Sónia de Carvalho (ed.)
Anton Petričević (ed.)

Building an Adapted Business Law

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Building an Adapted Business Law

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Activity
Sónia de Carvalho is associate professor at the Law Department of Portucalense *Infante D. Henrique* Universitiy, where she specializes in Commercial law, EU Competition Law, Procedural Labour Law. Lawyer in the Portuguese Bar Association; lecturer of Portuguese Bar Association, member in the Editorial Board of several scientific journals; evaluator at the exams to CEJ admission; researcher of IJP; lecturer at several conferences; professor in undergraduate, postgraduate, master's and professional training courses, in various institutions, since 2000.

Publications
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Activity

Anton Petričević is assistant professor at the Chair of labor and social security law and social work at the Faculty of Law, University of Josip Juraj Strossmayer in Osijek, Republic of Croatia. In 2007 he graduated from the Faculty of Law in Osijek. In 2011 he successfully completes the program of pedagogical-psychological and didactic-methodical training at the Faculty of Teacher Education in Osijek. In 2013 he successfully defended his master's thesis entitled "Working hours - Changes and Challenges" at the Faculty of Law of the Pan-European University "Apeiron" Banja Luka, Bosnia & Herzegovina. In the same year he conducted a research on his PhD thesis at the University of Tokyo, Faculty of Law, Japan. In 2015. he successfully defended his Ph.D. thesis titled "Working relation and decent work" at the Faculty of Law of the Pan-European University "Apeiron" Banja Luka, Bosnia & Herzegovina. In the same year he was elected as a postdoctoral assistant (senior assistant), and then since 2017 as assistant professor at the Chair of labor and social security law of the Faculty of Law of Josip Juraj Strossmayer University in Osijek, Croatia, where he currently works. He is actively using English and Italian language in speech and script and possesses passive knowledge of Spanish and Portuguese language. The main areas of his scientific interest are: decent work, protection against discrimination and mobbing at the workplace, job flexibility, legal protection of persons with disabilities. He teaches the following courses: Basics of labor and social security law, Social policy (Professional administrative study programme), Social security law (Undergraduate university study of social work).

Publications

Actively participates in scientific activity by publishing scientific papers independently and in co-authorship on domestic and international scientific conferences. He has participated in several international conferences in Austria, Romania, Serbia, Bosnia and Herzegovina, North Macedonia.

Prizes

Award of the Dean of the Faculty of Law in Osijek for outstanding success during education 2005.

Award of the International Literary Institute for outstanding contribution to artistic creation 2004.

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Building an Adapted Business Law

Contributions to the 11th International Conference
Perspectives of Business Law in the Third Millennium,
November 19, 2021, Bucharest

ADJURIS
International Academic Publisher

Bucharest, Paris, Calgary
2022

ADJURIS – International Academic Publisher
This is a Publishing House specializing in the publication of academic books, founded by the *Society of Juridical and Administrative Sciences (Societatea de Stiinte Juridice si Administrative)*, Bucharest.
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ADJURIS – International Academic Publisher is included among publishers recognized by **Clarivate Analytics (Thomson Reuters)**.

ISBN 978-606-95351-2-7 (E-Book)

Editing format .pdf Acrobat Reader
Bucharest, Paris, Calgary, 2022

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Preface

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This volume contains the scientific papers presented at the Eleventh International Conference „Perspectives of Business Law in the Third Millennium" that was held on 19 November 2021 in online format on Zoom. The conference is organized each year by the *Faculty of Law of the Bucharest University of Economic Studies* together with the *Society of Juridical and Administrative Sciences*. More information about the conference can be found on the official website: www.businesslawconference.ro.

The scientific studies included in this volume are grouped into four chapters:

- *Stop or go back to business as unusual — legal issues impacting businesses during this time*. The papers in this chapter refer to: how can be affected international investment by the reaction of states during crises; organizational and legal forms of intermunicipal cooperation to ensure human rights in the framework of COVID-19 pandemic: Ukraine and European experience; the impact of human rights on business; decent work and decent working hours in the world of modern technologies; collaborative economy vs. participatory economy in the digital age; law and security: legal and institutional aspects.
- *Changes in the legal landscape, regulatory challenges and more*. This chapter includes papers on: provisional measures concerning security for costs and security for claim in international commercial arbitration; how does the GDPR impacts real estate transactions; data protection in the context of employees' performance appraisal; Book X ("Trusts") of the Draft Common Frame of Reference (DCFR): subject of doctrinal discussions and model of inspiration for the legislator of the Republic of Moldova; the governance of groups under Albanian company law; matters concerning multiple office holding in light of the CJEU judgment in case C 585/19.
- *In-depth look at business law topics*. The papers in this chapter refer to: considerations on the acquisition of ownership rights over the assets of the company deregistered by the sole shareholder, foreign citizen belong-

ing to a third state; perspectives on the joint venture agreement in business law; some notes on the commercial concession contract; legal regime of competition in Croatia; valences of the "polluter pays" principle in the conflict between economic interest and ecological interest; influencers: the path from consumers to professionals; translation of arbitral awards in the procedure for the recognition and enforcement of foreign arbitral awards;

- *European overview of the legal and business considerations*. This chapter includes papers on: online sales of medicinal products in the CJEU case-law – between the free movement of goods and public health protection; the EU Green Deal and the future of the EU business law - scenarios for legal evolution; term of office as an indicator of independence of the antitrust authority in the implementation of the ECN+ Directive: experiences of Polish law and of the Polish antitrust authority; substantial and procedural rules in the perspective of Directive no. 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks; relationship between infringement proceedings applied by the European Commission and the WTO law.

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STOP OR GO BACK TO BUSINESS AS UNUSUAL — LEGAL ISSUES IMPACTING BUSINESSES DURING THIS TIME

How can be affected international investment by the reaction of states during crises?

PhD. **Cristina Elena POPA (TACHE)**[1]

Abstract

The current crisis has once again put the actors of the economic environment face to face. In these conditions, prudence of decisions and cooperation occupy the most important places. Both investors and states must reach a broader knowledge of the international legal rules, as well as the historical trajectory of the relevant jurisprudence. In this way, effective sets of regulations specific to all situations in which vulnerabilities can generate disputes can be drawn up. Given the sanctity of international obligations, it is easy to understand that non-compliance with the provisions of an investment treaty is extremely serious. For this study, the comparative method and the overall analysis of the existing and/or non-existent regulations for the functioning of the investment system were used, observing the relevant jurisprudence.

Keywords*: crisis, international investment, necessity, state measures, standards of protection.*

JEL Classification*:* D25, F21, K23

1. Introduction

Investors affected by government measures during the crisis use both the provisions of the treatment standards provide by the treaties and the contractual clauses on which they can rely at the internal level of the host state to defend their rights. It was noted that extraordinary situations can arise in any investment project and that one of the purposes of the legal framework created - preferably by an investment treaty - will be to protect the investment in such difficult times. Even in the absence of appropriate regulation by the Treaty, the relevant international rules will operate and be applied *on their own account*, independently of the internal provisions relating to extraordinary periods[2].

[1] Cristina Elena Popa (Tache) – associate scientific researcher at the Institute of Legal Research of the Romanian Academy, cristinapopatache@gmail.com.

[2] See e.g. Funnekqfter v Zimbabwe, Award, 22 April 2009, p. 103; Sempra v Argentina, Award, 28 September 2007, p. 257, generally explained that the solutions for periods of crisis cannot be undertaken by unilateral measures, apud Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law,* Oxford, 1012, p. 182.

Often, contractual clauses are activated such as: unpredictability; changing circumstances[3]; MAC clauses[4] (which provide for the risk that at some point in the future, an event with a material negative effect on the business may occur, in which case they have the right to terminate the contract under the conditions expressly stipulated on a case-by-case basis); economic impossibility, inability or delay to allow the withdrawal or modification of the contract, including postponement of deadlines (including clauses on the amendment of the law or on tariff changes, price), which prudent investors usually negotiate when establishing the investment); force majeure or *earnout clauses*[5].

The analysis of the provisions contained in the Investment Treaties (BITs or TIPs) shows that States Parties undertake, inter alia, to comply with treatment standards. These obligations are very important because investors establish their investment nest where they find sufficient protection measures offered by the host state. Violation of these self-imposed obligations often triggers state liability. In other words, by concluding an investment treaty, a state makes promises about the actions and behaviors it will take towards the investments and investors of the treaty partners[6]. International investors, without being parties to the treaties, witness as spectators how political power can create the legal norm of impact on

[3] Maria do Rosário Anjos, Maria João Mimoso, *Free Competition in EU: An Exploratory Study about Tax Benefits to Foreign Investment as a Distortion Measure of Free Competition*, in „International Investment Law Journal" vol. 1, issue 1/2021, Adjuris – International Academic Publisher, p. 43-44.

[4] Based on Thomson Reuters Law dictionary, Material adverse change (MAC) clause means: In the context of the acquisition of a target company or business, a clause which aims to give the buyer the right to walk away from the acquisition before closing, if events occur that are detrimental to the target company. MAC clauses are a common feature of public and private acquisition documents. In the context of lending transactions, a clause which acts as a "catch all" provision and aims to allow the lender to call a default if there is an adverse change in the borrower's position or circumstances (for example, a large negative variation shown in successive financial statements of the borrower). MAC clauses are a common feature of facility agreements. Although they are always heavily negotiated, MAC clauses are not commonly used to default a borrower. The form and content of MAC clauses vary depending on the nature of the transaction and the practice in any relevant jurisdiction. Definition available here: Material adverse change (MAC) clause | Practical Law (thomsonreuters.com), accessed on 10.11.2021.

[5] According to the definition given by Investopedia: "An earnout is a contractual provision stating that the seller of a business is to obtain additional compensation in the future if the business achieves certain financial goals, which are usually stated as a percentage of gross sales or earnings". See: Earnout Definition (investopedia.com), accessed on 30.10.2021.

[6] See J.W. Salacuse, *The Law of Investment Treaties*, Oxford International Law Library 2013, p. 205. In the same context, the author exemplifies by reporting the example of Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic, ICSID Case no. ARB/03/19 (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v. Republic of Argentina), where the court defines the treatment as follows: "The word *treatment* is not defined in the text of the treaty. However, the usual meaning of this term in the context of investment includes the rights and privileges granted and the obligations and obligations imposed by a Contracting State in respect of investments made by investors covered by a treaty. Decision on jurisdiction, 3 August 2006."

their own investment.

BITs have a fairly serious potential in the evolution and development trends not only of domestic law, but also of other regional and multilateral investment instruments. When negotiating such treaties, the existence of an ILO model promoted by one of the negotiating states helps to save time. The negotiating state, which has a BIT model, has already reflected before the negotiating partners its expectations, policies and general opinion on the applicable international norms and standards.

This phenomenon occurs because the general clauses existing in the body of investment treaties are: preamble, purpose and definitions, treatment standards, exceptions, settlement of state-state or investor-state disputes, institutional issues, duration, amendments, other provisions and termination.

With regard to the treatment standards applicable to international investments, although they appear to be multiplying, there is nevertheless an overall approach to a single regulatory standard, based on the legitimate expectation of international investors to benefit in a host state or, as the case may be, in a certain region or commercial area free of transparency, legal proceedings and non-discrimination. These standards are found in the classification of legal rules, in relation to that criterion by which legal rules are classified into strict rules of law and directives or standards. If the rules of strict law are rules of strict interpretation (the rules of tax laws that determine as accurately as possible taxable income and the amount of tax) against which the recipients have no possibility of interpretation, directives or standards are rules that contain criteria for judging the actions of the subject[7] (or addressees). From this perspective, investment treaties have the character of mixed legal rules.

From the observation of the relevant jurisprudence, it can be deduced the idea according to which the states can have the tendency towards a preferential or differentiated treatment, which raises some problems in the matter of liability under international law[8].

Such provisions are intended to prevent possible restrictive behavior by the host government and to regulate government action. Specifically, the measures of states that do not comply with the standards of the treaties, result in violations of treaties sanctioned by international law, in particular by forcing the wrongful state to pay compensation.

It has also been found that there are some more sensitive standards in times of crisis: a ban on performance requirements or a free transfer of funds;

[7] These are known since Roman law and are taken over by modern law, for example, the rule of good faith or the standard of a diligent person.

[8] In Oscar Chinn, Belgium v. The United Kingdom, Judgment of December 1934, p. 87, the Permanent Court of International Justice - CPJI emphasized that "prohibited discrimination is therefore one that will be based on nationality, a differentiated treatment for individuals belonging to different national groups depending on their nationality".

prohibition of direct or indirect expropriation; fair and equitable treatment/minimum standard of treatment; arbitrary, unreasonable and/or discriminatory measures; full protection and security, or similar.

From the analysis of the statistics available at UNCTAD, on 04.11.2021, it is observed the registration of a higher number of cases compared to the previous years, which denotes the dissatisfaction of the investors with the governmental measures[9].

In such cases, although it remains non-uniform, the arbitral practice revealed that the decisions were for or against the investor. The most relevant examples that have been the basis for the considerations of many arbitration decisions can be given here. The International Court of Justice in Chorzow affirmed the principle of compensation, the cases of Barcelona Traction and Diablo v. Congo, the principle of corporate identity and nationality[10].

2. Potentially litigious situations in which investors are placed

During the health crisis we are referring to, the areas sensitive to investment disputes were: aviation, retail, real estate, oil and gas and fintech.

The COVID-19 pandemic has led to an international intervention, a government intervention that could be followed by tense situations between investors and host states, or even could generate state-state tensions. Examples can be found here:

1. *Recent reforms in the energy sector*. E.g. the issue of renewable energy generation that has been considered by some states as a potential risk to national networks (see the measures taken in this crisis by the Mexican government). As a result, some states have adopted measures to block the development of renewable energy projects, to the detriment of foreign investors involved in these projects and in favor of state-owned energy companies. Recently, there have been political reforms and legislative changes in the energy sector in several countries. Changes are often a withdrawal of governments from previous programs to boost private investment, reduce carbon footprint and meet emissions targets. The experiences of some international investors in this time of crisis in some Latin American countries are a source of inspiration and initiative for investors everywhere, all the more so as there will be in the near future solutions of the arbitral tribunals that will be sources of jurisprudence for this type of claims. The statement is based on disputes and settlements in investment arbitration cases triggered by the emergency measures adopted by Argentina in 2002, as well as recent renewable energy cases against Spain, Italy and the Czech Republic.

[9] Information available on the official UNCTAD page: Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, accessed on 04.11.2021.

[10] Popescu Dumitra, *Principii și forme juridice ale cooperării economice internaționale / Principles and legal forms of international economic cooperation,* Ed. Academiei,1979, p. 34.

A brief overview of how investors are affected by the measures described above can provide the following examples, as they have been presented in the media:

- In Mexico, legislative changes in electricity have led to a reduction in income incentives for renewable energy projects.

- In Peru, from a judicial point of view, a decision of the Supreme Court generated proposals for a reform of the rules in the field of thermoelectric generators.

- In Chile, government measures tend to completely eliminate all coal-fired power plants by 2025.

- A new renegotiation of remuneration schemes has begun in Argentina, after a period in which tariffs in the gas and electricity sectors were suspended.

- In Ukraine, government measures require a significant reduction in food tariffs (previously negotiated and accepted for renewable energy investors)

- In France, at the end of 2020, the government adopted similar measures.

2. *Banks and financial institutions* have also not shied away from the measures taken by some governments in times of crisis, with particular reference to the forced conversion of loan currency and the compulsory administration of banks.

3. *Pension funds.* It could be seen how certain regulations with an impact on pension funds (most of which are owned by foreign financial institutions), regulations that allowed early withdrawals from these funds, shook this category of business. In Latin America, arbitration proceedings have been initiated by fund managers (Argentina, Bolivia and Chile), affected by government measures to give the public administration the management of the pension system. Many states have allowed taxpayers to extraordinarily withdraw a certain amount from their pension schemes, which has caused them to incur operating costs to the detriment of fund managers. In reality, the affected investors accuse some governments of trying to reshape the role and remuneration of private pension funds (the case of Mexico, Uruguay, Peru and Colombia) to use resources from the pension system to finance recovery measures adopted under the COVID-19 fund.

4. *Investments in new technologies*. The importance of this economic sector was marked by the possibility of working remotely during the COVID-19 pandemic. The increased profit potential that investors in information technology can obtain, especially, has generated an increase in them. As in the case of energy, justifying the same security reasons, states intend to impose not only new charges for digital services from technology companies (see measures taken by France, Spain, UK or Italy) but also taxes and regulations on consumer protection (in China a new law on export control through certain export restrictions for sensitive technologies, entered into force in December 2020).

The way in which governments have considered themselves to be subject to exonerating measures has already raised a number of questions for investors. They reasonably expected governments to take measures to mitigate the effects

or even rescue plans, although in most cases an economic recovery plan includes a program to privatize certain industries and public utilities owned by the government. There are also states that have officially declared COVID-19 as a force majeure event, although this measure alone is insufficient. China has issued force majeure certificates to companies trying to justify non-compliance with force majeure-related contractual obligations. The United Kingdom issued non-binding guidelines on responsible contractual behavior in the execution of contracts affected by the COVID-19 emergency in May 2020. Romania is also joining the states that are trying to mitigate the effects triggered by the state of emergency. With the publication of the Decree of the President of Romania no. 195/2020 on the establishment of the state of emergency, issued, under certain conditions, the Emergency Situation Certificate (CSU), which has not been regulated in the past and which may be requested by economic operators affected by the COVID-19 pandemic, and the force majeure notice (issued by the chambers of commerce), which has existed in legislation for a long time. GEO no. 29/2020[11] and 30/2020[12] subsequently regulated certain facilities for operators in difficulty in this context, accessing some of them requiring the prior obtaining of the CSU. By Order no. 791 of March 25, 2020, the Ministry of Economy, Energy and Business Environment regulated the issuance procedure and part of the general effects of the Emergency Situation Certificates.

However, measures to mitigate the effects of the crisis or possible rescue plans appear to be left to the exclusive competence of states, although the initiatives of non-governmental organizations at their various levels of operation play an important role in this area. Many of them, through their activity and actions, can support the categories affected by the various global crises. Recall that international economic organizations present themselves as a pressure group with the mission of defending the interests of certain international economic environments (including foreign investment) especially with states or international governmental organizations[13]. Chambers of commerce, for example, are actors in the field of international investment law, which could support opinions in favor of multinational corporations, especially in times of economic crisis. The International Chamber of Commerce played a leading role. Initiated draft codes on foreign investment and other related instruments[14]. "A state strongly anchored in

[11] Emergency Ordinance no. 29/2020 on some economic and fiscal-budgetary measures. In force since March 21, 2020. Published in the Official Gazette, Part I no. 230 of March 21, 2020. Form applicable on March 21, 2020.

[12] Emergency Ordinance no. 30/2020 of March 18, 2020 for the amendment and completion of some normative acts, as well as for the establishment of some measures in the field of social protection in the context of the epidemiological situation determined by the spread of SARS-CoV-2 coronavirus. Official Gazette no. 231 of March 21, 2020.

[13] W. Feld, *Nongovernmental forces and world politics*, New York: Praeger. Feld, W., & Coate, R. (1976), pp. 4, 25.

[14] M. Sornarajah, *The International Law on Foreign Investment*, third edition, Cambrige University Press, 2010, p. 61.

international investment must host and encourage a leading chamber of commerce in the field of investment. Other examples can be given by international professional associations: international producer and consumer groups, international trade union federations, the Paris-based International Chamber of Commerce (ICC), which plays an important role in formulating trade rules and practices. international. In addition to these traditional organizations, there are a large number of other organizations involved in highly specialized areas of international economic relations, such as the Center for International and Environmental Law (CIEL) and the International Institute for Sustainable Development. Institute for Sustainable Development (IISD), which have a not inconsiderable influence in the field of investment law."[15]

These organizations are frequently consulted when they participate directly or indirectly in the elaboration of norms of international law that fall within the objectives of international governmental organizations[16]. For example, by art. 71 of the Charter of the United Nations, which enshrines the Economic and Social Council (ECOSOC) gives it the opportunity to consult with non-governmental organizations dealing with issues within its competence, currently this body is focused on sustainable development. The condition is for NGOs to make a significant contribution to ECOSOC activities. I have also point out that NGOs have a predominantly technical role, separate from politics, a particularly important quality in intergovernmental cooperation. We can see that there are a multitude of NGOs globally. The importance of their role could be substantially emphasized in times of crisis and this attitude would multiply the number of those who join one or more of these organizations. Within this technical role, as previously exemplified in the case of chambers of commerce, other examples can be given such as: International Air Transport Association (IATA) or International Association of Road Transport (AIR), Advisory Committee on Business and Industry and Industry Advisory Committee: BIAC), Trade Unions Advisory Committee (TUAC), or the Multinational Investment and Enterprise Committee (CIME). The above-mentioned NGOs, CIEL and IISD, have been involved in the revision of the Arbitration Rules of the United Nations Conference on Trade and Development - UNCITRAL[17].

In conclusion, the participation of such organizations in the elaboration of the norms of international law (excluding the political and social dimension) is on the rise, the global market looking for uniform standards[18]. This naturally creates expectations for international investors. Their protections and treatment

[15] See Cristina Popa Tache, *Introduction to International Investment Law*, Ed. Adjuris International Academic Publisher, 2020, pp. 31 et seq.
[16] See W. Feld, *Nonguvernamental Forces and World Politics, a Study of Business, Labor and Political Groups*, 1972, pp. 22-23, apud Cristina Popa Tache, *op. cit.,* Adjuris, 2020, pp. 31 et seq.
[17] Cristina Popa Tache, *op. cit.*, Adjuris, 2020, pp. 31 et seq.
[18] This was an argument heard during the MIA negotiations, for example among NGOs. To be seen e.g. *L'Observatoire de la Mondialisation, "Lumière sur l'AMI : le test de Dracula", L'Esprit Frappeur*, 1998, p. 77, apud C.E. Popa Tache, *op. cit*., Adjuris, 2020, pp. 32 et seq.

can be monitored and improved through the initiatives of these organizations in times of global crisis.

3. The shields used by states in crisis situations

Faced with the current health crisis, international investors seek to protect their investments and states seek to implement measures they deem useful in such situations, without activating their responsibility. We have seen that some states have recognized the force majeure for the benefit of companies and have issued certificates in this regard. Other states are accused by investors of using the pretext of this crisis to implement certain policies that are not exactly favorable to the business environment. Because there is not really a set of specific regulations perfectly applicable to health crises, for example, governments have assimilated the effects caused by COVID-19 with economic crises that create public emergencies, in the sense that civil society in desperation, fear of poverty and health problems, can lead to violent disorders. In other words, these critical conditions could inflame conflicts and lead to war. States have used this opportunity to equate the economic crisis with military threats[19]. Even in these conditions (civil violence and military action), in accordance with customary international law, the issue of possible or unavoidable damage to a foreigner has been found in a rich jurisprudence. It is known that many cases were decided before 1930 and referred to the consequences of the disturbances in Central and Latin American countries on foreign property under force majeure. As R. Dolzer and C. Schreuer remarked, in these cases the principle of the irresponsibility of the host state for extraordinary events of social conflict and disorder leading to physical actions against the property of a foreign investor is stated. In these situations, this principle is qualified by an obligation of the host state to exercise diligence (so it is not an exonerating cause of liability), ie to use police and military forces to protect the interests of the alien insofar as it is feasible and practicable in certain circumstances, both before the event and while it is taking place[20]. However, in such cases, it is for the applicant to prove that the host State has been negligent. Claims by international investors will not be accepted if the host state can demonstrate that foreigners have received the same treatment as nationals. Therefore, the practice of arbitration has known the admission or rejection of certain claims of investors, under certain conditions, sometimes established by treaties, other times by customary international law.

That is why a very good knowledge of the conditions of admission or rejection of investor arbitration actions is very important.

The shields of states used in times of world crises are called exceptions, referring to exonerating causes of liability. However, the exhaustive analysis of

[19] See M. Sornarajah, *op. cit.*, 2010, p. 459.
[20] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford, 1012, p. 182.

these exceptions requires a very laborious study, which is why, in this article, I will present some exceptions. I remind you that today, specialists around the world are working hard on a more efficient and therefore more comprehensive regulation of these notions that have a strong impact on international economic law. The investment treaties do not state exactly the circumstances in which the exception to national security may be invoked by extension to economic crises, unless the crisis poses threats to infrastructure or interferes with the manufacture of armaments or affects any of the activities mentioned in those provisions. The decisions of the courts of CMS, Enron and Sempra affirmed the competence to judge whether the situation justifies invoking the exception of national security. In this case, the court considered that the measures taken were not justified. It was clear that the judgments were largely influenced by the connection of the customary right of necessity with the statement of justification contained in the treaty. The CMS cancellation committee pointed out that this was a mistake. The limitation in good faith may indicate that there must be objective circumstances that justify the subjective determination. Such a requirement may defeat the intention of the parties by including an express provision that a subjective determination of national security should be conclusive[21].

In the context of the responsibility of States, I recall the Draft Articles of the International Law Commission in which the 1996 Commission proposals on cases where the unlawfulness of a fact is ruled out were maintained[22]. It is widely accepted that the ILC Articles reflect customary international law[23]. Thus, even if some acts committed by States meet the elements for which they can be characterized as wrongful acts, international law excludes their illicit character in certain strictly limited circumstances, namely: a) if the State which could have invoked international liability freely consented when committing that fact; b) whether the act in question is a measure of self-defense taken in accordance with the UN Charter (respectively against an armed attack); c) if and to the extent that,

[21] Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16 (Award, 28 September 2007). One arbitrator sat in both CMS and Sempra. In Enron, the tribunal specifically held that the treaty provisions on security are 'inseparable from the customary law standard'. Enron Corporation v. Argentina, ICSID Case No. ARB/01/03 (Award, 22 May 2007), para. 333. LG&E Energy Corporation v. Argentina (2007) 46 ILM 36. The tribunal found that a situation of necessity existed. Enron Corporation v. Argentina, ICSID Case No. ARB/01/03 (Award, 22 May 2007), para. 339; CMS Gas Transmission Co v. Argentina (2003) 30 ILM 788; (2005) 44 ILM 1205, para. 373, apud M. Sornarajah, *op. cit.*, p.460.

[22] Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected. The text can be found here: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries - 2001 (un.org), accessed on 29.10.2021.

[23] See ICJ, Israel Security Wall Case, Advisory Opinion, 43 ILM 1009 (2004), p.140; GabiHkovo-Nagymaros Project, ICJ Reports (1997) 7, 63, p.102; see also Russian Indemnity Case, 11 RIAA 431 (1912); Societe Commercial de Belgique, 1939, PCIJ, Series A/B, No 78, 160.

the fact is a countermeasure to an unlawful act committed by another State; d) in case of force majeure consisting in the occurrence of an irresistible force or an unforeseen external event, outside the control of the state and which makes it impossible to execute the obligation; e) in case of disaster if the perpetrator has no other means to save his life or that of the persons he has the task of protecting; f) the state of necessity may be invoked only if it is the only means of protecting an essential interest against a serious and imminent danger and if it does not prejudice an essential interest of the State or States to which it is bound or of the international community as a whole.[24]

The International Court of Justice has explicitly referred to the text adopted by the Commission at first reading on the state of emergency as a ground for excluding unlawfulness and applied the criteria proposed by the Commission, emphasizing the exceptional nature of the state of emergency, which must be subject to strict and cumulative conditions, which can be assessed only by the State concerned and can only be invoked to exonerate a State from liability for non-performance of an obligation; as soon as the state of necessity ceases, the obligation to fulfill the respective substantive obligations is revived[25]. The International Maritime Tribunal also ruled in the Saiga case no. 2 concerning the state of emergency relied on by Guinea (in the dispute with Saint Vincent and the Grenadines) concerning measures taken against a ship flying the flag of that State, following closely the argument of the International Court that the fact relied on did not serious to an essential interest of the State to which there is an obligation[26]. We discuss these cases because they are a continuous jurisprudential source of inspiration for specialists, even if the subject of these requests has not always been related to an international investment. The relevance of these decisions continues to mark important issues of urgency, whenever this analysis is required, all the more so in times of economic crisis.

If, in the case of the consent of the injured State, the legitimate defense and the countermeasures, the conduct of the injured State intervenes in response to the unlawful act, in the case of necessity, of force majeure or disaster, an external force causes the State to act in accordance with the obligation assumed. And we have to make some differences between them. Thus, in cases of force majeure and disaster, the state is subject to a factor that makes it materially impossible to perform its obligation, and its conduct does not imply the intention to breach the obligation.

As is well known, force majeure covers situations and events beyond the

[24] Idem, the text adopted by Resolution no. 56/83 of 2001, art. 16-19.

[25] *Reports of Judments, Advisory Opinions and Orders, Case Concerning the Gabcikovo-Nagymaros Project (HungarylSlovakia)*, Judgment of 25 September 1997, pp.39-47, ISBN 92-1-070757-5, available here: 092-19970925-JUD-01-00-EN.pdf (icj-cij.org), accessed on 29.10.2021.

[26] See International Tribunal for the Law of the Sea, *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment*, ITLOS Reports 1999, para. 98, available at: C2-J-1_Jul_99.pdf (itlos.org), accessed on 29.10.2021.

control of a state that make it impossible for that state to fulfill its obligations. Art. 24 of the ILC articles, stipulates that the illegality of a fact "is excluded, if the author of the act in question has no other reasonable way, in a situation of suffering, to save the life of the author or other persons entrusted to the care of the author". Only in the rarest of circumstances will this rule apply in the context of an investment treaty, which is intended to ensure long-term legal stability. As can be seen from reading the text, the need is not defined in Article 25, but is addressed by identifying its limitations. The common elements of these concepts are the following: they allow a state to act in a manner that is not in accordance with customary law obligations or enshrined in the treaty; by their very nature, they are exceptional in the general framework of the international legal order; their application must take into account their derogating effect and must therefore impose strict limitations on their negative impact on the functioning of accepted international standards[27]. For example, CMS v. Argentina[28], The Tribunal considered, however, that a BIT that does not explicitly contain economic crisis clauses is clearly designed to protect investments in times of economic hardship or other circumstances leading to adverse government action. In the absence of such profoundly serious conditions as total collapse, the BIT would prevail over any plea of necessity. The tribunal concluded that the Argentine crisis was severe, but did not lead to a total economic and social collapse, and that other states, in similar conditions, did not derogate from their international obligations. The Tribunal then stated that, although it is not exonerating from liability, the crisis should be taken into account when establishing compensation.[29]

In the event of a disaster, the state is faced with a decision that leaves it no real choice, endangering its own life and the lives of others. In case of necessity, the state adopts a deliberate conduct of non-compliance with the assumed obligation, in order to protect an essential interest exposed to a serious and imminent danger. As it is a deliberate choice, fully conscious, in this case, the conditions under which it can be invoked to exclude the illegality of a fact are much stricter[30]. Looking at the linguistic interpretation of the text, we notice that again, the wording is a negative one: "only if it is the only means". This wording highlights the exceptional nature of recourse to the state of necessity. Interestingly, in its documents, the Commission emphasizes that the interest of the injured party in failing to fulfill his obligation must be of lesser importance than that protected and that the responsible State cannot rely on the state of necessity if it has itself

[27] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, Oxford, 1012, p. 182.

[28] CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, paras 353–356, of the Decision. Details available here: CMS v. Argentina – Investment Treaty News (iisd.org), accessed on 02.11.2021.

[29] Ibid.

[30] *Report of the International Law Commission* presented to the General Assembly in 1980, Yearbook of the ILC, 1980, Vol. II, part two, pp. 34, 35, apud Ion Diaconu, *International Responsibility in International Law*, Ed. Pro Universitaria, 2013, p. 22, ISBN 978-606-647-728-4.

contributed to its challenge. This condition appears as a reflection in international law of *Nemo auditur propriam turpitudinem allegans,* which is also natural[31]. This rule, which can be translated: "no one can be heard to invoke his own turpitude (his own guilt)" can find its practical application in various conjunctures. Following the example of the case of CMS v. Argentina, the court ruled that in order to qualify for the use of customary law defenses, the state should not have contributed to the situation of necessity, although such a contribution must be "sufficiently substantial and not just incidental or peripheral". The General Court considered that, while external factors fueled further difficulties, the crisis had its roots in Argentina's previous crisis in the 1980s and the shortcomings of its government policies in the 1990s (paragraphs 328-329 of the Decision). We can deduce that in the situation where the defendant host state is a poor or even developing state, in a case of investment arbitration that has as object violations of international law, external factors that have the potential to feed are also more relevant. crisis: the previous policy of the respective state, its previous behavior towards investors, as well as other roots of the current crisis, referring here to the amplifying factors at national level. Noting that all the conditions for the protection of customary law had to be met "cumulatively", the Tribunal considered that they had not been fully complied with in order to rule out the unlawfulness of the facts (recitals 330 to 331 of the Decision)[32].

Therefore, in the case of CMS v. Argentina, the need was raised in defense. The Tribunal rejected CMS's claims for expropriation, but ruled that Argentina had breached its obligations regarding fair and equitable treatment and the umbrella clause (by violating the stabilization clauses in a license). The Tribunal also rejected Argentina's preliminary objection of jurisdiction and did not accept Argentina's urgency and necessity defenses related to the severe economic, social and political crisis that took place in Argentina in 2000[33]. Also, in El Paso Energy International Company v. The Argentine Republic, ICSID Case No.

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[31] See Enonchong, Nelson, *Effects of Illegality: A Comparative Study in French and English Law* in *The International and Comparative Law Quarterly*, Cambridge University Press, 1995, on behalf of the British Institute of International and Comparative Law. 44 (1), pp. 196–213 at 202. DOI: 10.1093/iclqaj/44.1.196.

[32] See CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award: 12 May 2005 mentained in Decision on Annulment: 25 September 2007.

[33] May 2005, para 317; LG&E v Argentina, Decision on Liability, 3 October 2006, paras 207-14; Suez v Argentina, Decision on Liability, 30 July 2010, paras 235-43, 322. CMS v Argentina, Award, 12 May 2005, available here: CMS v. Argentina – Investment Treaty News (iisd.org), accessed in 02.11.2021. At paras 328-9; Enron v Argentina, Award, 22 May 2007, paras 294 et seq and Sempra v Argentina, Award, 28 September 2007, paras 333 et seq., essentially based their decisions on the reasoning of CMS v Argentina. In the context of its financial crisis, Argentina argued that its measures were necessary to protect the human rights of its citizens. The Tribunals saw no conflict between the rights of foreign investor and human rights of nationals; see eg Suez v Argentina, Decision on Liability, 30 July 2010, para 240. In the same sense: Total v Argentina, Decision on Liability, 27 December 2010, paras 220-4, 345, 482-4; Impregilo v Argentina, Award, 21 June 2011, paras 344-59, apud R. Dolzer and C. Schreuer, *op. cit.*, p. 182.

ARB/03/15, the complaints concerned certain breaches of protection standards during the economic crisis and measures taken by Argentina in the energy sector.

The statistics issued by Worldometer show that COVID-19 has affected 221 countries and territories so far[34], a situation that generates a series of measures that have affected the entire economic and social activity. In this context, regarding some visible arbitration cases in the coming years, the question of the future will be: could the states take other measures to prevent the aggravation of the situation and the danger of total economic collapse?

Some provisions useful in presenting relevant categories of exceptions are provided by GATT[35]. The document provides for justified derogations from the most-favored-nation clause, to the national treatment clause, as well as from any other GATT obligation. The main category of exceptions is represented by the general exceptions provided by art. XX of GATT[36]. This article is composed of the "chapeau", so called because it contains conditions that must be met by states in the application of specific measures. The document states that a condition is that such measures should not be applied in a way that constitutes a means of arbitrary or unjustified discrimination between countries where the same conditions exist or a disguised restriction on international trade[37].

Along with the general exceptions, in art. XXI of the same document presents the exceptions regarding security, already common in economic treaties, including those on investments. Which is an inspiring factor for any subsequent regulations, concerns the exceptions in art. XXIV which, although referring to regional economic integration organizations (customs unions and free trade areas), may inspire *in extenso* the establishment of such exceptions for certain categories of international investment. I am referring to strategic investments or areas considered essential for the economic systems in which they operate.

At the same time, the safeguard measures imposed by the states under certain conditions can be identified at a given time in the case of crises such as the current health crisis. States may temporarily impose customs duties, quotas or other measures to ensure that the national economy does not suffer serious

[34] Statistics available at: COVID Live Update: 247,965,951 Cases and 5,023,079 Deaths from the Coronavirus - Worldometer (worldometers.info), accessed on 02.11.2021.

[35] *The General Agreement on Tariffs and Trade* (abbreviated GATT) was negotiated during the United Nations Conference on Trade and Employment and was the result of governments' failure to negotiate the creation of the International Trade Organization (BTI). GATT was formed in 1947 and lasted until 1994, when it was replaced by the World Trade Organization in 1995. The original GATT text (GATT 1947) is still in force in the WTO, subject to GATT amendments from 1994. According to the Encyclopedia Britanica, by the time GATT was replaced by the World Trade Organization (WTO) in 1995, 125 nations were signatories to its agreements, which had become a code of conduct governing 90 percent of world trade. See: General Agreement on Tariffs and Trade | international relations | Britannica, accessed on 29.10.2021.

[36] Franck Attar, *Le droit international entre ordre et chaos***,** Hachette Référence, 1994, p. 373, apud Adrian Năstase, Ion Gâlea, *Drept internațional economic,* Ed. C.H. Beck, 2014, p. 230.

[37] For details, see art. XX of the GATT, available on the official WTO page, can be found here: WTO | legal texts - Marrakesh Agreement, accessed on 29.10.2021.

injury as a result of imports on the basis of tariff concessions. Returning to GATT, it includes such "escape clause" measures in art. XIX, detailed provisions in the Agreement on Safeguards in Annex IA to the WTO Agreement.

Irrespective of the document containing such measures, as provided for in the GATT, one of the obligations of States in such situations is to conduct an investigation into the need for such a measure[38]. In disputes concerning investments that will have as object the violation of legal treatment standards, a special emphasis will certainly be placed on the pre-existence of a thorough investigation into the real need to adopt the measure that led to the dispute. In these situations, serious discussions will be held on the interpretation of terms such as: "serious injury", "Threat of serious injury", "threat" (imminent, high degree of possibility of materialization in the near future); or the "limits" of these measures (the so-called condition of parallelism), in the sense that the measure must ensure proportionality between the investigation, its conclusions and the scope of the measure adopted by the State, on the other hand.

What is relevant is that when a state uses exceptions, safeguards or restrictions, it must at that time comply with the conditions imposed by international law in order to do so. When the conditions and limits of these exceptional measures are violated, state liability is activated.

Any attempts to justify the breach of the assumed obligations do not resist either ethically or politically-legally. The only real consequence that the adoption of hasty measures can have (lack of time necessary for an investigation or a procedure to analyze the measures to be adopted in time of crisis) or against the background of ignorance of the whole set of international rights and obligations (lack of culture international investment law, as well as superficiality), is a violation of the sanctity of commitments entered into by investment treaties, either BIT or TIP[39].

It is already a proven fact that non-compliance with the commitments made harms not only the other party, the cooperation partner through cooperation, but also the other states, not only through the immediate economic consequences, but also through the legal, political and moral implications[40]. Even in the use of their shields (exceptional measures taken by governments) in times of crisis, states must act with the utmost caution, and have the very difficult task of complying with the commitments made as a fundamental principle of international law, the transposition of which new relationships that are making their way from the perspective of democratization[41].

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[38] See Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn**,** *The World Trade Organization. Law, Practice, and Policy,* Oxford University Press, 2015, pp. 186 et seq.

[39] TIPs-Treaties with Investment Provisions.

[40] E. de Vattel, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains,* 1758, p. 221.

[41] Dumitru Mazilu, *Dreptul internațional public*, Ed. Lumina Lex Bucharest, 2008, p. 232.

Ultimately, states are the guardians of contemporary international legality. In this mission, states have both the obligation to refrain from committing illicit acts — obligations in non faciendo — and obligations in patiendo — consisting in tolerating certain actions of another state if they were necessary to the latter, without cause others a detriment. Recall that until recently, in 1948, when H. Lauterpacht prepared the first work program for the International Law Commission, he regarded international responsibility as a kind of criminal law, suggesting that work in this field should take into account new developments, especially that of "criminal liability of states as well as of persons"[42]. The first report by F.V. Garcia-Amador, the committee's special rapporteur on the subject, pointed out the criminal liability of the state in its conviction for damages, which was subsequently abandoned[43].

4. Conclusions

The health crisis has put the actors of the economic environment face to face. The effects of the measures adopted by governments against the background of the health crisis are beginning to be felt in all sectors of the economy.

The controversial impact of recent reforms in the energy sector, in the financial banking sector, on pension funds or on investments in new technologies has been noted. In these circumstances, the prudence of decisions, the adoption of a new set of regulations applicable to these situations and cooperation occupy the most important places.

A more useful and effective involvement of non-governmental organizations is expected in this process. Both investors and states must reach a broader knowledge of the international legal norm, as well as the historical trajectory of the relevant jurisprudence. In this way, effective sets of regulations specific to all situations in which vulnerabilities can give rise to disputes can be drawn up. Given the sanctity of international obligations, it is easy to understand that non-compliance with the provisions of an investment treaty is extremely serious and also affects the reputation of the respondent State[44].

Rescue measures or plans that can be adopted by governments do not always have the expected effect and can affect both citizens and certain categories of participants in international economic relations; we give the example of the privatization programs of certain industries and public utilities owned by governments.

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[42] H. Lauterpacht, *A Survey of International Law in Relation to Codification* (1948), in Lauterpacht, Vol. I, 1970 (ed. Elihu Lauterpacht), p. 447.

[43] Gacia-Amador, *International Responsability*, *Yearbook of the International Law Commision*, 1956/II, pp. 183 and 212, apud Ion Diaconu, *op. cit.*, 2013, p. 7.

[44] See Cristina Elena Popa (Tache), *Legal treatment standards for international investments. Heuristic aspects*, Adjuris – International Academic Publisher, 2021, ISBN 978-606-94978-7-6 (E-Book), pp. 15 – 39.

The investment system is at a stage where it has to deal with all the waves of the crisis, with the means at its disposal at the moment. Insufficient regulation and hesitation in the most appropriate choices can lead to disputes that can turn into arbitration disputes.

For all these reasons, prudence and the correct application of measures specific to need or force majeure, for example, are a priority for states because mistakes can lead to international liability.

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Organizational and legal forms of intermunicipal cooperation to ensure human rights in the framework of COVID-19 pandemic: Ukraine and European experience

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Abstract

The article reveals the international legal regulation and features of inter-municipal cooperation. The author reviews the regulation of IMC in the law of the Council of Europe, and the author focuses on the decisions of the ECtHR. It focuses on the fact that IMC in Europe is a strategy to guarantee the ability to achieve the proper level of development of the territorial community and to ensure the ability to provide quality services to meet the modern challenges of society. In addition, the article reveals different aspects of the benefits of IMC under the quarantine restrictions caused by the spread of COVID-19. And the application and usefulness of IMC in the fields of transport and medicine. The article aims to analyze the European experience of IMC, its role under COVID-19, as well as to identify individual areas that can be applied when implementing the European experience in Ukrainian practice of IMC to ensure human rights and protection against coronavirus infection in conditions of quarantine restrictions. The authors used the following methods in the article: method of analysis and synthesis to study the current situation with IMC; historical-logical method to analyze the formation of legal regulation in European countries and the Council of Europe; legal method to analyze the legal regulation; systematic method to determine the necessity of IMC in Ukraine, as well as under conditions of quarantine restrictions. The authors concluded that, in general, the role of IMC can hardly be overestimated, especially in the context of the global need for security and human rights.

Keywords: *intermunicipal cooperation, IMC, cross-border cooperation, Council of Europe, human rights, COVID - 19.*

JEL Classification: K32, K33, K38

1. Introduction

Inter-municipal cooperation (IMC) is an area of local government activity aimed at achieving the goals of social and economic development of municipalities through cooperation and integration. Such cooperation is particularly necessary when the municipality's resources are limited and when the quality of services provided to the population needs to be increased.

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IMC deserves special attention in modern conditions, for example, just for Ukraine, taking into account the preparation for a deep and large-scale reform of local self-government and administrative-territorial structure. The IMC provides an opportunity for an impetus in solving the local self-governance problems. At the same time, it has great prospects for ensuring the sustainable development of all communities.

We cannot underestimate the IMC role and importance in the context of human rights protection during the global pandemic, because ensuring proper cooperation becomes the basis for preserving human life and health, which today is the highest value.

The European IMC experience in general and in the context of counteracting the spread of coronavirus infection can be considered as an example. Separate examples of such cooperation can be introduced in Ukraine.

The article aims to analyse the European experience of IMC, its role under COVID-19, as well as to identify individual areas that can be applied when implementing the European experience in Ukrainian practice of IMC to ensure human rights and protection against coronavirus infection in conditions of quarantine restrictions.

2. Etymology and meaning of intermunicipal cooperation

Intermunicipal cooperation is a form of horizontal cooperation in different countries of the world. As noted by the Ukrainian researcher E. Serhienko, the term *inter-municipal cooperation* should be distinguished from the concept of *Inter-Municipal Collaboration*, which has a similar translation often found in foreign literature. At the same time, the latter means inter-municipal cooperation of cities of different states, i.e. it has a broader content. The concept of *Intermunicipal consolidation* captures the pooling of administrative resources to achieve economic efficiency. In turn, the term *intermunicipal partnership* is used to refer to the special interaction of rural, township, and city communities through appropriately established local self-government[3].

The special role of IMC is manifested in the context of human rights protection. In general, any territorial associations are formed primarily to protect members of such a community. As noted by Ukrainian researcher P. Lyubchenko, municipal rights and freedoms important characteristic is the fact that in their normative basis they have constitutional content and constitutional level of their legal enshrining and this level is of fundamental importance in the issue of correlation of constitutional and municipal rights[4]. The right of a citizen to exercise in

[3] Serhienko E., *Interaction of territorial communities in Ukraine: theoretical and methodological aspect*, „Scientific Bulletin of the Academy of Urban Management. Series: Management", 2011, issue. 4, p. 464-473.

[4] Lyubchenko P., *Human rights and freedoms in the field of local self-government: problems of legal regulation and implementation.* Constitutional reform in Ukraine in the sphere of local self-

local self-government can be classified as a type of constitutional rights, but with a specific implementation, because such rights include the municipal legal personality of an individual, namely legal capacity, legal ability, and capacity to act in the sphere of local self-government[5].

In addition, the importance of the IMC is also evident in the issue of the protection of human rights and freedoms. The community performs some important functions in public life and serves as an instrument for involving individuals in the governance of society and its economic component. Territorial communities have broad powers, similar to the functions of the state, that are characteristic of municipal associations.

Following the Constitution of the Kingdom of the Netherlands of 1983, municipalities, as well as provinces are administrative-territorial units, and their boundaries are established by acts of Parliament (Art. 123). The powers of the provinces and municipalities to regulate and conduct internal affairs are delegated to their bodies – councils formed by citizens through elections. In addition to the councils, the provincial executive bodies and the King's commissioners manage provincial affairs, while municipal affairs are managed by municipal bodies and burgomasters (Art. 125)[6].

Japanese urban and rural communities have the status of municipalities, where the population can reach hundreds of thousands of residents. At the same time, municipalities are commonly referred to as the totality of all bodies of local self-government in most foreign countries.

Ukrainian researcher E. Serhienko believes that the term *local community cooperation* (LCC) would be appropriate to denote cooperation between communities of different levels, which in English-language sources is commonly referred to a local community. The concept of *inter-municipal cooperation* (IMC) is traditional in English-language scientific sources when it comes to the interaction of territorial communities, including in the context of cross-border cooperation[7].

Also, should be paid to our position on inter-municipal cooperation as the most general notion, which can cover various types, spheres, and directions of cooperation.

The term *cooperation of territorial communities* is peculiar only to Ukraine. Therefore, looking at the legislative acts of other states, one may encounter other legal categories, which will be somewhat similar to the national institute of cooperation, but with their specific features.

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government: lessons of the Visegrad Four countries: theses of the participants of the scientific-practical conference, Kharkiv, October 21-22, 2016, p. 57-70.

[5] Ibid.

[6] Constitution of the Kingdom of the Netherlands, 1983 https://www.concourt.am/armenian/legal_resources/world_constitutions/constit/nethrlnd/holand-r.htm, consulted on 08.10.2021.

[7] Serhienko E., *Interaction of territorial communities in Ukraine: theoretical and methodological aspect*, Scientific Bulletin of the Academy of Urban Management. Series: Management, 2011, issue. 4, p. 464-473.

Cooperation in the framework of local self-government in Europe has a long history. In addition, it is one of the effective institutions of decentralization of power in European countries. The European Community has always emphasized the priority of developing cooperation. This is evident from some of European recommendations given later in this article.

The issues of cooperation between the subjects of local self-government or issues of inter-municipal cooperation in the countries of Europe are regulated in different ways. Some are enshrined at the constitutional level, others at the legislative level, in the laws regulating the activities of local self-government.

Countries that are classical representatives of European law and European values (Germany, France, Great Britain, Scandinavian countries) have a long tradition of decentralization of power. Based on the experience of these countries, it can be argued that the reform of local government and administrative structure has been achieved only where the innovation applied in the reform took into account the interests of local communities, without handing over to them the full initiative.

3. General provisions for the formation of territorial communities' cooperation in European countries

Also, should be paid to the point of view of the Hungarian researcher P. Svjanevic, IMC in Europe is a strategy to guarantee the ability to achieve the proper level of development of the territorial community and to ensure the ability to provide quality services to meet the modern challenges of society[8].

Germany is the first country worthy of attention. According to its legislation, the territorial society is the primary subject of local self-government. There is a similar arrangement in Ukraine. By article 28 (paragraph 2) of the German Constitution of 1949, the territorial community has an exclusive right to resolve local issues within the framework of national legislation. Legislation of Germany refers to territorial communities as *territorial corporations* and regulates financial issues on general principles[9].

In other cases, reformers have had unexpected consequences. For example, in France, due to the Government's refusal to forcibly unite communes in the process of reform, their number did not decrease but, on the contrary, increased. In France, decentralization relations, including cooperation, are regulated by the General Code *On territorial units* of 1996. Interesting is the provision of article L1111-2, which specifies that in communes and public institutions of inter-mu-

[8] Swianiewicz P., *Working Together Intermunicipal Cooperation in Five Central European Countries*, http://pdc.ceu.hu/archive/00006996/01/LGI_Working-Together-Intermunicipal-Cooperation_2011.pdf consulted on 11.10.2021.

[9] The Constitution of the Federal Republic of Germany, 1949, https://www.concourt.am/armenian/legal_resources/world_constitutions/constit/germany/german-r.htm consulted on 20.10.2021.

nicipal cooperation that have concluded an urban contract [public-private partnership contract for urban development projects], defined in article 6 of Law No. 2014-173 of 2014 *On urban planning and urban cooperation*, the mayor and head of the public institution of inter-municipal cooperation submit to the relevant deliberative meetings a report on the situation of the community in terms of political. The data in the report shall be presented in a gender-sensitive manner. The report shall be discussed at the meetings of the city council and the cooperation council of the respective territorial unit. If a municipal or state inter-municipal cooperation agency is also required to submit a report as defined under the second paragraph of this article, that report shall be included in the general report per this paragraph. The content and methods for the development of the report under this paragraph shall be established by the relevant decree. The analysis of this norm shows that the initiators of cooperation may be the relevant officials, while in Ukraine, the initiators of cooperation may not only be the bodies and officials of local government - village, settlement, city mayor, deputies of the village, settlement, city council, but also members of the territorial society in the order of local initiative[10].

The example of Finland seems interesting to us, where since the end of the 1980s there has been an attempt to reduce the number of municipalities by a decision *from above*. However, the principle of voluntariness won out as a result of political debate. According to the Finland Law *About local self-government* of 1995, municipalities perform the functions assigned to them by the law independently or in cooperation with other municipalities. We notice that this norm explicitly defines cooperation between the subjects of local self-government[11].

4. Development of standardization of local self-government and cross-border and interregional cooperation in the law of the Council of Europe

The development of legal regulation and standardization of IMC within the framework of the Council of Europe should begin with the analysis of one of the basic documents – the European Charter of Local Self-Government of 1985. (Charter), which imposed on the ratifying states the obligation to define the principles of local self-governance in national legislation, in priority – in the Constitution. The Charter notes that local self-governance means the right and ability of local self-governments to regulate and manage, within the framework of the law, a significant share of public affairs belonging to their competence in the interests of the local population.

[10] The Law of Ukraine *on Cooperation of Territorial Communities*, 2014, https://zakon.rada.gov.ua/laws/show/1508-18#Text consulted on 10.10.2021.

[11] Charter of Local Self-Government 1995, http://www.lex-localis.press/index.php/LexLocalis Press/catalog/view/LocalGovernmentEurope/68/607-1 consulted on 20.10.2021.

It regulates the specifics of functioning and the rights of local self-government. The provisions of Art. 10 notes that local self-government bodies have the right to cooperate with other municipalities within the framework of clearly defined powers for common tasks and interests. The Charter also notes that the basic principles enshrined in its provisions apply to all categories of local self-government bodies existing within the territory of the respective ratifying country[12].

The institutional mechanism established by the Charter Council of Europe is important. It has established an advisory body called the *European Charter's Group of Independent Experts,* composed of academics from each member state. The group meets twice a year to review a range of issues related to compliance and the provisions of the Charter[13].

Attention should also be paid to the Additional Protocol of the European Charter of Local Self-Government of 2009 on the right to participate in the affairs of local authorities, which supplemented and expanded the provisions of the Charter. It notes the right to participate in the affairs of local authorities, which means the right to determine or influence the exercise of powers and responsibilities of local authorities. At the same time, it imposes on the parties the obligation to take all measures necessary for the exercise of the right to participate in the affairs of the local government[14].

In addition, several other legal instruments have contributed to the development of Council of Europe law concerning IMC. The Helsinki Declaration on Regional Self-Government of 2002 is important. Its provisions aim at ensuring democracy, promoting decentralization, establishing common standards in the areas of democratic governance, and stress the need for the exchange of good practices between member states, highlighting common principles based on member states' experiences[15.]

The Utrecht Declaration on good local and regional governance in turbulent times: problems of change of 2009 in its provisions stresses the need to implement certain steps to increase the effectiveness of the Council of Europe in promoting democracy in local self-government and to remove obstacles to cross-border cooperation[16].

We should pay attention to the Strategy for Innovation and Good Governance at Local Level of 2007. It puts the citizen at the center of all strategies for innovation and good governance at the local level, i.e. all structures, including

[12] European Charter of Local Self-Government, Council of Europe, October 2017, https://rm.coe.int/-pdf-a6-59-pages/168071a536 consulted on 20.10.2021.
[13] Ibid.
[14] Additional Protocol of the European Charter of Local Self-Government, 2009, https://rm.coe.int/-pdf-a6-59-pages/168071a536 consulted on 22.10.2021.
[15] Helsinki Declaration on Regional Self-Government, 2002, https://radaprogram.org/sites/default/files/publications/decentralization.pdf consulted on 22.10.2021.
[16] Utrecht Declaration on good local and regional governance in turbulent times: problems of change 2009, https://zakon.rada.gov.ua/laws/show/994_a16#Text consulted on 22.10.2021.

territorial communities, direct their activities towards protecting the rights of the citizen. At the same time, it places the obligation on communities to constantly develop and improve their level of performance based on the 12 principles of development and functioning of local government[17].

Another important act of recommendation is the Recommendation of the Congress of Local and Regional Authorities of Europe on Capacity Development at Local and Regional Level 2007 (12), 2007. It emphasizes the importance of local government capacity to provide high-quality public services at the local level and to engage residents in the democratic functioning of local government[18].

According to Recommendation 240 (2008) of the Congress of Local and Regional Authorities of Europe *on a draft European Charter for Regional Democracy* (May 28, 2008), Article 18 of the draft defined the framework for interregional cooperation. It noted that regional authorities and other territorial entities, within the limits prescribed by law and on matters within their competence, have the right to define their relations and cooperate. They have the right to form associations, including with other territorial authorities. Thus, part 2 of this article stipulates that regional authorities shall also have the right to be members of international organizations, regional and/or local authorities. Regional authorities shall have the right to establish interregional and cross-border cooperation with territorial authorities of other countries, within the limits of their powers and by the law, international obligations, and foreign policy of the state[19].

Standards for participatory democracy as a form of decentralization of power have also been formed in Europe. Annex II to the Recommendation of the Committee of Ministers of the Council of Europe (2001)19 *on citizens' participation in local public life* of 06 December 2001 on steps and measures aimed at encouraging and supporting citizens in local public life, regulates the advisability to encourage residents to unite in local communities and create representative bodies of such communities, and participate in projects on the environment, fight against crime, create conditions for assistance/self-help, etc.[20]

Recommendation 221(2007) of the Congress of Local and Regional Authorities of Europe *on an institutional framework for inter-municipal cooperation* of 2007 notes that inter-municipal cooperation can take different forms in Europe: it can be freely chosen by territorial authorities or provided for by law or by other

[17] Strategy for Innovation and Good Governance at Local Level, 2007, http://www.slg-coe.org.ua/wp-content/uploads/2015/05/Strategy_for_Innovation.pdf consulted on 22.10.2021.

[18] Recommendation of the Congress of Local and Regional Authorities of Europe on Capacity Development at Local and Regional Level 2007 (12), 2007, https://radaprogram.org/sites/default/files/publications/decentralization.pdf consulted on 22.10.2021.

[19] Recommendation 240 (2008) of the Congress of Local and Regional Authorities of Europe on a draft European Charter for Regional Democracy, 2008, https://radaprogram.org/sites/default/files/publications/decentralization.pdf consulted on 20.10.2021.

[20] Recommendation of the Committee of Ministers of the Council of Europe (2001)19 on citizens' participation in local public life, 2001, https://zakon.rada.gov.ua/laws/show/994_739#Text consulted on 20.10.2021.

instruments (treaties), it can be a legal entity under public or private law, and it is a new territorial entity which must comply with the European Charter of Local Self-Government[21]. It also points out that inter-municipal cooperation is accompanied by considerable relative advantages over either communal amalgamation (voluntary associations of communities – the Ukrainian example) or privatization of public services; amalgamations sometimes clash with local traditions and privatization of public services is not always sufficient to overcome the lack of public structures in the management and decision in local affairs. It is believed that inter-municipal cooperation is all the more desirable in those countries where regionalization is less developed.

One of the recommendations was to create a sufficiently specific, anticipated, and accessible legal framework for the implementation of inter-municipal cooperation, particularly in countries where specific legal frameworks for inter-municipal cooperation do not yet exist or where such legal frameworks are not yet sufficiently coordinated, harmonized, and updated. Therefore, the adoption by Ukraine of the Law on Cooperation of Territorial Communities demonstrates that these consultative and advisory European norms have been taken into account[22].

Finally, attention should be paid to another key legal act of the Council of Europe – the Charter of the Congress of Local and Regional Authorities of Europe of 1994[23].

In addition, cross-boundary IMC is of great importance, which is also reflected in the law of the Council of Europe. In this aspect, the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities of 1980 should be noted. In its provisions, each member state undertakes to support and encourage cross-border cooperation between territorial communities or authorities under its jurisdiction. It is cross-border cooperation that the Charter defines as any joint action aimed at strengthening and deepening good neighborly relations between territorial communities or authorities under the jurisdiction of two or more treaty parties, and the conclusion of any necessary agreements or arrangements to this end. Such cooperation shall be carried out within the limits of the powers of the territorial communities, based on procedures determined by the domestic law of the participating countries[24].

In addition, Protocol No. 3 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning

[21] Recommendation 221(2007) of the Congress of Local and Regional Authorities of Europe on an institutional framework for inter-municipal cooperation, 2007, https://radaprogram.org/sites/ default /files/publications/decentralization.pdf consulted on 20.10.2021.

[22] Law on Cooperation of Territorial Communities, 2014, https://zakon.rada.gov.ua/laws/show/1508-18#Text consulted on 10.10.2021.

[23] Charter of the Congress of Local and Regional Authorities of Europe, 1994, https://zakon.rada.gov.ua/laws/show/994_674#Text consulted on 10.10.2021.

[24] European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, 1980, https://zakon.rada.gov.ua/laws/show/995_106#Text consulted on 10.10.2021.

Euroregional Co-operation Groupings (ECGs) was adopted in 2009. Its provisions note that local governments can form separate institutions responsible for cross-border cooperation. Such cooperation aims to promote and develop cross-border cooperation in areas of common competence following the norms of national legislation[25].

The importance of the IMC is acquired in the context of the protection of human rights under COVID-19. As the Ukrainian scientist V. Slobodyan notes: *In international relations COVID-19 witnessed the transformation of forms of global leadership, growth of the role and influence of societies of states with effective institutions, strengthening of the role of states in general with their traditional mechanisms of regulation and influence on the lives of citizens and IMC*[26].

First of all, it should be noted that IMC takes on great importance in the context of pandemic and quarantine restrictions associated with the spread of coronavirus infection. As the current situation has shown, the health care system can take the lead on the issue of protecting human rights and the population, especially when the availability of medical care and the efficiency of the health care system becomes a matter of life and death. Historically, the health care system in peripheral areas has been far inferior to large cities. This hurts the lives of the general population in such regions, especially during a pandemic, and entails depopulation and marginalization of border regions. In such circumstances, the MSM can provide an adequate level of health and human rights services in the health care services provision[27].

Another important component in protecting human rights during a pandemic is the availability of transportation, which is not a critical industry like health care but can also play a role in improving living standards in rural areas. Ensuring mobility and accessibility of movement in many countries around the world is achieved by providing IMC in cross-border transportation services[28]. And if we consider the situation with the acute need for proper medical care and transportation of patients today, as well as access to qualified medical care, then transport plays a crucial role at all[29].

In addition, the adoption of quarantine measures in connection with the

[25] Protocol No. 3 to the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs), 2009, https://rm.coe.int/1680084827 consulted on 20.10.2021.

[26] Slobodian V., *Effect of COVID-19 on the development of international cooperation in the customs sphere Instruments of regulation of the national economy and national security in the conditions of modern globalization challenges*: mater. scientific-practical conf., November 6-7, 2020/Ministry of Education and Science of Ukraine, Khmelnytskyi National University [etc.]. Khmelnytskyi, 2020, p. 13-14.

[27] *Transboundary cooperation: legal foundations and successful practices: manual*/Evchak Y., Zardi A., Lazur Y., Ochka D., Sanchenko A., Soshnikov A., Ustimenko V., Fetko Y./ed. by V. Ustimenko; ed. Guk A., Sanchenko A. K., 2020. 152 p.

[28] Ibid.

[29] Ibid.

spread of coronavirus infection implies a legitimate human rights restriction. Interesting in this context is case 47621/13, *Vavřička and Others v. The Czech Republic* from 2021, which was considered by the ECtHR on the application of six people. The applicants argued, inter alia, that the various consequences for them of failing to comply with the legal obligation to vaccinate were incompatible with their right to respect for their private life under Article 8 of the ECHR. The ECtHR found in the case that there were strong objective arguments for finding a non-violation of Convention rights. These possible arguments would take precedence – at least in respect of most of the diseases at issue – over possible counter-arguments, even if we were to apply very strict standards of review and give credence to some of factual allegations made by the applicants. Without going into too much detail, suffice it here to note that vaccinations save numerous lives and prevent significant harm to health, as well as free up enormous financial and social resources by reducing the costs borne by the health care system. These resources can be devoted to saving lives threatened by other diseases.

Notwithstanding that statement, the Court stressed that the respondent Government had not put forward specific arguments in support of its position: *In these particular circumstances, and without prejudice to possible future cases dealing with similar issues, the ECtHR has no choice but to rely on the principle of formal truth and find that the respondent Government has not given sufficient reasons to justify the interference complained of by the applicants in this case*. Thus, despite the relevance of the issue of the coronavirus vaccination, we can still assert that the ECtHR still follows the legal framework in considering any case and, as in the particular judgment, relies on the legal side of the justification of the actions of each of the participants in the process. Since in this particular case the accused party was unable to provide arguments to defend its position, the ECtHR acted based on the applicants' cited evidence, without being guided by *public necessity*, although still emphasizing its role in the difficult current circumstances[30].

In the context of a pandemic and declining interstate contacts, inter-municipal cooperation could facilitate joint solutions to the crisis as well as find answers to other global challenges. As an example, the members of the Arctic Mayors Forum held an online conference on April 22, 2020. Mayors from Rovaniemi (Finland), Torshavn (Denmark), Akureyri (Iceland), Anchorage (USA), Tromsø (Norway), and other cities participated. Experience in the fight against coronavirus infection was exchanged[31].

[30] Case 47621/13 «Vavřička and Others v. The Czech Republic, 2021, https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-209039%22]}, consulted on 22.10.2020.

[31] Arctic Mayors Forum, 2020 http://www.forumarctic.com/conf2020/, consulted on 22.10.2020.

5. Introducing new forms and opportunities for inter-municipal cooperation in Ukraine under COVID-19

The Constitution of Ukraine, as the basic law, includes provisions for the unification of territorial communities based on common communal property, as well as the joint use of budgetary funds for the practical implementation of joint projects and create for this purpose the relevant bodies and services[32].

As noted in the Council of Europe Review of Inter-Municipal Cooperation in the Eastern Partnership countries, the IMC is crucial for the productivity of public administration, especially in economic and financial terms[33].

The basis of the state policy on inter-municipal cooperation was established by the Law of Ukraine *on Cooperation of Territorial Communities* adopted in 2014. Its provisions regulate the organizational and legal basis for the cooperation of territorial communities, principles, forms, mechanisms of such cooperation, its stimulation, financing, and control. According to Article 2 of this law, cooperation is based on the principles of legality; voluntariness; mutual benefit; transparency and openness; equality of participants, and mutual responsibility of subjects of cooperation for its results[34.]

Special attention should be paid to several other legal acts regulating the issues of MMC in Ukraine. In particular, these include the Law of Ukraine *on cross-boundary cooperation* of 2004. According to it the basic principles of cross-boundary cooperation are defined, namely, cross-boundary cooperation is defined as a system of actions aimed at the establishment of economic, cultural, scientific, social, and other relations between the subjects in Ukraine and foreign countries within the competence of such subjects, defined in the national legislation[35].

According to article 5 of the above-mentioned law, cross-boundary cooperation within the powers of the subjects of cross-boundary cooperation of Ukraine may be carried out in economic, social, scientific-technical, cultural-educational, ecological, and other spheres, as well as in the issues of mutual assistance in emergencies. The law also regulates some other issues related to cross-boundary cooperation, for example, material and financial support; features of the state support; principles and features of the cross-boundary cooperation,

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[32] Constitution of Ukraine 28.06.1996, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text consulted on 10.10.2021.

[33] Council of Europe review of inter-municipal cooperation in the six Eastern Partnership countries: conclusions and recommendations, 2015, https://rm.coe.int/CoERMPublic CommonSearch Services/Display DCTMContent?documentId=0900001680476890 consulted on 10.10.2021.

[34] Law of Ukraine on Cooperation of Territorial Communities, 2014, https://zakon.rada.gov.ua/laws/show/1508-18#Text consulted on 10.10.2021.

[35] Law of Ukraine on transboundary cooperation, 2004, https://zakon.rada.gov.ua/laws/show/1861-15#Text consulted on 22.10.2021.

etc.[36].

It is also important to pay attention to the Resolution of the Verkhovna Rada of Ukraine *on the accession of Ukraine to the European Framework Convention on Cross-boundary Cooperation between Territorial Communities or Authorities* of 1993, according to which accession of Ukraine to the European Framework Convention on Cross-boundary Cooperation between Territorial Communities or Authorities is established. Consequently, the provisions of the relevant convention mentioned above, apply to Ukraine as well[37].

Thus, the legislation of Ukraine has established the legal basis for a profound IMC to address urgent issues in the context of the protection of the Ukrainian population. The main issue of IMC development is formulated through the development of such cooperation in pandemic conditions. When developing forms of inter-municipal cooperation, one cannot ignore the problems of local budgets, primarily caused by: an inadequate level of financial support to assigned powers; a narrow revenue base of municipal budgets, high dependence on financial assistance from higher-level budgets; a high debt burden on local budgets; a low level of municipal financial management due to a lack of qualified personnel. Under such conditions, local governments are unable to implement an effective financial and budgetary policy and to resolve issues of local importance.

One promising tool for addressing local issues within the framework of inter-municipal cooperation may be the possibility of providing subsidies from the budget of one municipality to the budget of another municipality through *horizontal* subsidies. The goals and conditions for the provision of *horizontal* subsidies should be established by agreements between local administrations, entered into according to the procedure established by a decision of the representative body of the municipality from whose budget the subsidy is provided. The application of this instrument of inter-budget transfers will make it possible for municipalities to jointly finance various municipal projects, such as road construction, infrastructure creation, and other projects as part of inter-municipal cooperation.

Another important tool for addressing local issues within the framework of inter-municipal cooperation may be the possibility of granting so-called *horizontal* budget loans from the budget of one municipality to the budget of another in 2020. The purpose of the budget loan and the size of the fee for using the budget loan are set by the local parliament of the creditor municipality. The introduction of such an instrument of cooperation at the municipal level expands the mechanisms of municipal internal borrowing and opportunities to ensure the

[36] Ibid.

[37] Resolution of the Verkhovna Rada of Ukraine on the accession of Ukraine to the European Framework Convention on Transboundary Cooperation between Territorial Communities or Authorities, 1993, https://zakon.rada.gov.ua/laws/show/3384-12#Text, date of application 22.10. 2021.

sustainability of local government budgets in a pandemic of coronavirus infection.

We find the initiative of the United Territorial Communities Association, which presented a specialized web page called *Societies Against COVID-19* interesting. *Societies Against COVID-19* is a collection of practices, which will be useful for local governments in the context of counteracting the spread of the pandemic coronavirus. The idea of the American association ICMA and the experience of Ukrainian, Polish and Swedish municipalities were used as examples in creating the web page.

You can find relevant information on the Web page how to work under the new conditions, namely: how to organize local government executive bodies work during the quarantine period, how to optimize measures to counteract COVID-19 at housing facilities and organize the uninterrupted supply of water, heat, removal garbage, cleaning, and disinfection, as well as the work of social services to support socially vulnerable groups and persons in quarantine, how to self-organize under the new conditions[38].

We believe that such an organization on the Internet space can become an important auxiliary factor in the IMC in the population protection from COVID-19 and mutual assistance between members of society. It seems especially effective in conditions of limited communication through quarantine measures[39].

6. Conclusion

Thus, it can be argued that, in general, the role of IMC can hardly be overestimated, especially in the context of the global need for security and human rights. In general, individual practices of effective implementation of MMR in European countries show the promise of the development of this direction in the context of countering the COVID-19 spread.

In Ukraine, there is a need to create a clear legal regulation of IMC in general and the peculiarities of such cooperation in specific conditions, in particular, pandemic conditions. Particular attention should be paid to the Internet organization of IMC because this form of interaction is fast and safe in the spread of viral infection, as well as in the need to minimize *live* contacts. The already existing project *Society against COVID-19* can be considered an example of such cooperation. It provides a platform for exchanging views and experiences in the light of the spread of the disease in different regions and the protection of human rights. Such cooperation is used to create the best methodology for protecting life and health of the population. It is also possible to introduce the practice of European countries to create online conferences, as happened

[38] Society vs. COVID-19: OTH Association presents a specialized web page, https://decentralization.gov.ua/news/12365 consulted on 11.10.2021.
[39] Ibid.

with such an event by members of the Arctic Mayors Forum.

In addition, there is a need to address the problems that arise with the funding of territorial communities in the fight against COVID-19. For this, two main ways (subsidies and loans) were proposed as a way to evenly divide the funds to direct the finances to protect lives and health from the coronavirus.

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The impact of human rights on business

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Abstract

The aim of this paper is to explore the link between the development of human rights regulations in International Law and business, as well as the inverse relationship of the influence of business activities on fundamental rights. In this regard, the evolution of this two-way relationship will be examined through the lenses of the United Nations Guiding Principles on Business and Human Rights, as well as the connections between the standards set out in this act and other international instruments on human rights The aim of the paper is to prove and highlight the need to address the issues of respect of fundamental rights from a global perspective and the multi stakeholders approach by taking into account all actors involved - states, companies, individuals. The concept of responsibility to protect fundamental rights will also be addressed as being relevant for changing the paradigm of their protection by transferring the burden from States to companies.

Keywords: *global perspective, soft law, responsibility to respect, human rights.*

JEL Classification: K20, K33, K38

1. Introduction

Business activities are undoubtedly the engine of the economy by contributing to economic and social development in general, as a result of job creation and the provision of goods and services. From this perspective, if we add to the discussion the fundamental rights, we can highlight the positive impact on them by increasing the quality of life in general. At the same time, business activities as a whole, or only in the pursuit of specific objectives, can have a profound negative impact on the application and observance of human rights, including on environmental, labour and society issues in general.

The negative consequences on fundamental rights produced as a result of the activities or omissions of companies can affect the whole spectrum of fundamental rights enshrined at universal and regional level, regardless of the nature or generation to which they belong (civil and political rights, economic and cultural rights, equality and non-discrimination, children's rights, freedom of expression, the right to a fair trial, the rights specific to labour relations, the right to a fair trial, data protection, the right to health, the right to a healthy environment

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and sustainability, consumer protection)[2].

Respect for fundamental rights is currently one of the fundamental principles of Public International Law, enshrined in the Charter of the United Nations[3], which states among its aims in Article 1 in a form as clear as possible:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The field of fundamental rights has usually been analysed by reference to the development of international regulations and standards of protection through specialized legal instruments in this field, by reference to the obligations of states to ensure their effective exercise. To this end, regional jurisdictional mechanisms have been created, such as the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights with specific competences in the analysis of claims for violations of fundamental rights. Undoubtedly, these courts have proven over time to be effective in the effective protection of fundamental rights and in setting standards in this regard, which has contributed to the overall development of the field of protection of fundamental rights, at least at regional level.

At the level of the United Nations, however, such a body with jurisdictional powers similar to those mentioned above is missing, and instead of judgments with binding legal effect there is a system of recommendations or reports of specialized bodies created within the United Nations, being a part of the *soft law*[4]. This is the typical situation for acts that do not present binding legal force, but in reality, the effects produced are not necessarily limited to a simple suggestion to States, but it may surpass the scope of *soft law* and thus become part

[2] Fundamental rights can be classified according to several criteria, and according to their recognition and consecration can be divided into several generations: first generation rights which include civil and political rights (individual freedom, freedom of conscience, freedom of speech); second generation economic, social and cultural rights (right to work, right to education, right to social protection); these, unlike those of the first generation, involve actions, measures, guarantees from the state; the rights of this category are recognized to all individuals but not in consideration of their quality of human being, but as members of certain social categories; third generation rights - also called solidarity rights (right to peace, right to development, right to a healthy environment); 4th generation rights (right to personal data protection, right to privacy), Ioan Muraru, Elena Simina Tănăsescu, *Constitutional law and political institutions* , edition 15 volume I, CH Beck Publishing House, Bucharest, 2016, pp. 141 -143.

[3] The Charter of the United Nations was signed in San Francisco on June 26, 1945, at the conclusion of the United Nations Conference, and entered into force on October 24, 1945, United Nations, Charter of the United Nations, 1945, 1 UNTS XVI, available online at: https://www.un.org/en/about-us/un-charter (accessed 1 November 2021).

[4] Carmen Moldovan, *Drept internațional public. Principii și instituții fundamentale*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2019, p. 83-85.

of *hard law* or similar legally binding acts[5] through a more subtle mechanism than that specific to the adoption of mandatory rules provided by international treaties. Such a process can also be analysed in the context of the protection of fundamental rights in the field of business activities.

The Charter of the United Nations expressly enshrines the principle of the protection of fundamental rights without any reference to companies or commercial activity, but the Universal Declaration of Human Rights[6] contains in its preamble provisions which may be read in connection with the field of business:

The General Assembly. Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

A moment of extreme importance in establishing the relationship between business and human rights and its future evolution was represented by the adoption in 2011 of the *UN Guiding Principles on Business and Human Rights*, a complex act that put an end to the controversies that existed regarding the applicability of human rights in the field of business activities and the possibility to generate obligations for companies[7].

Human rights have traditionally been seen as a set of rules adopted at international level, through binding treaties, which protect people from violations from States and which establish the obligation for States to provide the appropriate framework for their application. Respect for fundamental rights by companies was a new idea as the relationship between business and human rights became a concern in the 1990s as an effect of globalization[8].

The framework established by this legal instrument has certainly contributed to the change of the classical paradigm in the field of fundamental rights in the sense of affirming the specific obligations for the observance of fundamental rights directly on the companies, not through the States. This situation describes

[5] Barnali Choudhury, *Balancing soft and hard law for business and human rights*, „International and Comparative Law Quarterly", 2018, vol. 67 issue 4, p. 961-986, doi:10.1017/S0020589318000155.

[6] *Universal Declaration of Human Rights*, GA resolution 217 A(III), UN Doc A/810 (1848).

[7] Surya Deva, *The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe*: *Managing the Interface*, „Business and Human Rights Journal", 6 (2021), p. 336-337, doi:10.1017/bhj.2021.23.

[8] John G. Ruggie, *Business and Human Rights*, „Dovenschmidt Quarterly", 2013, no. 4, p. 168-170.

the elements of the direct horizontal effect of fundamental rights[9] and represents an important element of the evolution of the protection of human rights and a shift from the individual-state opposition to the consecration of a normative framework that also involves private entities directly.

2. The universal value of human rights and their relevance for the business environment

The aim of this paper is not to set out the historical evolution of the consecration of the principle of protection of fundamental rights and the analysis of all relevant moments, thus detailed references in this regard will not be present, but only those that substantiate the features of the principle within the United Nations and subsequently, in universal and European legal instruments.

At the end of World War II, some of the accusations brought before the Nuremberg Tribunal[10] established for the trial of persons from defeated countries accused of committing acts within the jurisdiction of the Tribunal (war crimes, crimes against peace, crimes against humanity)[11] have been linked to the use of forced labour and deportation for the purpose of forced labour and slavery, one of the currently imperatively prohibited practices, by qualification given as *ius cogens* rules[12] by the International Law Commission[13].

An example in this regard is the case of German industrialist Alfred Krupp and 11 other Krupp executives who were accused, among other things, of

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[9] Nigel Rodley, *International Human Rights Law*, in Malcolm D. Evans (ed.) *International Law*, 4th ed., Oxford University Press, 2014, p. 793-796; Lottie Lane, *The Horizontal Effect of International Human Rights Law in Practice*, „European Journal of Comparative Law and Governance", 2018, 5(1), p. 5-88. doi: https://doi.org/10.1163/22134514-00501001; Cristina-Elena Popa Tache, *Legal treatment standards for international investments. Heuristic aspects*, ADJURIS – International Academic Publisher, Bucharest, 2021, p. 38.

[10] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"*), 8 August 1945, available at: https://www.refworld.org/docid/3ae6b39614.html (accessed 5 November 2021).

[11] Laura-Maria Crăciunean-Tatu, *International Humanitarian Law*, 2nd ed. revised and added, Hamangiu Publishing House, Bucharest, 2019, pp. 247-248; Frédéric Sudre, *Droit international et européen des droits de l`homme*, 8e edition revue et augmentee, Presses Universitaires de France, 2006, p. 30-32.

[12] The term *jus cogens* or mandatory rules of public international law is used by the 1969 Vienna Convention on the Law of Treaties, to designate in accordance with the provisions of Article 53, those rules accepted by States from which it may not derogate and which may be replaced only by another rule having the same character, Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, Treaty Series, vol. 1155, No. 18232.

[13] United Nations, *Report of the International Law Commission*, Seventy-first session (29 April – 7 June and 8 July – 9 August 2019) Conclusion 23, A/74/10, https://legal.un.org/ilc/reports/2019/english/a_74_10_advance.pd (accessed on November 1, 2021).

using forced labour[14], provided by the Charter of the Nuremberg Military Tribunal as an element of war crimes[15]. During World War II, Krupp companies were an important factor in the implementation of Nazi policies in France, Norway and Poland[16].

Violations of fundamental rights have been or are frequently encountered during armed conflicts, but they can also occur in peacetime, in the absence of situations involving military force, through practices involving the use of children, the application of discriminatory treatment to certain groups or categories of children, repression or discouragement of collective bargaining, committing acts that harm the environment.

The prohibition of slavery and forced labour are now essential coordinates of the protection of fundamental rights and the subject of special regulation of several conventions adopted within the International Labour Organization - freedom of association and the right to collective bargaining, the abolition of forced labour, the abolition of child labour, the elimination of discrimination in employment and occupation, which are international standards applicable to employment relationships. Specifically, the following are the Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), Forced Labour Convention, 1930 (No. 29) and its 2014 Protocol, Abolition of Forced Labour Convention, 1957 (No. 105), Minimum Age Convention, 1973 (No. 138), Worst Forms of Child Labour Convention, 1999 (No. 182), Equal Remuneration Convention, 1951 (No. 100), Discrimination (Employment and Occupation), 1958 (No. 111)[17].

The identification of some of the fundamental instruments of the International Labour Organization reveals the existence of a constant concern to eliminate forced labour since the interwar period, through the Convention adopted in 1930 and the return to this issue after decades, which may lead to the conclusion of continued prohibited practices, despite being included in the content of international crimes.

As an example, a violation of the prohibition of forced labour was found regarding the involvement of companies in the Democratic Republic of Congo during the conflict that resulted in the loss of more than 3 million lives, a conflict during which were identified practices reminiscent of World War II.

In June 2000, the Security Council, through its President, requested the

[14] *United States of America against Alfred Felix Alwin Krupp von Bohlen und Halbac and others,* available at: http://www.worldcourts.com/imt/eng/decisions/1948.06.30_United_States_v_Krupp.htm (accessed 5 November 2021).

[15] According to Article 6 letter b) of the Charter of the Nuremberg Tribunal.

[16] David Weissbrodt, *Business and Human Rights*, University of Cincinnati Law Review, Vol. 74, 2005, p. 56.

[17] Full details of the conventions adopted within the International Labour Organization are available at: https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (accessed November 4, 2021).

Secretary-General to establish a group of experts on the illegal exploitation of the Democratic Republic of Congo's natural resources and other forms of wealth[18], for a period of six months, with a mandate to follow up on reports and collect information on all activities of illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo, including in violation of that country's sovereignty, to investigate and analyse the links between the exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo and the continuation of the conflict, and to make recommendations to the Council.

The specialized group of experts - *UN Panel of Experts on the Illegal Exploitation of National Resources and Other Forms of Wealth of the Democratic Republic of the Congo* - produced three reports in which it identified more than 80 companies from developed countries in North America, Western Europe and Asia, members of the Organization for Economic Co-operation and Development (OECD) who have violated rules of international law[19], including *soft law*, in the exploitation of natural resources during the war. Illegal actions consisted in the use of forced labour or facilitating access to weapons for the parties to the conflict, used to commit war crimes. The motivation for committing all these acts was represented by the access to minerals present on the territory of the Democratic Republic of Congo.

The conclusions of the reports submitted to the Secretary General by the expert group referred to the OECD recommendations in the *Guidelines for multinational enterprises*, an act adopted in 2011 which comprises a set of principles and standards addressed to multinational companies from States operating in OECD.

