigurement can be factors that can cause job loss, if it is conditioned by a pleasant physical appearance, or even "condemnation" to loneliness. The negative consequences of the aesthetic damage are felt mainly in the family and professional context, without losing sight of the fact that any person suffers from awareness of unsightly wounds or scars. "[11]

[10] L. Pop, *Tratat de drept civil. Obligațiile (Obligations), Vol III. Non-contractual contractual relations,* Universul Juridic Publishing House, Bucharest, 2020, p. 507-509.

[11] I.C.C.J., s. I civ., dec. no. 1130 of 21.02.2012*, www.scj.ro*, Uță L., *Daunele morale în contencios administrativ, în litigii cu profesioniști, de muncă și de asigurări sociale- practică judiciară (Moral damages in administrative litigation, in litigation with professionals, labor and social insurance - judicial practice),* Hamangiu Publishing House, Bucharest, 2017, p. 29.

It has been shown that "the aesthetic damage involves both physical pain (as a result of injuries and physical injuries) and mental suffering, which the injured person feels when he becomes aware of his situation as a mutilated, disfigured person, etc. "[12], which means that this type of injury includes a subjective and an objective side. Mental suffering is shown in the legal literature that it can be felt differently by each victim given the mental sensitivity of each victim, the age of the victim, her gender, training or intellectual level, its harmony/balance.[13] We consider it important to remember the impossibility of accurately assessing the extent of an aesthetic damage from the subjective point of view, by medical experts in medical psychology precisely due to the subjective component, specific and different at the same time from one person to another.[14] About the objective aspect it was shown that it consists in achieving physical integrity, mutilation, disfigurement, scarring, etc. The perception according to the individual and his living conditions, of the physical mutilation, of the scars, is the premise that determines the psychic sufferings of the injured person. This results in both the objective and subjective nature of the aesthetic damage."[15]

About the aesthetic damage, we find provisions in the New Criminal Code; art. 194 regulates the offense of bodily injury which may have as a possible consequence the commission of the deed from art. 193 and a serious and permanent aesthetic damage. The specialized legal literature mentioned that[16]" (...) it has been noted that "disfigurement" from the old Code is replaced with the expression "serious and permanent aesthetic damage". The expression "aesthetic damage" was preferred, as it is already enshrined and explained in doctrine (including the medico-legal)

[12] A se vedea D. Mazeaud, *L'inconscience de la victime est sans influence sur la réalité et la réparation du préjudice*, in Recueil Dalloz Sirey nr. 27/20 iulie 1995, p. 234 apud I. Urs, *Repararea daunelor morale* (The victim's unconsciousness has no influence on reality and the reparation of harm), in Dalloz Sirey Collection no. 27/20 July 1995, p. 234 apud I. Urs, *Compensation of moral damages,* Lumina Lex Publishing House, Bucharest, 2001, p. 75.

[13] I. Urs, *Repararea daunelor morale (Reparation of moral damages),* Lumina Lex Publishing House, Bucharest, 2001, p. 75.

[14] *Ibidem*, p. 76.

[15] *Ibidem.*

[16] V. Cioclei în G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *Codul penal comentariu pe articole, ed. 2 (Criminal code commentary on articles, edition)*, C.H. Beck Publishing House, Bucharest, 2016, p. 541.

and in practice. Severity and permanence are two features of the aesthetic damage highlighted in the case-law and underlined by the Supreme Court. In general, these characteristics refer, on the one hand, to the fact that the temporary aesthetic damage that is remedied by itself, in a natural way, does not fall within the assumption targeted by the legislator, and, on the other hand, to the fact that the concealment of the damage aesthetically by a prosthesis, does not mean its removal and as such, does not remove the deed from the scope targeted by the legislator"[17].

In the considerations of the Constitutional Court Decision no. 703/2016, in paragraph 47, states that: " In addition, in these situations, the flexibility of the law is preferable, as it is not possible to establish a priori all the possible consequences that may or may not fall into the category of serious and permanent aesthetic damage, following that, depending on the particularities of each case to determine, *by medico-legal acts, whether or not the traumatic injuries are severe and permanent (*my italics*)"*, which leads to the idea that the experts are called to find out more the criteria of severity and permanence of an aesthetic damage.

