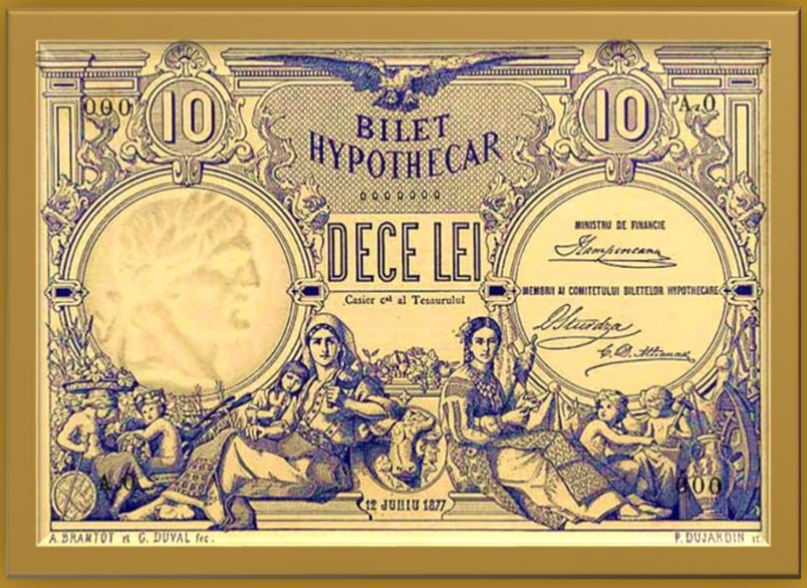
Ianfred Silberstein, Thierry Bonneau, Cristina Elena Popa Tache, Lucía Piazza Dobarganes, Katharina Muscheler, Christopher Hunt (eds.)

Banking Law in the 21st Century



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Banking Law in the 21st Century

Editors:

Ianfred Silberstein

Ianfred Silberstein is former director at the National Bank of Romania - Legal Department. He was an associate professor at the Bucharest University of Economic Studies (1990-1991), Romanian Banking Institute - Banking College/Faculty of Banking Management (from February 1, 1995 onwards), „Titu Maiorescu" University - Faculty of Law - master's course in banking law starting from the academic year 2005 - 2006 for several years and Banking Law Course - National Institute of Magistracy 2007. He is the president of the European Association of Banking and Financial Law, Romania branch, he is the honorary founding president of the Association of Legal Advisers in the Romanian Banking System and he has published a series of books (*Regimul juridic al institutiilor de credit/The legal regime of credit institutions*, C.H. Beck, 2019) and articles in banking law (*Viitorul băncilor centrale de Forrest Capie, Charles Goodhart, Stanley Fischer, Norbert Schnadt/The future of central banks by Forrest Capie, Charles Goodhart, Stanley Fischer, Norbert Schnadt,* „Revista de Drept Bancar și Financiar", no. 1/2021; *Cerințe prudențiale cu privire la organizarea și conducerea instituțiilor de credit/Prudential requirements regarding the organization and management of credit institutions*, „Revista de Drept Bancar și Financiar", no. 2/2020) being a member in the editorial board of several law journals (*International Investment Law Journal*, *Banking and Financial Law Journal* etc.).

Thierry Bonneau

Thierry Bonneau is professor in private law, Vice-President Research University Panthéon-Assas (Sorbona), Vice-President of the Academic Council, in charge of research, responsible for the quality/evaluation mission. He teaches Banking Law, Financial market Law, Banking and Financial European and international regulation. Considered as an expert in these fields, he is the author of several books and numerous articles on these subjects. He is a columnist for several law journals. One of the columns is related to financial European and international law. Panel member in several French (*Banque et droit*; *Bulletin joly bourse*; *Corporate Finance* and *Capital Markets Law Review*) and English (*International Financial Regulation Review (IFIN)*, which is published by BNA International) law journals and encyclopedia (*Encyclopaedia of Banking Law*, which is published by Lexisnexis UK), he is co-director of one of them (*Revue de droit bancaire et financier*) and a member of the Editorial Board of *International Investment Law Journal*. Thierry Bonneau is a board member of *European Society for Banking and Financial Law*. He also gives lectures in several countries (Germany, Can-

ada, Colombia, Dubai, United States, Hong Kong, Lebanon, Mauritius, Singapore, Iran, United Kingdom, Romania, Tunisia) and serves as a consultant for large international law firms, domestic or foreign companies. Main publications: *Information, et numérique et innovations* (en collaboration), Éditions Panthéon-Assas, 2020; *Régulation bancaire et financière européenne et internationale, Bruylant*, 5e éd. 2020; *Fintech et droit* (en collaboration), Revue Banque, 2e éd. 2020; *Droit bancaire*, Collection Domat, LGDJ,13e éd. 2019; *Droit financier* (en collaboration), Collection Domat, LGDJ, 2e éd. 2019; *Droit des marchés financiers* (en collaboration), Prix Jean-Baptiste Chevallier, 2002 (Institut de France), Economica, 2° éd. 2005; *Les offres publiques* (en collaboration), préface J-F. Lepetit, Editions EFE 1999, Législation «financière» et droit communautaire, in Le Code de commerce 1807-2007, Livre du bicentenaire, Dalloz 2007.

Cristina Elena Popa Tache

Cristina Elena Popa Tache is doctor in international law, specialized in international investment law and she also developed an intense legal research activity, as a scientific researcher at the *Institute of Legal Research of the Romanian Academy*. Cristina Popa Tache is *Vice-president of the European Association of Banking and Financial Law – Romania*, arbitrator and mediator registered in the lists of *VIAC - Vienna International Arbitral Center* and works as editor-in-chief for *International Investment Law Journal* and *Banking and Financial Law Review*, being the author of over 80 articles and scientific studies, most of them in the field of foreign investment. Cristina - Elena Popa Tache is co-editor with the French professor Thierry Bonneau of the volume *Innovation and Development in Business Law*, Adjuris – International Academic Publisher, Bucharest, Paris, 2021. She is author of the monographs *Introduction to International Investment Law*, Adjuris – International Academic Publisher, Bucharest, Paris, 2020 and *Dreptul internațional al investițiilor. Coordonate (International investment law. Coordinates)*, Coresi Publishing House 2019. Cristina - Elena Popa Tache is author of numerous articles in the field of international investment law, among which we list: *Principles of international law of investments, recognition and trajectory,* „Juridical Tribune – Tribuna Juridica", volume 7, special issue, October 2017; *The strategic importance of international investments in the field of mining and international law,* „Juridical Tribune – Tribuna Juridica", volume 7, issue 1, 2017; *The obsolescence of the Court, the evolutions of its application in the new Civil Procedure Code and the shortcomings of the Law, pendig the reform,* „Civil Procedure Review", Volume 8, no. 3/2017; *Repere istorice în dreptul internațional al investițiilor. Direcții de cercetare* (*Historical landmarks in international investment law. Research directions*), „Pandectele Romane" no. 12/2016.

Lucía Piazza Dobarganes

Lucía Piazza Dobarganes currently serves as head of the Single Supervisory Mechanism (SSM) affairs unit in the Banco de España's legal department. Prior to joining the Banco de España, she worked for the prestigious law firm Cuatrecasas, where her practice focused on corporate and commercial law. She holds a double degree in law and business administration from Universidad Pablo de Olavide of Seville and an LL.M. from Columbia Law School. She is admitted to practice in Spain and in New York.

Katharina Muscheler

Maître en droit, studied law at the universities of Munich and Paris. Katharina Muscheler is currently working as a senior legal counsel in the financial law division at Deutsche Bundesbank in Frankfurt and has contributed to the commentary "Europäische Währungsunion" edited by Helmut Siekmann.

Christopher Hunt

Christopher Hunt studied law at the universities of Jena and Paris, specialising in public law. He is currently working as a legal expert in the financial law division at Deutsche Bundesbank in Frankfurt with a focus on securities and digitalisation.

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Contributions to the 14th International Conference
Contemporary Approaches in Banking and Financial Law
April 15, 2021, Bucharest

ADJURIS
International Academic Publisher

Bucharest, Paris, Calgary 2021

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ISBN 978-606-94978-8-3 (E-Book)

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Editing format .pdf Acrobat Reader
Bucharest, Paris, Calgary 2021
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Cover - the first paper money notes in Romania are the mortgage notes, issued according to the law of June 12, 1877, with the nominal values of 5 lei, 10 lei, 20 lei, 50 lei, 100 lei and 500 lei, by the Ministry of Finance, in order to obtain the funds. necessary to financially support the War of Independence.

Preface

Editors
PhD. ***Ianfred Silberstein****, president of the European Association of Banking and Financial Law, Romania branch*
Professor ***Thierry Bonneau***
Paris II Panthéon-Assas University
Researcher ***Cristina Elena Popa Tache***
Institute of Legal Research of the Romanian Academy
Lucía Piazza Dobarganes, *head of the Single Supervisory Mechanism (SSM) affairs unit in the Banco de España's legal department*
Katharina Muscheler*, senior legal counsel in the financial law division at Deutsche Bundesbank in Frankfurt*
Christopher Hunt, *legal expert in the financial law division at Deutsche Bundesbank in Frankfurt*

This volume contains the scientific papers presented at the 14th International Conference „Contemporary Approaches in Banking and Financial Law" that was held on April 15, 2021, online on Zoom. The conference is organized by the *European Association of Banking and Financial Law – Romania* together with the *Society of Juridical and Administrative Sciences*. More information about the conference can be found on the official website: www.bankingandfinanciallaw.adjuris.ro .

The scientific studies included in this volume are grouped into editor's note with presentation of keynote speakers panel remarks and two chapters:

- *Exercise of banking activity, operations and contracts.* The papers in this chapter refer to: banking officer and criminal law; remuneration of bankers: legal questions from the supervisory perspective; the professionals' duty to inform versus the duty to advise the consumers in the field of banking services; the development of the resolution framework and the establishment of the Corporation for Deposit Insurance in South Africa; the escrow contract, a mechanism for guaranteeing and securing private and public contractual relations; a contemporary overview of the factoring agreement.
- *Activity, organization and functioning of credit institutions. Financial law topics.* This chapter includes papers on: registration of personal data in the record system of the Credit Bureau - an analysis of non-unitary case law; debt moratorium during the state of emergency and the state of

alert; intensification of the anti-money laundering (AML) regulation and its negative impacts on payments industry; protection of the right to redemption of shares of banking company reorganized by merger – internal rules and European case law; jurisdiction of the Court of Justice of the European Union on implementing monetary policy - case-law analysis; corporate financing.

This volume is aimed at practitioners, researchers, students and PhD candidates in banking law, who are interested in recent developments and prospects for development in this field at international and national level.

We thank all contributors and partners and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalization and the rise of dynamic elements in banking law.