3. The *UN Guiding Principles*

The idea of establishing the nexus between respect for fundamental rights and economic, commercial or business activity in general was expressed by United Nations Secretary-General Kofi Annan, who since 1999 has called on states and companies to engage in such an endeavour providing a comprehensive approach to human rights, labour relations standards and environmental practices[20]. Previously, the United Nations tried to adopt a code of conduct applicable

[18] Security Council, *Statement by the President of the Security Council*, S/PRST/2000/20, 2 June 2000, also available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D274E9C-8CD3-CF6E4FF96FF9%7D/DRC%20SPRST%202000%2020.pdf (accessedNovember 3, 2021).

[19] Final Report of the Panel of Experts on the Illegal Exploitation of National Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2002/1146 (2002), available online at: https://undocs.org/fr/S/2002/1146 (accessed 10 November 2021).

[20] Secretary-General Kofi Annan, *Adress at the World Economic Forum in Davos*, Switzerland, 1999: „I call on you - individually through your firms, and collectively through your business associations - to embrace, support and enact a set of core values in the areas of human rights, labor standards, and environmental practices." UN Doc. SG/SM/6448 (1999).

to transnational companies in the years 1970-1980, but with no avail.

This starting point was followed by the launch by the United Nations of a platform to train companies in upholding and enforcing fundamental rights as universal values and promoting their contribution to addressing social issues. The platform supported by Kofi Annan, called *UN Global Compact*[21], is still active, approaching current and pressing topics for the whole international community, such as the effects of climate change and the need to undertake measures to limit the effects of this phenomenon, concerting the efforts of states and companies in order to achieve the *Sustainable Development Goals*[22] established by the General Assembly of the United Nations.

The assertion of these areas highlights the implication of private companies and the diversity of topics for which concerns should be expressed globally and addressed by all actors involved, in order to efficiently protect generally accepted values. This stage highlights the importance of the interdisciplinary approach to the problems facing today's society and the interconnecting between business and fundamental rights, which have had a pervasive effect on all areas of activity and impacted interaction between all stakeholders.

One of the key figures in the establishment and operation of the UN Global Compact was John Ruggie, who was appointed Special Representative of the Secretary-General of the United Nations in 2005 with a difficult mandate to address the relationship between business and fundamental rights and to propose measures to strengthen respect for fundamental rights in the global business sector. His task was to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other commercial enterprises in terms of human rights" and to "detail the role of states in effectively regulating and assigning the role of transnational corporations and other commercial enterprises" on human rights, including through international cooperation"[23].

Such a task is affected by divergent aims: the desire of companies to increase profits on the one hand and the desire of States to maintain their prerogatives derived from the principle of sovereignty which is manifested in the adoption of regulations applicable in all areas of interest, on the other hand.

The document adopted by the Human Rights Council in 2011 – *UN Guiding Principles on Business and Human Rights*[24]- contain a number of 31 princi-

[21] *United Nations Global Compact*, https://www.unglobalcompact.org/ (accessed 2 November 2021).

[22] United Nations, *The Sustainable Development Agenda*, https://www.un.org/sustainabledevelopment/development-agenda/ (accessed 1 November 2021).

[23] UN Commissioner on Human Rights Resolution 2005/69, UN Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005).

[24] United Nations Human Rights, Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, available online at: https://www.ohchr.org/documents/publications/guidingprin ciplesbusinesshr_en.pdf (accessed 1 November 2021).

ples, structured in three interconnected pillars: the obligation of the State to protect against human rights violations by third parties, including companies, by adopting appropriate policies and regulations; corporate responsibility to respect human rights, in essence, ie to act with due diligence to avoid violating human rights; the need for effective access to judicial and non-judicial remedies by victims of corporate abuse[25].

In the opinion expressed by the architect of the *Guiding Principles*, their purpose is to create a cumulative change of governance systems with reference to business and human rights, from the perspective of all actors involved with the following roles: States must protect, companies must respect and those affected must to obtain remedy[26].

In essence, the issues addressed in the *Guiding Principles* can be structured from three perspectives: of States, the focus being on their obligations under International Human Rights Law to ensure respect for fundamental rights against abuse by third parties; of companies, the emphasis being on the issue of managing the risks of being part of abuses; of private persons, containing the conditions for high access to effective remedies of a judicial and non-judicial nature.

4. Dissemination of the framework established by the UN Guiding Principles

The global approach to the relationship between business and the need to strengthen the protection of fundamental rights for responsible activities under the *UN Guiding Principles* adopted by the United Nations has been assumed by other international organizations such as International Labour Organization, Organization for Economic Co-operation and Development, European Commission, multinational companies, States.

The widespread endorsement of the United Nations Guiding Principles has led to a process of accelerating the recognition of fundamental rights and the responsibility of States and companies in this process[27] and incorporation by other international instruments[28].

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[25] Karin Buhmann, *Business and Human Rights: Think Different, Act Better - Human Rights Due Diligence on Guidance from NCP Practice,* "International Review of Compliance and Business Ethics" No. 2, July 2015, p. 59.

[26] John G. Ruggie, *op. cit.*, 2013, no. 4, pp. 169.

[27] Nicola Jägers, *UN Guiding Principles at 10: Permeating Narratives or Yet Another Silo?,* „Business and Human Rights Journal", Volume 6, 2021, pp. 198–211, doi: 10.1017/bhj.20 21.9, pp. 198 .

[28] Stéphane Brabant, Elsa Savourey, Vigilance *Act. For a contextualized approach,* "International Review of Compliance and Business Ethics" - Supplement to Business and Business Legal Week No. 50 of Thursday, December 14, 2017, page 12; United Nations Human Rights Special Procedures, *Guiding Principles on Business and Human Rights At 10: Taking stock of the first decade, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises,* A/HRC/47/39, Geneva, 2021, also available online at: https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf (accessed 9 November 2021).

The Guiding principles for multinational companies were adopted by the Organization for Economic Cooperation and Development in 1997 and updated in 2011[29] include a special chapter on human rights, in accordance with the framework established by the UN Guiding Principles on the protection, respect for fundamental rights and remediation in case of violations[30].

Tripartite Declaration of Principles adopted by the International Labour Organization (ILO Tripartite Declaration of Principles)[31] amended several times, the most recent in 2017, was the first and only instrument adopted globally in the field of labour relations, developed and undertaken by governments, employers and employees. The principles listed are based on international labour standards and are addressed to all stakeholders involved: national and multinational companies, the governments of the host countries where they operate, employers' organizations, employees; they provide guidance on employment, working conditions, industrial relations. The amended version in 2017 makes references to the principles of the United Nations and the Sustainable Development Goals of the UN 2030 Agenda as well[32].

In Europe, the UN Guiding Principles are endorsed both within the Council of Europe and the European Union. Thus, in 2016, the Committee of Ministers adopted the *Recommendation on Human Rights and Business*[33] which directly refers to universally established standards, emphasizes the issue of the responsibility of States to protect fundamental rights and the actions they must undertake to create the framework applicable for the companies' responsibility for the protection of fundamental rights, as well as topics such as granting access to remedies, with special emphasis on the additional protection needs for workers, children, indigenous peoples and human rights defenders.

Regarding the access to remedies in case of violations of fundamental rights, the 2011 *UN Guiding Principles* establish the obligation for States to take appropriate measures in order to ensure access to effective remedies, through appropriate legislative, judicial, administrative means, and for companies, the obligation to repair the negative consequences produced by carrying out their activity.

Within the European Union, the issue of the relationship between business activities and fundamental rights is addressed in several instruments with

[29] *OECD Guidelines for Multinational Enterprises, 2011* Edition, OECD Publishing, 2011, available online at: https://www.oecd.org/corporate/mne/48004323.pdf (accessed 5 November 2021).
[30] *OECD Guidelines for Multinational Enterprises, 2011* Edition, OECD Publishing, 2011, pp. 31-34.
[31] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration*), 2017, available online at: https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm (accessed November 5, 2021).
[32] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (MNE Declaration), p. 1, 4.
[33] Council of Europe, *Human Rights and Business - Recommendation CM/Rec (2016) 3 of the Committee of Ministers to Member States (2016)*, 26 October 2016, available online at: https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html (accessed 5 November 2021).

different legal effects[34], as a consequence of the obligation to protect human rights enshrined in the European Convention on Human Rights and in accordance with the constitutional tradition of the Member States[35], although the main objective of the Union has not been in this area.

In 2011, the European Commission adopted *A New Strategy for Corporate Social Responsibility*[36], which refers to the implementation of the standards defined by the UN Guiding Principles in a special chapter[37] and which promotes the idea of social responsibility through specific approaches for certain sectors or policy areas such as environment and trade, public procurement, ensuring transparency. The European Commission's vision is multidimensional, taking into account all stakeholders. The 2011 Strategy also refers to the standards already established and recognised at the international level and provides a new definition of the concept of "corporate responsibility for their impact on society" which is more extensive than the previous notion of corporate social responsibility.

Also, the European Union endorsed the UN Guiding Principles in 2015 in its *Action Plan on Human Rights and Democracy*[38] and assumed the obligation to support their implementation.

The Charter of Fundamental Rights of the European Union[39] contains provisions on the prohibition of slavery and forced labour (Article 5)[40], freedom to conduct a business (Article 16)[41], non-discrimination (Article 21)[42], the rights

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[34] Daniel Augenstein, *Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union*. Global Policy, 2018, Vol. 9, pp. 254-263. https://doi.org/10.1111/1758-5899.12530.

[35] Gabriel-Liviu Ispas, Daniela Panc, *Drept instituțional al Uniunii Europene*, 2nd ed., Hamangiu Publishing House, Bucharest, 2021, p. 15.

[36] European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A New EU Strategy (2011-2014) for corporate social responsibility, 25.10.2011, COM/2011/0681 final*, available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0681&from=EN (accessed 5 November 2021).

[37] European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A New EU Strategy (2011-2014) for corporate social responsibility*, p. 14.

[38] Council of the European Union, *EU Action Plan on Human Rights and Democracy*, 2015, available at: https://www.consilium.europa.eu/media/30003/web_en__actionplanhumanrights.pdf (accessed 5 November 2021).

[39] *Charter of Fundamental Rights of the European Union*, published in the Official Journal of the European Union 2010/C 83/02.

[40] Article 5 of the Charter of Fundamental Rights - Prohibition of slavery and forced labour – reads as follows: "1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. Trafficking in human beings shall be prohibited."

[41] Article 16 of the Charter of Fundamental Rights - Freedom to conduct a business - reads as follows: "The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."

[42]Article 21 of the Charter of Fundamental Rights - Non-discrimination - reads as follows: "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority,

of the child (Article 24)[43], fair and just working conditions (Article 31)[44], prohibition of child labour (Article 32)[45], health care (Article 35)[46], environmental protection (Article 37)[47], consumer protection (Article 38)[48], right to an effective remedy and to a fair trial (Article 47)[49].

Various categories of subsequent acts adopted within the European Union have analysed the state of implementation of the UN Guiding Principles. In this regard, several reports and studies that refer to specific aspects, as well as proposals or new approaches with either general or regional scope can be mentioned.

property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

[43]Article 24 of the Charter of Fundamental Rights – The rights of the child - reads as follows: "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

[44] Article 31 of the Charter of Fundamental Rights - Fair and just working conditions – reads as follows: "1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

[45] Article 32 of the Charter of Fundamental Rights - Prohibition of child labour and protection of young people at work - reads as follows: "The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education."

[46]Article 35 of the Charter of Fundamental Rights – Health care - reads as follows: "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."

[47]Article 37 of the Charter of Fundamental Rights - Environmental protection- reads as follows: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

[48]Article 38 of the Charter of Fundamental Rights - Consumer protection - reads as follows: "Union policies shall ensure a high level of consumer protection."

[49] Article 47 of the Charter of Fundamental Rights - Right to an effective remedy and to a fair trial - reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

An extensive study conducted by the European Parliament in 2017[50] aims to highlight the state of implementation of the United Nations Guiding Principles and the measures taken to this end around the world, highlighting the differences between the European environment and that of third countries.

The 2017 Report of the Agency for Fundamental Rights[51] with a recommendation to establish a general framework for all remedies, in a clear language accessible to the general public, the European Commission's 2019 *Report on Corporate Social Responsibility, Responsible Business and Human Rights Conduct*[52], which includes an overall analysis of the status of the protection of fundamental rights based on the content of the United Nations Guiding Principles, Sustainable Development Goals and special instruments adopted within the European Union, the *2019 Report of the Fundamental Rights Agency* (FRA) on abuses related to business activity reported in the European Union and available remedies[53] notes the increase in the recognition of the impact that business has on fundamental rights as a whole, from all internationally recognized categories of rights (civil and political, economic, social and cultural rights and workers' rights, the right to privacy, equality and non-discrimination, freedom of expression and the right to health or rights specific to the protection framework provided by the Charter of Fundamental Rights of the European Union such as consumer rights and environmental protection).

The idea of corporate social responsibility is also reflected in the *ISO 26000 Standard,* for companies and organizations that are committed to act responsibly and is also a way of assessing their commitment to sustainability and its overall performance[54], therefore respect for fundamental rights is seen from a holistic, extended perspective that relates this special value with other current objectives.

The various instruments that followed the adoption of the 2011 UN Guiding Principles underline their relevance to the emergence of the concept of corporate social responsibility and fundamental rights and to the possibility for a

[50] European Parliament, Directorate General of External Policies, *Implementation of the UN Guiding Principles on Business and Human Rights*, 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf (accessed 5 November 2021).

[51] European Union Agency for Fundamental Rights, *Fundamental Rights Report 2017*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-fundamental-rights-report-2017_en.pdf (accessed 5 November 2021).

[52] European Commission, *Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights*, Overview of Progress, 2019, available at: https://ec.europa.eu/docsroom/documents/34963 (accessed 5 November 2021).

[53] *Fundamental Rights Agency focus report on the business-related human rights abuses reported in the EU and available remedies*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-business-and-human-rights-focus_en.pdf (accessed 5 November 2021).

[54] International Organization for Standardization, *ISO 26000 Guidance on Social Responsibility*, 2018 available at: https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100258.pdf (accessed at November 6, 2021).

future treaty to be concluded in this field to address from acritical perspective future consequences[55]; at the same time, they are a proof of awareness of the need to regulate corporate responsibility for violations of fundamental rights as a result of conducting business activities.

Within the United Nations, in 2014, the Human Rights Council adopted, at the initiative of Ecuador, a resolution establishing an intergovernmental working group - Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights - to initiate a process of negotiating an international treaty on business and human rights[56], in order to cover significant gaps in this area, in particular those relating to compensation mechanisms for infringements of fundamental rights through transnational business activities[57]; this a very sensitive issue provided as principle yet there lack concrete solutions in terms of implementation. The working group has been challenged and criticised since its establishment even by the European Union, especially because it focuses on the situation of transnational companies, but it has continued its work[58].

Even in the situation of recognizing the horizontal application of fundamental rights obligations for example, at the level of the European Court of Human Rights, disparities continue to exist due to the fact that its jurisdiction is limited regionally. Moreover, not all States are part of a jurisdictional system for the protection of fundamental rights, therefore the persons affected by violations or abuses on human rights are excluded from a real and effective form of protection. Unlike them, in the field of foreign investment[59], companies or individuals acting as investors may resort to arbitration directly against the State; this example underlines a situation that further deepens the differences between legal regimes and the continuous gaps.

The establishment of a specialized international court with jurisdiction

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[55] Surya Deva, *op. cit.*, pp. 337-338.

[56] Human Rights Council, Resolution A/HRC/26/L.22/Rev.1, 24 June 2014. The vote was twenty, fourteen against (including members of the European Union and the United States) and thirteen abstentions (including Brazil).

[57] Clémence Assou, *Key challenges for a binding international instrument on business and human rights*, „Journal de l'arbitrage de l' Université de Versailles - Versailles University Arbitration Journal" n° 1, October 2015, study 5; Douglass Cassell, Anita Ramasastry, (2016) "White Paper: Options for a Treaty on Business and Human Rights," Notre Dame "Journal of International & Comparative Law", Vol. 6: Issue 1, Article 4, pp. 3-50, also available at: http://scholarship.law.nd.edu/ndjicl/vol6/iss1/4 (accessed on November 5, 2021); John Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, Inst. for Hum. Rts. & Bus. (Sept. 9, 2014), available online at: http://www.ihrb.org/commentary/quovadis-unsolicited-advice-business.html (accessed November 3, 2021).

[58] Janne Mende, *The contestation and construction of global governance authorities: A study from the global business and human rights regime*, "Global Constitutionalism", 2021, vol. 10, pp. 384 doi: 10.1017/S204538172100011.

[59] Carmen Tamara Ungureanu, *Dreptul comerțului internațional*, Hamangiu Publishing House, Bucharest, 2018, p. 90-96.

to resolve claims against companies would also resolve complicated and unresolved issues regarding the extraterritorial effect of the obligation to respect fundamental rights and jurisdiction.

5. Conclusions

The responsibility of companies shaped by the new approach in the field of business activities and the protection of fundamental rights is a qualified one, in accordance with the social role of the business sector and should not be perceived as having only a negative dimension - abstinence from a conduct that does not harm people, but a positive dimension - to do good to people. Changing the classical approach on the respect for fundamental rights is certainly a new chapter in the evolution of their legal status.

The UN Guiding Principles have been acclaimed, assumed, taken as inspiration and considered an authentic normative reference point for responsible corporate conduct, which has led to the emergence of many legal tools and rules that contribute to formulating new responses in policies involving fundamental rights.

Companies and business activities have a double image and can be analysed from a double perspective: on the one hand they certainly contribute to the improvement of working and living conditions in general, through the access offered to new technologies, the creation of jobs, the provision of services in the most diverse fields; on the other hand, they can have a negative influence on fundamental rights by exercising abuse and creating harm directly or indirectly. The particular relevance of the 2011 Guiding Principles is represented by the balance of the relationship between the multi stakeholders (States, companies, private persons) in an integrative approach and taking into account all levels where their presence is significant and can cause changes.

Although the *soft law* nature of the Guiding Principles could normally call into question their effectiveness, further developments and dissemination under other international instruments indicate quite the opposite. The adoption of a special international treaty on the obligations of companies in carrying out business activities and respecting human rights does not seem feasible given the need to meet the will of States; furthermore, such a legal instrument might not be truly efficient, given the acceptance of the idea of responsibility to ensure respect for fundamental rights directly to companies but it would create the framework for legally binding judgments of a specialized international court against companies accused of violating fundamental rights, which will create a more comprehensive human rights regime.

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Decent work and decent working hours in the world of modern technologies

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Abstract

Where human work has been used for centuries, new technologies have been imposed. Systems of generating new information and configurations that help solve problematic issues without human factor interference are imposed to us. Is this good for humanity? Some people believe that artificial intelligence will destroy jobs and human labor. Others, in studying history, believe that the stages of job loss were accompanied by the stages of job creation. We are facing a very rapid development of modern technologies today, and at the same time we have a situation where workers 'working hours are getting longer and are more difficult to handle, and we are far from decent working hours today. The method of online research was used in the paper. Basic hypotheses set during the research are: 1. The introduction of modern technologies makes the work easier, working hours become reduced and the work becomes more humane and more dignified. 2. More dignified work and shorter working hours leads to more stable family relationships. *The purpose is to establish decent working relation and decent working hours. The goal is to protect the worker from hard labor and overtime work.*

Keywords: *artificial intelligence, new technologies, working hours, decent work, decent working hours.*

JEL Classification*:* K31

1. Introduction

It is believed that new technologies ensure our sustainable development and a better future. With the development of new technologies, one should live easier. New technological advances are thought to be useful to man, that man's work has become more humane in the sense that difficult jobs have been taken over by machines, that workers work less, that distribution is more measurable and fair. The time of the pandemic showed us that modern technologies are useful because some workers were doing their work from home, which means, in a separate place of work.

Although useful, automation will surely result in higher unemployment of people, although unemployment is already high today and is the cause of large population migration.

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2. Decent work and decent working hours today

The question is: What is decent work? Decent work is a strategy aimed at achieving sustainable, human-centered development. Decent work is a key element in building fair, equitable and inclusive societies based on the principles of job creation, the principles of workers' rights, equality between women and men, social protection and social dialogue. Decent work means equal access to employment without discrimination. Decent work means a wage from which workers can live to enable themselves and their families to live a dignified life. Decent work means social protection in the event of illness, pregnancy, ups and downs that we all experience in our lives. Decent work means being free from exploitation. Decent work means allowing people to organize and represent their interests collectively through trade unions, and to engage in genuine dialogue as citizens and workers. Decent work means the right of workers to decent working hours.[2]

The World Labor Movement jointly warns of the problems of workers, emphasizing the right to work, decent work, acceptable and safe working conditions, fair distribution of newly created value, decent wage, social justice, a call for unionization to resist the transformation of workers into slaves of the new age.[3]

Although, we are in the 21st century and experiencing an economic and technological boom, in terms of decent working hours we are in a vicious circle that is difficult to get out of. For most of the world's population, life has not changed for the better. The indicators are staggering unemployment has increased significantly and working conditions have deteriorated significantly in the sense that people are given jobs below their education level or are not being paid for the work they do.

Why the basic standards of the International Labor Organization are not being applied? It is believed that national, European and global monitoring over decent work application and decent working hours should be more effective.

The ILO and the UN have done a lot to improve the status of workers, but we see that the situation is unsatisfactory. Moreover, when international organizations make a quality step forward, business owners do not apply and intentionally violate legal regulations. Today, with the development of new information technologies and new challenges and insecurities related to work and employment of workers, it is necessary to find new effective solutions that lead to the humanization of employment and the introduction of decent work into employment and, consequently, decent working hours for the worker.

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[2] Petričević, Anton: Radni odnos i dostojan rad, doktorska disertacija, Panevropski univerzite "Apeiron" Fakultet pravnih nauka, Banja Luka, 2015, p.15.
[3] Ibid.

3. The man and his work

In order for a person to survive, he/she must work. By working, man consumes his strength and energy. First, it was physical labor that satisfied his survival needs, such as hunting wild animals, building houses, etc. Over time, man found easier ways of survival, began to think, to find new solutions, which led to intellectual work, new knowledge and development.

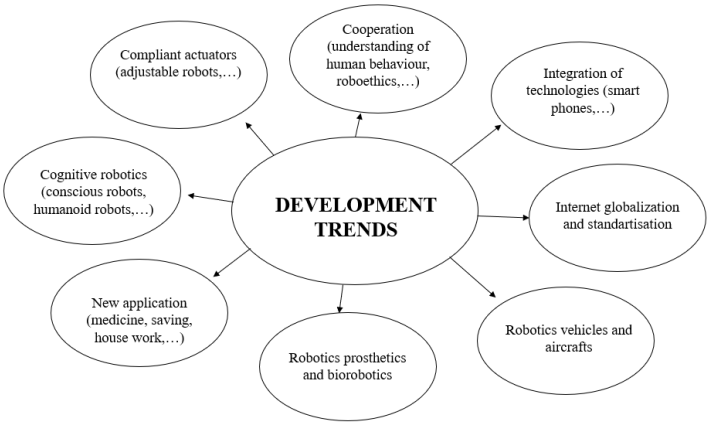
New insights, new technological developments, should lead to a better human life and more humane work.

Today, in the 21st century, we are confronted with the fact that human lives and health lost throughout history were not a lesson enough to humanize work and to have decent work today. How to help humanity?

The fact is that international human rights bodies and non-governmental organizations are increasingly concerned about poor working conditions. technological development requires rapid adaptation of the education system, which must follow new knowledge. The relationship between man and machine will soon become an extremely important ethical issue. Socio-economic, legal and ethical issues related to robotic applications are already being debated. Robots are becoming collaborators in the workplace. It seems that this is not a distant future for us and that we have to get involved as soon as possible.[4]

Although the Republic of Croatia is technologically backward, it still has fundamental potentials in a sector without which there is no progress, and that is education and science.

Figure 1. Directions of the development of robotics



Source: Jerbić, Bojan& Nikolić, Gojko, 2015: 64

[4] Jerbić,Bojan & Nikolić, Gojko, Ključna znanost 21.stoljeća, Zagreb, Open info Trend, Informatika za otvoreno društvo, No.199, Zagreb, 2015, p. 64.

4. A man through history – is work his destiny?

For humans, as a species, there is a Latin term homo sapiens. Ancient thinker Appius Claudius Caecus concluded that every man was a creator of his own destiny, Faber *est suae quisque fortunae*, and thus proved that the work compelled man to think. Of course, the thinking man came to new understandings, to design and use his mental abilities for the common good of mankind. Beautifully conceived, but literally not realized, but used for the purpose of subjecting the world around them to their own interests.

By systematic work, modern technologies have emerged, and time will tell whether they are a benefit to humanity or its opposite. Still until then, work was a punishment to the worker, and now it gets another dimension, it becomes a reward to the worker. It is important to note that work began to be understood as the essence of human existence in the beginning of the 19th century. Of course, it is necessary to accept new progress and adapt to technological changes that will be reasonably used by man.

Attitudes towards work have changed since the beginning of the 20th century but have not yet been conceived in practice. The Art. 24. of The Universal Declaration of Human Rights said: "Everyone has the right to rest and leisure, including reasonable limitation of working hours and occasional paid non-working days."[5] We see that decent work, and in addition, decent working hours, are always highlighted as the most important human need.

5. The importance of work for the human species sustainability

Work is every human action, regardless of the significance and circumstances of that action. We are interested in useful work, humane work, enriching work. Work is a necessity of life, a human act by which one gets his dignity. Legally work can be defined as a purposeful and socially permissible activity aimed at meeting the needs of man.[6] If we look at the understanding of the work through the statements of Mandić, we will see that the purpose of work is always emphasized, therefore, without work there is no survival. The concept of humane work as the need of today, whether it is modern technology work or classic work, has been well received. It is argued that the introduction of machines into the world of work does not result in the expulsion of man from that world.

Facing the universal crisis, modern technologies, humanity is looking for models of how to properly evaluate the need to realize man through daily work, how to make man more exalted and to make him realize himself in the world of work. The goal is to free man from hard work, to reduce working hours in favor of leisure. Work is to man the essence and condition of existence. Although

[5] The Universal Declaration of Human Rights, Art. 24.
[6] Mandić, Mlađen, Radno pravo, Panevropski univerzitet Apeiron. Banja Luka, 2007, p. 13.

throughout history it has been thought that man adapts himself to the laws of nature, today we can say that man adapts himself to the laws of technology to survive and satisfy his needs.

And what is surprising is that today, instead of making it easier for people to work with the use of new technologies, man-workers are increasingly working and working under inadequate conditions. Instead of the 40 hours allowed by the law as weekly working hours, the current Labor Act in the Republic of Croatia[7] leaves the possibility that a worker must work much more at the behest of the employer. We know that throughout history, the worker has barely fought a shorter working hour, and now we are pulling him back with these inhumane regulations.

The struggle of workers for limited working hours experienced significant changes during its existence, which were reflected in the demand for shortening of working hours. We have seen that in the first phase of the development of labor law as well as market economy, working hours was a free category by no means restricted.

Throughout history, it has been seen that from the beginning of the capitalist mode of production, that is, the abolition of feudalism, there were demands from workers for standardization of working hours, compensation for work done, demands for the protection of women and children (England 1804, 1819, 1825, 1844). The law of 1850 introduced a 10-hour working time in England, and in 1874 a child protection law was enacted in the Netherlands. It took over 100 years to reduce working hours from 84 to 42 hours per week.[8]

If we look at the evolution of working hours throughout history, we will see that it used to be as high as 70 hours a week, and today it amounts 40-48 hours a week and somewhere even 35 hours a week.

According to available statistics, people lived shorter during this period, intra-family situations were also very difficult and workers were often suffering due to severe, inhumane working conditions.

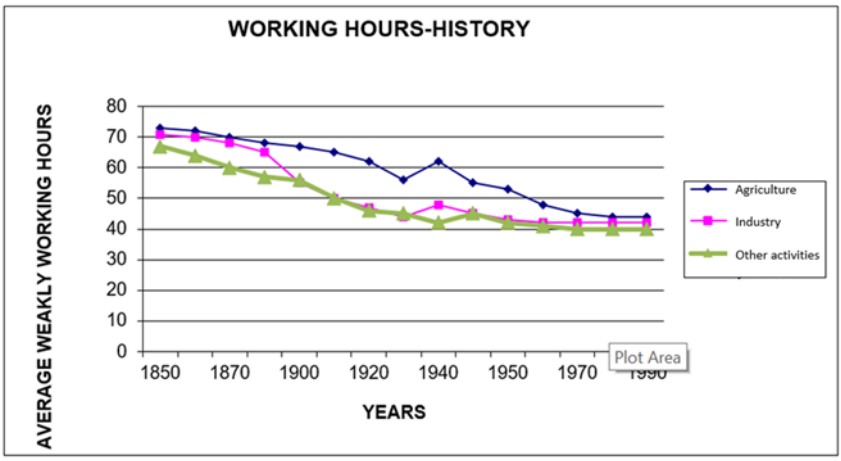
The first International Occupational Safety and Health Conference was held in Berlin in 1890 and discussed about significantly improving working conditions related to working hours such as:

- particular care was taken to ensure that the working hours of young people and children are appropriate, which means shorter than before, so that they are not used for the most difficult jobs. Particular attention was paid to women and their work, miners working in the toughest conditions and the toughest jobs,
- an effort was made to strictly determine the weekly rest, which until then was not the case.

[7] Official Gazette 93/14, 127/17, 98/19 in force since 1st January 2020.

[8] Petričević, Anton, Radno vrijeme-promjene i izazovi,magistarski rad, Panevropski univerzitet "Apeiron" Fakultet pravnih nauka, Banja Luka, 2013, p. 8.

Graph 1. Average weekly working hours through history



Source: Petričević, Anton, 2013:23 (author edit)

All told, was a significant step towards a better life for workers through, among other things, decent working hours.

In almost all countries, a slow but sure step was made towards humanizing work and decent working hours within working relation and work in general.

The ILO Convention no.1 refers to "the restriction of working hours in industrial enterprises to eight hours a day, or 48 hours a week".[9]

The International Labor Organization has taken over the care for reduction of working hours and at the same time the care for the health of workers. The five-day work week, or 40-hour work week, was introduced for the first time in France in 1934.

The ILO subsequently adopted a number of conventions on working hours or weekly rest. Today, in France, full-time work is 35 hours a week.[10] "The pronounced tendency of shortening of full-time work (48, 42, 40 hours per week) occurring in the last twenty years is in accordance with the right to fair working conditions of the European Social Charter which binds the parties "to determine the reasonable duration of daily and weekly work, gradually reducing the working week…"[11] Furthermore European Foundation for the Improvement of Living and Working Conditions, EF/10/86/HR1 says "...some results suggest that the quality of part-time jobs is, on average, lower, although overall the satisfaction of part-

[9] Ibid.
[10] Švigir, Mario, Propisano, odnosno ugovoreno i stvarno radno vrijeme-trendovi kao podloga za raspravu u kontekstu učinkovitosti rada ili sprječavanja novog zapošljavanja, Radno pravo, No. 3, 2005, p.19 .
[11] European Social Charter NN-MU 15/02.

time workers is similar to that of full-time workers."[12]

The personal dimension of work remains the foundation of all social science. Work is rooted in the person. It is a projection, an expression of a person. It is finalized in man; it is a condition of his psychological and sociological well-being. It is a means of human integral development[13]

6. Need for humanization of labor relation

"Decent Work, (ger. Menschenwurdige Arbeit), denotes the ability of women and men (workers) to carry out their work freely, on equal terms, in a safe manner and with the protection of human dignity."[14]

Today decent work is becoming a new institute in labor law. Of course, this is a result of workers' struggles throughout history for their fundamental rights to work to be recognized. Somewhat but hard it must become accepted by employers, the state, secular labor organizations.[15] Bruno Moslavac says that these are four major groups of rights:

- freedom of work,
- the right to work on equal terms and the right to safe work,
- the right to safety at work and
- the right to protect the dignity of workers.

As a person, man is the subject of work. As a person he works, performs various activities in the process of work, and all these actions should serve the realization of his humanity, the fulfillment of knowledge inherent in him in the name of humanity, which is to be a person. Working in all its forms, "physical" or "intellectual", "creative" or "reproductive", "research" or "organizational", deserves special respect because it is a human work and because behind every work there is a living subject: a human person. This is where the value and dignity of work comes from.

A person's entire life is focused on work. Today, in an age of globalization in the economy, rather, to the rest of the economy, labor is portrayed as accepting responsibility within production. Here we come across two layers of people. The first layer performs tasks and the second layer represents the layer of organization of power and decision making. The first layer is alienated from the final product and will disappear as the subject of the work. Its place is increasingly occupied by machines. We are entering a phase where the worker fails to express himself and his needs, where there is a growing rationalization, where the

[12] Europska zaklada za poboljšanje životnih i radnih uvjeta, EF/10/86/HR 1.
[13] Grbac, Josip: Rad danas: gospodarsko-sociologijski vidovi. *Bogoslovska smotra* 62(1–2), Zagreb,1992, p. 64–77.
[14] Riječnik hrvatskog jezika, Školska knjiga, Zagreb, 2000.
[15] Moslavac, Bruno, Osnove radnog prava za menadžere, Visoka škola za menadžment u turizmu I informatici, Virovitica, 2013, p. 39.

entire work process becomes automated and the work becomes a place of collective slavery, which inevitably leads to psychological differentiation. What can be done to stop the negative trend of depreciation of work and human beings as a subject of work?

When it comes to working hours, it is governed by the laws of individual countries, which are the basis of Directive 93/104/EC of 1993 and Directive 2003/88/EC relating to certain aspects of the organization of working hours, conditions of employment, and health and safety of workers. The aim is to improve the working conditions of workers in the EU by achieving minimum conditions of the organization of working hours. Certain working conditions can have adverse effects on the safety and health of workers. It is necessary to adapt the work as much as possible to the worker, considering the specific nature of the particular job[16]

To find the right working hours ratio, it is necessary to strive for research and joint efforts of all participants (government, employers, workers and others) to avoid a disagreement between actual, preferred and normative working hours. In order to achieve this, many factors need to be taken into account (eg the imposition of disproportionate obligations by employers, the needs of workers to perform certain tasks, while taking care of their health, safety and special care for the disabled, for children, for equality in the performance of work, etc.

In all modern societies, the constant interest is the relationship between working hours and off-hours, given the tendency to shorten working hours, ie increasing time off work.

The time spent by the worker in performing the job at the invitation of the employer shall be considered as working time, irrespective of whether they are carried out in a place designated by the employer or in a place chosen by the worker.[17] The current Labor Act introduced the concept of working hours for the first time.

The definition of working hours has been introduced to comply with the asquis. In theory, there are different definitions of working hours, which generally boil down to defining working hours as the amount of time an employee spends at work and in which he or she is required to be available to the employer.[18] Baltić & Despotović define working hours as the time of daily work in the course of which the worker is obliged to perform certain work functions. Vidaković Mukić[19] says that working hours is a period during which a worker is obliged to make his workforce available to his employer at the place of work in order to

[16] Dedić, Sead, Gradašćević-Sijerčić, Jasminka: *Radno pravo,* Pravni fakultet Univerziteta u Sarajevu, 2005, p. 257.
[17] Zakon o radu RH, NN 149/2009.
[18] Baltić, Aleksandar, Despotović, Milan: Osnovi radnog prava Jugoslavije: siste.... međusobnih radnih odnosa i osnovni problemi sociologije rada Print book. *1979.* 7. izd. Beograd: Savremena Administracija. 5, p. 222.
[19] Vidaković-Mukić, Marta: *Opći pravni rječnik,* Pravna biblioteka: Zagreb, 2015.

fulfill a contract of employment, ie to perform a certain job. Jelčić[20] defines working hours as follows: as the time required to perform a particular work of an individual worker who has undertaken an obligation to perform it (including the time spent on standby and on duty associated with the job taken over), or with the performance to which he has consented, as well as the amount of time a worker works for his protection in cases determined by a legal norm. The definition given by Prof. V. Jelčić was previously actual, that is, until the adoption of the new Labor Act. Today, however, standby time is not included in working hours in the Republic of Croatia. The EU prefers flexible working hours.

Aligning with legal standards of the European Union, the Labor Act of the Republic of Croatia, according to Directive 97/81/EC stipulates that an employer is obligated to consider petition of worker working full–time for concluding of part-time employment contract and vice versa.[21]

Employment has increased in all countries thanks to ILO Convention No. 175 on part-time work of 1994 as well as Recommendation 182 on part-time work at European Union level.

Other authors emphasize the division of European labor law into communitarian and non-communitarian, or labor law of the European Communities and the Council of Europe, and refer to the Maastricht Treaty, which is dealing with the promotion of employment, improvement of living and working conditions.[22].

The need for well-trained, flexible and mobile workers to revive the Croatian economy has led to the creation of European labor law that seeks economic and social progress, a high level of employment, equal opportunities for workers and adaptability.[23]

A specific issue and one of the key issues are the interpretation of European law on working hours. The methods of interpretation recognized by national law must be applied in the same way to guarantee Community law.[24]

Supranational European legislation seeks to establish minimum standards of working hours so that national economies, as well as individual economic operators, have the same starting bases[25].

The employment relationship has lost the character of humane treatment and action in relation to the worker and should again restore a decent employment

[20] Jelčić, Vera: izlaganje na izdavanju knjige Radni Odnosi U Republici Hrvatskoj, Organizator d.o.o. Zagreb, 2007.
[21] Herman, Vilim; Ćupurdija, Milorad, Osnove radnog prava [available at: https://www.pravos. unios.hr/pfo/sites/default/files/RadnoiSocijalno/knjiga-osnove_radnog_prava.pdf, access February 15, 2021], Pravni fakultet Osijek, 2011.
[22] Ibid, p. 46.
[23] Ibid, p. 46.
[24] Bodiroga-Vukobrat, Nada; Laleta, Sandra; Jukić, Anton (2008). Posebnostireguliranjaradnogvre mena u kontekstuSmjernice 2003/88/EZ s osvrtomnanacionalnarješenja u Njemačkoj, Austrijii Hrvatskoj. ZbornikPravnogfakultetaSveučilišta u Rijeci, 29(1), 71–109.
[25] Ibid.

relationship to the worker, fairer and more humane relations in the sphere of work.

EU wants more humane relations in the field of work and emphasizes decent work within the framework of employment as a legitimate form of work.

Prior to Croatia's accession to the EU, it was necessary to harmonize the provisions of the Labor Act with Directive 2003/88/EC which deals with aspects of the organization of working hours. The Republic of Croatia, as an EU member state and other countries wishing to accede to the European Union, must accept all the rights and obligations on which the European Union and its institutional framework are based. These rights and obligations represent the acquis communautaire that all Member States must follow[26].

Directive 2003/88/EC (full title: Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 on certain aspects of the organization of working hours) is a continuation of Directive 93/104/EEC European Working Hours Directive (EWTD).

On the 22nd of September 2004. The European Commission has submitted the final version of the proposal for a Directive 2003/88/EC on certain aspects of the organization of working hours.

The governments of some countries have begun to pay particular attention to the institute of working hours and to implement it in the legal system of their countries, as some well-known authors, including Jon C. Messenger on this basis, in many industrialized countries, the understanding of working hours in this way has led to innovative forms of reconciling the needs of workers in achieving the same or better results with shorter working hours.[27]

The International Labor Organization is constantly exploring ways to reduce working hours so that workers have as much time as possible for family, education, socializing and rest.

7. Development of artificial intelligence

The complexity of the tasks and tasks that people perform daily is increasing, mobile technologies are advancing day by day. Today we are at the beginning of the fourth industrial revolution (development of artificial intelligence, robotics, nanotechnology, 3D printing, biotechnology and automation.

Today particular attention is drawn to robotics, which will surely change the world fundamentally. The Republic of Croatia is one of the technologically backward countries, but considering the young people eager for education, we are taking big steps forward.

A robot is a machine that works in direct contact with humans and has the cognitive ability to turn information into action which means it can change

[26] Messenger, Jon. C: *Radno vrijeme i preferencije radnika u razvijenimzemljama–pronalaženje ravnoteže*, Biblioteka Čovjek i globalizacija, Zagreb, 2009, p. 14 .
[27] Ibid.

the material world and affect the cultural, emotional and social aspects of our lives. This can be good, and it can also be a big problem in countries that have a very slow transition to a new technological society. One of the great truths is that some occupations will disappear in the future, but history has shown that the disappearance of old ones creates new occupations, which will change the picture of the labor market. It remains to be seen in the near future whether there will be humane work in such a technological society and whether man will be the center of attention.

8. Research results

In 2021, a short online survey was conducted on a sample of 105 respondents. The survey consisted of **basic data about the respondent** such as age, sex, level of education, employment, form of employment. The obtained results show that 57.1% women and 42.9% men took the survey. With regard to completed education, 3.9% of respondents completed elementary school, 32.4% of respondents completed high school, 24.8% of respondents completed bachelor, 21.9% of respondents completed college, and 19.0% completed postgraduate studies, of the respondents, 40% had a fixed-term employment and 60% part-time work.

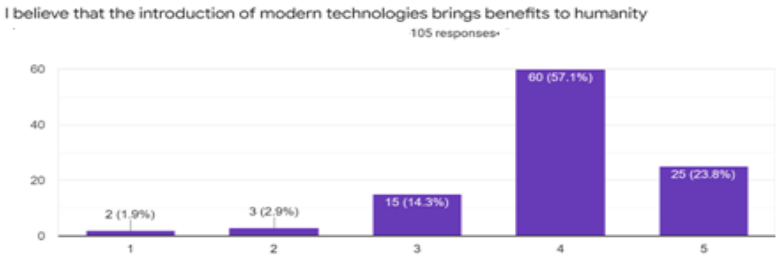
Most respondents were aged 35 years.

The second group of questions related to working hours. The survey shows that most workers work 8 hours a day, but it is also evident that 14.3 % work 9 hours and 3.8 % work 10 hours a day, which is 18.1 % of respondents who work more than full time, which in the Republic of Croatia is 8 hours a day. Thus, 18.1% of respondents work overtime. The third group of questions referred to the application of modern technologies in the world of work and reflection on working hours and decent work.

The survey shows that the respondents to the question "I think that the introduction of modern technologies brings benefits to humanity" in the largest percentage answered with "mostly agree" 57.1% of respondents and "completely agree" 23.4% of them which can be seen from the attached graph and what is a respectable percentage totaling 80.5%.

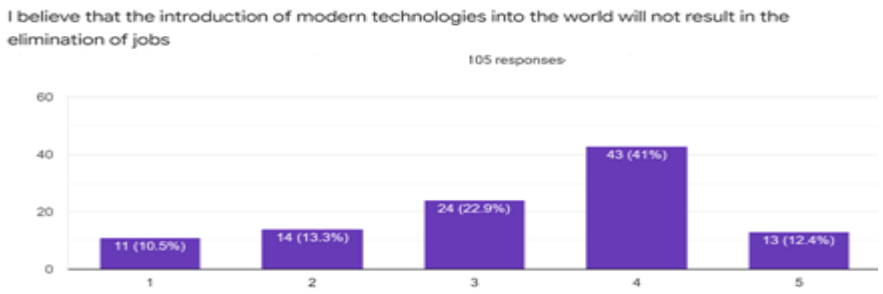
To the question "I think that the introduction of modern technologies in the world of work will not result in the abolition of jobs, the largest percentage answered with "mostly agree" 41% of respondents and "completely agree" 12.4% which can be seen from the attached graph and which is respectable percentage that together is 53.4% and is a consolation to employees

Graph 2



Source: Research 2021 (Author's edit)

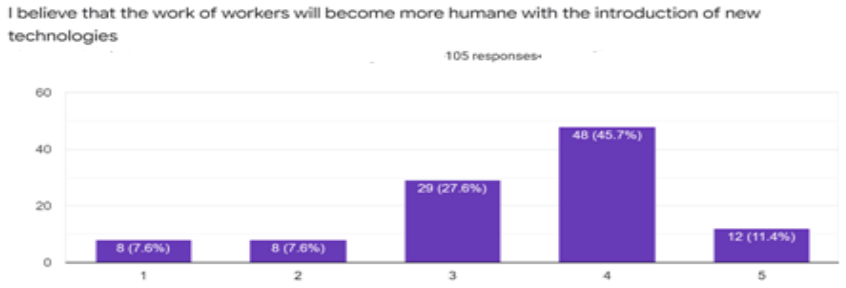
Graph 3



Source: Research 2021 (Author's edit)

To the question "I think that the work of workers will become more humane with the introduction of modern technologies" in the largest percentage of respondents answered "mostly agree" 45.7% of respondents and "completely agree" 11.4% which can be seen from the attached graph and what is a respectable percentage which together amounts to 53.4%.

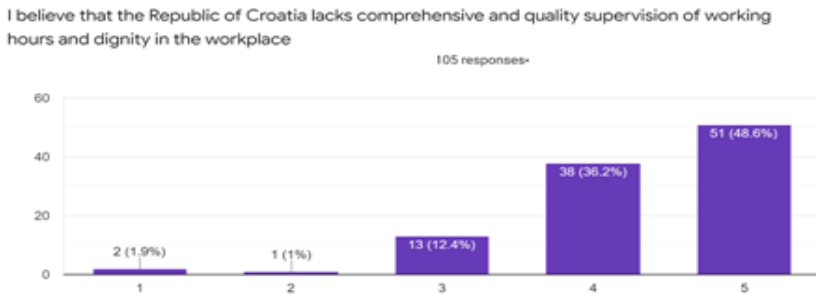
Graph 4



Source: Research 2021 (Author s edit)

To the question "I think that the Republic of Croatia lacks comprehensive and quality supervision of working hours and dignity in a workplace", the largest percentage of respondents answered with "mostly agree" 26.2% of respondents and "completely agree" 48.6% of them as can be seen from the attached graph and which is a respectable percentage that together amounts to 74.8%, which indicates the hidden dissatisfaction of workers.

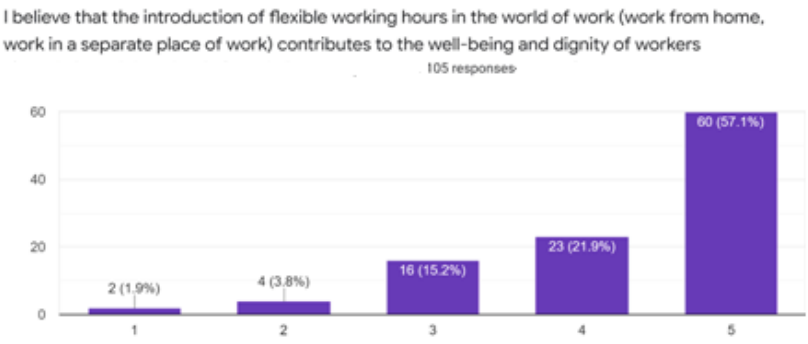
Graph 5



Source: Research 2021 (Author s edit)

To the question "I think that the introduction of flexible working hours (work from home, work in a separate place of work) contributes to the well-being and dignity of workers" in the largest percentage the respondents answered with "I completely agree" 57.1% of them as seen in the attached graph which represents a respectable percentage.

Graph 6



Source: Research 2021 (Author s edit)

8. Conclusion

The processes of urbanization, automation and globalization in history have led to problems of unemployment. From today's perspective, these were transition periods in which certain jobs were disappearing, but new industries and jobs were also being created. However, in the long run, when markets and society adapted to the initial shock of automation and modern technologies, the productivity effect with a positive effect on employment and working hours of worker began to dominate. For the time being, it is very likely that people will be required to actively participate in the processes of new technologies, so new technologies will be used as an aid and complement to human action rather than a complete replacement of human labor. The direction in which innovations will go is determined by ourselves. Certainly, the focus should be on the man, his health, his family, and his social life.

What is not good is that the law is not respected. Workers work more hours a day than legally allowed. Inspections do not react even though they know the problem which is shown by a short survey conducted in this paper. Many people do not have a job, so they leave the country, while others work, but under inadequate conditions, they must remain silent in order to keep what they have.

At the same time, we are constantly training ourselves to work on new technologies, but the worker does not feel a better life.

All this has long-lasting consequences. Are new technologies just an illusion for easier and more efficient work, are they replacing people in work and thus creating new problems because many jobs are disappearing, but at the same time new jobs are created or are they the balance between work and private life? Time will tell.

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Business law: collaborative economy vs. participatory economy in the digital age

Lecturer **Nicolae PANĂ**[1]

Abstract

The general objective of the postdoctoral paper is to develop a multidisciplinary and cross-sectional study to highlight the role of artificial intelligence in the globalization of democracy and the opportunities offered by technological progress related to the legal phenomenon as a matter of fact. At the same time, the study includes an analysis of the risks to which enterprises and public authorities are subjected in the context of using new technologies and the impact that legal vulnerabilities may have on the calculation of management risks reported through artificial intelligence applications. This article is an integral part of the author's research in the postdoctoral program within ASE Bucharest - Faculty of Law and is focused on the fact that the collaborative economy and participatory economy are major challenges of democracy in general and participatory democracy. Following the analysis of these two concepts, we tried to emphasize the importance of digital processes in the process of globalization of democracy. The author used for this study among the usual research methods, the empirical approach corroborated with the historical approach that underlined the practical relevance of the theses proposed by well-known authors in the field. Among the results and implications, we mention the dissemination of knowledge of concepts and their analysis to the academic community and beyond, and the study can be useful in calibrating and improving management processes both in private/joint ventures and in local and central public authorities.

Keywords*: collaborative economy, participatory economy, e-commerce, participatory democracy.*

JEL Classification: K22, K24

1. Introduction

When we refer to sharing economy, collaborative economy, collaborative consumption, sharing consumption or circular economy, we are talking about the new economic models where the activities are facilitated by collaborative digital platforms. These new technological tools are creating an open market that allows the temporary shared use of goods or services provided by individuals that are not obligatory assimilated to a professional category.

The sharing economy and the collaborative economy are perceived as possible solutions for the recovery of the business environment, given that EU industrial production is facing major problems due to a lack of raw materials. The

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two types of economy cannot exist without the support of digital technologies because without this digital tools it is impossible to create a real interconnection between producers and consumers, each of them having a bivalent role: *"Building on the single market and the potential of digital technologies, the circular economy can strengthen the EU's industrial base and foster business creation and entrepreneurship among SMEs. Innovative models based on a closer relationship with customers, mass customization, the sharing and collaborative economy, and powered by digital technologies, such as the internet of things, big data, blockchain and artificial intelligence, will not only accelerate circularity but also the dematerialization of our economy and make Europe less dependent on primary materials"*[2].

The sharing economy is based on the active participation of citizens in the economy and their ability to influence the market. The commercial flow is organized as a horizontal relationship between the parties (the peer-to-peer economy). These new modalities of collaboration are generating legal relationships that sometimes are difficult to be integrate into traditional legal frameworks and pose difficulties when identifying an adequate legal qualification. The Committee on the Internal Market and Consumer Protection of The European Parliament identified these challenges in the 2017 Report, which: *"Points to the lack of clarity among entrepreneurs, consumers and authorities as to how to apply current regulations in some areas and thus the need to address regulatory grey areas, and is concerned about the risk of fragmentation of the single market; is aware that, if not properly governed, these changes could result in legal uncertainty about applicable rules and constraints in exercising individual rights and protecting consumers; believes that regulation needs to be fit for purpose for the digital age and is deeply concerned about the negative impact of legal uncertainty and the complexity of rules on European start-ups and non-profit organizations involved in the collaborative economy"*.[3]

The new types of economy are materialized through digital platforms, and, thanks to the trust generated by very diverse reputation systems and tools, they also manifest an extraordinary ability to avoid conflicts. The administrators of these digital platforms act as simply technological intermediaries, and the users exchange goods or services that are underused. However, lately, these platforms have been incorporating additional services that are helping the consumers and the providers to easily connect and exchange their products and services.

The conceptualization and qualification of these new economic models

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – COM(2020) 98 final - A new Circular Economy Action Plan. For a cleaner and more competitive Europe, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0098.

[3] Committee on the Internal Market and Consumer Protection, Rapporteur: Nicola Danti Report - A8-0195/2017- on a European Agenda for the collaborative economy (2017/2003(INI)), available at: https://www.europarl.europa.eu/doceo/document/A-8-2017-0195_EN.html.

is raising numerous questions regarding to the legal implications, not only at a formal level but particularly at a practical level[4]. The European Union has not yet adopted uniform terminology, definitions and descriptors. Even the European Parliament "*recognize that while certain parts of the collaborative economy are covered by regulation, including at local and national level, other parts may fall into regulatory grey areas as it is not always clear which EU regulations apply, thus causing significant differences among the Member States due to national, regional and local regulations as well as case-law, thereby fragmenting the Single Market*."[5]

While the European Parliament refers to this new socio-economic sharing model[6], promoted by the digital revolution and the Internet, that favors the connection of people through digital platforms where the transactions of goods and services can be carried out in a secure and transparent manner, the European Commission opts for using expression like collaborative or circular economy[7] and avoids expression like "*sharing economy"*, describing it as a complex ecosystem of services and goods provided for temporary use, through online platforms: *"The way many services and assets are provided and consumed is rapidly changing: the collaborative economy, a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms, is developing at a fast pace. The collaborative economy leads to greater choice and lower prices for consumers and provides growth opportunities for innovative start-ups and existing European companies, both in their home country and across borders. It also increases employment and benefits employees by allowing for more flexible schedules, from non-professional micro jobs to part-time entrepreneurship. Resources can be used more efficiently thereby increasing productivity and sustainability."*[8]

In all cases, the model of participatory economy proposed by the European institutions is substantially different from the model proposed by the authors Michael Alberts and Robin Hahnel - Parecon - in their work "The Political Economy of Participatory Economics"[9]. The utopic model described by the American

[4] Codagnone, C.; Martens, B., *Scoping the Sharing Economy: Origins, Definitions, Impact and Regulatory Issues*. Institute for Prospective Technological Studies Digital Economy, Working Paper 2016/01, p. 6.

[5] Report - A8-0195/2017- on a European Agenda for the collaborative economy (2017/2003(INI)).

[6] Ibid.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – COM(2020) 98 final - A new Circular Economy Action Plan. For a cleaner and more competitive Europe, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0098.

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – COM (2015) 550 final - Upgrading the Single Market: more opportunities for people and business, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A550%3AFIN.

[9] Michael Alberts & Robin Hahnel, *The Political Economy of Participatory Economics*, Princeton University Press, New Jersey, 1991, p. 144.

authors rejects the current pyramid-type decision-making model and imposes a horizontal government, where the opinion of every individual has the same value in the decision-making process.

The European Union recognizes that the collaborative economy provides a whole new set of business models that offer goods and services, allowing an integration between the economy and society, based on very diverse bivalent relationships, both for social and economic purposes. The European documents elaborated on the subject highlight the need to ensure a fair business environment in which collaborative platforms can expand and become competitive in the global market. Also, the need to draft a minimum common regulatory framework is mentioned by most of the reports and documents. This new legal framework must be integrated into the existing set of European regulatory tools in order to provide a comprehensive and preventive response to the challenges imposed by the new economic environment.

The challenge to ensure the protection of consumers, in particular the aspects related to safety, health, privacy and transparency conditions, requires some legislative measures. In this context, it is obvious that states must establish a minimum regulatory framework that guarantees effective and equitable access to collaborative services, to prevent all forms of discrimination, to ensure free competition between the different providers of goods or services, to avoid unfair practices and to guarantee the effective protection of users and consumers.

2. The sharing economy and digital collaborative platforms

The sharing economy is based on digital intermediary platforms and online market. The concept is mainly dependent on Internet and collaborative platforms, where producers and consumers trade almost everything, from physical goods, products, accessories, to experiences. Some of the very popular sectors developed by these digital platforms are the short-term vacation accommodation, passenger transport, professional and technical services, teaching services and even crowdfunding: *"A good understanding of how crowdfunding works, what it can deliver and what the risks might be is also key to establishing trust with both contributors and campaigners. Sustainable growth in crowdfunding is only possible if users have confidence in it. Running successful crowdfunding campaigns also depends on campaigners having the necessary skills and training, as well as support offered by platforms and other actors"*[10].

The activity of these providers tends to be prolonged over time, it is carried out on demand, they use the compensation or monetary payment when offer-

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - COM/2014/0172 final - Unleashing the potential of Crowdfunding in the European Union, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0172.

ing their products or highly professionalized services. All the classical economical instruments have been incorporated into these digital markets by those who use them: *"In some ways, the peer-production economy marks a return to the early modern and colonial eras, when it was more common for individual craftsmen to own their tools of production. The crucial difference with the new sharing economy, of course, is that new technologies vastly reduce transaction costs and create new markets to connect buyers and sellers. All sharing-economy companies operate websites as hubs for their activities, and many rely on smart-phone applications to match parties to a transaction. Traditional brick-and-mortar firms like Wal-Mart and internet retailers like Amazon have websites and smartphone apps too, of course. But peer-production companies innovate either by disintermediating labor, "unlocking" otherwise dormant capital, or both"*[11].

On the other hand, it also happens that the final purchaser of the product or service turns out to have a very heterogeneous nature, from private individuals to companies or even public administrations. In any case, all of them make use of technology and very innovative and highly sophisticated tools in this digital environment. As Christopher Koopman, Matthew Mitchell and Adam Thierer said: *"Sharing economy entrepreneurs have developed a number of other monitoring mechanisms to ensure quality. Uber[12] and Lyft[13], for example, allow consumers to see the GPS path of their rides so they can independently verify the driver took the shortest route. The firms also have the address and credit card information of every customer, which helps to ensure the drivers' safety. This also permits all transactions to be cashless, reducing the incentive for theft"*[14].

At the same time, we can observe the coexistence of digital platforms that are simply facilitators, offering only connection services to users, with other types of platforms that offer integrated and complementary services, exercising even a sensitive control over the participants and carrying out the management of the transaction itself, providing services or products to cover certain contracting risks. So, the task of discerning the nature of each platform is increasingly complex. Also, from a functional point of view, Aura Esther Vilalta Nicuesa[15], a distinguish professor from Universitat Oberta de Catalunya, has identified three types of platforms, as:

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[11] Eli Lehrer & Andrew Moylan, *Embracing the Peer-Production Economy*, „National Affairs" No. 51, 2014, available at: https://www.nationalaffairs.com/publications/detail/embracing-the-peer-production-economy.

[12] https://www.uber.com/ro/en/, consulted on 1.10.2021.

[13] https://www.lyft.com/, consulted on 1.10.2021.

[14] Christopher Koopman, Matthew Mitchell and Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, „The Journal of Business, Entrepreneurship & the Law" vol. 8, issue 2, 2015, p. 529, 530 available at*:* https://digital commons.pepperdine.edu/ jbel/vol8/iss2/4.

[15] Aura Esther Vilalta Nicuesa, *La regulación europea de las plataformas digitales en la era de la economía colaborativa. Un cambio de paradigma en el sistema de reparación europeo*. „Revista Crítica de Derecho Inmobiliario", Nº 765, 2018, pp. 265 to 320.

- digital intermediaries or technological support platforms that offers Information Society services, accessible through the Internet or similar digital media, allowing users to carry out electronic transactions with each other or with professional suppliers of goods, services or content.

- reputation feedback mechanism and private execution systems, that represent a set of electronic tools having as the ultimate objective to generate trust among users and that incorporate highly heterogeneous rating, scoring or recommendation services – for suppliers of goods, services or content - thus as mechanisms of private compulsion through technological intermediaries that allow the reimbursement of payments made or the blocking of accounts in case of non-compliance.

- search engines, the classic one-way intermediaries that crawl the Web and provide information about the products and services searched by the consumer. Without these types of platforms, it would be practically impossible to locate the providers.

Suppliers of goods and services depend on these systems to promote and sell their products or services on the digital market. Reputation feedback mechanism and private execution systems are complementary auxiliary tools of any digital intermediation platform. Currently, the market develops and offers very diverse online reputation monitoring tools, which can be integrated into the platforms, not only to reveal the opinion of users, but also to produce statistics, track data on the network, in order to consolidate the commercial profile and to identify any cyber-attack in an effective way. Most of the digital intermediary platforms develop their own monitoring and feedback systems and the complexity of these tools makes the difference between various platforms acting in the same economic sector. As great philosopher Adam Smith mentioned in his book[16]:*"We desire both to be respectable and to be respected, and people's success in life almost always depends upon the favor and good opinion of their neighbours and equals; and without a tolerably regular conduct these can very seldom be obtained. The good old proverb, therefore, that honesty is the best policy, holds, in such situations, almost always perfectly true.*"

When digital platforms offer additional information society services, the first doubts arise. The concept of "information society services" includes "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services[17]", where "at a distance" means that the service is provided without the parties being simultaneously present, "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means

[16] Adam Smith, *The Theory of Moral Sentiments*, Cambridge University Press, 2002, p. 72.

[17] Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31998L0048.

and "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request. These types of digital platforms cover a wide variety of online economic activities and are not limited to certain services that generate an online contract, but also, they are offering free digital services for their users, as part of these economical activities. For example, the free commercial communications offered by the platforms in order to promote the members and their services may be considered a public offer to contract or simply publicity. In some cases, is difficult to establish the legal nature of the online activity provided by the collaborative platforms: "*Incumbents who oppose new entry by sharing economy innovators will argue that they still face various regulatory burdens that new entrants are evading. These include licensing requirements, price controls, service area requirements, marketing limitations, and technology standards. In theory, this could place incumbents at a disadvantage relative to new sharing economy startups that might not face the same regulations (even though those same regulations could simultaneously be used to keep smaller start-ups out of the market)*"[18].

This new economy and the new socio-economic relationships involve various categories of actors, including operators of digital platforms, providers of goods and services and customers, users who may have a bivalent role and could meet any time the status of consumer. The providers of goods and services make use of the platforms to make available their offer to third parties, but at the same time they can become consumers for their own costumers. The versatility nature of the platforms allows the trade of all kinds of goods, services, resources, assets, time, skills, permitting a peer-to-peer fare trade for a large variety of users acting simultaneously in their commercial, artisanal, professional field.

3. The European legal framework regarding sharing economy

Since 2013, the European institutions have observed the new economic models and started their efforts in analyzing and conceptualizing the most important terms of sharing economy. Starting with the *Opinion of the European Economic and Social Committee on 'Collaborative or participatory consumption, a sustainability model for the 21st century*' (2014/C 177/01) the process of regulating sharing economy have been initiated in the European Union. The document is offering the first legal definition of the specific concepts: *"The most common definition of collaborative or participatory consumption is the traditional way of sharing, swapping, lending, renting and giving away, redefined through modern technology and communities. This definition makes it clear that this form of consumption is by no means a new idea; it is actually the revival of a practice that benefits from today's technology to make services much more ef-*

[18] Christopher Koopman, Matthew Mitchell and Adam Thierer, *op. cit.*, p. 529.

ficient and scalable. At the same time, the impetus for collaborative or participatory consumption must come from those involved and participation must be voluntary"[19].

In 2016, the European Commission published a Report on a European Agenda for the collaborative economy (2017/2003(INI)) addressed to the European Parliament and to the Council and, the same year, the Commission issued the Communication on "Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (COM (2016) 288 final)[20]", advocating for a uniform regulation framework regarding electronic platforms and offering some important guidelines.

Currently, in the academic area, investigative work is being carried out to describe the phenomenon and its management from a regulatory point of view. But perfect legal solutions are still far from being agreed, due to the variety of regulated activities and products offered by the digital platforms. For example, the transport activity has a specific regulation, meanwhile food delivery and online money transactions are submitted to other type of regulation. The BOLT[21] is a collaborative digital platform integrates at the same time car sharing, food delivery, bike sharing, and all these services are electronical paid. One user may contract all these services in a day or in an hour without thinking about the incident regulation of each purchase he is doing. This is a reason for many questions that scholars are formulating: *"The ride sharing services have already implemented a very efficient system for customers to communicate their grievances through mobile apps. We would argue that the system is faster, more efficient and more convenient than the traditional methods implemented by taxi companies. The reason that Uber and Lyft do not have physical office space in most cities is primarily cost efficiency; to mandate a physical office location in each city, one should first establish its necessity. Are there any cases where grievances were not handled through the mobile applications? And if there are, could they be handled through a physical office? Taxi companies have a physical office because they run their business and, in some cases, handle customer grievances out of their office. In other words, they do not have this office specifically for customer grievances and therefore, why should Uber and Lyft also be forced to meet that requirement?"*[22]

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[19] Conclusions and recommendations (1.1; 1.3) *Opinion of the European Economic and Social Committee on 'Collaborative or participatory consumption, a sustainability model for the 21st century*' (2014/C 177/01), available at: EUR-Lex - 52013IE2788 - EN - EUR-Lex (europa.eu).

[20] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (COM/2016/0288 final), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0288.

[21] https://bolt.eu/en/, consulted on 1.10.2021.

[22] Yaraghi, Niam; Ravi, Shamika, *The Current and Future State of the Sharing Economy*, Brookings India IMPACT Series No. 032017. March 2017, p. 18.

In 2021, at the European level, users of the digital platforms enjoy a diverse panoply of rights regarding their protection when digitally contracting goods or services. The existing regulatory acquis in the European Union includes: the Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), the he Regulation (EU) 2016/679 (General Data Protection Regulation), the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 (the Services Directive), the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, the Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.

As it can be observed a lot of regulations are incident on the subject but none of them is focused on the sharing economy topic itself. There is still a lot of room for debates and consultations between the European institutions, consumers, digital platforms administrators and digital providers. The need of specific regulation is clear, but every involved party wants to negotiate something more. The European Commission advocated for a better and detailed legislation able to effectively protect consumer's rights, digital providers and platform's administrators hope for a minimal regulation and for an absolute freedom of the sharing economy: "*online platforms are subject to existing EU rules in areas such as competition, consumer protection, protection of personal data and single market freedoms. Compliance with these rules by all including platforms is essential to ensure that all players can compete fairly. This will create trust for both businesses and the general public to confidently engage with online platforms. Effective enforcement is crucial*"[23].

On the other hand: "*Nevertheless, such regulatory asymmetries represent a legitimate policy problem. But the solution is not to punish new innovations by simply rolling old regulatory regimes onto new technologies and sectors. The better alternative is to level the playing field by "deregulating down" to put everyone on equal footing, not by "regulating up" to achieve parity. Policymakers should relax old rules on incumbents as new entrants and new technologies challenge the status quo. By extension, new entrants should* ***only face minimal regu-***

[23] COM(2016) 288 final, idem.

latory requirements *as more onerous and unnecessary restrictions on incumbents are relaxed"*[24].

4. Conclusions

The new economic models facilitated by digital platforms – that operate under the umbrella of the so-called shared economy, collaborative economy, collaborative consumption or participatory consumption – generate an open market, where the legal regime is difficult to be determined. The traditional commercial schemes are often outdated when lawyers are requested to establish the applicable positive law. These platforms have the capacity to expand thanks to many different reputation systems - scores, ratings, recommendations - and electronic payment through financial intermediaries. Also, the other underlying information society services generate trust among their users.

The European Union has not a uniform terminology yet, regulations, legal definitions and nomenclature are still open to debates and transformation in order to describe this phenomenon. The European Commission is still hesitant to use the more open expression of the collaborative economy, meaning the complex ecosystem providing services and goods for temporary use, based on exchanges through online platforms, instead of sharing economy or participatory consumption.

In the described context, the legal framework applicable to the private relations that are established within the platforms as well as to the intermediation activities is still unclear. When analyzing the legal nature of a particular economical relationship, not only the internal regulations of each of the Member States should be considered, but also the Union legislation and all its acquis.

For the European bodies, these new business models are considered to have a significant potential to contribute to competitiveness, economic growth and employment. This potential represents the main reason which determine common efforts towards establishing an adequate legal environment. The identified difficulties are linked to the introduction of certain market access requirements, to the applicable legal regime to the provision of services inter pares, to the provision of underlying services by the platforms or to the possible influence or control of the platforms over the providers of goods and services.

Sufficient transparency on the information provided by platforms must be guaranteed, so the users be aware about how information presented to them is filtered, configured or personalized, particularly when their economic decisions are influenced by it. Online evaluation and rating of products and services should be transparent and not mislead consumers. At the same time, it is necessary to establish common standards for the transfer of data as well as for its portability or transferability.

[24] Koopman, C., Mitchell, M. And Thierer, A., *op. cit.*, 2015, p. 530.

About taxation, it would be desirable to establish or harmonize tax determination criteria to avoid a potential forum shopping within the European Single Market and to provide Administrations with tools to detect fraudulent practices and adequate intervention and sanction mechanisms.

Finally, a large part of the negative externalities that are attributed to platforms in certain sectors could be mitigated by applying rates to the final price that allow the social costs to be properly covered.

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Law and security: legal and institutional aspects

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Abstract

In the last decades, the concept of security has extended from the state power to ensure the sovereignty to the human dimensions of security. The environment security, health security, food security, personal security, community security, political security, economic security are all areas of security. The issue of security goes into many fields and, from the disciplinary perspective, the law has the role to grant the necessary framework. The article analyses current legal aspects of the health, environment and food security, considering their deep interdependency and their determining role to increasing the quality of life. The European legislative acts and institutions establish certain standards in these domains and they have a strong and growing impact on the normative evolution in our country. The study of European and Romanian law identifies some findings as start points for changing the current level of health, environment and food protection, having the human well being as purpose behind them.

Keywords: *health security, environment security, food security, law.*

JEL Classification: K10

1. Introduction

In an Europe of growing economies, free movement of goods, services and capital, fluctuating labor, migrations, human security as a whole[2], from health, food and environment security to economic security or cyber security, is challenging for every state. In the meantime, the regulations and actions in the field of security have to be oriented towards human well being, irrespective of the domain of life we are referring to. The achievement of security protection goal in each life sector implies not just policies, principles, but concrete legal rules and proper institutions to educate, to prevent, to sanction their infringement. Under the European Union "umbrella", the Member States' authorities and nationals are becoming more and more conscious of their right to a secure life. In this context, the role of the European and national legal framework is increasing and the legislators at both levels have to establish the proper legal regime to grant and to guarantee it. An overview of the health, environmental and food law in

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[2] For human security as policy, see Cristina Churruca Muguruza, *Human Security as a policy framework: Critics and Challenges*, Anuario de Acción Humanitaria y Derechos Humanos Yearbook on Humanitarian Action and Human Rights, Universidad de Deusto. ISSN: 1885-298X, No. 4/2007, p. 15-35.

Europe Union and in our country reveals that a more integrated legal and institutional frame is the determining factor to achieving the human security objective.

2. Health security legal framework: a new perspective

The right to health is one of the most important topics around worldwide in this period. More than ever, the relationship between health security and other domains of security, the idea that the actions and measures regarding the security cannot be limited to one or another of its aspects because they are very strongly connected is unquestionably.

In the European Union, the health policy has as objective to provide high health protection standards for all the European citizens. According to Article 168 paragraph 1 of the Treaty on the Functioning of the European Union, "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health."

Despite the European institutions' activity has an important impact on the healthcare system of each Member States, there are severe differences between the standards of healthcare services in the European countries. Taking into consideration the case of East European countries, including Romania, it is notorious that the migration of healthcare staff in countries of western countries didn't stop, even their salaries were increased. Moreover, citizens of these countries having the necessary resources prefer to treat their health problems in the western healthcare systems.

Therefore, the question arising under the above circumstances is if the current framework regulating the health domain is connected to the interests of European Citizens and Member States.

Article 5 paragraph 2 of the Treaty on the European Union expressly stipulates that the European Union, through its institutions acts only on the basis and within the limits of the competences agreed by the Member States in the European Treaties. Under Article 3, Article 4 and Article 6, of the Treaty on the Functioning of the European Union, the types of competences are exclusive competences, shared competences and supporting competences.

The domain of protection and improvement of human health belongs to the third category of competences, provided for by the Article 6 of the Treaty on the Functioning of the European Union. In other words, the European legislative

acts regarding the health sector are not legally binding.[3] The European role in this area is to support, coordinate, complement the Member States actions, without obligations of direct and immediate application or harmonization, for them, as it is in the cases of exclusive and shared competences policy fields. This may be one of the start points for analyzing the matter of current differences between standards of public health in the European Union countries and for identifying solutions for solving them. On our opinion, *de lege ferenda*, as an imperative condition to harmonise the national health systems, the states could take into consideration to include the health policy in the field of shared competences, adding to the Article 4 of the Treaty on the Functioning of European Union a new domain: protection and improvement of human health[4].

One discouraging reason to put on the agenda the amending of the European Treaty is the fact that it is a lasting process, supposing not only political decision, but a lot of preparatory work. On the other hand, it is more relevant that all the effort done nowadays will generate weak concrete results and will keep the unbalanced health services for European citizens with negative consequences for all the European state health systems, not just for those of those having lower levels of health protection. It is enough to have a look to Brexit [5]and to the most frequent arguments invoked in support of it - migration of labour force, pressure on social security system - as sources of insecurity for British citizens to see the other face of such a decision. We are of the opinion that the right solution is to act in the sense of ensuring health rights equality for all the European citizens. The costs for achieving a similar health system in the European Union will be high, but the benefits will be even more. In case this change will be adopted, the directive, as an European legislative tool will guarantee enough flexibility as a response to all the national interest in connection with the European interest and the member states' individual issues will be solved with particular nationally adapted solutions.

Recently, was adopted the Regulation (EU) 2021/522 establishes the EU4Health programme for the 2021-2027[6]. The Regulation establishes the framework for a programme aiming to improve the Union action in the field of health. With a budget of over €5 billion, as it is specifying in the Article 3 of the

[3] For better understanding of the EU beyond the limits established though the competences see the case C-154/04 and C-155/04 *Alliance for Natural Health.*

[4] The Covid period is a severe reason to be taken into consideration by the Member States and to motivate such an important decision, as the changing of the domain of competence is.

[5] As regard the Brexit causes, process and consequences see Ispas, Gabriel Liviu, *The Brexit consequences on the European single market*, „Juridical Tribune – Tribuna Juridica", vol.10, issue 1, 2020, p.116-129; Antonio Goucha Soares, *The United Kingdom withdrawal procedure from the European Union*, „Juridical Tribune – Tribuna Juridica", vol. 10, special issue, 2020, p. 5-19; Evans, Geoffrey, Noah Carl and James Dennison, *Brexit: The Causes and Consequences of the UK's Decision to Leave the EU,* in *Europe's Crises*, edited by Manuel Castells et al., p. 380-404. Cambridge: Polity Press, 2018.

[6] Published in the Official Journal no. *107/2021.*

legislative act, the general objectives of this programme are the following:

(a) improving and fostering health in the Union to reduce the burden of communicable and non-communicable diseases, by supporting health promotion and disease prevention, by reducing health inequalities, by fostering healthy lifestyles and by promoting access to healthcare;

(b) protecting people in the Union from serious cross-border threats to health and strengthening the responsiveness of health systems and coordination among the Member States in order to cope with serious cross-border threats to health;

(c) improving the availability, accessibility and affordability of medicinal products and medical devices, and crisis-relevant products in the Union, and supporting innovation regarding such products;

(d) strengthening health systems by improving their resilience and resource efficiency, in particular through:

(i) supporting integrated and coordinated work between Member States;

(ii) promoting the implementation of best practices and promoting data sharing;

(iii) reinforcing the healthcare workforce;

(iv) tackling the implications of demographic challenges; and

(v) advancing digital transformation.

In the recitals of the Regulation it is specified that the Programme provides support to the actions and structures stipulated into another important European act in domain- the Communication of the Commission of 11 November 2020 entitled Building a European Health Union: Reinforcing the European Union's resilience for cross-border health threats, considered "the first building blocks for a European Health Union"[7] and focusing on issues like the need for a stronger European Union health security framework, lessons learnt from the Covid-19 pandemic and proposals for the future, enforcing coordinating response at the European Union level, international cooperation and coordination.

We are of the opinion that all these acts and actions taken at the European Union level prove once more that the health policy is more an European one than a national one and that our proposals to integrate the Health domain in the shared competences domain as soon as possible is the most appropriate solution for achieving the objective of having a health security European framework guarantying the protection of its citizens, the well-being of its peoples.

Our proposal is reinforced by one of the considerations of the Regulation (EU) 2021/522, say Regulation (EU) 2021/522 that "Health is an investment, and the Programme should have this concept at its core. Keeping people healthy and active longer and empowering them to take an active role in managing their health

[7]https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0724, accessed 1.12. 2021.

by improving their health literacy will have positive effects on health, health inequalities and inequities, access to sexual and reproductive healthcare, quality of life, workers' health, productivity, competitiveness and inclusiveness, while reducing pressures on national healthcare systems and national budgets. The Programme should also support actions to reduce inequalities in the provision of healthcare, in particular in rural and remote areas, including in the outermost regions, for the purposes of achieving inclusive growth."[8]

3. Environmental law: theoretically and practically challenges

The issues of health protection are highly correlated with those regarding environment protection. The Regulation (EU) 2021/522 establishes the EU4Health programme for the 2021-2027 uses the concept "One Health approach "meaning" a multisectoral approach which recognises that human health is connected to animal health and to the environment, and that actions to tackle threats to health must take into account those three dimensions."[9] It is notorious, as an example, that the atmospheric pollution may cause cardiovascular and respiratory disorders or that the noise pollution increases the stress level, causes also cardiovascular debases, affects the quality of life.

The human security is fundamental dependent of a sustainable environment in all its areas: air, water-and soil quality, pollution observation and handling ecological labeling, management, disposal waste and materials, noise and light pollution, biodiversity, security and preservation[10], pollution in atmospheric concerns and ultimately, the climate change action[11].

Obviously, the environment security and the environmental legal framework, with the wide range of environmental issues, are priority objectives of the European Union. Recently, taking into consideration the necessity of protection measures emergency, a new common goal was set at the last EU summit by all the 27 EU members, the achieving of 55% reduction of the Greenhouse Gas (GHG)[12], increasing the prior percentage goal which was to reduce emissions about 40% compared to the emission values of 1990 levels. The European envi-

[8] Recital (19) of the Regulation (EU) 2021/522 establishes the EU4Health programme for the 2021-2027.

[9] Article 2 paragraph 4 of the definition.

[10] Biosecurity and biodiversity are central parts of the European environmental policy agenda of the European Commission. *The Environmental Implementation Review 2019 Country Report Romania*, ec.europa.eu/environment/eir/pdf/report_ro_en.pdf, p. 11. See Duțu, Mircea. *The impact of climate change on human rights. Towards a fundamental human right to a stable climate*, „The Law Review – Revista Dreptul", no. 4/2021, p. 107-134.

[11] Regarding the European Green Deal, see Beatriz Pérez de las Heras, *European Climate Law(s): Assessing the Legal Path to Climate Neutrality***, „**Romanian Journal of European Affairs", Vol. 21, No. 2, December 2021, 19-32.

[12] "EU Agrees on Tougher Climate Goals for 2030, www.dw.com/en/eu-agrees-on-tougher-climate-goals-for-2030/a-55901612, accessed 1.12.2021.

ronmental policy "is based on three broad basic principles, namely: the precautionary and the preventive action principle; the principle of improvement, with priority at the source, of the damages caused to the environment and the "polluter pays" principle."[13]

Unlike the health field, the environmental domain belongs to the shared European Union fields of competences, provided for by the Article 4 letter e) of the Treaty on the Functioning of the European Union[14]. The legal regime of the shared competences is clarified in the Article 2 of the Treaty on the Functioning of the European Union "when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."[15]

Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) energy; (i) trans-European networks; (j) area of freedom, security and justice; (k) common safety concerns in public health matters.

Thus, the environment area is regulated through European legislative acts and the domestic normative acts with the respecting of the requirements established through the Art 2 and of the principle of subsidiarity and of the principle of proportionality, as they are defined by the Article 5 of the Treaty on European Union[16] of the principle of priority.

The European environmental law is reflected in the national legislation of each Member State, including Romania. The European Directives were transposed into Romanian law and, theoretically, Romania has an environmental legislation that would give the executive bodies enough instruments to implement the environmental policy. The Government Emergency Ordinance no.

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[13] Andreea Stoican, *The natural environment. The development of an institutional protection framework - a permanent concern of the European Union*, „Juridical Tribune – Tribuna Juridica", vol. 10, issue 1, 2020, p. 94-101.

[14] Article 4(2) stipulates the following: "The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

[15] For details about the shared competences, see Craig, Paul, de Burca, Grainne, *European Union Law*, Hamangiu Publishing House, Bucharest, 2017, p. 91-94. and for instruments and hierarchy of the law, see Craig, Paul, de Burca, Grainne, *Text, cases, materials*, seventh edition, Oxford University Press, 2020, p. 136 and the following.

[16] The conditions and procedure for applying these two principles are set out in the Protocol (No. 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties. For details about the shared competences and about the principle of subsidiarity, see Craig, Paul, de Burca, Grainne, *op. cit.*, 2017, p. 91 and p.192.

195/2005 on environmental protection[17], as it was amended, the Government Emergency Ordinance No. 152/2005 on integrated pollution prevention and control[18] as it was amended, the Government Emergency Ordinance no. 68/2007 on the environmental responsibility related to the prevention and repairing of environmental damage[19], the Government Emergency Ordinance no. 196/2005 on the Environment Fund[20], the Government Resolution no. 878/2005 concerning public access to information on the environment[21], the Law no. 211/2011 on waste regime[22], the Government Resolution no. 780/2006 on establishment of trading scheme for greenhouse gas emission certificates[23] are the most relevant normative act through witch our national authorities have implemented the European environmental legal framework. This legal base has created a support for our administrative bodies in their action to restore and build a healthier environment in Romania. Irrespective of the transposing manner, the enforcement of the principle of priority is the obligation of all Romanian authorities involved in the process of compliance of Romanian legislation with the European norms.[24]

Despite the existing regulations. practically, while the Romanian emissions have decreased more than the EU average, waste management[25] or deforestation[26] are vulnerable issues.

The differences in terms of concrete results between our country and other member states[27] are well-known, and one of the causes of having fragilities in

[17] Published in the Romanian Official Monitor no. 1196/2005.
[18] Published in the Romanian Official Monitor no. 1078//2005.
[19] Published in the Romanian Official Monitor no. 446/2007.
[20] Published in the Romanian Official Monitor no. 1193/2005.
[21] Published in the Romanian Official Monitor no. 760/2005.
[22] Published in the Romanian Official Monitor no. 837/2005.
[23] Published in the Romanian Official Monitor no. 554/2006.
[24] See Dogaru, Ion, *Aplicarea normei juridice ca finalitate a interferentei sistemului de drept romanesc cu dreptul comunitar*, „Revista Romana de drept comunitar" no. 4/2008, p. 60-93.
[25] In 2018, according to the annual report of the National Environmental Protection Agency (NEPA) the percentage of recycled waste on the local level was about 13.39%, corresponding to a number of 739,384 tones.
[26] Romania has severe problems with the respectind and application of the legislation in this field, particularly with the wood traffic, while the European Commission have already adopted its Communication for the *New EU Forest Strategy for 2030*, outlining in the introduction part that "the EU's land space and they are essential for the health and wellbeing of all Europeans" and forests "are a place to connect with nature, thus helping us to strengthen our physical and mental health, and are central to preserving lively and prosperous rural areas."
[27] Even though Romania is one of the most polluted Member State of the European Union, the "podium" is occupied by Cyprus, Ireland and Malta. The most eco-friendly Member State in the European Union is Sweden, followed by Austria and Latvia. Swedish Environmental Code, which entered into force on 1 January 1999, having the goal to promote sustainable development., and being elaborated in the form of ordinances and regulations adopted by public authorities and decisions taken in particular cases, is the core of the environmental legislation. According to GreenMatch, *The Most Eco-Costly Countries in the EU*, Sweden "has much to teach the rest of the EU members. As a matter of fact, more than 68% of the energy used in heating and cooling in Sweden comes from a renewable source, far above the European average of 26%. To many, it may

some sectors is considered to be the activity of our public institutions[28], the weak enforcement of the legal provision by the authorities, by their staff.[29] The Evaluation Report on the eight Round of Mutual Evaluation -The practical implementation and operation of European policies onpreventing and combating Environmental Crim**e**, Report on Romania -, in its conclusions, emphasised that, as "the totally number of controls on waste shipments seems inadequate given the high risk of illegal shipments resulting from Romania's geographical situation at the external border of the EU and from multiple economic incentives", it is necessary "to be considered whether a sufficient number of inspections and controls can be carried out in the future without additional budget allocations".[30]

We consider that a greater number of controls implies, in the meantime, the increase of the number of employees in the domain and, in order to have more focus control, the expertise of the staff has to be improved.