3. Aspects regarding the compensation of aesthetic damage in France

The legal literature has exemplified the fact that French courts have long granted compensation for aesthetic damage, taking into account "mental suffering resulting from loss of physical harmony or any aesthetic damage; (…) these damages must be compensated even in situations where they do not have any negative pecuniary repercussions on the injured person. "[18]

Given that the regulations of the Civil Code of 1865 took into account the provisions of the French Civil Code of 1804, we turned our attention to the French regulations; it has been noted that the effects of the Great War (consisting in part in mutilations, severe disfigurements, etc.) led to the need for the Decree of February 28, 1925, which completed the scale guide for facial mutilation, which is the annex to the Decree of 29.05. 1919 on the implementation of the Law of 31.03.1919 on pensions;

[17] *Ibidem*, p. 541.
[18] *Ibidem*, p. 78.

subsequently, the Law of 27 December 1973 expressly enshrines the existence of this type of reparable damage.[19] Currently, we find the aesthetic damage in the content of the Dintilhac nomenclature, which, although not binding, is used by the civil courts.[20]

An opinion says that the French case-law seems to provide insufficient compensation to the victim, which is why lawyers' efforts in arguing for obtaining monetary compensation for the victim before the judge must be concentrated because the reasons of the courts generally tend to be minimal in terms of quantification, compensation due to the victim for compensating the aesthetic damage; not being possible to extract a clear definition of it. Uncertainties affecting the concept of aesthetic damage affect the assessment methods. The Dintilhac nomenclature defines the aesthetic damage as the alteration of the victim's appearance, giving the example of a scar. It has been said that it is a laconic definition that does not lead to the clarification of the doctrinal positions expressed regarding the aesthetic damage; the concept of aesthetic damage oscillating between the attack on beauty and the attack on a person's identity. If the aesthetic damage compensation is regarded as an attack on beauty, it leads to the fact that the society is crossed by norms that regulate beauty, ugliness, which attracts even more suffering caused to the victim. It has been shown that the right to beauty is as legitimate today as is the right to health.[21]

Regarding the aesthetic damage understood as an attack on the person's identity, it has been interpreted that the change of physical appearance without the person's consent is an attack on the identity, standing for a damage that must be fully repaired according to the principle of full damage but in a different logic, other than the attack on beauty which leads to the fact that the physical appearance of a person is an element of a person's individuality.[22] In the absence of an exact definition of the aesthetic damage in positive law, the answer to these questions is provided by the assessments made by the judges. From the checks performed by an author it appears that in practice, the instruments

[19] A. Mâzouz, E. Gardounis et Al. Dumery, *Les évolutions contemporaines du préjudice*, L'Harmattan, 2019, Paris, p. 264.
[20] *Ibidem*, p. 264.
[21] *Ibidem*, p. 266.
[22] *Ibidem*, p. 269.

used are standardized by carrying out a normative evaluation of the aesthetic damages. The assessment of the aesthetic damage is achieved by its standardization and is the result of the use of medical scales, but also of the predefining of the individualization criteria in the compensation references.[23] With respect to the aesthetic damage assessment, the judge often uses a medical examination, the expertise being understood as a guarantee for an informed decision because the magistrate does not have the necessary medical skills to examine the victim himself, so the stakes related to the way the medical expertise is carried out have a major impact on the final assessment. To accomplish their mission, medical experts use scales that allow them to structure their expertise by a method. The object of these scales consists in the objective description of the damage that leads to the individualization by the judge taking into account criteria such as the gender, age or even profession of the victim.[24]

The most used scale is the ESKA scale which involves a scale from 1 to 7. These figures are associated with ratings that assess the damage from minimal to very significant damage.[25] Questions about how these ratings are given, specifically what is taken into account to give the "important" rating in the aesthetic field have been constant? Is it appreciated in terms of beauty or normality? It has been said that "an extremely discreet, short scar, usually hidden by clothes, could lead to the retention of the tiny qualifier for which the quantification is less than 0.5/7. At the other end of the scale is the grade of 7/7 and is extremely rarely retained, in exceptional situations that correspond to monstrous disfigurements or those physical aspects that usually generate repulsion. The social norm of beauty seems to be at the heart of assessing the severity of the wound.[26]

The standardization of the assessment, according to a medical scale raised many questions, considering that assessing the seriousness of an aesthetic damage through a scale also involves a subjective part. Then a careful assessment of the damage based on a scale generates the questioning of whether the aesthetic damage is a damage to beauty or