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Editor's note about the 14th International Conference „Contemporary Approaches in Banking and Financial Law" took place in Bucharest, Romania, on 15 April 2021

Associate scientific researcher **Cristina Elena POPA (TACHE)**[1]

Abstract

The 14th Banking and Financial Law Conference took place in Bucharest, Romania, on 15 April 2021, which I had the privilege of moderating. It seems that banking law has never faced such great challenges and all this can be done only with specialized lawyers very well trained in banking and financial field. A country that does not have banking guidance from its own team of elite specialists in banking law will not find the way to progress because it will not be able to identify the best solutions. For this purpose, a very important approach is the exchange of experience through conferences, working groups, research committees, the writing of studies, articles or the elaboration of research programs in this field.

Keywords: *banking law, financial law, international law, international conference.*

JEL Classification: K22, K23, K33, K34

1. Introductory considerations

The 14th Banking and Financial Law Conference brought together a distinguished group of central bank lawyers, leading academics and former public officials to exchange views on the topic "**Contemporary Approaches in Banking and Financial Law"** to prove once again that only through an ecosystem of very good laws and contracts, the regulation of the functioning of the entire banking mechanism could cover problems such as: the digital environment; the concept of open bank and legal order in the eyes of consumers and businesses side; architecturing a legal digital identity system; building a legal system in which governments take over the incorporation of open banking principles into their regulatory framework; confidentiality and data protection and cyber security; government policy roadmaps and innovation by constantly updating the entire national norm to the international one.

The opening of the Conference *"Contemporary Approaches in Banking and Financial Law"* was given by the following personalities who had the floor:

- Mr. Ianfred Silberstein, President of the European Society for Banking and Financial Law, Romanian Branch;
- Mrs. Anca Dana Dragu, President of the Romanian Senate;

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

- Mr. Ilie-Dan Barna, Vice Prime Minister in the Government of Romania represented by Mr. Marius Vulcan;
- Mr. Roberto Ferretti, President of the European Society for Banking and Financial Law.

In the continuation of this editorial note you will discover several introductory lines to the present volume containing the Keynote speakers Panel remarks. Their very interesting analyzes are presented below, with the mention that the points presented were developed extensively oratorically during the conference.

2. Keynote speakers panel remarks

2.1. Regulations regarding the shareholders of a credit institution

*(PhD. **Ianfred Silberstein**, former director of the legal department of the National Bank of Romania and founding member of the Association of Legal Advisers in the Romanian Banking System)*

The rules enable the National Bank of Romania (NBR) to assess the information on the source of funds to be used for the proposed acquisition, including both the activity that generated the funds and the means by which they were transferred and, at the same time, the Supervisory Authority to assess whether could give rise to an increased risk of money laundering or terrorist financing. As can be seen, the recent regulation of the NBR provides the most relevant information about the significant shareholder so that there is a more accurate picture of his personality. In this way, by assessing the significant shareholder as responsibly as possible, the possibility of knowing him as concretely as possible will be created, so that the Supervisory Authority will be able to assess in all aspects the personality of the significant shareholder and give such a substantial assessment, as well as its responsible in the conditions of prudence in the spirit of legality.

A. *Criteria for evaluating significant shareholders*. The new regulation from the end of 2020 expressly provides criteria for assessing significant shareholders regarding its reputation and financial soundness, as well as the bank's compliance with potential requirements, or identifying the existence or absence of suspicions of money laundering or terrorist financing. Regarding the analysis of his reputation, elements related to his integrity and professional competence are taken into account. The integrity requirements concern both the level of qualification but also its involvement in the management of the bank or the influence it intends to exert on the bank.

This assessment also concerns the actual beneficiaries of the significant shareholder. In the case of a legal person, the integrity requirement must satisfy both that person and the natural persons who manage it. It demonstrates the constant action of the supervisory authority so that the integrity requirement can be

considered to be met in accordance with all aspects of the assessment requirements.

B. ***The NBR mechanism through which it assesses integrity.*** The mandatory provision entitles the NBR to always check the significant shareholder integrity requirement for any changes or information that were not known by the authority that made the previous assessment. The NBR has the possibility to rely on the conclusions of the previous assessment when establishing the need for information but must perform a full verification of the integrity requirement which, provided there are reasonable grounds, may lead to different results from the previous one.

In this situation the NBR must inform the authority that made the previous assessment. Explicitly in art. 24 shows that a significant shareholder is considered to meet the integrity requirement if there are no objective reasons to suggest otherwise when there is relevant information on the factors or elements provided by art. 25-27 of the NBR Regulation no. 12/2020.

The regulatory aspects regarding the shareholding of a Romanian entity credit institution are included both in GEO 99/2006 regarding credit institutions and capital adequacy, and in the NBR Regulation no. 12/2020 on the authorization of credit institutions and changes in their situation. Thus, at the end of 2020, a normative act was issued for all changes whose object of activity is the authorization of credit institutions as well as changes in their situation. This normative act completes the legal framework contained in GEO no. 99/2006, offering an adequacy to it, taking into account the concrete conditions currently existing so as to ensure an adequate consolidation of the credit institution in accordance with the prudential requirements imposed on at Community and national level.

The National Bank of Romania assesses the information on the source of funds to be used for the proposed acquisition, including both the activity that generated the funds and the means by which they were transferred and, at the same time, the Supervisory Authority assesses whether this could at increased risk of money laundering or terrorist financing, and must verify that:

a) the transfer of funds used for the proposed acquisition shall be initiated through financial institutions effectively supervised to combat money laundering and terrorist financing by the competent authorities of the European Union or third countries which are not on lists published by the European Commission or other international bodies. countries with a high degree of risk or with major deficiencies in the national regime for preventing and combating sb and ft;

b) the information on the activity that generated the funds, including the history of the economic activities of the significant shareholder or on the financing scheme of the qualified holding is credible and in accordance with the value of the proposed acquisition;

c) the funds have an uninterrupted support of documents from their origins or other information that justifies their legal origin.

As can be seen, the recent regulation of the NBR provides the most relevant information about the significant shareholder so that there is a more accurate picture of his personality.

In this way, by assessing the significant shareholder as responsibly as possible, the possibility of knowing him as concretely as possible will be created, so that the Supervisory Authority will be able to assess in all aspects the personality of the significant shareholder and give such a substantial assessment, as well as its responsible in the conditions of prudence in the spirit of legality.

C. *Conclusions*. As can be seen, the recent regulation of the NBR provides the most relevant information regarding the significant shareholder so that there is a more accurate picture of his personality.

In this way, by assessing the significant shareholder as responsibly as possible, the possibility of knowing him as concretely as possible will be created, so that the Supervisory Authority will be able to assess in all aspects the personality of the significant shareholder and give such a substantial assessment. , as well as responsible for it in the conditions of prudence and in the spirit of legality.

2.2. The digital finance package - EU Commission, Septembre 24, 2020 (*professor of law* ***Thierry Bonneau****, University Panthéon-Assas - Paris 2, France)*

The presentation included extensive remarks as follows:

1. Introduction

- Four proposals: 3 regulations and 1 directive
- EU consultation 19 December 2019-19 March 2020
- The key distinction :
    - assets qualified as financials instruments and classified as crypto - assets because they are based on the DLT
    - assets which are crypto - assets without being financial instruments
- The DLT has no effect on the substance of rights attached to crypto – assets

2. The market in crypto-assets

Objectives of the proposal:

"(a)transparency and disclosure requirements for the issuance and admission to trading of crypto-assets;

(b)the authorization and supervision of crypto-asset service providers and issuers of asset-referenced tokens and issuers of electronic money tokens;

(c)the operation, organization and governance of issuers of asset-referenced tokens, issuers of electronic money tokens and crypto-asset service providers;

(d)consumer protection rules for the issuance, trading, exchange and custody of crypto-assets;

(e)measures to prevent market abuse to ensure the integrity of crypto-asset markets".

A – Categories of crypto-assets and regime of offers on these assets.

Three sub-categories based on the potential functions of crypto-assets (digital access to goods or services, means of payment, means of exchange):

- Crypto-assets other than ART and E-MT: utility tokens; no prior authorisation for the offers, white paper;
- Asset-referenced tokens (ART): prior authorisation, duties of issuers, reserve of assets, threshold crossing, Significant asset-referenced tokens (SART);
- E-money tokens (e-MT): general requirements and specific provisions applicable to Significant e-money tokens (Se-MT).

B – Crypto-assets service providers.

List crypto-asset services:

(a) the custody and administration of crypto assets on behalf of third parties;

(b) the operation of a trading platform for crypto assets;

(c)the exchange of crypto assets for fiat currency that is legal tender;

(d)the exchange of crypto-assets for other crypto-assets;

(e)the execution of orders for crypto-assets on behalf of third parties;

(f)placing of crypto-assets;

(g)the reception and transmission of orders for crypto-assets on behalf of third parties;

(h)providing advice on crypto-assets".

3. Definitions

The custody and administration of crypto-assets on behalf of third parties means safekeeping or controlling, on behalf of third parties, crypto-assets or the means of access to such crypto-assets, where applicable in the form of private cryptographic keys; the operation of a trading platform for crypto-assets means managing one or more trading platforms for crypto-assets, within which multiple third-party buying and selling interests for crypto-assets can interact in a manner that results in a contract, either by exchanging one crypto-asset for another or a crypto-asset for fiat currency that is legal tender;

Chapter 1: Authorization of competent Authorities and register established by ESMA;

Chapter 2 and 3: Obligations for crypto-assets service providers:

Obligations for all crypto-assets service providers;

Obligations specific to some services;

Chapter 4: Threshold crossing

C – The prevention of market abuses involving crypto-assets;

D – The competent authorities, the EBA and the ESMA.

Competent Authorities: supervisory and investigative powers, power of sanction.

EBA: its powers vis-à-vis issuers of SART and Se-MT.

4. The market infrastructures based on DLT

'DLT multilateral trading facility' or 'DLT MTF', which means a 'multilateral trading facility', operated by an investment firm or a market operator, that only admits to trading DLT transferable securities and that may be permitted, on the basis of transparent, non-discretionary, uniform rules and procedures, to:

(a) ensure the initial recording of DLT transferable securities;

(b) settle transactions in DLT transferable securities against payment; and

(c) provide safekeeping services in relation to DLT transferable securities, or where applicable, to related payments and collateral, provided using the DLT MTF.

DLT securities settlement system', that is to say a securities settlement system, operated by a 'central securities depository', that settles transactions in DLT transferable securities against payment.

Pilot regime for crypto-assets considered as financial instruments: optional regime and temporary derogations to provisions laid down in MIFIF2 and CSD regulation.

Proposal covering non-liquid securities and whose market capitalisation is not too big.

Compensatory measures.

5. The digital operational resilience for the financial sector

Proposal constituting lex specialis to Directive of 6 July 2016.

Objectives of the proposal: "This Regulation lays down the following uniform requirements concerning the security of network and information systems supporting the business processes of financial entities needed to achieve a high common level of digital operational resilience, as follows:

Requirements applicable to financial entities in relation to:

– Information and Communication Technology (ICT) risk management;

– reporting of major ICT-related incidents to the competent authorities;

– digital operational resilience testing;

– information and intelligence sharing in relation to cyber threats and vulnerabilities;

– measures for a sound management by financial entities of the ICT third-party risk.