In the juridical literature, it was expressed the opinion that "the Union can support the efforts made by Member States to improve their administrative capacity in the implementation of Union law. This can mainly consist of facilitating the exchange of information, by officials, and in supporting training programs"[31].The author considered also that "the high degree of influence of the principles of European administrative upon national laws and the presence of these principles in real behaviour of public actors (the level of implementation of the *acquis communautaire* formalized) are representative and are correlated withthe ability of that country adopt and implement the "*acquis communautaire*"

not be too surprising to see Sweden listed as the **most eco-friendly country** in the EU. With top scores in each of the six categories analysed and an **average score of 27.17 out of 28,** Sweden is undoubtedly the greenest renewable energy hub in Europe. Additionally, **99% of the municipal waste** generated by its inhabitants **is sustainably recycled.** This impressive figure shows how the Swedish waste management system is the best of all the other European Union countries, especially when comparing the average rate for the rest of the EU countries, which is only 60.55%", https://www.greenmatch.co.uk/blog/2018/07/top-eco-costly-countries-in-eu, accessed 1.12.2021.

[28] The most important institution is the Romanian Ministry of Environment and Sustainable Development (MESD), and a sub instance of the Ministry of Environment is the so-called National Environmental Protection Agency (NEPA). This Agency is in charge of giving permissions for projects and plans that need an environmental approval. The safeguard and controlling actor for the implementation of environmental policies and regulations is the National Environmental Guard (NEG), having as main objective to make sure that the legal order is put into practice by approval, surveillance, checks and sanction mechanisms.

[29] See Radu Liviu, *How to develop sustainable administration reform*, „Transylvanian Review of Administrative Sciences", no 44 E/2015, p. 180-193; *Emil Kotsev, Followership Resilience in Administrative Structures: A New Perspective*, „Transylvanian Review of Administrative Sciences", Special Issue 2021, p.37-53; *Curt, Cynthia Carmen Considerations on Public Integrity Standards for Romanian MPs*, „Transylvanian Review of Administrative Sciences" no. 58E/2018, p. 22-37.

[30] Council of the European Union. *REPORT Subject: 8th Round of Mutual Evaluations - 'The Practical Implementation and Operation of European Policies on Preventing and Combating Environmental Crime'* 2019, data.consilium.europa.eu/doc/document/ST-8783-2019-REV-1/en/pdf, p. 103.

[31] Săraru, Cătălin-Silviu, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 18.

formalized. Observe so it is necessary to allow more attention to the actions of national public services because they are tools that ensure or prevent the transfer ofthese administrative law principles into public actions and decision making."[32]

We totally agree with these opinions and, relating to the environmental security, it is evident that the cooperation between national and European administrative bodies has to be intensified on the basis of a more efficient supporting and controlling programme in order to reduce the disparities between the European Union countries' administrative systems. The European measures can go a little further and, the *lege ferenda*, an European monitoring mechanism can be established, similar with those of Cooperation and Verification Mechanism (CVM) set up for the judicial system of the Member States.

Besides the need of a specialized working force and the exchange of knowledge and information, the current Romanian environmental law has to evolve. To illustrate the need, Romania was subject to an infringement procedure because of the inadequate transposition of Directive 2010/75 of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control[33]. The European Commission complained that the Romania legislation doesn't guarantee the directive's key goals' achievement, particularly that to operate exclusively on the base of a permit, the low level of penalties, breaching the principle of proportionality and being inefficient as sanction having as purpose to stop them from illegally functioning. Natural habitats, waste, water and air quality issues have also formed the object of infringement procedure for the poor implementation of the Council Directive 92/43/EEC concerning the conservation of natural habitats and of wild fauna and flora waste[34], of the Council Directive 91/271/EEC concerning urban waste treatment[35] and of the Directive 2016/2284 of the European Parliament on the reduction of national emission of certain atmospheric pollutants.[36] The infringement grounds concerned the incomplete character of the conservation measures adopted through Romanian legislation with the aim of preserving the biodiversity, about the non-fulfilment of the obligation to retrieve and eliminate waste without negative effect on the public health and the environment and non-performance of the obligation to regulate and apply national air pollution control programmes, with the purpose of having high quality air, thus ensuring the public health and the environment.

In general terms, Romania appears to be a member state in which the

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32 Săraru, Cătălin-Silviu, *Premises for the establishing of the European Administrative Space*, „Juridical Tribune–Tribuna Juridica", vol. 6, issue 1, 2016, p. 182. For same topic, see Cătălin-Silviu Săraru, *Capitolul 2 - Spatiul administrativ european*, in Ioan Alexandru, Cătălin-Silviu Săraru a.o., *Drept administrativ european*, Lumina Lex Publishing House, Bucharest, 2005, p. 95-145.

33 Published in the Official Journal no. 334/2016.

34 Published in the Official Journal no. 206/1992.

35 Published in the Official Journal no. 135/21991.

36 Published in the Official Journal no. 344//2016. This Directive is amending Directive 2003/35/EC (providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment).

environmental law is developed to a certain level, but it isn't widely established. Moreover, the cases of inappropriate transposition of European law or incorrect application of the legislation in force, as those mentioned before demonstrating that our legislative bodies have to build a legal system that would enable public authorities to take action for the environmental protection.[37]

4. Food law and security: consequence of a healthy environment and a condition for the public health

Similar to the environment area, the food domain belongs to the shared competences. The majority[38] of the European legislative acts in this area are regulations, acts of general application, binding in their entirety and directly applicable.[39] As the regulations are automatically incorporated into the national laws, in the food domain there are no fundamental differences between the Member States laws and practices. The legislation adopted by the Member States in the field doesn't change or affect their content or scope of application.

The term "food" was defined by the dispositions of the Regulation (EC) no. 178/2002 of the European Parliament and of the Council of 28 January 2002[40] laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. According to the Article 2 paragraph 2 of the Regulation food "means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans" and includes, as well, "drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. It includes water after the point of compliance as defined in Article 6 of Directive 98/83/EC and without prejudice to the requirements of Directives 80/778/EEC and 98/83/EC."[41]

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[37] Council of the European Union. *REPORT Subject: 8th Round of Mutual Evaluations - 'The Practical Implementation and Operation of European Policies on Preventing and Combating Environmental Crime'* 2019, data.consilium.europa.eu/doc/document/ST-8783-2019-REV-1/en, p. 76.

[38] The domain is regulated through Directives as well, but they are not so numerous as regulations. An example of such type of secondary European legislation is the Directive (EU) 2015/720 amending Directive 94/62/EC, defines measures to reduce the consumption of lightweight plastic carrier bags, including imposing charges or setting national maximum consumption targets.

[39] Article 288 of Treaty on the Functioning of the European Union.

[40] Published in the Official Journal no. *031/2002*. The application of the regulation is extended to "all stages of production, processing and distribution of food and feed. It shall not apply to primary production for private domestic use or to the domestic preparation, handling or storage of food for private domestic consumption."

[41] In order to strictly define the domain of regulation, the legislative act specifies also that "Food" shall not include: (a) feed;(b) live animal unless they are prepared for placing on the market for human consumption; (c) plants prior to harvesting; (d) medicinal products within the meaning of Council Directives 65/65/EEC(21) and 92/73/EEC(22); (e) cosmetics within the meaning of Council Directive 76/768/EEC(23); (f) tobacco and tobacco products within the meaning of Council

Aiming to a high level of protection of human health, animal health, plant health or the environment, consumers' interests against any risk, the European food regulation established as main goals[42]:

- to ensure a of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment;

- to achieve the free movement in the Community of food and feed manufactured or marketed according to the general principles and requirements;

- to take into consideration the existing international standards[43] or their evolution, in the development or adaptation of food law, except where such standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives of food law or where there is a scientific justification, or where they would result in a different level of protection from the one determined as appropriate in the Community.

The Romanian legal framework is harmonized with EU legislation in the food domain. Among the key normative acts we point out the Law 150/2004 regarding of food and animal feed safety[44], the Government Decision 106/2002 concerning food labelling as it was amended[45], the Government Ordinance 42/2004 regarding the organization of sanitary-veterinary and foodsafety activity as it was amended[46], the Emergency Ordinance 43/2007 regarding the deliberate release into the environment ofgenetically-modified organisms, as it was amended[47], the Emergency Ordinance 44/2007 referring to contained use of genetically-modified micro-organisms[48], the Government Ordinance 34/2000 concerning organic food, as it was amended[49], Law 321/2009 concerning food products trading as it was amended.[50]

Broadly, the national law respects the legislation adopted at the European level.[51] However, in the year 2020, Romania has been subjected to an infringement procedure on the grounds of adopting legal rules providing advantages to

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Directive 89/622/EEC(24); (g) narcotic or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971; (h) residues and contaminants.

[42] Art. 5 of the Regulation (EC) No 178/2002 of the European Parliament and of the Council.

[43] About the influence of the European standards on global commerce, see Anu Bradford, *Exporting standards: The externalization of the EU's regulatory power via markets*, „International Review of Law and Economics", Volume 42, 2015, 158-173.

[44] Published in the Romanian Official Monitor no. 959/2006.

[45] Published in the Romanian Official Monitor no. 147/2002.

[46] Published in the Romanian Official Monitor no. 94/2004.

[47] Published in the Romanian Official Monitor no. 435/2007.

[48] Published in the Romanian Official Monitor no. 438/2007.

[49] Published in the Romanian Official Monitor no. 172/2000.

[50] Published in the Romanian Official Monitor no. 705/2009

[51] See Bernd van der Meulen, *The Function of Food Law. On the Objectives of Food Law, Legitimate Factors and Interests Taken into Account,* „European Food and Feed Law Review" 2/2010

domestic food products against similar products from other countries of the European Union. As a consequence, the national law was modified, and the provision stipulating that "the trader legally authorized to carry out marketing activities for foodstuffs are required for the categories meat, eggs, vegetables and fruit, honey bees, dairy products and bakery products, purchase these products at least 51% of the volume of goods per shelf corresponding to each category of food originating in the short food chain as defined in accordance with the legislation in force"[52] was amended.

It can be noticed that, unlike the environment field, in the food area, the domestic regulatory frame and the activity of national authorities are capable to ensure some level of security and of consumers' interests' protection. At the same time, the negative impact of the pollution on the soil and water quality, agriculture, forest, flora and fauna should not be neglected. Food security is directly dependent on a healthy environment, so that the improvement of the regulations and practices in this regard will automatically create better conditions for having healthy food, as it is defined by the Regulation (EC) No. 178/2002. Correlative, the production, the processing and the distribution of the food preserving the environment will contribute to its health, and both of them to the public health.

5. Conclusions

The analysis of the legal framework of health, environment and food domains revealed differences between these interconnected areas as regards the impact of the European policies and law on the Romanian ones, with more or less severe consequences on the life quality. In our opinion there are some key aspects explaining the disparities.

Health, environment and food are regulated through legislative acts having different level of juridical effects on the national legislative system. Thus, the European legislative acts adopted in the health domain, belonging to the supporting competences, have not compulsory character. The environment domain and the food domain pertaining to the shared competences are regulated though binding legislative acts. The binding or non-binding character of the European law determines severe disparities in terms of influence on the legal frameworks of the Member States. As we outlined in the first part of the study, this might be one of the main motives for including *de lege ferenda* the health area into the category of shared competences with the common goal of achieving the health security objective for all the European citizens, regardless of the country they come from.

Another important aspect we have identified is that, despite the fact that the environment and the food domain are regulated through binding secondary

and Ferdinanco Albisinni, *The Path to the European Food Law System*, in *European Food Law*, edited by Luigi Costato, Ferdinanco Albisinni, Wolters Kluwer. Rome: Cedam, 2012, p. 17–52.

[52] Law no. 150/2016 modifying and completing the Law 321/2009 on the on the marketing of foodstuffs.

legislative acts, at the national level, the environment legal and institutional framework didn't reach a satisfactory level as it has been attained the food area. Our study showed that the environment issues are regulated in the majority of cases though Directives, while the food matters are framed mainly through Regulations. The regulatory and administrative capacity of the state bodies' having competences to transpose the Directives and to apply the national normative acts that implemented them should be considered the weak link in this case. The flexibility of the Directive, which as a rule grants advantages to the Member States, can highlight the limits of their authorities, as well. It is the case of Romania, being obviously that, in order to efficiently monitor, manage and apply the European and national legislation regarding environmental matters, the administrative actors need to improve their way of organizing, their expertise, with the strong support of the European Union.

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CHANGES IN THE LEGAL LANDSCAPE, REGULATORY CHALLENGES AND MORE

Provisional measures concerning security for costs and security for claim in international commercial arbitration

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Abstract

This paper is an analysis from a theoretical and case law perspective of the admissibility conditions for interim measures for security of arbitration costs and for security of claim. These types of interim measures belong to the category of interim measures that are less common in arbitral practice. However, according to recent statistics, applications for interim measures have increased exponentially in recent years. It is therefore important that the rules governing them are well-known by both parties as well as arbitrators, so that they can be correctly used in these situations. The major benefit is that the party requesting such measures will be protected from the possible insolvency of the other party. In other words, a party making unmeritorious claims who is also in a precarious financial situation could be discouraged by such a measure from pursuing possible bad faith claims. However, arbitral tribunals should carefully weigh the granting of such measures in order not to financially block the party initiating arbitral proceedings who may also be in a precarious financial situation due to the damaging actions of the party requesting such measures. Such a measure could amount to a denial of justice in international law, preventing the claimant's access to courts. What is essential in such a claim is for the arbitral tribunals to carry out detailed analysis, by balancing the interests of both parties in an attempt not to block the claimant's access to justice. This is why these types of requests are very rarely admitted, and only for sound reasons, as we will further demonstrate in the upcoming lines.

Keywords: *provisional measures, security for costs in arbitration, security for claim, denial of justice.*

JEL Classification*:* K15, K33, K39, K49

1. Introduction

One feature of international commercial arbitration[2], in particular of investment arbitration, is that these are complex proceedings which involve substantial costs for the parties for securing the legal representation and for the payment of arbitral fees.

The securing of the arbitral fees has become a very used legal practice in the recent years. The parties are thus using these protective measures in view of

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[2] Regarding of the international bodies involved in resolving investment disputes see Cristina-Elena Popa Tache, *Introduction to International Investment Law*, ADJURIS – International Academic Publisher, Bucharest, 2020, p. 154-169.

securing the arbitration costs and the amounts claimed in the arbitration. These particular provisional measures available to the parties within the commercial arbitration proceedings must consider certain admissibility criteria which will be further analysed below.

These measures are generally used in cases where one of the parties has reasonable concerns that the losing party does not have sufficient funds to pay the costs of the arbitration, or that it could not pay the damages awarded in the arbitration.

The granting of such an application for interim measures will lead to the effect that the party against whom they are issued will be ordered to provide a security of a certain value in order to be able to pay the damages to which it may be liable at a later date, namely the arbitration costs or the awarded damages.

Although theoretically these measures are provided for by most international arbitration rules, case law demonstrates that international arbitral tribunals order them after a rigorous analysis, by applying very high standards, precisely in order to avoid a denial of justice. In this context, in order to outline, as precisely as possible, the characteristics of these measures, the research method requires an in-depth analysis of the relevant doctrine and case law.

2. The requirement of a restrictive legal analysis of the claims related to security for costs and security for claim

There are two fundamental policy reasons that have caused applications for interim measures for cost security, respectively for security of claims in commercial arbitration to be interpreted restrictively.[3]

Firstly, the providing of a security for costs may adversely affect the claimant by equalling to a denial of justice.

Secondly, a *prima facie* assessment of the merits of the dispute often involves an analysis of complex jurisdictional and substantive issues and may thus lead to a prejudgement of the merits.

a. Denial of justice. Investment tribunals under both the ICSID and UNCITRAL Rules have found access to justice for investors to be an important principle[4], holding that the ability to pursue claims is a paramount consideration and that legitimate claims must not be blocked in the request of security for costs.[5]

As one arbitral tribunal ruled: *"In the Tribunal's view, there is a poten-*

[3] Johan Sidklev, Bruno Gustafsson, *UNCITRAL Working Group III: Security for Costs- An Inefficient Mechanism to Avert Frivolous Claims in ISDS*, Kluwer Arbitration Blog, 27 March 2020, available at - http://arbitrationblog.kluwerarbitration.com/2020/03/27/uncitral-working-group-iii-security-for-costs-an-inefficient-mechanism-to-avert-frivolous-claims-in-isds/.

[4] *Eugene Kazmin v. Republic of Latvia*, Case ICSID No. ARB/17/5; *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case file No. ARB/12/6.

[5] *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15.

tially important "access to justice" issue. If the Claimant can meet the jurisdictional prerequisites to have his claim arbitrated (a matter which is still to be determined) there is no additional requirement that he prove financial capacity to meet any potential adverse costs award or that he is the master of his own litigation." [6]

Indeed, ICSID tribunals generally dismiss such requests for interim measures aiming to provide security for costs when they find that the concerned party will not be able to comply with such an order and therefore will not be able to proceed with its claim.

Both case law[7] and doctrine[8] jointly agree, that a proportionate determination of the possible amount that could be provided as a security for costs, protects the investor's rights and is the most appropriate solution.

b. The absence of a prejudgement of the merits. Since an application for security for costs requires a preliminary review of the claims, a significant concern is that the merits will be prejudged.[9] This may amount to a severe violation of the procedural justice guaranteed and can lead to the tribunal's impartiality being questioned.[10]

Indeed, in one of four investment awards where security was actually granted, an arbitrator was challenged for his bias against third party funders.[11] An UNCITRAL tribunal has especially cautioned that determining the possibility of success on the merits, as required under Article 26 of the Rules, must be avoided as it turns into a *difficult hypothetical exercise.*[12]

In the following we will analyse what are the essential conditions for the admission of such provisional measures in the light of the relevant case law and we will continue by analysing some particular cases in which such measures have been granted or dismissed. We will also analyse the current proposals of new enactments in this area.

3. The request for the provisional measure of security for costs

Security for costs is an interim measure that allows an applicant (usually the respondent) to secure an amount representing its arbitration costs, namely the

[6] *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Procedural Order no. 2, 19 October 2020, para. 9.
[7] *Eugene Kazmin v. Republic of Latvia*, ICSID Case File No. ARB/17/5.
[8] Christine Sim, *Security for Costs in Investor-State Arbitration*, Arbitration International, 2017, pp 1-69.
[9] *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7), Procedural Order No. 2 (28 October 1999).
[10] Christine Sim, *op. cit.*, pp 1-69.
[11] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10.
[12] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No 2011-17) Procedural Order No 14, 11 March 2013.

legal costs, the tribunal's fees, administrative costs etc.[13] This measure is grounded on the principle of law recognized in most jurisdictions, which provides that an unsuccessful party in the legal proceedings is obliged to reimburse such costs to the successful party.[14]

The mandatory condition for the filing a request for a provisional measure for cost security is that arbitral tribunals must have good reasons to order the respective party to secure in advance certain amounts, based on such party's alleged inability to pay an adverse costs order against it.

If security for costs is granted in favor of the applicant, the opposing party will be required to set aside a sum of money, usually an estimate of the applicant's arbitration costs. The practical way of complying with such an obligation is through the issuance, by the affected party, of a bank guaranty or the establishing of an escrow account[15], until the tribunal issues its final award dealing with the arbitration costs.

Following the issuance of the final arbitral award within the case file, the concerned party will be able to cover at least part of its legal costs by enforcing the bank guarantee letter.

4. The request for provisional measure of security for claim

Security for claim is an interim measure that allows an applicant (either the claimant, or the respondent in respect of the counterclaim) to secure the amount that it is claiming against the opposing party before the issuance of the arbitral award.

As in the case of the security for costs the obligations of the concerned party will be enforced by either issuing a bank guarantee letter, or by depositing the amount in an escrow account until such time as the arbitral tribunal will issue the final arbitral award covering the arbitration damages aspects.

As in the case of security for costs applications, there must be solid grounds in relation with the opposing party's alleged inability to pay the awarded damages, that may justify the advance securing of certain amounts, before the issuance of an award to that effect.

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[13] Kirstin Dodge, Jonathan Barnett, Lucas Macedo, Patryk Kulig, *Third party funding and the reform of the ICSID Arbitration Rules*, „Romanian Arbitration Journal" no. 3/2021, p. 24.

[14] This principle may be found under Romanian law as a general principle (Article 451 of the Romanian Civil Procedure Code – "CPC"), but also as a particular rule, in the section dedicated to arbitration (Art. 595 CPC).

[15] *Dirk Herzig (Insolvency Administrator of Unionmatex Industrieanlagen) v. Turkmenistan*, ICSID Case File No. ARB/18/35, Award for security for costs and claim of 27 January 2020 available at: https://www.italaw.com/sites/default/files/case-documents/italaw11243.pdf, consulted on 1.09. 2021.

5. Regulation of security for costs and security for claim in the international arbitration law

What should be emphasised as a matter of principle is that applications for interim measures to secure costs and arbitration claims are most often based on the general provisions on interim measures of the (i) national arbitration law, respectively (ii) the arbitration rules of the various national and international arbitral institutions.

A corresponding example in respect of the rules governing provisional measures under Romanian law, which may stand as legal grounds for such a request for interim measures in an *ad-hoc* arbitration is represented by Art. 585 CPC[16] (*Provisional measures*), corroborated with the provisions of Art. 597 CPC[17] (*Payment in advance of arbitral costs*).

In what concerns international arbitral law, the Arbitration Rules of the International Court of Arbitration attached to the International Chamber of Commerce (ICC) Rules and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules do not make specific reference to these forms of relief. However, it is acknowledged and accepted that Article 28[18] (ICC

[16] "*Art. 585: Provisional measures: (1) Before or in the course of the arbitration, either party may apply to the tribunal referred to in Article 547 for the granting of provisional and protective measures in respect of the subject-matter of the dispute or for a determination of certain facts. (2) Such request shall be accompanied by a copy of the request for arbitration or, failing that, proof of the communication referred to in Article 558 (2). (2) and the arbitration agreement. (3) The party requesting such measures shall inform the arbitral tribunal of the granting of such measures. (4) In the course of the arbitration, provisional and protective measures and findings of fact may also be granted by the arbitral tribunal. In the event of opposition, the enforcement of such measures shall be ordered by the court in accordance with the provisions of paragraph (1).*"

[17] "*Art. 597: Advance payment of costs: (1) The arbitral tribunal may require the parties or each of them to advance any costs necessary for the organization and conduct of the arbitration. (2) The arbitral tribunal may not proceed with the arbitration until the sums provided for in this Chapter have been deposited, advanced or paid.*"

[18] "*Article 28: Conservatory and Interim Measures: 1.Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate. 2.Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.*"

Rules) and Article 26[19] (UNCITRAL Arbitration Rules) represent the legal basis for the general power awarded to tribunals to order such interim measures.

In respect of investment arbitration, Article 47 of the International Centre for Settlement of Investment Disputes (ICSID) Convention and Rule 39 of the ICSID Arbitration Rules, grant the tribunals the power to order provisional measures. As to be further detailed below, such provisions have been used by parties in applying for provisional measures for security for costs taking into account the high costs and high damages involved in investment arbitration claims.

The Rules of Arbitration of the International Court of Arbitration attached to the Romanian Chamber of Commerce and Industry provide within Article 40[20] the arbitral tribunal's possibility to order such provisional measures, the rule being a general one, without a specific provision referring to security for costs or security for claim. However, as in the case of the ICC Rules, such provisional measures may be requested based on this general legal ground.

With reference to the international arbitration rules which **expressly** grant tribunals the power to order interim measures, we note the arbitration rules of the London Court of International Arbitration[21] (LCIA) and of the rules the Singapore International Arbitration Centre[22] (SIAC). These sets of rules expressly provide powers for the arbitral tribunals to award security for costs (Article 25.2 and Rule 27(j) respectively) and security for claim (Article 25.1(i) and (iii) and Rule 27(k) respectively). In a similar manner, the 2018 Rules of Arbitration of the Vienna International Arbitration Centre (VIAC), explicitly provide within Article 33 a particular provisional measure for security of costs.

Despite their wide availability in the commonly used international arbitration rules, such interim measures are seldom made. The reason for this is that

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[19] "*Article 26 - Interim measures of protection: 1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures. 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."*

[20] "*Article 40. – Interim and Conservatory Measures (1) The arbitral tribunal may, at the request of a party and by means of a procedural order rendered under an expedited regime, grant any interim or conservatory measures that it deems appropriate. (2) The arbitral tribunal may order the party requesting an interim or conservatory measure to provide the necessary security in connection with the measure requested. (3) Requests for interim or conservatory measures filed before the initiation of the arbitration or before the case file was referred to the arbitral tribunal shall be decided by an emergency arbitrator, in accordance with the procedure set forth in Annex II. (4) A request for interim or conservatory measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules."*

[21] Available at: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx, consulted on 1.09. 2021.

[22] Available at: https://siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%202017.pdf, consulted on 1.09. 2021.

the threshold for granting such measures is very high.

A 2014 ICC publication[23] analyzing the arbitral decisions concerning security for costs in ICC arbitrations concluded that out of approximately 10 applications submitted, only three were successful. Moreover, where such measures were granted, they were granted only partially and subject to certain conditions.

Despite these strictly applied conditions, what needs to be underlined is that if the requests for such provisional measures are justified, more precisely if these comply with the conditions for such a request, as these are defined by the case law, such provisional measures will be granted by the arbitral tribunals, as to be further detailed below.

6. Trends of a uniform regulation in respect of provisional measures for security of costs and claim in the international arbitral law

In the arbitration practice, there are no standard, unanimously accepted criteria which apply to a request for provisional measures in respect of security for costs or claim. The rules of arbitral institutions are generally silent as to the exact circumstances that need to exist, or conditions that need to be met.

The 2015 Guidelines issued by the Chartered Institute of Arbitrators[24] in relation to security for costs applications suggest that, upon the issuance of provisional measures arbitral tribunals should take into account three essential criteria:

(i) The prospects of success for the claimant's claim(s) and respondent's defence(s). Taking great care not to prejudge or predetermine the merits of the case itself, arbitrators should consider whether, on a preliminary view of the relative merits of the case, there may be a need for security for costs (**Article 2 of the Guidelines**).

(ii) Claimant's ability to satisfy an adverse costs award. The arbitrators will analyze whether there are reasonable grounds for concluding that there is a serious risk that the applicant will not be able to enforce a costs award in its favor because: i) the claimant will not have the funds to pay the costs awarded; and/or ii) the claimant's assets will not be readily available for an effective enforcement against them.

If the arbitrators conclude that, for either or both of these reasons, there is a real risk that the applicant will have difficulty enforcing a costs award, then these factors favor an order for security, unless these factors were considered **and accepted as part of the business risk at the inception of the parties' relationship**. Conversely, if the arbitrators conclude that the claimant has assets that will likely enable the applicant to pursue enforcement of a costs award, and that these

[23] ICC Bulletin Vol 25 Supplement 2014, "Procedural Decisions in ICC Arbitration: Security for Costs".

[24] https://www.ciarb.org/media/4196/guideline-5-security-for-costs-2015.pdf, consulted on 1.09. 2021.

assets will be readily accessible to the applicant, then there is no justification for an order for security. (**Article 3 of the Guidelines**).

(iii) Whether it is fair under the circumstances to make the order. Before making an order requiring a party to provide security for costs, arbitrators should consider and be satisfied that, in light of all of the surrounding circumstances, it would be fair to make an order requiring one party to provide security for the costs of the other party.

In any event, arbitrators should consider whether awarding security would unjustly stifle a legitimate and material claim (**Article 4 of the Guidelines**).

There is currently a proposal to amend the ICSID rules under consideration. This proposal is the **Proposed Amendment No. 5** published by ICSID in June 2021[25]. Under Article 53[26],, entitled "Assurance of Costs" there are provisions on the conditions for issuing an order for assurance of costs.

7. Analysis of the conditions for granting interim measures for security of costs and claims in the light of recent case law

In order to analyse the essential conditions that arbitral tribunals have taken into account in applications for such interim measures, certain relevant cases are presented below.

a. Arguments for the granting of claims for provisional measures of

[25] https://icsid.worldbank.org/sites/default/files/documents/WP%205-Volume1-ENG-FINAL.pdf, consulted on 1.09. 2021.

[26] *"Rule 53 Security for Costs: (1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs. (2) The following procedure shall apply:(a) the request shall specify the circumstances that require security for costs; (b) the Tribunal shall fix time limits for submissions on the request;(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and (d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request. (3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including: (a) that party's ability to comply with an adverse decision on costs; (b) that party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and (d) the conduct of the parties. (4) The Tribunal shall consider all evidence adduced in relation to the circumstances inparagraph (3), including the existence of third-party funding. (5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order. (6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding. (7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs. (8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request".*

security for costs. In *Garcia-Armas v. Venezuela*, the UNCITRAL tribunal ordered, that claimants post a security in the form of a bank guarantee in the amount of USD 1.5 million, for the following reasons: the claimant was insolvent (or failed to prove its solvency), its claim was funded, and the third-party funder had no obligation to cover adverse costs.[27]

In the recent 2020 case *Kazmin v. Latvia*, the ICSID tribunal ordered claimant to post a security in the form of a bank guarantee in the amount of EUR 3 million based on the following facts: a) claimant's failure to pay former counsel; b) the existence of Ukrainian criminal investigations against claimant; c) the fact claimant had untraceable assets despite allegations of having assets; and d) the existence of unusual transactions by claimant which were being investigated.[28]

In *RSM v. St. Lucia*[29], the ICSID tribunal ordered claimant to post a security in the form of a bank guarantee in the amount of USD 750,000 because the claimant had financial difficulties, because the claim was funded by an unidentified third-party funder and because the claimant had a history of not paying costs awards.

In *Herzig v. Turkmenistan*[30],, the ICSID tribunal ordered claimant to post a security in the form of a bank guarantee in the amount of EUR 3 million because the claimant was the insolvency administrator of a German company, and because the claim was being funded by a third-party funder who did not have an obligation to pay an adverse costs award.

In the ICC case 10021[31], however, the tribunal indirectly complied with the request for security payment. In this case, the claimant requested the tribunal to attach the assets of the respondents. The tribunal, rather than accepting the request, ordered the respondents to refrain from disposing of the assets in dispute since the power to attach assets would not be within the domain of arbitration. The dispute, in this case, arose from breach of certain agreements including a shareholders agreement concerning a company.

b. Arguments for the dismissal of the requests for provisional

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[27] *Manuel García Armas et al v. the Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2016-08, Procedural Order 9, Decision on Respondent's Request for Provisional Measures, 20 June 2018, para. 261.

[28] *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6 - Decision on the Respondent's Application for Security for Costs, 13 April 2020, paras. 31-60.

[29] *RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10*, Decision for security of costs, 13 August 2014, para. 90, available at: https://www.italaw.com/sites/default/files/case-documents/italaw3318.pdf, consulted on 1.09. 2021.

[30] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision for security of costs, 27 January 2020, para. 20, available at: https://www.italaw.com/sites/default/files/case-documents/italaw11243.pdf.

[31] ICC Interim Conservatory Award 10021 of 1999 (unpublished), cited in Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, Kluwer Law International 2005, Chapter 5.

measures for security for costs. In other cases, tribunals have dismissed applications for interim measures to secure costs for failure to comply with several conditions.

In *South American*, the Tribunal ruled that: *„In sum, the general position of investment tribunals in cases deciding on security for costs is that the lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not per se reasons or justifications sufficient to warrant security for costs."*[32]

In the words of the Tribunal in the *Bacilio Amorrortu* case: *„The fact of third-party funding does not imply that [Claimant] is impecunious. There are numerous other reasons why a may seek third party funding, including risk management and validation by a more objective third party of the merits of the claim."*[33]

UNCITRAL tribunals, such as the *Orlandini v. Bolivia* and the *Tennant v. Canada*[34] tribunals have rather focused on a party's "improper" behavior.[35]

The *Orlandini* tribunal established certain criteria for the "improper" behaviour, as well as additional factors to be considered, in view of issuing a security costs order:

- a claimant's track record of non-payment of cost awards in prior proceedings;
- a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings;
- evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or
- other evidence of a claimant's bad faith or improper behavior.

In *EuroGas v. Slovak Republic*[36], the tribunal refused to make an order for security for costs as the respondent had failed to establish that the claimants had defaulted on their payment obligations in the proceedings or in other arbitration proceedings. The tribunal made clear in that case that "*financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs*".

As for the awarding of ***security for claim provisional measures***, in the

[32] *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15.
[33] *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, PO No. 2 of 19 October 2020, para 9.
[34] *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4 for Interim Measures, 27 February 2020, para. 174.
[35] *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v. The Plurinational State of Bolivia*, UNCITRAL, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, para. 143.
[36] *EuroGas v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order no. 3 on Provisional Measures, 23 June 2015, para. 123.

ICC case 8786[37], the respondent requested a security for claim by arguing that the claimant would not comply with the award that would be in its favor and the chances of such award's enforcement in State X "*are less than slim*". The tribunal refused the request on the grounds that the applicant "*has failed to sufficiently substantiate the existence of a not easily reparable prejudice*" and that there was no urgency.

The claimant requested interim relief in respect of the disputed claims, alleging that the respondents were seeking to transfer shares in that company. The respondents did not deny the allegations and did not provide any reasonable explanation in this regard. Moreover, the claimant also argued that, apart from its shares in the company, the respondents had no other assets which would enable them to pay any damages.

Moreover, the tribunal noted that the respondents had not paid their share of the arbitration costs nor had they specified the actual value of their assets. In addition, the claimant demonstrated on the record that it had certain well-founded financial claims.

In these circumstances, the tribunal found that the value of the respondents' shares in the company did not exceed the value of the security sought. Thus, the tribunal ordered the respondents, by an arbitral order, not to transfer or otherwise dispose of those shares (instead of imposing a lien on the assets).

8. Conclusions

Following the review of the relevant case law, it results that security for costs and security for claim in international commercial arbitration are certain types of provisional measures which are granted with a certain reluctancy in the arbitration practice. Recent case law demonstrates a certain increase of the applications for the issuance of such provisional measures in respect of the security for costs.

Against this background, it is important that the parties are aware of the rules governing them, so that they make use of them in certain situations, the major benefit being that the party requesting such measures might be protected from the potential insolvability of the opponent. Otherwise said, a party which files ungrounded claims and also has a fragile financial situation could be discouraged to pursue such bad faith claims.

However, arbitral tribunals must carefully weigh the awarding of such measures, so as not to financially block the party initiating the arbitration proceedings and who may have a weak financial situation due to the harmful actions of the party requesting such measures.

[37] ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 82-83 (2000). The tribunal relied mainly on the requirements set forth under the law of the place of arbitration for the granting of the requested measure.

Thus, it is essential for arbitral tribunals to hear these claims in accordance with the principle of free access to justice and the principle of absence of prejudgment of the merits of the case.

Last but not least, given the international practice in this field and the tendency of international arbitration rules to regulate the criteria for granting these measures, it is desirable that the provisions of Romanian law be supplemented by similar rules in this respect.

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15. *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case file No. ARB/12/6.
16. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10.

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How does the GDPR impacts real estate transactions?

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Abstract

Any processing of personal data should be lawful and fair. GDPR provides rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. In is well known that a real estate transaction (regardless if it is an asset or a share deal), implies processing some personal data. This is applicable also for the legal persons involved in real estate transaction. This article aims to answer to some relevant questions related to the restrictions imposed by the GDPR in the context of a real estate transaction of whatsoever type.

Keywords: *GDPR, real estate transaction, protection of personal data, globalization.*

JEL Classification: K25

1. Introduction

The globalization brought lots of advantages but also disadvantages to the business environment. According to GDPR: (i) "the economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows of personal data", respectively (ii) the protection of natural persons in relation to the processing of personal data is a fundamental right"[2]. The protection of private lives is recognised and guaranteed also under the Romanian Constitution[3], the Civil Code[4] and other special pieces of legislation applicable in Romania.

GDPR became in between a constant of our private and economic lives. However, "any processing of personal data should be lawful and fair"[5]. In this respect, the real estate field should also consider the new rules introduced by GDPR. Thus, the professional, private persons and authorities should reconsider the old way of carrying out the real estate deals, especially when they use and process personal data that are subject to GDPR protection. This article comes with some answers to the main relevant questions related to potential impact of GDPR rules on real estate transactions. In order to avoid the very severe sanctions

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[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN, consulted on 1.09.2021.

[3] Art 26 of Romanian Constitution.

[4] Art 58 (1) Civil Code.

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN, consulted on 1.09.2021.

provided under the GDPR, the involved parties should understand which are the new rules to which they should comply in this respect.

2. Legal framework

Although not exhaustive, we shall further enumerate the relevant legal norms we have analysed for the purpose of this article:

1. Law No. 544/2001 on free access to information of public interest, published in the Romanian Official Gazette, Part I, no. 663 of 23 October 2001 ("**Law 544**");

2. Law No. 287/2009 regarding the Civil Code, republished in the Romanian Official Gazette, Part I, no. 505 of 15 July 2011 ("**Civil Code**");

3. Law No. 190/2018 on implementing measures to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), published in the Romanian Official Gazette, Part I, no. 651 of 26 July 2018 ("**GDPR**");

4. Romanian Constitution, published in the Romanian Official Gazette, Part I, no. 767 dated 31 October 2003 ("**Romanian Constitution**");

5. Law no. 82/1991 on accountancy republished in the Romanian Official Gazette, Part I, no. 454 dated 18th of June 2008 ("**Law no. 82/1991**").

3. Analysis

The transmission of personal data has an essential role for the conclusion of real estate transactions. Therefore, the provisions of the General Data Protection Regulation ("**GDPR**") must be observed by all persons involved in such process.

Before detailing the GDPR rules, the legal subjects, the sanctions, it is preferable to clarify the term "real estate transaction".

The Romanian legislation does not expressly defines this term. However, for the purpose of this article, a real estate transaction could mean: a legal binding act through which a real estate property is subject to the following actions/deeds:

a) transfer from a person to another one (regardless of the person is natural or legal) by way of sale purchase, barter, allotment[6], mergers and spin offs, reorganization, time sharing, etc.

b) reservation, promissory, option.

c) lease, concession, lease and sale back.

[6] As per the Civil Code, the allotment has a constitutive regime compared to the Old Civil Code from 1864 (nowadays aborted) through which the allotment had a declarative regime. For more details see, art 680 Civil code and https://www.juridice.ro/212603/efectele-juridice-ale-partajului-potrivit-ncc.html, consulted on 1.09.2021.

d) financing a real estate deal with establishing a mortgage thereon.

e) development of a real estate project, etc.

Regardless the stage of the transaction (i) the purchase of the real estate property (land plot and/or building), which may involve: preparing a legal due diligence report having as object the identification of the red flag risks that could be a deal-breaker; transaction negotiation; concluding the pre-sale agreement, the option agreement or the sale agreement; concluding a pre-sale (and lease back) agreement, concluding an financing agreement; and so on; or (ii) the construction/reconstruction phase of a project (construction/building), which may imply the actions mentioned at point (i) above as well as the conclusion of several agreements (for construction works, for architectural services, for other services, and so on), all participants of the real estate deal must observe the provisions of GDPR.

GDPR "lays down rules relating to the protection of natural persons"[7] (including the representatives of the companies) with regard to the processing of personal data and rules relating to the free movement of personal data. According to article 4 of GDPR, "personal data" means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

We will briefly analyze some important aspects that should be observed by the participants of the real estate transactions, in order to avoid the infringement of GDPR's provisions and implicitly bearing the applicable sanctions.

3.1. The participants of the real estate transactions

When we speak about a real estate deal, we should first clarify who are the main involved factors in such a deal. After determining such circle of factors, it will become more clear which are the legal subjects that should observe and apply the GDPR rules in a real estate deal.

Although the following enumeration is not meant to cover exhaustively all persons that may be involved in a real estate deal, we may further enumerate the most relevant factors as per the current market standard practice. Thus, a large number of people from different expertise areas can participate in a real estate transaction, out of which we mention: the owner(s)/titleholder(s), the lawyers, the public notary, the real estate broker, the technician, the architect, the environmental auditor, property valuator or other persons authorized to perform various expertise regarding the building, as well as the contractor/ subcontractor, the project financier, and so on.

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN, consulted on 1.09.2021.

3.2. The personal data processed by the persons involved in the real estate transactions

In case a legal due diligence report in relation with the real estate(s) is performed, a series of documents containing personal data of natural persons shall be subject to the analysis. Among the documents reviewed in a real estate legal due diligence that contain personal data and which are subject to GDPR protection, we remember: (i) documents attesting the chain of the ownership title, such as the ownership titles, the certificate of inheritance, the auction deed, partition/consolidation deed, the power of attorney on the basis of which the ownership transfer documents were concluded (such as the name, ID number, personal identification number, domicile, signature, birth certificate number, email address that includes the person's name, and so on, of the natural persons involved in the chain of the ownership title). In relation with the data provided by the land book excerpt for information purpose regarding the real estate, only the personal data of any natural person indicated in the excerpt (i.e. the name) are considered *"personal data"*.

Also, in order to prepare the legal due diligence some information regarding the real estate must be obtained from the public authorities or organizations, such as archaeological regime, restitution claims, environmental obligations, the existence of some networks, pipes, utility lines that cross the land plot/part of it and that could affect the erection of the project, tax regime, and so on. To this extend the authorities or organizations must provide the applicant with the information considered of public interest[8] in accordance with the Law no. 544/2001 on free access to information of public interest ("**Law 544**") (public information[9] means any information related to or resulting from the activities of a public authority or organization, regardless of the frame, form or way of expression of the information). Such authorities/organizations shall provide the applicant with the public information and take into account for themselves if any of the information needs to be withhold or anonymized.

However, even if the documentation analyzed for the performance of a legal due diligence contains a high volume of information attesting the chain of the ownership title, and which are considered *"personal data"*, in order to prepare a legal due diligence certain such information are necessary, otherwise we would end up in an absurd situation in which we could not analyze the chain of the ownership title. Therefore, the information considered mandatory in order to prepare a legal due diligence, such as the name of the titleholder and other relevant data for the performance of the due diligence, may be disclosed for the purpose of the due diligence, of course under the observance of the provisions of GDPR and by applying the actions provided below.

[8] Art. 1 and 6 of Law 544.
[9] Art. 2 (b) of Law 544.

In case an expertise must be performed (i.e. evaluation report, technical report, geo-technical report, environmental report) the beneficiary shall conclude with the technician/expert a services agreement and provide him with the relevant information. To this extend, part of the information provided to the expert may contain personal data of the parties involved in the transaction, such as the name, domicile, ID number, personal identification number, signatures, domicile, and so on. The same situation is applicable in case of concluding an agreement for construction works, architectural services, or other services.

3.3. Action to be taken by the involved parties in order to ensure compliance with the GDPR

The involved parties must undertake the following, in order to ensure compliance with the GDPR:

a) Information of data subjects. All data subjects must be informed about the processing of their personal data by the relevant party. Such information must be provided to data subjects, as a rule, at latest, at the time when the personal data are obtained, and must include a minimum content (as per art. 13-14 of the GDPR) about, inter alia, the identity and contact details of the data controller, the categories of personal data, the legal grounds of the processing, the purposes, recipients of the personal data, storage periods, the data subjects' rights. This obligation of information may be achieved, for example, by providing data subjects with a privacy notice (detailing the aspects under art. 13-14 of the GDPR) upon collection of their personal data and/or by publishing the privacy notice on the company's website and providing the relevant link.

b) Legal ground for processing of personal data. Each processing activity must be based on a valid ground of processing. Such processing grounds are established under art. 6 of the GDPR and include: (i) data subject's consent, (ii) execution of a contract with the data subject, (iii) a legal obligation, (iv) the vital interest of the data subject, (v) the performance of a task carried out in the public interest or in the exercise of official authority, (vi) the legitimate interest of the controller or a third party. In case of a real estate transaction, it is most likely that the parties will rely on the processing grounds under (ii), (iii), and/or (vi). Where the processing grounds is constituted by a legitimate interest, an assessment of such interest must be performed, in order to prove that the legitimate interest pursued is not overridden by the fundamental rights and freedoms of the data subjects. The extent and content of such analysis should be established on a case by case basis.

c) Purpose limitation. The personal data must be collected for specified, explicit and legitimate purposes and not be further processed in a manner that is incompatible with those purposes.[10] It is to be understood that the parties must

[10] Art. 5(1)(b) of the GDPR.

establish beforehand the specific purposes of a processing activity and not use the data for other purposes, without the data subject's prior information, and/or consent, as necessary. For example, the personal data mentioned in the documentation collected and used for the due diligence related to the real estate, may not be further used for marketing purposes, without the prior information and consent of the data subject.

d) Data minimization. The personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.[11] In order to achieve this, the party that discloses documentation (for example during the due diligence phase) must anonymize such documentation, in order to reveal only the strictly necessary data for the envisaged purpose. This shall be assessed on case by case basis, taking into account, for example, the scope and extent of the due diligence. Special attention should be given to national identification numbers (personal identification number, ID number, birth certificate number, driver license number, etc.). We recommend such data, in general to be anonymized, except where the disclosure of such data is required by law. Where such information is processed based on a legitimate interest, the controller must in addition observe additional conditions to be met, such as the appointment of a data protection officer (DPO), and periodical training of employees.[12]

e) Storage limitation. The personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.[13] In this respect, the controller must establish retention/deletion periods for each category of data processed. Such retention periods must take into account the purpose of the processing activity, as well as any specific storage periods provided by the applicable legislation. For example, accountancy documents must be kept for a period of 5 years, respectively 10 years, in accordance with the accountancy legislation[14], documents related to the construction/property must be kept by the owner for the entire life span of the construction/property and transferred together with the ownership to the buyer, other documents reviewed during the due diligence phase should be kept only for a limited period of time after closing the transaction, in case they are further needed for the establishment, exercise, or defense of legal claims (the term of the general statute of limitation – 3 years - may be considered in this case).

f) Security of the personal data. The personal data must be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, by implementing appropriate technical or organizational

[11] Art. 5(1)(c) of the GDPR.
[12] Art. 4(2) of Law no. 190/2018 regarding the implementation of the GDPR.
[13] Art. 5(1)(e) of the GDPR.
[14] Art 25 of Law no. 82/1991.

measures.[15] Such technical and organizational measures may consist, inter alia, in implementation and monitoring of security policies (IT policy, clean desk policy, password policy, etc.) and training of employees in relation to relevant aspects of data protection. During the due diligence phase, the seller must ensure that the relevant documents are transferred to potential buyers through secure communication means, for example via a specialized VDR platform, and/or only to professional (work) email addresses. Access to such documents shall be granted on need-to-know basis. Also, appropriate confidentiality clauses should be concluded with potential buyers and other parties involved in the due diligence, as appropriate. This translates on concluding strong NDAs (nondisclosure agreements).

g) Concluding data processing agreements, as necessary. If the involved parties contract services which involve the processing of personal data (e.g. a VDR platform, or other IT services), the relationship with the respective service provider must be analyzed from a data protection perspective (one party may be either a controller, or a processor). Such analysis is made on case by case basis, taking into account also the factual relationship between the parties. If the service provider processes personal data on behalf of the party (and is therefore qualified as a processor), a data processing agreement must be concluded, with a series obligations to be undertaken by the processor (as per art. 28 of the GDPR).

4. Sanctions for non-compliance with GDPR's provisions

The controller shall be responsible for, and be able to demonstrate compliance with, all the above obligations.[16] In this respect, it is important to document any steps and measures taken for the compliance with the GDPR.

Infringements of any of the obligations stated above are subject to administrative fines of up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.[17]

Moreover, the supervisory authority may, in addition, or instead of the fines mentioned above, apply the following corrective measures:[18]

a) to issue warnings that the intended processing operations are likely to infringe provisions of the GDPR;

b) to issue reprimands where the processing operations have infringed provisions of the GDPR;

c) to order a controller/processor to comply with the data subject's requests to exercise his or her rights pursuant to the GDPR;

d) to order the controller/processor to bring processing operations into

[15] Art. 5(1)(f) of the GDPR.
[16] Art. 5(2) of the GDPR.
[17] Art. 83(5) of the GDPR.
[18] Art. 58(2) of the GDPR.

compliance with the GDPR, where appropriate, in a specified manner and within a specified period;

e) to order the controller to communicate a personal data breach to the data subject;

f) to impose a temporary or definitive limitation including a ban on processing;

g) to order the rectification or erasure of personal data or restriction of processing and notification of such actions to recipients to whom the personal data have been disclosed;

h) to withdraw a certification or to order the certification body to withdraw a certification issued, or to order the certification body not to issue certification if the requirements for the certification are not or are no longer met;

i) to order the suspension of data flows to a recipient in a third country or to an international organization.

The fines and the corrective measures mentioned above can be imposed following an investigation by the Supervisory Authority – such investigation may be triggered due to a data subject's complaint[19], a data breach notification, or ex officio by the Supervisory Authority.[20]

Furthermore, any person who has suffered material or non-material damage as a result of an infringement of the GDPR shall have the right to receive compensation from the controller or processor for the damage suffered.[21] Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State where the controller or processor has an establishment, or where the data subject has his or her habitual residence.[22]

5. Conclusion

Taking into consideration that the public and private actors are constantly exchanging data during a real estate transaction/deal, in order to avoid any sanction and to offer a safe environment for the involved factors, the provisions of GDPR must be first understood and observed by the parties involved in the real estate transaction. It is of utmost importance that the people should become more aware of the new protection granted by the GDPR and nevertheless to work in smooth real estate deals.

[19] As per Art. 77(1) of the GDPR, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes the GDPR.

[20] ANSPDCP's Decision no. 161/2018 regarding the investigation procedure.

[21] Art. 82(1) of the GDPR.

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Data protection in the context of employees' performance appraisal

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Abstract

By this study we propose to determine what are the conditions and limits of the collection and processing of personal data in the activity of professional evaluation of employees. Personal data are collected and processed in the context of employment relations also for the purpose of the appraisal of employees' professional activity. The monitoring of the employees' activity aims at evaluating the accomplishment of the specific responsibilities of the position, as well as the fulfillment of the individual and/or team goals. A discussion on personal data protection aims at the very analysis of the balance between the legitimate interests of employers in collecting and processing employees' data and the reasonable expectations of employees when it comes to privacy. Facilities allowing real-time access of the employer to employee's location data via smart devices, that is considered less visible to employees, applications that record the time and pace of work, the facial expressions and gestures of employees provide more than a process diagnosis, but also the diagnosis and prediction of behaviors, automatically generating profiling.

Keywords*: appraisal, protection, data, processing, storage, deletion, archiving.*

JEL Classification: K31

1. Introduction

Workplace dependence on computer, implementation of hardware and software facilities, applications and devices monitoring employees' access in the employer's locations, servers and storage environment (including cloud), applications and devices for tracking work process allow systematic data processing and is potentially invasive to employees at work, whether they are present physically or work remotely.

Regulation 2016/679[2] (General Data Protection Regulation or "GDPR") which entered into force on 25 May 2018 establishes a set of rules on personal

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[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("RGPD") and repealing Directive 95/46/CE.

data protection. The rules on profiling[3] are summarized in an opinion[4].

The principles to be taken into account when processing employees' personal data include the following:

• employers must comply with the fundamental principles of data protection, regardless of the technology used for processing;

• simply subjecting the processing of personal data to the approval of the employee is an insufficient legal basis for processing data at work, as long as the employee's refusal to process personal data can lead to unfavorable consequences, especially because they are rare situations in which they can revoke the consent, taking into account the relationship of economic dependence between the employer and the employee;

• processing must be strictly necessary for a legitimate purpose and respect the principles of proportionality and subsidiarity;

• employees should be informed in advance and concretely about the monitoring of their personal information.

2. Profiling versus evaluation

When referring to the creation of profiles, the Regulation envisages the adoption of automatic procedures for processing personal data and the purpose of processing is to evaluate/assess personal issues, analyze the prediction on the evolution or behavior of the person.

Subject to GDPR requirements during each of the stages of the profiling process it is possible to profile, respectively during data collection, data analysis to identify patterns and correlations (measurement standard) and to compare a real person with such standard, to identify characteristics and formulate behavioral predictions.

Therefore, during these processing/profiling, employers have the obligation to ensure certain conditions:

a) For clearly defined and legitimate purposes, proportionate and necessary; it is not sufficient to obtain the consent[5] of the employee as the

[3] The GDPR defines profiling in Article 4 (4) as "any form of automatic processing of personal data which consists in the use of personal data to assess certain personal aspects relating to a natural person, in particular to analyze or predict on performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movement of the individual."

[4] Guidance in this regard is set out in Opinion WP258 on some key aspects of Directive (EU) 2016/680 on data protection in law enforcement, adopted on 29 November 2017 by the Article 29 Working Party. The opinion refers to the automated individual decision-making process and the creation of profiles in the context of data processing in order to ensure compliance with the law.

[5] According to the Directive, "consent is defined as any manifestation of the will, free, specific and informed, of the wishes of a data subject, by which he or she expresses consent to the processing of personal data concerning him or her. In order to ensure the validity of the consent, it must also be revocable."

legal basis[6] for processing. Thus, the basis for collecting and processing of data deriving from employee's activity is the individual employment contract (as a contractual basis for the execution of mutual rights and obligations between the parties).

The evaluation of the employee's activity is performed by the employer in accordance with the law and based on the internal regulations (comprising procedural aspects, but also the appraisal criteria applicable to the employees, as per art. 242 letter e) of the Labor Code).

The legal basis for processing personal data for the purpose of appraising employees' activity is the Labor Code. The data of employees collected for the purpose of appraisal must allow: the application of appraisal criteria enshrined in the individual employment agreement and provided in art. 17 para. (3) lit. e) and para. (4) of the Labor Code and the right of the employer to exercise control over the manner of fulfilling the service tasks, including by via performance goals and the modalities (criteria) for their appraisal art. 40 para. (1) lit. d) and f) of the Labor Code.

b) By limiting the purpose of the processing to the collection of relevant and adequate data (data quality) for appraisal. The processing must take into account the activities relevant for the achievement of the performance goals, the information collected must be adequate, not excessive in relation to the legitimate purpose. In this regard, the collection/processing of data related to nationality/citizenship/sex/place-of-birth/previous career details may be considered excessive for the purpose of staff appraisal.

On the other hand, in the context of an assessment for professional misconduct, the collection/processing of data on employees' studies are essential for establishing knowledge or lack of knowledge related to the rules specific to the job.

The personal data used in the appraisal processes must have a certain accuracy and there is a need to be regularly updated for this purpose. Part of the process of ensuring data accuracy is the employee's filling-in of the self-assessment form. The same objective is achieved by the use of assessment of certificates and attestations, which by their nature indicate the presumption of veracity and accuracy with regard to the knowledge, skills and abilities of employees.

Correlated with the need to ensure the accuracy of the data in the appraisal process, they must be accessible to the employee and to allow inaccuracies to be rectified, while the errors must be deleted. This can be ensured either by review of appraisal descriptions made by the manager (reconsidered by the author himself, based on updated information) and by additional observations or comments by the employee, in order to correct the conclusion of the analysis. Last but not least, the quality of the data can be ensured via collective appraisal discussions, for example in front of appeal (hearing) commissions where members

[6] "For most cases of employee data processing, the legal basis for such processing cannot and should not be the consent of employees, so a different legal basis is required."

can make their own evaluations, observations and corrections to the initial appraisal formulated by the manager.

The need for correction is all the more important as the evaluation process has some subjective components, such as the evaluator's perceptions and interpretations, and the very subject for appraisal, which could be the conduct of the employee.

c) By applying the principles of proportionality and subsidiarity[7], regardless of the applicable legal basis. With regard to the use of work monitoring applications, measures should be considered before the introduction of technologies to "mitigate or reduce the impact of data processing". The good practice recommended under the Regulation is to carry out the DPIA (Data Protection Impact Assessment) which takes place when the processing is "likely to induce high risk to the rights and freedoms of individuals".

Transparency on processing is particularly important, as this is put into practice by endorsement of the use of data via policies approved by employees' representatives or trade unions or, in their absence, by a "representative treshold of employees envisaged by such monitoring".

An example of disproportion in the matter of staff development and appraisal is indicated in an opinion[8] under the European Regulation and concerns the way in which a transportation company monitors the inside of the driver's cabin via cameras, observing the behavior of drivers under the pretext of "improving the driving skills of employees" by recording sudden braking or phone use. These measures are not proportionate, as there are otherways that are more appropriate for the same purpose and less invasive[9].

d) The employer must inform employees in a transparent (complete and full) manner about the processing of data either manually or by monitoring technologies and explain the presence and purpose of the use of technologies in the appraisal process. To the extent that the pursuit of the activity for the purpose of appraisal is based on a specific technology, it must be necessary, proportionate and implemented in the least intrusive way possible in order to ensure a balance with the fundamental rights and freedoms of employees. Such an example could refer to the recording of activity in connection with the client. This could not rely on the permanent surveillance of operations via tracking software (via Bluetooth or WiFi), but rather could aim to achieve quantitative or qualitative indicators of the activity (e.g. by marking the completion of the task via entering a QR Code or validation with a PIN obtained from the customer) instead

[7] "Sometimes means that no monitoring action can take place. For example, this is true when the prohibited use of communications services can be avoided by blocking certain sites."

[8] See Opinion no. 2/2017 supplementing previous publications prepared under Article 29 Working Party ("GL 29") and entitled Opinion no. 8/2001 on the processing of personal data in the context of employment.

[9] "Devices blocking the of phone or an advanced emergency braking system or a warning system for crossing over the separating lanes, which are considered more appropriate to prevention".

of installing a location or time tracking device to detect the presence of the worker in customer's locations or the travel from a customer's location to another customer's location. In this situation, the data collection is done via automated systems, with the capacity to also provide profiles of employees, which requires the observation of the specifications of Decision no. 174/2018[10].

Accordingly, even if the collection and processing of data is done via systems, the employee should have the right not to be subject to a decision based on personal matters and which are based solely on automatic processing. In other words, the validation of some results or behaviors cannot derive from the algorithm of an application or device. It is mandatory to include the analysis, appreciation and conclusion of a human in this process. In particular, such issues may refer to "the performance at the workplace of the subject, (...) reliability or behavior".

The purpose of protection is to avoid harm of physical, material or moral aspects when assessing personal aspects[11].

For the adoption of such systems, it is necessary for the operator to carry out the data protection impact assessment and the result of the assessment and by identifying the risks resulting from such processing to propose appropriate measures to ensure the balance between processing need and fundamental rights of employees.

It is considered mandatory to assess the impact on the protection of personal data, in particular the large-scale processing of personal data of vulnerable persons (e.g. minors) and employees by automatic monitoring and/or systematic recording of behaviors for the purpose of assessing performance. The express consent of the employee for such devices is also required[12].

The electronic activity monitoring panel "electronic panopticon[13]" is a supervision tool available to managers which records in real time the pace of activities on the manufacturing line, down to a level of detail that allows the identification of the worker based on the badge. The technology is therefore involved in assisting/monitoring the production process and this is based on the collection

[10] National Authority for Supervision of Personal Data Processing - ANSPDCP, Decision no. 174/2018 on the list of operations for which it is mandatory to perform the impact assessment on the protection of personal data, Official Gazette, Part I no. 919/2018.

[11] "Personal matters, in particular the analysis or the forecasting of workplace performance, economic situation, health, personal preferences or interests, reliability or behavior, location or travel, in order to create or use personal profiles".

[12] "The default settings on devices and/or the installation of software to facilitate the processing of personal data in the electronic environment cannot be considered as an expression of consent from employees, as the consent requires an active expression of the will", according to the Opinion no. 2/2017 supplementing previous publications prepared under Article 29 Working Party ("GL 29") and entitled Opinion no. 8/2001 on the processing of personal data in the context of employment.

[13] B. Cattero and M. D'Onofrio, *Organizing and Collective Bargaining in the Digitized "Tertiary Factories" of Amazon: A Comparison Between Germany and Italy* in „Working in Digital and Smart Organizations Legal, Economic and Organizational Perspectives on the Digitalization of Labor Relations", Palgrave Macmillan, 2018, p. 141.

of data related to employee's work.

Portable digital applications installed on the company mobile phone allow monitoring of movements, habits, health data, nervous system data, collecting information that is directly related to psycho-emotional and cognitive factors, also relevant for the appraisal of employee performance.

A recent analysis[14] finds the shift of "managerial control from the work of employees to their body, maybe to their mind" under the pretext of job supervision. The intimacy of work is affected, the worker being subjected to a constant pressure that, misused, can disturb the ergonomics of work inducing stress under the obsessive pressure of productivity. The use of artificial intelligence in the workplace and the supervision of employee's work also helps employers to create productivity standards and regulate processes more in line with the "natural" rhythms of the worker.

Facial recognition and psycho-emotional diagnosis programs by reading facial expressions and gestures can help establish work teams by analyzing workers' compatibility and therefore may intervene in the team working evaluation. They all use personal data and are subject to special personal data protection requirements.

e) The employer must keep the exact data on the basis of which he appraises the activity of the employee and their storage must be limited in time for the purpose of processing. Last but not least, data storage systems should have the appropriate security to ensure the confidentiality and security of information, part of this condition being the adoption of organizational protection measures, such as granting access to as few employees as possible, subject to the obligation of confidentiality (from human resources, personnel administration, payroll) to these data to ensure the security of the processing.

The storage time must be calibrated with the data processing purposes. Thus, if the data processing aims at supporting the appraisal for a certain evaluation cycle, the duration of data retention must be related to it. Retaining data for a longer period of time would be possible for the processes deriving as output from the appraisal, such as for example a multi-annual development plan, which is not strictly reduced to one appraisal process and involves consolidating the data during several evaluation cycles. It is necessary that the purpose of this processing be transparently set, not only for the initial appraisal, but also for the secondary processes.

There are situations where data collection systems are legitimately installed initially (such as example cameras to protect locations). Continuing their use or changing the purpose of the initial processing to monitor employees and their relation to customers or to measure performance becomes illegitimate.

[14] Lia Tirabeni, *Technology, Power and the Organization: Wearable Technologies and Their Implications for the Performance Appraisal, Performance Appraisal* in „Modern Employment Relations an Interdisciplinary Approach", Palgrave Macmillan ebook, 2020, p. 84.

However, it is not a processing outside the original purpose if the collection of personal data performed initially for the regular appraisal is considered as reference during several evaluation cycles, even if employer uses this data differently from one stage to another.

Thus, if data collection is done for the initial appraisal and after a certain number of appraisals a conclusion of performance below standards is reached, it is possible to set a performance improvement process based on it for developing employees' skills and knowledge and further than perform a second appraisal process. Likewise, if the appraisal process is continued with the assumption that underperformance is caused by professional unfit, further processing in this direction does not represent a change of the original purpose of the processing. Thus, all procedural steps and measures ordered by the employer in relation to these are based on a processing with a single and consistent purpose, namely, monitoring and appraisal of professional competence of the employee.

An example of maintaining the purpose of the processing for the (initial) appraisal, even if the measures from it are diverse, is when the data initially collected is used for promoting employees, for reclassification (change of gradation) but also when the appraisal provides input for certification procedures in certain industries.

f) The employer must allow the employees subject to appraisal to exercise their rights, including the right of access and, where appropriate, the rectification, deletion or blocking of personal data collected for the purpose of appraisal; personal data must also be protected by the employer through specific measures against unauthorized access. An interesting issue is the antagonism between the right possible to delete (implicitly, the need to limit the processing of personal data in the shortest time in the light of the European Regulation) and the need for long-term documentation resulting from Law no. 16/1996 of the national archives, republished. According to the legislation of archives, personal files must be kept based on nomenclatures[15] issued by the creators of documents for periods determined in relation to their social, practical, historical or scientific importance. According to the practice approved by the National Archives regarding the retention periods approved by nomenclatures issued by the archive creators (employers) the retention periods of the documents in the personnel files are established in relation to the person's life expectancy which is approx. 70 - 75 years.

The retention of documents is also governed by an analysis of the processes by which they are issued, which may indicate different retention periods (usually shorter) considering whether the documents are essential or not for the

[15] According to art. 8 of Law no. 16/1996 of the National Archives „Annually, the documents are grouped in archival units, according to the issues and deadlines established in the nomenclature of archive documents, which is prepared by each creator for their own documents. The nomenclatures drawn up by the creators at central level are approved by the National Archives, and those of the other creators, by the county services of the National Archives (...).”

issuance of the individual employment contract, the addenda or to the decision etc.

From the perspective of appraisal process, a question arises: whether the preparatory documents (records on the activity based on which the evaluation forms are filled in or even the evaluation forms themselves) are covered by the same retention period deriving from the practice of archiving (e.g. 70-75 years) or should be subject to a shorter retention period and thus annihilated by the right of deletion under the protection of personal data.

We consider that the retention regime for employment documents must be maximum (e.g. 75 years) insofar the documents that support the decisions/addenda to the individual labor agreements have led decisively to the respective measure regarding the modification, execution or termination of the individual employment contract (e.g. addendum to change the type of work, decision to grant a salary increase or benefits based on the appraisal, dismissal decision for professional unfit, collective dismissal decision issued considering the selection process performed based the appraisal of performance goals).

On the other hand, when keeping an appraisal file without taking action within a reasonable period of time (practice also indicates terms shorter than 5-10 years, as per archiving nomenclatures) there is no argument against deleting the data after such periods of time expire.

The long-term preservation of data can be criticized also from the perspective of the persisting of the same reason for data processing. Thus, if the data is usefulness for similar processes, it could be retained. Such situations that justify retention refer to certifications, attestations, promotions (in the case of public servants), as there are few situations in which these data are relevant for the long-term employee's career perspectives. We consider that the support documents, the detailed information, should be subject to the right of deletion after reasonable periods of time.

On the other hand, the storage of data for an indefinite period is possible from a GDPR perspective for statistical or scientific purposes and its retention may take place subject to anonymization.

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Book X ("Trusts") of the Draft Common Frame of Reference (DCFR): subject of doctrinal discussions and model of inspiration for the legislator of the Republic of Moldova

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Abstract

The Draft Common Frame of Reference (DCFR) project is a comprehensive work to harmonize the rules of private law in the European area. Although it has not gained legal force at European level, the project has undeniable value for the development of private law and can serve as a model for legislators in different states. This has already happened in the case of modernization of the Civil Code of the Republic of Moldova. For the matter of trusts, in DCFR was allocated a separate book - Book X ("Trusts"), which was the basis for the regulation of the institution "fiducia" in the Civil Code of the Republic of Moldova. The purpose of this article is to analyze the assessments and criticisms that have been brought to Book X of DCFR, but also to assess the extent to which the legislator of the Republic of Moldova has followed the model of these rules. Thus, the discussions in the doctrine regarding the strengths and weaknesses of Book X are revealed, the sources of inspiration of the DCFR authors are analyzed and the way in which the institution of "fiducia" in the Civil Code of the Republic of Moldova follows the DCFR trust model is presented. Some comparative observations are also made with reference to the "fiducia" in the Romanian Civil Code.

Keywords: *trust, fiducia, DCFR, Civil Code of the Republic of Moldova, Civil Code of Romania.*

JEL Classification: K11, K12, K15

1. Introduction

In 2003, to ensure a more coherent European contract law, the European Commission included in the action plan the concept of a Common Frame of Reference (CFR).[2] In a 2004 Communication, the essence of the CFR was summarized as follows: "The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States' legal orders."[3]

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[2] Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan (2003/C 63/01), Official Journal of the European Union C 63/1-44 (2003), the document is available online at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0068:FIN:EN:PDF (last accessed at 10.11.2021).

[3] Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward, Brussels, 11.10.2004 COM(2004)

In February 2009 was published the "outline" edition[4] of the Draft Common Frame of Reference (DCFR), containing the text of the ten Books which make up the DCFR, and in October 2009 - the "full" edition[5], comprising six substantial volumes of comments and notes.[6] Thus, DCFR represents an extensive work of harmonization of the private law rules in the European area. Although it has not acquired legal force at the European level, the project is of undeniable value for the development of private law and can serve as a model for legislators in different states. This has already happened in the case of modernization of the Civil Code of the Republic of Moldova.

For the matter of trusts, in DCFR was allocated a separate book - Book X ("Trusts"), which was the basis for the regulation of the institution of trust (in Romanian: "fiducia") in the Civil Code of the Republic of Moldova. The concept of trust, which is transposed by the concept of *fiducia*, has very specific characteristics, previously unknown to the national legal system. Therefore, the research of the new institution must start from the analysis of the sources that inspired the regulation, which makes it indispensable to study Book X of the DCFR. The desideratum is not an easy one because the book on trusts did not enjoy as extensive comments (in the final version) as other books in DCFR did, and there are relatively few articles in the literature that put in discussion exclusively the DCFR trust. Despite this fact, we have identified some valuable sources, which we will analyze in this article to facilitate understanding the concept of trust in the DCFR and that of *fiducia* in the Civil Code of the Republic of Moldova.

2. The purpose of introducing a Book on Trusts into the DCFR

As it exists in common law, the trust has proven successful applicability in various areas of private law. This fact has led legal theorists and practitioners to discuss more and more often the possibility of introducing this institution in civil law systems as well. The adoption of a mechanism similar to the trust has become the desideratum of many legislators (especially in order to implement the

651, the document is available online at: https://ec.europa.eu/info/sites/default/files/european_contract_law_and_the_revision_of_the_acquis.pdf (last accessed at 10.11.2021), p. 3.

[4] Von Bar Christian, Clive Eric, Schulte-Nölke Hans (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition*, Otto Schmidt/De Gruyter european law publishers, Berlin, New York, 2009, 643 p., the document is available online at: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf (last accessed at 10.11.2021).

[5] Von Bar Christian, Clive Eric (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Volumes I-VI*, Oxford University Press, Oxford, 2010, 6704 p.

[6] Symposium: Book X (Trusts) of the DCFR, „Edinburgh Law Review", 2011, vol. 15, no. 3, p. 462-463, p. 462.

trust in the commercial area[7]). Thus, despite the difficulties involved in this process, multiple states have already introduced trust-like devices in their legislations.

Of course, the subject of trusts could not remain outside DCFR. For the matter of trusts, a separate book has been allocated in DCFR - Book X ("Trusts"), which contains 116 articles. This was seen as an "underline of the importance that the legal instrument of the trust can acquire in the system of community law."[8] In a 2009 article, Reinhard Zimmermann stated that in recent years more attention has been paid to the comparative study of trust law and cited the idea previously launched by Marius J. de Waal, that we are at the threshold of a truly European trust law: "[…] perhaps we have already crossed that boundary without realising it."[9]

Therefore, the actuality of the subject of trusts ensured him a place in DCFR. Introducing Book X, the DCFR authors noted that "the rules on trusts could enhance freedom by opening up possibilities for setting property aside for particular purposes (commercial, familial or charitable) in a flexible way which has been much used and much valued in some systems for a very long time and is gradually spreading to others."[10] However, Stephen Swann, who led the working group on trusts, stated that Book X should not be regarded as a draft European Trusts Law, because the model rules of the DCFR were drafted with a variety of purposes in mind, and with regard to Books VIII, IX and X (i.e., beyond the pure law of obligations) it was not very clear to what extent they could take the form of a set of rules (not academic, but institutionalized at European level).[11]

The process of drafting Book X involved many difficulties (in terms of the elements of incoherence), a fact stated by the editor-in-chief himself. Thus, one of the biggest challenges faced by the working group was the "profound unevenness of the legal traditions" in this matter. In general, the purpose of drafting the DCFR was to distil from the collective European legal experience the universal regulations, and in the absence of common solutions, to adopt the "best rules". The same goal was pursued in the field of trusts, but it was much more difficult to create a "common European framework" in this area. As stated, it has been complicated to achieve the desideratum to satisfy, through a set of common rules on trusts, both groups of jurisdictions: those who know and those who do not know trusts in their legal tradition. Therefore, "the aim was to create a general

[7] Reid Kenneth, Watanabe Hiroyuki, *"Principles of European Trust Law" and "Draft Directive on Protective Funds" (Interview with Professor Kenneth Reid)*, „The Quarterly Review of Corporation Law and Society", 2012, no. 32, p. 113-125, p. 113.
[8] Moreanu Daniel, *Fiducia și Trust-ul*, C.H. Beck, Bucharest, 2017, 604 p., p. 501-502.
[9] Zimmermann Reinhard, *The Present State of European Private Law*, „American Journal of Comparative Law", 2009, vol. 57, no. 2, p. 479-512, p. 504.
[10] Von Bar Christian, Clive Eric, Schulte-Nölke Hans (eds.), *op. cit.*, p. 71.
[11] Swann Stephen, *Aims and Context*. Symposium: Book X (Trusts) of the DCFR, „Edinburgh Law Review", 2011, vol. 15, no. 3, p. 463-466, p. 463.

instrument, comparable in width to that offered in the established trust jurisdictions."[12]. As in other areas, "the attempt here was not one of finding a lowest common denominator, but much more of establishing the highest common factor."[13]

This explains several objectionable elements of Book X: the large number of articles, the mixing of concepts from the common law and the civil law system, the decisive inspiration from English law, the lack of references to various legal systems (in comments), etc. Moreover, Stephen Swann explained that the need to comply with the terms imposed at the political level led to the parallel redaction works. "As tail-end Charlie", Book X could not obtain the same comprehensive examination and detailed approval, which was devoted to earlier work: "Weaknesses in Book X reflect those limitations."[14] Thus, although the full edition does contain a large volume of explanations and examples that facilitate the perception of the rules in the DCFR, the comments on Book X are more limited. The authors themselves made the following statement: "Regrettably, there was not time for the writing of Comments on all of the Articles in Book X. Completed Comments will be provided in the later PEL [Principles of European Law] Book on Trusts."[15] The PEL Book on Trusts has not been published so far, and according to the information provided by a specialized bookstore, its publication has been "abandoned".[16]

Despite any objections that can be made to Book X, it is certain that the editors have made a colossal effort and have the merit of creating a set of rules on trusts, which can be taken as a model by state legislators. For the hypothesis in which some states will decide to introduce in their legal system a trust based on the one developed in DCFR (which the Republic of Moldova has already achieved by modernizing the Civil Code), Stephen Swann concluded: "Once transplanted, it [the trust] would provide merely a further option for use within that national legal regime, and its comparative utility would determine whether it faded, flourished alongside or dwarfed its native neighbours [i.e., the institutions with similar functions, pre-existing in that system]".[17]

Therefore, Book X of the DCFR is of great interest, both general and particular (for our research): general - because many European countries currently do not know this legal institution, but may wish to introduce it; and particular - because in the Republic of Moldova the modernization of private law has already been carried out and the institution of trust (in Romanian: "fiducia") has been

[12] Ibid, p. 465.
[13] Ibid, p. 466.
[14] Ibid, p. 464.
[15] Von Bar Christian, Clive Eric (eds.), *op. cit.*, p. 5669.
[16] Book Information. Principles of European Law Volume 12: Trust Law, the information is available online at: https://www.wildy.com/isbn/9780199229468/principles-of-european-law-volume-12-trust-law-hardback-oxford-university-press?fbclid=IwAR0heM69TEuKYmp9RVJVqokFxl8-K0CL8g5exKtkLjnlOhb5CNycGL7CoWE (last accessed at 10.11.2021).
[17] Swann Stephen, *op. cit.*, p. 466.

regulated, based on the DCFR trust.

3. Evaluation of the Book X of the DCFR in the academia

Analyzing the way in which DCFR has been generally evaluated, we notice that the admiration is unanimously oriented towards the comparative approach of the rules existing in different European jurisdictions: "When one sees the full edition of the Draft Common Frame of Reference, a general idea of the enormous work that was put into its completion starts to arise. Despite the criticism on its scope and methods, the Draft Common Frame of Reference offers a richness of comparative information in English, that has not yet been seen. This applies especially to the comparative notes that offer information on the private laws of the Member States. […] The real value therefore – especially in the light of these new developments – lies in the comments and notes, which will remain of relevance for a very long time."[18] "Perhaps the most important achievement of the DCFR is that we now have de facto, if not (yet) de iure, a sketch map for getting our bearings in the varied topography of European private law. Where else does one look to find a concise statement, in English, of how a particular DCFR provision relates to the law of a national legal system? The DCFR's utility for comparative law is considerable."[19]

Reflecting on these strengths and on Book X, we notice that a problem arises: the characteristics which have given the DCFR, in general, a real value - extensive comments and comparative view of the rules - cannot be retained with regard to Book X. The limited comments on Book X and the predominant influence of English law (and, respectively, the lack of the common element, of harmonization, based on comparative law) are two of the most important criticisms of this Book. Thus, although no one could dispute the enormous effort of the working group, Book X of the DCFR was "received" by academia with a dose of skepticism and criticism. Some of the objections will be mentioned below.

A skeptical attitude was manifested by Alexandra Braun, who made a comprehensive analysis of the issues raised by Book X of DCFR. In opening the discussion, Braun mentioned: "Book X suggests a comprehensive set of model rules aimed at providing Europe with a uniform trust law. These model rules are contained in 116 detailed Articles that, in the eyes of the drafters, would appear

[18] Akkermans Bram, van Erp Sjef, Ramaekers Eveline, *Book review: C. Von Bar and E. Clive (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Oxford University Press, Oxford 2010, Volumes I-VI, 6,704 pp., hardback, £ 750, ISBN 978–0–19–957375–2*, „Maastricht Journal of European and Comparative Law", 2012, vol. 19, no. 1, p. 83-93, p. 92-93.

[19] Anderson Ross Gilbert, *Review: Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full edition. Ed by Christian von Bar and Eric Clive. Volumes 1, 2, 3 (Books I-V)*, „Edinburgh Law Review", 2011, vol. 15, no. 2, p. 306-309, p. 306.

to represent the "best solution" for Europe. But is this really the case?"[20] The comments that followed focus on several aspects: the sources from which the editors of Book X were inspired, the mixing of the characteristics of a trust, the definition, the parts and effects of a trust, etc. Braun noticed from the beginning that evaluating the DCFR trust is not an easy endeavour, relying on the same problems that we mentioned before: "This is partly because, differently to other Books of the DCFR, it contains no notes explaining the propositions which it sets out by reference to existing European legal systems. Moreover, the comments by the drafters of Book X cover only three of its ten chapters."[21] This first objection to Book X was also launched by Van Erp S., who considered a major problem the fact that "the comments accompanying Book X are not very helpful, partly because they are rather general and partly because they are incomplete, with whole parts of Book X not commented upon at all".[22]

As we have already mentioned, a second essential objection concerns the predominant influence of English law. In the same context, is criticized the non-uniformity of the methods used in drafting the DCFR (in Book X, there is almost no comparative method, of harmonization), are mentioned the problems generated by mixing legal concepts from common law and civil law system and is questioned the feasibility of the DCFR trust with most European legal systems: "Not only is Book X too strongly influenced by the law of one legal system, but it also contains ambiguities and inconsistencies. Further, as it stands, Book X is bound to enter into conflict with national laws in those countries that are not familiar with the trust concept, so that its feasibility remains questionable."[23] We will discuss these issues in more detail in the next section.

Along with these criticisms, there are also concerns about trusts being used to divest a person of property in order to defraud creditors: "Unfortunately, nothing is said in Book X concerning attempts to safeguard property from the creditors of the settlor, and there is no provision on sham trusts." [24]

4. Sources of inspiration for the DCFR Trust

In order to effectively analyse the rules contained in Book X of the DCFR, it is essential first to identify the sources from which the editors of the Book X drew inspiration. This exercise is also necessary to understand the objections that have been raised against Book X, which we will address in this section.

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[20] Braun Alexandra, *Trusts in the Draft Common Frame of Reference: The "Best Solution" for Europe?*, „Cambridge Law Journal", 2011, vol. 70, no. 2, p. 327-352, p. 328.
[21] Ibid, p. 329.
[22] Van Erp Sjef. *A Dutch Perspective.* Symposium: Book X (Trusts) of the DCFR, „Edinburgh Law Review", 2011, vol. 15, no. 3, p. 479-482, p. 481.
[23] Braun Alexandra, *Trusts in the Draft Common Frame of Reference…, op. cit.*, p. 328-329.
[24] Braun Alexandra, *An Italian Perspective*. Symposium: Book X (Trusts) of the DCFR, „Edinburgh Law Review", 2011, vol. 15, no. 3, p. 475-479, p. 478.

The DCFR trust has been significantly influenced by English law. The literature points out that this is "understandably […] given the developed state of trusts law in that legal system."[25]

Although the editors' decision can be understood, there were objections from academia on this issue as well (i.e., the predominant English influence). First of all, this option of the editors was seen as "a refusal to admit variety", giving sceptics of the wider DCFR the opportunity to point to Book X to challenge the claim that the project attempts to capture the diversity of European legal systems.[26] In an article of March 2010, Jansen N. and Zimmermann R. stated: "A Continental (as well as an English!) lawyer might also, incidentally, find it somewhat difficult to identify the 116 articles on Trusts contained in the DCFR as a reflection of the existing European legal systems *in all their beauty and diversity*."[27]

The preference given mainly to a single legal system as a source of inspiration has led to criticism of inconsistency between the methodology used by the authors of Book X and that used in other books of the DCFR: "It follows that the trust, whose adoption the drafters recommend within Europe, is not based on principles common to existing trust and fiduciary devices in Europe. In other words, it is not an attempt at comparative legislation, but rather an attempt to extend the English model, or more specifically a somewhat modified version of it, to the rest of Europe"[28]. "Do we "have" more ius commune in some of them [Books] than in others? We probably do, because it is generally recognised, also by the authors, that some parts are to a larger extent reflecting an existing degree of commonality, namely Books I to VII and probably VIII; Books IX on Security Rights and X on Trusts are indeed reform proposals rather a restatement of a law that is already common to a sufficient extent."[29]

Concerning the foundation of the DCFR trust on the Anglo-Saxon model, we note that this choice is subject to a double criticism: both from the perspective of the civil law system and from the English perspective. On the one hand, it has been objected that the text of Book X, „at times, follows the minutiae of English

[25] Steven Andrew, *Review: Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full edition. Ed by Christian von Bar and Eric Clive. Volumes 5, 6 (Books VIII-X)*, „Edinburgh Law Review", 2011, vol. 15, no. 2, p. 312-314, p. 314.

[26] McFarlane Ben, *An English Perspective: Two Cheers for Book X.* Symposium: Book X (Trusts) of the DCFR, „Edinburgh Law Review", 2011, vol. 15, no. 3, p. 471-474, p. 471.

[27] Jansen Nils, Zimmermann Reinhard, *"A European Civil Code in all but name": discussing the nature and purposes of the Draft Common Frame of Reference*, „Cambridge Law Journal", 2010, vol. 69, no. 1, p. 98–112, p. 100.