[23] *Ibidem*, p. 270.
[24] *Ibidem*, p. 271.
[25] *Ibidem.*
[26] *Ibidem*, p. 272.

identity? It has been said that this issue would be in the legal field rather than a medical practice. It has been considered that even if it were held in the positive law that the aesthetic damage is half an attack on beauty, the question was asked to what extent, which is the extent to which the physician has the task of making a fine/delicate assessment of the repair between the new appearance, physical condition of the victim and the standards of beauty in his social environment[27]. It has been seen that the judges are happy to currently and generally assess, by conducting an assessment of the damage suffered rated on the scale of 1 to 7 in a sum of money slightly modulated by the individualization of the damage.[28] The Dintilhac nomenclature shows that the aesthetic damage is assessed by experts on a scale from 1 to 7, validating the procedure by which the indemnity references are directly associated with indicative amounts on a scale from 1 to 7. For example, the Mornet framework, which is widely used by the courts, being updated regularly and extremely easily, proposes for the aesthetic damage quoted from 1/7 to 2000 euro indemnity and for a damage quoted 3/7 between 4000 and 8000 euro.[29]

It was considered that through the systematic use of the scale, the assessment made by the experts has a direct influence on the amount allocated in the end, in the opinion of an author, should be strictly judicial. In the light of these elements, it has been noted that it was necessary that the objective part of the damage assessment be performed by experts and the subjective part and that of the individualization of the aesthetic damage be left to the judges. Specifically, the medical expertise is presented to consist of a detailed description of the injury accompanied by a description with photographs. Such a method leads to an evolution in the sense of abandoning the severity scales, which would lead to the possibility of making the assessment as close as possible to the individuality of each victim. In the same vein, it is appreciated that the predefined criteria for compensation benchmarks could be waived.[30]

Another option recommended by an author would be the standardization of the criteria for individualizing the compensation references. In this case, after an objective assessment of the injury by the

[27] *Ibidem.*
[28] *Ibidem.*
[29] *Ibidem*, p. 273.
[30] *Ibidem*, p. 274.

expert, it has been shown that it is up to the judges in principle to individualize and contextualize it in order to take into account the specifics of each victim and each situation. For this reason, the indemnity references associate grades 1 to 7 not with a precise amount, but with an interval in which the judge is invited to meet. Such an assessment largely depends on the judge's personal empathy, on its own sensitivity to the victim's situation. To avoid differences that could result in the award of different amounts as compensations, the nomenclatures of the categories of damages and the indemnity references for bodily injuries recommend that the judicial evaluation take into account predetermined criteria such as the age, gender, professional situation of the victim or even social habits. It has been considered that taking such criteria into account in the individualisation of the injury may even be harmful because standardization could occur at this level, although initially such criteria would seem objective at first sight. It reminded to judges that these elements must be taken into account is a way of conveying revised ideas that are so well accepted, socially "normal" that are seen as a form of objectivity. An example was provided in terms of rabies and sex; in this case, the age criterion, as recommended, is in fact an invitation to better compensate young people. It may be considered that this is justified by the fact that the young person will probably live longer with an altered appearance than the elderly person. The invitation to take gender into account, is surprising; this implies that the compensation for aesthetic damage granted to women would be higher than that granted to men. It has been claimed by some authors that "scars and deformities are less severe in men than in women. Eventually, a scar that affects a delicate young person may not have the same effects on a man's aesthetics.[31]

The case-law does not clearly indicate from the court's reasons how to substantiate the amount granted to the victim, and it is not possible to identify possible stereotypes.[32] In the absence of a clear definition of the

[31] L. Melennec, *L'indemnisation du préjudicie estehétique*, Gaz.pal.1976.2.doctr.625. spec.p.625 apud Alicia Mâzouz, Emmanuel Gardounis et Alexandre Dumery, Les évolutions contemporaines du préjudice, L'Harmattan, 2019, Paris, p. 276.