Requirements in relation to the contractual arrangements concluded between ICT third-party service providers and financial entities;

The oversight framework for critical ICT third-party service providers when providing services to financial entities;

Rules on cooperation among competent authorities and rules on supervision and enforcement by competent authorities in relation to all matters covered by this Regulation".

"'Digital operational resilience' means the ability of a financial entity to build, assure and review its operational integrity from a technological perspective

by ensuring, either directly or indirectly, through the use of services of ICT third-party providers, the full range of ICT-related capabilities needed to address the security of the network and information systems which a financial entity makes use of, and which support the continued provision of financial services and their quality".

"'ICT risk' means any reasonably identifiable circumstance in relation to the use of network and information systems, - including a malfunction, capacity overrun, failure, disruption, impairment, misuse, loss or other type of malicious or no malicious event - which, if materialized, may compromise the security of the network and information systems, of any technology-dependent tool or process, of the operation and process' running, or of the provision of services, thereby compromising the integrity or availability of data, software or any other component of ICT services and infrastructures, or causing a breach of confidentiality, a damage to physical ICT infrastructure or other adverse effects".

6. The adjustments of existing legislations to "Digital finance package.

CRD4, SEPA2, UCITs, FIA, MIFID2.

Main modifications affect MIFID2:

For instance, the definition of financial instruments, mentioned in article 4, §1, point 15, of MIFID 2, is amended so as to indicate that the financial instruments listed in section C of annex 1 include the instruments issued by means of DLT.

2.3. Implications of the Global Digital Economy in Financial Regulation and Supervision (*professor of administrative law* ***José Carlos Laguna de Paz****, University of Valladolid, Spain)*

This presentation highlighted remarks such as:

1. Introduction

This article analyzes authorities' priorities and major concerns and discusses what is needed to go forward. In Europe, the European Commission (EC) was the first body to issue a broad consultation paper assessing measures to foster the development of technology-based innovation for financial services. This document published in March is the outcome of the high-level public-private dialogue established by the EC in 2015, which resulted in the creation of an inter-services FinTech Task Force. Following the EC, the European Parliament adopted a resolution on Fintech and the influence of technology on the future of the financial sector, and more recently the European Banking Authority (EBA) stepped into the debate by issuing a discussion paper on its approach to fintech, which will serve to guide the EBA's work in the months to come. Although narrower in its scope, a recent publication of the European Central Bank (ECB) is also worth highlighting, as it represents a first glimpse of the supervisor's mindset. The ECB has recently drafted a guide to clarify the process of assessing new banking applications for institutions with a fintech business model.

2. Application of new technologies to the financial sector

3. Provision of financial services by big tech

The new entrants, FinTech and especially BigTech (i.e., large technology companies that expand toward the direct provision of financial services or products) should gain market share because of efficiency gains rather than by bypassing regulation or monopolizing the interface with customers. Most institutions have followed the FSB's definition of FinTech, which is inclusive. However, often they identify fintech firms with smaller new entrants, without encompassing banks or big technological companies. This seems inconsistent with the definition and may lead to an underestimation of the real impact of the phenomenon.

4. How to deal with crypto-assets, cryptocurrencies and digital stable coins?

5. Central bank digital currency

6. Conclusions

The efforts of the different bodies to outline the current landscape and start envisaging how this may affect their mandate as regulators and supervisors is much welcomed, as these institutions are a central piece in the new fintech ecosystem. Still, most often their analysis is still at a high level and a lot of work needs to be done to materialise concrete actions. Given the global dimension of most innovations and the increased interconnectedness of the financial system, international cooperation is a must. The co-operation of competition and prudential authorities should be extended to encompass the units responsible for consumer protection and data management.

2.4. The German Federal Constitutional Court's judgment on the ECB's Public Sector Purchase Programme: An attempt to prevent the redefinition of monetary policy by the ECB? *(PhD. jur.* ***Dimitris Tsibanoulis****, President AEDBF – Greece, Senior Partner Tsibanoulis & Partners)*

This presentation included remarks as follows:

What is "monetary policy"/TFEU/CHAPTER 2- MONETARY POLICY Article 127:

1. *The primary objective of the ESCB* shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. *The basic tasks to be carried out through the ESCB* shall be:

— to define and implement the monetary policy of the Union, [...]

TFEU/CHAPTER 1 - ECONOMIC POLICY/Article 120:

Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the TEU, and in the context of the broad guidelines referred to in Article 121(2).

TEU/Article 3:

1. The Union's aim is to promote peace, its values and the well-being of its peoples. […]

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

Monetary policy objectives and strategy:

The "unconventional" monetary policy tools used by the ECB:

The Asset Purchase Programmes of the ESCB:

➢ In the course of the crisis, the ESCB has acted several times to support the EU Member States and banking systems in financial distress by purchasing debt instruments.

▪ The Securities Market Programmes (SMP) [2010].

▪ The Outright Monetary Transactions (OMT) [2012]/

▪ The Public sector purchase programme (PSPP) [2015]/The Eurosystem's Quantitative Easing.

➢ The Pandemic emergency purchase programme (PEPP).

Bundesverfassungsgericht/German Federal Constitutional Court/ Judgment of 05 May 2020 - 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

• The Second Senate of the Federal Constitutional Court granted several constitutional complaints directed against the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB).

• The review undertaken by the CJEU with regard to whether the ECB's decisions on the PSPP satisfy the principle of proportionality is not comprehensible; to this extent, the judgment was thus rendered ultra vires.

Prohibition of monetary financing

▪ TFEU - Article 123

1. Overdraft facilities or any other type of credit facility with the ECB or with National Central Banks in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

▪ STATUTE OF THE ESCB AND OF THE ECB

Article 18 - Open market and credit operations 18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national

central banks may:

- operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;

- conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.

18.2. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.

The compatibility of OMT and PSPP with primary Union law -Constitutional issues

• The risk of circumvention of Art. 123 TFEU through the OMT and PSPP – Prohibition of monetary financing and non-bail out.

• The alleged equivalence of intervention in the secondary market under the OMT and the PSPP and the purchase of Government bonds on the primary markets.

Constitutional issues

• Does the ECB interfere in the area of Member States economic policy competence?

• The definition of monetary policy.

• Price stability.

• Delimitation of competences between the ECB and the Member States.

• The new unconventional monetary policy measures during the crisis as instruments to tackle the currency denomination risk and to establish an efficient monetary policy transmission mechanism in the fragmented Eurozone.

• The redefined content of monetary policy.

• The recent challenge of PEPP.

Judgment of the Court of Justice of the European Union [CJEU] (Grand Chamber) of 16 June 2015 in Case C-62/14 (Gauweiler).

Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of Protocol (No 4) on the Statute of the ESCB and of the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release to which reference is made in the minutes of the 340th meeting of the Governing Council of the European Central Bank (ECB) on 5 and 6 September 2012.

Judgment of CJEU (Grand Chamber) of 11 December 2018 in Case C-493/17 (Weiss).

Request for a preliminary ruling under Article 267 TFEU from the Bundesverfassungsgericht (Federal Constitutional Court, Germany).

▪ Is the mandate of the ECB exceeded?

▪ Delimitation of the Union's monetary policy.

▪ The risk of negative consequences and effects of the Programmes on economic policy domains: alleged reduced impetus (for Member States) to pursue a sound budgetary policy.

▪ Holding bonds until maturity and purchasing bonds at a negative yield to maturity CJEU judgment in Case Weiss.

▪ The indirect results of the Programmes in the domain of economic policy.

▪ The utilization of the very instrument of government bonds purchase for economic policy purposes from other European mechanisms.

▪ Proportionality in relation to the objectives of monetary policy.

▪ The GFCC's pre-perception that the ECB, through the Programmes, interpretatively transforms monetary policy, extending it to economic policy areas.

The GFCC reproaches

▪ alleged methodological inconsistency: the CJEU's decision lacks a legal basis.

▪ the CJEI had to weight the "dosage" of each ingredient, monetary policy and economic policy, in the mixture of the PSPP policy tools.

▪ the ruling of the EUCJ in the Weiss case lacked a proper proportionality assessment.

▪ thus, the GFCC declared the EUCJ ruling ultra vires and, therefore, not legally binding in Germany.

PSPP participates in both monetary and economic policy. This alone does not constitute a breach of primary Union law and Article 123 of the TFEU.

• PSPP's impact on economic policy.

• CJEU granted the ECB a broad discretion, taking into account the need to redefine "monetary policy" with regard to the tools that may be used to implement it, particularly after the international financial crisis.

• GFCC reasoning.

• The proportionality principle: The 'dosage' in the policy mix/ Weighting the two ingredients, monetary effects and economic policy effects.

The ultra vires[2] argument

▪ The risk of creating a European legal Babel.

▪ A rift in EU law?

The GFCC

• attempts to put the brakes on the new unconventional monetary policy Eurosystem measures launched by the ECB during the global financial crisis, and the sovereign debt crisis in particular, paving the way for a redefinition of monetary policy.

• tries to hamper any involvement on the part of the ECB in European

[2] Ultra vires (Latin: "beyond the powers") is a Latin phrase used in law to describe an act which requires legal authority but is done without it. Its opposite, an act done under proper authority, is intra vires ("within the powers").

economic policy matters through the launch of market driven monetary policy measures, which may have a collateral economic impact on the Eurozone.

2.5. (How much) Can the judge intervene in banking contracts? (*associate professor PhD.* ***Radu Rizoiu****, Faculty of Law, University of Bucharest, Romania)*

The main points of these remarks were:
Hardship revisited [Judicial Intervention]
• Hardship was here all the time [CCR 623/2016 §95];
• RCC [art. 1271] only codified existing doctrine;
• Actually, NCC copied DCFR [art. 1:110];
• Hardship is more than an accident [CCR 623/2016 §101];
• Hardship is the form of the good faith rule [CCR 623/2016 §94].
Effects of hardship:
• Obligation of the courts [CCR 623/2016 §119-120];
• Step-by-step approach [CCR 623/2016 §94];
• obligation for the parties to renegotiate an equitable adaptation;
• failure to do so: the court will order the equitable adaptation;
• if the contract is no longer viable: the court will rule on termination.
The easy way?
• Non-intervention policy [C-618/10 Banco Espanol de Credito];
• Negotiation as mother of all solutions [ICCJ II 3913/2013].
The wise way!
• Guided negotiations [C-269/19, Banca B. SA];
• How detailed the guidelines?
The new way.
• Court intervention as a rule [art. 4(4) L77/2016];
• Is the court under an ex officio obligation to adapt the contract?
• Is my dream still possible?