[28] Braun Alexandra, *The framing of a European law of trusts*. In: Smith L. (ed.), The Worlds of the Trust, Cambridge University Press, Cambridge, 2013, p. 277-304, p. 287.

[29] Storme Matthias E., *The (Draft) Common Frame of Reference as a toolbox and as a basis for an optional instrument*, Stockholm Conference paper, 23 October 2009, the document is available online at: https://www.law.kuleuven.be/personal/mstorme/DCFRStockholm.pdf (last accessed at 10.11.2021).

trust law so faithfully as to be inaccessible to those unversed in its case law."[30] On the other hand, from an English perspective, was expressed the view that Book X „does not live up to its claim to furnish a complete regulation of trust law (save for some matters of detail)" and „this is not simply a question of length". In particular, it was stated that „the bald articles of Book X, intended to be interpreted autonomously, are divorced from the support of case-law and, as a result, may be apt to mislead."[31]

Moreover, although the English influence is indisputable, both from the content of Book X and from the opinions presented in the literature, it follows that the concept in DCFR is, however, a modified English trust or, as it has been characterized - "English trust, but shorn of equity."[32] On closer examination, we find that the drafters of the DCFR actually had multiple sources of inspiration, not just the English law. Among these sources were mentioned Scottish trust rules and Maltese legislation. In addition, an essential role in the formulation of the 116 articles was played by "the influence of continental legal thinking".[33]

Thus, in the content of Book X, some elements have been identified which contradict English tradition, but they seem to have been taken from Scottish legislation. Alexandra Braun noted that the use of the Scottish term 'truster' rather than the English 'settlor' (for constituent) and the absence of a limit to the duration of the DCFR trust "may be ascribed to a Scottish influence."[34]

As to the second identified source, during a symposium dedicated to the DCFR trust, Stephen Swann pointed out that the text of Book X was influenced by Maltese law (in the context of analysing the operation of a trust in a jurisdiction outside the common law). However, another author has objected that such inspiration, although indicated by the Book's principal editor, is nowhere documented in the comments to DCFR.[35]

Regarding the "influence of continental legal thinking", some terminological aspects and some solutions (different from those existing in English law) adopted by the editors were suggested. At the terminological level, this influence is denoted, for example, by the use of the phrase "non-performance of the trust obligation" instead of the usual English term "breach of trust". At the conceptual level, the influence is demonstrated by the use of the concept of "juridical act", which is inappropriate to English thinking, but also by the decision of the editors to apply to the trust some regulations of contract law - in particular, the rules on donation (in the context of the termination of a gratuitous trust by the truster), the

[30] Reid Kenneth G.C. *Constitution of Trust: A Scottish Perspective.* Symposium: Book X (Trusts) of the DCFR, „Edinburgh Law Review", 2011, vol. 15, no. 3, p. 467-470, p. 467.
[31] McFarlane Ben, *op. cit.*, p. 473-474.
[32] Van Erp Sjef, *op. cit.*, p. 482.
[33] Braun Alexandra, *Trusts in the Draft Common Frame of Reference…, op. cit.*, p. 336.
[34] Ibid, p. 338.
[35] Van Erp Sjef, *op. cit.*, p. 481.

effect being of great importance: in such circumstances, the trust acquires a revocable character (which would also have significant tax implications).[36]

Analyzing these derivations from English law, Alexandra Braun concluded that "it is not entirely clear why the editors opted for these changes, or many of them cannot be easily explained."[37] However, the final conclusion was as follows: "The fact that Book X is not entirely modelled on the English trust is not the problem. It is not the case that a future European trust should be wholly based on English law, or any other national law. On the contrary, we should not dress up English law in European clothes. A European law of trusts should represent the outcome of a comparative exercise that brings to light both the conceptual techniques and the underlying policies of the various trust devices. Why the draft of Book X pays so little attention to the laws in the different European legal systems and to the comparative research in this field is not entirely clear."[38]

Another problem in the same context is the effect of mixing common law and civil law concepts. The attempt to transpose the English rules into a civilian context had a paradoxical result: the DCFR trust was declared complicated to understand by both English and continental lawyers.

English professor William Swadling mentioned that the approach of the trust fund as a patrimony distinct from the personal patrimony of the trustee (and any other patrimonies vested in or managed by the trustee) is a difficult one for a common lawyer. This is due to the fact that „in common law there is no concept of "patrimony", which is instead one peculiar to civilian systems". In this respect, it was appreciated that „the DCFR trust is clearly directed to a civil law, rather than a common law, audience, and hardly reflects any 'common' frame of reference". This is one of the reasons why it was anticipated that „the DCFR trust would not be attractive to persons resident in the common law jurisdictions of England, Wales, Northern Ireland and the Republic of Ireland. Usage of concepts such as 'patrimony' and other civil law terms, more of which below, will make it all but impossible for it to be applied in domestic common law courts"[39] The changes to the English model of trust (determined by continental legal thinking) are so significant that the English Professor even concluded: „although labelled a 'common' frame of reference, the DCFR trust has a very clear civilian flavour, with much of the language incomprehensible to a common lawyer. For that reason, and also that the common law already has a far more developed law of trusts, it is doubtful that the DCFR trust will appeal to common lawyers. Even the form it takes, that of a code, is completely against the common law tradition"[40]

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[36] Braun Alexandra, *Trusts in the Draft Common Frame of Reference…*, *op. cit.*, p. 336, 338, 340.
[37] Ibid, p. 338.
[38] Ibid, p. 351.
[39] Swadling William, *The DCFR Trusts: A Common Law Perspective*. In: van Erp S., Salomons A., Akkermans B. (eds.). The Future of European Property Law, Otto Schmidt/De Gruyter european law publishers, Berlin, Boston, 2012, p. 21-30, p. 23-24.
[40] Ibid, p. 30.

The same issue (i.e., language sometimes incomprehensible) was also objected from the perspective of the civil law system: „The concepts of "title", "vesting" and "divesting" are typically English. From a Civil Law viewpoint their content is unclear. The terms are not defined in the DCFR's Annex. Is "title" the same as Civil Law ownership? If so, what does it mean that ownership "vests" in a person "on appointment as a trustee"? Is vesting something different from transferring ownership of the asset to a person (perhaps because the transferee is appointed as trustee)? Is it not obvious that, when assets have been transferred to a new trustee, the old trustee is no longer the owner? […]"[41],the author referring especially to art. X.-8:502 of DCFR.

If we extend the analysis and research these notions, comparing the English and French versions of the DCFR[42], we notice that in French several (different) terms are used for words that in English derive from "(to) vest". As an example, we will present some phrases from different articles: art. X.-1:203 para. (2): eng. „The trustee is the person in whom the trust fund becomes or remains *vested*", fr. „Le fiduciaire est celui auquel est *confié* un fonds fiduciaire"; art. X.-8:502 para.(1): eng. „*Title* to a trust asset *vests* in a person", fr. „*Le droit* à un actif fiduciaire *est remis* à une personne"; art. X.-8:502 para.(2): eng. „*The vesting* of an asset in a person who is appointed a trustee does not *divest* any continuing trustees", fr. „*La remise* d'un actif à une personne nommée comme fiduciaire ne *dépossède* pas les fiduciaires permanents".

From the perspective of terminological analysis, we can object that the term "confié" used in French would be usually translated (in Romanian) as "încredințat (în grija cuiva)" (eng. "entrusted (in someone's care)"), a meaning that is not precise enough: this entrustment may involve or, as the case may be, may not necessarily involve the transfer of ownership. Finally, it is certain that operating with specific notions from a particular legal system, when transposed into another legal system, presents difficulties both conceptually and terminologically, and translation problems can exacerbate the situation, sometimes leading to distortions or confusions.

Reflecting on these issues from the perspective of the Civil Code of the Republic of Moldova, we notice that the national legislator opted for the use of the terms "*titlu*" (eng. „title"), „*titular*" (eng. "holder"), „*transmitere* a titlului/drepturilor" (eng. "transmission of title/rights"), „*lipsire* de titlu/drepturi" (eng. "deprivation of title/rights"), etc. For example, for art. X.-8: 502 of DCFR (eng. *Vesting and divesting of trust assets*, fr. *Remise des actifs fiduciaires et dépossession*) is correspondent (as meaning/object of regulation) the art. 2137 of the Civil Code of the Republic of Moldova (rom. *Transmiterea şi lipsirea de drepturile fiduciei*), from which we can deduce how the legislator chose to translate the terms from DCFR. Thus, the phrases used in the Civil Code of the Republic of Moldova are sufficiently clear from a terminological point of view, but

[41] Van Erp Sjef, *op. cit.*, p. 482.
[42] DCFR. Translation Project. English – French. Version of 15 May 2012.

there are questions at a conceptual level. For example, the question pointed to DCFR is also valid in this case: is "*titular*" (eng. "holder") equivalent to "*proprietar*" (eng. "owner")? In short, the answer would most likely be "Yes" (if the property right is part of the trust fund), but there are a lot of problematic issues to discuss here. Aspects related to conceptual issues go beyond the scope of this section but have been analyzed in other contexts and will also be addressed in future works.

Although we imagine how difficult it was for DCFR editors to present the English trust in civil terms, we must recognize that mixing concepts and terminology seems to have created more problems than solutions, so the result is criticized as sometimes unclear for both common law and continental lawyers.

However, we will conclude this section by reiterating that the Book X authors' efforts could not be neglected. Despite the fact that various objections have been raised to this Book, almost every critical exposition has been followed by a generally positive appreciation of the results or, at least, of the work done. Ben McFarlane concluded that "the conceptual basis of the trust set out in Book X, whilst controversial, is a marked improvement on other possible means of explaining the trust."[43] On a similar note, William Swadling mentioned the following: "in that it shares many attributes of the common law trust, it may be of some use to those civilian jurisdictions wanting to incorporate the trust device into their law, though it provides a mere skeleton when compared to vast corpus of detailed law which is the common law trust."[44]

A few years after this statement, Professor Swadling's assumption came true: the model of the DCFR trust *was very useful* for the legislator of the Republic of Moldova, serving as a fundamental source of inspiration in the regulation of the institution called "Fiducia".

5. Following the DCFR trust model for regulating the „fiducia" in the Civil Code of the Republic of Moldova

At the end of 2018, the Civil Code of the Republic of Moldova was modernized. The amendments made by Law no. 133 of 15.11.2018 (in force since 01.03.2019, with some exceptions) aligned national private law with international trends. An important novelty was the introduction of an additional title in Book III ("Obligations"): Title IV ("Fiducia"), consisting of 10 chapters - 107 articles (art. 2055 - art. 2161). As mentioned in the Information note on the Draft Law on modernizing the Civil Code[45], the regulations on *fiducia* were based on the Book

[43] McFarlane Ben, *op. cit.*, p. 472.
[44] Swadling William, *op. cit.*, p. 30.
[45] Information note on the Draft Law on modernizing the Civil Code and amending and supplementing some legislative acts, the document is available online at: http://justice.gov.md/public/files/transparenta_in_procesul_decizional/coordonare/2017/aprilie/Nota_informativ_proiect_amendare_Cod_civil_xxxxxxx.pdf (last accessed at 10.11.2021), p. 90.

X of the DCFR. In addition, legislative developments in other states have been taken into account and the necessary adjustments have been made to adapt and introduce this new institution into national private law.

If we analyze the content of the norms, it is clear that the rules of the Civil Code of the Republic of Moldova followed, as a priority, the DCFR model, being made only a few indispensable adaptations. Based on the comparative research, we established that about 90 of the 107 articles in the Civil Code of the Republic of Moldova are founded on the corresponding articles in the DCFR. From the opposite perspective, we notice that the major differences concern the constitution of the trust (chapter III of the CC RM: art. 2074-2081, except for art. 2077), the provisions on formalities - form of juridical act, requirements for registration; rules on opposability; the liability of the trustee etc. At the same time, there are adapted the rules on the transmission and deprivation of trust rights (art. 2137) and, additionally, the Civil Code of the Republic of Moldova provides for the right of claim (revendication) of the beneficiary - art. 2065 alin. (2), the equivalent of which we did not identify in the DCFR.

The high level of similarity between the *fiducia* in the Civil Code of the Republic of Moldova and the DCFR trust (in terms of concept, structure of regulation and meaning of rules) determines us to pay more attention to Book X of the DCFR. However, in this paper we will not discuss all the regulations in this field. A general presentation of DCFR and, especially, of Book X has already been made in the literature, being mentioned even the similarities or differences in relation to the *fiducia* regulated in the Civil Code of Romania.[46]

In the following, we will analyze mainly the notion of trust in the DCFR and that of *fiducia* in the Civil Code of the Republic of Moldova. Thus, we will present several opinions set out in the literature on the concept of trust in the DCFR and we will compare it, in some aspects, with the concepts of *fiducia* in the civil legislations of the Republic of Moldova and of Romania.

6. Comparative analysis of the definition of trust in the DCFR and of the definition of *fiducia* in the Civil Code of the Republic of Moldova

Terminological issues. Before starting the comparative analysis between the concept of trust in the DCFR and that of *fiducia* in the Civil Code of the Republic of Moldova, it is necessary to make a brief terminological clarification. The term "trust", used by the authors in the official version of the DCFR (in English), has been translated into the French version by the term "fiducie", with all related terminology adapted. The terminology used in the Civil Code of the Republic of Moldova is much more similar to that used in the French

[46] In this regard, see: Moreanu Daniel, *Fiducia și Trust-ul, op. cit.*, p. 501-506; Moreanu Daniel, *Trust-ul în cadrul unui viitor Cod Civil European*. In: Motica R.I., Pașca V., Bercea L. (eds.). *Studii și cercetări juridice europene. Conferința internațională a doctoranzilor în drept,* ed. 8, Timișoara, 2016. Universul Juridic, Bucharest, 2016, p. 207-213.

version of the DCFR (obviously, given that both are Romance languages). English terminology seems to operate more with notions known in common law, and the one in French seems to transpose notions through the prism of general concepts known in civil law systems. Thus, it is sometimes difficult to equate terms used in one language or another.

The issues generated at the terminological[47] level by the institution of the trust/*fiducie* are a broad topic of discussion and, yet, exceed the purpose of this article. However, to be able to effectively compare the provisions of the DCFR and those of the Civil Code of the Republic of Moldova, we must specify the terminological framework of the discussions. Thus, we will consider as equivalent the following terms in English-French-Romanian (as used in the English version of DCFR, the French version of DCFR and the Civil Code of the Republic of Moldova): *the trust – la fiducie – fiducia; truster – constituant – constituitor; trustee – fiduciaire – fiduciar; beneficiary – bénéficiaire – beneficiar; trust auxiliary - auxiliaire de la fiducie - asistent al fiduciei; assets – actifs* – (the faithful Romanian translation would be „active"; the Civil Code of the Republic of Moldova does not use the exact translation of this term, but uses as a conceptual equivalent the terms „drepturi" or „masă patrimonială", as the case may be); *the trust fund – le fonds fiduciaire - masa patrimonială fiduciară; trust terms – les (modalités ou) termes de la fiducie - condițiile fiduciei; public benefit purpose – intérêt général – scop de utilitate publică.*

Comparative analysis of the definitions. According to art. X-1: 201 of the DCFR, „a trust is a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes."

According to art. 2055 CC RM, „a trust is a legal relationship in which a party (trustee) is obliged to become the holder of a patrimonial mass (trust fund), to administer it and to dispose of it, in accordance with the terms governing the relationship (trust terms), to benefit a beneficiary or advance a public benefit purpose."

A simple comparative look evokes the striking similarity of the definitions. It is certain that the definition given by the legislator of the Republic of Moldova follows the model of the definition given to the trust in DCFR. The essential difference consists only in the phrase "[…] to become the holder […]" from the Civil Code of the Republic of Moldova. Otherwise, the differences are rather at the level of translation (some minor ones may arise even from the premise if for the translation we take as initial text the English or French version of DCFR). Finally, in this case, the indissoluble connection between the meaning of the definitions is obvious. Thus, we will further analyze their component parts, also

[47] There are many works that address this topic. One of the most extensive and recent works is: Gvelesiani Irina, *Trusts and Trust-like Devices: Translation and Interpretation*, LexisNexis Canada, Toronto, ON, 2021.

guided by the explanations provided by the authors of the DCFR in the comments.

The definition of trust in the Civil Code of the Republic of Moldova reveals several important aspects: - a trust is a legal relationship, - an essential part of it is the trustee, - the trustee has the obligation to become the holder of the trust fund (as we indicated above, in essence, only this point constitutes a real difference between the definition provided by the Civil Code of the Republic of Moldova and that of DCFR, which we will analyze in the last section), to administer it and dispose of it, - the trustee's obligations concern the trust fund, - they must be fulfilled in accordance with the trust terms, and - to benefit a beneficiary or advance a public benefit purpose. Some of these particularities will be analyzed below or in subsequent works. At this stage, however, we will mainly discuss the first of the characteristics – the trust is a legal relationship.

A trust is a legal relationship. The DCFR authors stated that in Book X, "the trust is not treated as a legal person independent of the trustees (who on that approach would be reduced to the status of members of its governing board). Nor is legal personality conferred on the fund itself, since this would leave too much out of the equation. While the special nature of the trust patrimony (and in particular its unavailability to the trustees' personal creditors) amounts to a defining aspect of a trust, the rights and duties of the trustee to administer undoubtedly form an equally central pillar of the trust institution. It therefore seems more immediately comprehensible if the trust is defined in terms of an arrangement of rights and obligations focused on the trust fund."[48] We also deduce from the DCFR Comments that a trust, within the meaning of Book X, is treated as an obligation *sui generis*.[49] In this context, William Swadling, who identified both strengths and some criticisms of the definition provided in the DCFR, welcomed the clear statement that „a trust is not a thing in itself, not a legal person like a corporation or a foundation, but a relationship between people in respect of 'assets'."[50]

The approach to trust as a legal relationship is also found in the Convention on the Law Applicable to Trusts and on their Recognition[51], concluded at The Hague on 1 July 1985 (the Hague Convention). Article 2 of the Hague Convention provides: "for the purposes of this Convention, the term "trust" refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose." Therefore, there is a uniform approach in the Hague Convention, DCFR, and Civil Code of the Republic of Moldova.

Comparing the provisions of the Hague Convention, DCFR, and Civil

[48] Von Bar Christian, Clive Eric (eds.), *op. cit.*, p. 5679.
[49] Ibid, p. 5680.
[50] Swadling William, *op. cit.*, p. 23.
[51] Convention on the Law Applicable to Trusts and on their Recognition (The Hague, 01.07.1985), the document is available online at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=59 (last accessed at 10.11.2021).

Code of the Republic of Moldova, we also note that the definition in the Convention expressly states that this legal relationship can be established "inter vivos or on death". This is a difference only at the notion level and not at the concept level: although this aspect is not included in the definitions contained in DCFR or in the Civil Code of the Republic of Moldova, the rule is the same and results from the following articles (art. X-2:103 of DCFR, respectively art. 2074 and 2077 of CC RM). This aspect, however, constitutes a difference between the trust in the DCFR or the *fiducia* from the Civil Code of the Republic of Moldova and the *fiducia* in the Civil Code of Romania. According to par. (1), art. 774 of the Civil Code of Romania, *fiducia* can only be established by law or by contract.

In the same context, we must specify that the DCFR trust (similarly the trust in the Civil Code of the Republic of Moldova) can arise not only by transfer to another person (from the truster to the trustee), but also without transfer, by a unilateral declaration of the truster by which he declares himself the sole trustee. A trust may also arise on the basis of a testamentary disposition. From this perspective, the DCFR trust and the *fiducia* in the Civil Code of the Republic of Moldova follow the model of the English trust, which is positively appreciated in academia.[52] This aspect, however, constitutes a new significant difference from the Romanian *fiducia*. As previously mentioned, according to par. (1) art. 774 of the Civil Code of Romania, the *fiducia* can be established only by law or by contract, being excluded the possibility of creating a *fiducia* by unilateral act of the constituent (truster).[53] In addition, art. 775 of the Romanian Civil Code prohibits indirect (and direct[54]) liberalities in favor of the beneficiary.

A trust is not a legal person. A trust is not a legal person neither in terms of DCFR nor in terms of the Civil Code of the Republic of Moldova. This fact was also explained by the DCFR authors, as we indicated above. This approach has been positively appreciated in the literature. During a symposium dedicated to the DCFR trust, Ben McFarlane (Oxford University) presented his comments from an English perspective and welcomed the fact that „Book X does not adopt the notion, sometimes appearing even in Common Law jurisdictions, that a trust

[52] Swadling William, *op. cit.*, p. 23.

[53] In this regard, see: Golub Sergiu, *Fiducia. Analiza definiției legale. Genul proxim*, „Revista Română de Drept al Afacerilor", 2016, no. 11, p. 31-59, p. 40-43. Although he supports the second opinion, the author cites both the opinions that admit and those that exclude the possibility of establishing a trust on the basis of a unilateral act of the founder.

[54] We agree with the opinion according to which the intention of the Romanian legislator was to ban the liberalities (both direct and indirect). In this regard, see: Moreanu Daniel, *Fiducia și Trustul*, *op. cit.*, p. 323. In the opposite sense (for the opinion that only indirect liberalities are prohibited and direct liberalities would be allowed), see: Uniunea Națională a Notarilor Publici din România, *Codul civil al României. Îndrumar notarial, vol. I-II*, Ed. Monitorul Oficial, Bucharest, 2011, p. 257; Bogaru Cristian, *Aspecte practice ale fiduciei*, presentation, Bucharest, 28-29 September 2012, the document is available online at: https://issuu.com/hbalaw/docs/hba_fiducia_2012 (last accessed at 10.11.2021), p. 4; Chirică Dan. *Fiducia în noul Cod civil*. In: *Noile Coduri ale României. Studii și cercetări juridice,* Ed. Universul Juridic, Bucharest, 2011, p. 185-207, p. 189-190, in this last work, however, the expression chosen by the Romanian legislator was firmly criticized.

has legal personality."[55] The same opinion on the relationship between trust and the concept of legal person is shared by Lionel Smith, who commented in a 2008 article on the following: „The common law trust is not a legal person; I argue that it would be a mistake for any legal system to conceptualize the trust as a legal person, since the result will only be to eliminate the trust as a fundamental legal institution."[56]

Private purpose trusts are prohibited. Another peculiarity of the trust, which results from the definition provided in DCFR (and from the definition provided in the Civil Code of the Republic of Moldova as well), which was positively assessed, is that trusts can be established only for the benefit of a beneficiary or for a public utility purpose: „In other words, private purpose trusts[57] are prohibited."[58] This rule also exists in English law and has been established in the case of Astor's Settlement Trusts [1952] Ch 534: „[…] if the purposes are not charitable, great difficulties arise both in theory and in practice. In theory, because having regard to the historical origins of equity it is difficult to visualize the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration reform […] A court of equity does not recognise as valid a trust which it cannot both enforce and control […]"[59]

A trust is not based on the division of property. Another aspect that has received a favorable evaluation in academia is that the DCFR trust is not based on the division of property. Analyzing the rules from a common law perspective, Swadling welcomed „the fact that the definition does not fall into the trap of thinking that a trust involves a division of 'ownership' into legal and equitable parts. Not only would this be impossible in legal systems which did not have

[55] McFarlane Ben, *op. cit.*, p. 472.
[56] Smith Lionel D. *Trust and Patrimony*, „Revue générale de droit", 2008, vol. 38, no. 2, p. 379-403, p. 381.
[57] Private purpose trusts are those trusts that are neither for the benefit of a person nor for charitable/public benefit purposes. Many of these trusts fail because of a lack of human beneficiary or individual who can enforce the trust. As an exception, there were cases in which such trusts were upheld to maintain specific animals, for monuments, tombs, the saying of masses, etc.). In this regard, see: Private Purpose Trust. The information is available online at: https://chrismallonlaw tutor.com/equity-and-trusts/private-purpose-trust/ (last accessed at 10.11.2021).
[58] Swadling William, *op. cit.*, p. 23.
[59] Re Astor's Settlement Trusts [1952] Ch 534, the information is available online at: https://en.wikipedia.org/wiki/Re_Astor%27s_Settlement_Trusts (last accessed at 10.11.2021).

equity, but it is in any case inaccurate[60] as a portrayal of the common law trust."[61] In this regard, he quoted McLelland J's statement in the Australian case of Transphere Pty Ltd: „Where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold and use those rights which the law gives him in accordance with the obligations which equity has imposed on him by virtue of the existence of the trust. Although this right of the beneficiary constitutes an equitable estate in the property, it is engrafted onto, not carved out of, the legal estate."[62]

The last three aspects analyzed (i.e., the trust is not a legal person, private purpose trusts are prohibited, and the trust is not based on the division of property in legal and equitable title) are also valid in the case of the Romanian *fiducia*. In the legal literature there are already several works exposing more detailed comparisons between *fiducia* in the Civil Code of Romania and DCFR trust[63] or the trust under the Civil Code of the Republic of Moldova[64].

Criticisms and improvements. Along with the positively appreciated elements, in the concept of the DCFR trust, there are also aspects that have been criticized. Fortunately, it seems that they have been remedied in the Civil Code of the Republic of Moldova. Apart from the constitution of trust[65] – a section that has been essentially adapted to the Republic of Moldova legislation; we note that there are some other improvements. For example, the following objection was raised in the literature regarding the word "assets" used in the definition of trust in DCFR: „the word 'assets' is far too loose. We hold, we transfer, we acquire 'rights', so that is the word which should be used. It might be said of an actor that his greatest asset is his looks, but looks cannot be held on trust."[66] The legislator of the Republic of Moldova seems to have followed exactly Swadling's advice and provided in par. (2) art. 2062 of CC RM that "Trust fund can include the *right*

[60] The presentation of the common law trust through the theory of the division of property into legal property and equitable property is often used, but, as we see, it is also often criticized. Opinions remain divided even in English literature. For example, Gary Watt has a different view than Swadling's and states the following: „Despite a recent academic trend of questioning the accuracy of the 'split property' metaphor for the relationship between legal and equitable title under a trust, it is hard to deny the metaphor's ongoing practical efficacy. The metaphor of the trust as divided or split ownership might not be perfect, but it remains the most efficient and persuasive way to elucidate most of, and the most significant of, the trust's practical effects—in particular the trust's proprietary effect in insolvency." In this regard, see: Watt Gary, *Trusts & Equity. 9th ed.*, Oxford University Press, Oxford, 2020, 672 p., p. 28-29.

[61] Swadling William, *op. cit.*, p. 23.

[62] Ibid.

[63] In this regard, see: Moreanu Daniel, *Fiducia și Trust-ul*, *op. cit.*, p. 501-506; Moreanu Daniel, *Trust-ul în cadrul unui viitor Cod Civil European…*, *op. cit.*, p. 207-213.

[64] In this regard, see: Digori Irina, *Some considerations regarding the regulation of „fiducia" in the Civil Code of the Republic of Moldova and in the Civil Code of Romania*, „Perspectives of Law and Public Administration", 2021, vol. 10, no. 1, p.104-117.

[65] For a critical analysis of this topic, see: Reid Kenneth G.C. *Constitution of Trust…*, *op. cit.*, p. 467-470.

[66] Swadling William, *op. cit.*, p. 24.

of property and other real rights over money and other goods, rights of claim of any kind, guarantees or other patrimonial rights or a set of such rights, present or future (trust rights)." Another significant improvement concerns the indication in the definition that the holder of the trust fund is the trustee.

Indication of the holder of the trust fund: key aspect in defining the trust concept. As mentioned above, the definition of trust in the Civil Code of the Republic of Moldova, unlike that in DCFR, contains the provision "[…] a party (trustee) is obliged to become the *holder* of a patrimonial mass (trust fund) […]", which clearly indicates that the trustee is the holder of the trust fund. On closer inspection, we notice that the legislator of the Republic of Moldova has combined the content of art. X. – 1: 201 and the content of par. (2) art. X. – 1: 203 of DCFR, introducing in the notion of trust also the definition of trustee. Although the essence does not change - the same provisions are contained in both the Civil Code of the Republic of Moldova and the DCFR, it seems that the option of the national legislator was an appropriate one.

Analyzing the opinions expressed in academia regarding the definition of trust in DCFR, we notice that a multitude of objections was directed towards the absence, in the definition, of clarity regarding the holder of the trust fund. The definition in the DCFR was called „striking"[67] and was considered „too wide"[68]: „Book X simply establishes that the trustee is obliged to administer or dispose of one or more assets. The definition makes no reference to a transfer of assets from the truster to the trustee, nor does it explain who possesses title to or enjoys ownership of the trust assets."[69] Therefore, it was argued that "it could equally cover a bailment[70] and even certain types of agency relationship."[71] This objection[72] was also made with regard to the definition of trust in Article 2 of the Hague Convention, which uses the wording: "assets have been placed under the control of a trustee". By comparison, at first sight, the definition in the DCFR is even more extensive than that in the Hague Convention, as it could possibly include in its scope even the power of appointment [power of designation with regard to the disposal of certain goods], which is very different thing to a trust[73], or direct representation, which, of course, are not functionally equivalent to a trust.[74]

Although the issue is resolved in the section immediately following (art.

[67] Sagaert Vincent, *The Trust Book in the DCFR: A civil lawyer's perspective*. In: van Erp S., Salomons A., Akkermans B. (eds.), The Future of European Property Law, Otto Schmidt/De Gruyter european law publishers, Berlin, Boston, 2012, p. 31-46, p. 32.
[68] Swadling William, *op. cit.*, p. 23-24.
[69] Braun Alexandra, *Trusts in the Draft Common Frame of Reference…*, *op. cit.*, p. 330.
[70] In this case the possession over a good is transferred by the owner to another person. In this regard, see: Thomson Reuters. Practical Law. Glossary: Bailment. The information is available online at: https://uk.practicallaw.thomsonreuters.com/9-381-8490?transitionType=Default&contextData=(sc.Default)&firstPage=true (last accessed at 10.11.2021).
[71] Swadling William, *op. cit.*, p. 24.
[72] Lupoi Maurizio, *The Shapeless Trust*, „Trusts & Trustees", 1995, vol. 1, no. 3, p. 15-18, p. 16.
[73] Swadling William, *op. cit.*, p. 23-24.
[74] Sagaert Vincent, *op. cit.*, p. 32.

X.-1: 202), where it is expressly stated that the trustee is the holder of the trust fund - and thus are excluded mechanisms mentioned above - Swadling warned that „it needs to be made clear from the start that a trust involves rights being held by one person for another or for a permitted purpose."[75] Finally, as it follows from the combination of art. X. – 1: 201 and para. (2) art. X. – 1: 203 of DCFR, in a trust, „the trustee has title to the trust assets, which he needs to segregate, but which do not comprise a separate legal entity" (which is similar to the rules of English law).[76]

7. Conclusions

The Draft Common Frame of Reference (DCFR) is a remarkable achievement for European private law, widely appreciated in academia. Its value lies mainly in the comments and notes that refer to the multitude of legal systems in the European area. Regulation of the trust in a separate book - Book X denotes the high degree of interest oriented at the international level towards this legal mechanism. Book X attempted to provide a general instrument, comparable in width to that offered in the established trust jurisdictions, which is revealed by a volume of 116 articles. However, the desideratum was a difficult one. The authors of the Book have faced a profound unevenness of the legal traditions in this area, and it has been a great challenge to create rules that satisfy both groups of jurisdictions: those who know and those who do not know trusts in their legal system.

The effort of the authors of Book X was highly appreciated, but there were also multiple objections regarding the methodology used and the content of the rules. Two of the most important criticisms of this Book are the predominant influence of a single legal system - the English one (respectively, the lack of the common element, of harmonization, based on comparative law) and the limited comments.

Analyzing the content of Book X and the opinions expressed in the literature, we notice that in DCFR is regulated a modified English trust. Although the basic source for the creation of the rules was the English law of trusts, it was also attested the inspiration of the drafters of the existing regulations in Scotland and Malta. In addition, the English model has been substantially changed under the influence of continental legal thinking. Therefore, there are problems both in terms of terminology and in terms of concept. For this reason, it has been mentioned in the literature that there are incomprehensible aspects for both English and continental lawyers. Despite the objections, the work of the editors was appreciated, and some academics considered that the model of trust in DCFR may be useful for legal systems wishing to introduce such a legal instrument.

Turning our attention to the institution of the trust (*fiducia*) regulated in

[75] Swadling William, *op. cit.*, p. 24.
[76] Braun Alexandra, *Trusts in the Draft Common Frame of Reference…*, *op. cit.*, p. 330.

the Civil Code of the Republic of Moldova, we find that the rules in Book X of DCFR were really very useful for the national legislator: about 90 of the 107 articles of the Civil Code of the Republic of Moldova are based on the corresponding articles of the DCFR. Of course, taking inspiration from Book X, the legislator also made some indispensable adaptations. The major differences concern the constitution of the trust, the provisions on formalities - form of juridical act, requirements for registration, rules on opposability, the liability of the trustee, the rules on the transmission and deprivation of trust rights, the right of claim (revendication) of the beneficiary, etc.

The comparative research of the definition of trust in DCFR and of the definition of trust in the Civil Code of the Republic of Moldova allowed us to establish the similarity between the two concepts. From the definition of trust (set out in the Civil Code of the Republic of Moldova), we have deduced the following important features: - trust is a legal relationship, - an essential part of it is the trustee, - the trustee has the obligation to become the holder of the trust fund (this aspect constituting a difference between the definition provided by the Civil Code of the Republic of Moldova and that of DCFR), to administer it and dispose of it, - the trustee's obligations concern the trust fund, - they must be fulfilled in accordance with the trust terms, and - to benefit a beneficiary or advance a public benefit purpose.

Studying the opinions expressed in the literature on the definition of trust in DCFR, we determined which elements were appreciated positively and which were criticized. The definition of trust in the Civil Code of the Republic of Moldova corresponds to all the positively evaluated criteria and even presents some welcome adjustments compared to the notion in DCFR.

Thus, the following aspects regarding the *fiducia*/trust are to be appreciated: - is presented as a legal relationship (established inter vivos or mortis causa) and not as a legal person; - may be constituted not only by a transfer to another person (from the truster to the trustee) but also by a unilateral declaration of the truster by which he declares himself the sole trustee or by a testamentary disposition; - it can be constituted only for the benefit of a beneficiary or for a public utility purpose (i.e., private purpose trusts are prohibited); - does not involve the division of property (in legal title and equitable title); in the Civil Code of the Republic of Moldova, the definition of trust (as opposed to the definition of trust in DCFR) clearly indicates that the holder of the trust fund is the trustee.

In the context of the analysis of these characteristics, some similarities and differences were established in relation to the institution of *fiducia* in Romanian legislation. Thus, similar to the institutions regulated in DCFR and in the Civil Code of the Republic of Moldova, the *fiducia* regulated in the Civil Code of Romania: is not a legal person, can not be established for a private purpose, and is not based on the division of property into legal title and equitable title. The major differences mentioned in this paper are the following: the Romanian

fiducia can be established only by law or contract (not by unilateral act), only inter vivos; trust-liberalities are prohibited.

Finally, all the opinions and issues discussed in this paper facilitate a better understanding of the concept of trust in DCFR and, in some respects, even of the *fiducia* in the Civil Code of the Republic of Moldova or of the *fiducia* in the Civil Code of Romania. The analysis conducted made it possible to identify the essential features of the trust/*fiducia*, resulting from definitions, but also to reveal the appropriateness and importance of adjustments made by the legislator of the Republic of Moldova in the definition of *fiducia*.

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The governance of groups under Albanian company law: what can be changed?

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Abstract

Corporate groups are an emerging business structure that deserves further elaboration. They are much more encountered in an international context. To reflect this reality, company groups are given special attention in the Albanian company law. The introduction of a detailed regulation for corporate groups was a novelty for the Albanian company law, back in 2008 when it was passed. The experts engaged in drafting the law opted for two categories of company groups which were considered distinct and provided for different legal consequences for each category This article aims at elaborating governance issues of these groups recognized by the Albanian legislation through an analytical approach of the provisions. First an introduction of the groups and the regulation in the ACL will take place. Then specific considerations as regards governance issues will be further elaborated in order to pinpoint any need for further improvement. Finally, the article concludes with a set of recommendations of what can be changed towards a better organization and governance of groups in Albania.

Keywords*: company law, corporate groups, group liability, control group, equity group.*

JEL Classification: K22

1. Introduction

Corporate governance is a rather new concept for Albanian companies. The main body of norms that regulate corporate governance is laid in the Law "on entrepreneurs and companies" enacted in 2008. This act has embedded a variety of provisions that aim at balancing the powers within a company, but certainly it cannot cover all corporate governance related issues. Therefore, in 2011, a Code of Corporate Governance was enacted for unlisted companies.[2] Basically, corporations are governed by the mandatory nature of the company law provisions and the principles of corporate governance code that entail a non-mandatory nature. The Code contains 14 principles of those 9 are dedicated to unlisted joint stock companies and the rest address issues related to bigger unlisted joint stock companies. However, none of the principles is dedicated to groups of companies,

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[2] Kodi i Drejtimit të Brendshëm i Shoqërive Aksionare Jo të Listuara në Bursë (Albanian Code for Corporate Governance of Unlisted Joint-Stock Companies), available online at https://alse.al/wp-content/uploads/2020/06/cg_code_unlisted_companies_albania_14apr2008_al1.pdf, last access on 29.7.2021. This code is a set of non-mandatory principles mainly focusing on the board and its composition. Few principles are dedicated to family companies being predominant in Albania.

hence the only source that regulates the relationships and governance of groups is found in the company law provisions.

The introduction of detailed provisions for corporate groups was a novelty for the Albanian company law[3] (ACL), back in 2008 when it was passed. The experts engaged in drafting the law opted for two categories of company groups which were considered distinct and provided for different consequences.[4]

This article aims at elaborating governance issues of groups recognized by the Albanian legislation through an analytical approach. First an introduction of the groups and the regulation in the ACL will take place. Then specific considerations as regards governance issues will be further elaborated to pinpoint any need for further improvement. Finally, the article concludes with a set of recommendations of what can be changed towards a better organization and governance of groups in Albania.

2. Groups of companies under ACL

Under ACL corporate groups are governed by a specific set of articles[5] which provide the structural and organizational framework as well as provisions regarding intra-group liability. Given the custom-made regulation for groups, some provisions that are specifically designed to single companies are not applicable to corporate groups.

For the first time in the Albanian company law, two different categories of groups were introduced: (1) Control groups and (2) Equity groups.[6] These groups are distinguished by the level of control exercised by the parent company towards its subsidiary and mainly by the consequences that the law provides for the parent company in each category of group. Clearly, the provisions were highly influenced by the German law on groups but brought with certain corrections.[7] Therefore, in the forthcoming sections, for a better understanding of the provisions, reference will be made to the German law.

a. Control Groups. Pursuant to the definition of Article 207(1) of ACL control group exists "… *where one company regularly behaves and acts subject*

[3] Janet Dine, Michael Blecher, *The Law on Entrepreneurs and Companies, Text with Commentary*, (2016), Gent Grafik, Tirana, p. 200.

[4] Janet Dine, *Jurisdictional arbitrage by multinational companies: a national law solution?*, „Journal of Human Rights and the Environment", Vol. 3 No. 1, March 2012, pp. 44–69, p. 65.

[5] Articles 206-213 of Law no.9901, dated 14.04.2008 "On Entrepreneurs and Companies", dated 14.04.2008 "On Entrepreneurs and Companies", as amended, published in the Official Gazette No. 60.

[6] Article 207 (1) and 207 (2) of Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies", as amended.

[7] Janet Dine, Michael Blecher, *op. cit.*, 2016, p. 200-210. This may be even due to the fact that one of the experts that was engaged in drafting this law was from Germany and he certainly left his imprint in the Albanian law.

to the directions or instructions of another company."[8] Hence, accordingly this section of the law (i.e. articles 206-212) applies only when these relations are established between companies and not when the "controller" is an individual. Basically, one individual who controls at the same time several companies cannot be considered as a parent company and these provisions should not apply in this case. As it is widely accepted, control is mainly manifested when the parent holds more the 50% of the shares in a company[9], but the provision of the ACL does not limit control only through share ownership. Clearly, there may be other cases when control groups may be formed.

As indicated by the drafters of the law, there are few deviations from the German model. First, the provision does not necessarily require an agreement[10] for the establishment of the control group, instead it requires a continuous interference through directions or instructions of one company to another. The source of this dependence is irrelevant, be it a dominance/control agreement, share ownership, or an economic dependence (a distribution or franchise contract). What seems important from the wording is the constant dependency of the subsidiary from the directions and instructions of the controller.

b. Directors' duties in control groups. In ACL fiduciary duties reflect the obligation of directors to build a trust relationship with shareholders and certainly the company as a whole.[11] This general principle embedded in article 14 of ACL is further elaborated by additional provisions such as articles 98 and 163. These provisions enhance the obligation of directors with the duty of loyalty towards the best interest of the company and duty of care and skill.[12] It is surprising that the law does not require any fiduciary duty of the parent towards the subsidiary. Certainly, one may assume that the general principles of the law (regarding

[8] Article 207: "(1) A parent-subsidiary relationship shall be deemed to exist where one company is accustomed to act in accordance with the directions or instructions of another company. This is called control group. (2) If a company, based on its capital share in another company or based on an agreement with that company, has the rights to appoint at least 30% of members of the Board of Directors or Supervisory Board or of the Managing Directors of that company or if it has at least 30% of votes at the General Meeting, it shall be regarded as parent and the other one as its subsidiary. This is called equity group. (3) The parent's rights over the subsidiary established in paragraph 2 shall be determined taking into account voting rights in the subsidiary held by any other subsidiary of that parent or held by a third party acting on account of the parent or its subsidiaries. (4) The third party is presumed to act on account of the parent if he is named in paragraphed 2 or 3 of Article 13." (Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies").

[9] See section 15.05 of European Model Company Act, 2017, p.385, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348, last access on 4.11.2021.

[10] Cf. Section 15-19 of German Act on Joint Stock Company, English translation available online at http://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.pdf last access on 29.7.2021.

[11] Janet Dine, Michael Blecher, *The Law on Entrepreneurs and Companies, Text with Commentary*, (2016), Gent Grafik, Tirana, p. 60.

[12] Ibid, p. 121.

fiduciary duties) may apply[13], but groups represent a complex structure that requires custom-build rules.

Anyhow, we suggest that reference should be made to the general provisions of the law for directors' duties as regard the specific forms of company. First, under article 14 of ACL directors are under a general obligation of fiduciary duty which obliges them to take into consideration the interest of the company and of other partners, members or shareholders. This fiduciary duty extends likewise to partners, members and shareholders that should take into consideration the interest of the company and other partners, members and shareholders. Basically, this fiduciary duty can be considered as the obligation of the controlling shareholders towards minority ones. In the groups context these duties may arise in a vertical relation that is between the parent company as the majority shareholder of the controlled company and the minority shareholders of the latter. Apparently, in the corporate group structure the conflicts (or agency conflict as it is normally referred to) are much more complex because the behavior of the parent (controlling shareholders) company, may disregard the interest of certain subsidiaries because the interest of other subsidiaries may be more beneficial.[14] Likewise the directors of the subsidiary may disregard the interest of the parent and/or other subsidiaries that are part of the group. But can they be so independent to act solely in the interest of the subsidiary? Normally in this case, the subsidiary's directors are not under any obligation to follow the parent's interest while managing the subsidiary[15], but are their independence is questionable, because there is a pressing interest of the parent to integrate its interest in the subsidiary decision making. This is also supported by empirical evidence that shows that the interests of the subsidiary are subordinated to the benefit of the group as a whole.[16] In case the parent interferes so vigorously in the subsidiary decision-making, then this behavior may reshape its position as a de facto or shadow director of the subsidiary. Afterwards, directors' fiduciary duties should extend to the parent as well.

One of the novelties of the ACL was that it had integrated for the first time the environmental concerns in the directors' fiduciary duties. This means that directors of the company when performing their duties should consider, beside the interest of the company as a whole, the environmental sustainability of the operations as well. Basically, the interest of the company encompasses a

[13] Under article 14 of ACL shareholders are obliged to take into the consideration (while acting as such) the interest of the company and other shareholders as well. Basically, shareholders owe fiduciary duties to the company and other shareholders. In the group context this may be translated as an obligation of the parent towards the fiduciary.

[14] Klaus Hopt, *Groups of Companies a Comparative Study on the Economics, Law and Regulation of Corporate Groups*, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560935, p. 5, last access on 28.7.2021

[15] Eike Thomas Bicker, *Creditor Protection in Corporate Groups*, p. 25, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=920472, last access 20.10.2021.

[16] Ibid.

broader spectrum of interest.[17] One may ask, should a control group integrate the environmental concern of the subsidiary? Given the absence of a recognized group interest for control groups, this may not be applicable. However, in case there are losses or claims of involuntary creditors of the subsidiary then the parent should compensate this losses. Furthermore, if courts take the stance that the parent should be considered as a de facto director, then the environmental concerns of the subsidiary should be evaluated and integrated by the parent company as well.

c. Obligations of the parent company in control groups. When a control group exists between the parent and the subsidiary, the former is held liable for compensating the subsidiary for its annual losses.[18] Unlike German law that imposes liability for the parent only in case an agreement is concluded (that is for contractual groups), the Albanian law does not make such distinction.[19] Article 208 of the ACL in a plain and clear language recognizes the parent as responsible, regardless of how it came into being, for annual losses of the subsidiary when it says that: "*1) Where there is a parent-subsidiary relationship as defined in Article 207 Paragraph 1 of the present Law, the parent shall have a duty to compensate the subsidiary for its annual losses. …"*

The underlying rationale of this provision lies in the fact that the subsidiary has no independent decision-making. The nerve centre in this parent-subsidiary relationship is the parent; therefore, the latter should bear all the cost of its action. Hence, in control group the privilege of limited liability of the shareholders (that are not individuals), is not applicable. The application of tailor-made rules for companies that are part of a group constitutes a deviation from the general principle of limited liability enshrined in the doctrine and reflected in article 3 of the ACL. In this context, the lawmaker does not recognize the so-called group interest.[20] For those decisions that are in the interest of the group as a whole, but detrimental to the subsidiary, the consequence is the same, i.e. compensation. This approach has the German imprint which deviates from the (French) Rozenblum doctrine that lately is gaining acceptance in Member States.[21]

Moreover, it is noteworthy that the law does not require any causal link between the consequence (annual losses) and the control conducted by the parent. Instead, the parent incurs a full liability for all subsidiary losses since the management of the latter is in the hands of the former. In this vein, this provision offers protection to all the stakeholders of the subsidiary. Given this background,

[17] Janet Dine, *op. cit.*, 2012, p. 65.
[18] Article 208 of the Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".
[19] Janet Dine, Michael Blecher, *op. cit.*, 2016, p. 203. See also, Klaus Hopt, *op. cit*, p. 10.
[20] Martin Winner, *Group Interest in European Company Law: an Overview,* Acta Univ. Sapientiae, Legal Studies, 5, 1 (2016) 85–96, p. 88.
[21] European Model Company Act, 2017, p.381, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348, last access on 4.11.2021.

the ACL fully meets the two-fold objective of the corporate group law that is to protect minority shareholders and creditors.[22]

d. Protection of minority shareholders and stakeholders in control groups. Protection of minority shareholders is a general principle of ACL, granted via several instruments such as the obligation of the company to offer transparency through mandatory disclosure, special investigations, derivative actions, qualified majority for a wide array of decisions etc.[23] In a control group context, these mechanisms are enhanced by providing that members and shareholders of the subsidiary have at any time the right to require the parent to buy their securities.[24] This provision results somehow problematic because it does not specify any timeframe within which the parent is obliged to fulfill its obligation and especially what price should the parent pay for these securities. Key elements are missing in this provision, while in another very similar provision, regulating sell-out right where a parent holds 90% or more of the subsidiary's shares, the law offers more protection by setting forth the obligation of the parent to buy the shares at the market price within 6 months.[25] Here the law has granted more protection for stakeholders, but has not made any specific regulation for wholly-owned subsidiaries as compared to non-wholly owned ones. Clearly, the standard of protection should be more lenient in the former case.[26]

To provide additional protection towards minority shareholders, there are few more provisions in the takeover bid law, which set forth the obligation for mandatory bid[27] and sell-out right.[28]

3. Related party transactions

Another mechanism that offers protection to minority shareholders in individual companies is related party transactions.[29] Related party transactions are addressed in the Albanian company law through detailed provisions on conditions to be met and mandatory disclosure of the relevant transaction. The wording of the provision does not explicitly refer to the group structure; therefore, intra-

[22] Klaus Hopt, *op. cit.*, p. 3.
[23] For example, articles 87, 91, 92, 145, 150, 151 etc. of Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".
[24] Article 208(2) of the Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".
[25] Article 212 of Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".
[26] European Model Company Act, 2017, p. 382, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348, last access on 4.11.2021.
[27] Article 28 of the Law no. 10236, dated 18.2.2010, "On takeover of public companies", published in the Official Gazette 23.
[28] Article 26, ibid.
[29] In France there is not specific regulation for related party transaction either, but the judiciary through the Rozenblum doctrine has set the limits of these transactions between companies that are part of the group. See, Geneviève Helleringer, *Related Party Transactions in France - A Critical Assessment*, Working Paper N° 474/2019 August 2019, available online at https://ecgi.global/sites/default/files/working_papers/documents/finalhelleringer.pdf, last access on 4.11.2021.

group transactions remain uncovered. One may normally ask; how can unbalanced transaction in intra-group relation be handled? Given the lack of specific regulation, a *lato sensu* interpretation of the provisions directed to individual companies can extend to the group relations as well.

Article 13 (2) of the ACL highlights that related party transactions are subject to disclosure of the terms of the transactions, the nature, and the scope of the interest of the persons involved and the approval by the pertinent body, that for joint stock companies are the board and the general assembly[30]. This provision should be considered as an extension of the fiduciary duty of the directors and therefore as an obligation of the parent company towards the subsidiary(ies). According to this provision the "person that is authorized to represent or to supervise the company may not enter contracts or into other relationship with the company" unless the aforementioned conditions are met. In the group relation the person that may exercise control over the subsidiary is clearly the parent. Therefore, in this context, the parent should conclude arm's length transaction with the subsidiary or comply with the conditions as provided by the provisions. If it fails to do so, the minority shareholders of the subsidiary may challenge the validity of the intra-group transaction. Anyhow in wholly owned subsidiaries there may not be conflicting interest therefore, this may be applicable to partially owned subsidiaries.[31] However, it is worth noting that the law needs to be revised as to encompass even related party transactions between groups of companies or this may be part of the provisions of the Corporate Governance Code. When making these amendments the lawmaker should take into consideration that certain transaction may be expected from the mandatory disclosure or getting the relevant approval as provided by the law, such as the transactions between the parent and its wholly owned company or transaction where no other related party of the company has an interest in the subsidiary undertaking or that national law provides for adequate protection of interests of the company, of the subsidiary and of their shareholders who are not a related party, including minority shareholders in such transactions.[32] Furthermore, there may be a need to adopt these rules to fit the group reality, because the approval by the general meeting that is normally required in case of related party transaction, may not work in a group context because the general meeting is basically the parent. Therefore, an approval granted by a group

[30] Article 13(2) of Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".

[31] Corporate Governance of Groups, OECD 2021, p. 19, available online at https://www.oecd-ilibrary.org/docserver/6302f79a-en.pdf?expires=1627596602&id=id&accname=guest&checksum=ABC2D58F52894D5B8F45AFA1485FE7E7, last access on 15.7.2021.

[32] Art. 9c(6)(a) Shareholders Rights Directive, Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, *OJ L 132, 20.5.2017, p. 1–25. See Also, Andreas Cahn and David C. Donald, Comparative Company Law. Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA, Cambridge University Press, 2018, p. 834.*

of independent directors or minority shareholders may be a working solution.[33]

4. Protection of creditors

Another group of stakeholders that is granted special protection in a control group relationship are creditors. This may be due to the fact that creditors in group of companies may be more prone to controlling shareholders opportunism and because the risk they face in groups structures are higher as compared to independent companies.[34]

Firstly, creditors are protected through the transparency obligation set forth in article 206 of the law. This protection is also extended to other stakeholders, but in this case, it is of specific relevance for creditors. Anyhow, it is questionable whether solely this disclosure obligation can guarantee creditor's rights or further information regarding the group structure is required. Pursuant to this regulation, there is a general obligation of the person that acquires or sells shares that exceeds or falls below the thresholds[35] to notify the National Business Centre in writing within 15 days as of the transaction.

Secondly, creditors, and other stakeholders in a company and group structure are protected via the requirement of consolidated accounts and their mandatory disclosure.[36] Under the Albanian legislation there is an obligation of the parent company to compile and store the consolidated account of the group.

Thirdly, according to the regulation offered by article 208 (3) of ACL, creditors of the subsidiary have at any time the right to require the parent to offer the necessary security for their claims. And what is worth emphasizing is that the law has included in the category of creditors the victims of wrongs done by the subsidiary (involuntary creditors), wherever the subsidiary is registered (Article 208 (4) of ACL). This provision apparently offers guaranties to a wide array of creditors, considering as such even the victims of wrongs done by the subsidiary.

However, this provision entails few problematic issues: firstly, it is not clear how involuntary creditors will be protected in case they are located in another jurisdiction, different from the parent's. Is this provision applicable and enforceable in the context of a multi-national company and if the parent and the subsidiary have different registered offices? It is questionable whether this right of involuntary creditors can be effectively enforced. Secondly, under article 208(2) the parent assumes full liability for the subsidiary's annual losses, then why still creditors need security for their claims as provided in article 208 (3) of the ACL? It is unclear from the wording of these provisions; therefore, given the

[33] Klaus Hopt, *op. cit.*, p .16.
[34] Klaus Hopt, *op. cit.*, p.6, last access on 28.7.2021.
[35] 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% (pursuant to article 206 of Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies").
[36] Article 12 and article 8(2) of the Law no. 25/2018, "On Accounting and Financial Accounts", published in the Official Gazette no. 79.

German influence in drafting this piece of legislation, reference may be made to the relevant provisions of the German group law. For contractual groups in Germany, this security for creditors is given "where a control agreement… ends, the other contracting party is to provide security to those of the creditors of the company whose claims have arisen prior to publication by notice of the agreement's termination having been entered in the Commercial Register …"[37]. Therefore, the same should be the meaning of this provision even in the Albanian company law.

These 'penalties' provided by the law serve to balance the interest of the parent company and the infringed interest of the subsidiary, given that the latter has strictly followed the instructions and directions of the former. Basically, integrating the concept of enterprise liability, the law here provides no independent subsidiary, hence every consequence should be borne by the unit who took the decision or gave directions in the decision-making process. The law does not provide here any custom-made consequences based on the grounds on which the group was created. Regardless of the instrument that gave birth to the group, the consequences are the same. Unlike German law which distinguishes between contractual groups and factual groups[38], the Albanian law provides no custom-made treatment for control groups. Under German law, the consequences for factual groups are considered on a case-by-case basis, interference-by-interference analysis of intragroup liability.[39]

Obviously, the "penalties" provided by the law for the control groups are harsher as compared to the equity group, but at the same time the lawmaker has not introduced strong mechanisms for their enforcement. Therefore, it is questionable whether these rights will normally be enforced. Whereas, for equity groups the lawmaker has at the same time introduced real instruments for enforcement of the consequences provided by the law.

[37] Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 9 of the Act of 17 July 2017 (Federal Law Gazette I p. 2446), available online at http://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.pdf last access on 29.7.2021. See also, Alexander Scheuch *Konzernrecht: an Overview of the German Regulation of Corporate Groups and Resulting Liability Issues*, University of Oslo Research Paper Series, 2016-29, available online at ssrn https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881180 lat access on 29.7.2021.

[38] Factual groups, under German law exist when, first, majority ownership of a particular corporation by another company is established-which, under the Stock Corporation Act, creates a presumption of the lack of independence of the majority-owned corporation. Second, a uniform, centralized management structure *("einheitliche Leitung")* is applied to the majority-shareholder company and the majority- owned corporation, i.e., both companies are operated as a single, centralized enterprise *("Konzern")* as far as corporate management and control are concerned. See René Reich-Graefe *Changing Paradigms: The Liability of Corporate Groups in Germany*, 37 Conn. L. Rev. 785 (2005), p. 790.

[39] René Reich-Graefe, *op. cit*., p. 790.

5. Equity groups

The second category of group is the equity group, which, under the ACL, shall be deemed to exist if a company based on shares owned in another company, or based on an agreement with that company, has the right to appoint at least 30% of members of the Board of Director or the Supervisory Board or of the Managing Directors of the company, or if it has at least 30 percent of votes at the general meeting.[40] As the drafters of the law contend, this definition was imported by the (then) Seventh Company Law Directive 83/349/EEC[41]. Apparently, the focus here is the influence in management and decision-making. Thus, the parent has no complete control, but may influence the subsidiary life through management and voting rights.

The law has determined the threshold of 30% based on another directive, i.e. Takeover Directive 2004/25/EC[42]. Anyhow, the lawmaker did not take into consideration that in publicly held companies this threshold is significant, whether in privately held companies this threshold, in certain circumstances, may be totally insignificant. Therefore, equity groups should be assessed on a case-by-case basis that means that the dispersion of shares should be crucial while defining the equity group.

The law here takes a completely different approach. Companies, part of the group, are considered as independent entities and the immediate consequence is not liability for the parent. Therefore, the consequences of the control group do not apply in case the relation between companies falls within the equity group definition. Instead, the law follows a conduct-based approach for the parent. Liability is imposed on the parent company, only if the latter is in breach of fiduciary duties imposed by the law. For this reason, the law sets forth a triple set of fiduciary duties which should bring together a triple set of interest in the group.[43] Here the lawmaker did not rely only on the general principles of fiduciary duties but

[40] Article 207 (2) of the Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".

[41] Article 1 of the latter sets forth that groups comprise: "… if that undertaking (a parent undertaking): (a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking); or (b) has the right to appoint or remove a majority of the members of the administrative, or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking; or (c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions. A Member State need not prescribe that a parent undertaking must be a shareholder in or member of its subsidiary undertaking. Those Member States the laws of which do not provide for such contracts or clauses shall not be required to apply this provision; or…" Seventh Company Law Directive 83/349/EEC, published in the O.J. L. 193/2, 18.07.1983. Currently repealed by Directive 2009/49/EC, OJ L 164, 26.6.2009, p. 42–44.

[42] Janet Dine, Michael Blecher, *op. cit.*, 2016, p. 204.

[43] Ibid, p. 204.

introduced specific and tailor-made fiduciary duties for equity groups and furthermore has introduced the concept of group interest. Here the rigid approach of the control group (automatically imposing liability on the parent) is corrected with the triple set of interest that the representative of the mother company should take into consideration. However, the provision still remains unclear in case there is a conflicting interest between the interest of one subsidiary and the parent or in case there are conflicting interests between subsidiaries.

6. Fiduciary duties in equity groups

In equity groups the law requires the management of the parent company to take into account:

a) any duty of the parent under Articles 14 to 18 of the present Law, or in case of a limited liability company, Articles 98 of the present Law, and in case of a joint stock company, Article 163 of the present Law;

b) the way a decision might affect or benefit the group of companies as a whole;

c) interests of the subsidiary company.[44]

Hence, this provision has provided a three layer of obligations toward the management (the representative) of the parent company which constitute a roadmap for shaping the behavior of the parent company. In the group context, the management should be flexible, especially in an international context. Therefore, such flexibility is enhanced through a more lenient regime for the parent company as compared to control groups.[45]

First, the fiduciary duties embedded in the general principles of ACL are reiterated in the equity group context but added and enhanced with specific and tailor-made fiduciary duties. Second, the director's fiduciary duties are extended to the representative of the parent company thus creating liability as a shadow director for the parent company.

These criteria may become ambiguous when there is a clash of interest between the parent company and its subsidiary. Naturally, the question of which is going to prevail may arise? The law introduces a standard by which the court may determine whether the actions of the parent management comply with the fiduciary duties or not. The law provides a vague standard that is the independent judgment of an independent director. The concept of 'independent' director is rather ambiguous and normally very hard for courts to sort out. Under the definition of the law, an independent director is one that has no family or financial links with the company, but strictly follows the interest of the company. Here the question at stake is which is the interest this director should follow in case the action

[44] Article 209 of the Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".

[45] The Informal Company Law Expert Group (ICLEG), Report on the recognition of the interest of the group, October 2016, p. 7, available online at https://ec.europa.eu/info/sites/default/files/icleg_recommendations_interest_group_final_en_0.pdf, last access on 4.11.2021.

is beneficial for the subsidiary, but harm the parent or other subsidiaries? This question remains unanswered and Albanian courts will face some difficulties when deciding whether the parent management breached the duty or not. It will be challenging for Albanian courts to put themselves in the shoes of an independent director and to assess a business decision. Currently, there is a significant lack of jurisprudence as regard corporate group issues.

The consequence that the law provides in case the fiduciary duties are breached is liability for the parent company.[46] This liability is shared among the parent, the parent's members of administration and the subsidiary administration which are jointly and severally liable.[47] Taking into consideration that this provision may not be enforced, the law has introduced a strong mechanism to protect the interest of the subsidiary: the derivative action. Under the regulation envisaged in article 211 of the ACL, in case the action is not filed by the management of the subsidiary within 90 days after the breach of duty, the law recognizes standing to minority shareholders in limited liability companies and joint-stock companies representing at least 5% of the total votes of the company (for LLC) or at least 5% of the basic capital (for joint-stock companies). For both cases if there is another, smaller portion envisaged in the statute, that prevails. Furthermore, for joint-stock companies, to grant a greater protection for creditors, the law stipulates that the right to file this claim with the court also pertains to the subsidiary's creditors whose claim amount to at least 5% of the subsidiary basic capital. In this way, the provisions provide real mechanisms for the real enforcement of the fiduciary duties.

Unfortunately, veil-piercing cannot be extended in a group relation because the wording of article 16 of the ACL that provides the cases when the veil me be lifted is applicable only towards individual shareholders. For group relation reference should be made only to the provisions mentioned therein.

7. Concluding remarks

The current regulation of groups of companies under the ACL constitutes a good body of provisions governing group structures. However, few improvements are needed in order to fully protect each stakeholder in the group structure. These improvements may either be interventions in the company law or tailor-made provisions for groups in the corporate governance code.

Firstly, as regards the disclosure of the group structure, for a better protection of creditors and minority shareholders a whole structure of the group is needed. Given that there is no obligation for auditors as gatekeepers to scrutinize this aspect of the group governance, maybe a mandatory disclosure may be added as an obligation of the parent and the subsidiary as well.

Secondly, the fiduciary duties should be extended even to control groups,

[46] Article 210 of the Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".
[47] Article 210 (2), (3) of the Law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies".

even though reference may be made to the general principles, to avoid any misunderstandings, it would be advisable to have clear fiduciary duty of the parent towards the subsidiary.

Thirdly, the regulation of Albanian Company law regarding related party transaction should be extended even to the group context so that even transactions of the parent/parent representative with the company are subject to the requirements set by the law. However, certain transaction may be exempted from this regulation such as between the parent and the wholly owned subsidiary.

Last, but not least, another way of enhancing the governance of groups is provide tailor-made principles for groups in the Albanian corporate governance code. This may include the obligation of disclosure of the board structure, the right of information for minority shareholders of the subsidiary etc., so that the Albanian Code comes in line with the provision of the G20/OECD principles of corporate governance.[48]

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Matters concerning multiple office holding in light of the CJEU judgment in case C-585/19

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Abstract

In the field of labour law, we are currently witnessing a development in the case law of the Court of Justice of the European Union concerning multiple office-holding with the same employer, which is changing the framework of the regulations and practices related to employment relationships at national level. The CJEU's judgment in Case C-585/19 established as a matter of principle that the mechanism for determining the daily rest period for workers who have concluded several contracts of employment with the same employer is to be determined by reference to the total number of contracts - irrespective of how high the number of contracts concluded with the same employer is - and not by reference to each contract individually. Therefore, we will make an attempt at analysing the effect of this ruling at national level, by reference to the specific provisions of the current Labour Code regulations which, in some cases, enshrine differences of nuance and different perspectives from those established by Directive 2003/88/EC concerning certain aspects of the organisation of working time.

Keywords: *multiple office-holding, weekly rest, working time, daily rest.*

JEL Classification: K31, K33

1. Introduction

The case law of the Court of Justice of the European Union has recently witnessed a development in the matters concerning the organisation of working time which is significantly changing the framework of employment regulations and practices at national level as well. Thus, the CJEU in Case C-585/19 ruled that *Articles 2(1)*[2] *and 3 of Directive 2003/88/EC*[3] *of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time ("Directive 2003/88") should be construed to mean that, where a worker has concluded several contracts of employment with the same employer, the minimum daily rest period applies to those contracts taken as a*

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[2] Establishing that *working time* "means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".

[3] According to which "Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period".

whole and not to each of those contracts taken separately.[4]

Consequently, our intention is to analyse the effect of this ruling at the national level, by reference to the specific provisions of the current Labour Code regulations, which sometimes enshrine differences of nuance and different perspectives, although, at first glance, there is a certain degree of consistency between the applicable national provisions and the provisions of Directive 2003/88/EC concerning certain aspects of the organisation of working time. We will consider the relevant texts of the Labour Code in force concerning daily/weekly working time and daily/weekly rest, as well as those concerning multiple office-holding, as they become relevant in light of CJEU's judgment in case C-585/19. What the judgment establishes as a matter of principle is that the mechanism for determining daily rest in the case of workers who have concluded several contracts of employment with the same employer should be determined by reference to the total number of contracts - irrespective of how high the number of contracts concluded with the same employer is - and not by reference to each contract individually. However, as we shall further see, this ruling by the Court complicates matters at national level in terms of how we calculate working time for employees who are holding multiple offices with the same employer. On the one hand, the current domestic legislation includes a transposition of the Directive concerning working time which provides greater protection for employees than the Directive requires[5], and on the other hand, certain mandatory provisions in the Labour Code concerning working time, which supplement the conditions imposed by the Directive, actually restrict the possibility for employees to combine several employment contracts with the same employer. However, before reviewing in more detail the regulations which have an impact on working hours, in light of the current developments in case law, we will list some of the matters which the Court of Justice of the European Union has established when responding to the request for a preliminary ruling on the interpretation of Articles 2(1) and 3 of Directive 2003/88/EC concerning certain aspects of the organisation of working time.

[4] The request for a preliminary ruling on the interpretation of Article 2(1) and Article 3 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time ("Directive 2003/88") made by *Tribunalul București* (Regional Court, Bucharest, Romania) in relation to a dispute between Academia de Studii Economice din București (Bucharest Academy of Economic Studies) ("ASE") and *Organismul Intermediar pentru Programul Operațional Capital Uman – Ministerul Educației Naționale* (Intermediary Body for the Human Capital Operational Programme – Ministry of National Education) ("OI POCU MEN") concerning a financial correction established by OI POCU MEN within the framework of a funding programme, for failure by ASE to comply with the maximum number of hours a person may work per day.

[5] This is in fact permitted under Article 15 of Directive 2003/88/EC concerning certain aspects of the organisation of working time, which expressly states that the Directive "shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers" (https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32003L0088).

2. The questions referred for a preliminary ruling by the Court of Justice of the European Union

In light of the provisions of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[6], the national court (*Tribunalul București*) referred the following questions to the CJEU for a preliminary ruling:

1) Should "working time", as defined in Article 2(1) of Directive 2003/88, be understood as meaning "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties" under a single (full-time) contract or under all (employment) contracts concluded by that worker?

2) Should the requirements imposed on Member States by Article 3 of Directive 2003/88 (the obligation to take the measures necessary to ensure that every worker is entitled to at least 11 consecutive hours' rest per 24-hour period) and Article 6(b) thereof (fixing an average weekly working time not exceeding [48] hours, including overtime) be interpreted as introducing limits with regard to individual contracts or with regard to all the contracts concluded with the same employer or with different employers?

3) In the event that the answers to the first and second questions require an interpretation that prevents Member States, at national level, providing for the application per contract of Article 3 and Article 6(b) of Directive 2003/88, where there are no provisions of national law to the effect that the minimum daily rest period and the maximum weekly working time are to apply to the worker (regardless of how many employment contracts are concluded with the same employer or with different employers), is a public institution of a Member State, acting on behalf of that State, able to rely on the direct application of Article 3 and Article 6(b) of Directive 2003/88 and sanction the employer for failure to observe the limits laid down by that directive with regard to daily rest and/or the maximum weekly working time.

3. Consideration of the questions referred

The Court of Justice of the European Union did not give a complete answer to the questions referred for a preliminary ruling, abstaining to rule on the assumption that the employment contracts were combined with different employers, since it was not apparent from the order for reference that the said assumption was applicable in the present case. At the same time, the Court did not consider it necessary to respond to the matters set forth in Article 6 of Directive 2003/88

[6] For a more detailed analysis, see A. Popescu *Dreptul internațional și european al muncii (International and European Labour Law)*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2008, pp. 777-790.

which were the subject of the third question referred for a preliminary ruling, on the ground that the relevance of the said provisions to the present case could not be established.

With regard to the first and second questions referred for a preliminary ruling, the Court held that the concept of *"any worker"* in light of the provisions of the Directive means that the minimum daily rest period of 11 hours must relate to the worker, whoever they may be, irrespective of whether or not they have concluded several employment contracts with their employer. Similarly, as regards the concepts of *"rest period"* and *"working time"* referred to in Article 2 of Directive 2003/88, the Court of Justice of the European Union has held that they are mutually exclusive, since the concept of *"rest period"* is defined as any period which is not working time and Directive 2003/88 concerning certain aspects of the organisation of working time does not provide for an intermediate category between working time and rest periods. In this context, the Court considered that all the employment contracts concluded by a worker with their employer must be examined together in order to find out if the period classified as daily rest does not constitute working time by virtue of another contract. The Court held, inter alia, that a different interpretation of Article 3 of Directive 2003/88, i.e. a separate application to each contract concluded by the worker with their employer, would reduce the protection afforded to that worker, since the rest period of 11 consecutive hours for every 24 hours could not be guaranteed if the working time provided for in each of the contracts were to be taken separately.

4. Interpretation of the CJEU Judgment in Case C-585/19 in the light of national laws and/or practices

An analysis of the concept of working time from the perspective of the national laws[7] is not limited only to the matters related to the number of hours actually worked, but must necessarily include the other regulations of the Labour Code which have an impact on working hours, as well as the manner in which

[7] For a review of working time matters in the applicable national laws, see R. Dimitriu, *Considerații în legătură cu flexibilizarea timpului de muncă al salariaților (Considerations on the flexibilization of employee working time)*, „Dreptul" (Law Review), issue no. 7/2008; L. Dima, *Dreptul muncii. Curs universitar (Labour law. University Coursebook)*, C.H. Beck Publishing House, Bucharest, 2017, pp. 168-184; Al. Athanasiu, A.-M. Vlăsceanu, *Dreptul muncii. Note de curs (Labour law. Course notes)*, C.H. Beck Publishing House, 2017, pp. 163-169; I.T. Ștefănescu (coord.), *Dicționar de drept al muncii* (*Dictionary of labour law*), Universul Juridic Publishing House, Bucharest, 2014, pp. 345-346; Al. Țiclea, L. Georgescu, *Dreptul muncii. Curs universitar (Labour law. University Coursebook)*, 7th edition, Universul Juridic Publishing House, Bucharest, 2020, pp. 362-374; I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii (Theoretical and practical labour law treaty)*, 4th edition, Universul Juridic Publishing House, Bucharest, 2017, pp. 611-626; Al. Țiclea, *Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență* (*Labour law treaty – Legislation. Doctrine. Case law)*, Universul Juridic Publishing House, Bucharest, 2016, pp. 581-587; B. Vartolomei, *Dreptul muncii. Curs universitar (Labour law. University Coursebook)*, Universul Juridic Publishing House, Bucharest, 2016, pp. 208 – 215.

these regulations are implemented in practice in all employment relationships. In this sense, working time includes, in addition to the regulations on the actual number of hours worked by the employee, the provisions concerning daily and weekly rest periods as laid down in the current Labour Code. As we have seen from the case law of the Court of Justice of the European Union interpreting the provisions of Directive 2003/88/EC concerning certain aspects of the organisation of working time, the Court has laid down certain rules on the relationship between the concept of "*working time*"[8] and "*rest period*"[9], in the sense that the two concepts are closely linked but nevertheless not indistinguishable. The provisions governing working time must be read in conjunction with those applicable to the rest period so that the application of one does not prejudice the other. In fact, the minimum rules concerning working time, as laid down in Directive 2000/88/EC, are mandatory for Member States, which means that deviations from standards are permitted by way of the national laws only if they provide greater protection for workers than the protection granted in the Directive[10]. This is the theoretical starting point for the debates concerning working time matters as per national laws. We shall see in what follows how Romania has transposed into its national laws the provisions of Directive 2003/88/EC concerning certain aspects of the organisation of working time.

4.1. National legal framework concerning working time in relation to the provisions of Directive 2003/88/EC

Under Romanian law, according to the provisions of Article 112(1) of the Labour Code, in the case of full-time employees, the normal working time is 8 hours per day and 40 hours per week[11], while the maximum legal weekly working time laid down in Article 114(1) of the Labour Code is 48 hours, including overtime[12]. Without reiterating the explanations concerning the unconstitutionality of Article 112(1) of the Labour Code, on the ground that the legislative text in

[8] Which, in the light of Article 2 of Directive 2003/88/EC, refers to "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".

[9] Defined in Article 2 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time as "any period which is not working time".

[10] For an analysis of the correlation between European law and national law, see A. Popescu, *op. cit.*, 2008, pp. 258 – 263.

[11] A process of gradual reduction of working time was necessary, marked by long-standing worker protests since before the First World War; today, most countries have introduced the 5-day/40-hour limit in their national laws. (See J. Rojot, *Working Time in Industrialized Countries: the recent evolution*, in *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer Law International Publishing House, 1998, p. 437).

[12] In other legal systems, such as the one in Belgium, for instance, the maximum legal working week is set at 38 hours, with exceptions strictly defined by law. By way of example, this limit may be exceeded in the case of shift work (maximum 65 hours per week), in the case of overtime in the

question does not expressly state that the normal working time of 8 hours per day relates to a single employment contract (which would have infringed the provisions contained in Article 41(1) of the Constitution (concerning non-restriction of the right to work)), the Constitutional Court rejected the objection of unconstitutionality as inadmissible[13]. However, the Court held that the provisions of the Labour Code relating to the duration of working time must be applied in their totality, with a focus on their substantive meaning. Thus, it was held that the provisions of Article 35 of the Labour Code, which refer to the possibility of combining functions with the same employer or with different employers, should not be interpreted in a restrictive manner, since the normal working time of 8 hours a day and 40 hours a week, respectively, also includes the assumption of combining functions under a single employment contract[14]. We consider the Court's solution to be correct, as there is no question of unconstitutionality in this matter. However, the incomplete regulation of the text referred to in Article 112(1) of the Labour Code remains an issue and should be resolved *de lege ferenda*, by expressly specifying that the normal working time of 8 hours per day refers to a single employment contract.

From the point of view of the enforcement of European laws, it should be emphasised that the provisions relating to the maximum statutory working time of 48 hours per week, including overtime, reflect a transposition into national law of the provisions of Directive 2003/88/EC concerning certain aspects of the organisation of working time[15].

It should be noted that, as regards *daily* and *weekly* rest periods, the national regulations contain additional details on top of the provisions of the relevant European Directive. While the European Directive lays down a minimum daily rest period of 11 consecutive hours during a 24-hour period[16], according to Article 135(1) of the national Labour Code, employees are entitled to a rest period of not less than 12 consecutive hours[17] between two working days. In addition to these provisions, the Labour Code imposes a special regulation in Article 115(2),

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textile industry (maximum 5 hours in excess of the maximum weekly working time), in the case of activities involving materials which could deteriorate rapidly (maximum 65 hours per week) as well as in the case of an extraordinary increase in the amount of work (maximum 65 hours per week). (For details, see R. Blanpain, *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer Law International Publishing House, 2006, pp. 165 - 166).

[13] By Decision 1004 of 7 July 2009 on the exception of unconstitutionality of the provisions of Article 109(1) (now Article 112(1)) of Law 53/2003, the Labour Code, published in the Official Gazette no. 575 of 18 August 2009.

[14] See I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii (Theoretical and practical labour law treaty)*, 4th edition, Universul Juridic Publishing House, 2017, pp. 621-622.

[15] Which lays down in Article 6 the obligation for Member States to take the measures necessary to ensure that, in relation to the protection of the health and safety of workers, the average working time for each seven-day period, including overtime, does not exceed 48 hours.

[16] Art. 3 of Directive 2003/88/EC concerning certain aspects of the organisation of working time.

[17] For example, in Belgium, the law provides that every worker is entitled to a daily rest period of at least 11 consecutive hours within a 24-hour period. (See R. Blanpain, *op. cit.*, 2006, p. 164).

according to which "the daily working time of 12 hours shall be followed by a rest period of 24 hours". In other words, the provision contained in Article 115(2) is of a mandatory nature and derogations from the standard by any individual employment contract or collective agreement will become null and void. Directive 2003/88/EC concerning certain aspects of the organisation of working time has no such requirement imposed on Member States, so the provision referred to above is an additional local measure for the protection of employees.[18]

The examination of the national legal framework concerning working time - including daily/weekly rest periods - in a wider European context shows that Directive 2003/88/EC concerning certain aspects of the organisation of working time has been transposed in a more favourable manner for the employee. The additional protection for employees, as seen by national law makers, is reflected both in the provisions applicable to daily and weekly rest (which, as we have seen, is 12 hours and 48 hours respectively, as opposed to 11 hours and 24 hours as required by the European Directive) and in the provisions of Article 115(2) of the Labour Code, which impose a longer rest period for employees whose daily working time is 12 hours. While, in theory, some nuances and distinctions can be made with regard to the specificity of national provisions concerning working time, in practice, the enforcement of national regulations in the context of the case law of the Court of Justice of the European Union generates a number of difficulties. This is why it may be appropriate to integrate the review of the CJEU judgment in case C-585/19 concerning the interpretation of the Directive regulating multiple office-holding with the same employer in the context of the specific Romanian laws, as detailed below.

4.2. Multiple office-holding with the same employer

As we have seen, a very specific assumption in the enforcement of the provisions relating to daily and weekly working time is set out in Article 35(1) of the Labour Code, according to which an employee has the right to work for different employers or for the same employer under individual employment contracts generating separate income. Although no precise circumstances are given regarding the relationship between the combination of functions and the provisions relating to the maximum legal working time of 48 hours per week (including overtime), the doctrine[19] establishes that the regulations concerning the duration of working time are matters "of public social order aimed at protecting the health of employees", regardless of whether the employee is working under a single employment contract or under several employment contracts with the same employer or with different employers, which means that the regulations must also

[18] See L. Dima, *op. cit.*, 2017, p. 171.
[19] See I. T. Ștefănescu, *op. cit.*, 2017, p. 614.

apply in the case of multiple office-holding[20]. Likewise, the provisions of Article 135(1) of the Labour Code relating to the daily rest period of at least 12 hours between two working days and those of Article 115(2) relating to the 12-hour/24-hour working day are also applicable, since they do not specifically exclude combined functions. Yet again, issues of interpretation and enforcement arise from the ambiguity of the wording of the legal provisions concerning daily rest, which makes no distinction as regards the multiple office-holding, in the sense of expressly specifying the method of granting daily rest by reference to all the contracts combined or by reference to each contract individually. Starting from the commonly accepted idea that the normal working time of 8 hours per day and 40 hours per week should be interpreted as referring to a single employment contract[21], the solution that has been implemented in national practices has been that daily rest is granted on the basis of one contract, irrespective of the number of contracts of employment with the same or different employers.

The recent judgment of the Court of Justice of the European Union in case C-585/19 concerning multiple office-holding with the same employer changes this perspective completely. As we have seen from the Court's considerations, the granting of the 12-hour daily rest period (11 hours under the Directive, respectively) will be granted to employees taking into account the combined contracts not each individual employment contract. Given that the Court's judgment on the Directive is of a general binding nature[22], the possibility of combining jobs with the same employer is currently subject to a daily rest period of 12 hours between two consecutive working days and a maximum weekly working time limit of 48 hours per week (including overtime). On this basis, multiple office-holding with the same employer is no longer possible in the form of two full-time contracts, as the 12-hour daily rest period provided for in the Labour Code becomes impossible to apply. The problem becomes even more difficult in practical terms, with reference to the provisions of Article 115(2) of the Labour Code, which require a 24-hour rest period for a 12-hour working day. At national level, the application of Article 135(1) in conjunction with Article 115(2) of the Labour Code also makes it impossible for an employee to combine a full-time and a part-time contract. This difficulty arises from the fact that, if two employment contracts are combined with the same employer and the working time totals 12 hours a day, a 24-hour period of rest must be granted. However, granting 24 hours' rest for a 12-hour day does not eliminate the provisions of Article 137(1) of the Labour Code concerning the 48-hour weekly rest period, which complicates matters

[20] With no exceptions from the general rules established with regard to working time. (See also R. Dimitriu, *op. cit.*, 2008, p. 118).

[21] A different point of view expressed is that the 48-hour working week ban no longer applies in the case of multiple office-holding. (See Al. Țiclea, L. Georgescu, *op. cit.*, 2020, p. 369).

[22] In the sense that the case-law of the Court of Justice of the European Union does not create rules of law *per se*, but principles of law which then become applicable in all situations. (See Crenguța Leaua, *Dreptul afacerilor. Noțiuni generale de drept privat (Business Law. General Concepts of Private Law),* Universul Juridic Publishing House, Bucharest, 2012, p. 12).

even further in practice. We note that the application of the CJEU judgment in Case C-585/19 in the context of national rules has a more restrictive effect on the possibility of concluding multiple employment contracts with the same employer.

Consequently, at national level, recent developments in case law have resulted in a much narrower range of possibilities for multiple employment with the same employer. In practice, the following legal assumptions could be considered:

- a full-time employment contract and a part-time employment contract under the 12 working hours per day limit combined;
- one full-time employment contract and several part-time employment contracts under the 12 working hours per day limit combined;
- several part-time employment contracts under the 12 working hours per day limit combined.

4.3. Multiple office-holding with different employers

The situation remains equally ambiguous with regard to multiple employment with different employers, as the Court of Justice of the European Union abstained from responding to the question of multiple office-holding with different employers.

The fact is that, under the same provisions of Article 35 of the Labour Code, it is possible for an employee to conclude two or more contracts of employment with different employers during the same period of time, as the only prohibition contained in the wording of paragraph 2 of the regulation refers to certain incompatibilities laid down by law[23]. The wording does not specify any legal limitation to working time (daily or weekly), or any mention of the granting of daily and weekly rest for employees with several combined employment contracts. This raises the question of whether the 12-hour rest period between two working days should be granted taking into account all the employment contracts combined or each contract individually!

At first sight, it might be assumed that it is not a problem for an employee to combine several employment contracts with different employers without observing the daily rest period for all the employment contracts combined (but taking into account each individual contract instead), since there are no provisions to this effect in the Labour Code, and the Court of Justice of the European Union, when expressly asked on the matter has abstained from giving a response on the grounds that the question concerned a hypothetical situation which has no corresponding national practice.