[32] S. Chassagnard-Pinet et M. Naab, *Corps féminins et responsabilité civile*, in S. Hennette-Vauchez, M. Pichard et D. Roman (dir.), la loi & le genre - Études critiques de droit français, CNRS éditions, Paris, 2014, p. 297, spéc. p. 308-309 apud Alicia Mâzouz, Emmanuel Gardounis et Alexandre Dumery, Les évolutions contemporaines du préjudice, L'Harmattan, 2019, Paris, p. 276.

aesthetic damage, the practice develops a standardized, even stereotyped, concept, which is developed using highly serious medical scales and the established criteria for individualizing the damage. It has been indicated that there is currently no legal argument to allow a specific choice of conduct showing that the violation of identity would gain ground in addressing the issue of compensating the aesthetic damage taking into account other issues such as: voice and smell.[33]

We note that the subject of appreciation of beauty/aesthetics by expert doctors and also of the methods used to assess the aesthetic damage is a permanent concern of our specialists, so in the XX National Congress of Forensic Medicine was formulated ”a scale assessment of aesthetic damage” as follows: ”(…) I have reviewed the methods of assessing the aesthetic damage in Romania and I found that they all have a high degree of subjectivism. Therefore, we used a new method of assessing the aesthetic damage that uses three criteria: the characteristics of the consequences of traumatic injuries (not only scars), the distance from which they are observed, the intimate distance and social distance, the view angle for these assessment. Their corroboration results in an aesthetic damage assessment scale that is easy to use and much more objective."[34] The experts also commented on the "severe and permanent damage in the medico-legal practice, showing the following: ”The new criminal code that entered into force in February 2014 no longer uses the term of disfigurement, but the term of severe and permanent aesthetic damage; there is no major difference between the two terms, implying both a morphological or aesthetic deformation that obviously prejudices the overall harmonious conformation of an anatomical segment; this morphological or aesthetic deformation must be permanent, definitive after the exhaustion of all the therapeutic means. *As the medical examiner is not an esthetician*, (sn.) appears *the rather subjective nature* (my italics) on the appreciation of the aesthetic damage, which can generate controversies"[35].

[33] *Ibidem*, p. 274.

[34] A. Căpâlnean, Institute of Forensic Medicine Iasi "Proposals for a unitary assessment of aesthetic damage" in the XX National Congress of Forensic Medicine - material on: https: cnml.ro on 09.11.2021.

[35] A. Knieling, Antoanela Croitoriu, Gina Toma, A. Scripcaru, Diana Bulgaru Iliescu, *Institute of Forensic Medicine Iasi;* 2 UMF "Grigore T. Popa" Iasi, "Serious and

Conclusions

As can be seen, the issue of non-existence of a unitary practice regarding the assessment of the damage, and the establishment of the amount of the monetary compensation due to the victim is also identified in our country. In the same respect, we consider that on the objective side of the aesthetic damage assessment can be done by experts where a medico-legal examination is required; however the assessment of sums of money must be made by the judge based on an interval (using "grids" that are constantly updated). Also, this estimate made by the judge based on a possible grid should be made as a possibility and not as an obligation on the judge. Regarding the subjective side, we consider that this should be the attribute of the judge motivated by the fact that an expert doctor does not have the quality of esthetician (as the specialists said); there is no field of natural "aesthetics" that has standardized, pre-determined criteria to which every human being should accede. In our opinion, the judge is called to assess based on each individual, the state of affairs by taking into account that the human being is unique and using standardized rules would generate a new harm to the victim.

BIBLIOGRAPHY

1. I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale (Civil Liability for Non-pecuniary Damages),* Publishing House Dacia, Cluj-Napoca, 1979.
2. Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil - comentariu pe articole (The New Civil Code - commentary on articles),* 2 ed., C.H. Beck, Publishing House Bucharest, 2014.
3. G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *Codul penal comentariu pe articole, ed. 2 (Criminal code commentary on articles, edition),* C.H. Beck Publishing House, Bucharest, 2016.
4. The Civil Code of 1865.
5. The New Civil Code.

permanent cosmetic damage in forensic practice" in the XX National Congress of forensic medicine - material on: https:cnml.ro on 09.11.2021.