2.6. The current conditions of debt take over payment in the procedure of credit agreements (*lecturer* ***Doru Trăilă****, Faculty of Law, University of Bucharest, Romania)*

The presentation focused on:
The premises of Law no. 77/2016

- Numerous credit agreements have been concluded in currencies whose exchange rates have significantly increased.
- As a result of the exchange rate increase, monthly payments have risen and the credit became more and more burdensome.
- A legislative intervention was required to shield the debtors from the abuses of claim transfers.

- The purpose is to share, as equitably as possible, the risk of the devaluation between the creditor and the debtor.

The effects of Law nr. 77/2016

- The legislator intervened in the contracts concluded by the parties (bank and borrower.
- The way in which debt resulting from credit agreements is cleared is changed over the will of the parties.
- The right of the borrower (consumer) are extended, being offered the possibility to give in payment one or more mortgaged properties in order to clear the debt.
- The creditor`s possibilities in regard to recovering the borrowed sums, since the enforcement procedure (which is carried out by the bailiff, on the debtor`s own expense) is impossible.
- Giving in payment can be made, exceptionally, without the consent of the creditor.

Creditor`s drawbacks

- As a result of the give in payment procedure, the creditor receives properties in lieu of the borrowed sums, without his consent.
- Properties have to be harnessed, at a value which is often inferior to the borrowed amounts, through procedures which entail additional costs: property evaluation, real estate agents etc.
- Legal obligations deriving from being the owner of the property, which he receives by law: taxes, fees, tariffs, maintenance and conservations of the property etc.

Eligibility conditions for the debtor

Being a consumer

Borrowed amount < 250.000 euro

For acquiring/guaranteed with a property with housing purposes

Lack of penal convictions in regard to the credit

Fulfilment of the hardship condition, established through Law nr. 52/2020.

Article 4 paragraph (1) of Law nr. 77/2016, as modified by Law nr. 52/2020:

„(1) In order to clear the debt and its accessories deriving from a credit agreement through giving in payment, the further cumulative conditions must be fulfilled:

a) the creditor and the consumer are part of the categories instituted by article 1 paragraph 1, in the way that they are defined by particular legislation;

b) the amount borrowed, at the time of granting, was not bigger than the lei equivalent of 250.000 euro, amount calculated at the exchange rate published by the National Bank of Romania in the day the contract was concluded;

c) the credit was contracted by the consumer with the purpose of buying, building, expanding, fitting, rehabilitating a property with housing purposes or,

regardless of the purpose of contracted, is guaranteed with at least one property with housing purposes;

d) the consumer was not convicted through a final judgement for crimes related to the credit for which he requests the application of the present law;

e) the hardship condition is met".

Modifications brought by Law nr. 52/2020 – Hardship

Legal hardship is expressly regulated as an irrebuttable presumption.

The two conditions for hardship to take effect are the increase of over 52,6% of the price of the contract and the increase of over 50% of the monthly payments.

If all the other conditions are met, the 52,6% threshold becomes a marker for hardship taking effect.

Article 4 of Law nr. 77/2016, as modified by Law nr. 52/2020:

„(11) It constitutes hardship if:

a) while the credit agreement is being carried out, the exchange rate applicable in order to buy the currency of the credit has had, from the date of sending the notice, an increase of over 52,6% from the date in which the contract was concluded. In order to calculate the 52,6% percentage, the exchange rate published by the National Bank of Romania at the date of sending the notice and the exchange rate published by the National Bank of Romania at the date of concluding the contract agreement will be taken into account.

b) while the credit agreement is being carried out, the monthly payment has had an increase of over 50% as a result of variable interest rate increase.

(12) In order to apply the provisions of the present law, it is necessary for the thresholds laid down by paragraph (11) letter a) and b) to be maintained in the last 6 months before sending the give in payment notice.

(13) The presumptions laid down by paragraph (11) are irrebuttable. The creditor which files a challenge, in accordance article 7, has the obligation to prove the failure to fulfil the eligibility conditions of the give in payment notice, as set forth by article 1 letters a) – d)".

Cumulative or alternative conditions?

The question set forth after the Law no. 52/2020 took effect was if the conditions regarding the increase in price of the credit agreement and monthly payments are cumulative or alternative.

Paragraph (11) is an explanation for letter e) of the previous paragraph, regarding the fulfilment of the hardship condition. The paragraph containing the letter e) says that the conditions are cumulative.

Moreover, paragraph (12) ("it is necessary for the thresholds laid down by paragraph (11) letter a) and b) to be maintained in the last 6 months before sending the give in payment notice") uses the copulative conjunction „and" which had the purpose of linking two sentences of word of the same kind.

The increase of the price of the contract is determined in relation to the exchange rate published by the National Bank of Romania applicable in the two

moments (signing of the contract agreement and sending of notice). For the increase of monthly payments, an objective marker should be used, for example LIBOR.

Both conditions should be met for the give in payment to occur.

Modifications brought by Law nr. 52/2020 – Adaptation

Adaptation solutions of the contract are preferred over the termination of the credit agreement.

Article 4 paragraph (4), laid down by Law nr. 52/2020:

„The balancing and continuation of the credit agreement are a priority. Termination of the credit agreement will be declared only in the case that continuation is manifestly impossible".

Through these provisions a direction is given to the courts, which will analyse the social utility of continuing the contract, in accordance with Decision nr. 623/2016 of the Constitutional Court of Romania, as a result of sending the give in payment notice by the debtors.

There is no provision within Law nr. 77/2016 which offers a concrete way through which the debtor would be entitled to act in order to obtain the adaptation of the contract through the court of justice.

The notice problem

Article 5 paragraph (1) of Law nr. 77/2016:

„In order to apply the present law, the consumer send to the creditor, through a bailiff, a lawyer or a public notary, a notice by which he informs of his decision to transfer the ownership of the property in order to clear the debt deriving from the mortgage credit agreement, detailing the conditions of eligibility as set forth by article 4."

The legislator wanted to create the legal framework for an extra-judicial procedure, which begins with sending a notice, with the parties conducting negotiations resulting in the continuation of the contract in agreeable conditions. If such a deal cannot be made, the give in payment act is to be concluded, and the transfer of ownership is to finalise with the debt being cleared as a result.

The notice suspends any payment to the creditor, as well as any other judicial or extra-judicial procedure initiated by the creditor.

Debtor`s intent

The notice cannot have any effect without it expressing the debtor`s decision to give the mortgaged property in payment, so as to clear any debt deriving from the credit agreement.

The intention to give in payment should be unequivocal and is essential for the procedure to be effective, since the aforementioned conditions can be verified only when faced with the court, by the creditor challenging the fulfilment of conditions (article 7), by the debtor soliciting the bank to receive the mortgaged property (article 8).

None of the effects laid down by the law can happen without having met the conditions set forth by article 5.

Practical aspects

Debtors are trying to use the provisions of article 4 paragraph (4) („the balancing and continuation of the credit agreement are a priority") as legal basis to send an adaptation notice. They then petition the court with the request to adapt the contract, without having a given in payment notice apt to have effect, as mandated by Law nr. 77/2016. Moreover, there is no legal action as per the provisions of the law which can be brought to the court bearing this solicitation.

Furthermore, the debtors are trying to offer an appearance of legality to the whole process by transmitting the adaptation notice through the notary, setting dates and times in which the parties should be present at the notary etc. in an attempt to hijack the provisions and the purpose of the law.

In reality, these notices are invitations to negotiations and they cannot have the effects that the Law nr. 77/2016 gives to proper notices.

Readapting the contract

In any way, should the contract be adapted, the 52,6% margin should be taken into account when calculating the risk distribution, since the purpose of this mechanism is to eliminate the added risk by sharing equally what is above the 52,6% margin.

In other words, exchange rate increase below 52,6% represents an inherent risk, undertaken by the parties and does not justify the court` intervention. After all, the credit agreement constitutes an expression of freedom of contract and its binding force.

Since hardship can come into discussion only if the exchange rate increase between the two moments (signing the credit agreement and sending the notice) has increased by over 52,6%, any eventual adaptation should be considered only over this threshold, on a case to case basis.

All of this can happen only if the other hardship condition is met, with the monthly payment of the debtor increasing by over 50%, which is also to be verified before any other conditions.

Conclusion

The legal framework imposed by Law nr. 52/2020 institutes the possibility of adapting the credit agreement, rather than closure of the contract through the giving in payment procedure.

In this version of Law nr. 52/2020, there is no provision which gives the debtor the right to petition the court for adapting the credit agreement.

As per the giving in payment notice, this is still mandatory for any lawsuit deriving from Law nr. 77/2020, since this was not replaced by a credit agreement adaptation notice. Without such notice meeting the proper conditions, mainly the giving in payment intention, the court cannot receive such a complaint.

2.7. A hot topic: is the letter of guarantee an enforceable title or not?!? *(lecturer **Sergiu Golub**, Faculty of Law, "Babes-Bolyai" University of Cluj-Napoca, Romania)*

The concern to find out whether or not the letter of guarantee, issued by a bank, is an enforceable title has not been the main concern of many (we could even say the opposite). A few sporadic mentions in the doctrine, hardly summing up a few lines and those stingy in arguments, taking the form of assertions (elliptical). These axiomatic truths are not, however, unanimously shared, neither by doctrine nor by jurisprudence. But even peremptory arguments to the contrary are not easy to detect ... However, the subject was relatively cold until it appeared on the agenda of the High Court, which was asked to resolve this dilemma in advance. With this change in the situation, the subject became "hot" and appeared on the list of "service respondents" in such cases. The problem, distilled by the HCCJ, reads as follows: "from the corroborated interpretation of the provisions of art. 120 of the O.U.G. no. 99/2006, art. 2279 and art. 2321 Civil Code 2009, can the character of executory title of the letter of bank guarantee be retained?" We will try, in the following, to show that, from our point of view, the answer is a firm one and definitely not. The enforceability (of the letter of guarantee in general) of the letter of guarantee issued by a bank cannot be retained. Neither under common law nor, moreover, under special law. We will evoke multiple arguments - legal etymology, legal nature, proximate gender of the operation, legislative (in) evolution, legal topography and others, trying to counteract a weak (in this context) *ubi lex non distinguit* ..., the basic exponent of contrary opinion.

2.8. Forensic investigation of crimes against the EU's financial interests (*associate professor **Petrut Ciobanu**, Faculty of Law, University of Bucharest, Romania)*

I. *The phenomenon of globalization is taking on a new dimension in the development of states, so the protection of the European Union's financial interests is an extremely important issue for our society.*

The funds allocated by the European Union to the Member States enjoy legal protection through a number of institutional instruments and means of criminal law.

Thus, the Convention on the Protection of the European Communities' Financial Interests was adopted in 1995, known as the PIF Convention, a document containing provisions on the harmonization of the laws of the Member States, criminalizing fraud affecting the financial interests of the European Communities, applicable sanctions, criminal liability of persons with decision or control powers within an economic agent.

The Protocol to the Convention on the Financial Interests of the European Communities, adopted in 1996, criminalizes corruption offenses committed by

Community or national officials.