However, we consider that the meaning of the rules on combining several individual employment contracts with different employers is equally restrictive,

[23] For instance, National Education Law no. 1/2011 expressly states in Article 214(1) that "Leadership positions such as rector, prorector, dean, vice dean, head of department or of a research and development, design or micromanufacturing unit cannot be combined".

in the sense that one cannot exceed the general limits imposed on working time (including daily and weekly rest periods). To do otherwise is to circumvent the provisions on working time, which are general rules applicable in all cases, including the combination of several individual contracts of employment with different employers. Although there is no express prohibition in the wording of the laws regarding the limitation of working time in the case of several employment contracts concluded concurrently, a limitation in the case of multiple employment results from the combination of the legal provisions in force concerning working time, namely those relating to the maximum weekly working time (Art. 114(1)), daily rest (Article 135(1)) and weekly rest (Article 137(1)), and the legal regime applicable in the case of 12-hour working days (Article 115(2)). Moreover, if a maximum number of working hours and a minimum number of hours of rest were to be ensured by reference to each contract in the case of multiple office-holding, the protection of employees could be severely impaired. This is because a clear line between working time and rest periods could be difficult to draw in the context of employees having several contracts of employment at the same time.

5. Conclusions

With reference to the standards contained in European Directive 2003/88/EC concerning certain aspects of the organisation of working time and taking into account the developments the CJEU case law in this regard, it is our opinion that some national legislative changes relating to working time could prove to be useful. It is therefore important, *de lege ferenda*, that the rules in the Labour Code should not deviate so disproportionately from the limits imposed by the Directive. In this respect, reducing the daily and weekly rest periods and rewording or even repealing the provisions of Article 115(2) of the Labour Code, which impose the right to a 24-hour rest period in the case of a 12-hour working day, could be an option for national law makers. The reason for this is that, as we have already seen, the current regulations are translated into practice in a way that creates a restrictive effect on the possibility of concluding several combined employment contracts. Although the provisions of Directive 2003/88/EC concerning certain aspects of the organisation of working time only lay down minimum standards for working time as well as daily and weekly rest periods, there is a specific regulatory framework at European level in the form of the minimum working time standards contained in the Directive, which the Court of Justice of the European Union constantly takes into account in its practice.

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IN-DEPTH LOOK AT BUSINESS LAW TOPICS

Considerations on the acquisition of ownership rights over the assets of the company deregistered by the sole shareholder, foreign citizen belonging to a third state

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Abstract

The dissolution and liquidation of a company always has consequences in terms of its assets. After the satisfaction of the company's creditors and the payment of its debts, the remaining assets belong to the shareholders, according to the relevant legislation. However, the case where the partner is a foreign national of a third country, not a Member State of the European Union, and the assets left after the deregistration of the company are land, is a specific situation that has been analyzed by the High Court of Cassation and Justice in a recent case. Although the legislation applicable to companies recognizes the right of shareholders over the assets remaining after the deregistration of a company, the situation of the lands is particular, considering the overriding applicable constitutional provisions, as well as the treaties to which Romania is a party. The existence of reciprocity in the matter of acquiring the right of ownership over land is essential and relevant in an action for establishing the right to property, even for a foreign citizen who has the quality of shareholder in a company established on the Romanian territory.

Keywords: *Romanian commercial law, dissolution, property rights of foreign citizens over land, third state.*

JEL Classification*:* K22

1. Introduction

The subject of Romanian companies[2] has been and still is a constantly changing field, on the one hand to keep up with the changes arising at European level, but especially, as any legislative approach, to be useful to its recipients.

The case analyzed by the High Court of Cassation and Justice[3], on which this article is focused, concerns a limited liability company, removed from the Trade Register, whose sole partner is a citizen belonging to the state of Israel requesting the right to ownership of the land than remained as a result of the deregistration of the company.

With regard to the limited liability company, it should be noted that it has been the subject of recent legislative changes. Thus, among the changes are: the

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[2] See C. Săraru, *Dreptul afacerilor. Curs pentru învățământul economic*, A.S.E. Publishing, Bucharest, 2015, p. 61; I. N. Militaru, *Dreptul afacerilor. Introducere în dreptul afacerilor. Raportul juridic de afaceri. Contractul*, Universul Juridic Publishing, Bucharest, 2013, p. 10.

[3] High Court of Cassation and Justice, Civil Section II, Decision no. 59 of 20 January 2021.

removal of the mandatory minimum share capital and of the minimum nominal value of the shares, the transfer of shares is left to the discretion of the associates, by eliminating the opposition period provided in favour of third parties[4]. However, the cases of dissolution and the effects of dissolution have not been the subject of recent legislative changes.

Without claiming an exhaustive analysis of the matter, the article aims to briefly outline the causes of dissolution and its effects in the case of the limited liability company, the situation of the assets left after the deregistration of the company, as provided by the applicable law, as well as the considerations of the supreme court, in the present case, where the sole shareholder of a third-country national was not recognized as the owner of the land remaining after the deregistration of the company.

2. Dissolution of the limited liability company according to the Companies Law

According to the Companies Law no. 31/1990 (hereinafter referred to as "the Law" or "Companies Law") a limited liability company is dissolved according to the general causes of dissolution of companies, as well as according to specific causes of dissolution of partnerships.

Therefore, the general causes of dissolution applicable to the limited liability company are those provided in art. 227 and art. 237 of the Companies Law.

According to art. 227 paragraph 1, the limited liability company is dissolved by:

a) the expiry of the period established for the duration of the company;

b) the impossibility of carrying out the object of activity of the company or its fulfilment;

c) the declared nullity of the company;

d) the decision of the general assembly;

e) the decision of the court, at the request of any shareholder, for good reasons, such as serious misunderstandings between the shareholders, which hinder the functioning of the company;

f) bankruptcy of the company;

g) other causes provided by law or by the articles of association of the company.

Also, article 237 paragraph 1 of the Companies Law provides other causes of dissolution. Therefore, the limited liability company is dissolved when:

a) the company no longer has statutory bodies or they can no longer meet;

b) the shareholders have disappeared or their domicile or residence is not known;

[4] Law no. 223/2020 on the simplification or debureaucratization of the transfer of shares and the payment of share capital by amending the Company Law no. 31/1990.

c) the requirements regarding the registered office are no longer met, including as a result of the expiry of the document attesting the right of use over the space where the registered office is located or the transfer of the right of use or ownership over the space where the registered office is located;

d) the company ceased its activity or the activity has not been resumed after the period of temporary inactivity, notified to the fiscal bodies and registered in the Trade Register, a period that cannot exceed 3 years from the date of registration in the Trade Register;

e) the company did not complete its share capital, in accordance with the law;

f) the company failed to submit its annual financial statements and, as the case may be, the consolidated annual financial statements, as well as the accounting reports to the territorial units of the Ministry of Public Finance, within the term provided by law, if the delay period exceeds 60 working days;

g) the company failed to submit to the territorial units of the Ministry of Public Finance, within the term provided by law, the statement that it has not carried out activity since its establishment, if the delay period exceeds 60 working days.

It should be mentioned that the dissolution of the company for these causes is decided by the court at the request of any interested person, as well as of the National Office of the Trade Register.

The Companies Law provides for two special cases of dissolution applicable to the limited liability company.

The first case is the decrease of the company's net assets[5]. Based on art. 153^{24} of the Law, if the administrator finds that, as a result of losses, established by the annual financial statements approved according to law, the company's net assets, determined as the difference between total assets and total liabilities, decreased to less than half of the subscribed share capital[6], they will immediately convene the general meeting to decide whether the company must be dissolved[7].

The second specific case of dissolution applicable to the limited liability company is provided in art. 229 of the Law. Thus, the limited liability company

[5] According to art. 228 para. 2 of the Law.

[6] It should be mentioned that the Companies Law provides in para. (2) of this article that the articles of association may establish that the general meeting be convened even in the event of a decrease in net assets less significant than that provided in para. (1), establishing this minimum level of net assets in relation to the subscribed share capital.

[7] According to para. (4) of the same article, if the general meeting does not decide to dissolve the company, then the company is obliged, at the latest until the end of the financial year following the one in which the losses were found and subject to the provisions of art. 10, to reduce the share capital by an amount at least equal to that of the losses that could not be covered from reserves, if during this period the company's net assets have not been recreated to a value at least equal to half of social capital. It should be noted that in any of these cases the court may grant the company a period not exceeding 6 months to settle the situation, and the company will not be dissolved if the recreation of net assets to a value at least equal to half of the share capital takes place until the court decision for the dissolution remains final (art. 153^{24} paragraph 5 of the Companies Law).

is dissolved by the bankruptcy, incapacity, exclusion, withdrawal or death of one of the associates, when, due to such causes, the number of associates has been reduced to one. If in the articles of association there is a continuation clause with the heirs or if the remaining partner decides to continue the existence of the company in the form of a limited liability company with a sole partner, the company will not be dissolved.

It should be noted that the dissolution of the companies must be registered in the Trade Register and published in the Official Gazette of Romania, according to art. 232 of the Law.

3. The effects of the dissolution of the limited liability company

The effects of the dissolution of the limited liability company are the opening of the liquidation procedure and the prohibition of new business operations[8].

According to art. 233 of the Law, the dissolution takes place without liquidation in case of merger or total division of the company or in other cases provided by law. The same article states that the company retains its legal personality for the liquidation operations, until they are completed. At the same time, from the moment of dissolution, the administrator or administrators can no longer conduct business operations. Otherwise, they are personally and jointly liable for the actions taken.

4. The situation of the assets remaining after the deregistration of the limited liability company

The Companies Law provides, in article 235, that the shareholders may also decide, along with the dissolution, with the quorum and majority provided for the amendment of the articles of association, on the way liquidation is to be carried out, when there is full agreement on the distribution and liquidation of the company's assets and when ensuring the settlement of liabilities or their settlement based on an agreement with the creditors. Moreover, by unanimous vote, the shareholders may also decide on the way in which the assets left after the payment of the creditors will be distributed among themselves.

The transfer of ownership over the assets remaining after the payment of creditors takes place on the date of the removal of the company from the Trade Register, after which the Trade Register shall issue to each partner a certificate of ownership over the distributed assets, based on which the partner can proceed to register the real estate in the Land Register.

Art. 237 paragraph 13 of the Law also stipulates that the assets remaining

[8] St. D. Cărpenaru, *Tratat de drept comercial român conform noului Cod civil*, Universul Juridic Publishing, Bucharest, 2012, p. 271.

from the patrimony of the legal person removed from the Trade Register, in accordance with the law, belong to the shareholders, or to the associates, respectively.

5. Considerations of the High Court of Cassation and Justice in Decision no. 59 of 20 January 2021

In the present case, the applicant A. filed an action, against the National Trade Register Office and the Trade Register Office attached to the Bucharest Tribunal, demanding the establishment of his acquired ownership, by transfer from B L.L.C., removed from the Trade Register, on the company's assets, consisting of three plots of land, located in Dâmbovița County.

The plaintiff based his claims on art. 44 para. (2) of the Romanian Constitution which guarantees private property, regardless of the owner, while the law which offered foreign citizens the possibility to acquire such a right, i.e. Law no. 247/2005 on the reform in the areas of property and justice, as well as some accompanying measures, refers to special laws, rules contained in the provisions of art. 237 of Companies Law or of art. 31 para. (7) of Law no. 359/2004[9].

The Romanian Constitution, republished, provides in art. 44 paragraph 2 that "Foreign citizens and stateless persons may acquire the right of private ownership over land only under the conditions resulting from Romania's accession to the European Union and other international treaties to which Romania is a party, on the basis of reciprocity, under the conditions provided by organic law, as well as by legal inheritance".

The courts of first instance rejected the applicant's request, considering that, although art. 44 para. (2) of the Romanian Constitution guarantees private property, it does not confer on foreign citizens the right to acquire land in property except under the terms provided by the organic law. At the same time, the situation of foreign citizens and their right to acquire land in Romania must be regulated by such a law and not various legal acts that provide ways of acquiring ownership rights, in general terms, such as the Code civil, or in particular cases, such as those provided by art. 237 para. (13) of the Companies Law or of art. 31 para. (7) of Law no. 359/2004.

The High Court of Cassation and Justice also states that Law no. 312/2005 regarding the acquisition of the right of ownership over the lands by foreign citizens and stateless persons, as well as by the foreign legal persons, came into force prior to the removal from the Trade Register of the company of which he was shareholder and that, in relation to the provisions of art. 73 para.

[9] Law no. 359 of 8 September 2004 on simplifying the formalities for the registration in the trade register of authorized natural persons, individual enterprises, family enterprises and legal entities, their fiscal registration, as well as for the authorization of the operation of legal entities provides in art. 31 para. (7) that "The assets remaining in the patrimony of the legal person after its removal from the trade register (…) belong to the shareholders".

(3) letter m) of the Romanian Constitution, this law has the status of an organic law.

Article 6 of this law[10] allows foreign nationals, belonging not to a Member State of the European Union, but to a third state, as in the case brought before the court, to acquire ownership of the land, under the conditions regulated by international treaties, on the basis of reciprocity.

Moreover, the provisions of art. 237 para. (13) of the Companies Law or of art. 31 para. (7) of Law no. 359/2004 – do not have the character of an organic law, as the plaintiff claims, as they do not contain regulations on areas falling within the scope of organic laws, indicated by art. 73 para. (3) of the Romanian Constitution, so that the allocation of the remaining assets from the patrimony of the deregistered legal entity to associates or shareholders must take place in accordance with the law, not automatically. Therefore, the Supreme Court did not rule in favour of the applicant.

6. Conclusion

It should be noted that regardless of the cause that led to the dissolution of the company, its effects are the same. Moreover, the situation of the assets remaining after deregistration is regulated uniformly by the legislation applicable to companies. It must be also pointed out that both under the provisions of the Companies Law, as we have seen above, and in the cases where the legislation on insolvency proceedings becomes applicable, the purpose of the regulations is to pay the company's debts, while the remaining assets become the property of the company's associates, holders of the share capital.

Given its nature, the acquisition of real estate, both by Romanian citizens and by foreign citizens, rightly benefits from stricter rules.

Therefore, although the Constitution guarantees the right to property to any natural and legal person, the actual acquisition must be made according to the internal laws, taking into account their hierarchy. This explains why the organic law, respectively Law no. 312 of 10 November 2005 on the acquisition of the right of private ownership over land by foreign nationals and stateless persons, as well as by foreign legal entities, prevails in this case and only after the criteria established by it, i.e. the existence of international treaties, establishing reciprocity in the acquisition of real estate, one can analyze the provisions of other laws with a lower legal force, such as Companies Law.

[10] Article 6 of Law no. 312/2005 provides that "(1) The foreign national, the stateless person and the legal person belonging to third countries may acquire the right of ownership over the lands, under the conditions regulated by international treaties, on the basis of reciprocity. (2) The foreign national, the stateless person and the legal person belonging to third States may not acquire ownership of the land on more favourable terms than those applicable to the national of a Member State and to a legal person established in accordance with the law of a Member State."

The decision issued by the supreme court also offers businesses the opportunity to consider the effects of the dissolution related to the situation of the assets of each company, one aspect that can lead, as we have seen, to the most important consequences.

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Perspectives on the joint venture agreement in business law

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Abstract

This research aims to objectively analyze the applicability of the joint venture agreement in the business sphere. Determining the need to use such a legal mechanism in the field of contractual relations is an important starting point for presenting the specific elements but also its functioning mechanism. Thus, it will proceed to the analysis of the current regulation of the Civil Code as well as the practical applicability of this legal mechanism in various fields of law. In carrying out this research, works from the current specialized doctrine as well as current judicial practice were used.

Keywords: *joint venture agreement, legal mechanism, contractual relations, operation mechanism, business sphere.*

JEL Classification: K12

1. Introduction

The continuous evolution of the business environment is a constant present in any modern society. The need for innovation and progress is a consequence of economic and technological development which at the same time engages the need to create a favorable and timely legal framework for all participants in those development projects. From the perspective of business law[2], a necessary tool regulated in Romanian legislation is the joint venture. Analyzing from the perspective of the benefits that such an association can bring, we can see that it can allow access to new markets and important development projects (road infrastructure, construction), sharing benefits and losses between partners or even pooling resources. and technologies for niche activities in certain key areas.

2. Joint venture agreement in business law

In the old regulation, the joint venture was found in the Commercial Code at art. 251-256[3]. Currently, the joint venture is regulated in the Civil Code at art. 1949-1954. Thus, the operation of the joint venture represents the contract by which a person grants to one or more persons a share in the profits and losses of

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[2] Camelia Ignătescu, Maria Dumitru, *Business Law*, Hamangiu Publishing House, Bucharest, 2013, p. 6.

[3] The provisions of the Commercial Code were repealed following the entry into force on October 1, 2011 of the Civil Code (Law 287/2009).

one or more operations which he undertakes[4].

In the current specialized doctrine, the joint venture has been defined as "being that contract, by which two or more natural or legal persons share their contribution in money, goods, specific knowledge or services for undertaking operations, without constitute a person distinct from the persons of the associates, each of them having a share of participation in the sharing of profits and bearing losses[5]".

As it results from the stated definition, from the perspective of the parties that can conclude a joint venture agreement, they can be natural or legal persons. Given the fact that a legal act (association contract) is essentially concluded, the general conditions provided for the valid conclusion of the contract, the capacity of the contracting parties, the consent, the object and the cause of the contract will also be taken into account[6]. As a rule, the contracting parties bear specific names such as: principal partner or administrator, being the partner who carries out the actual activity of the association depending on its object, as well as participant or occult partner, who is not a direct participant in the operations but it is limited to participating with certain goods or sums of money in carrying out the actual activity.

Regarding the structure of the contract form, art. 1950 of the Civil Code, stipulates that "the association is proved only by document". Thus, it can be observed that the current regulation leaves to the parties the form of the contract, based on the principle of consensuality, but the parties are not obliged to draft a document, the operation being valid even by their simple agreement of will. As mentioned above, only proof of the document is required to be made in writing[7]. In practice, the parties either choose a document under private signature or an authentic document.

The defining characteristic of the joint venture is that the association has no legal personality and does not give rise to a subject of law distinct from the signatory partners of the contract, being a contract and not a company.

An important consequence of the fact that the joint venture does not have legal personality is the fact that it is not subject to any registration and publicity formalities such as, for example, in the case of a company that is registered in the trade register.

In the specialized doctrine this lack of registration and publicity of the

[4] See art. 1949 Civil Code.

[5] Liviu Stănciulescu, *Civil Law Course. Contracts*, Hamangiu Publishing House, Bucharest, 2014, p. 276.

[6] See also art. 1179-1239 C. civ.

[7] Regarding the form of legal acts, see the paper, Gabriel Boroi, Carla Anghelescu, *Civil Law Course. General part*, Hamangiu Publishing House, Bucharest, 2012, p. 183.

association refers to its occult character[8]. There is an exception to the occult nature of the association, namely in tax matters[9] where it is necessary to declare the association in order to pay the related taxes and fees made on profit.

Another consequence of the lack of legal personality is given by the fact that the association does not have its own patrimony[10]. Usually, the goods brought in association remain the assets of the associates, but there are also situations when the very contribution of the associates may consist in the transfer of the ownership right to the association of a good.

At the same time, the association will not have a proper name or a registered office[11]. However, the parties may establish in the contract a commercial name in the form of which they will operate in the economic circuit as well as may establish a de facto headquarters of the association without the association becoming an entity separate from the person of the partners.

From a procedural perspective, art. 56 Civil procedure code establishes that "associations, companies or other companies without legal personality may be sued, if they are constituted according to the law". And according to art. 110

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[8] Flavius Baias, *The New Civil Code. Comments on articles. Art. 1-2664*, C.H. Beck Publishing House, Bucharest, 2014, p. 2103.

[9] According to art. 125 of the Fiscal Code provides: (2) Within each association without legal personality, constituted according to the law, the associations have the obligation to conclude association contracts in written form, at the beginning of the activity, which should include data related to: a) the contracting parties; b) the object of activity and the headquarters of the association; c) the contribution of the associates in goods and rights; d) the percentage of participation of each associate in the income or losses within the association corresponding to the contribution of each; e) designating the associate to be responsible for fulfilling the obligations of the association towards the public authorities; f) the conditions for termination of the association. The contributions of the members according to the association contract are not considered revenues for the association. The association contract is registered with the competent fiscal body, within 30 days from the date of its conclusion. The tax authority has the right to refuse the registration of contracts, if they do not contain the data requested according to this paragraph. (3) If between the associated members there are kinship ties up to the fourth degree inclusive, the parties are obliged to prove that they participate in the realization of the income with goods or rights over which they have the right of property. Associated members may also be individuals who have acquired limited exercise capacity. (4) The associations, except for those that realize incomes from agricultural activities imposed on the basis of the income norms, have the obligation to submit to the competent fiscal body, until the last day of February of the following year, annual income declarations, according to the model established by order of the president of ANAF, which will also include the distribution of the net income/loss related to the associates. (5) The annual/annual income/loss realized within the association is distributed to the associates proportionally with the percentage of participation corresponding to the contribution, according to the association contract. (6) The fiscal treatment of the income realized from the association, will be established in the same manner as for the category of incomes in which it is included. (7) The obligation to register the incomes and expenses related to the activities carried out within the associations with a legal person, taxpayer according to titles II, III or Law no. 170/2016, belongs to the legal entity.

[10] Corneliu Bîrsan, *Civil law. Main real rights*, Hamangiu Publishing House, Bucharest, 2013, pp. 4-7.

[11] Cornelia Munteanu, Ovidiu Ungureanu, *Civil law. People*, Hamangiu Publishing House, Bucharest, 2013, p.326.

Civil procedure code, "the request for a lawsuit against an association, company or other entity without legal personality, constituted according to the law, may be submitted to the competent court for the person to whom, according to the agreement between the members, its management or administration has been entrusted. In the absence of such a person, the application may be lodged with the court competent for any of the members of that entity".

In terms of legal characteristics, the joint venture contract is a synallagmatic, bilateral or multilateral contract, called, consensual, onerous, commutative, *intuitu personae* and with successive execution[12].

The main classification criterion of the joint venture agreement refers to the multitude of operations that are the object of the contract. Therefore, there will be associations that have as object a single economic operation, associations that have as object several commercial operations or operations that have as object a whole trade[13].

The operation of the joint venture is based on the freedom of will of the members and aims to comply with principles specific to the nature of the contract. The first principle refers to the legal and commercial independence of each partner. In essence, the notion of independence of each partner must be understood by reference to the fact that although we are talking about an association, each partner remains in full control over his own business and exercises it in accordance with its own rules. Although the association may have as its object several operations, they will be carried out under the conditions established in the association contract without leading to a possible subordination of the partners between them. At the same time, another direct consequence of independence is given by the fact that each partner will not lose his legal personality as a result of concluding the joint venture agreement.

Another principle specific to the joint venture is the principle of managerial and legal assistance[14]. Naturally, this principle aims at the component of cooperation between the associates that can be manifested both from the sphere of management and the good development of the established activities but also from the perspective of legal assistance in carrying out the current activities of the association.

The last specific principle refers to the exercise with priority of the operations specific to the joint venture. This principle concerns the very rationale for setting up the association in view of the need for the parties to devote all financial, human, intellectual or legal resources in order to fulfill the purpose for which they have chosen to carry out the association.

With regard to the effects of the joint venture agreement, we note that there are a number of rights and obligations specific to it in accordance with the

[12] Jorg Menzer, *Contract Book*, C.H. Beck Publishing House, Bucharest, 2013, p. 124.
[13] Lucian Săuleanu, *Joint Venture*, Hamangiu Publishing House, Bucharest, 2009 p. 7.
[14] Stanciu Cărpenaru, Liviu Stănciulescu, Vasile Nemeș, *Civil and commercial contracts*, Hamangiu Publishing House, Bucharest, 2009, p. 496.

synallagmatic nature, thus giving rise to reciprocal rights and obligations on the parties.

The main obligation of the members is to make a contribution to the association. This obligation concerns the fact that each member must pool goods or any other amount of money in order to form the association[15]. Execution of this obligation involves the actual delivery of the goods or the remittance of the sums of money as established in the association agreement.

From the perspective of the legal regime of the contributions, the associates remain the owners of the goods made available to the association. However, they can establish that the goods brought in association, but also those obtained as a result of their use, become common property. The associates may also establish that the goods made available to the association may become partially or totally the property of one of the associates for the purpose of the association, under the conditions established in the agreement of the parties, but also compliance with advertising formalities[16].

Other rights and obligations may be established by the parties voluntarily in the contract and may concern the right to participate in decision-making, the right to information, the right of assignment, the right to participate in benefits or the right of withdrawal.

The right to participate in decision-making concerns the functioning of the association and through which concrete ways of making decisions can be established, thus pursuing the actual activity.

The right to information aims at the exact transmission and communication of all the steps taken in the activity carried out in order to create the necessary conditions to be able to take exactly the following decisions in order to achieve the proposed objectives of the association. Usually, the managing partner is the one who deals with informing and presenting the concrete situations to the other partners.

The right to participate in benefits is a specific right on the basis of which the parties obtain part of the resulting benefits through the contribution made to the establishment of the association. The associates are free to set their participation quotas, they can be set even in direct proportion to the value of the contribution or any other quotas can be used, but without establishing a possible leonine clause[17], through which only a part to participate profits and not losses.

The right of withdrawal may be established in the joint venture agreement in the event that there are more than two partners. If there are only two members, such a withdrawal "indirectly" represents a termination of the association. The associate who uses the right of withdrawal will benefit from the refund of the contribution brought and the obtaining of the benefits due to him.

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[15] In this we will consider, movable/immovable goods, know-how, brands, inventions or a whole goodwill.

[16] According to art. 1952 C.civ.

[17] Vasile Nemeș, *Commercial Law,* Hamangiu Publishing House, Bucharest, 2012, p. 354.

From the perspective of the internal activity of the association, its actual development is performed by the managing partner. The appointment is made through the association contract. If a managing partner has not been appointed by contract, it is assumed that there is a mutual management mandate. All associations can be appointed as administrators, each having the right to carry out the respective activity in their personal name. The person representing the association must be one of the partners and not a third party. It also does not matter whether the managing partner is a natural person or a legal entity. As a general rule, the term of office shall be for the duration of the contract as regards the existence of the association in question. In carrying out the activity of the association, the managing partner has the right to request the submission of contributions to which the other members have committed but the partner does not have the right to substitute third parties in performing the activities established by contract, but may use only agents.

Regarding the external activity of the company, the relations between the associates and those towards third parties, the associates even acting on behalf of the association will contract and will be obliged to execute the commitments in their own name towards the third parties with whom they contracted. However, if both act in this capacity, they are jointly and severally liable to third parties for the acts concluded by either of them[18]. At the same time, the associations that exercise all the rights deriving from the contracts concluded by any of them, but the third party is held exclusively towards the partner with whom it contracted, unless the latter declared its quality at the time of concluding the act[19].

Given the contractual nature of the joint venture, there will be several ways to terminate it. A first way concerns the situation in which the objective for which the association was established has been fulfilled. The association may also cease if the objective has not been achieved and thus the reason for the existence of the association is no longer current and necessary.

Equally, another way of terminating the association refers to the fulfillment of the term established in the association contract. Depending on the objectives set by the partners, the association may be concluded for a limited or indefinite period.

Also, the association may be terminated by the agreement of the parties according to the *mutual consensus - mutuus dissensu*. At the same time, considering the situation of the joint venture agreement, which is a contract with successive execution, it will also terminate by termination due to the non-execution of the obligations assumed by one of the partners[20].

[18] According to art. 1443 Civil Code. - The obligation is joint and several between the debtors when all are obliged to the same benefit, so that each can be kept separate for the entire obligation, and its execution by one of the co-debtors releases the others from the creditor.

[19] See art. 1953 C. civ.

[20] For example, non-performance of the obligation to make the contribution to which it was initially obliged.

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Some notes on the commercial concession contract

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Abstract

The concession contract, to which the majority of legal scholars recognize the legal nature of a framework contract, is a commercial contract, which establishes a complex and long lasting contractual relationship, under which the grantor undertakes to sell to the concessionaire, and the latter to buy from him, for resale, a certain quantity of goods, assuming the risk of marketing the goods. The integration of the dealer, who acts on its own behalf and in its own name, in the grantor's network, is ensured by the compliance with certain obligations, relating to commercial policy and promotional and after sales services, under the control and supervision of the grantor. The concession contract started out as a sales contract concluded between the producer and the trader, who acted in his own name and for his own account, characterised by the existence of an exclusivity clause in favour of the latter, provided that he undertook to purchase a certain quantity of products. This negotiating scheme has, however, undergone alterations as a result of the greater integration of the distributor in the network of the licensor, resulting from the complex web of rights and duties around the parties, with emphasis on the transformation of the exclusivity clause, hitherto considered a social type element, into one of several possible clauses of the contract. Considering that we are dealing with a legally atypical, but socially typical contract, it is necessary to point out the most relevant clauses of the contract, which are essential to sustain that this contract belongs to distribution contracts, an autonomous category. The supply chain crisis currently experienced worldwide following the Pandemic COVD 19 and the role that this contract can play in the commercial distribution, by allowing the manufacturer to achieve greater efficiency in the distribution of its products, justifies the analysis of the main features of this contract.

Keywords: *concession, distribution, contracts, commercial law.*

JEL Classification: K22

1. Introduction

The concession contract is a commercial contract, which establishes a complex and long-lasting contractual relationship, under which the grantor undertakes to sell to the concessionaire, and the latter to buy from him, for resale, a certain quantity of goods, assuming the risk of marketing the goods. The integration of the dealer, who acts on its own behalf and in its own name, in the grantor's network, is ensured by the compliance with certain obligations, relating to commercial policy and promotional and after sales services, under the control and supervision of the grantor.

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The concession contract started out as a sales contract concluded between the producer and the trader, who acted in his own name and for his own account, characterised by the existence of an exclusivity clause in favour of the latter, provided that he undertook to purchase a certain quantity of products.

This negotiating scheme has, however, undergone alterations as a result of the greater integration of the distributor in the network of the licensor, resulting from the complex web of rights and duties around the parties, with emphasis on the transformation of the exclusivity clause, hitherto considered a social type element, into one of several possible clauses of the contract.

Considering that we are dealing with a legally atypical, but socially typical contract, it is necessary to point out the most relevant clauses of the contract, which are essential to considerer the contract an autonomous category.

2. The commercial concession contract

The majority of legal scholars recognises to the concession contract the legal nature of a *framework*[2], as this contract provides for the formation and fix the regulation of future contracts to be concluded between the grantor and between the grantor and third parties. The literature identifies three groups of purchase and sale contracts deriving from the concession contract and whose legal regime is pre-determined in this contract, depending on the parties involved: the purchase and sale contracts between the grantor and the concessionaire, the purchase and sale contracts to be entered into between the concessionaire and third parties for the resale of products and the contracts to be entered into between the grantor and other concessionaires[3].

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[2] This category of contracts was born in France under the designation *contrat-cadre* or *convention-cadre*, initially used in Administrative Law. See Maria Helena Brito, *O contrato de concessão*, cit, p. 199, note 21 and Pinto Monteiro, *Denúncia de um contrato de concessão comercial*, Reimpressão, Coimbra Editora, 1998, p. 39, note 10, where bibliographical notes may be found. On these contracts, see António Pinto Monteiro, *Contratos de Distribuição Comercial, cit., p. 108, idem, Denúncia de um contrato de concessão comercial, cit., pp. 39-40, idem, Contrato de Agência, Anotação ao Decreto –Lei n.º 178/86, cit, p. 64-65*, Maria Helena Brito, *O contrato de concessão...*, cit., pp. 197 and ff. Following Maria Helena Brito, *O contrato de concessão, cit*, p. 197, we maintain that the framework contract is a merely technical category, capable of assimilating a diversity of economic contents, but devoid, in itself, of a proper content. In this sense, our *O Contrato Factoring – Na prática negocial e sua natureza jurídica*, Universidade Católica Portuguesa, 2007, p. 337.

[3] See Maria Helena Brito, *O contrato de concessão*, cit., p. 201. In the terminology of Ulmer, *Der Vetragshändler*, G H Beck, München, 1969 pp. 300 and ff, the framework contract (*Rahmenvertrag*) is at the origin of a *Stammverpflichtung*, within the scope of a *dauernde Vertragsbeziehung*, which is not exhausted in the conclusion of *Einzelverträgen*, although it also includes the conclusion of these performance contracts, also referred to by Italian doctrine as *contratti particulari* (G Guglielmetti, *I Contratti normativo*, Padua, 1969, p. 36), one-off contracts, in the terminology of Galvão Telles, *Manual dos contratos em geral*, Refundido e Actualizado, 4th ed, Coimbra Editora, Coimbra, 2002, p. 411 and ff and second degree contracts, in the terminology of Luís Miguel Pestana Vasconcelos, *Dos Contratos de Cessão Financeira (Factoring)*, BFDUC, "Studia Iurídica 43", Coimbra Editora, 1999, p. 354, *idem, O contrato de franquia*, p. 50. In this case, are

The framework contract is likely to be the source of a complex contractual relationship, giving rise to a set of rights and duties, from which emerge, from the outset, the obligation of the parties to conclude, between themselves and possibly with third parties, future contracts whose regime, even if partially already fixed in advance.

Some literature has tried to fit the concession contract into the category of promissory contract, briefly arguing that it obliges the parties to enter into successive sale and purchase contracts through which the ownership of the products would be transferred. An inevitable difficulty is the fact that the promissory contract has a provisional existence as it ends with the conclusion of the contract. On the opposite, the commercial concession contract does not end with the conclusion of successive sale and purchase contracts, but remains in force until the end of the fixed term[4].

The framework contract gives rise to an obligation on the parties to enter into future and successive legal relations, whose rules are set out (in whole or in part) in the basic contract. However, and this is the major difference from the other theses, this framework contract is also an independent source of other obligations for the parties.

In this case, the framework contract, in the pursuit of the economic and social function of the concession contract, which is the organisation by the grantor of the distribution of the products according to its commercial policy, with the transfer of the commercialisation risk to the concessionaire, materialised by the establishment of future legal relations subordinated to a previously established regime, assumes an important organising function of the relations between the parties and third parties, leading to a durable collaboration, guided by the pursuit of their respective interests. The framework contract does not end when future contracts are concluded, but continues for the period stipulated by the parties. The contracts resulting from the framework contract, because they perform the function or functions of the framework contract, are subordinate to it and are instrumental to it[5].

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concluded purchase and sale contracts between the grantor and the concessionaire and between the latter and third parties, which structurally and functionally depend on the concession contract, being designated as *Erganzungs- oder Hilfsgeschäfte* in German doctrine and *contrats d'application* in French doctrine. See Philippe Tourneau, *Les contrats de concession*, cit., p. 13 and ff.

[4] See Maria Helena Brito, *O contrato de concessão comercial*, cit., p. 192. On the other hand, as Pinto Monteiro, *Contratos de distribuição comercial*, cit., p. 108, notes, a multiple set of obligations arises from the commercial concession contract, whose execution, in addition to implying the execution of future contracts between the parties, may involve negative provisions of fact, in the event that non-competition obligations and the allocation of exclusive territories and customers are provided for, as well as the compliance of the concessionaire with a set of guidelines within the scope of the organisation, commercial policy and assistance to be provided to customers.

[5] This structure is so broad and flexible that it can take on the characteristics and functions of all preparatory contracts, as a category that includes the promissory contract, the normative contract and the coordination contract (see Salandra, *Contratti preparatoriii e contratti di coordinamento*,

The commercial concession is a commercial contract[6], which establishes a complex and long lasting contractual relationship, under which the grantor undertakes to sell to the concessionaire, and the latter to buy from him, for resale, a certain quantity of goods, assuming the risk of marketing the goods. The integration of the dealer, who acts on its own behalf and in its own name, in the grantor's network, is ensured by the compliance with certain obligations, relating to commercial policy[7] and promotional and after sales services, under the control and

cit., p. 21), thus managing to absorb a type of contract characterized by a complex obligatory relationship, which cannot be extended to just one of these. The framework contract is, therefore, the most *appropriate category for the concession contract. In this sense, see Pinto Monteiro, Contratos* de distribuição comercial, cit., p. 108, Maria Helena Brito, *O contrato de concessão comercial*, cit., pp. 197 e ss, Ulmer, *Der Vertragshändler*, cit., p. 314, Moralejo Menéndez, *El contrato mercantil de concesión*, cit, p. 143. In our case law, see STJ Acs of 21.04.2005, Proc 05B603, of 13.04.2010, Proc. 673/2002.E1.S1, of 24.01.2012, Proc. 39/2000.L1.S1, of 29.04.2010, Proc 622/081TVPRT. P1.S1, available at www.dgsi.pt. On the framework contract as the most appropriate structure for the heterogeneity of distribution contracts, see, for Italian legal literature, Roberto Pardolesi, *I contratti di distribuzione*, pp. 268-269, 287 and ff, in German literature, Ulmer, Der vertragshändler, cit., pp. 300, in Spanish literature, Paz Ares, R*ecension a Santini: il commercio. Saggio di Economia del Diritto*, RDM, 1979, pp. 153 and ff, Dominguez Garcia, *Aproximación al regimen juridico*, cit. pp. 429-430.

[6] On the commercial concession as an act of commerce, under the terms of article 2, first and second part of the Código Comercial and on the status of the grantor and the concessionaire as traders, see Helena Brito, *O contrato de concessão comercial*, cit., pp. 186 and ff. It is also pointed out that the promissory contract establishes the obligation to enter into a single promissory contract. However, as we have already sustained in our *O contrato de factoring*, cit., p. 321, following Luís Pestana Vasconcelos, nothing prevents that such contract is the source of more than one contract of the same type and characteristics, as long as the object of the contract is determined or determinable. It will be the framework contract, as a contractual structure capable of founding the most diverse contractual relationships, with different legal and economic purposes, which is more suited to express the complexity of the commercial concession contract. Ulmer, *Der Vertragshändler*, cit., pp. 297 and ff, p. 320, note 117, considers it to be a Vertragsstruktur, which, as a generic contractual category, receives the most diverse types of contracts. As Calvão da Silva refers, *Direito Bancário*, Almedina, Coimbra, 2001, p. 433, it is a complex figure with multiple socio-economic functions, which appears as a framework contract of future and compulsory execution deals.

[7] The definition and execution of a commercial policy outlined by the producer includes, amongst others, rules to be observed by the concessionaire regarding sales methods, advertising, organisation of activity, characteristics of premises, information duties, fixing or recommending resale prices. See Maria Helena Brito, *O contrato de concessão comercial*, cit, pp. 65 and ff, Pinto Monteiro, *Denúncia de um contrato de concessão comercial*, cit., pp. 41-42, Moralejo Menéndez, *El contrato mercantil de concésión*, cit., pp. 249 and ff. *Resale price maintenance* is one of the clauses that will raise most questions within the scope of European Union competition law. Some legal theorists have justified the price maintenance clause as a means of improving the quality of the services to be provided to customers and of encouraging the distributor to follow the promotional policy, given that, by stabilising the price, it eliminates price competition. In this sense, Pardolesi, *I contratti di distribuzione*. cit., pp. 54-57, Santini, *Vendita a prezzo imposto*, RDPCiv, 1952, pp. 1042 and ff, although admitting the criticism that the absence of price competition does not guarantee an adequate level of services provided to customers. Other authors emphasize the producer's interest in safeguarding the uniformity of the network, avoiding, through price fixing, that the fall

supervision of the grantor[8].

As we mentioned earlier, the concession contract started out as a sales contract concluded between the producer and the trader, who acted in his own name and for his own account, characterised by the existence of an exclusivity clause in favour of the latter, provided that he undertook to purchase a certain quantity of products[9].

A characteristic feature of these contracts was the exclusivity in favour of both parties: while the traders were under an obligation to buy beer only from the brewer, the latter undertook not to sell beer to other restaurants and cafés within a certain territorial area or, if he reserved that right, to allow the trader a certain percentage.[10]

This negotiating scheme has, however, undergone alterations as a result of the greater integration of the distributor in the network of the producer, resulting from the complex web of rights and duties around the parties, with emphasis on the transformation of the exclusivity clause, hitherto considered a social type element, into one of several possible clauses of the contract[11].

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in prices jeopardizes the image of the network. In this sense, Puente Muñoz, *El contrato de concesión mercantil,* Montecorvo, Madrid, 1976, pp. 182 and ff. This justification, as we shall see, corresponds to those recognized by economic theory.

[8] We follow very closely the notion of Pinto Monteiro, *Contratos de distribuição,* cit. 108, *Denúncia de um contrato de concessão comercial*, cit., p. 39 and ff, which we consider the most complete.

[9] The literature identifies in the origin of the concession contract the so-called beer contracts. These agreements date back to the 18th century and their purpose was to guarantee the brewer an outlet for his product, a need felt in particular in view of the lengthy production process involved, which, as it required low temperatures, only occurred in winter. These contracts were concluded between brewers or distributors and owners of cafés and restaurants (*Bierlieferungsverträge*) or with traders who undertook to bottle beer for sale to restaurants and cafés (*Bierverlagsverträge)*.

[10] See Ulmer, *Der vertragshändler,* cit., pp. 50 and ff, Guyénot, *Les contrats de concession commerciale: droit français et communautaire de la concurrence,* Libraire Sirey, 1968, p. 94, Garcia Herrera, *La duración del contrato de distribución exclusiva*, Tirant lo Blanch, Valencia, 2006, pp. 168-169. In Portuguese literature, see Maria Helena Brito, *O contrato de concessão comercial,* cit. pp. 34 and ff, Pinto Monteiro, *Contratos de distribuição comercial,* cit., p. 106. The exclusivity clause extended to other sectors, during the 19th and 20th centuries, exclusive sales contracts became common, i.e. contracts whereby the trader undertook to purchase, for a certain period of time, a certain quantity of products only from the manufacturer, the latter undertaking in return to grant him the exclusive right to sell his products, within a certain territorial area and during a certain period of time. This is why the concession contract was initially called *vendita esclusiva* in Italy and *vente à monopole* in France. See Orestes Cagnasso, *Concessione di vendita e Franchising,* cit., p. 382. In Germany, it started out as the *Generalvertretung,* characterised by the obligation to promote the distribution of goods and exclusivity, as Ulmer, *Der vertragshändler,* cit., p. 73. This broad formula allowed a wide range of phenomena to be covered and could be understood as the sale of goods with a bilateral or unilateral exclusivity clause, the sale of products in a given area and also the sale by the producer to a single dealer or the purchase by the latter from a single grantor. See Cottino, *Diritto Commerciale,* Vol II, pp. 395 and ff, *apud* Cagnasso, *op cit*., p. 383.

[11] As a reflection of this alteration of the negotiation scheme, the name of this contract evolved to the formula in Italy, *concessione di vendita* (*vendita commerciale*). In this sense, Orestes Cagnasso, *Concessione di vendita e Franchising,* cit., p. 383. In the same sense, Ulmer, *Der vertragshändler, cit*., p. 78. Among us, Pinto Monteiro, *Contratos de distribuição comercial*, cit., p. 106. Contrary

to what happened in France where the change from *concession exclusive* to *concession commerciale* merely intended to avoid suspicions of monopoly, as referred to by Guyenot, *Les contrats de concession commerciale en droit français et communautaire, Sirey*, 1968, p. 23. However, in an initial moment, the Italian literature based, on the exclusivity clause, the autonomy of the concession contract before other contracts, including the one that served as a paradigm, the supply contract (*somministrazione*), convened in the assessment of the concession contract, because of the successive purchase and sale contracts that the parties were obliged to conclude in performance of the concession contract, over a period of time. In the wake of a current of case law which considered that the ownership of the goods made it impossible to reconcile the contract to an agency contract, the legislator typified the exclusive *vendita* in art. 1568 of the *Codice Civile*, presenting as an essential element the exclusivity clause, based on the exclusive supply relationship established between the parties to the contract, recognizing a merely incidental character to the obligation to promote the resale of the products. This legislative intervention strengthened, in the doctrine, the conviction that the concession was no more than a sub-species of the supply contract with the typical features of the purchase and sale contract, in which the exclusivity clause was an essential element of the type. In this sense, Cartella, *Concessione di vendita,* "Dizionario del Diritto Privato", *a cura di* Natalino Irti, Carnevalli. Diritto Commerciale e Industriale, Giuffré Editore, Milano, 1981, pp. 304-305, Ferri, *Vendita con esclusiva,* Dir. prat. comm., 1933, II, pp. 467-468, Rubino, *La compravendita*, Tratt. Dir. civ. comm, *diretto da* Cicu e Messineo, Utet, Milano, 1962, pp. 601 and ff. The economic representation of the interests of the grantor patent in the contract and revealed by the economic subordination of the concessionaire is justified, by the doctrine, in the exclusivity clause. Some literature excludes from the contractual type the obligation to promote sales, requiring its express agreement. See Rubino, *La compravendita,* cit., p. 603 and Corrado, *La somministrazione,* "Tratt. dir. civ. *diretto da* Vassalli", Turin, 1963, pp. 7-8. The exclusivity was pointed out as an instrument of the producer to control the network. In exchange, this clause gave the distributor a more advantageous position in terms of competition, due to the association with the grantor's trademark. See Galgano, *L'impreditore,* Zanichelli, Bologna, 1970, p. 111. The discussion which arose in Germany around exclusivity as a minimum requirement of the commercial concession, in which the decisive contribution of Ulmer, *Der vertragshandler,* cit., pp. 93 and ff, ends up demonstrating the accidental nature of the exclusivity clause in the integration of the trader in the producer's distribution network. Ulmer, Der *Vertragshändler, cit.*, pp. 93, 206, constructs an *idealtypus* of *Vertragshändler in* which the integration of the dealer, who acts in his own name and for his own account, is the result of the dealer's obligation to resell and promote the producer's goods in a given territory, his distinctive signs coexisting with those of the producer. In this sense, the author concludes, *Der vertragshändler*, cit., p. 249, that the integration (*Eingliederung) of* the distributor in the distribution organization is the consequence - as a rule desired by the parties - of the execution of the clauses agreed upon by the parties. The Italian legal doctrine will also explain the integration of the distributor into the network of the producer without having to resort to the exclusivity clause, which is only one, among several, instruments available to the producer in order to comply with the cause of the contract which, from the transactional function has moved to the promotion of the distribution of the grantor's products. For further details, see Pardolesi, *I contratti di distribuzione,* cit., pp. 223 and ff., 232 and ff, 237 and ff, 285 and ff, 297-298. Also in Spain, the literature began to explain the integration and dependence of the dealer based on the exclusivity pact which was considered, together with acting in one's own name and on one's own behalf, one of the distinctive features of the contract. In this sense, see Iglesias Prada, *Notas para el estudio,* cit., p. 255, Dias Echegaray, *El contrato distribución exclusiva o de concesión,* Contratos Mercantiles, Bercovitz Rodriguez-Cano, Clazada Conde (coord.), Thomson, Arazandi, Navarra, 2004, pp. 552,555-556, Dominguez Garcia, *Aproximación al régimen juridico,* cit., pp. 426-427. In Belgian law, the typification of the contract by the *Loi du 27 juillet 1961,* consecrated exclusivity as an element of the type, see, Bricmont, Gysels, *Le contrat de concession de vente exclusive*: *ses effets entre parties, ses effets a l'egard des tiers. Commentaire de la loi du 27 juillet 1961*, F. Larcier, Bruxelles, 1962, pp. 13 and ff.

Given the fact that we are dealing with a legally atypical, but socially typical contract, it is necessary to point out the most relevant clauses of the contract, which are essential, both for the reconduction of the contract to an autonomous category[12].

2.1. The commercial concession contract clauses

From the concession contract arises the obligation of the grantor to enter into future purchase and sale agreements with the concessionaire, that is, to issue negotiating statements corresponding to future sales contracts, whose conditions, as a rule, are set out in annexes to the concession contract[13].

This obligation to sell will be matched by an obligation on the dealer to purchase products from the grantor. This obligation may be accompanied by an obligation to purchase a minimum quantity of products over a certain period of time or to sell a minimum quantity of products to customers over a certain period of time. The obligation to purchase a minimum quantity of products may also be related to an obligation to keep a certain level of goods in stock.

When agreed, exclusivity is usually associated with these obligations and may be bilateral or unilateral, depending on whether it binds both parties and only one of them[14].

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[12] See Franceschelli, *Natura giuridica,* cit., p. 252, Maria Helena Brito, *O contrato de concessão,* cit. pp. 54 and ff, Guyénot, *Concessionaires et commercialisation des marques,* Libreire du journal des Notaires et des Advocats, Paris, pp. 137 and ff.

[13] Maria Helena Brito, *A concessão comercial,* cit., pp. 59 and ff, describes the several clauses agreed upon regarding the formation and contents of the purchase and sale contracts. The absence of regulation of future purchase and sale contracts in the contract generated in the literature two views, one pluralist and the other unitary, regarding the need for new agreements for the execution of these purchase and sale contracts. A part of the literature holds that the consent expressed by the parties in the conclusion of the concession contract is insufficient to determine the content of the acts of performance, when these are not regulated in the contract. In this sense, Salandra, *Contratti preparatorii, contratto di coordinamento*, RDCom, 1940, pp. 24 and ff. Other authors hold a unitary view, considering that the consent expressed by the parties to the conclusion of the concession contract extends to the acts executed in execution thereof. In this sense, Franceschelli, *Natura giuridica della compravendita*, cit. pp. 237-240. Considering that the concession contract is a framework contract, we do not consider that, in any way, the lack of determination of the quantity and quality of the products to be object of purchase and sale, entered into in the performance of the contract, does not jeopardize the validity of the contract, provided that they are determinable, in the general terms provided for in the Law of Obligations, under penalty of breach of the provisions of art. 280 of the Código Civil. In the same sense, Moralejo Menedez, *El contrato mercantil de concesión,* cit., p. 186.

[14] Exclusivity has been considered a limitation of competition, since it means a reduction of supply, when the supplier of goods undertakes to supply them to only one buyer and a reduction of demand when the buyer obtains supplies only from one supplier, and both, whenever the exclusivity is reciprocal. In this sense, it is considered a vertical restriction of competition, because by preventing other suppliers from distributing their products through that distributor, as well as the latter from sourcing from other suppliers, it produces effects on competition between economic operators located at different levels of the production process. In this sense, Ghidini, *Restrizioni negoziali della*

In this sense, the concessionaire may assume, along with the obligation to sell products to the concessionaire, the obligation of negative de facto provision of not supplying to third parties, within certain time and territorial limits[15]. This clause is very frequent in the concession contract. In other cases, the grantor reserves the right to sell products to third parties within the concessionaire's territory, recognising the concessionaire's right to a percentage[16].

concorrenza: profili di diritto interno, Riv. trim. dir. proc. civ, 1979, pp. 984 and ff, Delli Priscoli, *La restrizioni verticali della concorrenza*, Casa Editrice Giuffrè, 2002, pp. 117 and ff. Some authors, however, argue that vertical restraints are beneficial to protect networks from *free riding* and safeguard specific investments of the independent distributor. See Richard Posner, *The next step in the antitrust treatment of restricted distribution: per se legality*, U. Chi. L. Rev, Vol 48, 1981, pp. and ff. Therefore, it has raised some questions, in the field of competition, in view of the provisions of article 101 of the TFEU.

[15] It is of interest to distinguish in strict terms the exclusivity clause from the non-competition pact, given that the latter always implies an obligation not to compete, corresponding to the passive side of the exclusivity, even if limited to the object of the exclusivity agreed upon, which generates some imprecision. The two are distinguished, first of all, by their breadth, which in the exclusivity clause is greater and may cover not only competing activities but, if so agreed, activities which are not, unlike the non-competition pact, which is limited to competing activities. While both may be in force during the duration of the contract, only the non-compete obligation may continue after termination of the contract. As regards the content, the non-compete obligation is always a negative de facto obligation, whereas the exclusivity pact has a dynamic content, being able to correspond to the obligation to supply the supplier with all or almost all of the products or the supplier, while maintaining the right to be supplied by other suppliers of products different from those marketed by the supplier, just as the supplier may assume the obligation to supply only that distributor in a given territory or to a given customer group, while maintaining the right to supply distributors in neighbouring territories or to other customers. See Daniel Mainguy/Jean Louis Respaud/Malo Depince, *Droit de la concurrence*, LexisNexis, Paris, 2010, pp. 170-171. In Regulation N.º 330/2010, the non-compete obligation in article 5 corresponds, according to article 1(d), to "*non-compete obligation' means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year.*" This obligation is intended to cover single branding obligations, which can also be achieved through less onerous forms such as quantity forcing on the buyer or the 'English clause', which requires the buyer to report any better offer and allows him to accept such an offer only when the supplier does not match it, and therefore deserves the same treatment from a competition point of view. See *Orientações relativas às restrições verticais*, 2010, paragraph 129. Exclusive supply, on the other hand, corresponds to the obligation for the exclusive distributors to purchase their supplies for a particular brand directly from the manufacturer. Exclusive distribution is based on exclusivity, granted by the supplier to the distributor on a territory basis, whereby the supplier undertakes to sell only to one distributor for resale in a given territory and restricts active and passive sales outside the territory. Exclusivity may also be defined by customer group suppliers, whereby the supplier undertakes to sell its products only to one distributor for resale to a certain customer group, usually coupled with limitations on its active sales to other customer groups, which are allocated on an exclusive basis. See *Orientações relativas às restrições verticais*, paragraphs 151 and 168.

[16] Roberto Baldi, Alberto Venezia, *Il contratto di agenzia*, cit., p. 112. Cartella, *Concessione di vendita*, cit., p. 317. Regarding the possibility documented in the doctrine of the grantor reserving

The concessionaire, in turn, may assume the obligation to purchase products from the grantor together with the obligation of not acquiring products from third parties, nor to promote the marketing of third party products, which may be limited to products that compete with those of the grantor or cover all types of products[17].

The obligation to conclude sale and purchase contracts, by virtue of the concession contract, corresponding to the execution or second degree contracts, whose terms are already outlined in the framework contract, is instrumental to the obligation of the concessionaire to promote its resale.

In fact, of particular importance to the economic and social function of the concession contract is the obligation assumed, by the concessionaire, to promote the resale of the grantor's products, through which the grantor accompanies the distribution of its products, transferring to the concessionaire the risks of marketing[18].

This contract does not have as its primary purpose, as the defenders of exclusivity as an essential note of the contract apparently maintained, the supply of goods to the concessionaire, but the increase in demand for their goods resulting from the promotional activity of the concessionaire, thus placing them on the market[19]. In turn, the latter also has a direct interest in reselling the goods it has

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the ownership of the products until the full payment of the price by the concessionaire or selling on consignment, we consider that these are practices that distort the contract, since the essential feature of the concession is the acquisition by the concessionaire of the ownership of the goods, assuming the risk of the respective sale. In this sense, Moralejo Menéndez, *El contrato mercantil de concesión,* cit., p. 185.

[17] Baldi, Venezia, *Il contratto di agenzia,* cit., p. 112-113. The initial notions of the concession contract focused on the exclusivity granted to the concessionaire in the resale of the manufacturer's or dealer's products. The literature identifies open and closed dealerships, depending on whether the grantor was obliged only not to sell products directly in the area reserved for the dealer or whether the dealer was granted absolute territorial protection, even preventing imports by third parties into that area. If it is true that the first method did not necessarily offend European Union Competition Law, namely art. 85.º and, subsequently, art. 81.º of the Treaty and, currently, art. 101.º of the TFEU, the same does not apply to the latter. However, it will always be said that even the open method when articulated with the obligation of dealers not to market products outside their recognised territorial area, to which must be added the monopoly right arising from the protection recognised by national legislation to the brand, allowed dealers to oppose parallel imports and therefore deserved the censure of the European Union competition authorities.

[18] In favor of the imposition, under the concession contract, of the resale obligation, see Ulmer, *Der Vertragshandler,* cit., p. 184, Pardolesi, *I contratti di distribuzione,* cit., p. 279, Maria Helena Brito, *O contrato de concessão,* cit., p. 64, note 51. As Maria Helena Brito notes, *O contrato de concessão,* cit., pp. 63-64, some literature has unsuccessfully tried to defend that this distribution function could be performed by means of contracts distinct from the purchase and sale, the example given being lease.

[19] Some literature, such as Cartella, identifies the supply contract as the main contract of the concession. This author, *Concessione di vendita, "*Dizionario del Diritto Privato*",* cit., p. 331, holds that the promotion of resale is inseparable from the exclusivity in favor of the grantor, even if limited to competing products, as a way of encouraging the activity of the concessionaire. In this sense, the obligation of promotion of goods by the dealer, as well as the consequences of the breach of

acquired from the grantor, firstly, because there would be no point in acquiring certain quantities from the grantor if it was not foreseeable that the resale would cover the costs incurred in the acquisition of the goods. On the other hand, the grantor's profits will be higher the more he increases demand, benefiting from the difference between the purchase price and the selling price.

This obligation constitutes together with the fact that the concessionaire acts in its name and on its own behalf, one of the essential notes of the concession contract[20], being considered, by some literature, the basic duty of the contractual scheme[21].

As we shall see later on, this obligation to promote the resale of the products in the concession contract corresponds to one of the features that, later on,

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this obligation are resolved by the literature by application of the provisions of art. 1568 of the *Codice Civile*. Failure to comply with the obligation to promote goods entails contractual liability for the concessionaire, even if the minimum set in the contract is reached. Also, Baldi, *Il contratto di agenzia*, pp. 118 and ff, although the exclusivity is seen only as a customary pact, but no longer essential, considers this rule applicable to the concession. However, this author, *ob cit*, pp. 113 and ff considers that the reconnection to the supply contract is not satisfactory, since the concession contract extrapolates the social economic function of exchange of the supply contract, assuming special relevance the cooperation relationship established between the parties, closer in the distribution contracts. In the same sense of Baldi, Cagnasso, *Concessione di vendita,* cit., pp. 383 and ff, although defending a notion of supply contract, in the scope of which the acquisition of products is not accompanied by any scope, exhausting the contract in the act of acquisition. This perspective, although no longer current, does not preclude the reductionist character of the reconduction of the commercial concession contract to the supply contract pointed out by the doctrine. The economic and social function of the supply contract, which initially focused on satisfying the distributor's repeated needs for supplies, is now a means whereby the supplier, establishing a relationship of commercial cooperation with the distributor, increases the sales of his products, as a rule by means of a system of discounts and bonuses. See Carolina Cunha, *O contrato de fornecimento no sector da grande distribuição a retalho: perspectivas atuais,* "Estudos em Homenagem ao Prof. Doutor Manuel Henrique Mesquita", Vol. I, Coimbra Editora, Coimbra, 2009, pp. 624-627, 633. This complex set of contractual relations, which extend over time, is structured by the framework contract, which governs the terms of this commercial cooperation and the successive sale and purchase contracts entered into by the parties in its execution. See Carolina Cunha, *O contrato de fornecimento no sector da grande distribuição a retalho: perspectivas atuais*, cit., p. 624, and Ferreira de Almeida, *Contratos II - Conteúdo, contratos* de *troca*, Almedina, Coimbra, 2007 p. 143. This contract is an atypical contract, but endowed with social typicality, being considered by the literature nominated in the light of art. 230.º, n.º 2 of the Codigo Comercial. Carolina Cunha, *O contrato de fornecimento no sector da grande distribuição a retalho: perspectivas atuais*, cit., pp. 623.

[20] See Pinto Monteiro, *Denunciation of a Commercial Concession Contract*, *Denúncia de um contrato de concessão comercial*, cit., p. 41, *Contratos de distribuição comercial*, cit., p. 109, Maria Helena Brito, *O contrato de concessão comercial*, cit, pp. 61 and ff, Iglesias Prada, *Notas para el estudio, cit*., p. 256, Martinez Sanz, *Contratos de distribución comercial*, cit., p. 349, *idem*, *La indemnización por clientela*, cit., p. 318, Moralejo Menéndez, *El contrato mercantil*, cit., p. 226, Cartella, *Concessione di vendita,* cit, p. 331, Cagnasso, *Concessione di vendita e franchising*, cit., p. 384, Baldi, Venezia, *Il contrato di agencia, cit*, pp. 114, 122,123, Pardolesi, *I contratti di distribuzione, cit, pp.* 279-280, Ulmer, *Der vertragshändler*,cit, pp. 241 and ff, 340-341, whose contribution to this approach to the concession contract was decisive, as noted by Martinez Sanz, *La indemnización por clientela,* cit., pp. 318-321.

[21] Martinez Sanz, *La indemnización por clientela,* cit., p. 318.

will be identified by the doctrine to justify the autonomy of the legal category of distribution contracts, in a strict sense[22].

The promotional activity is a set of actions of the concessionaire aimed at signing sales contracts with third parties and attracting customers, which may range from the exhibition of products to customers, conducting market research, advertising products, promotional campaigns, always subject to the guidelines of the grantor in terms of commercial policy.

This obligation may be accompanied by clauses that impose minimum limits on sales to be made to third parties, clauses that determine certain rules in the marketing of products and, as we have already seen, the prohibition of the sale of other products, competing with those of the grantor and, in some cases, non-competing.

The purpose of integrated distribution is not only to market goods, but also to meet market requirements as regards the guarantee and assistance provided by the producer, which is intensified when, as in the case of commercial dealerships, luxury, technological and mechanical products are involved[23]. In this sense, the grantor is obliged to provide a warranty for the goods marketed by the concessionaire and to provide the technical assistance and training necessary for the distributor to provide after-sales assistance, namely maintenance and repair services for the marketed products.

The concession contract also contemplates, with different degrees of intensity, the use by the concessionaire of the distinctive signs of the grantor and other intellectual property rights, namely the trademark, logo, know-how, this use being conditioned by the obligation of the concessionaire to observe the instructions and conditions stipulated by the grantor[24].

The greater the integration of the dealer in the grantor's network, the greater is the need to control the actions of the dealers, not only as regards the use of intellectual property rights, but also in other aspects of the dealer's conduct in the course of its business, which includes the demonstration of products, promotional activity, advertising, quality of services provided, all factors that may have a negative impact on the network, calling into question the grantor, as well as the other dealers[25].

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[22] Pardolesi, *I contratti di distribuzione,* cit., pp. 285 and ff.

[23] See Santini, *Commercio e Servizi*, cit., pp. 404-405.

[24] The use by the concessionaire of intellectual property rights, which in franchising takes on the nature of an essential obligation, takes on various forms in the concession contract, and may be limited to the marketing of the grantor's products, integrated in promotional activities and advertising campaigns, as may be accompanied by the use of distinctive signs, advertising, furniture, exhibitors and there may even be the transmission of technical knowledge for the provision of services to customers, especially in the after-sales phase. See Moralejo Menéndez, *El contrato mercantil de concesión,* cit., pp. 195-206.

[25] See Pardolesi, *I contratti di distribuzione,* cit. p. 75 and ff. This power, usually acknowledged in contracts, expressed in clauses recognising the concessionaire's right to inspect warehouses, sales outlets, the quality of the services provided and accounting documents, is considered an obligation, since it is essential to the maintenance and success of the network.

This power of control is a natural consequence of the commercial integration of the concessionaire in the grantor's network and its subjection to the commercial policy of the network, but is limited to the autonomy of the concessionaire, and must be guided by the interests that led both parties to contract[26].

The subordination of the dealer to the commercial policy may mean subjection to general rules, but also to particular rules, particularly with regard to prices, customer loyalty policies, promotional policy, among others.

In this sense, the concessionaire is subject to the control and supervision of the grantor, both in the use of the intellectual property rights and in the execution of the grantor's commercial policy.

The integration of the concessionaire into the commercial network of the grantor also entails a duty to inform the concessionaire of all facts that in any way affect the marketing of the products[27].

The contract, as a general rule, obliges the concessionaire to abstain, during the duration of the contract, from distributing, marketing, stocking, promoting and representing products that compete with those of the grantor, the legitimate interest of the grantor in protecting the network and preventing the practice of unfair acts being given as grounds[28].

In order to protect know-how transferred during the contract, a non-competition agreement may be concluded for the duration of the contract after its termination.

European Union competition law has been quite demanding in the treatment given to this obligation, conditioning its legality to strict requirements, based on the harmful effects on competition[29].

The integration of the dealer into the network or distribution chain of the grantor is achieved through these obligations, which go far beyond the obligation to purchase for resale.

Regarding the exclusivity clause, as we have already mentioned, although the grantor usually grants the concessionaire exclusive rights, recognizing it as the monopoly for the sale of these goods in a certain territory, it is not an essential feature of the commercial concession contract[30].

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[26] In this sense, Moralejo Menéndez, *El contrato mercantil de concesión*, cit., pp. 202-203. On the liability of the grantor for damages suffered as a result of the commercial policy developed and imposed by it, see Moralejo Menéndez, *El contrato mercantil de concesión*, cit., pp. 203 and ff.

[27] Cfr. Moralejo Menéndez, *El contrato mercantil de concesión*, cit., pp. 250-251.

[28] The limitations imposed by the grantor, in the sense that the concessionaire may not develop any other activity, even if in a market, segment and products distinct from those of the grantor, will be a different situation, and will raise more doubts, and may only be justified by the fact that the dedication required by the new activity may jeopardize the diligent performance of the latter in the execution of the concession contract. Moralejo Menéndez, *El contrato mercantil de concesión*, cit., p. 254.

[29] See art. 5.º of Regulation 330/2010, which replaced Regulation 2790/1999.

[30] In this sense, Ulmer, *Der vertragshändler*, cit., pp. 77-78, Baldi, Venezia, *Il contratto di agenzia*, cit, p. 112, *Pardolesi, I contratti di distribuzione*, cit., p. 223, Santini, *Commercio e Servizi*, , cit., p. 171, Pinto Monteiro, *Contratos de distribuição*,, cit, p. 106, Maria Helena Brito, *O contrato de*

concessão comercial, cit., p. 38, Martinez Sanz, *Contratos de distribución comercial: concesión y franchising*, cit., p. 348, *idem*, *La indemnización por clientela en los contratos de agencia y concesión*, cit., p. 318, n.º 706, Alonso Soto, *Los contratos*, cit., p. 197, Broseta Pont, *Manual de Derecho Mercantil*, under Martinez Sanchez, cit., p. 130, Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, cit., pp. 117-119. The exclusivity is still considered today, by much of the French literature, an essential feature of the concession, as initially held. See Champaud, *La concession commerciale*, Revue Trim. D. Comm, 1963, cit., pp. 462-463, 482-483, Virassimy, *Les contrats de dependance, Essai sur les activités professionnelles exercées dans une dépendance économique*, L.G.D.J, 1986, pp. 50-51, Guyenot, *Les conventions d'exclusivité de vente*, Revue Trim. D. Comm, T XVI, 1963, p. 34, *idem*, *Concessionnaires et Commercialisation des Marques. La Distribution Intégrée*, LJNA, Paris, 1975, pp. 49 and ff, pp. 71-72, albeit under the inaccurate terminology of non-compete obligation, pp. 75-76. Currently, Ripert, Roplot, *Traité de Droit Commercial*, Tome 2, 16th ed, L.G.D.J., Paris, 2000, pp. 544-545, Beauchard, *Droit de la distribution et de la consommation*, Presses Universitaires de France, Paris, 1996, p. 183, Philippe Le Tourneau, *Les contrats de concession*, Litec, Paris, 2003, pp. 9, 47 and ff, Didier Ferrier, *Droit de la distribution*, 4th ed, Lexis Nexis -Litec, Paris, 2006, pp. 280 and ff, David Bosco, *L'obligation d'exclusivitè*, Feduci, Coll dirigée par Henry Lesguilons, Bruylant, Bruxelles, 2008, p. 413. Also in Belgian law, Bricmont/Gysels, *Le contrat de concession de vente exclusive*, Bruxelles, 1962, pp. 12 and ff. Among us, following the French literature, Maria de Fátima Ribeiro, *O contrato de franquia (franchising)*, DJ, Vol XIX, Volume 1, 2005, p. 86. In Spain, some literature maintains exclusivity as an essential element of the contract, such as Echegaray, *El contrato de distribucion exclusiva o de concesión*, Contratos Mercantiles, Bercovitz Rodriguez-Cano, Clazada Conde (coord), Navarra, 2004, pp. 544-545, Alicia García Herrera, *La duración del contrato de distribución* exclusiva, *cit.*, pp. 166-168, this author alleging that exclusivity is the consideration given to the concessionaire for assuming the risks of commercialization. In Italy, Bastianon, *Distribuzione selettiva e distribuzione esclusiva, cit*, p. 289. French legal theorists initially focused on the legality of exclusivity clauses which, in the post-war period marked by strong state interventionism, were subject to a strict regime laid down *Ordonnance 45-1483, du 30 de Juin 1945* and to the general principle of the unlawfulness of the *refus de vente*, penalised by art. 38 of the *Loi du 21 Octobre 1940*, re-enacted by the *décret de 9 août 1953* and introduced in Article 37 of the *Ordennance du 30 juin 1945*, later amended by *décret 58-545 du 24 juin de 1958*, with the aim of protecting small businesses and preventing price manipulation in times of shortage. See Mainguy, Respaud, Depince, *Droit de la concurrence*, cit., p. 129, Didier, *Droit de la distribution*, cit., pp. 24-25. The exclusivity clause was associated, by French literature, with the integration of the distributor in the network, arguing that, by creating a situation of dependence of the distributor, the latter was compelled to accept the instructions of the grantor, for fear that the contract would cease, thus facilitating the control of the network by the grantor. Cf. Champaud, *La concession commerciale*, cit., pp. 462-463, 482-483, Virassimy, *Les contrats de dependance*, cit., pp. 50-51. In this sense, Guyenot, *Concessionnaires et Commercialisation des Marques*, cit., pp. 13 and ff, distinguishes simple aggregate preferential distribution from preferential distribution enforced by exclusive supply and supply contracts. This subordination is offset by the advantages that the dealer derives from association with the grantor's brand in the case of products intended for a limited market and with high added value. This common interest of both parties in marketing the products has led case law to place the contract in the category of *mandat d'interet commun*, in assessing the consequences of unilateral termination by the parties. In view of the absence of legal representation, guaranteed by the fact that the dealer acts in his own name and on his own behalf, this line of case law emphasised the economic representation by the dealer of the grantor's interests, together with the fact that the dealer was subject to the grantor's instructions in marketing the products, making him equivalent in functional terms to an agent and in some cases a subsidiary. These arguments were eventually rejected by the doctrine and by *Cassation*, which began to refuse to extend the term "mandate" to other contracts. See Le Tourneau, *Les contrats de concession*, cit., p. 23, note 20, where you can gather jurisprudential indications. The common interest will be accepted by *Loi n.° 89-1008 du 31 décembre* 1989, known as *Loi Doubin*, whose

In a parallel movement that moved the attention of the literature from exclusivity to the obligation to promote the resale of the producer's products, later reconducted, in a broader perspective, to the obligation to promote the commercialization of the products, weakening the emphasis on the resale of the goods, as a central characteristic of the distribution contracts, the exclusivity agreed in this contract also gives way to the obligation of the grantor to promote the commercialization of the producer's goods, following the instructions of the latter[31].

2.2. Advantages of the concession contract

The producer, through this contract, can monitor the distribution of its products, without bearing the costs inherent in direct distribution and transferring

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content was later incorporated into art. L 330-3 of the *Code de Commerce*, by *Ordonnance n°2000-912 du 18 septembre 2000 relative à la partie législative du Code de Commerce* which considers that "*Toute personne qui met à la disposition d'une autre personne un nom commercial, une marque ou une enseigne, en exigeant d'elle un engagement d'exclusivité ou de quasi-exclusivité pour l'exercice de son activité, est tenue, préalablement à la signature de tout contrat conclu dans l'intérêt commun des deux parties, de fournir à l'autre partie un document donnant des informations sincères, qui lui permette de s'engager en connaissance de cause*". The qualification of this contract, as contracts of common interest, will justify a set of obligations for the parties, in particular, regarding the obligation of the grantor to provide technical and financial assistance to the concessionaire, to establish common rules of protection of the network, to set a *numerus clausus* for the network, to which are added reciprocal information obligations, whose interest is not exhausted in the concession, but also covers the franchise contract. See Le Tourneau, *Les contrats*, cit., p. 26 and ff. The exclusivity clause, according to L 330-1 also introduced by Ordonnance n.° 2000-912 du 18 septembre 2000 "*Est limitée à un maximum de dix ans la durée de validité de toute clause d'exclusivité par laquelle l'acheteur, cessionnaire ou locataire de biens meubles s'engage vis à vis de son vendeur, cédant ou bailleur, à ne pas faire usage d'objets semblables ou complémentaires en provenance d'un autre fournisseur.*" On the expansion of the nullity of the exclusivity clause before L 330-1 of the *Code Civile*, see David Bosco, *L'obligation d'exclusivitè*, cit., pp. 396 and ff. Only a minority of literature maintain that exclusivity as the cornerstone of the contract represents a restrictive view, admitting that the integration may occur without recourse to the clause. See B. Mercadal/P. Janin, *Les contrats de coopération inter-entreprises*, Ed. juridiques Lefebvre, Paris, 1974, p. 355. Some admit that it is a customary clause, even if it is not essential. See Jean Casel, *Refus de vente: clauses d'exclusivité, contrat de concession*, Éditions de l'Enterprise moderne, 1960, p. 105.

[31] See Pinto Monteiro, *Os contratos de distribuição comercial*, cit, p. 106, who points out the importance of economic development and, consequently, the improvement of marketing and distribution techniques in this evolution. Pardolesi, *I contratti di distribuzione*, cit., pp. 155 and ff, 169 and ff, one of the authors who shares this restricted notion of distribution contracts centred on the obligation to promote the resale of the producer's products, as we have already mentioned in footnote 27 *above*, describes the doctrinal jurisprudential path in Germany and Italy which led to the overcoming of the exclusivity clause as the nerve centre of distribution contracts. In this sense, see Ignacio Moralejo Menéndez, *El contrato mercantil di concesión*, cit., pp. 226 and ff, Baldi,Venezia *Il contratto di agenzia*, cit., pp 121 and ff, Zuddas, *Somministrazione, Concessione di vendita, Franchising*, Giappichelli Editore, Torino, 2003, p. 277, Martinez Sanz, *Contratos de distribución comercial: concesión y franchising*, cit, p. 349, *idem*, *La indemnización por clientela en los contratos de agencia y concesión*, cit., pp. 318-319, Manuel Broseta Pont, *Manual de Derecho Mercantil*, cit., pp.130-131. It is this obligation to promote the distribution of the producer's goods that justifies the inclusion of this contract in the legal-economic phenomenon of distribution contracts.

the risk of marketing the products to the concessionaire, with the guarantee that it can put its commercial policy into practice and schedule production.

These objectives are achieved by setting minimum purchasing and sales quotas, sales methods, advertising and promotional activities.

This contract also ensures better service to the consumer, in particular in after-sales assistance which is required by the grantor to the dealer.

In return for the limitation suffered, in the course of the interference inherent in subordination to the respective commercial policy of the concessionaire, the concessionaire becomes part of the producer's network, benefiting from the prestige associated with the grantor's product, which, in addition to giving it a competitive advantage over its competitors, has a direct impact on the profits obtained in the marketing of the same[32].

2.3. Distinction from the agency contract

The commercial concession shares with the agency contract some essential features, evident in the integration of the reseller in the distribution network of the producer through a stable commercial relationship of collaboration existing between grantor and concessionaire, oriented to the pursuit of the same goal, the distribution of goods from the producer to the consumer, through an activity of promoting the marketing of the goods that will allow us to include them both in the category of distribution contracts[33].

However, it also has aspects that distinguish it from the agency, namely the fact that the grantor, unlike the agent, acts in his own name and for his own account, acquiring ownership of the goods for resale, in some cases subject to minimum quotas, assuming the marketing risks. This contract, in this respect, represents an evolution in the greater integration of the distributor in the network, simultaneously allowing the dealer to be subject to the instructions and supervision of the grantor but, at the same time, the transfer of the commercialisation risks to the dealer[34].

Remuneration is also different, being, in the case of the agent, dependent on commission, while the concessionaire's remuneration is obtained indirectly

[32] See Maria Helena de Brito, *O contrato de concessão comercial,* cit., pp. 21and ff, Pinto Monteiro, *Denúncia de um contrato comercial,* cit., pp. 43-44, Menéndez Moralejo, *El contrato mercantil de concesión,* cit., p. 24.

[33] Both the agent and the concessionaire are economic representatives, in a different sense from the legal representation set out in articles 258 to 269 of the CC, since they pursue the economic interests of the principal and the grantor, promoting the commercialization of the goods through distinct legal instruments. In both, the doctrine identifies a situation of economic dependence. See Georges Virassimy, *Les contrats de dependance,* cit., pp. 5 and ff, 45 and ff, Iglesias Prada, *Notas para el estudio,* cit., p. 273.

[34] See Pinto Monteiro, *Contratos de distribuição,* cit., pp. 112-113, also points out that unlike the agency, the dealer in most cases provides after-sales assistance services.

from the profit margin resulting from the marketing of the goods[35].

3. Conclusion

The concession contract started out as a sales contract concluded between the producer and the trader, who acted in his own name and for his own account, characterised by the existence of an exclusivity clause in favour of the latter, provided that he undertook to purchase a certain quantity of products.

This contract, though, has evolved to a complex web of rights and duties for the parties, under which the grantor undertakes to sell to the concessionaire, and the latter to buy from him, for resale, a certain quantity of goods, assuming the risk of marketing the goods.

The integration of the dealer, who acts on its own behalf and in its own name, in the grantor's network, is ensured by the compliance with certain obligations, relating to commercial policy and promotional and after sales services, under the control and supervision of the grantor. In this scenario, the exclusivity clause it is not an essential feature of the commercial concession contract.

The producer, through this contract, can monitor the distribution of its products, without bearing the costs inherent in direct distribution and transferring the risk of marketing the products to the concessionaire, with the guarantee that it can put its commercial policy into practice and schedule production

Even though commercial concession shares with the agency contract some essential features, as it allows the integration of the reseller in the distribution network of the producer through a stable commercial relationship of collaboration existing between grantor and concessionaire, oriented to the pursuit of the same goal, the distribution of goods from the producer to the consumer, commercial concession represents an evolution in the greater integration of the distributor in the network, simultaneously allowing the dealer to be subject to the instructions and supervision of the grantor but, at the same time, the transfer of the commercialisation risks to the dealer.

The role that this contract can perform in the commercial distribution, by allowing the manufacturer to achieve greater efficiency in the distribution of its products, may help to face the supply chain crisis currently experienced worldwide following the Pandemic COVD 19.

[35] Some literature argues that the establishment by the grantor of a recommended price brings the concession contract closer to the agency in retributive terms, since by assuming the delimitation by the grantor of the concessionaire's margin that is included in the recommended price, there is predetermination of the concessionaire's remuneration. See Moralejo Menéndez, *El contrato mercantil de concesion, cit.*, p. 124.

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Legal regime of competition in Croatia

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Abstract

Croatia has implemented EU's competition rules. Competition Act lays down the competition rules and establishes the competition regime in Croatia. It also regulates work of the Croatian Competition Agency. The Competition Act defines the rules and methods for promoting and protecting competition. On paper, competitive equality is enforced with respect to market access, credit and other business operations. In practice, however, state-owned enterprises (SOEs) and government-designated "strategic" firms may still receive preferential treatment. The Croatian Competition Agency is the country's competition watchdog, determining whether anti-competitive practices exist and punishing infringements. It has determined in the past that some subsidies to SOEs constituted unlawful state aid.

Keywords: *competition, Croatia, European Union, legislation, harmonization.*

JEL Classification: K21, K22

1. Introduction

The Law on the Protection of Market Competition of Croatia has as foundation EU Competition Law. The Law shows that the importance of the competition law as a part of economic law has been recognized since 1995. The Law sets the basis for the balancing of disadvantages and benefits for certain types of agreements.

In the same time there has been a revision of the Croatian Commercial Act, which has integrated the distribution agreements in the Croatian legal system. Due to all these positive changes and having in mind that Croatia is approaching the European economic integration, special attention must be paid to any legislative changes. For a further development of the Croatian competition law, the harmonization will be a great challenge.

2. General aspects

Croatian competition law is built on two legal sources, the Constitution of the Republic of Croatia on one hand, and the Treaty on the Functioning of the European Union (TFEU) together with the complete EU competition acquis on the other. Article 49 of the Constitution of the Republic of Croatia publicizes that

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entre preneurial and market freedom shall be the groundwork of the home economic system, that the country shall make sure an equal legal regime to all undertakings on the market and that abuse of monopolies is forbidden.[2]

Such constitutional provisions current the groundwork for the improvement of home competition law regulations aimed at the realisation of free market competition. The first Croatian Competition Act used to be enacted in 1995 and resulted in a systematic regulation of the Croatian competition regulation for the first time. In 2003, a new law used to be adopted that tried to deal with a number of inconsistencies and short comings of the 1995 Act. Bearing in mind its strong willpower to accede to EU membership, Croatia strived to harmonise its law with EU competition law.[3]

As a consequence, the 2003 Act has to a large extent already been deemed harmonised with the acquis. However, the greatest shortfall of the 2003 regulation has been its slow and bad execution – namely the sanctioning of infringements through the misdemeanour courts, which ultimately resulted in insufficient protection of the free market competition. The modern-day Competition Act was once adopted on 24 June 2009, in the direction of the EU-accession negotiations. The new Competition Act entered into pressure on 1 October 2010 and delivered a number of novelties in phrases of the powers and equipment that allow the Croatian Competition Agency (the Agency) to goal its enforcement activ ity at areas that pose the most chance to consumers.[4]

Before Croatia's accession to the European Union on 1 July 2013, the Competition Act was similarly amended on 21 June 2013 to allow the direct enforcement of articles one zero one and 102 of the TFEU and to empower the Agency to immediately observe these articles together with the Council Regulation 1/2003 and Regulation 139/2004 on the control of concentrations between undertakings, as well as to cooperate with the European Commission and other competition authorities inside the Network of Competition Authorities. Now that the Agency has these powers, Croatian competition laws has been completely aligned and harmonised with the EU acquis and all the prerequisites for tremendous competition enforcement have been fulfilled. Regulatory framework Croatian competition rules are set out in the 2009 Competition Act, as amended in 2013.