6. The New Criminal Code.
7. A. Mâzouz, E. Gardounis et A. Dumery, *Les évolutions contemporaines du préjudice,* L'Harmattan Publishing House, Paris, 2019.
8. L. Pop, *Tratat de drept civil (Civil Law Treaty) Obligațiile (Obligations) Volume III. Non-contractual contractual relations.* Universul Juridic Publishing House, Bucharest, 2020.
9. L. Uță, *Daunele morale în contencios administrativ, în litigii cu profesioniști, de muncă și de asigurări sociale- practică judiciară (Moral damages in administrative litigation, in litigation with professionals, labor and social insurance - judicial practice),* Hamangiu Publishing House, Bucharest, 2017.
10. I. Urs, *Repararea daunelor morale (Reparation of moral damages)*, Lumina Lex Publishing House, Bucharest, 2001.
11. Căpâlnean A. - Institute of Forensic Medicine Iasi "*Proposals for a unitary assessment of aesthetic damage"* in the XX National Congress of Forensic Medicine - material on: https: cnml.ro on 09.11.2021.
12. A. Knieling, Antoanela Croitoriu, Gina Toma, A. Scripcaru, D. Bulgaru Iliescu - Institute of Forensic Medicine Iasi; 2UMF "Grigore T. Popa" Iasi "*Serious and permanent cosmetic damage in forensic practice*" in the XX National Congress of forensic medicine - material on: https: cnml.ro on 09.11.2021.
13. I.C.C.J. and civ., Dec. no. 1130 of 21.02.2012, www.scj.ro.
14. DCC no. 703/2016, Official Gazette, Part I no. 293 of April 25, 2017.

NOVATION, AN ILLUSORY UTILITY

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ABSTRACT

The idea of novation involves the transformation of the obligation relationship by extinguishing an old obligation and the emergence of a new obligation.
The importance of the novation mechanism in Roman law was indisputable given that in this legal system were not allowed many legal proceedings that today reach the same inconvenient but more advantageous effect for the creditor (e.g., assignment of a claim, personal subrogation and so on). The last decades have urgently called into question the need for the existence of this legal figure. In the context of the complete disappearance of the mechanism in German law, some authors have invoked the futility of the novation, showing that the actual transformation of the obligation can be achieved through other legal operations, while emphasizing the disadvantage of using this legal figure, leading to the loss of the guarantees of the original obligation. Other authors emphasize the need to retain a legal figure collateral to the novation of the obligation, namely the novation of the contract that would benefit from a real practical interest.

KEYWORDS: *novation; obligation; debt; debtor;*

I. What is novation?

This means of transformation has been used since Roman law, is regulated (or accepted) in all legal systems and has been accepted under the rule of our old Civil Code.

The current civil code concisely legislates the novation in six articles, 1.609-1.614, sufficient texts, in our opinion, to emphasize the legal nature of the novation (the birth of a new obligation), its types (objective and subjective) but also the concrete effects. Moreover, a broader and more analytical normative approach would have been superfluous and, moreover, in our opinion, would have created undesirable confusions, given the legal regulation of all the other legal institutions discussed so far in relation to the transfer of obligations.

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Novation is the legal operation by which the parties, as a result of the agreement of wills, *extinguish an old obligation* and, at the same time, *replace it with a new obligation*. It is therefore a transformation of the obligation.

The specificity of the novation consists in the fact that the extinction of the old obligation does not lead to the cessation of its effects, but only to its transformation into another obligation. Therefore, the novation achieves an extinction of the old obligation with all the accessories that guarantee it and, at the same time, a transformation of it into another obligation that will be contracted by the parties instead of the old one.[1]

For example, if a party no longer wants to receive the price from the debtor, but wants to receive certain services in return, they will have to change the object of the obligation, i.e. the objective novation will operate - the contract with the old object expires and a contract is born with the new object.

II. Utility of the novation

There is interest in the *objective novation*, i.e. by changing the object, being the only legal mechanism of this kind.

Regarding the subjective novation, by changing the debtor or the creditor, it is similar to the assignment of a claim and the taking over of a debt. However, how do we distinguish them? In the case of novation, the essential effect is that the old obligation is extinguished and a new one will be born; in the case of assignment of claim or subrogation, the obligation remains unchanged and is transmitted with all guarantees and accessories to the creditor. Also, the novation is delimited by the taking over of the debt by the fact that it transmits both the asset and the liability of the obligation through the subjective novation; the takeover of the debt transmits only the liability. The novation leads to the extinction of the guarantees of the old obligation, being a real advantage.

[1] I. Adam, *Civil law. General Theory of Obligations, op. cit.,* 2014, p. 663.

II.1. Objective novation

It is the first form regulated by art. 1609 point (a), and presupposes an identity of the parties, creditor - debtor, but which implies the modification of the cause, object or modalities of the obligation (the parties agree that the amount owed by the debtor by way of purchase price shall be retained by the debtor but as a loan)[2] .

It has also been noted in the case-law that the change in the currency in which the payment is to be made is a real objective novation.