The second protocol to the Convention on the Financial Interests of the European Communities contains provisions on the criminalization of the crime of money laundering, the liability of the legal person, the applicable sanctions.

In July 2017, Directive 2017/1371 on combating fraud against the financial interests of the European Union by means of criminal law was published in the Official Journal of the European Union.

The preamble to the PIF Directive states that "the protection of the financial interests of the Union requires a common definition of fraud falling within the scope of this Directive, including fraudulent conduct in respect of revenue, expenditure and assets, against the general budget of the Union. (Hereinafter referred to as the "Union budget"), including financial operations such as lending and lending.

II. *By Romania's accession to the European space, bodies, norms and rules for accessing European funds were created, in correlation with the incrimination and sanctioning of the crimes regarding the illegal access of these funds*. Thus, the crimes against the financial interests of the European Union are incriminated in a separate section of Law no. 78/2000, in art. 18/1 - art.18/5.

Today, the fight against fraud against the financial interests of the European Union is taking on new dimensions by identifying and using the most effective means of preventing, combating and cooperating.

The forensic investigation of crimes against the EU's financial interests aims to establish illicit activities by which the general budget of the European Union or the budgets administered by it has been defrauded, to identify the perpetrators and to establish their contribution to the commission of crimes, to establish the existence and extent of damage. and prosecuting the guilty natural or legal persons.

III. *The investigation in this field involves the application of certain principles and the initiation of investigative acts in the field of crimes against property*.

IV. *Knowledge of the legal provisions o*n obtaining European funds is important, as the authors in this economic field constantly seek to cover all the facts, through a pseudo-legality to inspire confidence and evade the investigations of judicial or financial control bodies.

V. *Knowledge of the specifics of economic and financial activity* is particularly useful for investigation.

VI. *The exact establishment of the facts and circumstances* of the case is extremely important for the settlement of the case and the finding out of the judicial truth. Thus, the identification of the means used by the authors, the study and reconstruction of fraudulent maneuvers in their entirety, but also in detail, following segment by segment all the facts and circumstances, the personal contribution of the participants, is important to find out the judicial truth.

VII. *Picking up objects and documents* is a necessary and mandatory activity to find out the truth.

VIII. *Special methods* of technical supervision.

IX. *The authorization* of some technical supervision measures by the prosecutor is carried out on the basis and in compliance with the provisions of art. 141 C.p.p., being a probative procedure with a special legal relevance within the forensic investigation of crimes against the financial interests of the U.E.

X. *The use of undercover* or real-identity investigators and collaborators is a probative procedure frequently used in the forensic investigation of crimes against the financial interests of the U.E.

XI. *The disposition and taking of precautionary measures* for the purpose of special confiscation or extended confiscation may be carried out in strict compliance with the provisions of art. 249 C.p.p.

3. Conclusions

As can be seen, the efforts of specialists tend towards a specific regulation. The conference brought into discussion through the topics presented the importance of banking law in a modern and full of novelty era. Therefore, the challenges and approaches of banking law are immeasurable and have no barriers, having both an international and a national specific.

Finally we remind you that banking law is the broad term for laws that govern how banks and other financial institutions conduct business. Banks must comply with a myriad of federal, state and even local regulations. Lawyers perform a wide variety of functions that relate to creating, following and enforcing regulations and multiple agencies oversee banking regulations. As has always been said, the practice of banking law is as diverse as it is vast because there are thousands of regulations. First of all, those interested, including banks, must start by establishing how their regulations are applied, regardless of whether the aim is to create regulations, to implement or to accuse violations.

The participants' materials showed that it is necessary to develop high-level legal strategies and redefine approaches and regulatory frameworks by creating an environment conducive to adapting the "legislative infrastructure" of promotion and protection for providers and users of banking and financial services.

EXERCISE OF BANKING ACTIVITY, OPERATIONS AND CONTRACTS

Banking officer and criminal law

Professor **Constantin DUVAC**[1]

Abstract

The study aims to examine the meaning of the notion of bank officer from the criminal law perspective and the criminal implications in case of crimes committed by them. The object of this analysis is both the banking employees of some banking units with full or majority state capital, as well as those of the private banking units. The author arguably criticizes the interpretation given by the supreme court by the preliminary decision no. 18/2017, formulating some genuine ideas that emerge from the analysis undertaken and even offer some suggestions for improvement of the examined texts. In this analysis, the technical-legal method was used as research method, which involved the study of exegetical, dogmatic and critical incidental criminal norms. Based on the literary, rational and teleological interpretation of the texts subject to analysis, the author tries to clarify this concept from the perspective of criminal law. Through this study, the author brings the necessary clarifications for a unitary interpretation and application of the criminal law to banking officials by criminal judicial bodies.

Keywords: *Criminal Code, criminal law, crime, punishment, civil servant, bank officer.*

JEL Classification: K14

1. Getting started

The problem under investigation lies in clarifying whether employees in banking units are part of the category of civil servants within the meaning of criminal law.

In the Romanian criminal doctrine, an in-depth investigation regarding this issue was not carried out after the entry into force of the new Penal Code (C. pen.).

This article seeks such a conceptual clarification in relation to the structure of the share capital of the respective state (integral or majority) or private banking unit by reference to the provisions of art. 175 C. pen., in the interpretation given by preliminary decision of the High Court of Cassation and Justice no. 18/2017.

After these conceptual clarifications, the criminal implications of the integration of the banking "official" in the notion of civil servant are presented, in the sense of criminal law, using the technical-legal method in this regard with its three perspectives: exegetical study, dogmatic study and critical study.

[1] Constantin Duvac - Romanian-American University of Bucharest, Faculty of Law, Romania, constantinduvac@gmail.com.

In the activity of drafting legal norms, the legislator uses, besides the common words, different terms and expressions specific to each branch of law. For their understanding and application, criminal law provisions should, as we have shown, be elaborated and drafted very precisely and clearly that no great effort should be required for their interpretation - *in claris non fit interpretatio*.

Although the legislator usually uses ordinary language when formulating criminal norms, so as to ensure easier knowledge of the precept by the addressees, sometimes for reasons of criminal policy and legislative technique, the criminal law assigns another meaning (narrower or broader than the one used in ordinary speech) these terms, this time using a specific technical-legal language.

2. The bank officer - civil servant, within the meaning of the criminal law

2.1. Such a case, provided in art. 175 para. (1) C. pen., is that of the civil servant who*, within the meaning of the criminal law, among others, is the person who, permanently or temporarily, with or without a remuneration, exercises, alone or together with other persons, within a legal entity with full or majority state capital, attributions related to the achievement of its object of activity.*

Legal entities with full or majority state capital are those in which the Romanian state holds more than half or all of the subscribed and paid-in share capital. In order to carry out commercial acts, natural persons and legal entities may associate and may constitute commercial companies, in compliance with the provisions of Law no. 31/1990 regarding the commercial companies, republished[2] or of some special laws. The commercial companies will be constituted in one of the following forms: a) company in collective name; b) limited partnership; c) joint stock company; d) limited partnership and e) limited liability company.

For example, those persons employed in banking units with full or majority state capital who, permanently or temporarily, with or without remuneration, exercise attributions related to the achievement of their object of activity will have the quality of civil servants (actual civil servants), within the meaning of the criminal law, with all the legal consequences deriving from such a quality. Thus, the persons from the National Bank of Romania, the House of Savings and Consignments C.E.C. S.A. or the Export Import Bank of Romania - Eximbank S.A. which exercises attributions related to the achievement of their object of activity.

2.2. According to art. 175 para. (2) C. pen., is considered a civil servant (assimilated civil servant), within the meaning of the criminal law, *the person exercising a service of public interest for which he was invested by the public authorities or who is subject to their control or supervision regarding performance of that public service*.

The assimilation of these persons who are not properly civil servants with

[2] Official Monitor no. 1066 of November 17, 2004, as subsequently amended and supplemented.

this notional category was justified by the drafting commission of the Code in that they exercise attributes of public authority, which were delegated to them by an act of the competent state authority and are subject to its control. It should be mentioned that when certain incriminations are not compatible with the status of these persons, or it was not wanted to bring them under the incidence of a certain incrimination text, it was explicitly provided not to apply the text regarding the mentioned persons.

Compared to the provisions of art. 175 para. (2), an assimilated civil servant may be: notary public, lawyer, when certifying the identity of the parties, the content or date of a document[3], doctor, pharmacist, forensic expert, bailiff, private detective, interpreters, certified translators, etc.

By Decision no. 18/2017[4] of the High Court of Cassation and Justice, the Panel for resolving legal issues in criminal matters, extremely debatable, but mandatory, established that "within the meaning of criminal law, the bank officer, employee of a banking company with fully private capital, authorized and under the supervision of the National Bank of Romania, is a civil servant, within the meaning of art. 175 para. (2)".

In order to rule in this respect, the supreme court established that "in Romania there are two categories of autonomous central authorities: some of constitutional rank, created by the constituent legislator, and others created by organic law… Although it is argued that the National Bank of Romania is an independent institution, whose statute was adopted by an ordinary law (Law no. 101/1998 on the Statute of the National Bank of Romania, in force from July 1, 1998 to July 29, 2004, being repealed and replaced by Law no. 312 / 2004 on the Statute of the National Bank of Romania, published in the Official Gazette of Romania, Part I, No. 582 of June 30, 2004) it should not be omitted that the establishment of the National Bank of Romania was made by an organic law, "Law for the establishment of a discount and circulation bank", published in the Official Gazette of Romania, Part I, no. 90 of April 17, 1880, and the entire activity of the bank, at present, is regulated by organic laws… In art. 4 para. (1) of the Government Emergency Ordinance no. 99/2006 stipulates that the National Bank of Romania is the competent authority regarding the regulation, authorization and prudential supervision of credit institutions, according to the provisions of this emergency ordinance and of Regulation (EU) no. 575/2013.

In the analysis of the fact that the National Bank of Romania is a public authority in the sense provided by art. 175 para. (2) of the Criminal Code, in the opinion of the High Court, one cannot ignore the special importance of this public entity within the general economic-financial policy of the state, the competencies assigned to it by law in order to achieve its fundamental objective, consisting in ensuring and maintaining price stability, being the only body in Romania that has responsibilities

[3] M. Udroiu, V. Constantinescu, *Noul Cod penal. Codul penal anterior*, Hamangiu Publishing House, Bucharest, 2014, p. 241.
[4] Published in Official Monitor no. 545 of July 11, 2017.

for developing and implementing monetary policy and exchange rate policy, promoting and monitoring the proper functioning of the payment systems so to ensure financial stability, for issuing banknotes and coins, as legal means of payment on the Romanian territory and when establishing the foreign exchange regime, for supervising its observance and managing the country's international reserves, as well as the efficiency of the legal means made available for carrying out these duties, having the competence to issue normative acts in the banking field (regulations, orders, norms) whose observance is mandatory by the subjects to whom it is addressed, having competent authority regarding the regulation, authorization and prudential supervision of credit institutions, being supervisory authority and resolution authority.