The Competition Act establishes the competition regime and regulates the powers, duties, internal organisation and proceedings of the Croatian Competition Agency, which is entrusted with the enforcement of the Act. The Act applies to all varieties of prevention, restrict or distortion of competition by using

[2] M. Liszt, *Croatia: Overview*, „European Antitrust Review" 2016, p. 78. Available at: http://globalcompetitionreview.com/reviews/72/sections/243/chapters/2907/croatia-overview/ (accessed on 1 September 2021).
[3] Ibid, p. 78.
[4] Ibid, p. 78.

undertakings within the territory of Croatia or outdoor its territory, if such practices take impact in the territory of Croatia. In 2010 and 2011 the Croatian government surpassed a dozen subordinate rules upon the concept of the Agency to put in force the 2009 Competition Act. [5]

The Croatian Competition Agency, which is responsible for enforcing the competition regulation, is an independent felony entity with public authority that autonomously performs things to do inside the powers granted to it by way of the Competition Act. The Agency is responsible only to the Croatian parliament, which ratifies the Statute of the Agency and appoints the individuals of the Competition Council, which is the managing body of the Agency. The Competition Act expressly prohibits any approach or structure of affect on the Agency that may want to impair its independence and autonomy. It in addition presents that participant of the Competition Council can also no longer be nation officials, individuals who function duties in any administrative body of a political party, mem bers of supervisory boards and government our bodies of undertakings, or members of any variety of interest associations, which ought to lead to a conflict of interest.[6]

3. Competition Council

The Competition Council consists of five members with ample knowledge and at least 10 years' experience in the discipline of competition law. At the head of the Competition Council is the President, who represents the Agency and administers its everyday affairs. The Competition Council's competences include: task compatibility-assessment complaints and the court cases concerning the imposition of fines due to infringements of competition rules, concluding the complaints and figuring out on the adoption of measures (obligations, prerequisites and deadlines) indispensable to restoration effective competition and imposing fines, training of the Agency's team of specialists to behavior prelimi nary investigations, proposing to the authorities the adoption of subordinate legis lation and issuing opinions on the compliance of proposed draft laws and other law with the Competition Act, issuing opinions and statements on the development of com parative practices in the region of competition law, issuing specialist opinions at the request of the Croatian parlia ment, the Croatian government, central administration authori ties and other public authorities, defining methodological standards for competition research and market investigation and promoting things to do related to competition advocacy and rais ing cognizance on the position and importance of competition regulation and policy.[7]

The Agency holds extensive competences that allow it to efficiently make certain a stage taking part in area for all market participants. As a standard rule,

[5] Ibid, p. 78.
[6] Ibid, p. 79.
[7] Ibid, p. 79.

a technique of identifying prohibited agree ments and abuses of dominant function is initiated by the Agency ex officio, whilst in contrast, the process for assessing concentra tions is initiated by way of the parties to the concentration. However, there are exceptions to this rule that enable the Agency to nevertheless initiate the procedure ex officio in cases the place there is no notification of concentration. [8]

Fines for extreme infringements of the competition regulation can be imposed in the amount of up to 10 per cent of the total turnover of the venture realised and quoted in the closing year's economic country ments, especially if an mission concludes a prohibited agree ment or participates in any different way in an agreement that resulted in undue distortion of competition, abuses a dominant position, participates in the implementation of a prohibited attention or does now not act in compliance with the certain choices of the Agency. For less extreme infringements, undertakings can also be fined in the amount of up to 1 per cent of the total turnover quoted in the previous year's economic statements if the undertaking fails to put up the obligatory prior notification of concentration to the Agency, submits to the Agency fallacious or deceptive records in the concentration appraisal proceedings, fails to act in compliance with the request of the Agency or obstructs the enforcement of the injunction of the High Administrative Court.[9]

When setting the fine, the Agency takes into account all mitigating and aggravating circumstances, such as the gravity of the infringe ment, the duration of the infringement and the harm brought on to competing undertakings and consumers. With a view to disclosing the most severe infringements of the provisions of the Competition Act or article 101 TFEU, the Agency might also grant immunity from a satisfactory to a cartel member who first comes ahead and informs the Agency of the existence of a cartel and sup plies proof that will enable the Agency to provoke the intending in connection with the alleged cartel, or to the first cartel member who submits data and evidence that will enable the Agency to discover the infringement in connection with the alleged cartel in the earlier initiated lawsuits the place the Agency had no ample proof to adopt a decision (to realize the existence of a cartel). Immunity from a fine might also no longer be granted to the venture who was the originator (leader) or instigator of the cartel. [10]

For full leniency, an undertaking have to furnish decisive evidence, need to cooperate certainly and fully on a continuous basis and expeditiously from the time it submits its application, must stop its involvement in the cartel without delay following its software to the Agency, besides for what would, in the Agency's view, be fairly fundamental to keep the integrity of the surprise inspections and must no longer have destroyed, falsified or hid evidence of the cartel, nor disclosed the fact or any of the content of its contem plated software to the

[8] Ibid, p. 79.
[9] Ibid, p. 79.
[10] Ibid, p. 79.

Agency when considering making its application.[11]

Against the decisions of the Agency establishing the infringements of the competition regulation and imposing fines, no attraction is allowed. However, the injured party may additionally bring a claim before the High Administrative Court of the Republic of Croatia inside 30 days from the receipt of the decision. The High Administrative Court, in a panel consisting of three judges, will examine and decide upon each element of the decision.[12]

The Croatian Competition Agency (the Agency; CCA), was once mounted through the Decision of the Croatian Parliament of 20 September 1995 and grew to be operative in early 1997. The CCA independently and autonomously performs the things to do inside its scope and powers regulated underneath the Competition Act (Official Gazette 79/09) and the Act on the Amendments to the Competition Act (Official Gazette 80/13).

During 2018, the CCA persisted its leading position in Croatian delegation for negotiation of Proposal of the EU Directive to empower the competition authorities of the member states to be more superb enforcers and to make sure the perfect functioning of the inner market (ECN + Directive). From May 2017 to April 2018, CCA representatives prepared their positions on the proposals of the Directive, participated in discussions in the working our bodies of the Council of the EU and submitted remarks on the texts of the Directive. Finally, on 14 January 2019, the Directive was adopted and it entered into force on 4 February 2019. Once the Directive has come into force, Member States have a two yr deadline for its transposition into national legislation. 5. In addition to the above-mentioned directive, throughout 2018, representatives of the CCA, together with representatives of the Ministry of Agriculture, have been actively concerned in drafting of the future directive on unfair trading practices in the meals provide chain. Directive (EU) 2019/633 of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and meals supply chain used to be adopted on 17 April 2019.[13]

4. The control of concentrations

A merger notification should be made inside eight days of the day of the signing of the settlement obtaining a majority share or prevailing influence over an undertaking, or making a takeover bid. The parties to the concentration may, as an exception to the standard rule, file a pre-notification earlier than the signing of the agreement or the booklet of a takeover bid if they, appearing in accurate faith, prove a actual intention to enter into an settlement or make a public offer.

[11] Ibid, p. 79.
[12] Ibid, p. 79.
[13] OECD, *Annual Report on Competition Policy Developments in Croatia*, 2020, p. 3, available online at https://one.oecd.org/document/DAF/COMP/AR(2020)43/en/pdf, consulted on 1.10. 2021.

The notification is given in a designated form, set out with the aid of the Regulation on the manner of notification and the criteria on the evaluation of the concentration of the undertakings (Official Gazete No. 38/2011). The following need to be enclosed with the notification (the unique or a notarised copy, or if the original report is no longer drafted in the Croatian language, a licensed translation of the document constituting the criminal grounds for the concentration, annual financial statements of the parties to the attention for the financial year preceding the concentration and other legally obligatory documentation and data.[14]

When filing the notification, it needs to be noted whether or not the concentration notification have to also be filed to a competition authority in a jurisdiction different than the Republic of Croatia, and if any such physique has until now made a selection related to the concentration, the aforesaid selection should be despatched to the Agency.[15]

A simplified version of the notification may be submitted to the Agency, in the following instances in particular, that no party competes in the equal relevant product market or the identical geographical market, two or extra parties to the agreemeny are engaged in commercial enterprise activities in the equal product and geographic market, but their combined market share is less than 15 per cent, or one or more events to the attention are engaged in enterprise things to do in a product market that is upstream or downstream from a product market in which any other celebration to the awareness is engaged, however their sole or combined market share in a single market is less than 25 per cent, a birthday celebration to the attention acquires independent manage over an challenge over which they had earlier exercised joint control or in the tournament that two or more undertakings acquire manipulate over a joint mission with no big things to do in the Republic of Croatia, or such large activities are no longer planned in the foreseeable future.[16]

The relevant thresholds for simplified merger notification are decrease than these proposed via the Commission Notice on a simplified technique for therapy of sure concentrations under Council Regulation (EC) No. 139/2004.

When submitting the notification, positive records can also be specified as a trade secret.

The individuals of the awareness together make the pre-notification. However, if a single assignment acquires control over an mission or components of an undertaking, the notification of the concentration should be made with the aid of that undertaking.

When the notification is filed to the Agency, a transient prohibition of the awareness implementation enters into force.[17]

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[14] Durmiš, G, Ostojić I, Ivančić, T., Beber, I., *Croatia*, „The Merger Control Review", eleventh edition, 2020, p. 8.
[15] Ibid, p. 8.
[16] Ibid, p. 9.
[17] Ibid, p. 9.

The attention may only be implemented either following the lapse of 30 days from the day of the receipt of the full merger notification or, in the match that a choice to provoke the concentration clearance lawsuits used to be rendered, on the day of the transport of the Agency selection granting the approval or conditional approval of the concentration.

The notification is viewed filed on the day of the receipt of the required documentation in full. The Agency shall issue excellent affirmation of the receipt of the entire documentation.

When the Agency receives the entire merger documentation, they submit a public invitation, asking all interested parties to put up their written remarks and opinions on the proposed attention inside eight to 15 days.[18]

The merger will be assessed in recognize to the impact of the viable concentration on the relevant market. The concentrations are prohibited when they may notably restrict, impair or distort the competition, in unique if the concentration creates or strengthens the dominant position of one or more undertakings, whether individually or jointly.[19]

The Agency may additionally request any additional information from the events to the concentration at all times, and the events to the awareness are free to deliver to the Agency any statistics they may also think about applicable to the evaluation of the concentration, as the burden of proof of the existence of the high-quality market consequences of the awareness is upon the events to the concentration.

If, following a overview of the submitted documents, the Agency finds that it may additionally not reasonably anticipate that the concentration impairs, restricts or distorts the opposition in the applicable market, then the concentration will be considered to be cleared after 30 days. The Agency will without delay issue the fabulous decision pointing out the attention is allowed, and supply it to the birthday party that submitted the notification. The choice is also posted on the Agency's website[20].

However, if the Agency finds that the attention may additionally have a full-size impact on opposition in the applicable market, then the Agency shall provoke Phase II court cases on the assessment of the concentration, launching an in-depth review.[21]

The in-depth assessment of the attention can also be concluded by using a selection declaring the attention is prohibited, allowed or conditionally allowed. This decision ought to be rendered within three months following the day of receipt of the complete notification of the concentration. This three-month duration may also be prolonged by using an extra three-month length if the Agency deems it quintessential for identifying the full statistics of the case and the evaluation of

[18] Ibid, p. 9.
[19] Ibid, p. 9.
[20] Ibid, p. 10.
[21] Ibid, p. 10.

the submitted evidence. During the whole path of the proceedings, the parties may additionally strategy the Agency and recommend the implementation of measures and conditions to alleviate the poor effects the attention may have on competition.

A hearing, which the frequent public is now not authorized to attend, may additionally be scheduled all through Phase II of the proceedings need to the Agency reflect onconsideration on it to be useful.

Prior to the hearing, the events to the awareness may request an perception into the Agency's case file. Drafts of the decisions, minutes from the conferences of the Competition Council, inner notes and instructions, and correspondence between the Agency and the European Commission can also not be reviewed.[22]

A word on the preliminary determined data will be delivered to the events to the attention prior to the scheduling of the oral hearing. The parties can also respond to the note in writing, inside one month of the day of receipt of the notice.

A provision is in effect in this instance, and the three-month time duration for the rendering of the choice of the Agency is halted from the day the notice on the preliminary decided data is delivered to the events till the day the corporation receives the written response from the parties proposing ample measure and conditions.

The participation is limited, for example, to the submission of their opinions on the proposed awareness upon the Agency's invitation.

Even in cases where parties have established their felony interest, and have been granted certain procedural rights, they are not authorized to evaluate the case file throughout the pending procedure, however solely to obtain a written word on the preliminary decided data in simplified form, upon request.[23]

There is no enchantment of an Agency decision, however the parties might also resort an administrative declare against the selection earlier than the High Administrative Court of the Republic of Croatia within 30 days of receipt of the decision.

Only parties to the proceedings, or humans the Agency granted the equal rights in the course of proceedings, are entitled to inn an attraction against the Agency's decision.

Initiation of the judicial assessment complaints does now not have a suspensory effect, until it pertains to imposed fines.[24]

The Agency may additionally annul a choice on the assessment of a concentration if the decision was once made with inaccurate or false data, and such facts were cloth to the decision or if any participant to the awareness has failed to fulfil their duties as set out in the Agency's decision.

Measures, conditions and deadlines for the parties to the awareness to

[22] Ibid, p. 10.
[23] Ibid, p. 11.
[24] Ibid, p. 11.

restoration opposition in the applicable market will be outlined in the new decision, and the splendid fines will be imposed.

The statute of barriers for evaluation of mergers is 5 years. Each procedural motion of the Agency in this admire halts the statute of limitations, however in any case the length may now not exceed 10 years.

The maximum exceptional for failure to notify a merger to the Agency is 1 per cent of the annual turnover of the undertaking, in accordance to the last published economic statements.

The most excellent for participation in a prohibited attention is 10 per cent of the annual turnover of the undertaking, in accordance to the final published financial statements.[25]

5. The modernization of legislation

The CCA proposed to the Ministry of the Economy, Entrepreneurship and Crafts at the give up of 2017 the adoption of the amendments to the Competition Act and drafted the textual content of the proposed revisions with the reason of: a. defining the fame of the CCA as an autonomous and unbiased criminal individual performing the activities of a typical country wide regulatory authority in the region of competition in cost of all markets within the scope and in line with the competences described by using the Competition Act.[26]

This is fundamental on the account of the fact that even though the current Competition Act implies that the CCA is a countrywide regulatory authority in charge of opposition in all markets, it fails to supply an specific definition of the CCA as a national and customary regulatory authority in charge of opposition troubles on all markets, enabling the CCA to endorse to the Government the adoption of provisions revoking the block exemption from the widespread ban of the agreements beneath Article 8 paragraph 1 of the Croatian Competition Act for sure classes of agreements, in case the market state of affairs or market conditions change, making sure the termination of the Regulation on block exemption granted to insurance agreements, corrigendum of three provisions of the existing Croatian Competition Act dealing with concentrations between undertakings (Article 17 paragraph 6, Article 19 paragraph 7 and Article 58 paragraph 1 item 13) with the view to ensuring ideal application of the EU competition law the place the European Commission decides to refer the assessment of a specific concentration between the undertakings producing outcomes on trade between the Member States to the CCA (regardless of the fact whether or not the turnover thresholds at the countrywide stage are fulfilled or not).[27]

[25] Ibid, p. 11.
[26] OECD, *Annual Report on Competition Policy Developments in Croatia*, 2020, p. 4, available online at https://one.oecd.org/document/DAF/COMP/AR(2020)43/en/pdf, consulted on 1.10. 2021.
[27] Ibid, p. 4.

The cartel prohibition pursuant to the Competition Act copies Article 81 of the EC Treaty. What differs is that the Croatian competition regime allows, but now not requires, that anti-competitive agreements that fall outside the cartel prohibition are notified to the CCA for individual exemption. If the respective agreement creates overriding efficiencies, it will be exempted for a limited period of time, which, generally, does now not exceed 5 years. Similar to EC rules, infringements of the cartel prohibition may additionally entail fines of up to 10 per cent of the infringing party's global turnover.[28]

In addition, the natural or legal person responsible for the infringement may be fined up to 200,000 kuna. Unlike the European Commission, the CCA is, however, not empowered to impose fines however has to apply to a court for the infringing challenge to be fined. In 2007, the CCA, on its very own initiative, exposed a cartel between 14 bus operators. These undertakings have been located to have constant bus fares on the routes between Zagreb and Split and Zagreb and Šibenik. The CCA consequently utilized for fines to be imposed on the implicated undertakings. The court, however, solely imposed a great of 10,000 kuna on Cazmatrans prijevoz d.o.o, one of the undertakings involved, and 6,000 kuna on the person in charge. Croatian Financial Services Supervisory Agency.[29]

The CCA additionally pushed aside an anonymous request for investigating the alleged existence of a cartel settlement fixing fees of compulsory motor insurance concluded between insurance plan companies. After having consulted the unique regulator in this region the Croatian Financial Services Supervisory Agency ('HANFA'), which denied the existence of any pricing cartel between the insurance groups and explained that the maintenance of uniform expenses of compulsory motor insurance plan was once no longer the end result of a cartel but of HANFA's temporary selection to maintain the charge stage of obligatory motor insurance plan as lengthy as insurance businesses are compliant and update their databases and make sure crucial technical and economic conditions for the charge liberalisation and insurance market reform. In detecting and prosecuting cartel agreements, Croatia is some distance from matching the tune document of competition authorities of other EU Member States.[30]

Public enforcement lacks any deterrent effect and is ineffective. This is due the following reasons: a the CCA is not empowered to impose fines. Instead it have to apply to misdemeanour courts for fines to be imposed on infringing undertakings. Not solely are lawsuits earlier than these courts very time ingesting (which is why many complaints are terminated because the infringement is time-barred meanwhile), but the courts have a popularity of imposing inappropriately low fines which lack any deterrent effects. Examples of such low fines in 2008

[28] Haid, C., *Croatia*, „The Public Competition Enforcement Review", 2009, p. 79, available online at https://www.clearygottlieb.com/en/professionals/~/media/55b1e1cbe761415290adabe1d5c23000.ashx, consulted on 1.10.2021.
[29] Ibid, p. 79.
[30] Ibid, p. 80.

include the cartel between bus operators that were solely fined a most of approximately E1,800.[31]

Currently, the solely capability for the CCA to battle these low fines is by using attractive the respective selection earlier than the High Minor Offence Court in Zagreb.

The CCA may additionally only behavior dawn raids after requests for records have been not answered (fully) with the aid of the respective undertaking and solely on the basis of a court docket order; and c finally, no leniency programme is presently in place. This fact, plus the confined investigative powers of the CCA, are essential elements as to why the prosecution of hard-core infringements in Croatia is underdeveloped.

Procedural adjustments are much-needed in order to foster public enforcement. Amendments to the Competition Act and were adopted in 2009.[32]

None of the draft proposals are publicly accessible yet. Expected major amendments include, inter alia: a empowering the CCA to impose fines on undertakings that have infringed opposition guidelines (currently, the CCA has to observe for fines before misdemeanour courts), setting up a single courtroom safety regime in appreciate of the legality of the decisions of the CCA and the degree of imposed fines (currently, the injured birthday party may also file an administrative dispute earlier than the administrative court) and introducing a leniency programme comparable to the one of the European Commission[33].

The established authority for merger manages in Croatia is the Croatian Competition Agency (Agency). Contrary to popular public perception, the Agency is not a regulator, but as an alternative a public entity vested with public authority powers to make sure the enforcement of the competition law regulation.

There are particular authorities in Croatia approved to oversee a wide variety of troubles bobbing up in a particular market within their purview, which include matters of market law and control over the undertakings acting in the precise market. Examples of these markets include the energy market, supervised with the aid of the Croatian Energy Regulatory Agency, the telecommunications sector, supervised through the Croatian Regulatory Agency for Network Industries, the financial sector, supervised by way of the Croatian Financial Services Supervisory Agency and the digital media sector, supervised by way of the Agency for Electronic Media.[34]

6. Conclusions

Croatian procedural and substantive law were not created in order to facilitate antitrust damages claims. After the adoption of the Competition Act 2009,

[31] Ibid, p. 80.
[32] Ibid, p. 80.
[33] Ibid, p. 80.
[34] Durmiš, G, Ostojić I, Ivančić, T., Beber, I., *op. cit.*, p. 1.

it is time to start discussions about changes to legislative framework in order to make antitrust damages actions more attractive for plaintiffs.

The conflict between public and private enforcement will have to be resolved.

Current jurisprudence of Croatian commercial courts regarding antitrust damages actions is completely underdeveloped. It is very possible that the rising level of public awareness of competition rules and their enforcement will soon be accompanied by an increase in the number of antitrust damages actions.

Current Croatian tort law is sufficiently flexible to be used in practice to accomplish the goals of competition law. The general opinion is that no intrusive amendments will be needed here in order to facilitate antitrust damages

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Valences of the "*polluter pays*" principle in the conflict between economic interest and ecological interest

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Abstract

The polluter pays principle is one of the fundamental principles of environmental law, the content of which can be summarized as follows: the one who produces the pollution bears its cost. The principle has a strong economic character. In this paper, I aimed to analyze the content of the "polluter pays" principle, as well as to establish its role in the dispute between economic and ecological interest. As research methods we used: the logical method, the comparative method and the historical method. The study highlights the conflict between economic interest and ecological interest, which has been balanced, to some extent, by the consecration of the "polluter pays" principle. The paper results in emphasizing the role of principles, in general, and in particular of the "polluter pays" principle, in terms of the evolution of the field, in accordance with the desideratum - the priority of the environment in relation to other types of activities.

Keywords*: the polluter pays; economic conflict; prevention; caution.*

JEL Classification: K32

1. Introduction

The conflict between economic interest and ecological interest has always existed, but it became apparent when the ecological crisis broke out. Chronologically speaking, the ecological crisis was recognized and raised by officials, the media and public opinion in the sixth decade of the last century.

Since then, a series of actions and meetings have taken place, at international level, aimed at drawing attention to the declining situation of natural resources used without limits and recklessly by the peoples of the world, as well as the consequences of technological and industrial development, with repercussions negative effects on the environment.

We cannot talk about the emergence and development of an environmental right without mentioning two very important moments: the Stockholm Conference (1972) and the Rio de Janeiro Conference (1992). The two events marked the beginning of real concerns in the field of legislation in the field, by creating a specific legal framework at the state level on environmental protection, conservation and improvement.

The principles of environmental law were expressed both at the 1972 Conference, obviously in its infancy, and gradually matured through their resumption at the 1992 Conference.

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Practically, after 1972, each country was concerned that, at its internal level, to create a set of legal norms to prevent, but also to sanction, if necessary, the damages (damages) brought to the environment.

Over time, the principles crystallized more and more and fully gained their role as general, guiding ideas of the field.

At the international level, six fundamental principles have been developed: the principle of environmental protection, the principle of environmental conservation, the principle of environmental improvement, the principle of prevention, the precautionary principle and the "*polluter pays*" principle.

Of the six fundamental principles, three are considered classical principles (protection, conservation and improvement), and the other three principles (prevention, precaution and "*polluter pays*") are based on modernism and avant-garde, and are the modern, expanding principle and affirmation.

The principle of prevention applies to situations of certain risks, when the consequences of an action against the environment are known in advance. In its completion and continuation comes the precautionary principle, considered at its appearance a fiction, or a utopia, as it applies to uncertain risks when there is only a suspicion that it is possible that a certain action will produce negative effects on the environment.

The "*polluter pays*" principle, inspired by economic theory, has metaphorically blurred the economic influence on the ecological, because in its essence, the principle has the following reasoning: the one who pollutes, bears the cost of pollution. As a result, any type of activity must internalize the cost of pollution in the production cost, is take into account, from the outset, the costs of the pollution produced.

Increasingly, it has become clear that only by combining economic development with environmental protection and the sustainable use of its resources can we stop the effects of ecological phenomena that have extremely serious repercussions on the environment and humanity (global warming, climate change, massive deforestation, water, air, soil and subsoil pollution, waste, demography, etc.).

2. The notion of principle - short considerations

The notion of "*principle of law*" has several meanings that differ from one legal system to another and from one branch of law to another. Usually, these principles come in the form of binding rules that have general applicability.

2.1. Fundamental principles of environmental law

2.1.1. The principle of preventing environmental degradation

For a long time, mankind and its economic bases have developed in accordance with a well-defined goal: that of making a profit, so that there was no question of industrial pollution. The technological and anti-ecological monopoly managed to develop based on the discoveries in the science and technology of the industrial age, but also on the advantages that a large series production brought. It was only when human activities, including in the field of industry, became dangerous for the environment, that there began to be questions about the usefulness and efficiency of hazardous industries.

Since then, it has opted for continuous industrial growth, but with the establishment of limits and guarantees, protection technologies, control bodies, methods and tactics to stimulate clean production and determine the danger posed by certain technologies, all based on knowledge and collaboration of states for the purpose of sustainable and clean development.

The principles of environmental law raise the issue of the risk of ecological damage and whether it is a certain risk or an uncertain risk. By establishing certainty or uncertainty, the principle that is applied is also delimited: that of prevention or that of precaution. Caution deals with uncertain risks and prevention with certain risks. Risk forecasting is a managerial issue, because risk is embedded in the structure of the system.[2]

"*Prevent*" refers to that type of warning, warning, or prior notice of an event or fact that is about to occur in the near future[3]. In the content of its meanings, the principle presupposes both actions on the causes that produce pollution or degradation, as well as activities to limit the destructive or harmful effects for the environmental factors.

2.1.2. The precautionary principle

In environmental law, the "*precautionary principle*" is about to become an institution or a legal basis for liability. "Caution" refers to the one who foresees the possible consequences (orienting well in the environment); acting by taking all precautionary measures; cautious; prudent; circumspect.[4]

The precautionary principle in decision-making aims to anticipate, pre-

[2] V. Gheorghe, *Cibernetica riscului şi securităţii tehnologiilor şi echipamentelor nucleare*, Journal „ENERG", no. 1/1986, p. 302.
[3] Dicţionarul Explicativ al Limbii Romane (The Explanatory Dictionary of the Romanian Language), Bucharest, 1998, p. 256.
[4] Idem.

vent and combat the causes of environmental degradation using the most environmentally friendly technologies available, improving norms and standards, requesting opinions and additional information, such as the environmental balance and risk analysis.

The principle is justified especially when the scientific data do not show exactly whether an activity is dangerous for the environment or not. In other words, when scientific data are inconclusive about the effects of an activity, the environmental decision must be in the sense of stopping that activity, because the danger of environmental degradation is too great to risk a decision that will later prove wrong.[5]

2.1.3. The principle of environmental conservation

A fundamental objective of the environmental protection issue, conservation aims to maintain a sustainable level of ecological sources. This requires adequate management of renewable resources and special attention to the use of non-renewable resources.

According to the IUCN World Conservation Strategy (1980), conservation refers to the maintenance of essential ecological processes and life support systems; preserving genetic diversity and achieving sustainable use of species and ecosystems.

2.1.4. The principles of environmental protection

Environmental protection is "*a conscious, scientifically grounded human activity, aimed at achieving a concrete goal, consisting in preventing pollution, maintaining and improving living conditions on Earth*".[6] Internationally, the practice of environmental protection is relatively old, exceeding 20 which is linked to the onset of the "*ecological crisis*" in the sixth decade of the last century. Today, "*the idea is already accepted that environmental protection means all actions designed to ensure the conservation of natural resources and protect the quality of environmental components*".[7]

The principle of environmental protection is considered a corollary principle, which has various legal expressions in terms of national, European and international legislation. In a broad sense, the principle of environmental protection includes the meanings of several principles, namely: the principle of prevention, precaution and conservation, but it is not reduced to them. The

[5] Daniela Marinescu, *Tratat de dreptul mediului*, 3rd ed., Universul Juridic Publishing House, Bucharest, 2008, p. 58.
[6] Ciprian Raul Romiţan, *Dicţionar de dreptul mediului*, ALL Beck Publishing House, Bucharest, 2004, p. 140.
[7] V. Rojanschi, F. Bran, Ghe. Diaconu, *Protecţia şi ingineria mediului*, Economic Publishing House, Bucharest, 1997, p. 20.

principle contains a series of elements that define it and give it specificity. It is about the fact that the principle avoids actions harmful to the quality of the environment and adopts positive measures to prevent and prevent its deterioration.[8]

2.1.5. The principle of improving the quality of the environment

Improving involves improving the state and quality of the environment, its components, through socio-human actions. The consecration of this principle is more obvious at the level of the European Union, being expressly provided in art. 130 R of the EC Treaty introduced by the Single European Act of 1987.

Improvement involves positive actions and results, increasing natural data and pursues a higher goal of preventing, conserving and protecting the environment.

The principle of environmental improvement is a fundamental principle expressed and taken over at national, European and international level, the content of which means the idea that improving means improving the state and quality of the environment, its components, through socio-human actions.

2.1.6. The "*polluter pays*" principle

The "*polluter pays*" principle is inspired by the economic theory according to which the external social costs that accompany production must be internalized, ie to be taken into account by all economic agents in their production costs. "*Originally, this is a principle of economic efficiency, not a legal principle of fairness and responsibility. Adherence to this principle does not suit everyone, and especially industries that have long lobbied against the adoption of a special regime of environmental responsibility*".[9]

In order not to end up in the situation that the company is the one to bear the cost of combating the negative effects of pollution instead of its generators, the "*polluter pays*" principle has been recognized and enshrined.

The "*polluter pays*" principle was first adopted by the OECD in 1972 by Recommendation C (72) 128, meaning the imputation of the polluter to the costs of measures taken by public authorities to maintain the environment in an acceptable state. The cost of measures against the polluter must be reflected in the cost of the goods and services that are the source of the pollution, through their protection or consumption.

A second recommendation, dated 14 November 1974 (C9742243), refers to the "*application of the polluter-pays principle*", and sets out the exceptional

[8] Mircea Duţu, *Tratat de dreptul mediului,* Economic Publishing House, vol. I, Bucharest, 2003, p. 207.

[9]Andrée Brunet, *La regulation juridique des questions environnmentales et le principe de subsidiarité*, „Revista Română de Drept al Mediului", no. 2, 2003, p. 87 – 88.

cases of the "*polluter pays*" principle. International acceptance of the "*polluter pays*" principle was strengthened during the 1980s and manifested in its inclusion in numerous international agreements, such as the Convention on the Protection of the Marine Environment of the North-East Atlantic, signed on 22 September. 1992, which stipulates that "*the Contracting Parties shall apply the 'polluter pays' principle according to which the costs resulting from measures to prevent, reduce and combat pollution shall be borne by the polluter*".[10]

The principle is also enshrined in the Helsinki Convention of 17 March 1992 on the transboundary effects of transboundary accidents. This development has led to its global consecration, with its integration into the principles proclaimed in the Rio Declaration on Environment and Sustainable Development in 1992: "*National authorities should make efforts to allow the internalisation of environmental protection costs and the use of economic instruments, by virtue of the principle that the polluter is the one who must, in principle, pay the cost of the pollution, in the public interest and without affecting the system trade and international investment*".

The "*polluter pays*" principle arose from the need for the pollution costs to be borne by the polluter, who is also the direct beneficiary of the results of economic activities, in accordance with the "*ubi emolumentum ibi onus*" principle.

Indeed, many economic and social activities involve negative externalities in the form of pollution, affecting the population and environmental factors. Their existence leads to a real "*doubling*" of the realities regarding the costs and profit of the economic agents. Thus, on the whole, the economy must cover both production costs and those related to the existence of externalities (pollution).

Pollution generators have their own costs reduced due to the saving of pollution prevention costs (endowment with devices and filters, adoption of technologies, etc.) society as a whole, immediately or in time, bearing costs to combat the negative effects of pollution on human health, economic activities. social or the environment as a whole.

In order to avoid such a situation and to correct the inequities caused by the costs of "*externalities*", it is "*internalized*" through the legal recognition of the "*polluter pays*" principle.

The realization of the meanings of this principle can take several forms, such as: the establishment of anti-pollution norms, the use of an incentive taxation, the definition of an objective liability regime, the independence of fault for the ecological damage, etc.

The polluter pays principle can be defined as that fundamental rule of environmental law established at national and international level whose main purpose is to protect the environment by obliging polluters to pay sums of money

[10] In accordance with Principle 16 of the 1992 Rio de Janeiro Declaration.

to institutions that have control and supervision in the field of environment in report on the severity with which certain pollutants in various commercial activities may affect the environment.

"*The issue of liability and compensation for damages therefore remains at the total discretion of the states, which may or may not include it (and develop it) in the bi- and multilateral agreements. The anomaly is all the more obvious as almost all recently adopted conventions and agreements at European level state that one of the guiding principles for use and protection […], the "polluter pays" principle, without giving it any practical implementation mechanism*".[11]

3. The "*polluter pays*" principle from an integrated perspective

3.1. The "*polluter pays*" principle in Romanian legislation

In the Romanian legislation, the principle "*the polluter pays*" was enshrined for the first time in art. 3, letter d) of Law no. 137/1995 (repealed). Thus, its fundamental meanings have already been legally expressed by establishing, as ways of implementing the principles, the introduction of stimulus or coercive economic levers and the elaboration of anti-pollution norms and standards (art. 4, letters d) and f) of Law 137/1995 - repealed), as well as the establishment of a special liability regime for the damage consisting of two rules: the objective nature independent of fault and, respectively, joint and several liability in case of plurality of perpetrators (art. 80 of Law no. 137/1995 repealed).

Currently, the legal framework on environmental protection represented by GEO no. 195/2005 approved by Law no. 265/2006, enshrines in art. 3 letter "*E*" is the "*polluter pays*" principle, along with the other principles and strategic elements that underlie the current legal framework.

The polluter is the entrepreneur or decision maker in economic matters who is in an anti-ecological position, being obliged to bear the consequences of non-compliance with the duties provided by law on the introduction and use of clean technologies, limiting pollution to the parameters set by eco-standards, non-compliance of other specific obligations in this regard.

The principle also has an economic justification: expenditures that are not made on time in the field of environmental protection subsequently attract higher costs that must be covered without taking into account profit losses. The question that arises about this issue is whether environmental protection spending is productive or unproductive.

Some specialists[12] consider these expenses as productive expenses

[11] Adriana Gheorghe, „*Contribuţia noilor reglementări la protecţia şi utilizarea durabilă a apelor internaţionale şi a ecosistemelor acvatice*", „Revista Română de Drept al Mediului", year III, no. 2(6), 2005, p. 55.

[12] N. N. Constantinescu, "*Economia protecţiei mediului natural"*, Political Publishing House, Bucharest, 1976, p. 114 – 115.

because the protection of the environment, besides the fact that it maintains it unaltered, gives it the possibility to progress, to improve and to improve its quality, prolonging its existence in time.

The evolution of the field of environmental protection shows us that some goods, once considered "*free goods*", such as water, air, in the sense that they had a use value that does not require social work costs to be reproduced with their original properties re-entry into the normal circuit, now falls into the category of goods that cost and have value.

Expenditures related to environmental protection are, implicitly, expenditures that lead to the creation of added value. Whether the cost price of environmental measures is borne by producers or service providers or the responsibility of the public authority, the economy will always be the one to bear the short-term consequences and the additional costs will be borne by the prices at export.

3.2. The "*polluter pays*" principle at EU level

At the level of the European Union, the meaning of the principle is more limited as the "*polluter pays*" principle involves the polluter to bear the costs of combating pollution, which means a partial internalization of costs, which allows taxes or depollution charges to be imposed on polluters without depollution to be borne by the whole community.

According to the "*polluter pays*" principle, the emitter of pollutants is the one who has to bear the cost of the corrective measures claimed by the damages brought to the environment and occurred by violating the existing rules. Such costs can only have an exceptional impact on the community, and exemptions can only be granted at regional level.

Broadly speaking, the principle seeks to impute to the polluter the social cost of the pollution it generates, which triggers a liability mechanism for environmental damage that covers all the effects of pollution, not only on goods and people, but also on nature itself. In a narrow sense, the principle presupposes the obligation of the polluter to bear only the cost of anti-pollution and cleaning measures, being thus in the situation of only a partial internalization, which allows the imposition of taxes or fees by public authorities.

The result of applying this principle is that less polluting products will require lower costs and consumers will be able to focus on less polluting products. The major consequences will materialize in a more efficient use of resources and in the generation of lower pollution. He has so far expressed himself, from a legal point of view, specifically at the level of the European Union, but he tends to gain universal recognition and consecration.

The "*polluter pays*" principle is a synthesis of some economic and legal aspects, conjugated by the requirement of environmental protection and conservation.

Regarding the European Union's contribution to the development of the principle, it should be noted that, in the first action program (1973), the EEC stated that it applies the polluter pays principle defined by the OECD, while providing for the necessary adaptations sources of pollution and by respective regions.

The recommendation of the Council of the European Community of 7 November 1974 explains the content of the principle of "*imposition of costs and intervention of public authorities in the field of the environment*". The Recommendation of 3 March 1975 also contains an Annex setting out its implementing rules.

Resumed in the second program, the principle "*polluter pays*" is provided under the expression "*imputation of pollutants to costs related to environmental protection*".[13] At the level of the European Union, the principle was enshrined in the Single European Act (1987) in art. 130 and in the Maastricht Treaty (1993).

This is essential to avoid distortions of competition. As these tasks can sometimes create difficulties for existing businesses, the Commission acknowledged in 1974 and 1980 that Member States may grant a number of aids to facilitate the introduction of new regulations beneficial for environmental protection, but subject to certain conditions and only until in 1987.

Several appropriate tools have been provided for the application of the principle at international level, such as the pollution tax, the imposition of rules and various compensation mechanisms. At European level, the OECD has adopted a system of anti-pollution rules, a process which, although not directly aimed at the financial field, makes it possible to reduce pollution by imputing the investment burden to a single polluter.[14]

Unfortunately, the "*polluter pays*" principle has now remained less of a legal instrument to oblige those responsible to bear the consequences of their actions, but rather a convenient means of financing environmental policies.[15]

3.3. The "*polluter pays*" principle in international law

The "*polluter pays*" principle is essentially an economic policy for allocating the costs of pollution or environmental damage, costs borne by public authorities, but has implications for the development of national and international law on liability for damages.

The inclusion of the principle in the 1992 Rio Declaration suggests that it should not be seen in the broader context as an element of the concept of environmentally friendly development.

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[13] H. Smets, *Apropos d'un eventuel principe pollueur-payer en matière de pollution transfrontallière*, "Environement policy and law", 1982, p. 40.

[14] *Les normes relatives a l'environnement, définition et besoins d'armonisation internationale*, OCDE, Paris, 1974.

[15] Mircea Duțu, *op. cit.*, p. 126.

The "*polluter pays*" principle was first approved by the OECD (Organization for Economic Co-operation and Development) in a series of recommendations since 1970. As defined by the OECD, the principle assumes that the polluter should bear the costs. implementing measures decided by public authorities to ensure that the environment is in an "*acceptable state*" and "*the cost of such measures should be reflected in the cost of goods and services that cause pollution in production or consumption*". Thus, the purpose of the OECD policy and recommendations on the subject was to internalize the economic costs of pollution control, cleanliness and to ensure that governments did not change international trade and investment by subsidizing these environmental costs.

The "*polluter pays*" principle received support for the first time as an environmental policy at the United Nations Conference on Environment and Development. Principle 16 of the Rio Declaration sets out in somewhat limited terms that: "*National authorities should seek to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, on the public interest and without distorting international trade and investment*".

Given this wording, it cannot be said that the "*polluter pays*" principle is intended to be legally binding. Principle 16 simply lacks the normative character of an act of law.

The principle appears only in a limited series of post-Rio treaties dealing with pollution of international watercourses, marine pollution, transboundary industrial accidents and energy. The implementation of the principle has been largely left to national action rather than international action. As a result, both the choice of methods - taxation, fees, and the degree of implementation - were highly variable and few states were fully insistent on their policy.

All that can be said is that states, intergovernmental institutions and courts can and should take into account the principle in the development of environmental law and policy, but they are in no way obliged by international law to "*make polluters pay*". Moreover, the reference to the public interest in Principle 16 leaves much room for exceptions and thus for continued government subsidy. As adopted in Rio, the "polluter pays" principle is neither absolute nor mandatory.

4. The polluter pays principle – economic-fiscal instrument for environmental protection

4.1. The effects of the "polluter pays" principle

From a legal point of view, the polluter pays principle is expressed by recognizing an ecological responsibility of the polluter, including both repression and reparation for environmental damage. Therefore, liability can be assumed by the authorities, both pecuniary and criminal when the provisions of the polluter

pays principle have been violated.

There may be situations when certain people pollute the environment through fault or intent. For these acts intentional or guilty of the will of the perpetrators, the authorities may hold them administratively or criminally liable, depending on the form of guilt with which they acted or the degree of danger, therefore, they will apply both pecuniary and criminal sanctions.

The polluter pays principle can generate negative but also positive effects.

A. Negative effects. As it is likely to protect and repair the quality of the environment, the "*polluter pays*" principle can, due to the internalization of ecological costs created by public authorities, bring distortions likely to generate competition between economic actors, so from this point of view it does not bring benefits -is like a negative factor.

B. Positive effects. From a positive point of view, the polluter pays principle is relevant due to the fact that by observing it, the process of protecting and improving the quality of the environment is carried out, even through its specificity; the polluter must pay, avoiding the risk of massive pollution due to the economic process of industrialization generated by the economic agents of some institutions whose main object is activities intended to pollute the environment. Another positive aspect of the polluter pays principle is the repair environmental damage, which, regardless of the administrative or criminal repression imputed to persons polluting the environment, as it results from its generic name, can, above all, repair the damage caused to the environment.

5. Conclusion

The "*polluter pays*" principle is closely related to other fundamental principles of environmental law, thus being an imperative rule of law, the observance of which cannot harm the environment through pollution, and in case of violation of its provisions the damage caused by the polluter can be repaired.

Therefore, the polluter pays principle is undoubtedly a necessary and useful rule in the fight against and degradation of the environment, thereby ensuring the right to a healthy environment. This principle can be considered an effective economic and fiscal instrument, which can be used in the fight for the protection and conservation of the environment, especially since based on this principle certain pollution taxes are established and sanctions are applied to the subjects of law who pollute. through their activities.

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Influencers: the path from consumers to professionals

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Abstract

The concept of 'influencer' stands at the confluence of law, economy, marketing, sociology and psychology, being in a continuous grinding, generated by the development of social media tools and the diversification of the activities that can be carried out on social media. The influencer has crystallized his presence within the virtual environment, as he started to use social media from the position of a consumer. At the moment, he evolved into an entity that shirks the national imperative legal provisions and has a series of attributes which cannot characterise any other existing and conceptualised entity. The uniqueness of the influencer, along with his constant developing characteristics, have led to several difficulties in the process of regulating his activity. Nevertheless, the time that has passed since their emergence on the market is more than sufficient for providing the possibility of describing the influencers and confining them within a legal regime. Our analysis focuses on the compatibility between the status of a professional, as it is regulated in the Romanian law, and the status of influencer. Then, we will briefly discuss the possible consequences, determined by the compatibility, on the activity of the influencer and on his digital content.

Keywords: *professional, trader, influencer, marketing.*

JEL Classification: K15, K29

1. Introduction

The influencer marketing phenomenon has acquired an international dimension during the last year as it intensively spread itself even at the national level. The companies, regardless their dimension (from micro-undertakings[2] to multinational companies), allocate increasing percentages of their budgets for influencer marketing, leading to a substantial demand for influencers on the advertising services market. This demand is fully supplied as influencers' market is constantly growing due to their specialization in particular areas, and also as a result of lowering the qualitative and quantitative threshold for being considered an influencer and contracted as such/in that capacity. In this situation in which influencers' activity is getting more visible and present in consumers' and companies' lives, the following question arises: where do they stand from a legal point of view?

The importance of the answer firstly resides in identifying the applicable

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[2] For the definition of the micro-undertaking, see Article 47 of Law no. 227/2015, published in Offical Gazette, Part I, no. 688 of 10 September 2015.

legal regime, along with its implications for the incidence of tax law, commercial law, consumer protection law and competition law.

2. The definition of an influencer

One of the definitions of an influencer can be found in the Conclusions of the Advocate General in Case C-105/17[3], in which he used the influencer as an example of a person who acts on behalf of a trader and is then rewarded for his intermediation activity. Within footnote number 36 from the Conclusions, the influencer is defined as it follows: *'a person having great influence over decision-makers or opinion*', especially over consumer habits[4]. The same footnote continues with an extensive definition, which adds that an influencer is directly linked to social media, active on these platforms, and characterised by a large number of followers or subscribers.

Having as a starting point the qualification of an intermediary as a professional, the influencers are considered to be intermediaries between the companies (hereinafter referred to as '*brands*') and the consumers (their potential clients[5]), as influencers' advertising services are requested by brands. The influencers represent a new marketing tool[6].

At first glance, it may be distinguished a clear-cut distinction between influencers and consumers, as the first ones aim at influencing the second ones. In view of the intermediation role of the influencers, they are considered '*third parties*'[7], who through their posted digital content may influence opinions and behaviours, leading to buying commercial decisions[8]. The qualification as third parties derives from their exemption from the relationship established between brands and consumers, even if they may actually generate that relationship from

[3] Opinion of Advocate General Szpunar delivered on 31 May 2018, CJEU, Case C-105/17, *Komisia za zashtita na potrebitelite v. Evelina Kamenova* available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=202421&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=39752939, last accessed on 13.11.2021.

[4] Ibid.

[5] Ibid.

[6] Loes van Driel, Delia Dumitrica, *Selling brands while staying "Authentic": The professionalization of Instagram influencers*, in 'Convergence: The International Journal of Research into New Media Technologies', Vol. 27(1), 2021, p. 68.

[7] Josef Vodák, Martin Novysedlák, Lucia Čakanová, Miroslav Pekár, *Who is Influencer and How to Choose the Right One to Improve Brand Reputation?*, in ‚Managing Global Transitions', vol. 17 (2), 2019, p. 150; Nur Amalina Faizol, Nor Fadzlina Nawi, *Arising Legal Concern in Endorsement Practices by Social Media Influencers in Malaysia: A Comparative Perspective*, in 'Proceedings of the International Law Conference (iN-LAC 2018) - Law, Technology and the Imperative of Change in the 21st Century', DOI: 10.5220/0010051903720378, p. 373; Hanan Ezzat Moussa, *Social Media Influencers And The Online Identity Of Egyptian Youth*, in 'Catalan Journal of Communication & Cultural Studies', Volume 12, Number 1, 2020, p. 33.

[8] Rudy Pramono, Yolenta Winda, Agus Purwanto, Mirza Prameswari, Masduki Asbari, Rosma Indriana Purba, *Narrative Study: The Life of Influencers between Hobbies and Professions,* in 'International Journal of Advanced Science and Technology', Vol. 29, No. 03, 2020, p. 8418.

the very first beginning.

Among the other proposed definitions in the literature, is the one according to which influencers are a category of celebrities who have succeeded to accrue a considerable number of followers/subscribers on social media. These subscribers form a sort of human capital which is harnessed by influencers for gaining access to financial resources[9]. Influencers are preferred over traditional celebrities (even if they end up being celebrities as well) as a result of their content's quality with a personal touch (as they become experts in digital content creation), as well as due to their authenticity and success in advertising.

In Romanian case-law, the definition of an influencer is shaping up piecemeal by bringing together isolated ideas held in judicial judgements. The main definition's component is that the influencer is a person who advertises products[10], being engaged in economic activity for promoting products and services[11]. The influencer is considered to have a sphere of influence which includes persons[12] whose behaviour may be influenced. Furthermore, he is familiar to the public opinion[13], being a popular, well-known and public person[14].

An influencer frequently starts his activity as a hobby to create digital content[15] on social media. Then, as he gathers more and more followers, his activity as an influencer turns into a full-time job[16]. The consumers are lured to follow the influencer through his daily posted content[17]. Successful content creators get to have the power of persuasion by means of their digital content, being similar to traditional celebrities[18]. The influence is not necessarily based on rational grounds, but it is more the result of consumers' sympathy and personal affection towards the influencer, these emotions being triggered by the influencer's popularity, close relationship, and even a form of authority when the influencers is also an expert in the advertised field[19]. With the help of influencers, brands carry out a type of marketing which is more forceful and convincing, based on *e-WOM*[20].

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[9] Janusz Wielki, *Analysis of the Role of Digital Influencers and Their Impact on the Functioning of the Contemporary On-Line Promotional System and Its Sustainable Development*, in 'Sustainability 2020', 12(17), 7138; https://doi.org/10.3390/su12177138, p. 4.
[10] Judgement no. 82/2021 of 07/01/2021, District 1 Court, Civil Section I.
[11] Judgement no. 869/2021 of 22/03/2021, Bucharest Tribunal, Civil Section III.
[12] Judgement no. 273/2021 of 28/05/2021, Argeș Tribunal, Civil Section.
[13] Judgement no. 580/2021 of 07/04/2021, Bucharest Court of Appeal, Civil Section III.
[14] Judgement no. 869/2021 din 22/03/2021, Bucharest Tribunal, Civil Section III.
[15] Rudy Pramono, Yolenta Winda, Agus Purwanto, Mirza Prameswari, Masduki Asbari, Rosma Indriana Purba, *op. cit.*, p. 8418.
[16] Loes van Driel, Delia Dumitrica, *op. cit.*, p. 68.
[17] Rudy Pramono, Yolenta Winda, Agus Purwanto, Mirza Prameswari, Masduki Asbari, Rosma Indriana Purba, *op. cit.*, p. 8418.
[18] *Ibid.*
[19] Nur Amalina Faizol, Nor Fadzlina Nawi, *op. cit.*, p. 373.
[20] Hanan Ezzat Moussa, *op. cit.*, p. 84.

3. General characteristics of influencers

Influencers' main characteristic consists in the large number of followers who make up a '*community*'[21], also referred to as '*audience*'[22]. They are those social media users who exploited their personal image and turned it into a business[23], as their activity consists of creating and improving an online identity[24], a '*human brand*'[25]. Brands capitalise the influencer's online identity and offer him a remuneration[26] in return (the influencer may charge additional costs for the right of the brand to use his personal content).

Then, influencers obtain followers' engagement[27]. The concept on engagement is understood as determining followers or subscribers' interactions with the content created and posted by the consumer (interactions that may consist in likes, shares, views, clicks on links etc.). The engagement may go further and consist in users' involvement in the activities promoted by the influencer. The engagement with influencer's content may afterwards determine a second engagement with the promoted brand[28], which is exactly what brands expect to achieve in the long-term.

It is with these benchmarks in mind (the influencer's community and its engagement) that the value of an influencer may be determined[29]. The choice of an influencer is based on his value and is analysed on the basis of empirical data

[21] Anil Narassiguin, Selina Sargent, *Data Science for Influencer Marketing: feature processing and quantitative analysis*, HAL Id: hal-02120859, 2019, available online at https://hal.archives-ouvertes.fr/hal-02120859/file/*influencer*_marketing_data.pdf, last accessed on 13.11.2021, p. 2.

[22] Marijke De Veirman, Veroline Cauberghe, Liselot Hudders, *Marketing through instagram influencers: impact of number of followers and product divergence on brand attitude*, in 'International Journal of Advertising the Review of Marketing Communications', Volume 36, 2017 - Issue 5: International Conference on Research in Advertising (ICORIA) 2016, https://doi.org/10.1080/02650487.2017.1348035, p. 800.

[23] Kolsquare, *Influencer Marketing pricing and rates*, available online at https://www.kolsquare.com/en/guide/cost-*influencer*s, last accessed on 13.11.2021.

[24] Hanan Ezzat Moussa, *op. cit.*, p. 33.

[25] Samantha Kay, Rory Mulcahy, Joy Parkinson, *When less is more: the impact of macro and micro social media influencers' disclosure*, in 'Journal of Marketing Management' 36(4):1-31, 2020, DOI:10.1080/0267257X.2020.1718740, p. 5.

[26] Kolsquare, *Drafting a contract for an influencer marketing campaign*, https://www.kolsquare.com/en/guide/contracts, last accessed on 13.11.2021.

[27] Anil Narassiguin, Selina Sargent, *op. cit.*, p. 2.

[28] Christian Hughes, Vanitha Swaminathan, Gillian Brooks, *Driving Brand Engagement Through Online Social Influencers: An Empirical Investigation of Sponsored Blogging Campaigns*, in 'Journal of Marketing 2019', Vol. 83(5), p. 80, 81.

[29] Catalina Goanta, Sofia Ranchordas, *The Regulation of Social Media Influencers: An Introduction*, in 'University of Groningen Faculty of Law Research Paper Series No. 41/2019', p. 8.

know as '*influence analytics*'[30]. These analytics generally include: number of followers/subscribers; number of likes; users' engagement; impressions[31] (understood as the number of times a post is viewed by the user); social media page traffic and the traffic generated on brands' pages (the traffic can be traced with the help of *tracking links*[32] which indicate the social media profile from which the link to the brands' page has been accessed); number of conversions (how many consumers from influencers' community made commercial decisions in order to buy traders' products and/or services). The better the influence analytics, the more the influencer will become well-known[33] and demanded on the market.

An important attribute of an influencer is the authenticity. It is a key element, achieved by means of an online conduit, which implies a personal, direct and sincere self-presentation[34]. In order to be recognized as authentic, influencers should first of all post original content, and after that, they should have real and frequent interactions with their followers/subscribers[35]. Authenticity is also built up by exposing the person who is behind the social media account (so not only the online identity), and by truthfully presenting that person's offline identity. In addition, for authenticity, the influencer shall reveal his knowledge and competences in the fields in which he carries out the advertising activity[36]. Authenticity is also perceived as a guarantee for the success of an advertising campaign[37]. At the opposite pole from that of authenticity, there is the 'fake influencer' – an influencer that should be avoided by brands because he would not generate a substantial[38] ROI[39]. A fake influencer may be identified primarily by the lack of his users' engagement (he may also try to buy fake likes and followers/subscribers)[40].

Other key words that come together in the concept of influencers are: credibility, similarity[41], trust and familiarity[42]. First of all, influencers try to create their own credibility, which is extracted from the number of followers and their

[30] *Idem*, p. 7.
[31] Kolsquare, *Which KPIs should you use to measure an influencer marketing campaign?*, available online at https://www.kolsquare.com/en/guide/kpis, last accessed on 13.11.2021.
[32] Ibid.
[33] Catalina Goanta, Sofia Ranchordas, *op. cit.*, p. 7.
[34] Hanan Ezzat Moussa, *op. cit.*, p. 78.
[35] Ibid, p. 79.
[36] Ibid, p. 80.
[37] Kolsquare, *Local Influencer Marketing: why and how?*, available online at https://www.kolsquare.com/en/guide/local-*influencer*-marketing, last accessed on 13.11.2021.
[38] Kolsquare, op. cit. (*Which KPIs should you use…)*.
[39] *Return on investment*.
[40] Kolsquare, *Vers la fin des faux comptes sur Instagram?*, available online at https://www.kolsquare.com/fr/blog/faux-comptes-instagram, last accessed on 13.11.2021.
[41] Zainab Al-Darraji, Zahra Al Mansour, Shilan Rezai, *Similarity, Familiarity, and Credibility in influencers and their impact on purchasing intention*, School of Business, Society and Engineering, Mälardalen University, 2020, available online at https://www.diva-portal.org/smash/get/diva2:1437746/FULLTEXT01.pdf, last accessed on 13.11.2021. p. 10
[42] Ibid.

expertise in the advertised field[43]. A number of influencers stand out as actual experts in what concerns the promoted products and services, impacting directly and positively the consumers, because if a person owns superior and qualified knowledge in a field, then consumers will be more likely to be persuaded by that person's recommendations, as he is more credible[44]. Due to the advantages offered by specialisation and expertise (including the increased attractiveness of an influencer for the brands), more and more influencers follow the path of specialization.

Similarity refers to influencer's capacity to mirror the users who are a part of his community. Consequently, those users should find themselves in the influencer's conduct, life, behaviour, events, and actions. Similarity increases the interpersonal connection and the confidence degree between the influencer and his community. Familiarity supposes an exposé on the influencer's life so that his followers develop a feeling of closeness towards the influencer, as well as the impression that they already know him. The familiarity confers a greater power to persuade the consumers[45].

4. Influencers' categorization

Over time, influencers have braided themselves according to their main characteristics, process that led to the creation of four principal categories at the moment: nano-influencers, micro-influencers, macro-influencers and mega-influencers[46]. According to another classification, there would be six principal categories instead of four: nano-influencers, micro-influencers, middle-level influencers, macro-influencers, top-influencers, mega-influencers and celebrities[47]. The fundamental difference between the categories consists in the number of users from each influencer type's community. The dimension of the community has also a direct effect on the influencer's behaviour, activities and results, elements which further deepen the differences between the main categories.

Nano-influencers and micro-influencers have detached themselves from the sole category of 'influencers' through their smaller communities (it is argued that micro-influencers have at most 50.000 followers/subscribers on social media, nano-influencers have even less users following them - these thresholds are subjective and may vary in the literature[48]). Nano-influencers have the smallest com-

[43] Hanan Ezzat Moussa, *op. cit.*, p. 84.
[44] Rudy Pramono, Yolenta Winda, Agus Purwanto, Mirza Prameswari, Masduki Asbari, Rosma Indriana Purba, *op. cit.*, p. 8422.
[45] Zainab Al-Darraji, Zahra Al Mansour, Shilan Rezai, *op. cit.*, p. 11.
[46] Josef Vodák, Martin Novysedlák, Lucia Čakanová, Miroslav Pekár, *op. cit.*, p. 153.
[47] Janusz Wielki, *op. cit.*, p. 4.
[48] See Tomás Pires Ribeiro, *A Decentralized Approach to a Social Media Marketing Campaign: Proof of Concept*, Integrated Master in Industrial Engineering and Management, Universidade do

munity and it could be reasonable argued that they are not influencers that perform an economic or professional activity. They are simply consumers and they represent all of the other social media users[49] that are not influencers. The odds are that they already belong in the community of a real influencer. Nano-influencers have between 0 and 10.000 followers/subscribers, or no more than 1.000 followers/subscribers[50]. According to another opinion, they have the greatest power to influence, directly, because their 'community' is formed of close persons (family, relatives, friends, colleagues), whom they are daily talking to[51]. Moreover, nano-influencers are considered to be the sincerest, their sincerity being extremely valuable, in particular in the context of trust economy.

Micro-influencers manage to reply to all the messages received from their community members[52] and are the closest situated in the influence sphere of a consumer[53] (right after the nano-influencers). The reduced number of followers allows him to have the time to keep in touch with all the users. Micro-influencers have the strongest social media presence[54], which is decisive in brands' process of choosing an influencer.

Macro-influencers have overs 150.000 users in their community[55] or over one million according to other sources[56]. In some classification, there is no distinction between macro-influencers and mega-influencers, as all the influencers with over one million users are considered macro-influencers[57]. Even if they do not present a strong engagement (they lack especially the necessary time), they provide the advantage of creating more often digital content. Therefore, social media became their workplace and they handle their social media account just like a business. They offer more visibility[58] to their marketing campaigns, they generate a greater traffic on brands' pages, and they may evolve in time into their own brand[59].

In addition to the previous principal categories, there are also secondary

Porto, 02.07.2018, available online at https://core.ac.uk/download/pdf/186457304.pdf, last accessed on 13.11.2021, p. 20.

[49] *Idem*, p. 21.

[50] *Ibid.*

[51] Kolsquare, *Influencer profiles: finding the right mix*, available online at https://www.kolsquare.com/en/guide/*influencer*-profiles-the-right-mix, last accessed on 13.11.2021.

[52] Kolsquare, *Micro-influencers? No, it is rather Alpha consumers!*, available online at https://www.kolsquare.com/en/guide/alpha-consumers-trends-*influencer*-marketing-2021, last accessed on 13.11.2021.

[53] Josef Vodák, Martin Novysedlák, Lucia Čakanová, Miroslav Pekár, *op. cit.*, p. 155.

[54]Jana Gross, Florian von Wangenheim, *The Big Four of Influencer Marketing. A Typology of Influencers*, in 'Marketing Review St. Gallen', vol. 2, 2018, p. 37.

[55] Kolsquare, *Macro-influencers*, available online at https://www.kolsquare.com/en/guide/macro-*influencer*s, last accessed on 13.11.2021.

[56] Josef Vodák, Martin Novysedlák, Lucia Čakanová, Miroslav Pekár, *op. cit.*, p. 152.

[57] *Idem*, p. 20.

[58] Kolsquare, *op. cit.* (*Macro-influencers).*

[59] Ibid.

categories with their specific characteristics: key opinion leader (KOL), adviser, brand ambassador and prosumer.

The overall image of the influencer begins to be altered as a result of brands' attempt to find persons with a better yield regarding the engagement and the persuasive power. Focusing on these two criteria, it has been noticed that their fulfilment is accomplished only when it comes to consumers replacing the influencers. The explication resides in the fact that consumers, as social media users, have small communities, made of close persons with whom they have a natural, real engagement, which has a serious effect on their decisions. Consequently, the most efficient in influencing others would be the consumers who use social media and create digital content[60] ('*consumer-generated content*'[61]). What is more, consumers are the most involved in e-WOM (commentaries, shares, likes), and the algorithms of the social media are made to encourage and to promote the involvement of consumers[62]. In conclusion, consumers would be the newest influencers.

Out of all the consumers there may be selected alpha consumers. They belong to the nano-influencers or micro-influencers categories and are chosen by virtue of their consumer nature. They are considered 'alpha' because they have an identical profile to the one of the targeted consumers for buying the advertised products and/or services. Their main task is to test the given products/services and to express their opinion[63]. In Romania, this system is practiced through platforms such as Buzz Store, which claims that '*somewhere between all the sponsored posts, promote tweets and cats' photos, magic happens: consumers share involuntarily their brand experiences with the other consumers – and their real stories have a real impact on the buying decisions*'[64].

Without being in particular chosen to disseminate marketing information about a brand, advisers are not rewarded for their feedback, but they still post their opinion about the products and the services that they bought. They are not at all traditional influencers, as brands have no control over their opinion and do not even request their opinion. Advisers are a relevant component of trust economy[65].

Diametrically opposed to consumers is the *key opinion leader*[66] ('KOL'). A KOL is not exactly the traditional influencer from a formal point of view, even

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[60] Kolsquare, *The consumer as a new influencer?*, available online at https://www.kolsquare.com/en/guide/consumer-a-new-*influencer*, last accessed on 13.11.2021.

[61] Ibid.

[62] Ibid.

[63] Kolsquare, *Micro-influencers? No, it is rather Alpha consumers!*, available online at https://www.kolsquare.com/en/guide/alpha-consumers-trends-*influencer*-marketing-2021, last accessed on 13.11.2021.

[64] SC BUZZ STORE SRL, https://www.buzzstore.ro/corporate/, last accessed on 13.11.2021.

[65] Minzheong Song, *Trust-based business model in trust economy: External interaction, data orchestration and ecosystem value*, in 'International Journal of Advanced Culture Technology', Vol.6 No.1 .32-41 (2018), https://doi.org /10.17703/IJACT.2018.6.1.32, pp. 33, 34.

[66] Kolsquare, *What is the difference between an influencer and a KOL?*, available online at https://www.kolsquare.com/en/guide/kol-*influencer*, last accessed on 13.11.2021.

if he naturally has the aptitude to influence the users from his community. He differs from influencers in enhanced authenticity, being extremely selective with the brands he promotes and constantly expressing his undressed personal opinion (brands cannot impose them commercial communications). A KOL has a clear position on certain issues, as well as a unique identity, being likened to a pharmacist – users ask him for prescriptions, and he offers his personal opinion, being often an expert in the promoted field.

One last category is represented by brand ambassadors. They have a long-term collaboration with a particular brand based on a framework contract, which typically includes an exclusivity clause[67]. That clause prohibits the brand ambassador to collaborate with any brand competitor.

In the light of the above, we can conclude that influencers are differentiated from consumers, being generally considered separate categories. Nevertheless, it may be observed that the thin dividing line is often unclear[68]. In our opinion, at the confluence of influencers and consumers are situated the prosumers[69].

5. Influencers' activity

The main influencers' activity is digital content creation for advertising purposes. The content is regarded as '*user-generated content*'[70] because it is considered personal and trustworthy[71]. On the opposite side, there is found the '*consumer-generated content'*, a content that does not belong to influencers and has no commercial purposes.

Influencers' digital content have a persuasive component, being able to determine consumers to internalize the information and choices transmitted by the influencers. Consumers end up believing that their interests and opinions are similar to influencers'[72] on the ground that the digital content provides a glimpse into influencers' personal lives[73].

The activities which an influencer shall perform under a contract concluded with a brand include among others: posting visual advertising content (photos, videos), organizing online campaigns and contests (in particular 'giveaways'[74]), making live streams for the events organised by brands (influencers are

[67] Catalina Goanta, Sofia Ranchordás, *op. cit*., p. 11.
[68] Kolsquare, op. cit. (*The consumer as a new influencer?*).
[69] Carmen Tamara Ungureanu, *Platformele Colaborative Online – Provocări Juridice Europene*, in 'Analele Științifice ale Universitații „Alexandru Ioan Cuza" Iași, Științe Juridice', Tom LXIV, 2018, supliment, p. 205. See Carmen Tamara Ungureanu, *Drept international privat european in raporturi de comert international*, Ed. Hamangiu, 2021, p. 175.
[70] Ibid, p. 21.
[71] Rudy Pramono, Yolenta Winda, Agus Purwanto, Mirza Prameswari, Masduki Asbari, Rosma Indriana Purba, *op. cit.*, p. 8421.
[72] Ibid, p. 8422.
[73] Ibid, p. 8421.
[74] Nur Amalina Faizol, Nor Fadzlina Nawi, *op. cit.*, p. 374.

generally entitled to free attendance to such events) etc. At heart, influencers are digital content creators[75] and are rewarded for their activity. Their digital content is mainly created under the contractual obligations concluded with the brands. Consequently, they have an economic pursuit[76] when they conclude and perform advertising contracts. Their digital content incorporates their personal opinion about the promoted products/services, instructions or ideas for use, and explanations concerning the process of manufacturing or the scope of a products and/or service[77].

Besides the activity performed under the contract, the influencer shall carry out other activities with the purpose of strengthening his market position and visibility among the brands, and preserving and growing his community. Influencers' references and online consolidated presence (in particular reflected in a large number of followers), will give rise to a higher remuneration, as the action of creating content and maintaining the followers imply a significant amount of work and time[78]. In this way, when a brand pays the influencers, the brand shall also reward his work and time for 'cultivating' the capitalized community. Through a solid engagement, created by means of a direct and personal contact with followers, the influencer provides more benefits to a brand, including a broader dissemination of its products and services[79]. Generally, influencers' fees are established according to the visibility they provide[80] among the consumers.

A good relation between the influencers and the consumers helps to maintain consumers' attention and to consequently raise brand awareness, which will reflect in the number of consumer purchases[81]. It is self-evident that the better results an influencer achieve, the better remunerated he will be. Another relevant method for generating more consumer purchases is by raising a familiar and close feeling in consumers[82].

The most essential elements that should be taken into account when choosing influencers are: his community's dimension, the frequency of his posts on social media, and the level of engagement[83] with his audience. Brands can find this information through the statistics provided by social media (as it has special tools[84]). In addition, they could use tracking links[85].

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[75] Hanan Ezzat Moussa, *op. cit.*, p. 32.
[76] Ibid.
[77] Alice Audrezet, Julie Guidry Moulard, *Authenticity under threat: When social media influencers need to go beyond self-presentation*, in 'Journal of Business Research 117', DOI:10.1016/ j.jbusres.2018.07.008, 2018, p. 2.
[78] Kolsquare, *op. cit.* (*Influencer Marketing pricing…)*.
[79] Ibid.
[80] Ibid.
[81] Rudy Pramono, Yolenta Winda, Agus Purwanto, Mirza Prameswari, Masduki Asbari, Rosma Indriana Purba, *op. cit.*, p. 8422.
[82] Ibid.
[83] Josef Vodák, Martin Novysedlák, Lucia Čakanová, Miroslav Pekár, *op. cit.*, p. 153.
[84] Kolsquare, *op. cit.* (*Which KPIs should you…).*
[85] Ibid. An example of tracking links provider is https://bitly.com/.

6. Could an influencer be classified as a trader under the European law?

A professional and a trader are synonyms that can be found in Romanian and European legislation. According to Directive no. 2005/29/CE[86], a '*trader*' means '*any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader*'[87]. Article 2 (d) of Directive 2005/29/CE defines '*business-to-consumer commercial practices'* as '*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*'. Pursuant to the same article, the notion of '*products*' encompasses any type of goods or services, without excluding a certain field of activity.

With regard to the meaning of a '*trader*', in Advocate General's Conclusions in Case C-105/17, it has been affirmed that a trader may be understood as '*any natural or legal person which carries out a gainful activity*'[88]. The activity shall be carried out solely for economic purposes, the acts being carried '*within his trade, business, craft or profession*'[89]. Therefore, acting as a natural person does not exclude the possibility of being classified as a trader[90], as long as the acts are performed for economic purposes (nevertheless the person acts in her own name or as an intermediary, namely '*in the name or on behalf of a trader*'[91]).

At the core of being a trader is the condition of performing an economic[92] and gainful activity, on a regular basis[93]. That activity should have a commercial or professional nature[94]. Besides checking these previous formal conditions, classifying a person as a trader should be the result of an *in concreto* analysis, carried

[86] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), published in JO L 149, 11.6.2005, p. 22-39.
[87] Article 2 (b) of Directive 2005/29/CE.
[88] Opinion of Advocate General Szpunar delivered on 31 May 2018, CJEU, Case C-105/17, Komisia za zashtita na potrebitelite v. Evelina Kamenova, parag 43.
[89] Ibid, para. 43.
[90] Ibid, para. 44.
[91] Ibid, para. 44.
[92] Ibid, para. 46.
[93] Judgement of 4 October 2018, CJEU, Case C-105/17, *Komisia za zashtita na potrebitelite v. Evelina Kamenova*, parag. 37, 38.
[94] Opinion of Advocate General Bot delivered on 4 July 2013, CJEU, Case C-59/12, Zentrale zur Bekämpfung unlauteren Wettbewerbs, available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=139106&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=41574214, last accessed at 13.11.2021, para. 41, 42.

out according to the factual circumstances[95].

The main criteria set out for the classification as a trader are: a regular and organised activity; a considerable length of time in performing the activity; the existence of a legal status that allows the person to perform commercial acts; a link between the actions and the economic activity – when the person '*is acting in the name of a specific trader or on his behalf or through any other person acting in her name or on her behalf*'[96] and receives a form of remuneration; the amount of profit generated by the activity, which shall be enough in order to prove that it was performed for commercial purposes[97].

In view of the foregoing, we deem that the influencer, or at least the macro-influencer and the mega-influencer, could be classified as a trader within the meaning of European legislation. In support of the claim, it is undeniable that: an influencer has an organised and gainful activity (see section 4); the duration of the activity is more than considerable (the mere fact of being an influencer requires a long, constant and organized activity on social media); he has often a legal status that allows him to perform commercial acts (we will discuss this in the next section); he acts in the name and on behalf of a trader (the brand) when he performs advertising-related activities. Influencers are contacted by brands for marketing purposes (the branding activity is nowadays partially done through influencers[98]) and are pecuniary rewarded for their activity. The amount of the remuneration is dependent on the dimension of the communities, especially in case of macro-influencers and mega-influencers, because large communities automatically involve a higher effort and more time invested in creating and maintaining it, as well as the engagement that benefits brands.

In European legislation, consumers are at the opposite pole of the traders. A consumer is 'any individual not engaged in commercial or trade activities'[99]. In *Petruchova v. FIBO*[100], the Court of Justice of the European Union held that a consumer may be found '*only in contracts concluded outside his trade or profession*'[101], since a consumer acts only for meeting his personal needs[102]. It cannot

[95] Opinion of Advocate General Bot delivered on 4 July 2013, CJEU, Case C-59/12, Zentrale zur Bekämpfung unlauteren Wettbewerbs, para. 40.
[96] Opinion of Advocate General Szpunar delivered on 31 May 2018, CJEU, Case C-105/17, *Komisia za zashtita na potrebitelite v. Evelina Kamenova*, para. 51.
[97] Ibid.
[98] Jewon Lyu, Maureen Lehto Brewster, *Exploring the Parasocial Impact of Nano, Micro and Macro Influencers*, in 'ITAA Proceedings, #77', DOI:10.31274/itaa.12254, 2020, p. 1.
[99] Opinion of Advocate General Szpunar delivered on 31 May 2018, CJEU, Case C-105/17, *Komisia za zashtita na potrebitelite v. Evelina Kamenova*, para. 45.
[100] Judgement of 3 October 2019, CJEU, C-208/18, Jana Petruchová v FIBO Group Holdings Limited, available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=218626&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=41575584, last accessed on 13.11.2021.
[101] Carmen Tamara Ungureanu, *op. cit.*, 2021, p. 69.
[102] Judgement of 3 October 2019, CJEU, C-208/18, Jana Petruchová v. FIBO Group Holdings Limited, para. 39.

be argued that the influencers, at least the ones from the categories with the largest communities, devote their time to social media due to professional reasons, and not personal. Influencers become entrepreneurs that exploit their social media account, which transforms into their workplace[103]. Being an influencer equals to having a new business model[104] that generates all the income and is based on monetizing social media activity[105].

7. Could an influencer be classified as a professional under the Romanian law?

According to Article 3 of the Romanian Civil Code[106], a professional is the person who operates an undertaking. Thus, for analysing if it is possible to classify the influencer as a professional, we shall firstly discuss the meaning of '*operating an undertaking*'[107] and the conditions laid down by Article 3.

To begin with, a person shall physically and legally perform an activity[108] which should encompass material and legal operations. This first condition is completely fulfilled by an influencer (his activities and contractual relations are detailed in section no. 4). Then, another condition regards his activity that shall be performed in one of the forms provided in the Civil Code. The influencer provides advertising services that fall within the Civil Code provisions as 'provision of services'). In addition, he carries out his activities in a systematic and repeated manner (he creates and posts daily content), these two characteristics being also required by the Civil Code to be accomplished. The influencer is actually forced to carry out his activity in such a manner because if he would post only occasionally and sporadic, he would no longer be able to maintain or even grow his community, weakening or even losing the engagement. An influencer gives the impression that he is permanently active and in a '*constant state of offer*'[109] (as he does not have a working program).

The activity of an influencer has an organized and complex nature, exceeding the needs of a basic activity[110] (an influencer is carrying out his own promoting activities, is specialising in certain field, and has often a team that helps him – we will detail this aspect later). The activity is carried out according

[103] Loes van Driel, Delia Dumitrica, *op. cit.*, p. 69.
[104] Elvis E. Asia, *Legal issues in the business of social media influencer*, available online at https://www.academia.edu/40867255/Legal_issues_in_the_business_of_social_media_*influencer*, last accessed on 13.11.2021, p. 1.
[105] Catalina Goanta, Sofia Ranchordás, *op. cit.*, p. 9.
[106] Law no. 287/2009 published in Official Gazette no. 505 of 15 July 2011.
[107] Andreea Teodora Stănescu, *Drept comercial. Contracte profesionale*, Ed. Hamangiu, Bucharest, 2018, p. 4, 5.
[108] Ibid, p. 4.
[109] Ibid, p. 5.
[110] Ibid.

to influencer's own rules[111] and he has independence when it comes to making decisions[112] (he decides what type of products and/or services will advertise, with whom will collaborate, what content will post, and what type of platform will make use of – he has an autonomous activity). As a result, the entire activity is performed on his risk and he aims at making profits (monetizing his online activity and his community's engagement).

Beyond the legal conditions laid down in the civil legislation, an undertaking is also understood as '*any entity engaged in an economic activity, regardless of its legal status*'. This definition reflects perfectly the terminology adopted by the Court of Justice of the European Union[113] and it highlights the economic character of the activity as a fundamental criterion for the statute of '*professional*'[114]. This definition provides the crowning element of the classification of the influencer as a professional trader[115] (or, more general, '*trader*'[116]) who operates an economic undertaking[117].

In addition to Romanian Civil Code, Emergency Ordinance no. 44/2008[118] provides the definition of an undertaking and regulates the provision of services. The characteristic of an enterprise laid down in the Emergency Ordinance are identical to the one enshrined in the Civil Code: an economic activity carried out in an organized, permanent, systematic manner, at the risk of the professional. The activity is supposed to be performed by combining financial resources, workforce, raw materials, logistical means and information. Emergency Ordinance no. 44/2008 also defines the economic activity as a gainful activity which includes, among others, the prestation of services. It can be concluded that at the core of the economic activity and, consequently, of the commercial undertaking, stands the pursuit of profit[119]. Influencers aim to make profit from their activity and they endeavour to improve their influence analytics in order to generate greater profits.

In the process of carrying out their activity, influencers conclude different contracts (mainly commercial advertising contracts) and undertake various commercial operations. Their commercial acts consist in provision of services, and not only. Our opinion is that the entire activity of the influencers, that is car-

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111 Vasile Nemeș, *Drept comercial*, 3rd ed. Ed. Hamangiu, Bucharest, 2018, p. 19.
112 Ibid.
113 Ion Țuțuianu, *Profesionistul comerciant în viziunea Noului Cod civil român*, in 'Revista Națională de Drept' no. 10, 2013, p. 52.
114 Ibid.
115 Ibid, p. 50
116 Stanciu Cărpenaru, *Dreptul comercial in conditiile noului Cod civil*, 10.12.2010, available online at https://www.juridice.ro/129735/dreptul-comercial-in-conditiile-noului-cod-civil.html, last accessed on 13.11.2021.
117 Luminița Tuleașcă, *Drept comercial. Comercianții*, Ed. Universul Juridic, Bucharest, 2018, p. 51-59.
118 Vasile Nemes, *op. cit.*, p. 27.
119 Stanciu Cărpenaru, *op. cit.*

ried out on social media, is actually carried out in professional and economic purposes, when those influencers can be classified as professionals. We consider that there cannot be made a distinction between the 'personal' content and the 'economic' content, because the 'private' or 'personal' posts are part of a strategy and represent those elements which help him to maintain the characteristics that depict him as an influencer. Without that 'personal' content, an influencer could not sustain and strengthen the engagement. That type of content is exactly what attracts audience, generates a stronger engagement, a larger community and thus a higher value of the influencer, who could request higher fees based on his solid influence analytics.

The content which is claimed to be 'personal' or 'private' and distinct from the sponsored one (which is created under an advertising contract) is actual professional content when it is posted by a professional influencer (in general, a macro-influencer or a mega-influencer). If an influencer would post only commercial content ('sponsored' by brands), he would lose his authenticity and credibility, which would further lead to a loss of followers[120] and a decrease in influencer's value. The final result may even turn into a loss of the title of influencer and all the associated income. Therefore, influencers are actually forced, by their professional nature, to post both sponsored and non-sponsored, personal-alike content. This mixture between types of content gives the impression of spontaneity and authenticity and lays the foundation for a relation between the influencer and his community, a relation based on confidence, which in the end will give rise to a loyal community[121] that generates substantial profit.

The so-called 'personal' content is a vital part for developing and maintaining consumers' confidence. The grounds of community's trust fluctuate between two extremes: on the one hand, there are the expert influencers, with certified expertise in a field, that are followed by virtue of their knowledge and qualification; on the other hand, there are the influencers that have built up an affective tie with their community, by means of posting personal content and constantly sharing private life events that are not linked with their advertising contracts. The personal content ensures keeping the community intact and even growing it by fortifying the emotional connections and establishing a communication channel (*e.g.* when an influencer posts private moments such as child birth, family celebrations, unfortunate events or the most emotional events, he creates a direct relation with the users that turn into close confidants of the influencer).

The last category of influencers, who lure consumers with personal content, transform the emotional strategy into a professional one, focused on creating the feeling of intimacy between themselves and their followers[122]. Consequently, influencers create the illusion of real interpersonal relations[123], even if they are

[120] Loes van Driel, Delia Dumitrica, *op. cit.*, p. 69.
[121] Ibid.
[122] Hanan Ezzat Moussa, *op. cit.*, p. 37.
[123] Ibid, p. 85.

actual virtual and unilateral. There are influencers that make use of both strategies[124] (the personal content strategy and the expert content strategy). It is argued in literature that the intimacy itself, created with the help of personal content, is the one that provides the influencer with a superior advertising power[125] compared to other advertising means.

Brands are looking after and harness the trust that consumers have in influencers[126]. If influencers would lose this given confidence, then they would no longer be valuable, and therefore would stop gaining money for 'influencing'. They are a source of trust for consumers, so they choose to buy the goods and services recommended by influencers. This is a phenomenon specific to trust economy,

Influencers are remunerated for providing their advertising services, as their entire activity have an economic pursuit, namely to make profits. Anyhow, the consideration is not always established in money. Remuneration may also be in goods delivered by the brands or the services they provide[127] (as well as free invitations to events, trips[128] etc.). As it has been already said, in general, the remuneration is fixed according to the dimension of the influencers' community (and hence the economic interest in growing the community). In this way, mega-influencers may earn up to 300.000$ for a post, while micro-influencers may earn up to 250$ for a post[129]. Nano-influencers with less than 1.000 followers may earn an average of 82,60$ for a post[130].

There is also the possibility to determine the remuneration based on the number of consumers buying decisions that followed the influencer's advertising and 'advice' to buy, as well as based on the number of consumers that accessed brands' pages[131]. An example on this is the discount code which is personalized and given to an influencer[132]: after receiving the discount code, the influencer posts it within his community, where his followers have the possibility to use it for buying reduced goods and services; consumers (followers) have to introduce the code for getting the discount; due to the fact that each

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[124] Ibid, p. 38.
[125] Loes van Driel, Delia Dumitrica, *op. cit.*, p. 68.
[126] Elvis E. Asia, *op. cit.*, p. 1.
[127] Nur Amalina Faizol, Nor Fadzlina Nawi, *op. cit.*, p. 373.
[128] Kolsquare, op. cit. (*Drafting a contract for…).*
[129] Josef Vodák, Martin Novysedlák, Lucia Čakanová, Miroslav Pekár, *op. cit.*, p. 154.
[130] *How To Start A Social Media Influencer Business*, available online at https://howtostartanllc.com/business-ideas/social-media-*influencer*, last accessed on 13.11.2021.
[131] The Committee of Advertising Practice (CAP), The Competition and Markets Authority (CMA), *An Influencer's Guide to making clear that ads are ads*, available online at https://www.asa.org.uk/uploads/assets/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf, last accessed on 13.11.2021, p. 6.
[132] Yasameen Thaer. A. Al Mashhadani, *The Impact of Trust on Social Media's Influencers and the Effect of Influencer's Discount Codes on the Consumer Purchase Involvement*, Kadir Has University, School Of Graduate Studies, Program of Business Adminstration, Istanbul, May, 2019, available online at http://academicrepository.khas.edu.tr/, last accessed on 13.11.2021.

code is personalized (in general with the name of the influencer), brands will know exactly how many consumers who made buying decisions came from each influencer; in the end, the influencer will be remunerated with a percentage of the total revenue he generated with 'the help' of his community.

As they are remunerated for an economic activity, they carry out advertising activities and most of them are classified as professionals, they must comply with consumer protection regulations. As a consequence, they are obliged to publicly announce when a post is 'sponsored'[133].

A lot of influencers, regardless their category, have made a living out of this online activity on social media[134]. For these persons, being an influencer becomes their 'job', the main economic activity[135]. Their revenue is primarily generated by the advertising contracts concluded with brands[136]. There may be cases when they receive goods without entering into agreements, particularly when brands deliver them different goods hoping that they will post about them.

Another argument in favour of classifying the influencers as professionals is represented by their negotiation position when concluding the contracts. The influencers, together with the brands, are equal partners in advertising[137]. They negotiate the terms of their collaboration on an equal footing. Anyhow, we consider that in what concerns nano-influencers and maybe some of the micro-influencers, the situation differs. Precisely because there is a thin demarcation line between consumers and some categories of influencers, we appreciate that in the contracts concluded between brands and nano-influencers or micro-influencers, the position of the latter may be inferior[138].

The influencers have shifted from consumers to professionals. A great contributor to this shift has been the brands' requests on the market. During the last years, a significant percentage of brands have dedicated a part of their budget to influencer marketing[139]. This points out that influencer marketing has crystallized itself as an independent industry, with its own professionals whose services are highly required on the market and highly remunerated. *Influencer marketing* is nowadays considered the most efficient type of marketing[140].