II.2. Subjective novation

It is done by changing the creditor or debtor of the original obligation.

By changing the debtor, a third party undertakes to pay the debt, even without the consent of the original debtor, which will be released (a third party pays the debt of the borrower).

With the change of creditor, a new creditor is substituted for the original creditor, the debtor being released from the creditor of the old obligation, but bound to the new creditor of the new obligation (the creditor agrees with a third party that his debt will be paid to him, as a result of a new agreement, on the idea of "*don't give me my money back, give it to him and you are also released towards me*").

III. Novation and other legal operations

Although the novation, by changing the creditor, has similarities with the assignment of the claim, and the novation, by changing the debtor, with the taking over of the debt, the fundamental difference in relation to them is represented by the fact that the novation does not transmit the obligation from one patrimony to another, but transforms it; the original obligation and its accessories are extinguished, thus resulting in a new obligation, which may have a different legal nature. For example, the initial obligation may have the nature of tort liability, but the obligation resulting from the novation will always be of a contractual nature.

[2] *Civil code comments by articles*, 3rd ed., in Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), C.H. Beck Publishing House, 2021.

IV. Validity conditions

Novation is a contract, and as such it is necessary that the new novation agreement fulfils all the general conditions of validity, respectively all the conditions regarding the existence of the capacity to contract, consent, the object to be determined and lawful, also the cause to be lawful and moral.

The form of the novation must be in accordance with the one imposed by law for the modification of the contract, which is mentioned by art. 1243 Civil code - any modification of the contract is subject to the formal conditions required by law for its valid conclusion.

V. Special conditions

V.1. There must be a valid *old* obligation, which will be extinguished by the will of the parties.

The obligation under absolute nullity cannot be novated. The contract under absolute nullity is not subject to confirmation or novation. The obligation was not born valid, so it cannot be novated. An absolute null contract will remain so.

As an exception, if the old obligation is under relative nullity, it may be novated, as the voidable obligations can be confirmed according to art. 1264 of the civil code. However, it is necessary for the annulment to be covered by the novation before the court rules and orders the annulment of the contract.

V.2. A new valid obligation is born which will replace the old one. If the new obligation is not valid, the old obligation remains in force and the new obligation is deemed never to have existed and the old obligation is deemed never to have been extinguished.

Therefore, *the extinction of the old obligation is conditional on the creation in its place of another valid obligation.* If the parties terminate the new obligation by mutual consent, then the old obligation will take effect as the old obligation is revived. We could consider that the old obligation *survives and waits in the background*, preventively, in case the parties change their minds.

V.3. The new obligation must have an element of innovation compared to the old obligation. Either the parts can be changed, or the object or cause. The change of the debtor can be done with or without the consent of the debtor from the old obligation; in the assignment of the claim, the consent of the debtor is not necessary at all, so that it is similar, only that in the case of novation, an obligation is extinguished and another is born towards the new creditor.

As a mechanism, the novation does not transmit the debt, as happens in the case of assignment of claim, but gives rise to a new debt instead of the extinguished one, because the new debt will no longer benefit from the guarantees of the old obligation and any of its accessories. The parties' consent, when the subject matter changes, must be obtained before the payment is made. In addition, the conversion of an obligation purely and simply into an obligation subject to a condition and vice versa is also considered novation.

Therefore, a simple contractual modification should not be confused, by an addendum, with the novation, because the novation is not only a simple modification of the initial contract, but, by the express will of the parties, the existence of the novation is determined.

V.4. **There must be the express intention of the parties to novate**. Novation is not presumed. The intention to novate must be unquestionable. The will to transform the obligation must be express and clear.

VI. Effects of novation

VI.1. Extinctive effect

The novation leads to the extinction of the initial obligation together with all its accessories, respectively guarantees: pledge, mortgage, surety, privileges and its replacement with a new obligation.

Original claim (the old obligation) will be extinguished together with all its guarantees, which, being accessories of the original claim, cease at the same time. However, some distinctions must be noted, namely that the mortgages constituted by the debtor are to be extinguished if a *subjective novation by changing the debtor*; in the case of other types of novation, the guarantees provided are maintained.

However, mortgages may be maintained if the debtor expressly consents to them, mortgages set up by third parties to guarantee the original obligation will be extinguished once the novation is concluded.