In our opinion, the analysis of our supreme court ignored the provisions of par. (2) in art. 1 of Law no. 312/2004 on the Statute of the National Bank of Romania[5] where it is explicitly provided that it is a "public institution", and not a public authority and as such, employees working in private banking units, in which the Romanian state is not a shareholder or in which he is a minority shareholder should have remained outside the concept of civil servant, from the perspective of criminal law.

However, until a possible return to its jurisprudence, the Preliminary Decision no. 18/2017 is mandatory for those called to apply the criminal law, but, from our point of view, being an interpretation *in malam partem* for this notional category we believe that its effects cannot be extended to acts committed before its publication, the courts having the option whether or not to comply with such a case law interpretation.

Undoubtedly, the decisions of the High Court of Cassation and Justice to unify judicial practice (the content and it`s considerations), such as the one cited, *are sources of criminal law*, because by this interpretation, certain concrete facts may fall or leave, as the case may be, from under the incidence of a rule of incrimination. These have *binding effects* on the judiciary, a character that *does not affect the Constitutional Court*, an authority distinct from the judiciary.

In this respect, it would be interesting to note how the Constitutional Court would resolve a possible exception of unconstitutionality of a text, in the mandatory interpretation given by the High Court of Cassation and Justice, by reference to the provisions of art. 15 para. (2) of the fundamental law. Obviously, these, when they are negative for the recipient, could not be retroactive, and will of course be applied to all deeds committed after their publication in the Official Gazette of Romania.

3. The criminal implications of considering the banking official as a civil servant, within the meaning of the criminal law

3.1. But why is it important from the perspective of criminal law to distinguish between civil servants and "private" civil servants, i.e. persons exercising a

[5] Published in Official Monitor no. 582 of June 30, 2004, as subsequently amended and supplemented.

task in private legal entities?

3.1.1. First, the quality of civil servant is used by the legislator either to designate the directly qualified active subject of some criminal acts, as is the case, for example, of the crimes of: omission of notification (art. 267), abusive investigation (art. 280), submission to ill-treatment (art. 281), torture (art. 282), unjust repression (art. 283), assistance and unfair representation (art. 284), or to designate the qualified passive subject of other crimes, such as assault on a public servant (art. 257), assault on a judicial servant (art. 279). In both situations (either as perpetrator or co-perpetrator, or as a qualified or circumstantial passive subject), the quality of civil servant acquires a special importance because the lack of this quality will lead either to the non-existence of the crime, as a rule, or to a change of the legal classification. committed in a more lenient one (for example, from assault on a public servant in battery or threat if the passive subject is not a civil servant who performs a function involving the exercise of state authority).

3.1.2. Then, this quality is also of interest from the point of view of *criminal participation in intrinsic crimes*, since the lack of quality required by the incrimination norm for the person who is the direct active subject, according to the majority doctrine[6], will automatically change his quality from the perpetrator of the

[6] Tr. Pop, *Drept penal comparat. Partea generală*, vol. II, "Ardealul" Institute of Graphic Arts, Cluj, 1923, p. 828. In the same sense: V. Dongoroz, *Drept penal* (*Tratat*), Bucharest, 1939, p. 510; N. Trainin, *Teoria generală a conţinutului infracţiunii*, Scientific Publishing House, Bucharest, 1959, p. 273; V. Roşca, Other terms and expressions explained (The meaning of some terms or expressions in the criminal law), in „*Explicaţii teoretice ale Codului penal român. Partea generală*", vol. II by V. Dongoroz (coord.), Romanian Academy Publishing House, Bucharest, 1970, p. 443; I. Fodor, Betrayal through the transmission of secrets; Enemy actions against the state, in „*Explicaţii teoretice ale Codului penal român. Partea specială*", vol. III by V. Dongoroz (coord.), Ed. Academiei, Bucharest, 1971, p. 55, 74; S. Kahane, Abuse in the service against public interests, in „*Explicaţii teoretice ale Codului penal român. Partea specială*", vol. IV by V. Dongoroz (coord.), Romanian Academy Publishing House, Bucharest, 1972, p. 94 95; O.A. Stoica, *Drept penal. Partea specială*, Didactic and Pedagogical Publishing House, Bucharest, 1976, p. 199; V. Răműreanu, Embezzlement (Commentary), in „*Codul penal român, comentat şi adnotat. Partea specială*", vol. II by T. Vasiliu (coord.), Scientific and Encyclopedic Publishing House, Bucharest, 1977, p. 366; Av. Filipaş, The embezzlement, in „*Drept penal. Partea specială*" by O. Loghin, Av. Filipaş, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 162; Av. Filipaş, The embezzlement, in „*Drept penal. Partea specială*" by O. Loghin, Av. Filipaş, ed. revised, "Şansa" SRL Publishing and Press House, Bucharest, 1992, p. 150; O. Loghin, The embezzlement, in „*Drept penal. Partea specială*" by O. Loghin, T. Toader, Publishing House and Press „Şansa" S.R.L., Bucharest, 1994, p. 266; V. Dobrinoiu and others, *Drept penal. Partea specială*, Ed. Atlas Lex, Bucharest, 1996, p. 310; A. Ungureanu, *Drept penal. Partea generală*, Lumina Lex Publishing House, Bucharest, 1995, p. 126; C. Bulai, *Manual de drept penal. Partea generală*, All Publishing House, Bucharest, 1997, p. 435; Av. Filipaş, Delapidarea, in „*Instituţii de drept penal. Curs selectiv pentru examenul de licenţă*" by C. Bulai, Av. Filipaş, C. Mitrache, ed. III revised and added, Ed. Trei, Bucharest, 2006, p. 402 403; C. Bulai, B.N. Bulai, *Manual de drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2007, p. 464; C. Mitrache, Cr. Mitrache, *Drept penal. Partea generală*, VI ed, revised and added, Universul Juridic Publishing House, Bucharest, 2007, p. 317; L.V. Lefterache, *Drept penal. Partea generală*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2010, p. 471.

crime, although he performed acts of direct execution of the deed, in concurrent complicity of the respective crime, a solution shared by the judicial practice[7]. It was said[8], in this sense, that, of course, from a *material* point of view, it cannot be denied that the individual, who cooperates even in committing the act, would not contribute directly to the creation of the illicit result, but from the point of view of the *content of the incrimination*, this cooperation appears as an accessory, in relation to the conduct of the qualified person to whom the command of the law forbids such conduct. The *third party*, not being able to realize, in his person, this conduct, his collaboration becomes a simple help given to the *intraneus*, so he is an *accomplice*.

On the contrary[9], it is argued that when such crimes are committed together by a person who has the quality required by the legal content of the crime with another who does not have that quality, their actions are criminalized as separate crimes, considering both the quality of active subject, especially of those who cooperated, as well as the nature of their contribution. In promoting this point of

[7] TS, col. pen., dec. no. 1207/1959, in LP no. 12/1959, p. 72. The Supreme Court ruled that participants in the crime of embezzlement who do not have the duties of administration or management of the assets required to be the perpetrator of the crime, even if they have directly committed acts of theft, are considered accomplices. In the same sense: TS, col. pen., dec. no. 960/1964, in JN no. 2/1965, pp. 172; TS, col. pen., dec. no. 244/1965, in JN no. 6/1965, pp. 164; TS, s. Pen., Dec. no. 3082/1972, in RRD no. 1/1973, pp. 166.

[8] V. Dongoroz, *Drept penal* (reissue), Romanian Association of Criminal Sciences, Bucharest, 2000, pp. 407, 435. In the same sense: A. Dincu, *Drept penal. Partea generală*, vol. I, Bucharest, 1975, p. 195; R.M. Stănoiu, I. Griga, T. Dianu, *Drept penal. Partea generală*, (course notes), Hyperion XXI Publishing House, Bucharest, 1992, p. 126; M. Zolyneak, *Drept penal. Partea generală*, vol. II, "Chemarea" Foundation Publishing House, Iaşi, 1993, p. 372 373; C. Butiuc, *Coautoratul în unele situaţii deosebite*, in RDP no. 4/1995, pp. 71; Al. Boroi, *Infracţiuni contra vieţii*, National Publishing House, Bucharest, 1996, p. 80; C. Mitrache, *Drept penal. Partea generală*, ed. IV revised and added, "Şansa" Publishing and Press House S.R.L., Bucharest, 2000, p. 245; I. Griga, *Drept penal. Partea generală*, vol. I, Romania of Tomorrow Foundation Publishing House, Bucharest, 2006, p. 329; I. Pascu, *Drept penal. Partea generală*, Hamangiu Publishing House, Bucharest, 2007, p. 232. In the foreign doctrine they defended this thesis: Binding, Liszt, Von Hippel, Mezger, Allfeld quoted by V. Dongoroz, *Tratat* (reissue), *op. cit.*, p. 407.

[9] M. Basarab, *Participaţiunea la infracţiunile cu subiect special*, in "Studia Universitatis Babeş Bolyai", Cluj, 1965, p. 143 et seq.; M. Basarab, *Drept penal. Partea generală*, vol. I, Lumina Lex Publishing House, Bucharest, 1997, p. 440; M. Basarab, *Drept penal. Partea generală* (*Tratat*), vol. I, Lumina Lex Publishing House, Bucharest, 2005, p. 379. In the same sense: Gh. Mateuţ, Embezzlement (Commentary) in „*Codul penal comentat. Partea specială*", vol. II by M. Basarab et al., Hamangiu Publishing House, Bucharest, 2008, p. 493. The author considers that, in case of embezzlement, the one who acts, respectively cooperates with execution acts, because he has not the quality of civil servant, manager or administrator, commits the crime of theft as perpetrator, not that of accomplice in embezzlement. The consent given by the managing official or administrator is not valid, so that the theft of the property by the one who does not have this quality will be classified as theft.

view[10], we start from the solution adopted by the previous Criminal Code in connection with treason by the transmission of secrets (art. 157) and espionage (art. 159). In support of this opinion, it was shown that an act having direct causal value in achieving the consequence required by law, cannot be transformed from the cause in condition and from the act of execution into an act of subsequent participation, such as complicity.

In our opinion, *the co-perpetrator, the instigator and the accomplice must have the quality required by law for the perpetrator at the time of committing the crime*. Otherwise, they will be held liable under the conditions provided in the simple version (when the quality of the perpetrator is a circumstantial element of aggravation) or in another norm of incrimination (for example theft instead of embezzlement) or such deed is not provided by the criminal law when it is committed by an unqualified person, the quality of the perpetrator being a personal circumstance that does not affect the other participants, according to art. 50 para. (1), in the absence of a derogating provision. In support of this thesis, which we promote in all crimes with a directly qualified active subject, other arguments could be invoked, in our opinion.