From the point of view of legal organization and status, there are influencers that created their own companies, influencers who declare themselves

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[133] Vuelio, The Competition and Markets Authority (CMA), *Influencer Marketing and the Law. How To Comply with Disclosure*, available online at https://www.vuelio.com/uk/wp-content/ uploads/2019/10/*Influencer*-Marketing-and-the-law.pdf, last accessed on 13.11.2021, p. 4.
[134] Catalina Goanta, Sofia Ranchordas, *op. cit.*, p. 7.
[135] Kolsquare, *op. cit.* (*Vers la fin des faux…)*.
[136] Catalina Goanta, Sofia Ranchordás, *op. cit*., p. 10.
[137] Kolsquare, *op. cit.* (*Drafting a contract for…).*
[138] Carmen Tamara Ungureanu, *op. cit.*, 2021, p. 68.
[139] Nur Amalina Faizol, Nor Fadzlina Nawi, *op. cit.*, p. 374.
[140] Kolsquare, *The Influencer Marketing Market in France – In Figures*, available online at https:// www.kolsquare.com/en/guide/market-france, last accessed on 13.11.2021.

freelancers (their legal status in Romania would be 'authorized person'), and influencers who remained consumers (as they do not have enough activity on social media in order to set up a company – *e.g.* most of nano-influencers)[141].

The high demand on the market, the numerous activities and the amount of funds invested in this new industry, altogether reshaped the undertakings operated by professionals. A lot of influencers who have not managed to handle their work volume have hired employees to work for them, as well as entire professional production teams for helping them with digital content creation. Due to these changes, in time, some of the influencers became treated as advertising agencies[142].

Because of the rapid evolution of their activity, which further generated a greater volume of work and a higher level of complexity, influencers are advised to create their own legal entity which completely authorizes them to carry out their economic activities and to obtain revenues. The most favourable such entity in Romania's legal framework is the limited responsibility company[143].

The existence of an industry of influencers, together with a market of influencer services marketing, is also proven by the recent emergence of intermediary national and international platforms. These platforms facilitate the process of finding the right influencer, negotiating and concluding the contract. In Romania, there is Mocapp platform which works on the basis of an intermediation agreement[144] and provides intermediation and assistance services for brands. At the international level there is Hivency platform with a similar activity[145]. Lately, there have popped up platforms that act like a search engine for brands, helping them to find and evaluate influencers[146].

8. Conclusions

In general, the influencer is conceptually separated from the consumers. It is said that an influencer has the role to influencer '*the consumers'*, and not '*the other consumers*'. Influencers may be qualified as professionals under the Romanian law, but the distinctions between the main influencers' categories may tip the balance in favour of the qualification as a consumer. We consider that a clear-cut demarcation between consumers and influencers as professionals cannot be made, especially when it comes to micro-influencers. Nevertheless, as regards macro-influencers and mega-influencers, we deem that they could be always

[141] Catalina Goanta, Sofia Ranchordas, *op. cit.*, p. 8.
[142] Josef Vodák, Martin Novysedlák, Lucia Čakanová, Miroslav Pekár, *op. cit.*, p. 151. A Romanian influencer is Alina Ceusan (her Instagram account link: https://www.instagram.com/alinaceusan/?hl=ro, last accessed on 13.11.2021).
[143] *How To Start A Social Media Influencer Business,* available online at https://howtostartanllc.com/business-ideas/social-media-*influencer* last accessed on 13.11.2021.
[144] Andreea Teodora Stănescu, *op. cit.*, p. 175.
[145] https://www.hivency.com/en/, last accessed on 13.11.2021.
[146] For example, https://www.infludata.com/, https://socialblade.com/, last accessed on 13.11.2021.

qualified as professionals. In what concerns the nano-influencers, we appreciate that they may be both prosumers or consumers, depending on the factual background.

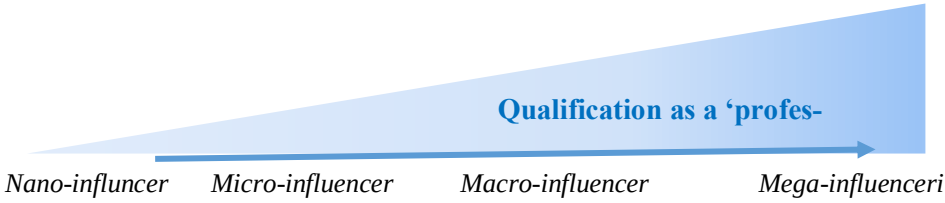

Fig. 1. The gradual increase in qualifying the categories of influencers as professionals

Being a professional reflects on the entire activity of the influencers, including on their so-called '*personal*' and '*private life'* posts which acquire an economic dimension. Then, another important effect manifests on the contractual field because, according to Romanian civil law, the contracts concluded between professionals (*i.e.* influencers and brands) generate professional obligations[147] and are subject to special provisions applicable only to professionals (such as Law no. 72/2013[148] and Articles 1.233, 1.297, 1.446, 1.523[149] of Romanian Civil Code). Because of being qualified as professionals, they must comply with consumer protection legislation and unfair competition regulations, which require an economic activity carried out within the limits of lawful competition.

What is more, because of the professional nature, there is incident a specific tax regime[150], that gives rise to legal obligations such as keeping separate and transparent accounts. Professionals are obliged to register themselves within the Trade[151]. Their legal regimes differ depending of the chosen legal form: an authorised person is regulated by Emergency Ordinance no. 44.2008, while a company is regulated by Law no. 31/1990. Both of them have the obligation enshrined in Law no. 26/1990, for registration and opposability purposes[152]. And last but not least, a professional is subject to special provisions in the field of contractual liability and tort law[153].

In the end, an important implication of the qualification as a professional,

[147] Andreea Teodora Stănescu, *op. cit.*, p. 8.
[148] Law no. 72/3013 published in Official Gazette no. 182 of 2 April 2013.
[149] Andreea Teodora Stănescu, *op. cit.*, p. 7.
[150] See, for example, tax regime applicable in Singapore, *Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms*, available online at https://www.iras.gov.sg/media/docs/default-source/uploadedfiles/pdf/social-media-*influencer*.pdf?sfvrsn=6204a1de_0, last accessed on 13.11.2021. See also, Carmen Tamara Ungureanu, *op. cit.*, 2021, p. 181, 182.
[151] Luminița Tuleașcă, *op. cit.*, p. 62.
[152] Decision no. 209/2019 of 9 April2019, Romanian Constitutional Court, para. 13.
[153] Catalina Goanta, Sofia Ranchordás, *op. cit.*, p. 14.

and which we will detail in our future work, refers to the legal regime applicable to the posted digital content of the influencer. We consider that the disputes between influencers in respect of their content will no longer fall under the umbrella of 'private life' (as it has been held[154]). That kind of disputes will be classified as disputes between professionals and they will involve unfair competition and other laws applicable to professionals (we already had in Romania the first dispute between influencers as professionals[155]).

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[154] For example, Judgement no. 5/2021 of 06/01/2021, Bucharest District 1 Court, Civil Section II.
[155] Judgement no. 1167/2021 of 26/07/2021, Bucharest Tribunal, 5th Civil Section.

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Translation of arbitral awards in the procedure for the recognition and enforcement of foreign arbitral awards. Conditions and assumptions

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Abstract

The purpose of the article is to examine the manner in which the regulation of the applicant's ability to submit a certified translation for compliance with a foreign arbitral award responds to the legislative desire to facilitate the recognition and enforcement of foreign arbitral awards in Romania. It is approached the hypothesis in which the defendant disputes the accuracy of the translation or the court ex officio considers that the translation submitted to the case file presents certain ambiguities. In this case, the question arises as to whether it is necessary to file a translation by a certified translator in the case file or whether it is sufficient in that case to submit a translation by a party. The article also examines whether or not the provisions of the Code of Civil Procedure are more favorable or unfavorable than the provisions of the New York Convention (1958) with regard to the translation of foreign arbitration awards.

Keywords: *foreign arbitration award, translation of foreign arbitration award, New York Convention, Code of Civil Procedure.*

JEL Classification: K41

1. The language of drafting foreign arbitration awards. Brief preliminary considerations

In this article we aim to analyze the conditions under which arbitral awards written in a foreign language are to be translated in the procedure for the recognition and/or enforcement of foreign arbitral awards[3] and the various practical hypotheses that may arise in connection with this issue in the said procedure.

Some specific clarifications are needed in order to be able to determine

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[3] For an analysis of the concept of "foreign arbitral award" as the starting point for the New York Convention and its reference to other treaties incidental to the recognition and enforcement of foreign arbitral awards and to national law applicable to such matters, see J. D. M. Lew, L.A. Mistelis, S.M. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 693 – 702, A. J. Bělohlávek, *Concept of Foreign Arbitral Award in Connection with Recognition and Enforcement and Conflicts of Sources*, „Revista Română de Arbitraj" no. 2/2013, p. 32 – 52.

the framework in which we are going to place this legal analysis.

Thus, the issue of the article will be addressed, from a legislative point of view, by referring mainly to the provisions of the Code of Civil Procedure, but also to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York in 1958 (in continued New York Convention)[4], each applicable to the above-mentioned issues under certain conditions. In this sense, according to art. 1124 of the Civil Procedure Code: "Any arbitral awards of domestic or international arbitration pronounced in a foreign state and which are not considered national decisions in Romania are foreign arbitral awards". In turn, art. 1 para. (1) of the New York Convention provides: "This Convention shall apply to the recognition and enforcement of arbitral awards given in the territory of a State other than that in which the recognition and enforcement of judgments and the result of disputes between natural or legal persons are required. It shall also apply to arbitral awards which are not regarded as national judgments in the State in which recognition and enforcement is sought."

In the legal literature, from the perspective of the importance of the correct qualification of an arbitral award, it was noted that: "the distinction between Romanian national arbitral awards and foreign (or non-national) arbitral awards is relevant to define a number of procedural options:

- first of all, if it is possible to promote an action in annulment of the arbitral award before the Romanian courts, in application of the Romanian Code of Civil Procedure. Such an action is possible for national arbitral awards.

- secondly, if the procedure for recognizing the respective arbitral award on the territory of Romania is necessary or if it is sufficient to proceed with the start of the enforcement procedures. For a national arbitral award, it will be sufficient to initiate the enforcement procedure, without the need to go through the procedure for recognizing the arbitral award on the territory of Romania."[5]

We will not insist on the existing regulatory differences regarding the notion of "foreign arbitral award" between the two mentioned normative acts and on the legal consequences produced by the respective differences[6], as such an

[4] For an analysis of the relationship between the New York Convention and the Code of Civil Procedure, including the scope of these regulations, see R. M. Necula, *The role of courts in the procedure for recognizing and enforcing foreign arbitral awards. Comparative look at the Romanian Code of Civil Procedure and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York (1958)* in Thierry Bonneau, Cristina Elena Popa Tache (eds.), *Innovation and Development in Business Law Contributions to the 10th International Conference „Perspectives of Business Law in the Third Millennium", November 13, 2020, Bucharest*, Adjuris International Academic Publisher, Bucharest, Paris, Calgary, 2021, p. 300 – 309.

[5] C. Leaua, *Relaţia dintre locul arbitrajului şi calificarea unei hotărâri arbitrale ca fiind naţională sau străină,* in M. Şandru, A. Săvescu (coord), *Forţa juridică a hotărârilor arbitrale*, University Publishing House, 2012, p. 144 – 160.

[6] For an analysis of this topic, see R.M. Necula, *Foreign arbitral award under the Code of Civil Procedure and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,*

analysis would exceed the purpose of this study. We will emphasize, however, that a foreign arbitration award will not necessarily be drafted in a foreign language.

For example, an arbitral award rendered in a foreign state as a result of a dispute between two legal persons of Romanian nationality, regarding the legal relations developed by them on the territory of the mentioned state, based on the foreign law governing the contractual relations developed between them, is to be qualified as a foreign arbitral award.

Such a conclusion results both in the conception of the Code of Civil Procedure and in the conception of the New York Convention. In this context, the arbitral award may be drafted in Romanian, to the extent that the parties agree that the language in which the arbitration will be conducted and in which the arbitral award will be drafted shall be Romanian, without the said language being changed. of foreign arbitral award.

In practice, however, the aforementioned situation is not often encountered, because, given the elements that determine the qualification of an arbitral award as foreign, most foreign arbitral awards are not written in Romanian.

2. Translation of the foreign arbitration award which is not written in Romanian within the procedure of recognition and enforcement of foreign arbitration awards

As we have shown, as a rule, the foreign arbitration award will be drafted in a foreign language, but there is also the possibility that it will be drafted in Romanian.

The procedure for recognizing and enforcing foreign arbitral awards, as regulated by art. 1124 - 1133 of the Code of Civil Procedure (C.proc.civ.), is applicable, by hypothesis, only to foreign arbitral awards. In this context, we find that according to art. 1128 para. (2) C.proc.civ., if the foreign arbitral award is not drafted in Romanian, the person requesting, in the main way, the recognition and/or execution of the foreign arbitral award must also present its translation into Romanian, certified for compliance.

At the same time, we note that the legislator did not expressly provide what the request for recognition and/or execution of foreign arbitral awards must contain, which is why we consider that the provisions of art. 148 - 152 C.proc.civ. This conclusion is necessary because the mentioned provisions are regulated in the first book of the Code of Civil Procedure, in which the general provisions applicable to the civil process are provided.

More precisely, we consider that the provisions of art. 148 - 152 C.proc.civ. they shall apply accordingly in the said procedure, as they lay down the general rules applicable to any application to the courts, in the absence of

adopted in New York (1958). Comparative look, „Perspectives of Law and Public Administration" vol. 9, issue 2, 2020, p. 219 – 223.

derogating legal provisions.

With regard to the legal provisions derogating from the general framework established by articles 148 - 152 C.proc.civ., we find, however, that although the legislator did not understand to establish specific rules applicable, in itself, to the application for recognition and/or foreign arbitration awards, provided for the need for the foreign arbitration award to be filed in original or in copy and, if it is not drafted in Romanian, to present its translation into Romanian, certified for compliance.

Given the object of this study, we will be strictly concerned with the issue of translating foreign arbitration awards that have not been drafted into Romanian.[7]

In this context, it is observed that the legislator understood to derogate from the provisions with general applicability established by art. 150 para. (4) C.proc.civ. which provide as follows: "when the documents are written in a foreign language, they shall be submitted in a certified copy, accompanied by a certified translation by a certified translator. If there is no authorized translator for the language in which the documents in question are written, the translation made by trusted persons who know the respective language may be used, in accordance with the special law".

The legislator did not understand to impose the necessity that the foreign arbitral award that is not written in Romanian be translated by an authorized translator or by a trusted person, under the conditions of art. 150 para. (4) C.proc.civ., establishing exclusively the obligation of certification for conformity of the respective translation.

A contrary conclusion, which, moreover, was expressed in the literature[8], we believe can not be retained, since art. 150 para. (4) C.proc.civ. imposes the obligation to certify the copies of the documents written in a foreign language,

[7] The conclusions that will result from this legal analysis will be applicable, however, accordingly, to the situation in which the arbitration agreement is not drafted in Romanian.

[8] Ş-Al. Stănescu în V. M. Ciobanu, M. Nicolae (coord), *Noul Cod de procedură civilă comentat şi adnotat. Vol. II – art. 527 -1134*, Universul Juridic Publishing House, 2016, p. 1773. The quoted author mentions that „the phrase "certified conformity", used by art. 1128 para. (2) NCPC, is inadequate, may suggest the idea that a simple translation by the party is sufficient from the perspective of the legal provisions analyzed. Such a conclusion, which could be based on the provisions of art. 150 para. (2) NCPC, according to which the certification for compliance is made by the party, would, from our perspective, be erroneous, for the following reasons:

- art.150 para. (2) NCPC refers to the certification by the party of the copies of the documents, and not of the translations of these documents;
- art.150 para. (4) NCPC requires that, in the case of documents written in a foreign language, certified copies be submitted to the file [under the conditions of art. 150 para. (2) NCPC, ie by the party], accompanied by a certified translation by a certified translator;
- art.1100 para. (2) NCPC requires that, at the request for recognition of a foreign decision (within the meaning of art. 1094 NCPC), the documents listed in para. (1) of this legal text, superlegalized, accompanied by their authorized translation, and there is no reason why, in the case of the request for recognition or approval of the execution of a foreign arbitral award, the solution be different".

which are to be accompanied, as a rule, by the legalized translation performed by an authorized translator, and art. 1128 para. (2) C.proc.civ. provides for the need for certification for compliance even of the translation performed.

We are therefore of the opinion that by establishing the obligation of certification for conformity of the translation made, the legislator aimed for the party that performed the respective translation to assume its content, precisely because he understood to derogate from the general rules established by art. 150 para. (4) C.proc.civ. from which it results that the "assumption" of the translation was done, as a rule, by legalization by an authorized translator.

As far as we are concerned, we believe that the most likely aim of the legislator was to pursue through this derogation the transposition of the flexibility that characterizes the arbitration procedure and in the stage of recognition and enforcement of foreign arbitral awards, by establishing a less onerous legal regime regarding the translation of arbitral awards, than the one generally applicable. This view is also supported by the explanatory memorandum to the Code of Civil Procedure, which states, with regard to arbitration, that: „the draft of the new Code of Civil Procedure proposes the transformation of this alternative dispute resolution procedure into an attractive, supple and modern one which, through flexibility and speed, has beneficial effects in the sense of reducing the volume of activity of the courts"[9].

Next, we will focus on the procedural steps to be followed in the event that the party against whom recognition and/or enforcement of the foreign arbitral award is sought disputes the manner in which such translation was made.

A careful analysis shows that the respective contestation of the manner in which the translation was made must not be purely formal, in the sense that the party opposed by the arbitral award must invoke one of the reasons for refusal of recognition or enforcement regulated by art. 1129 C.proc.civ.[10] or to invoke the ineffectiveness of the arbitral award under the conditions of art. 1125

[9] http://www.cdep.ro/proiecte/2009/400/10/3/em413.pdf, consulted on 1.10.2021.

[10] Art. 1129 C.proc.civ. provides that: "Recognition or enforcement of a foreign arbitral award shall be refused by the court if the party against whom the judgment is invoked proves the existence of one of the following circumstances: a) the parties did not; b) the arbitration agreement was not valid according to the law to which the parties submitted it or, failing that, according to the law of the State in which the arbitral award was rendered; c) the party against whom the judgment is invoked was not appropriate; d) the establishment of the arbitral tribunal or the arbitral proceedings did not comply with the agreement of the parties or, in the absence of their agreement, the law of the place where the arbitration took place; e) the decision concerns a difference is not provided for in the arbitration agreement or outside the limits set by it, or contains provisions that exceed the terms of the arbitration agreement. However, if the provisions of the judgment relating to matters subject to arbitration may be separated from those relating to matters not subject to arbitration, the former may be recognized and declared enforceable; f) the arbitral award has not yet become binding on the parties or has been annulled from the state in which or according to the law of which it was pronounced."

C.proc.civ.[11] and to state the link between the erroneous mode of translation and the issues raised by it in order to obtain the rejection of the request made.

Thus, for example, it could be invoked that, if the arbitral award had been properly translated, it would have resulted that the dispute resolved by the arbitral tribunal was not provided for in the arbitration agreement, the hypothesis regulated by art. 1129 letter e) C.proc.civ. or that an appropriate translation would lead to the conclusion that the arbitral dispute could not have been settled by arbitration in Romania or that the arbitral award contains provisions contrary to the public order of Romanian private international law.

In all the above, I note that the interested party should state the manner in which the translation should have been carried out, which should lead to its conclusions.

However, the following question arises: what is the procedural means by which the translation made by the applicant can be challenged?

On another occasion[12], seeing the provisions of art. 1131 para. (1) C.proc.civ.[13] and retaining the contentious character of the analyzed procedure, I noted that regarding the judgment of the request for recognition and/or execution of the foreign arbitral award "the provisions of art. 200 C.proc.civ. which regulates the verification and regularization of the summons and the provisions of art. 201 C.proc.civ. which regulates the procedure for fixing the first trial term, the aforementioned provisions being incidental within the contentious procedure."

Also, regarding the hypothesis regulated by art. 1131 para. (2) C.proc.civ.[14], considering that the purpose of this legal text is to allow the recognition and/or execution of the arbitral award in a shorter time by reference to the defendant's procedural position, respectively that of recognizing the plaintiff's claims, I noted that analysis, „in principle, the provisions of art. 200 C.proc.civ. which regulates the verification and regularization of the summons, but the provisions of art. 201 C.proc.civ. which regulates the procedure of fixing the first trial term, since the application of these legal provisions would be likely to lead to the extension of the term for solving the case, contrary to the purpose pursued by the legislator, by regulating the hypothesis provided by art. 1131 para. (2) C.proc.civ."[15]

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[11] Article 1125 C.proc.civ. provides that: "Any arbitral award from those provided in art. 1,124 is recognized and can be executed in Romania if the dispute forming its object can be resolved by arbitration in Romania and if the decision does not contain provisions contrary to the public order of Romanian private international law."

[12] R. M. Necula, *op. cit.*, 2020, p. 305.

[13]Article 1131 para. (1) C.proc.civ. provides that: "The request for recognition or enforcement of the foreign arbitral award shall be resolved by a judgment given by the summons of the parties and which can be appealed only on appeal."

[14] Article 1131 para. (2) C.proc.civ. provides that: "The application may be resolved without summoning the parties if it is apparent from the judgment that the defendant agreed to admit the action."

[15] R. M. Necula, *op. cit.*, 2020, p. 305.

We maintain in this case the opinions previously expressed, meaning that we will emphasize that, in most cases, the request for recognition and/or execution of the foreign arbitration award will be resolved according to the procedure regulated by art. 1131 para. (1) C.proc.civ., respectively with the procedure provided by art. 201 C.proc.civ. and by summoning the parties.

In these conditions, we find that the defendant will be able to contest the translation of the arbitral award by formulating the objection, under the conditions regulated by art. 201 para. (1) C.proc.civ. by reference to the provisions of art. 205 C.proc.civ.

The following question arises: how can the defendant prove, however, the allegations made in the statement of defense regarding the irregularity of the translation made?

It is obvious to us that the incidental legal texts only allow us to conclude that the defendant can prove his claims exclusively by submitting the legalized translation of the arbitration award made by an authorized translator or a trusted person who knows the respective foreign language, under the conditions regulated by art. 150 para. (4) C.proc.civ. This conclusion is required, in the absence of derogating legal provisions applicable to the objection within the procedure of recognition and/or execution of foreign arbitral awards, since according to art. 206 para. (2) C.proc.civ. and regarding the reception of the provisions of art. 150 C.proc.civ. are applicable. More specifically, the legislature provided exclusively that the request for recognition and/or enforcement of the foreign arbitral award made by the plaintiff would be accompanied by the translation, certified in Romanian, of the arbitral award drafted in a foreign language, without concern of the hypothesis in which the defendant formulates an objection and disputes the translation made. In such a situation, in the absence of an express legal basis that provides for another solution, the general provisions of art. 206 para. (2) referred to in art. 150 para. (4) C.proc.civ., cannot be removed.

We find, therefore, that there is an asymmetry between the applicant's obligation to submit only a translation, certified for conformity, in Romanian, of the arbitral award written in a foreign language and the obligation of the defendant to submit the legalized translation of the arbitral award made by a certified translator or a trusted person who knows that foreign language, under the conditions regulated by art. 150 para. (4) C.proc.civ and to bear, implicitly, the expenses necessary to carry out the respective translation. We believe, however, that only apparently the legislator's solution is unfair, because, in fact, it is fair in relation to the legal situation with which the court is invested. Thus, if the legislator had also allowed the defendant to submit a translation, certified for conformity, in Romanian, of the arbitral award written in a foreign language, the judge would have been put in a position to make a comparison of the two translations, different by hypothesis, filed in the case file. In such a case, the judge would not have been able to rule directly on the correctness of the translation, even if he had known the foreign language in which the arbitral award was drafted, as no legal

provision confers this right on him[16].

We do not believe that a contrary solution could be accepted, as the evidence can only be administered legally.

In this sense, we note that art. 250 of the Civil Procedure Code, which regulates the object of evidence and the means of proof, provides that the proof of a legal act can be made only by means provided by law.

Therefore, even in the case of a legislative regulation that would have allowed the defendant to submit a certified translation by him for compliance, the only solution that the judge in charge of resolving the case could have resorted to would have been to inform the defendant who contest the translation made, as a claimant before the court[17], to file the legalized translation of the arbitral award made by a certified translator or the translation made by a trusted person who knows that foreign language, if a certified translator does not exists for that foreign language, as only a person with certified or recognized knowledge could provide information suitable for resolving the issue in question.

Consequently, the possible legislative solution that would have allowed the defendant to submit a translation, certified for conformity, in Romanian, of the arbitral award drafted in a foreign language, would have been useless, given that, in such a case. In any case, the judge in charge of solving the case should have turned to an authorized translator or to a trusted person who knows the respective foreign language, under the conditions regulated by art. 150 para. (4) C.proc.civ., for solving the litigious issue.

In the same context, we mention that there is a possibility that the court in charge of resolving the case will find the translation inaccurate, even if the defendant does not dispute the manner of translation. Thus, if the defendant does not contest the translation and does not invoke the incidence of one of the cases of refusal of recognition or execution, expressly provided by art. 1129 of the Civil Procedure Code, as a result of the manner of making the translation[18], the court may, however, find that it cannot verify the effectiveness of the arbitral award, pursuant to art. 1125 C.proc.civ., based on the translation made. More precisely, the court cannot verify the fulfillment of the conditions provided by art. 1125 C.proc.civ., as a result of the manner of making the translation submitted to the

[16] We consider that when he wanted the judge to be able to capitalize on his knowledge in the field of foreign languages, the legislator expressly provided for this possibility. Thus, according to art. 225 para. (1) C.proc.civ.: „When one of the parties or of the persons to be heard does not know the Romanian language, the court will use an authorized translator. If the parties agree, the judge or clerk may act as translator. In the situation where the presence of an authorized translator cannot be ensured, the provisions of art. 150 para. (4)".

[17] According to art. 249 of the Civil Procedure Code: "the one who makes a claim during the trial must prove it, except for the specific cases provided by law".

[18] This hypothesis can be met in the situation regulated by art. 1131 para. (2) C.proc.civ., when, in principle, the defendant, not being summoned, will not be aware of the existence of the file having as object the recognition and/or execution of the foreign arbitral award until the moment of resolving the case when the decision to be pronounced follows you are communicating.

file. For example, the translation is not sufficiently rigorous in terms of legal terminology, so the court cannot ascertain exactly by reference to the translation of legal terms whether the dispute between the parties was arbitrable in Romania.

It is also possible for the court to know the foreign language in which the arbitral award was made and to find that the translation is erroneous, in the sense that, for example, the object of the case is not that which would result from the manner in which the translation was made, but another which, possibly, could not have been the subject of an arbitral settlement in Romania.

In these situations, as I have shown, the judge in charge of resolving the case does not have the opportunity to rule directly on the correctness of the translation, even if he knew the foreign language in which the arbitral award was drafted, given that no legal provision confers this right on him. That is why we believe that the only possible solution is that, pursuant to art. 249 C.proc.civ., the court to instruct the plaintiff, as the party who initiated the legal action, to submit the legalized translation of the arbitral award made by an authorized translator or the translation made by a trusted person who knows the respective foreign language, if a certified translator does not exist for that foreign language.

Furthermore, without insisting on the relationship between the New York Convention and the provisions of the Code of Civil Procedure, since such an analysis is not the subject of this study, we find only that, from the applicant's point of view, the provisions of the Code of Civil Procedure are more favorable. than the provisions of the New York Convention, as regards the manner in which the translation of the foreign arbitration award is to be carried out.

Thus, if the provisions of the Code of Civil Procedure provide for the possibility of submitting a translation, certified by the applicant for compliance, the provisions of the New York Convention require the translation to be performed by an official translator, or a sworn translator, or a diplomatic or consular agent (art. 4 point 2), formalities which are obviously more onerous for the applicant.

In this context, we emphasize that the respective New York Convention allows the plaintiff to invoke the more favorable provisions of the law of the state in which the recognition/enforcement of foreign arbitral awards is requested, as it results from art. 7 point 1 of the text of the mentioned convention.

Regarding this issue of law, in the specialized literature[19] it has also been shown that it is advisable to translate the documents provided by art. 1128 para. (1) C.proc.civ. by an official translator, or by a sworn translator or by a diplomatic or consular agent, this interpretation being facilitated by the conception established by art. 4 point 2 of the New York Convention, to which Romania has acceded. From our perspective, such an interpretation of the internal legal provisions cannot be accepted, for the reasons presented in this study and the clarity of

[19] R. B. Bobei, *Arbitrajul intern şi internaţional. Texte. Comentarii. Mentalităţi*, C.H. Beck Publishing House, 2013, p. 426.

the legal text which requires only the submission of the translation of the arbitration award, certified for compliance, so that the interpretation of the legal text it is necessary to submit a translation made by an official translator, or by a sworn translator or by a diplomatic or consular agent is likely to add to the legal text analyzed, which cannot be admitted.

In addition, such an interpretation would be contrary to the provisions of the New York Convention, which allow the applicant to invoke more favorable provisions of the law of the State in which recognition or enforcement of foreign arbitral awards is sought. More precisely, following the interpretation of the national provisions, in the manner proposed by the cited author, it would be concluded that the translation of the foreign arbitration award must be done in the same way, both under the Code of Civil Procedure and under the Convention in New York, so that the more favorable provisions of domestic law, in the opposite interpretation which we have agreed to retain, would be of no practical use, which is why the applicant's right to invoke them, under the conditions laid down in the text of the New York Convention would no longer have legal effect, which would be contrary to the very favorable conception of the recognition and enforcement of the arbitral award established by that convention.

3. Conclusions

Although the legislature sought to facilitate the recognition and/or enforcement of foreign arbitral awards, by regulating the applicant's ability to submit a certified translation of the arbitral award in a foreign language, the desired outcome is achieved only in part.

More specifically, as I noted in this study, insofar as the defendant disputes the accuracy of the translation or the court, ex officio, considers that the translation submitted to the case file has certain ambiguities, for the resolution of the case it will be necessary to submit a translation to the case file. carried out by a certified translator or, in the event that a certified translator does not exist for that foreign language, by a trusted person who knows the foreign language, this being the only way to optimally resolve the existing divergence on this issue.

Also, from the point of view of translating the foreign arbitral award, we note that the provisions of the Code of Civil Procedure are more favorable than the provisions of the New York Convention, being likely to be invoked by the plaintiff, including in the case of applicability of the New York Convention, as it results from art. 7 point 1 of the text of the mentioned convention.

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EUROPEAN OVERVIEW OF THE LEGAL AND BUSINESS CONSIDERATIONS

Online sales of medicinal products in the CJEU case-law – between the free movement of goods and public health protection

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Abstract

The trans-border online purchase of medicines has been growing in the last decades. This paper provides an in-depth analysis of the relevant case-law of the Court of Justice of the European Union. The Luxembourg Court has addressed the issue of online sale of medicinal products on several occasions primarily from an internal market perspective. From its first judgments in cases Doc Morris, Ker-Optika and Pierre Fabre the Court tried to find the delicate balance between the freedom of goods within the European Union and the principle of protection of the public health. On the one hand, the Court tries to keep in line with the development of the internal market, including medicinal products sold online and on the other hand the public interest has been always observed, in particular the protection of public health. The article pays attention to one of the legislative initiatives of the European Commission in this field as well as to the newest judgments of the Court of Justice of the European Union.

Keywords: *online sale of medicinal products with or without prescription, case-law of the Court of Justice of the European Union.*

JEL Classification: K32, K33

1. Introduction

Nowadays online purchase of medicines (sometimes transborder) despite its controversial nature is becoming more and more common. The issue acquires even greater significance during the COVID-19 lockdowns. Among the potential advantages of buying medicines online there could be pointed out: accessibility and convenience, competitive prices, and a higher level of privacy. The doctrine also emphasizes some deficiencies such as the increased risk of getting counterfeit or low-quality drugs, lack of restrictions on the quantity of medicines purchased, undesirable interactions with other medications taken, and last but not least, the loss of the relationship with health professionals.

It should be noted that the online trade of medicines is a strictly regulated area in all Member States, which can easily conflict with the EU principle of freedom to provide services. Although in the EU there has been adopted a legal framework related to the sales of medicines via the Internet, The Court of Justice of the European Union (CJEU) several times tried to find the delicate balance between the free movement of goods and public health protection. The article

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seeks to enrich the existing analysis of the Luxembourg Court's case-law with accents on some newer decisions.

It should be borne in mind that under the Medicinal Products in Human Medicine Act[2] in the Republic of Bulgaria only medicinal products that do not need a doctor's prescription can be disseminated over the Internet. Sales of medicinal products without prescription via the Internet are permitted only for pharmacies that hold a retail license for medicinal products and for drugstores holding a registration certificate. The activities of these pharmacies and drugstores are regulated by the above mentioned legislative act as well as by the Ordinance No. 28 of the Ministry of Health on the organization of the pharmacies' activities and the nomenclature of medicinal products[3].

2. Cross-border online buying of medicines

As stated above, people choose to buy medicines online for reasons that include convenience, lower prices, avoidance of inconvenience or the ability to buy products that would otherwise not be available without a prescription (or at all) in the buyer's state of residence. Some of the most commonly bought products are sometimes associated with a social stigma which suggests that people would feel uncomfortable talking to their doctor about their condition or about the drugs in question. Also, it is possible that the prescription for these products in their own country was denied to them in the past. The Internet offers the possibility of receiving medicines that are not provided by the public health system in the state of the buyer or by the respective insurance system. Online pharmacies can also offer medicines at a lower cost than in the ordinary pharmacies network.

In addition to these certain advantages, cross-border online purchasing of medicinal products also poses potentially serious health damage. Due to the relatively recent development of this practice, evidence of the benefits and harms has not yet been systematized in the doctrine.

Shopping online from a website that is not registered as a pharmacy, usually does not include an opportunity for a medical professional to assess whether the drug is safe and appropriate for the person concerned, or to advise him/her how to take the medicine in question. Information on medicines available on some websites may not be accurate. Mistakes, of course, are also possible when prescribing medicines by doctors. Findings vary, but studies over the past ten years have shown an error rate when prescribing medicines between 7 and 12%, but at the same time, some of these mistakes have been corrected promptly by

[2] Medicinal Products in Human Medicine Act. In force from 13.04.2007 Promulgated in State Gazette Vol. 31/13 Apr. 2007. Last amendments - State Gazette Vol. 105/11.12.2020.

[3] Ordinance No. 28, issued by the Minister of Health, Prom. State Gazette Vol.109/23.12.2008. Last amendments – State Gazette Vol. 2/08.01.2021.

pharmacists, nurses or other physicians[4]. However, the lack of consultation with a medical professional can increase the risk of incorrect diagnosis or from prescribing the inappropriate pharmaceutical product (such as form, or dosage). The lack of opportunity to discuss with a medical professional a specific condition can lead to an attempt to treat symptoms rather than their underlying cause. For example, there are cases when people delay the consultation of a healthcare professional while they are self-medicating with medicinal products purchased via the Internet.

In addition, international access to pharmaceuticals provided by the Internet can lead to confusion regarding the names and labels of medicines. For example, a drug universally known as paracetamol can have different trade names in different countries. In the US, for example, it is called Acetaminophen, but it is more popular through the trademark Tylenol, while in Israel paracetamol is often known through another trademark - Acamol.

There is also a significant risk of side effects or undesirable interactions with other products. The increased privacy offered in online purchases creates a reasonable concern among health professionals that in a number of cases they prescribe medicines without knowing about all other purchased products that the patient is taking.

The Internet also provides easier access to antibiotics without a prescription. Nowadays the self-medication with antibiotics is becoming more and more popular in all countries, but currently, there is still limited information on the real quantity of actually purchased via Internet antibiotics, without a prescription. The increased use of antibiotics is a case of individual behaviour which, however, could harm public health by increasing the overall antibiotic resistance of the population.

3. Online sale of medicines in the case-law of the Court of Justice of the European Union

The online sale of medicines falls into the focus of the European Court of Justice (the Court of Justice of the European Union after 1 December 2009), through the prism of the internal market. In several landmark judgments, the court sought to strike the right balance between two fundamental principles: the free movement of goods and the protection of public health.

A. The *DocMorris* case. The legality of Internet pharmacies, in particular cross-border trade in pharmaceuticals, has been investigated in case C-322/01 DocMorris of 2003[5]. The case concerns the online sales of medicinal products

[4] https://www.unodc.org/documents/frontpage/UNODC_Annual_Report_2010_LowRes.pdf (Last accessed September 10, 2021).

[5] Case C-322/01 Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval. Reference for a preliminary ruling: Landgericht Frankfurt am Main - Germany. Judgment of the Court of 11 December 2003. ECLI:EU:C:2003:664.

with prescription as well as the medicines without prescription by the DocMorris – a company, based in Landgraaf, the Netherlands, but carrying out a substantial part of its commercial activity in Germany. The Court of Justice of the European Union is seised by the regional court in Frankfurt following an accusation of DocMorris for illegal activity by the German Association of Pharmacists. The Deutscher Apothekerverband was an association whose aims included protecting and promoting the economic and social interests of pharmacies, and its members at that time accounted for more than 19 thousand pharmacists from the local Länder branches. The Deutscher Apothekerverband challenged the transborder sale of medicinal products on the Internet and their international delivery before the Frankfurt regional court. According to the association, the provisions of the *Arzneimittelgesetz* (German Law on medicinal products) and *Heilmittelwerbegesetz* (German law on the advertising of medicinal products) do not allow such an activity to be carried out. The prohibitions imposed by German legislation are without prejudice to the provisions of the EC Treaty on the free movement of goods[6].

In fact, the DocMorris company offered the possibility for pharmaceutical products to be ordered in various ways, including by phone, fax and online. Some products offered by the company have been subject to medical prescription in Germany and in the Netherlands. The DocMorris approach is to apply a stricter classification to the client's country of residence when supplying drugs with medical prescription. Prescription drugs had been delivered only on presentation of the original recipe. Actual delivery had taken place in several ways. One was the option for the buyer to take in person his/her order from the DocMorris' pharmacy in Landgraaf, a town located near the border between the Netherlands and Germany. The other alternative had been at no extra cost to use a courier service recommended by the company.

The CJEU has addressed several issues, including: (i) which law should be followed in cross-border sales; and (ii) whether the German legislation prohibiting the online sale via post of pharmaceutical products that should be offered only in pharmacies is in breach of Article 28 of the EC Treaty (which governs for the free movement of goods within the European internal market)[7].

First, the Court sets out its observations on the provisions of the German law prohibiting transborder online deliveries by post of medicinal products from pharmacies authorised in other Member States in response to individual orders on the Internet. The Court found, as regards medicinal products which had not been authorised in Germany, that the general prohibition laid down by German

[6] Cayón-De las Cuevas, Joaquin *E-pharmacies and falsified medicines: challenges and concerns from a patient safety approach*, in: Medicine, Law and the Internet, Nomiki Bibliotiki S.A., Athens, 2018, pp. 265-274.

[7] Articles 28 -30 EC Treaty are now Chapter III Prohibition of quantitative restrictions between Member States, Articles 34-36 TFEU. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 26.10.2012 C 326, pp. 1-390.

legislation was in conformity with the Community rules, since medicinal products must have been authorised by the competent authority of that Member State. The Court should therefore not consider whether the prohibitions infringe the provisions of the EC Treaty on the free movement of goods.

The Court ruled that if a pharmaceutical product is not authorised in a particular country, it cannot be delivered there: "*Accordingly, Articles 28 EC to 30 EC (new Articles 34 to 36 TFEU) cannot be relied on in order to circumvent the system of national authorisation provided*"[8]. The Court also held that, while some Member States could impose a more restrictive regulatory environment for certain products than others, such as that relating to pharmaceuticals, that legislation must be implemented with due regard for Article 28 TEC. Even at first glance the German legislation prohibiting online cross-border deliveries of pharmaceutical products infringes Article 28 TEC, the necessity to provide individual advice or to check the prescriptions is a sufficiently convincing argument for the Court to conclude that the prohibition is lawful in accordance with Article 30 TEC (new Article 36 TFEU), which allows the imposition of public health restrictions. The Court held that Article 30 TEC could be invoked in the present case to justify a national prohibition on the online deliveries of medicinal products which could only be sold in pharmacies in the Member State concerned, in so far as the prohibition covers medicinal products subject to prescription. The Court considers the authorisation of such medicinal products to be supplied only with a prescription in national pharmacies and is convinced that the lack of control could have resulted in improper use or dosage of such medicines. Furthermore, the fact that the labelling of a medicinal product may have been in a different language could have an even more damaging effect. Therefore, a national prohibition on online purchase of medicinal products available only with medical prescription may be justified in accordance with European Union law.

However, Article 30 TEC cannot be invoked to justify an absolute ban on the online transborder sales and post deliveries of medicinal products which are not subject to medical prescription in the Member State concerned. As regards the medicinal products which obtained market authorisation in Germany, the Court found that the prohibition of their delivery by courier from another Member State would represent an interference in the free movement of goods.

Referring to its previous case-law, the Court has observed that a rule which may have restrictive effects on imports of pharmaceutical products is compatible with the Treaty only to the extent necessary to protect the health and life of humans effectively. In the case of non-prescription drugs, the prohibition is not justified as it is possible online to provide appropriate advice and information to the customers. This has also been made possible thanks to the fact that EU citizens from all Member States could get data in different languages (the website operated in several languages) since multilingualism in particular is a unique and

[8] *Supra* note 4, par.53.

significant element to European integration.[9] Shopping on the Internet may even have certain advantages, such as enough time for consumers to consider any questions they would like to ask the pharmacist from their home.

Prior to the *DocMorris* decision, most EU Member States rejected the marketing of medicines by post. After it, however, this is not the case. The prohibition on selling medicinal products by post is contrary to Community law when it applies to medicinal products obtained without a prescription, which are authorised for sale in that country. Conversely, that prohibition would be compatible with the EU law if it applied to medicinal products which had not been authorised in a Member State.

In addition, the Court examines the provisions of German legislation prohibiting advertising of online sales of medicinal products. The court found that, where such a prohibition applies to medicinal products for which authorisation is required but they are not authorised, or to medicinal products available only on prescription, that prohibition complies with the prohibition in the Directive 2001/83/EC[10] (replaced by the Community Code) on the advertising of medicinal products. On the other hand, the Community Code precludes the prohibition of advertising in respect of medicinal products which are authorised and provided without prescription.

B. The *Ker-Optika* case. A few years later the Court of Justice of the European Union has the opportunity to rule again on the balance between the free movement of goods and the protection of public health, in particular, whether the ban on selling contact lenses on the Internet is proportionate to the health requirements of consumers. Following a preliminary ruling to clarify the Union legislation on the online sale of contact lenses, the Court of Justice of the European Union has ruled that less restrictive measures than those taken in Hungary are sufficient for the health of consumers[11].

The decision was given after the Hungarian company Ker-Optika, which operates on the Internet, challenged the legislation prohibiting the sale of contact

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[9] Georgieva, G. *Multilingualism as a Significant Element to European Integration*, The 21st International Conference the Knowledge-Based Organization 2015, Sibiu. Conference Proceedings 1; Management and Military Sciences: "Nicolae Bălcescu" Land Forces Academy Publishing House, p. 207, DOI: https://doi.org/10.1515/kbo-2015-0033. From the same author see also Георгиева, Г. (2021), Предизвикателства при редактирането на статии и резюмета с политическа насоченост на английски език в българската научна периодика (Challenges in Editing Politically Oriented Articles and Abstracts in Bulgarian Scientific Periodicals). В (in): Езиков свят (Ezikov Svyat). Т. 19 (2), p. 97, ISSN 1312 – 0484 (Print), ISSN 2603-4026 (Online), DOI: https://doi.org/10.37708/ezs.swu.bg.v19i2.12.

[10] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 (OJ 2012 L 299, p. 1).

[11] Case C-108/09. Ker-Optika bt срещу ÀNTSZ Dél-dunántúli Regionális Intézete. Judgment of 2 December 2010. ECLI identifier: ECLI:EU:C:2010:341.

lenses on the Internet, because an ophthalmologist's services were not necessary after the first consultation. The Court finds that, although a Member State has the right to impose restrictions on the sale of goods which are related to consumer health, the prohibition on selling contact lenses on the Internet is not proportionate to that objective. In this sense, the Court is adamant that national rules on the marketing of contact lenses fall within the scope of Directive 2000/31/EC[12] in so far as they relate to the act of selling such lenses via the Internet.

In addition, it found that the prohibition applies not only to Hungarian companies, but also to entities from other Member States, thus contrary to the provisions on free competition and to the rules governing the free movement of goods between Member States. Articles 34 TFEU and 36 TFEU and Directive 2000/31/EC must be interpreted as precluding national legislation which authorises the marketing of contact lenses only in specialised medical stores. An interesting approach has been applied by the Court of Justice of the EU in this case stating that: "*The application in respect of goods originating in other Member States of national provisions restricting or prohibiting certain selling arrangements is such as to hinder directly or indirectly, actually or potentially the trade between Member States for the purposes of the case-law flowing from the judgment in* ***Dassonville***[13]*, unless those provisions apply to all relevant traders operating within the national territory and affect in the same manner from a legal and factual point of view the marketing of national products and of products originating in other Member States…*"[14]. As rightly noted by Prof. Catherine Bernard, who emphasised the abovementioned paragraph of the judgment, the Court applied, in the present case, a presumption of illegality of certain conditions of sale, whereas the ***Keck*** test[15] presumed the legality of the national provisions[16]. She also points out that, in the Opinion of Advocate General Mengozzi[17], it is highlighted that Directive 2000/31/EC concerns only certain aspects relating to information society services. Since, in the present case, the Hungarian legislation concerns all forms and ways of selling contact lenses, it should not fall within the scope of the Directive. Curiously, the Advocate General refers to par. 21 of the

[12] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 17.07.2000, L 178, pp.1-16.

[13] Case 8-74. Procureur du Roi v. Benoît and Gustave Dassonville. Judgment of 11 July 1974. ECLI identifier: ECLI:EU:C:1974:82.

[14] *Supra* note 10, par. 51.

[15] Joined cases C-267/91 and C-268/91. Criminal proceedings against Bernard Keck and Daniel Mithouard. Judgment of 24 November 1993. ECLI identifier: ECLI:EU:C:1993:905.

[16] Barnard, Catherine, *The Substantive Law of the European Union*, 5th edition, Oxford University Press, 2016, p. 319.

[17] Opinion of Advocate General P. Mengozzi in regards to case C-108/09, delivered on 15 June 2010, curia.europa.eu/juris/document/document_print.jsf;jsessionid=969EA44DC5D66331C809A30A51856317?docid=82826&text=&doclang=BG&pageIndex=0&cid=542368 (Last accessed September 10, 2021).

preamble to the E-Commerce Directive, as well as to Art. 1, par. 3, where it is provided that "*the Directive complements Community law applicable to information society services, without prejudice to the level of protection, in particular public health and consumer interests, as established by Community and national legislation introducing them, in so far as this does not restrict the freedom to provide information society services*"[18]. In his view, the compatibility with EU law of national regulation prohibiting the online sale of ophthalmic lenses cannot be assessed with regard to the provisions of Directive 2000/31/EC. Since, in the case in question, Hungarian legislation concerns all forms and methods of selling contact lenses, it should not fall within the scope of the Directive. However, the Court does not agree with this reasoning and as regards the scope of Directive 2000/31/EC, it takes a position opposite the Advocate General's one.

In practice, the Court's attitude in *Ker-Optika* judgment confirms some of the Commission's conclusions in regard to the legal status of e-health services. E-health services related to medical devices fall within the scope of the E-Commerce Directive and consequently the advertising and sales of these services fall within its scope. Although certain aspects may still be regulated by EU Member States, such regulation should be subject to the requirements of proportionality of restrictions on the freedom to provide services.

C. The *Pierre Fabre* case. The company Pierre Fabre Dermo-Cosmétique manufactures a range of cosmetic and cosmetic products sold through a selective distribution network in France. The distribution agreements relating to four of Pierre Fabre's brands (in particular the brands Klorane, Ducray, Galenic and Avène) require sales to be made in a real commercial establishment and must be in the presence of a qualified pharmacist.

In 2006, the French competent competition authority found that the prohibition contained in the selective distribution agreements to sell Pierre Fabre's cosmetic and personal hygiene products via the Internet infringed French and European competition law. Following the appeal brought by Pierre Fabre, the national court formulated a reference for a preliminary ruling to the Court of Justice[19].

As it is well known, Article 101, par. 1 TFEU prohibits agreements which restrict competition as contrary to EU law. The agreements that fall within the scope of Art. 101, par. 1 may benefit from an exemption in accordance with the provision of par. 3 if the advantages to consumers outweigh the anti-competitive effects of the agreement. The Commission has developed a kind of 'block exemption' which creates a 'protected area' for these types of agreements[20]. Within

[18] *Supra* note 11.

[19] Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi. Judgment of 13 October 2011. ECLI identifier: ECLI:EU:C:2011:113.

[20] See more in Craig P., G. De Búrca *EU Law: Text, Cases, and Materials* (7th ed.), Oxford University Press, 2020, p.919. https://doi.org/10.1093/he/9780198856641.001.0001.

a selective distribution system, a supplier may in principle benefit from an exemption where his/her market share does not exceed 30%. This threshold has not been exceeded by Pierre Fabre Dermo Cosmétique as became apparent from the documents submitted to the court. In such cases, the agreement should not include the so-called hardcore restrictions such as limiting members who carry out retail activities in the context of a selective distribution agreement, to be engaged in non-significant active or passive sales outside their designated territory. At the same time, however, this does not mean that a member of the system may not be prohibited from operating an unauthorised place of establishment. According to Pierre Fabre Dermo Cosmétique, the prohibition of selling through the Internet the products covered by the contract is tantamount to prohibiting the operation of an unauthorised place of establishment which is permitted under Article 101, par. 3 TFEU. The question before the Court is whether a 'place of establishment' in accordance with Article 4(c) of Regulation No. 2790/1999[21] includes only outlets where direct sales to the customers are practiced or could include the place from which the services for sale via the Internet are provided. Pierre Fabre argues that the prohibition of Internet sales is equivalent to a prohibition on operating an unauthorised place of establishment. The Court does not agree and believes that Internet sales are a separate trading method. The Court held that, in the present case, there should be no broad interpretation which would also cover the prohibition on selective distributors for sale on the Internet. Such a ban would be a restriction of competition because it reduces the retailer's ability to sell Pierre Fabre's products. The Court considers that Art. 101, par. 1. TFEU must be interpreted as meaning that a contractual clause existing within a selective distribution system which requires the sales of cosmetic products and personal hygiene products to be carried out in a real establishment with the mandatory presence of a qualified pharmacist leading to the prohibition of the use of the Internet for those sales constitutes a restriction of competition within the meaning of that provision. The envisaged possibility of a block exemption does not apply to a selective distribution contract which contains a clause de facto prohibiting the Internet as a means of marketing the products covered by the contract. Similarly, the Court considers that the need to ensure the prestige of Pierre Fabre series products does not constitute a legitimate objective of restricting competition.

Although the decisions in the *Ker-Optika* and *Pierre Fabre* cases do not concern medicinal products, they are consistent with the conclusions reached by the Court in *DocMorris* on the cross-border online sale of medical devices without a prescription. They suggest that advice on this type of product could be obtained not only at the pharmacy's place, but if such advice or review is necessary, it could be provided separately during the online selling process.

[21] Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 29.12.1999, L336, pp. 21-25.

4. Common logo for online pharmacies in EU Member States

In order to improve the security of Internet sales of medical devices and as one of the measures to combat falsified medicinal products, the European Union also introduces a common logo for online pharmacies or retailers legally operating in the Member States. The logo guarantees the authenticity of the sites and the safety of the products. It is provided for the first time by Directive 2011/62/EU[22].

The Directive provides the European Commission with a legal basis for creating a common logo design, as well as for the technical, electronic and cryptographic requirements for verifying its authenticity. However, EU countries define the specific conditions for the retail supply of medicinal products to the public. They may impose certain restrictions, such as not permitting the online sale of prescription-only medicinal products.

On 24 June 2014, the Implementing Regulation (EU) 699/2014[23] has been adopted. As of 1 July 2015, a common logo has been introduced in the EU for those who carry out retail trade in medicinal products over the Internet. The aim of introducing the common logo in the EU is to make it easier to identify legitimate internet retailers and to raise citizens' awareness of the risk of purchasing pharmaceuticals from illegal sources on the Internet. Graphically, it includes the national flag in the middle left of the logo, which corresponds to the Member State (as well as Norway, Iceland and Liechtenstein) in which the pharmacy or retailer is registered or authorized to operate. It should be kept in mind that Member States retain the competence to authorise or sell medicinal products over the Internet. National websites are represented in the European Medicines Agency (EMA). In this sense, the common logo for online pharmacies or retailers supplying medical products is one of the most important regulations within the European Union.

5. The CJEU's case-law of the last decade

A. Case C-148/15. In its decision on the case of C-148/15 dated of 19 October 2016 the Luxembourg Court ruled out that the fixed prices introduced by Germany for medicinal products sold with prescription did not comply with

[22] Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products, OJ 01.07.2011, L174, pp.74-87.

[23] Commission Implementing Regulation (EU) No. 699/2014 of 24 June 2014 on the design of the common logo to identify persons offering medicinal products for sale at a distance to the public and the technical, electronic and cryptographic requirements for verification of its authenticity, OJ 25.06.2014, L 184/5.

the European Union law[24]. The Court discussed the interpretation of Articles 34 and 36 of the TFEU after the received the preliminary request made by the Higher Regional Court in Düsseldorf in relation to the above mentioned fixed prices for some medicinal products. The proceedings on the national level have been initiated between the non-governmental Deutsche Parkinson Vereinigung eV, an organization that aims at improving the situation of persons suffering from Parkinson's disease, and the Association for Protection against Unfair Competition. According to the Court Article 34 TFEU should be interpreted as "*national legislation, which provides for a system of fixed prices for the sale by pharmacies of prescription-only medicinal products for human use, constitutes a measure having equivalent effect to a quantitative restriction on imports, since that legislation has a greater impact on the sale of prescription-only medicinal products by pharmacies established in other Member States*" than on the sale of the same medicinal products by German pharmacy shops[25]. Such a rather surprising reading of the Court could only be explained by the fact that it concerns the specific case of cross border online trade pharmacies. In addition to that, the Court stated that "Article 36 TFEU must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, which provides for a system of fixed prices for the sale by pharmacies of prescription-only medicinal products for human use, **cannot be justified on grounds of the protection of health and life of humans** (as German government attempted to do)**,** within the meaning of that article, inasmuch as that legislation is not appropriate for attaining the objectives pursued"[26]. Thus, the Court accepted that pharmacy shops provided mail order delivery are more heavily dependent on price competition and harder access the market in comparison to the ordinary German pharmacies**.** But this also means that thirteen years later the Luxembourg Court to some extend deviates from its earlier conclusions in *DocMorris* case and some commentators even describing the situation as a Dutch company achieving a somewhat Pyrrhic victory[27].

B. Case C-649/18 A v. Daniel B. and others. In its more recent judgment, the Luxembourg Court ruled out on cross-border advertisement of online pharmacy services[28]. The case was brought between an online pharmacy registered in the Netherlands, which specifically targets via Internet French customers, and 'Daniel B. and others', which defends the interests of pharmacists in France. The Dutch company has launched a wide-ranging advertising campaign on the Internet which did not comply with the French legislation. Defendants

[24] C-148/15 Deutsche Parkinson Vereinigung eV v. Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, Decision of 19 October 2016 ECLI:EU:C:2016:776.
[25] *Ibidem.* Par. 27.
[26] *Supra* note 23. Par. 46.
[27] The CJEU on cross-border mail order trade of prescription-only medicinal products (taylorwessing.com). (Last accessed September 22, 2021).
[28] Case C-649/18 A v Daniel B and Others, Judgment of 1 October 2020. EUR-Lex - 62018CA0649 - EN - EUR-Lex (europa.eu) (Last accessed September 19, 2021).

search for a compensation for the damages resulting from unfair competition as they insisted that the Dutch company gained an undue advantage from its campaign in France.

The Court in Luxembourg stated that "*a Member State of destination of an online sales service relating to medical products without prescription may not prohibit pharmacies that are established in another Member State from using paid services such as search engines and price comparison websites*"[29]. Thus, the CJEU accepted that an online advertisement of medical products may be considered as an information society service, within the meaning of the E-Commerce Directive[30]. As summarized by the Court, in order to be in compliance with the Directive the French regulation of an online sales service relating to medical products may not restrict the free movement of 'the information society service' from another Member State, with certain exceptions which can be justified by public health or public interest considerations and which are proportionate in order to attain those objectives. Following this line of reasoning the Court found that Member State may, under certain conditions, limit advertising, prohibit some promotional offers or require the inclusion of a health questionnaire while ordering medicinal products online. In view of the above, the judgment is therefore well in line with the Luxembourg Court' consistent practice to protect consumers.

C. Case C-178/20. In its last decision dated of 8 July 2021 concerning the Case C-178/20, the Luxembourg Court decided that it is not possible a medicinal product not subject to medical prescription in one Member State automatically to be given an access to the market in another Member State[31].

The plaintiff, a Hungarian company Pharma Expressz had on few occasions imported a medicinal product from another Member State that has not been granted the needed market authorisation in Hungary, but had been granted authorisation in that other Member State to be supplied without a prescription. Pharma Expressz attempted to place its medicinal products on the national market without complying with the requirements stipulated by Hungarian law (obtaining the marketing authorization). Consequently, the Hungarian authorities ordered the company to stop the import of the abovementioned products.

The national court referred to the CJEU asking whether a medicinal product that has obtained national marketing authorisation in another Member State as a non-prescription medicinal product might lawfully be supplied in Hungary where that medicinal product has no national marketing authorisation.

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[29] A Member State of destination of an online sales service relating to medicinal products not subject to medical prescription may not prohibit pharmacies that are established in another Member State and sell such products from using paid referencing on search engines and price comparison websites (europa.eu). (Last accessed September 19, 2021).

[30] *Supra* note 11.

[31] Case C-178/20 Pharma Expressz Szolgáltató és Kereskedelmi Kft v. Országos Gyógyszerészeti és Élelmezés-egészségügyi Intézet, Judgment of 20 May 2021. ECLI:EU:C:2021:551.

The Court concluded: "*A medicinal product not subject to medical prescription in one Member State may not be placed on the market in another Member State unless that Member State, too, has granted its marketing authorisation. In the absence of such an authorisation, it may nevertheless be possible to supply that medicinal product where its use meets, in accordance with EU law, special medical needs"*[32].

The CJEU according to the Directive 2001/83/EC[33], makes it clear that if a medicinal product has not been granted an authorisation by the relevant bodies of the Member State in which it is offered for sale, it may not be distributed in that State, regardless of whether that same medicinal product may be sold in another Member State without a medical prescription.

6. Conclusion

In conclusion, it should be noted that since the beginning of the twenty-first century, the Court of Justice of the European Union has, in numerous of its judgments, made attempts to strike the fragile balance between the free movement of goods and public health protection. On the one hand, the public interest has been always observed, in particular, the protection of public health and, on the other hand, the Court tries to keep in line with the development of the internal market, including medicinal products sold online. Public health considerations have always been in the range of vision of governments, diplomats and human rights defenders[34]. Due to the Court's efforts, today we have well established a relatively consistent case-law within the EU legal framework with a clear interpretation on the cross border online sales of medical products.

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[32] *Ibidem.* Par.59.
[33] *Supra* note 9.
[34] Belova G., Y. Kochev *Challenges Facing Bulgaria's EU Presidency within the Context of Other New Member States' Experience,* "Балканистичен форум" (Balkanistic Forum), 2018, Issue 1, pp. 267-275. See also Hristova A., Chankova, D, *Climate Diplomacy – a Growing Foreign Policy Challenge,* „Juridical Tribune – Tribuna Juridica", Volume 10, Issue 2, June 2020, pp. 194-206 and Marin N., Kovacheva, D., *Legal Problems and Solutions in the Cooperation between the National Ombudsmen in Southeast Europe*, Balkanistic Forum, 2019, no. 2, pp. 295-317.

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12. Commission Implementing Regulation (EU) No. 699/2014 of 24 June 2014 on the design of the common logo to identify persons offering medicinal products for sale at a distance to the public and the technical, electronic and cryptographic requirements for verification of its authenticity, OJ 25.06.2014, L 184/5.
13. Belova G., Y. Kochev, *Challenges Facing Bulgaria's EU Presidency within the Context of Other New Member States' Experience*, "Балканистичен форум" (Balkanistic Forum), 2018, Issue 1, pp. 267-275.
14. Hristova A., Chankova, D, *Climate Diplomacy – a Growing Foreign Policy Challenge*, „Juridical Tribune – Tribuna Juridica", Volume 10, Issue 2, June 2020, pp. 194-206.
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The EU Green Deal and the future of the EU business law - scenarios for legal evolution

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Abstract

The ongoing transition away from fossil fuel presented a number of challenges for the EU and its legal profession. According to the EU official statistics, the EU is on its way toward becoming the first carbon neutral region of the planet. However, even Germany is struggling to generate enough electricity from its renewables and actively pursuing "strategic alternatives". The EU is actively looking into introducing a so-called carbon adjustment on its border to create a level field for its own companies. However, at the same time, the EU is heavily dependent on exporting its goods to the very same countries which actively resist EU's plan to charge the carbon border duty on their exports to the EU while EU's competitiveness and share of the world's trade is slowly but inexorably falls behind the rest of the world. The future of the EU business law and the outcome of the EU green transition depends on the speed of the technological progress which is highly uncertain. It is this evolution of technology which would determine the future of the EU business law whether EU's political actors accept it or not.

Keywords: *EU law, business law, renewables, EU Green Deal.*

JEL Classification: K23

1. Introduction

The EU Green Transition is enormously important for the future evolution of business law within the EU. It may or may not fit certain moral norms or aspirations of various political actors but, from the legal perspective, the future of the EU-wide business laws and regulations can be best described as "the art of possible, the attainable... the art of the next best".[3]

John Muir, a famous Scottish-American environmental philosopher, once said “When we try to pick out anything by itself, we find it hitched to everything else in the universe.” Business law includes all the laws and regulations that dictate how to form and run a business. Business laws establish the rules that

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[3] The quote comes from Prince Otto von Bismark, printed on Aug 11, 1867, https://www.shmoop.com/quotes/politics-art-of-impossible.html, consulted on 1.09.2021.

all businesses should follow. It includes a wide array of various laws and regulations related to business (contracts, legal entities, taxation, commercial paper, intellectual property, etc.). In the absence of business law, different countries would have different requirements in any number of areas making it difficult for business to operate across the border.

Business and business law are influenced by the endless list factors but, first of all, by long-term economic and technological trends. The economic trends are studied by the political economy which looks into the four types of problems, namely, the problem of aggregate demand for goods and services; the wage problem; the employment problem; and, finally, the productivity problem.

Conspicuously missing from the list of problems solved by the political economy is access to affordable energy. It has been argued for a long time in the economic literature that access to cheap energy is at least as important as access to land and labor while the economic growth of the Industrialized West can be attributed to a large degree to the replacement of pre-industrial renewables by cheap scalable fossil fuels.

There are two types of trends which can influence business laws across the EU, those which are a continuation of the existing trends and those which would emerge from unexpected future events. The anthropogenic climate change is currently viewed by governments and mass media as a slow-moving global disaster while the COVID-19 pandemic can be viewed as an unexpected event which changed business environment forever.

The EU common market for goods and services is one of the most important achievements and competitive advantages of the EU. Having equal access to the market and operating on a level playing field are important aspects of creating a successful market economy across the union where business law plays an important role as well.

The level playing field is a trade-policy term for a set of common rules and standards that prevent businesses in one country from gaining an unfair competitive advantage over those operating in other countries. Having an equal ability across the EU to produce goods and provide services is a more subtle and, one may argue, important aspect of the common market. Two long-term issues which would most likely influence the ability to produce goods and deliver services competitively across the EU are access to energy and post-COVID ability to travel freely across the border.

According to the existing political and mass media discourse in the EU, the ongoing transition away from fossil fuels and COVID-19 are two most visible sources for new business-related legislative initiatives. In both cases, in addition to various usual "soft factors" such as morality, justice and other, scientific knowledge is used by various political actors to advance their respective agendas.

One of the interesting peculiarities of modern representative democracies in the West is a low degree of trust allocated by voters to the representatives of

their respective political elites.[4] At the same time, voters tend to feel that "scientists at large" is a much more trustworthy source of information because, perhaps, they are not motivated by a personal gain - whether monetary or political - but by the eternal search of "positive truth" which is "objective" and independent from the human nature.

In reality, aside from basic laws which govern a physical world around us, "the science" can virtually never be completely certain and provide a "positive truth" which cannot be challenged. Science typically provides certain facts and a theory or a conjecture which explains these facts. Scientific research is typically delivered via publications in the reputable peer-reviewed journals. However, the peer review is not a warranty of verified accuracy and, in fact, a series of studies explained why most of published research findings are likely to be false: *"Simulations show that for most study designs and settings, it is more likely for a research claim to be false than true. Moreover, for many current scientific fields, claimed research findings may often be simply accurate measures of the prevailing bias."*[5] One of the first challenges associated with the value of scientific knowledge is an ongoing "reproducibility crisis" where more than two-thirds of researches have tried and failed to reproduce another scientists' experiments.[6]

Therefore, first, scientific knowledge may or may not be valid while the peer review is not a warranty of its validity; second, even if valid, it is often unclear how effective this knowledge can be in practice; and third, even if knowledge is valid and practical, having a detailed verifiable scientific agreement as a necessary and sufficient reason or justification for action is an entirely different matter.

Scientists and policymakers who frame their case in terms of consensual science invite criticism aiming at deconstruction of their scientific claims. If one presents "the science" as an absolute truth and the only reason for action such a claim invites those opposed to it to dissect "the science" and find its weak points. In return, those on the side of acting based on the claimed "clear science" may call into question the legitimacy of their opponents which does nothing to the validity of the scientific claim or development of a policy that could win a support of voters and influential political actors.

Historically, access to scientific research and its' secondary analysis has been severely hampered by its limited availability to third parties. The Internet data revolution changed this situation dramatically. Anybody with access to the Web can locate virtually any publication and, even if a particular piece of research is behind a paywall, one can find a free summary or a reprint. Such a change

[4] Ortiz-Ospina E., Roser M., Trust, Ourworldindata.org, Retrieved on Oct 26, 2021, https://ourworldindata.org/trust.

[5] Ioannidis J., *Why Most Published Research Findings Are False*, PLOS Medicine Aug; 2(8) e124, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1182327/, consulted on 1.09.2021.

[6] Feiden T., *Most scientists 'can't replicate studies by their peers'*, BBC News, Feb 22, 2017, https://www.bbc.com/news/science-environment-39054778, consulted on 1.09.2021.

shifted a "balance of knowledge" from political actors and legislators to the interested voters and business actors making it exceedingly difficult to use science as the only basis for a new business law or regulation.

2. EU climate ambition & equal access to energy - a revenge of thermodynamics

The climate change is a global challenge and it has been pointed out by some of the best internationally recognized energy scholars that, first, EU's self-appointed status of the world's leader makes sense only as long as it produces a measurable reduction of the global emissions and, second, that energy transitions tend to be multi-decade affairs based on a gradual shift to different sources of primary energy as they become commercially viable.[7]

It has been argued in the economic literature that a switch from historical renewables such as wind and water wheels to coal and, after coal, to petroleum, natural gas and nuclear energy was the key to rapid economic growth since the beginning of the Industrial Revolution. Therefore, a source of relatively inexpensive scalable energy for stationary and mobile implications is indispensable for the modern economy.

Energy is a key input essential for operation of any business whether it is involved in manufacturing or services. Having a uniform business law environment across the EU without access to affordable energy is not enough to create a level playing field for businesses across the block.

At the dawn of the Industrial Revolution the population of the world has been estimated at 1 billion and an absolute majority of inhabitants survived in poverty as subsistence farmers. A large number of contemporary residents of Africa, Asia and Latin America still survive as subsistence farmers. However, given a choice they would most likely escape such a predicament while the EU residents are not likely to support a return to the low energy existence of their ancestors which, by the way, is not even a technical possibility as roughly 50% of the current global population would not have enough food without the use of the artificial nitrogen fertilizer[8], genetically engineered seeds and modern energy intensive agricultural technology.

The EU is not blessed with abundant deposits of oil and natural gas. EU has a number of commercially mined sources of coal but, for most part, these deposits are not first-class by world's standards either due to the quality of coal

[7] Energy Vision 2013, Energy transitions: Past and Future, World Economic Forum, January 2013, https://www3.weforum.org/docs/WEF_EN_EnergyVision_Report_2013.pdf, consulted on 1.09. 2021.

[8] Ritchie H., *How many people does synthetic fertilizer feed?*, Our World in Data, Nov 7 2017, https://ourworldindata.org/how-many-people-does-synthetic-fertilizer-feed, consulted on 1.09. 2021.

and/or due to a high cost of extraction. Close of 90% of EU's petroleum and natural gas are imported from various jurisdictions that are not known for their stability and adherence to EU's values, standards and expectations.

Exports of goods and services (% of GDP) in Euro area was reported at 42.54 % in 2020.[9] A share of exports of goods and services (% of GDP) in Germany, the largest and most dynamic economy in the EU was reported at 43.82% which even higher than for the EU as a whole (2020).[10] Top five trading partners of the EU are the USA, China, the UK, Switzerland and the Russian Federation.[11] For each one of EU's most important trading partners a share of exports of goods and services in their respective GDPs was much smaller than for the EU (2020) - China (18.50%), USA (11.7%), the UK (27.4%), Russia (25.5%) - except for Switzerland (63.2%).[12]

Based on a popular narrative about the global anthropogenic climate change which, in practice, is taken for granted by voters, legislators and legal scholars the EU appears to justify one of the most visible lines of its legal evolution on the "inevitable" transition away from fossil fuels to so-called "green" energy sources. As in any technological shift, the cost of such a transition is largely unknown and is likely to be orders of magnitude higher than the proverbial "cost of an ice cream per month" promised by a top politician in Germany at the beginning of its famous energy transition. The energy shift, as it turned out, is such a prolonged and complex process that those who made initial claims about it cost are long gone from the political arena while the actual cost became a responsibility of a current "shift" of the political actors which are reluctant to lose their voters who may be unwilling to pay a full cost of the transition.

Distracted by the COVID-19 pandemic, it appears, various political actors within the EU and elsewhere did not closely follow developments on the PR and "science for the public" fronts, namely, a release of the Planet of the Humans (2019), a documentary by Jeff Gibbs and Michael Moore[13], a release of "Apocalypse Never: Why Environmental Alarmism Hurts Us All", a book of Michael Shellenberger; and a release of "Unsettled: What Climate Science Tells Us, What is Doesn't, and Why It matter", a book by Steven Koonin[14]. Given the credentials and reputation of Jeff Gibbs, Michael Moore, Michael Shellenberger and Steven

[9] https://tradingeconomics.com/euro-area/exports-of-goods-and-services-percent-of-gdp-wb-data.html, consulted on 1.09.2021.

[10] https://tradingeconomics.com/germany/exports-of-goods-and-services-percent-of-gdp-wb-data.html, consulted on 1.09.2021.

[11] https://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf, consulted on 1.09.2021.

[12] https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?locations=CN&name_desc=true, consulted on 1.09.2021.

[13] https://www.youtube.com/watch?v=3ZsXyDkyrCk&ab_channel=FanboyChannel, consulted on 1.09.2021.

[14]https://www.amazon.com/Unsettled-Climate-Science-Doesnt-Matters/dp/1950665798, consulted on 1.09.2021.

Koonin via-a-vis any politician in the EU and elsewhere, it hard to see how the anthropogenic climate change narrative of the "inevitable doom and gloom of the impeding climate catastrophe which can be avoided only by a global ban of fossil fuels and their replacement with renewables" would not deserve a fresh re-examination.

Any voter with a high-school familiarity with physics and an interest in gaining a fair grip on the scientific basics of the climate debate and the use of so-called "modern renewables" as a primary source of energy is well advised to watch "The Planet of the Humans" and read two well referenced books written by Michael Shellenberger and Steven Koonin. In short, according to these well referenced sources, modern renewables are hardly capable of being a "green" alternative to fossil fuels and nuclear energy for a number of reasons which were known and well understood for a long time, namely, a low energy density of wind and solar, intermittency and the use of non-renewable materials in their construction. The challenge of using a so-called "consensus of the climate scientists" comes from the science itself which was never "settled". The issues of climate sensitivity to the release of the greenhouse gasses and attribution of the climate change to any specific factor remain despite a decades long investment into the general circulation models and the related science.

Without arguing for or against any position regarding the scientific foundation of the climate change debate one can say that the atmosphere is a global asset whose composition is a responsibility of the mankind. If so, it seems uncontentious enough that a reduction of the release of CO2 and other greenhouse gases by the EU would make a difference for the global atmosphere only if it would lead to a global reduction of emissions.

A well referenced study which looked into EU's success of reducing global emissions of greenhouse gases reached a not-so-favorable for the EU climate ambition conclusion as follows: *"The European Union is broadly credited with reducing its emissions of greenhouse gases (GHGs) and is on track to meet its goal of a 20% reduction in GHGs in 2020 compared to 1990 levels. But a full lifecycle accounting of European member state carbon emissions, including those emissions caused through consumption of imported goods, tells a different story: under this accounting method, EU emissions have actually grown by 11% - with some nations seeing substantially higher emissions growth than others. For the European EU-27 region, total carbon emissions increased 11% over the period 1995 to 2009 under a consumption-based approach. A sharp increase in consumption-based emissions can be seen from 2002 onwards, when China joined the WTO, enabling increased trade flows between China and other countries."*[15]

A former Prime Minister Benjamin Disraeli once said: “There are three

[15] Becque R., Dubsky E., Hamza-Goodacre D., Lawis M., Europe's Carbon Loophole, Sep 2017, https://www.climateworks.org/wp-content/uploads/2017/09/EU-carbon-loophole_final-draft-for-consultation.pdf, consulted on 1.09.2021.

kinds of lies: lies, damned lies, and statistics." This brilliant observation is as true today as when he coined the phrase more than a century ago.

As of 2017, Germany spent an estimated EU189 Billion (US$222B) on renewable energy subsidies since 2000. But its CO2 emissions are stable at roughly the 2009 level while coal-fired plants are still used to compensate for the removal of nuclear power from the grid. In Germany and elsewhere, the green/renewables transition is financed through a surcharge on the electric bill whose size have doubled since 2000. De facto a novel class system has emerged where consumers without private houses and land subsidize those with private houses and land which have an ability to install solar panels and wind generators while Germany's CO2 emissions stay effectively the same since 2009.[16]From Germany's political discourse, the whole point of its widely publicized energy transition was to reduce its CO2 emissions, a goal which it demonstrably failed to achieve. From the global climate change perspective, Germany maintained its CO2 emissions at the same level because its companies' outsourced production of a large share of energy intensive goods to Asia which defeated the whole official goal of having the Energy transition in the first place.

In a perfect world, obviously, the EU would prefer to eliminate fossil fuels from its energy mix without the use of the nuclear energy which is not acceptable to some of its most influential members. Wind and solar are politically acceptable but have two virtually insurmountable limitations - low energy density and intermittency - both of which are fundamentally difficult and expensive to deal with.

The Paris Climate Accord has no sanctions and leaves it up to each country to develop its energy sources. The largest emitters of GHGs such as China and India made it abundantly clear to the EU and G7 that they would not tolerate any forceful restriction of their right to use cheap and abundant fossil fuels at their own will and progress toward other sources of energy at their own speed.[17]

We, of course, were not the first scholars to look into the history of EU's support for renewables:[18] *"Why did the EU lead on Kyoto? A combination of factors contributed to the strategy. The wider political attractions were compounded by the fact that Kyoto targets were seen as achievable with little or no pain. The collapse of the Eastern European and Russian economies at the end of the 1980s played helpfully against the 1990 baseline. The targets were defined in terms of carbon production, rather than consumption, and that neatly avoided the need to*

[16] Reed S., Germany's Shift to Green Power Stalls, Despite Huge Investments, The New York Times, Oct 7, 2017, https://www.nytimes.com/2017/10/07/business/energy-environment/german-renewable-energy.html, consulted on 1.09.2021.

[17] Mohan V., BASIC nations oppose EU's plan to impose a "carbon border tax", The Times of India, Apr 10, 2021, https://timesofindia.indiatimes.com/india/basic-nations-oppose-eus-plan-to-impose-a-carbon-border-tax/articleshow/81998314.cms, consulted on 1.09.2021.

[18] Helm D., EU climate-change policy - a critique, Oct 2009, http://www.dieterhelm.co.uk/assets/secure/documents/SS-EU-CC-Critique-0.pdf, consulted on 1.09.2021.

make substantial north south financial transfers. Finally, more narrowly, European governments entered the 1990s in the context of declining support for the major parties and hence coalitions were increasingly required to form governments, putting green votes in a powerful position, able to exercise political leverage beyond their voting base. In this they were supported by lobby groups backing particular technologies. In response, major parties scrambled to incorporate this green vote". "To sum up so far, the EU climate-change package is best regarded as a politically neat but economically inefficient set of targets. The 20 in all the targets is unlikely to be justified by the underlying costs and benefits: 2020 is short term, as is the supporting EU ETS and the renewables target. The critical component of a long-term price of carbon is therefore absent. The overlap between the price instrument and the renewables target has not been fully considered. On energy efficiency, it is not clear why the EU (as opposed to individual member states) has a target at all and, in particular, why in the short term it is targeting energy efficiency rather than energy demand. "Why has the Commission not pursued a level playing field for nuclear? As with the problem of a carbon tax, the answer is political. Several member states have political commitments to either phase out nuclear, or at least have a moratorium on future development. Germany is the key player here, and this position is a legacy of the Red Green coalition under Chancellor Gerhard Schröder. The price of Green Party membership of the coalition was, in practice, the closure of at least one nuclear plant and an agreement to eventually get rid of the rest. It was a policy carried over to the Grand Coalition between the Christian Democratic Union/Christian Social Union and the Social Democratic Party."

In 2020, the German Government released the National Hydrogen Strategy which envisions using H2 as a substitute for coal and natural gas. Hidden in the text of the strategy, is a recognition that the hydrogen needed for the transition cannot be produced by Germany's renewable generation capacity which is insufficient. Therefore, Germany is in discussion with the Russian Federation about the import of so-called "CO2-neutral" hydrogen. While it was no clear whether this "green" hydrogen will be produced via electrolysis using renewable energy or from natural gas linked to carbon capture, the fact of such an opened recognition of the insufficient sources of renewables in Germany was an interesting fact.[19]

On March 19, 2021 the leaders of the Czech Republic, France, Hungary, Romania and Slovenia sent a joint letter to the EU Commission on the role of nuclear power in the EU climate and energy policy where they reminded the EU Commission that the Member States have a sovereign right to choose between different energy sources and the right to determine the general structure of the

[19] Radowitz B., Germany in talks with Russia over hydrogen imports - but coy about "colour", Recharge, Feb 16, 2021, https://www.rechargenews.com/markets/germany-in-talks-with-russia-over-hydrogen-imports-but-coy-about-colour/2-1-964124, consulted on 1.09.2021.

energy supply (Art. 194 TFEU) while half of EU countries utilize and develop nuclear power which provide close to half of EU low-emission generation. The development of the nuclear sector is contested by a number of EU states, including Germany, and a long list of NGOs based on several well-known arguments such as potential accidents, storage of radioactive waste and other, all of which are valid but not insurmountable. The letter is calling the EU commission to ensure a true level-playing field for all low carbon sources, including the nuclear energy.[20]

On March 29, 2021, the Joint Research Centre (JRC) of the EU Commission published a report stating that greenhouse gas emissions from nuclear plants are "comparable" to those released by hydropower and wind[21], a conclusion shared by the International Energy Agency (IEA)[22] and the United States Department of Energy which, among other things, announced that nuclear energy is a key technology to "combat climate change in a truly sustainable way"[23].

On October 10, 2021, energy and economy ministers from ten EU member states (Bulgaria, Croatia, Czech Republic, Finland, France, Hungary, Poland, Romania, Slovakia and Slovenia) said in a joint article published across the EU that nuclear energy must be included in the framework of the EU taxonomy placing it on an equal footing with other low-carbon technologies.[24]

On the other side of the equation are Germany, Austria, Denmark, Luxembourg and Spain which jointly stated that including nuclear power in the green finance taxonomy would permanently damage its integrity, credibility and usefulness.[25]

As forecasted by Prof. Helm and other energy experts years ago, an accelerated shift to wind and solar increased a demand for natural gas as relatively clean fuel for gas-fired gas plants which can be quickly ramped up to meet a shortfall from wind and solar. According to Eurostat, in 2019, more than 90% of EU's natural gas came from outside the bloc with the Russian Federation was the

[20] Joint letter from the Czech Republic, French Republic, Hungary, Republic of Poland, Romania, Slovak Republic and Republic of Slovenia on the role of nuclear power in the EU climate and energy policy, Mar 19, 2021.

[21] EU Commission, Technical assessment of nuclear energy with respect ot the 'do no significant harm' criteria of Regulation (EU) 2020/852 ('Taxonomy Regulation'), Mar 29, 2021, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/210329-jrc-report-nuclear-energy-assessment_en.pdf, consulted on 1.09.2021.

[22] IEA, Nuclear Power in a Clean Energy System, May 2019, https://www.iea.org/reports/ nuclear-power-in-a-clean-energy-system, consulted on 1.09.2021.

[23] US Department of Energy, U.S. Secretary of Energy and IAEA Director General promote 2022 Nuclear Power, Sep 21, 2021, https://www.energy.gov/articles/us-secretary-energy-jennifer-m-granholm-and-iaea-director-general-rafael-grossi-promote, consulted on 1.09.2021.

[24] World Nuclear News, Tne EU nations call for nuclear's inclusion in taxonomy, Oct 11, 2021, https://world-nuclear-news.org/Articles/Ten-EU-nations-call-for-nuclear-s-inclusion-in-tax.

[25] Simon F., Germany leads call to keep nuclear out of EU green finance taxonomy, Euractiv, July 2, 2021, https://www.euractiv.com/section/energy-environment/news/germany-leads-call-to-keep-nuclear-out-of-eu-green-finance-taxonomy/.

largest source of natural gas for the EU.[26]

In 2020, Prof. Vaclav Smil, one of the top energy experts of modernity, wrote a paper called "Energiewende, 20 Years Later", which looked into the state of Germany's energy transition after twenty years of its start.[27] In 2020, Germany derived close to 84% of its primary energy from fossil. This number fell to approx. 78% in 2019. At this rate of decline, fossil fuels would provide almost 70% of Germany's primary energy in 2050. In 2019, almost half of Germany's installed electric energy generation or 110 GW but operated at an average capacity factor of only 20% (only 10% for solar) and required 100 percent backup which forced the country to keep its old system almost intact. Germany has one of the highest costs of electricity in the world which resulted from the need to maintain both systems at the same time. Starting from 2020, the green energy surcharge in Germany will be reduced by 43% under the pressure from consumers which are getting tired from paying some of the highest electricity rates in the world.[28]

The Paris Climate Agreement of 2015 signed by representative of 195 countries (ratified by 192 parties) is the key document which established a current state of consensus regarding the climate change policy across the planet. In essence, the agreement allowed countries to determine their own approach to reducing carbon emissions. Countries themselves determine their level of participation in the Agreement via Nationally Determined Contributions or NDCs which, according to Art. 3 of the treaty have to be ambitious enough toward achieving the purpose of the treaty and represent a progression over time. The EU, the UN or, for that matter, any other multinational entity cannot force a sovereign state into a particular path toward reduction of CO2 emissions in any way, shape or form.