This is logical, as third parties have guaranteed for a certain obligation, so the guarantees for a completely new obligation will not be maintained. Mortgages guaranteeing the original claim will not accompany the new claim unless expressly provided for, as such third parties will not be able to be obliged to guarantee the new contracted obligation but they are protected, for which reason their guarantee is extinguished strictly for the original obligation, but not for a new one, if they have agreed to maintain the guarantees for the new obligation.

Solidarity. The novation between the creditor and a joint and several debtor also releases the other co-debtors. In addition, the novation which operates for the principal debtor will also release the guarantor.

Mortgage on codebtor's assets. Mortgages related to the old claim can only be transferred to *co-debtor's assets* which contracts a new debt.

Parts of the novation

The new obligation is born at the same time and conditioned by the extinction of the old one. The new obligation is always contractual, resulting from the agreement of the parties, regardless of the source of the old obligation (contractual/extracontractual).

Means of defence. In the case of subjective novation by changing the debtor, the new debtor cannot oppose to the creditor the means of defence he had of the original debtor against the creditor, except the absolute nullity of the act of birth of the original obligation, because that previous contract concluded between the original debtor and the subsequent debtor is not creditor of the original debtor.

Co-ownership

The indivisible obligation is not divisible between debtors, creditors or their heirs. Each of the debtors or of the heirs can be constrained separately to the execution of the entire obligation, and obviously, each of the creditors or heirs of the creditors may claim from debtors the full performance of a joint and several obligation.

The existence of several creditors. The novation agreed by a creditor extinguishes the obligation only for the part of the claim that belongs to them. Towards the other creditors, the debtor remains obliged for everything.

The existence of several debtors. The novation consented by a debtor extinguishes the indivisible obligation and releases the other debtors, but they will have to pay back the debt of the debtor who paid, taking into account the part he was obliged to pay.

Therefore, payment by any of the debtors who are jointly and severally liable extinguishes the debt to all the other co-debtors. Indivisibility also passes on to successors. In the case of passive indivisibility, the debtor sued may claim to be joined by the other debtors.

The default of one of the debtors, whether by operation of law or at the creditor's request, does not have effect against the other debtors.

The suspension or interruption of the prescription in respect of one creditor or debtor shall also have effect in respect of the others.

VI.2. Generating effect, by giving rise to a new obligation at the same time as the original obligation is extinguished. The new obligation is always contractual in nature, since it results from the will of the parties, irrespective of the source of the old obligation.

Compared to the above, we can conclude that the novation is similar to the assignment of the contract, as we notice that the object of the novation contract may have its origin in a deed causing damages by which the tortious civil liability of the perpetrator was involved, and the source of the novation it may even be the judgment rendered in the case.

VII. Conclusions

It should be noted and remembered that, in view of the new legal provisions allowing, for the first time in our legislation, the transfer of a debt and the full assignment of a contract, in view of the clear and consistent approaches to assignment of a claim and subrogation in the Civil Code, the legal regulation of novation (especially subjective novation) appears superfluous. For our part, we also agree with the majority of doctrinal opinions (we refer, of course, to those based

exclusively on the provisions of the Civil Code in force) and consider that subjective novation, as a legal institution, is almost useless, since all the practical hypotheses in which it can be used are currently covered by the means of transmission of obligations which we have discussed, i.e. assignment of a claim, subrogation, transmission (assignment or takeover) of a debt and, above all, assignment of a contract.

The only utility of regulating subjective novation *de lege lata* (if we are trying to find such a utility) still resides, in the new modern legislative reality, in the opportunity to establish rules, generally applicable to concrete situations in which a person replaces another person in the performance of a contract, regardless of the contractual form under which this replacement is made.

Instead, we are of the opinion that objective novation must be approached legally, as a matter of principle, all the more so since the Civil Code does not contain, unlike subjective novation, any other provision regulating situations in which the contractual relationship is essentially modified by a change in the subject matter of the contract.

REFERENCES

1. Romanian Civil Code.
2. I. Adam, Civil Law, *General Theory of Obligations*, Ed. C.H. Beck, Bucharest, 2014.
3. G. Boroi, *Civil Law Fact sheets - Obligations,* Ed. Hamangiu, Bucharest, 2021.
4. *Civil code, commentary on articles,* 3rd ed., Ed. C.H. Beck, Bucharest, 2021.
5. L. Pop, *Civil Law Treaty, Obligations,* vol. I, Ed. C.H. Beck, Bucharest, 2006.