First, any other doctrinal or jurisprudential interpretation of art. 50 para. (1), provided that the criminal law is of strict interpretation, in the absence of a derogating criminal provision, is likely to infringe the *principle of legality of incrimination* (by applying a text of law that has not been violated by the defendant), and *implicitly also that of the legality of the punishment* (by judging the defendant in other limits than those provided in the criminal provision applicable to him), as they are regulated in art. 1 and in art. 2.

Then, the legal classification of the participants' contribution, as well as of the author of the crime in different variants (aggravated or attenuated) of incrimination of the deed or in the basic variant of the crime, when the different variations of the typical deed are incriminated in the same text, but also in different articles, from the same normative act or from different laws, does not defeat the theory of the crime unit and is in accordance with the principle of legality of incrimination and punishment, principle superior to the one regarding the crime unit and enshrined in the constitution, not only by the criminal law and which of course takes precedence.

Accepting the opposite view would mean creating a more difficult situation for the participant in his own crimes (with a directly qualified active subject), although it is beyond any doubt that in these cases he commits "part" of the crime, than for the unskilled person who would commit directly the same crime "in its entirety" and not just "part" of it, which is absurd.

[10] V. Paşca, The plurality of criminals, in „*Drept penal. Partea generală*" by V. Paşca, R. Mancaş, Ed. Universitas Timisiensis, Timişoara, 2002, p. 393. The author gives as an example the crime of embezzlement and theft.

Regarding the instigator of these intrinsic crimes, the newer doctrine[11] rightfully agrees, in the sense that only the one who has the quality required by law for the author at the date of committing the execution acts will be instigator. For example, in this conception, if embezzlement is instigated, the instigator must also be a civil servant, manager or administrator.

This means, *on the contrary*, that the person who does not have the quality required by law for the author at the time of the consummation of the concrete deed will not be able to be instigator for these offenses with a directly qualified active subject.

It is obvious that the same solution is required for accomplices to intrinsic deeds, according to the principle *ubi eadem ratio, ibi eadem ius*.

It should be mentioned that, in the case of killing of a new-born by the mother, correctly it is promoted the solution of legal classification and differentiated sanctioning of the participants in this crime *in persona propria,* mainly due to the non-transmission of the mother's personal circumstance to those who determined or helped her to commit the deed.

3.1.3. In other situations, the quality of civil servant of the perpetrator constitutes a circumstantial element of aggravation [art. 210 para. (2) - human trafficking, art. 259 para. (2) - theft or destruction of documents, art. 264 para. (2) lit. b) - facilitating the illegal stay in Romania, art. 302 para. (3) - violation of the secrecy of correspondence, art. 368 para. (2) - public instigation]. The lack of quality required by the incrimination norm, at the date of committing the concrete deed, removes the incidence of the circumstantial element of aggravation, the external manifestation of the direct active subject being framed in the standard (simple, basic) variant of that crime.

3.1.4. The quality of civil servant also falls within the content of some criminal law sanctions (the complementary punishment of prohibition of certain rights - art. 66 and the security measure of the prohibition of holding a position or exercising a profession - art. 111).

3.2. Last but not least, we must underline the importance of the distinction between the civil servant himself, provided in art. 175 para. (1) C. pen. and the assimilated civil servant, provided in art. 175 para. (2) of the Penal Code, because in the case of the crime of bribery, mentioned in art. 289 C. pen. the legislator applies a special criminal treatment to them, considering that the deed of the civil servant provided in art. 175 para. (2) C. pen. to claim, receive or accept the promise of undue benefits constitutes an offense only when it is committed in

[11] M. Basarab, Complicity (Commentary) in "*Codul penal comentat. Partea generală*", vol. I, by M. Basarab et al., Hamangiu Publishing House, Bucharest, 2007, p. 172 173; I. Pascu, The instigator (Author and participants), in "*Explicații preliminare ale noului Cod penal*", vol. I by G. Antoniu (coord.), Universul Juridic Publishing House, Bucharest, 2010, p. 509; I. Pascu, The instigator (Author and participants), in "*Explicațiile noului Cod penal*", vol. I by G. Antoniu (coord.), T. Toader (coord.), Universul Juridic Publishing House, Bucharest, 2015, p. 541; I. Pascu, Instigation (Commentary) in "*Noul Cod penal comentat*", vol. I by I. Pascu and others, Universul Juridic Publishing House, Bucharest, 2012, p. 344.

connection with the non-fulfilment, delay of the performance of an act concerning its legal duties or in connection with the performance of an act contrary to these duties.

On the contrary, it will not be considered the crime of bribery, the act of the same civil servant described in art. 175 para. (2) C. pen. to claim, receive or accept the promise of undue benefits when the action is committed in connection with the performance or urgency of the performance of an act relating to its legal duties.

4. Conclusions

The person employed within a banking unit with full or majority state capital is a civil servant, within the meaning of art. 175 para. (1) letter c) C. pen.

Until a return to its jurisprudence by the supreme court, *the bank officer, employee of a banking company with fully private capital, authorized and under the supervision of the National Bank of Romania, is a civil servant, within the meaning of art. 175 para. (2).*

Such qualifications lead to an aggravation of the criminal liability incumbent on this notional category in case of committing intrinsic criminal acts (with a qualified active subject) whose perpetrator, at the date of committing the act, must have the quality of civil servant compared to the private official. This results explicitly from the provisions of art. 308 C. pen. the last thesis and implicitly from the way in which the criminal legislator understands to incriminate deeds committed by any person with criminal capacity compared to those who must have a certain quality at the moment of committing the concrete deed.

By this approach, we tried to offer the necessary arguments for a return by the supreme court on the preliminary decision no. 18/2017, as well as for the unitary interpretation and application of the texts subject to our analysis.

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Remuneration of bankers: legal questions from the supervisory perspective

Senior legal counsel **Esther MARTÍNEZ de BUSTOS**[1]

Abstract

The remuneration perceived by the directors and senior managers of credit institutions became a topic of interest for regulators and supervisors in the aftermath of the financial crisis of 2007. By then, it became evident that some bankers were most focused on profits (and bonuses) on the short term, while exposing their institutions to higher risk in the long term. The Union legislator has progressively shaped a regime for remuneration under the Capital Requirements Directive (CRD), with the ultimate objective of aligning the remuneration with the long-term objectives of credit institutions. This is achieved with provisions requiring, among others, that part of the remuneration is paid in instruments, part of the remuneration is deferred for some years, retention obligations for the instruments awarded, and an ex-post risk adjustment in the form of malus or even clawback, i.e., the possibility for an institution to claim back the remuneration paid if the situation deteriorates further. The particularity for the ECB when ensuring the compliance of these rules is that, in accordance with its statutory provisions, it has to take into account the national legislation transposing the CRD, which obliges the ECB to be very mindful of the differences between jurisdictions. The supervision of the remuneration rules is conducted on an ongoing basis, in constant supervisory dialogue with credit institutions.

Keywords: *bankers, credit institutions, remuneration, European Banking Authority, Capital Requirements Directive.*

JEL Classification: K20, K22, K42

1. Introduction

I would like to thank the organisers of this conference for the opportunity of participating and sharing with you some reflections regarding the remuneration of managers of credit institutions. I will briefly introduce you the main aspects of the applicable legal framework and will also present you some of the questions that ECB faces when supervising this particular area, which forms part of the governance systems of credit institutions.

Remuneration is intrinsically an interesting topic. It is a concept familiar to everyone; after all, whoever performs a job receives some compensation in return. However, outside the field of labour law, it is not common that the legislator interferes a private relationship between a company and its employee.

[1] Esther Martínez de Bustos - senior legal counsel at the European Central Bank, Esther.Martinez-de-Bustos@ecb.europa.eu.

So, the interest of regulators and supervisors in the remuneration of bankers is relatively recent. As other matters related with the governance of credit institutions, it became under the spotlight as a consequence of the financial crisis of 2007.

2. Facts that led to the regulation of remuneration

It is now commonly accepted that one of the contributing factors to the crisis was the so-called *short-termism*, or management myopia[2], whereby some bank managers were mostly focused on realising short term benefits, in detriment of the longer-term perspective. In the aftermath of the crisis there were many doctrinal discussions on whether the bankers' bonuses were to be blamed for the crisis[3]. The achievement of high short-term benefits translated into very high bonus payments for bank managers, and this constituted a perverse incentive which in turn fostered the assumption of higher risk, and ultimately demonstrated to be very detrimental for the longer-term perspective of banks, in particular to their ability to cope during prolonged stressed times, such as the financial crisis.

These doctrinal discussions crystalized in a document published by the Financial Stability Board in April 2009, the FSB Principles for Sound Compensation Practices[4], followed in September of the same year by the Implementation Standards[5]. The Implementation Standards is a very short document (roughly 6 pages), but already provides for the main guidelines of the substantive change with respect to remuneration: first, a governance change in the organisation of institutions, to create committees dedicated to the remuneration of bankers; second, a change in the payment structure, to ensure a more effective alignment with long-term risks to which a bank may be exposed, and third, disclosure, or transparency obligation: the FSB recommends that, as part of market discipline, banks disclose the remuneration they pay to managers. The FSB Implementation Standards included a fourth leg, not addressed to credit institutions but to supervisors: these are recommended to "require significant financial institutions to demonstrate that the incentives provided by compensation systems take into appropriate consideration risk, capital, liquidity and the likelihood and timeliness of earnings".

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[2] Dallas, Lynne: *Short termism, the financial crisis and corporate governance*, „Journal of Corporation Law", 37 J. Corp L 265.

[3] Bebchuck, Lucian: *How to Fix Banker's Pay*, Discussion paper No. 677, The Harvard John M. Olin Discussion Paper Series, Harvard Law School.

[4] Available at the Financial Stability Board Internet page, https://www.fsb.org/wp-content/uploads/r_0904b.pdf.

[5] Available at the Financial Stability Board Internet page, https://www.fsb.org/wp-content/uploads/r_090925c.pdf.

3. Brief description of the legal framework

The Union legislative was among the first ones to incorporate in its legal framework the FSB principles and standards. While the FSB principles and standards were addressed to significant financial institutions, the EU legislator extended these principles to all institutions, although for the application of some requirements certain criteria such as size, nature, scope and complexity of the activities of the credit institutions were to be considered. In 2010, the Directive 2006/48/EC[6] (CRD III) was amended to include an Annex with the first rules dealing with remuneration. However, the banker's remuneration was fully developed with the introduction of CRR[7]/CRD IV[8], as most of the implementing legislation and developing standards were adopted after the entry into force of this legislative package. In the CRD IV, the remuneration provisions are moved from the Annex to the sub-section of Governance, in the section focused on arrangements, processes and mechanisms of institutions. Further to the provisions of the CRD, a series of delegated regulations were adopted to rule the process of identification of members of staff who may have an impact on the risk profile of the institutions[9], or which classes of instruments may be used to award remuneration[10]. Also, most importantly, the European Banking Authority (EBA) publishes in 2015 the Guidelines on sound remuneration practices[11], which is the most detailed instrument providing guidance on how remuneration should be structured.