The World Trade Organization (the WTO) is another possible venue for the EU to use toward acceleration of its global climate ambition. However, it is unclear whether the WTO is a suitable forum for any actions by the EU in respect of the energy transition.

On July 14, the EC presented 13 policy measures meant to put the EU on track to meet its goal of reducing its internal emission by 55% in 2030 compared to 1990 level. The evidence of the "carbon leakage" from the EU, so far, has been fairly weak.[29] Other than the use of carbon-based fuels which often an inevitable part of the manufacturing cycle there were other cost and market-related reasons

[26] Chadwick L., Europe's energy crisis: Five charts to explain why your bills might go up this winter, Euronews, Oct 13, 2021, https://www.euronews.com/2021/10/13/europe-s-energy-crisis-five-charts-to-explain-why-your-bills-might-go-up-this-winter, consulted on 1.09.2021.

[27] Smil V., Energiewende, 20 Years Later, December 2020, http://vaclavsmil.com/wp-content/uploads/2021/01/71.ENERGIEWENDE.pdf, consulted on 1.09.2021.

[28] Wacket M., Germany to slash renewable power fees to ease burden of higher energy bills, Reuters, Oct 15, 2021, https://www.euronews.com/green/2021/10/15/germany-to-slash-renewable-power-fees-to-ease-burden-of-higher-energy-bills.

[29] The lack of evidence for carbon leakage, Climate Action Network Europe, Feb 25, 2014, https://caneurope.org/the-lack-of-evidence-for-carbon-leakage/, consulted on 1.09.2021.

to shift large scale production of energy intensive goods from the EU to Asia. Included in the 13 policy innovations was the Carbon Border Adjustment Mechanism (CBAM) which initially (from 2026) would include electricity, cement, aluminum, fertilizer, iron and steel products depending on the emission content of production and the difference between the EU ETS price and any carbon price paid in the production country. It has been initially estimated that Russia, Turkey, Ukraine, India and China will be most likely affected by the CBAM.[30] In fact, all EU's trading partners may get eventually affected by the CBAM which is going to be a unique experiment as of the date of this essay. As of 1 November 2019, twenty-one national jurisdictions outside the EU implemented or scheduled a domestic price on carbon but none had a CBAM scheme. Last time when the EU tried to extend its emissions trading scheme on aviation it met a stiff resistance of twenty-three countries including the USA, China, Indian, Japan the Russian Federation and other and had to back off.[31]

It is hard to conclude at the moment with any degree of confidence what would be a long-term future of the EU Green Deal and its newly introduced CBAM. However, clearly, the issue of energy access across the EU and globally is not going away in the coming decades.

A logical step after the introduction of the CBAM on the border with the EU would be harmonization of carbon tax across the EU. In 1990, Finland was the world's first country to introduce a carbon tax. By 2021, 18 European countries implemented carbon taxes ranging from UE1.- per m3 of CO2 in Poland to EU116.- in Sweden.[32] The difference between Sweden and Poland when it comes to carbon tax demonstrates a profound difference between the sources of energy in the two countries. Sweden has a virtually carbon-free electricity generation and is working actively on making its real estate, transportation and industry carbon-free. In Sweden, 45% of electricity comes from hydro, 30% from nuclear and 17% from wind. Sweden has the highest level of carbon-free primary energy generation across the EU - 56% (2019).[33] Sweden has its own nuclear industry and is one of the top industrial countries of the world. Sweden is self-sufficient in the energy generation technology and makes its own decisions regarding the use of any sources of energy. When it comes to energy, Poland is fundamentally different from Sweden. In Poland, coal accounts for 74% of total electricity generation while natural gas and renewables (excluding hydropower) are responsible for

[30] Dumitru A., Kolbi B., Wijffelaars, *The Carbon Border Adjustment Mechanism explained*, Rabobank, July 16, 2021, https://economics.rabobank.com/publications/2021/july/cbam-carbon-border-adjustment-mechanism-eu-explained/, consulted on 1.09.2021.

[31] Possible Assessment of Possible Reactions of EU Main Trading Partners to EU Border Carbon Measures, European Parliament Policy Department for External Relations, April 2020, https://www.bruegel.org/wp-content/uploads/2020/06/EXPO_BRI2020603503_EN.pdf.

[32] Asen E., Carbon Taxes in Europe, Tax Foundation, Jun 3, 2021, https://taxfoundation.org/carbon-taxes-in-europe-2021/, consulted on 1.09.2021.

[33] Energy use in Sweden, Sverige, Jul 14, 2021, https://sweden.se/climate/sustainability/energy-use-in-sweden, consulted on 1.09.2021.

14% and 9% respectively (2019).[34] Poland, unlike Sweden, was a part of the Soviet block in the 1970th and, therefore, did not experience any oil shocks and had no chance to choose its energy future. Poland has no in-house nuclear energy expertise and is still relying on coal-fired stations-built decades ago.

As of the date of this essay, the EU and the rest of the world is struggling from a rapid increase of the energy commodity prices - coal, oil and gas - while China, the industrial powerhouse of the world, is experiencing electricity blackouts due to coal shortages. Speaking to the EU Parliament in September 2021, EU Commission President Ursula von den Leyen, a representative of Germany, stated that the issue of high energy prices was serious while EU's long-term solution to the high energy prices is further investments in renewables whose prices have decreased over last years.[35] What Mrs. EU Commission President failed to mention was a connection between over-capitalization of renewables and under-capitalization of hydrocarbon-based sources of energy which are still responsible for around 90% of the primary energy consumption worldwide. Wind and solar energy have zero non-random availability factor and needs a 100% backup which still comes from fossil fuels such as coal and natural gas. Therefore, the higher the share of renewables in the primary energy mix, the higher the need for the carbon-based back-up generation. Hence, EU's renewables transition increases EU's dependence on the imported fuels such natural gas and other fuels. This increase was factor in the current natural gas energy spike in the EU. Such a connection has been obvious to the energy and commodity trade experts for many years and was pointed at by world's top experts such as the Head of the Commodities Research at Goldman Sachs and other which, among other things, pointed out that the overinvestment into renewables issue existed long before the COVID-19 pandemic.[36]

The Head of Commodities Research at Goldman Sachs called the ongoing spike in the energy price the "revenge of the old economy". We would prefer to call it the "revenge of thermodynamics" which governs behavior of each and every source of energy. Wind and solar are sources of dispersed energy requiring collection over a wide area of land to serve as a reservoir of energy for conversion into useful work.

Sweden has demonstrated that, in principle, even at the current level of the energy generation technology it is possible to eliminate coal entirely from the energy mix and virtually completely decarbonize the electricity generation sector.

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[34]U.S., Energy Information Administration, Poland, July 2020, www.eia.gov/international /analysis/country/POL, consulted on 1.09.2021.

[35] EU's von der Leyen: "We must invest in renewables for more stable energy prices", Reuters, Oct 6, 2021, https://www.reuters.com/business/energy/eus-von-der-leyen-we-must-invest-rene wables-more-stable-energy-prices-2021-10-06/, consulted on 1.09.2021.

[36] Bloomberg Markets, Energy Crisis is "Revenge of Old Economy", Goldman Sachs says, Oct 1, 2021, https://www.youtube.com/watch?v=IwZDrUYpAvg&ab_channel=BloombergMarketsand Finance, consulted on 1.09.2021.

The public at large ascribes the green transition leadership to Germany but when it comes to the factual decarbonization Sweden is the leader. However, it took Sweden decades of hard work and investment into its nuclear energy sector to move away from fossil fuels. On top of of the nuclear generation, Sweden has a large hydroelectric generation potential which depends mostly on its geography and landscape. The same observation can be made about France where its nuclear-powered base load is balanced mostly by its hydro-electric stations. Poland, to stay with the narrative of the essay, has little hydro-electric potential and no indigenous nuclear generation sector and no ability to follow the Swedes. Germany, in spite of decades of trying to make the energy transition toward renewables, was unable to reach its goal.

Otto von Bismark once said: "Only a fool learns from his own mistakes. The wise man learns from the mistakes of others." Learning from the experience of Germany teaches us that the future of the energy transition is limited by the physical properties of the chosen technology and no amount of publicity and investment can change these properties.

The EU consists of a large number of states with different geographies, landscapes and ability to build extensive renewable generation. Even Sweden still depends on petroleum for its transportation whose decarbonization remains a technological challenge.

On December 11, 2020 the EU-27 leaders agreed to increase the blocks emission reduction target to 55% by 2030 (previously it was 40%).[37] It has been clearly shown by a number of recent above referenced studies that, first, on the total energy consumption basis, the EU was unable to decrease its emissions since 1990 after taking into account the import of energy dense goods from; and, second, the only major industrialized European country which receives more than 50% from low-carbon sources is Sweden (not Germany or Denmark). Sweden has one of the highest per capita levels of energy consumptions in the world and, yet it managed to achieve this level with a very limited use of fossil fuels. However, Sweden relied on carbon-free sources of electricity since the dawn of the age of electricity prior to the WWII due to its geography. After the WWII, Sweden developed its own world-class nuclear power industry and in-the-country expertise of building and operating nuclear power stations.

If after decades of "trying hard" the EU failed to decrease its emission on the full cycle basis, it is unclear how it may achieve a reduction of 55% in only 10 years. It stands to common sense, that the EU Green Deal without a package of country-specific pathways would remain another aspirational goal and it not going to result in any sensible evolution of the energy related business law across the EU.

[37] EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Jul 14, 2021, https://ec.europa.eu/info/sites/default/files/chapeau_communication.pdf, consulted on 1.09.2021.

Faced by a record level spike in the price of natural gas (90% of natural is imported to the EU), a preferred balancing source of energy for all the EU members other than France and Sweden which rely on nuclear energy, the EU is at a crossroads. The same can be said about the energy related business law within the EU.

Ten years ago in 2010, a number of major cell phone manufacturers including Apple and Samsung agreed to a standard charger connector for all their devices.[38] Ten years later, the EU still insists on a universal charging plug for all smartphones.[39] The energy transition is orders of magnitude more complex and challenging than standardization of cell phone connectors and is likely to take many decades to complete.

The Lisbon Treaty of 2009 explicitly added energy to the area of shared competences under Art. 4 of TFEU.[40] According to Art. 194 of TFEU, the EU policy on energy is based on three basic objectives: competitive internal market, security of energy supply and sustainability. Security of supply in the EU energy policy context provides for the availability of affordable energy with minimal social costs, including environmental costs. The energy security is also covered by Art. 122 which relates to "the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy". Article 194 of the TFEU specifically recognizes Member States' energy rights in areas of taxation and in determining the conditions for exploiting its energy resources, choices between different energy sources and the general structure of energy supply in a Member State.

The EU "fit for 55" and any other block-wide climate and environmental goals are difficult to achieve for a number of reasons despite the increasing number of EU directives. One of the legal challenges associated with any EU driven action toward business law related to the energy access arises from the use of the principle of subsidiarity, the recognition of national differences and the exercise of governmental discretion in shaping policies based on often uncertain assumptions.

A directive which is aimed, at least to a significant extent, at contributing towards the internal market does not require unanimity, but matters of tax, choice between energy sources (nuclear, renewables and coal are particularly noteworthy in this context) and the general structure of its energy supply, does (Articles 192(2) or 194(2) TFEU). Under Article 192(2) is that Member States cannot be

[38] Companies agree on standard mobile phone charger, DW News, Jun 29, 2009, https://www.dw.com/en/companies-agree-on-standard-mobile-phone-charger/a-4441089, consulted on 1.09.2021.

[39] EU proposes universal charging plug for all smartphones, DW News, Sep 23, 2021, https://www.dw.com/en/eu-proposes-universal-charging-plug-for-all-smartphones/a-59282754.

[40] Consolidated version of the Treaty on the Functioning of the European Union, Retrieved on Oct 24, 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT .

compelled by a majority to give up energy sources which are seen as less acceptable by influential political actors in some of the EU members. Art. 194(2) explicitly states that 'measures [taken under Article 194 TFEU and majority voting] shall not affect a Member State's right to determine the conditions for exploiting it energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)'. Article 192(2)(c) TFEU provides that 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' are subject to a requirement for unanimity. Therefore, based on basic legal logic, the new energy (ie., achieving "carbon neutrality" by 2050) title should not restrict Member States' choices with respect to energy sources. A requirement that approximately half the national primary energy production should come from renewable energy sources instead of nuclear, coal, natural gas or other options would clearly interfere with the right of a Member State to choose between different sources of energy supply.

The consensus on EU law supremacy is not absolute. Two recent challenges came from the German Constitutional Court (2020) and the Polish Constitutional Tribunal (2021). The version of supremacy articulated by the European Court of Justice has been questioned by the German Constitutional Court in a series of cases that stretch back to 1974 (established in 1954 in Costa v. ENEL). However, when the EU's member countries had an opportunity to explicitly recognize EU law's primacy over national law, they did not do it. The failed Treaty Establishing a Constitution for Europe included an article enshrining EU legal supremacy. That supremacy of the EU law provision was dropped from its successor, the Lisbon Treaty, after EU's constitution failed to achieve ratification in France and the Netherlands. Forcing all the voters across the EU pay some of the highest energy bills worldwide (as it happened already in Germany and Denmark) as a direct result of the EU climate ambition is a challenging path to follow to say the least.

3. Conclusion

Having equal uniform access to energy is not a question of law. It is a question of access to appropriate sources of energy and related technologies across the EU. The only two countries with substantially decarbonized electricity grids are France and Sweden. In both cases, decarbonization was achieved via a combination of nuclear and hydroelectric power generation long before the passage of various decarbonization and climate related goals. Forcing any EU member to discard its existing sources of energy without an adequate replacement is unrealistic. It would take decades for countries like Poland to build sufficient nuclear power generation capacity based on the existing generation of nuclear reactors. The EU imports roughly 90% of its natural gas. The ongoing energy crunch is a clear demonstration of risks associated with using natural gas as a sole or

primary source of back-up or balancing energy for the grid. Therefore, the EU, as a block has a number of alternatives to press ahead with its climate ambition and the EU green deal. First, it may help its members to upgrade their grids making similar to the grids in Sweden or France. Second, it may continue its current practice of using statistics to achieve a ramped-up emission ambition without making a detectable contribution to the emissions abatement globally. Third, it may invest in fundamental R&D and commercialization of technologies - which may or may not exist - required for making its climate ambitions affordable both for all of the EU members and, more importantly, low-income populous countries outside the EU. The EU may pursue all these alternatives simultaneously.

The future unification of various EU wide business laws related to the uniform affordable energy access across the EU would depend primarily on the availability of the affordable "green" and/or not so green energy sources which would be politically acceptable across the block. Had the EU, as a block, have a technological solution for affordable greening of its primary energy sources, it would have had a strong argument in favor of convincing its recalcitrant members to surrender their not-so-green sources of energy in favor of a more sustainable energy future. However, without an affordable solution, forcing a majority of its members to pass new energy related business laws and comply with the EU law making large sectors of their economies uncompetitive both within the EU and outside based on the ramped-up climate or any other ambitions is unlikely to work as a recent challenge from Poland clearly demonstrated to the EU leadership.[41]

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[41] On October 7, 2021, Polan's Constitutional Tribunal declared Art. 1, 2 and 19 of the Treaty on the Functioning of the European Union (TFEU) partly unconstitutional, https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/.

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Term of office as an indicator of independence of the antitrust authority in the implementation of the ECN+ Directive: experiences of Polish law and of the Polish antitrust authority

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Abstract

Whether in the European Union or elsewhere in the world, there is no universal model an antitrust authority could be patterned against. Instead, administrative, judicial and mixed bodies are present. For the proper performance of the functions entrusted to them, it is necessary to ensure that these bodies remain free from political influence. The need for such independence of antitrust authorities is clear from the ECN+ Directive, which Member States are required to implement. In the article, an attempt was made to assess whether the provisions of the ECN+ Directive introduce specific requirements as to the term of office for officeholders in antitrust bodies and examine what solutions have been adopted to this end in Polish law. The Polish antitrust authority is the President of UOKiK, which is currently an office without term. However, in the course of implementing the ECN+ Directive, different solutions have been designed, establishing that this authority should indeed operate against a fixed-term model. On the basis of historical legal acts, current normative acts, draft bills and the findings derived from the literature and case-law, the question should be answered whether term of office is an indicator of the independence of an antitrust authority. The research methods adopted to this end are the dogmatic and historical-legal approach.

Keywords: *Polish law, national competition authority (NCA), independence, term of office, ECN+.*

JEL Classification: K21

1. Introduction

The immediate reason why one might want to consider the independence of the antitrust authority in Polish law through the prism of implementing the ECN+ Directive[2] is the ongoing legislative efforts aimed at adjusting Polish antitrust law to the legal requirements defined in the Directive[3]. Currently, pursuant

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[2] Directive (EU) 2019/1 of the European Parliament and the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance) (OJ L 11, 14.1.2019, pp. 3–33).

[3] Directive (EU) 2019/1 of the European Parliament and the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure

to art. 29 of the Act of 16 February 2007 on competition and consumer protection, the Polish National Competition Authority (NCA) is the President of UOKiK[4] - the Office of Competition and Consumer Protection, appointed and dismissed by the executive authority - the Prime Minister. The provisions of the Act do not specify either term of office or grounds for deposal. The aim of the study is to determine: 1) how the term of office of the Polish antitrust authority was regulated in the past, 2) how the current solution (no fixed term of office) has been assessed in the literature, 3) what amendments are currently being drafted. The above deliberations have been contrasted with the issue of the impartiality of the antitrust body, and more specifically the relationship between the independence of and terms of office envisaged for such an authority[5]. Given the analyzed problem area, the research material comprises texts of normative acts (Polish and EU law), both modern and historical, as well as the literature and official documents (developed during the legislative process). The basic research method is the dogmatic-legal approach supplemented by the historical-legal method (a method based on the evolution of legal institutions).

2. ECN+ Directive: is term of office a prerequisite for independence?

The main issue to be addressed is whether the implementation of the ECN+ Directive binds the Polish legislator to account for the fixed-term approach to the antitrust authority's time in office or whether this is not implied. The analysis of the provisions of the ECN+ Directive prompt the conclusion that EU law leaves leeway for Member States to determine whether their national antitrust authority should be granted a fixed term of office or not[6]. Having said that, the aim of the Directive is to ensure sufficiently high standards of independence of the antitrust authority, which, in the context of possible external influence, account for the following:

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the proper functioning of the internal market (Text with EEA relevance) (OJ L 11, 14.1.2019, pp. 3–33).

[4] Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Act of 16 February 2007 on competition and consumer protection] (Journal of Laws of 2021, item 275).

[5] This paper builds on the existing hypothesis that the terms of office for regulatory and antitrust authorities are one of the factors influencing their independence - F. Gilardi, *Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis*, „Journal of European Public Policy" 2002 (6), p. 881 et seq., R.R. Wasilewski, *Postępowanie dowodowe przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów*, Warszawa: C.H. Beck, 2020, pp. 7-23.

[6] This conclusion stems from the provisions themselves, which do not introduce any specific requirements in this respect, and from recitals 18-20 of the preamble to the ECN+ Directive, which indicate possible different rules for filling such posts (employment, appointment to the office for a term of office). Incidentally, it is noteworthy that, in the literature, the lack of specificity in the ECN + directive regarding specific requirements as to the term of office of the NCA is perceived as a fundamental flaw of the directive – see M. Kozak, *Raz, dwa, trzy, niezależny będziesz ty... O konieczności szerszego spojrzenia na niezależność polskiego organu antymonopolowego w świetle dyrektywy ECN+*, „internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2019 (6), p. 33.

- independence from political and other external influence (art. 4.2.a.),

- not seeking or receiving any instructions from the government or other public or private entity when exercising its duties and powers relating to the application of EU antitrust law (art. 101 and 102 TFEU), without prejudice to the right of respective governments of Member States, if appropriate, to lay down general policy rules that will not be linked to sector inquiries or specific law-application proceedings (art. 4.2.b.),

- refraining by antitrust-authority officeholders from any actions inconsistent with the performance of their duties or powers with regard to the application of art. 101 and 102 TFEU and subordination to procedures which, within a reasonable period of time after termination of employment, ensure that they are not involved in enforcement procedures that could potentially give rise to conflicts of interest (Art. 4.2.c);

- decision-makers within national antitrust authorities must be selected, recruited or appointed on the basis of clear and transparent procedures predetermined by national law (art. 4 item 4);

- decision-makers within national antitrust authorities may not be removed from office for reasons related to the proper performance of their duties and powers under the application of art. 101 and 102 TFEU; they may be dismissed only if they no longer fulfill the conditions required for the performance of their duties or if they have been found guilty of serious misconduct under national law. The conditions required for the performance of their duties, and what constitutes serious misconduct, shall be laid down in advance in national law, taking into account the need to ensure effective enforcement (art. 4 sec. 3).

Let us note that the politically-charged position of the NCA, including the issue of the influence of the period of performing functions on the independence of and changes in these regulations, is of significant practical importance. In view of the general provisions of the ECN+ Directive whose provisions for the relevant standards of such bodies' political independence may be elaborated on in the jurisprudence of the Commission or the CJEU, a question touching explicitly on the relationship between the independence and the duration of NCA functions has already been formulated[7]. The Commission's reply stressed that the ECN+ Directive does not, in itself, outline a specific NCA model as to the method of its appointment and the duration of its function: *the rules on how the decisions by a national competition authority are adopted (e.g. by a board or by the Director General only) as well as the rules on how long the decision-makers can exercise their functions (e.g. only one mandate, several mandates or no restriction in*

[7] In view of the changes in Romanian law (modification of the existing term of office with the limitation to a maximum of two terms to office without term), the question was formulated whether this amendment meets the minimum standards provided for by the ECN+ Directive - Question for written answer E-001045/2020 to the Commission Rule 138 of 20 February 2020, the document is available online at: https://www.europarl.europa.eu/doceo/document/E-9-2020-001045_EN.html (date of access: 1.11.2021).

terms of time) are not harmonised at EU level. The national rules on these issues therefore differ between the Member States and there are no binding rules or recommendations at EU level. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market(1) ('the ECN+ Directive') provides all the necessary guarantees for ensuring the independence of all staff members in national competition authorities when they perform their duties. In particular, it ensures that they cannot be subject to instructions from any public or private body. The ECN+ Directive also provides that conditions for selection, recruitment and appointment of the decision-making bodies, including in this case the members of the governing board (the plenum) of the competition authority, should be laid down in advance in national law. As long as the decision-makers enjoy the guarantees of independence as set out in the ECN+ Directive, the length of a mandate or the number of possible mandates would not — in themselves — put into question the independence of decision-makers. Indeed, the duration of the mandate or the number of mandates of decision-makers of the national competition authorities are not governed by the ECN+ Directive and the national rules on the length of mandates go from shorter periods to lifelong appointments also in other Member States.[8]

3. The term of office of the Polish NCA: history and current state

As indicated in the introduction, the Polish NCA is currently a body whose functions are exercised by a person appointed for office without term, in accordance with art. 29 of the Polish Act on Competition and Consumer Protection, and the legal provisions do not specify grounds on which the officeholder might be deposed. As a result, it is commonly argued in the literature that the NCA is not sufficiently independent from the executive (as it can be dismissed at any time, without any restrictions as to the reasons for such a dismissal, which itself may be politically motivated)[9].

Interestingly, the President of UOKiK used to be a fixed-term body. Pursuant to the then applicable law, the President of UOKiK was appointed for a five-year term and the grounds for their dismissal were explicitly specified in the Act[10]: *Art. 24.: 2. The Prime Minister shall appoint, for the period of 5 years, the President of the Office, selected by way of a contest, from among the persons with*

[8] Answer given by Executive Vice-President Vestager on behalf of the European Commission of 6 April 2020, the document is available online at: https://www.europarl.europa.eu/doceo/document/E-9-2020-001045-ASW_EN.html#def1 (date of access: 1.11.2021).

[9] R.R. Wasilewski, *op. cit.*, pp. 14-15.

[10] Ustawa z dnia 15 grudnia 2000 r. o ochronie konkurencji i konsumentów [Act of 15 February 2000 on competition and consumer protection] (Journal of Laws of 2005, No. 244, item 2080 as amended).

university education, in particular in the field of law, economy or business administration, distinguished by their theoretical knowledge and practical experience in the scope of market economy and competition and consumer protection. 5. The President of the Office may be recalled by the Prime Minister before the term of office in the case of: 1) assuming relation of work, with the exception of employment as professor at the university or in a scientific institution, 2) undertaking business activity as an entrepreneur or assuming the function of a member of the body managing or controlling the entrepreneur, 3) conviction, on the basis of a lawful judgement, of the offence committed in deliberate conduct, 4) flagrant infringement of their responsibilities, 5) an illness preventing the duly performance of entrusted duties; 6) their resigning from office.

Amendments to the Polish NCA statute were introduced while the previous Act was still in force. Nevertheless, in the course of the legislative process concerning the new Act, negative opinions were issued regarding the abandonment of the term-of-office model and the specification of the grounds for dismissal[11], but ultimately – in spite of the criticism - the Bill was passed with no mention of the fixed term of office. These solutions, despite the lapse of more than 10 years since their entry into force, have consistently aroused controversy, and the doctrine strongly advocated restoring the term of office of the President of UOKiK; otherwise, and coupled with ambiguous grounds for deposal, it was perceived as a poor safeguard of independence and a driver of politicization of the authority in question[12].

4. The term of office of the Polish NCA: draft regulations

Currently, due to the need to implement the ECN+ Directive, legislative efforts are underway to amend the Polish Act on Competition and Consumer Protection currently in force. These amendments also concern the political stance of the President of UOKiK, including the envisaged term of office. In accordance with the proposed art. 29 sec. 3, the President of UOKiK is to be appointed by the Prime Minister for a five-year term from among candidates selected through

[11] Biuro Analiz Sejmowych, *Opinia o projekcie ustawy o ochronie konkurencji i konsumentów (druk sejmowy nr 1110)*, the document is available online at: https://orka.sejm.gov.pl/rexdomk5.nsf/0/9764EA3DFEE2C4F5C125722F003DD4D7/$file/i2677_06.rtf (date of access: 4.11.2021).

[12] See M. Król-Bogomilska, *Kierunki najnowszych zmian polskiego prawa antymonopolowego*, „Europejski Przegląd Sądowy" 2009 (6), p. 5; M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa: Urząd Ochrony Konkurencji i Konsumentów 2012, pp. 85-86, K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa: LexisNexis 2011, p. 438, A. Moszyńska, *Instytucjonalne ramy ochrony konkurencji w Polsce – historia i współczesność*, „Ekonomia i Prawo" 2013 (2), pp. 255-256, K. Jaroszyński [in:] *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Warszawa: C.H. Beck 2014, pp. 834-835, A. Jurkowska (et al.), *Nowa uokik z 2007 r. - kolejny krok w kierunku doskonalenia podstaw publicznoprawnej ochrony konkurencji w Polsce*, „Przegląd Ustawodawstwa Gospodarczego" 2007 (4), pp. 2-3.

an open, competitive recruitment process. In addition, the same person cannot hold the office of the President of UOKiK for more than two terms. After their term comes to an end, the President of the Office is expected to perform their duties until their successor is appointed. Meanwhile, the proposed new wording of art. 29 sec. 4 of the Act indicates that, before the end of the term of office, the officeholder in question may be dismissed by the Prime Minister in the following specific cases:

1) conviction by a lawful judgment of an intentional (fiscal) crime;

2) deprivation of public rights;

3) resignation;

4) losing Polish citizenship;

5) a medically certified illness, or other obstacle, permanently preventing the exercise of duties;

6) violating the prohibitions referred to in article 1. 4 of the Act of 21 August 1997 on the limitation of conducting economic activity by persons performing public functions (Journal of Laws of 2019, item 2399);

7) violating the prohibition referred to in sec. 3aa; [13]

8) submitting an untruthful lustration declaration, confirmed by a lawful court decision.

In the explanatory memorandum to the Bill, we read: *the current regulations in the Act on competition and consumer protection in the above-mentioned scope (art. 29 and art. 30), while providing the President of UOKiK with relative institutional autonomy, require modernization in terms of ensuring that the antitrust authority can perform its statutory duties independently. The proposed strengthening of the independence of the antitrust authority in Poland is the implementation of the postulate which has been repeatedly put forward in recent years by academics and professionals associated with the application of competition and consumer protection law. The introduction of terms of office will undoubtedly help the President of UOKiK fulfill their statutory duties more effectively. The Bill provides for the introduction of a five-year term of office for the President of UOKiK, a solution which, together with the provision of a definite catalog of grounds on the basis of which the President of the Office of Competition and Consumer Protection may be dismissed by the Prime Minister, is aimed at ensuring greater independence of the President of the Office of Competition and Consumer Protection and shall allow for the planning of competition and consumer protection policy in the longer-term perspective. The catalog of such premises shall be definite and devoid of premises of an unspecified or ambiguous nature [...] The introduction of the above-mentioned grounds for the removal of*

[13] This provision prohibits holding any other office, with the exception of a teaching, research or teaching and research post at a university, Polish Academy of Sciences, research institute or other academic center, or lecturing at the Polish National School of Public Administration, as well as issues a prohibition on performing other paid activities colliding with the duties of the President of the Office of Competition and Consumer Protection.

the President of the Office of Competition and Consumer Protection shall ensure the proper implementation of the Directive, according to which officeholders in antitrust bodies may not be deposed for reasons related to the proper performance of their duties and powers under art. 101 and 102 TFEU (art. 10 sec. 3 of the Directive).[14]

The proposed amendments to the Act were subject to criticism in the course of public consultations. In particular, the Polish Competition Law Association pointed out that it would be reasonable - for the implementation of a long-term competition policy - to extend the term of office but with the simultaneous adoption of a one-term limit: *we hereby postulate that the President of the Office be appointed for one term only (not two, as envisaged in the amendment to the Act). Meanwhile, a six or seven-year term of office seems to be appropriate given the circumstances. We point out that allowing the President of the Office to be appointed for another term (i.e. holding the office for a period of 10 years) is not justified in light of the ECN+ Directive. Appointing a new President of the Office after serving one full term will allow the body to become more fully independent from potential external sources of influence. As the Bill still provides for the appointment of the President of the Office by the Prime Minister, the activity of the former shall not be subject to a political evaluation which would influence their possible re-appointment for a second term. Noteworthy is that a similar solution has been adopted for another economic body, namely the Small and Medium Business Ombudsman, who is appointed for a period of six years against a one-term limit (see art. 4 sec. 2 Act of 6 March 2018 on Small and Medium Business Ombudsman; Journal of Laws, item 648 as amended).*[15]

These remarks, however, were all dismissed, arguing the following: *Dismissed comments - The Directive does not dictate how to ensure independence. The proposed solutions are, in our opinion, compliant with the ECN+ Directive (the Directive does not impose solutions regarding the limit of terms of office or their duration, and neither does it specify cut-off dates for appointing a new President). The proposed solutions are systemically consistent with the legislative regulations of other regulators*[16]. Contrary to the position of the Bill Drafter, the comments raised by the Polish Competition Law Association should be considered justified in their entirety, as the proposed solution paves the way for a two-

[14] *Projekt ustawy o zmianie ustawy o ochronie konkurencji i konsumentów oraz niektórych innych ustaw (nr UC 69)*, the document is available online at: https://legislacja.rcl.gov.pl/projekt/12342403 (date of access: 1.11.2021).

[15] Stowarzyszenie Prawa Konkurencji [The Polish Competition Law Association], *stanowisko wobec projektu UC69*, the document is available online at: https://legislacja.rcl.gov.pl/docs//2/12342403/12757018/12757021/dokument507309.pdf (date of access: 6.11.2021).

[16] *Tabela uwag zgłaszanych do projektu ustawy o zmianie ustawy o ochronie konkurencji i konsumentów oraz niektórych innych ustaw (UC69) w ramach konsultacji publicznych*, the document is available online at: https://legislacja.rcl.gov.pl/docs//2/12342403/12757018/12757021/dokument 507321.docx (date of access: 6.11.2021).

term (10 years) office-holding of the Polish NCA, where the re-appointment is in the hands of the executive who are pursuing a specific political agenda. Although, as indicated, the provisions of the ECN+ Directive do not outline specific solutions as to the NCA model for particular Member States, this model must nonetheless ensure independence according to the criteria specified in the Directive, including the antitrust authority remaining free from political influence. It does not therefore seem justified for the Bill Drafter to refer to similar solutions existing in regulatory authorities whose scope of duties is narrower (limited to specific, regulated sectors), whereas the President of UOKiK, in principle, deals with competition protection in the entire economic area, as well as with consumer protection (which is not common for NCAs).

5. Conclusions

Having reviewed the literature, a conclusion can be drawn that the period of performing functions by an antitrust authority (term of office) is one of the criteria for assessing the independence of such a body. However, the provisions of the ECN+ Directive allow different NCA models to exist in different Member States. The period of holding office so as to render such an authority independent is not subject to the provisions of the Directive, which merely defines the general criteria of independence, including political impartiality. As a rule, in the light of the provisions of the ECN+ Directive, an independent body does not necessarily have a fixed term of office, although it should be emphasized that specific solutions related to the term-of-office formula may have a negative impact on reported independence. In the past, Polish law stipulated that the Polish NCA was a fixed-term authority and the grounds for its early dismissal were provided in the Act. That model, however, was soon abandoned and the President of the Office of Competition and Consumer Protection is now an authority without term whose dismissal is decided by the Prime Minister. The lack of clearly defined grounds for such deposal means that this decision may be politically motivated, which clashes with the idea of independence from political influence. Consistent challenging of this model in the literature prompted, on the occasion of implementing the ECN+ Directive, a desire to restore the fixed-term system and define the grounds for early dismissal. Having said that, the draft bill envisages that the President of the Office of Competition and Consumer Protection may hold office for two terms, thereby paving the way for this body to perform their duties in line with certain political expectations. Lastly, let us note that extending the term of office and abandoning the possibility of re-appointment would, to a significant extent, ensure the independence of the Polish NCA.

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Substantial and procedural rules in the perspective of Directive no. 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks

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Abstract

Since 2011, a series of measures have been adopted by European Union, with the initial purpose to harmonizing of the very specific aspects of substantial law of insolvency, including restructuring, but also regarding the company law. The enforcement of Regulation (EU) 2015/848 on insolvency proceedings aimed solving the conflicts of jurisdiction in cross-border insolvency proceedings and ensuring the recognition of insolvency decisions on the territory of the Union. However, the Regulation did not seek to harmonize the substantial law of insolvency in the Member States. Even though in some Member States, including our country, the Commission's Recommendation was received as a useful proposal to undertake insolvency reforms (adoption of Law 85/2014 regarding the insolvency and insolvency prevention procedures in Romania), it did not succeed in generating uniform changes in all Member States to facilitate the rescue of companies in financial difficulty and to enable entrepreneurs to benefit from a second chance. The Recommendation did not have the expected effects because its partial implementation, even at the level of countries where real reforms have been made regarding the insolvency law. In this context, this study aims at an analysis of insolvency prevention procedures in our country, reported to the Directive of the European Parliament and of the Council, on preventive restructuring frameworks.

Keywords: *restructuring frameworks, insolvency, preventive concordat, ad-hoc mandate.*

JEL Classification: K22

1. Introduction

Like many Member States, Romania was influenced by the economic crisis of 2009, which in turn influenced the modern development of insolvency, corporate rescue and restructuring procedures.

The Preventive Concordat and the Ad-hoc Mandate Law no. 381/2009[2], had the aim of providing a buffer against the wave of insolvencies, which were not necessarily justified by a real cessation of payments. These early reforms, however, were not as effective as hoped. After the Preventive Concordat and the Ad-hoc Mandate Law no. 381/2009 came into force, it was foreseeable that the

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[2] Published on the Official Gazette no. 870, Part I, December 14, 2009.

insolvency claims would be drastically reduced for a period of at least 6 months afterward. Unfortunately, the effectiveness of the concordat was minimal. The debtors preferred to file for insolvency and financial institutions were resistant to the procedure, resulting in a slow take-up of the concordat.

Against this background, Romania introduced revised versions of the ad-hoc mandate and preventive concordat procedures in 2014, which seems to have improved the position of the concordat. While this law was intended to protect the interest of both debtors and creditors, the Law no. 85/2014 is more creditor friendly.

2. General context of preventive restructuring. Function and objectives of insolvency and recovery measures

The law contains concrete pre-insolvency instruments aimed at obtaining the amicable negotiation of claims through the ad hoc mandate and the conclusion of a preventive concordat. Reforms may include continuing the flow of interest for secured creditors; simplifying the approval of the arrangement; and introducing the private creditor test, which also allows public creditors to vote on a concordat project.

The shorter duration of pre-insolvency proceedings and their greater flexibility should encourage the parties to use pre-insolvency procedures when the business has a temporary and repairable shortfall in liquidity[3].

Pre-insolvency procedures aim to restructure the company through a conventional restructuring of debts subject to negotiations with creditors. Unfortunately, the debtor's protection against potential enforcement procedures from the non-adherent creditors is less effective. For this reason, most debtors prefer to open insolvency proceedings and propose a reorganisation plan to fully benefit from the protection against enforcement.

In Title I of Law no. 85/2014 on insolvency prevention and insolvency procedures, insolvency prevention procedures are regulated, respectively the ad-hoc mandate and the preventive arrangement.

The ad-hoc mandate[4] is a confidential procedure initiated at the request of the debtor in financial difficulty. An ad-hoc agent is then designated by the court and negotiates with creditors to reach an agreement between (one or more of) them and the debtor with the aim of overcoming the debtor's financial difficulties[5].

The preventive concordat[6] is a contract between the debtor and creditors

[3] Annotated Insolvency Code, "Strengthening the Insolvency Mechanism in Romania" www.just.ro/wp-content/uploads/2016/03/Cod-adnotat-FINAL.docx. consulted on 1.11.2021.
[4] Law no. 85/2014 on insolvency prevention and insolvency proceedings, published in the Official Gazette no. 466, June 25, 2014, art. 10-15.
[5] Idem, art. 5 para.1.36.
[6] Idem, art. 5 para.1.17.

that hold at least 75% of accepted and undisputed value of claims, which is homologated by the syndic judge. The debtor proposes a workout and recovery plan with the aim of covering the creditors' claims and the creditors, in turn, support debtor's efforts to overcome the financial distress. The concordat procedure is opened only at the request of the debtor. The most important effect of its approval is that an insolvency procedure against the debtor cannot be opened during the concordat period.

On 20 June 2019, it was addopted Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132. Member States have two years from publication in the Official Journal of the European Union to implement the new provisions, but in duly justified cases they may request an additional year from the Commission to implement them.[7]

The general objectives of the Directive are to contribute to the proper functioning of the internal market, to reduce the most important barriers to the free movement of capital and to the freedom of establishment resulting from differences between Member States in restructuring and insolvency frameworks. and to strengthen the culture of rescuing businesses on the basis of the second chance principle.[8]

3. Substantial aspects in the field of preventive restructuring, by reference to the provisions of Directive 1023/2019 of the European Parliament and of the Council of Europe

3.1. The stay of individual enforcement actions

Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks imposes the need to grant a suspension, from the moment the preventive restructuring frameworks are called into question, such a suspension of enforcement having a duration of be reasonable between 4 months and a maximum of 12 months. The reason for granting this suspension lies in accessing the restructuring frameworks as efficiently as possible, before and as a priority, the opening of insolvency proceedings.[9]: m*ember States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework*.[10]

[7] Phoenix Magazine, no. 4/2019, October-December 2019, p. 335.
[8] https://www.unpir.ro/obiectivele-stabilite-si-masurile-propuse-de-directiva-ue-20191023-privind-cadrele-de-restructurare, consulted on 1.11.2021.
[9] Phoenix Magazine, no. 69/2019, July - September 2019, p. 8.
[10] Art. 6 para.1 from Directive.

A moratorium does not automatically arise under the ad-hoc mandate. Following the appointment of the ad hoc agent by the president of the tribunal, majority creditors should grant the debtor a suspension of individual enforcement of outstanding or short-term claims (postponement of enforcement, judicial or extrajudicial proceedings or insolvency proceedings against the debtor).

In the procedure of the preventive concordat, based on the offer to be agreed, the debtor may request the syndic judge to suspend all individual forced executions, regardless of the object of execution or the quality of the following creditor. The temporary suspension of the individual forced pursuits is maintained until the pronouncement of an executory decision approving the concordat or until the rejection of the offer of concordat by vote by the creditors whose uncontested claims make up the credit table, according to the law.

Also, the provisions of art. 29-30 of Law no. 85/2014 provide for the suspension of individual enforcement actions. According to these provisions, from the date of communication of the decision approving the preventive concordat, the individual proceedings of the signatory creditors against the debtor and the limitation of the right to request the forced execution of their claims against the debtor are suspended. The flow of interest, penalties and any other expenses related to receivables is not suspended from the signatory creditors, unless they expressly express, in writing, their agreement to the contrary, an agreement that will be mentioned in the draft agreement.

The most important effect of the approval of the preventive concordat is that all enforcement procedures are suspended, and during the composition period the insolvency procedure cannot be opened against the debtor. Any creditor who obtains an enforceable title over the debtor during the procedure may file an application to join the preventive concordat or may recover his claim by any other means provided by law.

In the opinion of the practitioners, the temporary suspension of the individual forced execution provided by art. 29 para. (1) of Law no. 85/2014 shall apply only if the provisional suspension has not been previously requested and obtained pursuant to the provisions of art. 25 para. (1) of the Law. Also, the suspension provided by art. 29 para. (1) has the character of *ope legis* and enters into force from the date of communication of the approval decision to the signatory creditors, as opposed to the suspension provided by art. 30 para. (1) which has a judicial character and produces legal effects from the pronouncement.[11]

In the future, legal provisions are needed, relating to certain claims or

[11] R. Bufan, A.O. Stănescu a.o., *Tratat practic de insolvență*, Ed, Hamangiu, Bucharest, 2014, p. 117; N. Țăndăreanu, *Codul insolvenței adnotat. Noutăți, examinare comparativă și note explicative*, Ed. Universul Juridic, Bucharest, 2014, p. 80; Arin Octav Stanescu, Simona Maria Milos, Stefan Dumitru, Otilia Doina Milu, *Procedurile de preventie a insolventei: concordatul preventiv si mandatul ad-hoc. Reorganizarea judiciara*, Ed. Universul Juridic, Bucharest, 2010, p. 121; Nasz Csaba Bela, *Procedurile de prevenire a insolventei*, Ed. Universul Juridic, Bucharest, 2015, p. 172.

categories of claims excluded from the scope of the suspension of individual enforcement proceedings, in well-defined circumstances where such exclusion is duly justified and also to avoid abuse of law. Also, the initial and total duration of the suspension of the individual enforcement proceedings and the categories of creditors to which these legal provisions apply will have to find a strict regulation.

3.2. The role of creditors in adopting preventive restructuring plans

The provisions of art. 9 paragraph 2 of the Directive impose on the Member States the obligation to ensure that the affected parties, with certain exceptions provided by art. 9 paragraph 3, have the right to vote on the adoption of a restructuring plan.

In the insolvency prevention procedures provided by Law no. 85/2014, the creditors have the right to vote on the reorganization/restructuring plan, either directly or indirectly.

The list of creditors, in the procedure of the preventive concordat, is elaborated by the administrator, together with the debtor [12]. Legislation offers the debtor a great freedom to identify the creditors to whom he wants to propose a restructuring plan.

Creditors have the right to vote on the preventive composition offer, with any amendments resulting from the negotiations, and the vote is exercised, in principle, by correspondence[13]. Certain creditors are restricted from the right to vote, respectively creditors who, directly or indirectly, control, are controlled or are under common control with the debtor. This category of creditors can vote on the composition agreement only if it grants them less than it would receive in the event of bankruptcy.

In insolvency prevention proceedings, creditors are not separated into categories and do not have priority rank for the purpose of exercising the vote. The preventive concordat is approved with the vote of the creditors which represents at least 75% of the value of the accepted and uncontested claims.

All legal provisions governing the categories of creditors are set out in the chapter on judicial reorganization, which is part of the insolvency proceedings. These provisions should be extended in future to insolvency prevention proceedings so that national law complies with the provisions of the Directive, in order to ensure fair treatment for all creditors of the same rank, to respect the decision of the majority, while allowing other creditors to obtain payments equal to or greater than what he would receive in the event of bankruptcy.

[12] Art. 23 para. 3 of Law no. 85/2014.
[13] Idem, art. 27 para. 1.

4. Debtor in possession

The Directive requires Member States to ensure that debtors who resort to preventive restructuring proceedings retain full, or at least partial, control over their assets and their day-to-day business[14].

All Romanian restructuring processes require the appointment of an expert or administrator. The insolvency practitioners do not take over the business, rather the management stays in control; as such, the Romanian pre-insolvency procedures are "*debtor in possession*" mechanisms.

In the ad-hoc mandate procedure, the ad-hoc agent, chosen from among the insolvency practitioners, fulfills the role of a mediator between the debtor and one or more creditors, in order to overcome the state of financial difficulty.

In the preventive concordat, the concordat administrator has the role of supporting the debtor, elaborating together with him the preventive arrangement offers.

Doctrine[15], said that almost unanimously, the judicial administrator knows much less about the management of a concrete business than the former governing bodies, so that the alleged supervision of the insolvency practitioner turns into a formal verification of the debtor's documents. carried out during the observation period, without real business advice.

The appointment of an insolvency practitioner by a judicial authority should not be mandatory in all insolvency prevention proceedings. Both the ad hoc mandate and the preventive concordat are based on the agreement of the parties, i.e. the debtor and his creditors. Being an agreement of wills, which presupposes trust between the parties, means that the very conclusion of such contracts for the amicable settlement of the debtor's dispute with its creditors is a gain in itself for the debtor, since what a debtor lacks in the first place which reaches a state of financial difficulty is the trust of its creditors. By signing such agreements, the debtor regains, at least in part, the lost trust of creditors and business partners.[16].

5. Compared law aspects

National legislation on insolvency prevention procedures is largely adapted to the provisions of the Directive and similar to the regulations of other European countries.

In Italy there are three procedures that meet the definition of preventive

[14] Art. 5 para.1 from Directive.
[15] https://www.unpir.ro/legea-nr-852014-un-drum-catre-maturitate, consulted on 1.11.2021.
[16] Gheorghe Piperea, *Legea concordatului*, Ed. Wolters Kluwer, Bucharest, 2010.

restructuring: (judicial composition with creditors, the debt restructuring agreement, and the long-term restructuring agreements).

The *concordato preventivo* (judicial composition with creditors) allows a distressed company to avoid opening an insolvency liquidation proceeding by means of an agreement with a majority of its creditors.

The plan is proposed by the debtor, and in some cases by the creditors if they represent at least 10% of the indebtedness, which is known as a competing plan. A competing plan can only be submitted in response to a procedure initiated by the debtor. Competing plans are not admissible if an independent expert certifies that the debtor's proposal ensures the payment of at least 30% of the unsecured claims. Upon request by the debtor at court filing, the judicial composition features an automatic stay on enforcement actions; priority for new financing (priority cannot, however, trump secured creditors); termination of executory contracts; intra- and cross-class cram-down; and a stay on recapitalisation obligations. After the approval of the plan by the required majority of creditors, it becomes binding only after judicial confirmation, which will rely on an expert's report certifying that (1) the financial and economic data used in the plan are truthful as to the current situation, and reliable as to the prospects, and (2) that the plan is feasible, and, if implemented, suitable to overcome the crisis.

The *accordo di restrutturazione dei debiti* (debt restructuring agreement) allows for the confirmation of an out-of-court agreement reached by the debtor with at least 60% by value of a company's creditors, supported by an expert's report confirming that the agreement can ensure the full payment of nonconsisting creditors. The key features of this debt restructuring agreement are a temporary stay on enforcement actions, which is automatically granted by the court upon request by the debtor; priority for new financing (not including secured creditors); and a stay on recapitalisation obligations.

The *accordo di ristrutturazione ad efficacia estesa* (debt restructuring agreement binding on dissenting creditors) also allows for the confirmation of an out-of-court agreement. The differentiating feature is that it is also binding on dissenting creditors. The debtor may form one or more classes of creditors on the basis of commonality of interest and an equivalent ranking. All creditors included in a class are bound by effects of the agreement if at least 75% of the total amount of creditors of the relevant class have consented; this results in the remaining 25% of non-consenting creditors being bound. There is no cross-class cram-down provision, meaning that if the 75% threshold is not reached in a certain class, the creditors remain unaffected by the agreement. The key features of this alternative debt restructuring agreement are the temporary stay on enforcement actions at the request of the debtor; an intra-class cram-down; priority for new financing (not over secured creditors, as in the *concordato preventivo*); and a stay on recapitalisation obligations.

In France, three main preventive restructuring procedures are currently used: the ad hoc mandate, the conciliation procedure and the safeguard procedure.

The French model seems to be one of the most advanced preventive restructuring models in the European Union, although it has continually reformed its legislative frameworks, sometimes without enough time to fully test the procedures in practice. Relative to many other jurisdictions, France has given an early priority to business recue, unless the business is in such a dire situation that liquidation could be the only foreseeable outcome. The French model of insolvency and preventive restructuring has, since the recession of the 1980s, tended to favour the rescue of businesses in order to preserve employment, at times to the detriment of creditors and saving functionally non-viable businesses. Three new insolvency laws were passed during the 1980s, one of which introduced a pre-insolvency process for the first time. These laws placed the focus on reorganisation, rather than liquidation with the aim of protecting employment. The focus on employment preservation has changed over the last couple of decades, however, the importance of job preservation is still a clear aim of the French rescue culture.

In the Netherlands, the only preventive restructuring procedure currently available to debtors is the suspension of payments. Besides the suspension of payment, there are no specific formal or pre-insolvency restructuring proceedings available. With that said, it is worth noting that, in practice, the Dutch bankruptcy proceeding is often used to facilitate the restructuring of insolvent debtors.

Germany and Denmark, on the other hand, do not currently offer debtors any preventive restructuring procedure, in the spirit or in accordance with the provisions of the Preventive Restructuring Framework Directive.

While Germany does not yet provide a truly preventive proceeding, their insolvency law does provide for the possibility of proposing a restructuring plan. The Insolvenzordnung of 1999 (the "InsO") provides a unified insolvency procedure with three paths, one of which is an insolvency plan through which there is a possibility to agree a plan with creditors. This can preserve the company as a legal entity by waiving certain residual claims owed to debtors of the company through the plan. The plan also aims for higher and quicker repayments to debtors than would otherwise be available in a liquidation.

Denmark`s current insolvency framework provides for a restructuring proceeding that aims to overcome insolvency by negotiating a plan, which consists of either a compulsory composition or for the debtor's assets to be sold as a going concern. Functional insolvency is, however, required to utilise this procedure.

6. Conclusions

National legislation on insolvency prevention procedures will need to be further adapted and amended in order to comply with the provisions of Directive 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks.

Although out-of-court debt restructuring agreements are not expressly governed by relevant Romanian legislation, the Insolvency Law and Judicial Practice encourage out-of-court debt restructuring agreements and pre-insolvency proceedings, which aim to safeguard companies through conventional debt restructuring, which is achieved through negotiation with creditors. Unfortunately, the protection of the debtor against potential foreclosure proceedings by non-compliant creditors is less effective. For this reason, most debtors prefer to request the opening of insolvency proceedings and propose a reorganization plan in order to fully benefit from the protection of the law against enforcement.

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Relationship between infringement proceedings applied by the European Commission and the WTO law

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Abstract

The analysis of the interaction between the legal order of the Union and the law of the World Trade Organization (WTO) would be incomplete without a critical assessment of how European judges and panels and the WTO appellate body contribute to the articulation between the two legal systems. The Court has rejected the direct applicability of WTO law in settled case-law. This merely means, however, that Member States, in an action for annulment, or the parties in a reference for preliminary ruling on the validity of an EU act, may not rely on the incompatibility of an EU act with the WTO Agreement. The possibility of basing infringement proceedings on an infringement of WTO law does not run counter to the aims and particular character of dispute settlement in the WTO and can ensure the effective enforcement of any negative ruling by the WTO dispute settlement bodies. If the European Union was not able to bring infringement proceedings against Member States in such cases, the internal implementation of international trade law would even be seriously jeopardised.

Keywords*: infringement proceedings, the WTO dispute settlement procedure, General Agreement on Trade in Services (GATS), freedom to provide services, freedom of establishment, education services, academic freedom, freedom to found educational establishments.*

JEL Classification: K22, K33

1. Introduction

By a recent judgment of the Court of Justice of the European Union (Court) of 6 October 2020 in the Case *Commission v Hungary*[2], the Grand Chamber admitted that the European Commission had failed to fulfill its obligations under the restrictive conditions imposed by the Hungarian state on foreign higher education institutions in Hungary. outside the Union. In fact, the legislative amendments of April 2017 brought by the Budapest Parliament to the Law on Higher Education, for the exercise of the activity on the territory of Hungary, foreign universities outside the European Economic Area (EEA), must prove i) the existence of an international convention between Hungary and their country of origin, subject to the withdrawal of the authorization. Moreover, in order to be

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[2] CJEU (Grand Chamber), C-66/18, *Commission v. Hungary*, 6 October 2020, EU:C:2020 :792.

able to provide educational services in Hungary, it is not enough for foreign academic institutions to be accredited in the country of origin, but they must also meet the requirement of ii) the effective organization of a higher education activity in the country of origin.

The Court had the opportunity not only to help strengthen the freedom to provide services (Directive 2006/123/EC, Art. 56 TFEU) and the freedom of establishment (Art. 49 TFEU) but, in particular, to rule on a different context than it has been so far on the issue of the direct effect of WTO law.

That is why the study aims not so much at a detailed description of the case, but at the analysis of those elements of added value of the judgment which may serve as a reflection on the articulation between Union litigation and WTO law. The consistent orientation of the Court to reject the direct effect of the GATT rules (General Agreement on Tariffs and Trade of 1947) and, subsequently, of WTO[3] law is well known. WTO agreements are not, in principle, one of the rules in the light of which the Court reviews the legality of acts adopted by the institutions of the Union. In other words, individuals cannot invoke WTO law to challenge the validity of Union acts, as not only actions for annulment of EU acts but also actions for damages against EU institutions (and thus raising the issue of Union liability for breach of WTO rules) are considered inadmissible. The strictly delimited nature of the corrections made to this concept (with the exception of *Fediol* and *Nakajima*) and their insufficient exploitation have only strengthened the impression of a rather hermetic attitude on the part of the Court.

Or, in the *Commission v. Hungary*, we are witnessing the breaking of this model of rejecting the direct effect of WTO law, and the Court is doing so in the context of infringement proceedings against Hungary, specifically in a judicial intrigue between the Commission and the Member States. The following consequence becomes immediately apparent: although individuals are denied the opportunity to invoke the WTO Agreements (and no less the rulings of the Dispute Settlement Body), the Court upholds the direct effect only when it can use it against Member States. This difference in treatment deserves to be questioned and is seen not only as "a double standard designed to protect the Union only but also as a Trojan horse that could be used to attack it secretly".[4]

The judgment is innovative not only in terms of broadening the debate between the relationship between the action for failure to fulfill obligations and WTO law, but also in terms of the autonomous examination of the Charter of

[3] As a result of the multiple trade negotiations, known as the Uruguay Round 1986-1993, a new institution was born to replace the GATT: WTO, which became operational on 1 January 1985. Unlike the IMF or the World Bank, the WTO is not a specialized institution of the UN, being conceived as an international organization with a universal vocation – see Cristina-Elena Popa Tache, *Introduction to International Investment Law*, ADJURIS – International Academic Publisher, Bucharest, 2020, p. 29.

[4] Fontanelli, Filippo, *GATS the way/I like it: WTO Law, Review of EU Legality and Fundamental Rights*, ESIL Reflections volume 10, issue 2 (2021), p. 1.

Fundamental Rights of the European Union (Charter). Following the line of argument expressed by the Opinion of Advocate General Juliane Kokott of 5 March 2020, the Court finds that Hungary has violated the General Agreement on Trade in Services (GATS) as well as the provisions on university freedom, freedom of establishment [art. 13, art. 14 para. (3) and art. 16 CDFUE]. This is not the first time that the protection of fundamental rights has been limited to justifying a restriction on the economic freedoms on which the internal market rests (as in *Schmidberger*[5]). Instead, the ruling carries at its core a subtle process by which individuals can break the boundaries imposed by the Court when they are not allowed to invoke the applicability of WTO law (for the purpose of annulling EU acts or obliging the Union institutions to make good the damage). Even if WTO agreements cannot be used by individuals as a standard of control over EU law, the Charter is a valid benchmark against which national measures that violate WTO rules can be censored.

2. Political and legal context

The background to the dispute is set in a political context whose description cannot be ignored. Following the entry into force of the legislative measures hastily adopted by the Hungarian authorities, the public could easily see that of the six foreign higher education institutions operating in Hungary at the time of the amendment of the Law on Higher Education, an activity subject to the authorization requirement, Central European University (CEU) was the only one that, due to its specific model, did not meet the new requirements.

The CEU was established in 1991 under New York State law in the historical context of the profound changes brought about by the fall of the communist regimes, and its stated aim was to encourage critical debate on the formation of new decision-makers in Central and Eastern European countries. The main funders of the institution are the "Open Society" foundations of the American businessman of Hungarian origin, George Soros. Given its specific purpose, the CEU, although holding an operating license issued by the US State (the so-called "Absolute Charter"), did not conduct any educational or research activities in the United States at any time. Opponents of the measure, as well as Prime Minister Viktor Orbán's political opponents, argue that the measure, which is not officially *ad personam*, is nothing more than a means by which the Hungarian government seeks to ban US universities from operating in Hungary. In order to continue to provide educational services in Hungary, the CEU should demonstrate compliance with the requirement of an international agreement with the Hungarian government; Given that the other American universities operating in Budapest

[5] ECJ, 12 June 2003, C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge împotriva Republik Österreich*, ECR 2003, p. I-5659.

(McDaniel College and the University of Notre Dame benefit from such an agreement), it is clear that the law actually aims to inactivate the CEU in Hungary.

The Commission therefore considers that the imposition of this first requirement on the international agreement concluded by Hungary with the country of origin of the foreign university (and which applies only to higher education institutions established in non-EEA third countries)

i) a violation of WTO law, more precisely of the principle of national treatment enshrined in art. XVII of the GATS (according to which domestic and foreign service providers must be treated in an equivalent manner);

ii) a violation of the academic freedom, of the freedom to set up educational institutions and of the freedom to undertake enshrined in art. 13, art. 14 paragraph (3) and art. 16 of the EU Charter of Fundamental Rights.

In addition to the condition regarding the prior conclusion of an international convention with the US government, there is also the requirement to effectively organize a form of higher education in the country of origin (where the institution is located). Even if the second requirement also applies to universities located in a Member State of the Union or in the EEA, the fact that the CEU is exactly where the two restrictive requirements overlap cannot be accidental[6] and explains the reasons why In the public debate, the measure received the nickname "*Lex CEU*".

As regards the condition which makes the provision of educational services on the territory of Hungary conditional on the pursuit of an effective educational activity in the country of origin, the Commission considers that the legislative measure constitutes:

i) a violation of the same art. XVII of the GATS on the national treatment rule

ii) an unjustified restriction both in the way of the free provision of services provided in art. 16 of Directive 2006/123/EC on services as well as the freedom of establishment enshrined in art. 49 TFEU in the exercise of the freedom to provide services and the freedom of establishment;

iii) a transgression of the fundamental rights of higher education institutions recognized in particular by art. 13 and art. 14 para. (3) of the Charter.

Before developing the fact that, for the first time in the particular context of the action for failure to fulfill obligations, the Court applied WTO law not as an instrument of interpretation but as an integral part of European Union law, an observation is required.

Companies located outside the Union do not enjoy the economic freedoms (enshrined in the founding Treaties and now the TFEU) which form the basis of the Union's internal market. The Commission initiated infringement proceedings against Hungary on the grounds that the Higher Education Act as amended on 4

[6] See Guardian, '*George Soros: Orbán turns to familiar scapegoat as Hungary rows with EU*', December 5, 2020, available at https://www.theguardian.com/world/2020/dec/05/george-soros-orban-turns-to-familiar-scapegoat-as-hungary-rows-with-eu, last accessed November 3, 2021.

April 2017 (hereinafter referred to as the Higher Education Act) was incompatible with the freedom of educational institutions to provide services and to settle anywhere in Hungary. EU, as well as academic freedom, the right to education and the freedom to undertake provided for in the Charter as well as with the legal obligations of the Union under international trade law (GATS under WTO law)[7]. Informed voices noted how in the Commission Press Release of December 7, 2017, the violation of GATS seemed to be "a further idea, coming after the Charter in the list of violated provisions. Then he stole the spotlight."[8]

Of course, the Cartesian scheme of thinking that emerges from the reading of the judgment allows the development of comments on different legal issues. We intend to explore the issue of the Court's jurisdiction to resolve an action for failure to fulfill obligations on grounds of breach of the GATS rules within the wider framework of the Union's international responsibility for national measures. We will then explore the times in which the Union judge proceeds to verify the validity of the action by reporting the non-fulfillment by Hungary of the obligations assumed by violating art. XVII from GATS. We will not address here the issues raised by the restriction on the freedom of movement of service providers based in EU Member States and the reasons which, in Hungary's view, would justify the imposition of the restriction: (i) protection of public order and fraudulent and (ii) ensuring the quality of educational offerings.

However, the limitation of the scope of the freedom of establishment and the freedom to provide services to the specific circumstances of the case is worth noting. Thus, according to the case-law of the Court of Justice, services provided for consideration by higher education institutions fall within the scope of the freedom of establishment when they are exercised in the host Member State in a stable and continuous manner by nationals of a Member State in a Member State. head office or secondary office located in another Member State[9]. Accordingly, the Court will hold that the requirement for the actual organization of a form of education in the State in which the institution is situated falls within the scope of Article 49 TFEU in so far as that requirement applies to a higher education institution established in another Member State other than Hungary and which organizes a form of education in the latter State in return for remuneration[10].

[7] Press Release, *Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law,* 7 December 2017, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5004.
[8] Fontanelli, Filippo, *op. cit.*, p. 2.
[9] See Opinion of Advocate General Juliane Kokott delivered on 5 March 2020, point 154, and the case-law cited under footnote 70.
[10] *Commission v. Hungary*, paragraph 163 of the judgment.

3. Jurisdiction of the Court to bring an action for failure to fulfill obligations for reasons alleging infringement of GATS

3.1. GATS as an integral part of Union law

As a preliminary point, we remind you that according to art. 258 TFEU may be the subject of proceedings for failure to fulfill obligations other than breaches of obligations and commitments under Union law.

According to art. 216 para. (2) TFEU "agreements concluded by the Union shall be binding on the institutions of the Union and on Member States". Apart from this article, there are no provisions containing further details on the relationship between international agreements and Union law. Instead, the Court has consistently held that international agreements concluded by the Union have been an integral part of the legal order of the Union since their entry into force[11]. In other words, these international agreements are binding not only on the Union but also on the Member States, as expressly provided in Article 216 para. (2) TFEU. Moreover, there are judicial precedents in which the non-fulfillment by the member states of the international obligations was the object of initiating against them the infringement procedure provided in art. 258 TFEU[12].

The Agreement establishing the WTO, of which GATS forms part, was therefore signed by the Union and subsequently approved by the Union on 22 December 1994 by Council Decision 94/800. It entered into force on 1 January 1995, so it appears that GATS (which promotes the liberalization of trade in services) is part of Union law. A breach of the GATS entitles WTO members to trigger the WTO dispute settlement mechanism, which remains the main success of the international trading system under the 1994 Marrakesh Accords. Violation of the GATS implies the responsibility of the Union, which is a member of the WTO and is responsible for the actions of the Member States. Restoring compliance with GATS rules should in such a situation be triggered by the activation against the Union of the specific (and "relatively esoteric"[13] mechanism for the less familiar) dispute settlement regulated by the Memorandum of Understanding on Rules and Procedures for Settlement. Disputes Agreement (hereinafter referred to as the Dispute Settlement Understanding) contained in

[11] See the case-law cited in AG Kokott's Opinion under footnote 14, ECJ, 30 April 1974, C-181/73, Haegeman, EU:C:1974:41, points 5 and 6; CJEU, 21 December 2011, C 366/10, Air Transport Association of America and Others, EU:C:2011:864, point 73, and Opinion 1/17 (EU ECG Agreement Canada) of 30 April 2019, EU:C:2019:341, point 117.

[12] See ECJ, 10 September 1996, C 61/94, Commission v. Germany, EU:C:1996:313), Judgment of 19 March 2002, Commission v Ireland (C 13/00, EU:C:2002:184), Judgment of 7 October 2004, Commission v. France (C 239/03, EU:C:2004:598), and Judgment of 21 June 2007, Commission v. Italy (C-173/05, EU:C:2007:362).

[13] Luff, David, *Le droit de l'Organisation Mondiale du Commerce. Analyse critique*, Bruylant - LGDJ, 2004, p. IX.

Annex 2 to the WTO Agreement. Consequently, according to art. 23 of the Dispute Settlement Understanding, WTO members wishing to obtain redress for infringements of WTO rules (in this case, GATS) may have recourse to dispute settlement proceedings before panels and the WTO Appellate Body.

3.2. Hungary's defense: the Court's incompetence

Please note that we will not refer here to the defenses made by Hungary for the inadmissibility of the action on i) the reason why the Commission granted too short time-limits in the pre-litigation phase, in the opinion of the State, to affect its right to defense; nor from the point of view of ii) the plea alleging breach by the Commission of its obligation of independence and impartiality by the fact that it resorted to initiating proceedings on purely political grounds. We will detail the arguments alleging the Court's lack of jurisdiction to resolve the present action for failure to fulfill obligations for reasons related to GATS infringements, considering that in this case the Commission not only wants to be the guardian of the treaties but also the "guardian of international law" going against its own practice and initiating proceedings without jurisdiction to do so, unable to act to compel Member States to comply with their international commitments.[14]

Hungary argues in the first place that, pursuant to Art. 6 letter (e) TFEU, the field of higher education does not fall within the competence of the European Union and it is therefore the Member States concerned that are individually responsible in this field for any breach of their GATS obligations.

He further claims that it is the sole responsibility of the WTO Dispute Settlement Body (DSB), namely the panels and the Appellate Body, to assess whether the Law on Higher Education is compatible with Hungary's GATS commitments.

Thus, assuming the Commission's application and the Court's independent interpretation of the GATS articles would infringe the exclusive competence of the WTO Dispute Settlement Body to interpret WTO agreements with the subsidiary risk of compromising the uniform interpretation of GATS.

Last but not least, in the view of Hungary, the Court has jurisdiction to examine the implementation of a WTO Agreement which has become an integral part of Union law only in relations between the Member States and the Union institutions, not in relations between a Member State and a third country. Consequently, third countries would have no interest in initiating the WTO dispute settlement procedure once the Luxembourg Court found that a Member State had failed to fulfill its GATS obligations.[15]

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[14] Stoppioni, Edoardo, *L'audience dans l'affaire Commission c. Hongrie (C-66/18) sur la «loi CEU»: le detour par le droit de l'OMC pour protéger la liberté académique*, available at https://blogdroiteuropeen.com, accessed on November 3, 2021.

[15] *Commission v. Hungary*, § 61-63.

3.3. The link between the exclusive competence of the Union in the field of the common commercial policy and the extended competence of the Member States in the field of education

Responding to the objections raised by the defendant State concerning the lack of jurisdiction, the Court recalls the settled case-law which has held that international agreements concluded by the Union form an integral part of their entry into force under EU law. As a result of the agreement establishing the WTO, of which GATS is a party, was signed by the Union, it is clear that GATS is also a party to the legal order of the Union. Therefore, when applying an international agreement internally, Member States fulfill an obligation to the Union which has assumed in its external relations the responsibility for the correct implementation of the agreement, as AG Kokott notes, referring to the case law of the Court.[16]

The first objection of incompetence raised by the Hungarian State (referred to in paragraph 59 of the judgment) calls on the Court to take a more complex hermeneutics and raises the question of the link between the exclusive competence of the Union in the field of the common commercial policy and the extended competence of the Member States.

The common commercial policy is one of the areas in which the Union has full and exclusive competence, with the Commission (and not the Member States) negotiating trade agreements and defending the EU's interests before the WTO Dispute Settlement Body, on behalf of all 28 Member States[17]. The GATS commitments, including those on the liberalization of private education services, are related to the common commercial policy as the Court refers to Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017.

After the historic Lisbon moment (1 December 2009) trade agreements with other countries of the world are subject to the common commercial policy, which means that the Union can negotiate, conclude and implement trade agreements with other countries of the world. Through the provisions of art. 207 TFEU (ex-article 133 TEC) the Union's external competence with regard to trade in services has been extended to the exclusive competence of the Union under the common commercial policy. It is true that art. 6 para. (1) of the TFEU affirms the extended competence of the States in the field of education, calling on the Union to carry out "actions to support, coordinate or complement the Member States".

However, the exclusive competence of the Union in the framework of the common commercial policy is without prejudice to the extended internal competences of the Member States in the field of education referred to by Hungary. As

[16] See point 54 of the AG Conclusions.

[17] For developments, see the European Union and the World Trade Organization, *Fact Sheets on the European Union*. European Parliament available at https://www.europarl.europa.eu/factsheets/ro/sheet/161/uniunea-europeana-si-organizatia-mondiala-a-comertului, accessed on November 3, 2021.

AG Kokott points out, this circumstance is taken into account in art. 207 para. (4) letter b) TFEU under which the Council can decide only unanimously on the conclusion of international agreements in the field of trade in education services (as well as in trade in health services, social services) "in the event that such agreements may the organization of these services at national level and to undermine the responsibility of the Member States for the provision of these services".

Extending this reasoning, the Court notes that the commitments made under GATS, including those relating to educational services provided by private institutions, fall within the exclusive competence of the Union. GATS differs in this respect from other trade agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, contained in Annex 1C to the WTO Agreement) which was concluded by the Community and the Member States in on the basis of a shared competence.

Consequently, Hungary's assertion that the Member States are individually liable for breach of their GATS obligations in the field of trade in education services is incorrect.[18]

3.4. The Union's international responsibility for Member States' breaches of WTO law

Responding to the objections raised by the defendant State concerning the lack of jurisdiction, the Court recalls the settled case-law which has held that international agreements concluded by the Union form an integral part of their entry into force under EU law. It follows that the GATS is part of the Union's legal order and that the GATS has been signed by the Union. Failure to comply with its international obligations, even by an act adopted by the Member States, entails the international responsibility of the Union which is bound by the principle of *pacta sunt servanda* enshrined in art. 26 of the Vienna Convention on the Law of Treaties.[19]

Violation of GATS even by a national measure entails the responsibility of the Union as a member of the WTO. Therefore, the Union can be sued by the activation by a third country of the WTO dispute settlement mechanism as in the case of the US-EU dispute (as well as France, Germany, Spain, the United Kingdom) which has become the longest transatlantic dispute over airline subsidies to Airbus.[20] The acts adopted by Member States within the scope of

[18] *Commission v. Hungary*, paragraphs 74 to 75 of the judgment.

[19] Potrivit art. 26 din Convenția de la Viena cu privire la dreptul tratatelor „*Orice tratat în vigoare leagă părțile și trebuie să fie executat de ele cu bună credință*".

[20] The US-EU trade dispute erupted in 2004, a year after Airbus overtook its US sales competitor; The US has sued the European Community over the illegality of subsidies received by the European Airbus Group since 1970 ($ 22 billion in funding) and the violation of GATT 1994 and the Subsidies and Countervailing Measures (SCM) Agreement; for details on the facts, the consultation, the complaint and the working procedures before the panel and the Appellate Body https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm. The Union soon responded by launching its

GATS can be imputed to the Union, so the Commission must be able to verify, through an appeal, that Member States are complying with these international obligations.

When applying an international agreement internally, Member States shall fulfill an obligation vis-à-vis the Union which has assumed in its external relations the responsibility for the correct implementation of the Agreement. This obligation is the expression of the obligation of loyal cooperation provided in art. 4 para. (3) TEU as noted by AG Kokott, referring to the case-law of the Court[21]. Although Hungary has regulatory procedural autonomy in the field of higher education, it will only be able to do so through regulations that do not violate WTO obligations.

4. Recognizing the direct effect of WTO law in the infringement procedure: a double standard?

4.1. Denial of the direct effect of WTO law on CJEU case law. Temperaments brought to the rule of principle

As regards the direct effect of WTO agreements, the issue has most often been raised in actions for annulment of acts of the Union institutions or in actions for damages brought against the institutions of the Union which have raised the issue of Union liability for breach of WTO rules.

For political reasons rather than risking an inconsistent position with regard to the legal order of the Union itself, the Court has generally been reluctant to accept the direct effect of WTO law. Thus, WTO agreements are not, in principle, one of the rules in the light of which the Court checks the validity of acts of the European institutions. The refusal of direct effect has been the Court's obvious tendency since early jurisprudence under GATT rules in International Fruit and being promoted in the WTO Agreement system in *Portugal v. Council*, *Van Parys* or *FIAMM*[22]. The philosophy behind rejecting the direct effect of WTO rules and, more recently, the rulings of the Dispute Settlement Body rests on the important place that negotiations between the parties continue to play within the procedure and the idea of not restricting the scope of action of States involved in finding negotiated solutions.[23]

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own complaint against the United States, claiming that Boeing had received $ 23 billion in subsidies from the United States https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds317_e.htm, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm.

[21] Conclusions of AG Kokott, point 54.

[22] For developments see Orga-Dumitriu, Gina, *CJEU and WTO Dispute Settlement Mechanism - Convergence or Divergence?*, *International Investment Law Journal*, vol. 1, Issue 1, February 2021, p. 26 et seq.

[23] See CJEC, 12 December 1972, C-21-24/72, *International Fruit*, in the Repertory of Case Law, 1972, p. 1220 et seq; In paragraph 21 of the judgment, it is stated that „this agreement, as regards

At the same time, the concern to preserve the political freedom of the European institutions, as recognizing the direct effect, would jeopardize its own bargaining power in international trade disputes. The temperaments in this line of thought have been established by the *Fediol* and *Nakajima* case-law, with the exceptions allowed being limited to i) the case where the Union legislation itself refers to WTO rules and ii) the situation in which the Union has fulfilled a specific obligation under the WTO. The two exceptions are strictly interpreted, and their insufficient application, even in cases where their use would be possible, is part of the traditional refusal to allow individuals and Member States to invoke WTO law to establish the illegality of acts adopted by the Union institutions. or to obtain compensation for incurring Union liability for breaches of WTO law.

4.2. Applicability of WTO law as a standard of assessment of a national measure adopted by a Member State for a declaration of failure to fulfill obligations

Given these precedents, at first sight, the attempt to apply GATS seemed unlikely to succeed[24]. While individuals and Member States cannot rely on WTO law to obtain the annulment of a Union act or compensation for damage caused by Union infringements of WTO rules, in the *Commission v. Hungary* the Court instead uses WTO law to hold that the national measure it was non-compliant with GATS as an integral part of Union law. The reflector on this distinction is very well placed by Advocate General Kokott in his opinion when he states: „ *(...) It is true that, citing the particular importance of the WTO negotiations, the Court has consistently rejected the direct applicability of WTO law. However, this only means that Member States, in an action for annulment, or in a request for an examination of its validity, cannot invoke the incompatibility of a Union act with the WTO Agreement.*"[25]

In its judgment of 6 October 2020, the Court acted for the first time in a non-compliance procedure using WTO law, using it not as an interpretative tool but as a standard of legality for the national measure adopted by a Member State. In other words, it recognized for the first time in an infringement procedure the direct effect of WTO law contrary to the guidance promoted by its previous case-

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the possibilities for derogation, the measures which may be taken in the event of exceptional difficulties and the settlement of disputes between the Contracting Parties". Subsequently, in *Portugal v. Council*, the Court upheld a new argument based on the principle of reciprocity: „The fact that the jurisdiction of one of the parties considers that certain provisions of the agreement concluded with the Community are directly applicable while the courts of the other party do not allow such direct applicability is not in itself capable of constituting an absence reciprocity in the implementation of the Agreement ", see ECJ, Case C-268/94 *Portugal v. Council*, paragraph 44.

[24] See Csongor István Nagy, *Case C-66/18*, „The American Journal of International Law", vol. 115:4, Cambridge University Press**: 15 October 2021**, p. 702, doi:10.1017/ajil.2021.45,

[25] AG's conclusions, point 60.

law on annulment actions and actions for damages brought against the Union institutions. It is true that there was a precedent in the *Commission v. Germany*[26], but it was a matter of invoking the GATT rules (the predecessor of the WTO) following the import of dumped dairy products into the Community in violation of the International Dairy Arrangement[27]. In addition, the situation was different from that created by Hungarian law, as in breach of GATT rules and the minimum price set by the international agreement, the injured parties were Community producers, while the restrictive conditions imposed by Hungary in April 2017 on those in the US) benefited universities in the EU Member States (given the requirement for an international convention between Hungary and the home country that does not apply to foreign educational institutions established in the EEA).

Returning to the applicability of GATS in the present case and the difference in treatment contained in the judgment of the Grand Chamber, the doctrine views with critical eye this approach which can „strengthen a double standard: is WTO law a standard of respect for EU law or not? It depends on who asks"[28]. In practice, while the Commission can use WTO law to hold Member States accountable, individuals and Member States cannot invoke WTO law to seek the annulment of Union acts or compensation for breaches of WTO agreements. This difference in treatment operated by the CEU judgment and supported by the argument that the Union is not a Member State is further called into question by recalling the „*Barnard Castle* distinction: a distinction by which a leader explains why the ban imposed on everyone is not apply to yourself. (...). The only exception is the exclusion of the possibility for Member States and individuals to invoke WTO law to annul acts of the Union. The general rule, on the other hand, benefits only the Commission. The EU's liability for breaches of WTO law remains to be assessed by the WTO, while the liability of Member States for breaches of WTO law can be claimed by the Commission and established by the Court."

Denying individuals and Member States the opportunity to invoke WTO law and DSB rulings on breaches of WTO agreements by the Union itself undermines the very effectiveness of WTO law. Is WTO law designed only to be used by the Union to penalize the conduct of Member States in breach of its international obligations? Does it also work for Member States and individuals when they request the invalidation of Union acts on grounds of non-compliance with WTO law or compensation for incurring Union liability for breach of WTO law? WTO law cannot be activated in actions for annulment or in actions for liability for the legal protection of the rights and economic interests of individuals/states; more precisely, does it not also serve as a standard for the assessment of legal

[26] Case C-61/94 Commission v. Germany, 10 September 1996, Directory of case law, 1996 – I, p. 3989, point 25.
[27] See Council Decision 80/271/EEC of 10 December 1979 on the conclusion of multilateral agreements following trade negotiations from 1973 to 1979 (JO L 71, 17.3.1980, p. 1).
[28] Fontanelli, Filippo, *op. cit.*, p. 6.

acts of the Union by international trade operators? Is this protection worth sacrificing in the name of the special importance of the WTO negotiations and the reason why the Union's political institutions should not be deprived of negotiating options?

5. Relationship between the non-compliance procedure and the WTO dispute settlement procedure

Another objection raised by Hungary to the Court's incompetence in resolving the action for failure to fulfill obligations on grounds of breach of the GATS concerned the existence of the WTO dispute settlement system and its specific nature. The Hungarian State considers that it is the sole responsibility of the DSB to assess whether, by adopting the CEU law, Hungary has breached its GATS obligations. To put it simply, in Hungary's view, this exclusive competence of the WTO DSB can only be understood as an impediment to the Court exercising its jurisdiction. In addition, as we have already pointed out, the exclusive competence of the DSB to interpret the WTO agreements would also be affected and third countries would no longer have an interest in initiating specific working procedures before the panels and the DSB Appellate Body.

As the European judge points out, this issue has not been resolved in the case law on the interaction between Union law and WTO law. As the WTO's DSB compliance check may be aimed at incurring the Union's international liability, the Commission's contention that the main purpose of initiating infringement proceedings against Hungary is precisely to avoid incurring the Union's liability for non-compliance with its international obligations is relevant. Furthermore, WTO members have an obligation to ensure compliance with WTO commitments within the domestic legal order, which means, in the Court's view, that the peculiarity of the existence of the WTO dispute settlement system not only has no effect on its jurisdiction. The Court pursuant to art. 258 TFEU but is fully consistent with the obligations of WTO members to ensure compliance with WTO law[29].

The Advocate General's argument states that "the possibility of bringing an action for failure to fulfill obligations in respect of a breach of WTO law may guarantee the effective enforcement of a possible conviction by the WTO Dispute Settlement Body" in other conditions "the implementation of international trade law being seriously compromised"[30]. At the same time, promoting non-compliance is also seen as a tool that can strengthen the Union's negotiating position vis-à-vis third countries[31].

In other words, and going back to Hungary's defense when it argues that the CJEU's incompetence arises, the following question arises: does a judgment

[29] *Commission v Hungary*, § 86.
[30] AG Kokott's conclusions, point 65.
[31] Idem, point 66.

of the Court of First Instance infringe and prevent WTO panels and the WTO Appellate Body from finding infringements of WTO agreements in proceedings between two Member States or at the request of a third State? Of course not, and the Advocate General points out that the judgment of the CJEU, being a purely internal instrument, can only be binding in the relationship between the Union and the Member State. In other words, the Court's assessment of the conduct of the defendant Member State is not binding on the other members of the WTO and cannot interfere with DSB's assessment. The correlative consequence can only be that neither the Union nor the Member State concerned can rely on the Court's assessment of its conduct in the context of WTO law in a procedure for failure to fulfill obligations to refuse to comply with WTO law in the event that the DSB finds non-compliance with WTO rules.

6. Conclusions

In an optimistic key, the ECU judgment, by recognizing the direct effect of WTO law, can be seen as having a real Pygmalion effect on the legal treatment of WTO law in the jurisprudence of the CJEU. For the first time in the particular context of the action for failure to fulfill obligations, the Court used WTO law not as an interpretative tool but as a standard for assessing the national measures taken by the Member States. From a more critical point of view, while the judgment in *Commission v. Hungary* validates the Commission's invocation of WTO law to hold Member States liable, individuals and Member States under the traditional approach cannot invoke WTO law as a legal basis in actions for annulment. adopted by the European institutions or to obtain compensation for damage caused by breaches of WTO rules by the Union (established by decisions of the DSB).

Although presented as a trade dispute (from the perspective of the applicability of WTO law), the cause was (perhaps more so!) A debate on fundamental rights as an opportunity to express a "new form of finesse in the use of Union law to protect fundamental rights."[32]

At the same time, considering that the CEU law is a measure of implementation of Union law (since GATS is an integral part of Union law) the immediate consequence is that it is within the scope provided by art. 51 paragraph (1) of the Charter[33]. The consequence of this is that EU acts and national measures taken by Member States can be verified from the perspective of compliance with the Charter even when they infringe WTO law. From this perspective, the judgment ingeniously opens a subtle way for individuals to break the boundaries imposed by the Court when they are not allowed to invoke the applicability of WTO

[32] Csongor István Nagy, *op. cit.*, p. 701.

[33] According to art. 51 para. 1. CDFUE on the scope of the Charter: "The provisions of this Charter shall be addressed to the institutions, bodies, offices and agencies of the Union, in accordance with the principle of subsidiarity, and to the Member States only if they implement Union law".

law (for the purpose of annulling EU acts or obliging the Union institutions to make good the damage). Even if WTO agreements cannot be used by individuals as a standard of control over EU law, the Charter is a valid benchmark against which national measures that violate WTO rules can be censored.

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