[6] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1*)*.
[7] Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.
[8] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338–43).
[9] Commission Delegated Regulation (EU) No 604/2014 of 4 March 2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile.
[10] Commission Delegated Regulation (EU) No. 527/2014 of 12 March 2014 supplementing Directive (EU) No 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration.
[11] EBA: Guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No. 575/2013(EBA/GL/2015/22), available at the EBA Internet page, https://www.eba.europa.eu/sites/default/documents/files/documents/.

To finalise the chronological description of the legal framework, the latest amendment of the CRD package, as introduced by Directive (EU) 2019/878[12] (the CRD V), which applies since the end of December 2020, introduces some amendments based on the Opinions expressed by the EBA[13] and the progress reports prepared by the European Commission[14]. In particular, the CRD V defines more clearly the proportionality considerations by setting some clear rules, such as the non-application of the variable remuneration requirements to any employee earning less than EUR 50 000 per year, or to credit institutions with a level of assets equal or less to EUR 5 billion in the preceding 4 years. The CRD V also provides further clarity on the categories of staff whose professional activities have a material impact on the institution's risk profile, but we will also see that later. Finally, and true to the statement that law follows social reality, the CRD V provides that remuneration policies must be neutral from the gender perspective.

4. Rules applicable to remuneration

Under the Union framework, credit institutions are obliged to the following:

4.1. Governance

To have a remuneration committee which can exercise independent judgement on remuneration policies and practices, responsible for the preparation of all decisions regarding remuneration. For smaller institutions, this function can be performed by the management body in its supervisory function.

To establish and apply total remuneration policies, inclusive of salaries and discretionary pension benefits, for categories of staff including those whose professional activities have a material impact on their risk profile. Such remuneration policies must fulfil certain principles, in particular, (i) promoting a sound and effective risk management, i.e., not encouraging risk-taking that exceeds the level of tolerated risk of the institution; (ii) alignment with the business strategy, objectives, values and long-term interests of the institution, (iii) such policy is subject to both a central and independent review, and to a review by the manage-

[12] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (Text with EEA relevance.) (OJ L 150, 7.6.2019, p. 253–295).

[13] Review of the application of the principle of proportionality to the remuneration provisions in Directive 2013/36/EU: The EBA's response to the European Commission's letter – 21 November 2016 (EBA-Op-2016-20).

[14] Report from the Commission to the European Parliament and the Council: Assessment of the remuneration rules under Directive 2013/36/EU and Regulation (EU) No. 575/2013, 28.7.2016 (COM(2016) 510 final).

ment body; (iv) staff engaged in control functions are independent from the business units they oversee, and (v) the remuneration policy makes a clear distinction between criteria for setting: (a) basic fixed remuneration, which should primarily reflect relevant professional experience and organisational responsibility; and (b) variable remuneration, which should be based on a sustainable and risk adjusted performance.

The remuneration policies which this provision requires should cover all employees of the credit institution, and not only managers or those who may have an influence on the risk profile of a credit institution.

4.2. Disclosure obligations

As these are Pillar 3 or market discipline measures, they are not regulated in the CRD, but in the CRR. By virtue of these provisions, credit institutions are obliged to disclose certain information, including the most important design characteristics of the remuneration system, their remuneration policy and even aggregate quantitative information on remuneration (for example, institutions have to indicate the number of individuals receiving 1 EUR million or more).

4.3. Requirements for variable remuneration

This is the cornerstone of the remuneration rules, and in practice the one which gives rise to the higher number of legal questions. Identification of staff who may have an impact on the risk profile of an institution. It is worth noting that most of the rules on variable remuneration do not apply to all employees of a credit institution, but only to those members or categories of staff whose professional activities have the presumption of having a material impact on an institution's risk profile. This determination of the 'identified staff' is conducted annually by the credit institutions itself, in accordance with certain qualitative and quantitative criteria, which now with CRD V are enunciated in the Directive itself, and further developed in a Commission Delegated Regulation[15]. The qualitative criteria capture any person who has the presumption to be in a position of influence in the risk-taking of the institution. These criteria capture, among others, the management body, senior management, or heads of material business units (which are those who have allocated an internal capital of at least 2%). The quantitative criteria are much simpler: in principle, any employee receiving more

[15] Commission Delegated Regulation (EU) 2021/923 of 25 March 2021 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards setting out the criteria to define managerial responsibility, control functions, material business units and a significant impact on a material business unit's risk profile, and setting out criteria for identifying staff members or categories of staff whose professional activities have an impact on the institution's risk profile that is comparably as material as that of staff members or categories of staff referred to in Article 92(3) of that Directive (OJ L 203, 9.6.2021, p. 1).

than EUR 500 000 is considered identified staff. For the members of staff who are captured only by the quantitative criteria, there is a possibility of excluding them from the presumption of having a significant influence in the risk profile of an entity, if the institution can demonstrate that, despite the high amount perceived, the member of staff does not effectively have any influence on the risk-taking of the institution. In some cases (for total remunerations over EUR 750 000) the institutions need permission from the supervisor, and in very exceptional cases (remuneration over EUR 1 000 000), the supervisor has to consult with the EBA before granting its authorisation.

4.3.1. Rules on variable remuneration

For those which the credit institution identifies as 'identified staff', also called 'material risk takers', some special rules apply on the variable remuneration. The requirements are many and very detailed, but the most relevant ones are:

- Fixed-to-variable ratio: variable remuneration is capped at 100% of the fixed remuneration perceived by the material risk taker, although the general assembly of the institution may raise this ratio to 200%.
- Payment in instruments: at least 50% of the variable remuneration must be awarded in shares or other instruments convertible into CET1. An important amendment in the CRD V is that share-linked instruments are now also allowed, since for smaller institutions the requirement of paying in shares was very expensive.
- Deferral: at least 40% of the remuneration (both in cash and instruments) has to be deferred for a period that with CRD IV was from 3 to 5 years and is now increased from 4 to 5 years.
- Retention: All instruments awarded as variable remuneration must, once they are effectively vested on the member of staff, be subject to a retention policy, which means that the member of staff cannot dispose of them during a period recommended to be at least 1 year.
- Risk adjustment (malus and clawback): Institutions must conduct an *ex ante* assessment of the risks to which the institution is exposed in the moment of determining the bonus pool, but later, in the moment of the vesting or effective payment, institutions must conduct an *ex post* risk assessment and, if relevant, applying *malus* (i.e., reductions) to the amount effectively paid. When the identified member of staff contributed significantly to the subdued or negative financial performance and in cases of fraud or other conduct, he/she may even have to return the variable remuneration already paid. We note that in some occasions credit institutions, in their remuneration policies, try to limit the application of malus and clawback to breaches of the regulations that entail criminal or administrative liability, which need to be declared by a court judgement.

This does not seem to be aligned with the malus arrangements as described in Article 94(1)(n) CRD, which defines criteria also related of the financial situation of the institution as a whole, and to the performance of the institution, the business unit and the individual concerned, and not only to compliance cases.

As you can see, the ultimate purpose of these measures is that variable remuneration properly reflects the evolution of the credit institution not in one year but in several, hence disincentivising behaviour that may have the potential to deteriorate the financial situation of a bank in the longer term. But those measures are also very intrusive in the relationship between the bank and its senior managers.

5. The role of supervisors

So far, I have described the rules addressed to credit institutions, which are many and very detailed, but what role does the supervisor in the supervision of the remuneration? I would like to present you some of the challenges that the ECB, as supervisor, faces from the legal perspective in its task to ensure the compliance by credit institutions with remuneration rules.

5.1. The first one stems directly from the institutional set-up of the ECB within the SSM. As contemplated in Article 4(3) of Regulation (EU) No. 1024/2013[16] (the 'SSM Regulation') for the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. This means that the ECB does not only apply the EU legislation that is directly applicable (in particular, the Capital Requirements Regulation and the SSM Regulation), but also, when such EU law is composed of Directives, such as the CRD, the national law which implements them into national law. So, the ECB has the particularity of being a European institution that applies national law.

As regards remuneration, it is not by chance that most of its rules are included in the CRD and not in the CRR. This is because, as many other topics with a strong link to the corporate specificities of national law, Member States have to implement them in their national framework taking into account the general principles of national contract and labour law. But this also means that the ECB, when applying the CRD rules, has to be very mindful of the possible differences in the implementation of remuneration rules across jurisdictions. For example, before CRD V some Member States allowed the use of share-linked instruments for the payment in instruments, while others did not; in other Member

[16] Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

States, some remuneration rules are extended to all employees of the bank, and not only to identified staff; some Member States did not allow the increase of the fixed-to-variable ratio up to 200%, finally, some Member States allowed to waive the application of remuneration requirements depending of different criteria (low absolute amount, low fixed-to-variable ratio, balance sheet of the credit institution) … therefore, 'one advice does not fit all'.

5.2. The second one is related to the powers that the legal framework provides to supervisors to address the deficiencies found in the remuneration schemes applied by banks. The assessment of remuneration schemes is done an ongoing basis in the context of the Supervisory Review and Examination Program (SREP). The SREP is a decision adopted on a yearly basis by the ECB, in which the key aspects of the supervisory cycle of a bank (business model, internal governance, risks to capital and risks to liquidity) are assessed. The ECB may impose quantitative and qualitative measures to solve the deficiencies identified in each of those areas. For remuneration, the ECB may apply the supervisory measure of requiring the credit institution the reinforcement of its arrangements, processes, mechanisms, and strategies[17].

Furthermore, the list of concrete supervisory measures available to the ECB under the SSM Regulation, which mirrors the one of the CRD, include the power[18] to require institutions to limit variable remuneration as a percentage of net revenues, but only "when it inconsistent with the maintenance of a sound capital base"). The same occurs with the CRD provision[19] which allows imposing restrictions on distributions (including creating an obligation to pay variable remuneration or discretionary pension benefits, or pay variable remuneration), as this measure only be imposed when the distribution proposed by the bank would cause a breach of the combined buffer requirement.

Apart from the SREP mentioned above, most of the interaction between a credit institution and the ECB when it comes to remuneration takes place in the context of the supervisory dialogue.

5.3. Third, most of the remuneration rules are based on soft law. Just to give you an idea, the binding rules on remuneration are composed by one article[20] in the CRR, and seven articles[21] in the CRD. However, one may find very detailed explanations on the rationale and application of remuneration rules in the EBA Guidelines on sound remuneration practices, which, just to compare with the binding provisions, extend for a non-negligible number of 75 pages. As you know, the EBA Guidelines provide interpretation criteria, in order to ensure the common, uniform, and consistent application of Union law, in this case, the binding rules included in CRR and CRD. The EBA Guidelines on sound remuneration

[17] Article 16(2)(b) SSM Regulation, which reproduces Article 104(1)(b) CRD.
[18] Article 104(1)(g) of the CRD and Article 16 (2)(g) SSMR.
[19] Article 141(2)(b) and 141b(2)(b) CRD.
[20] Article 450 CRR.
[21] Articles 74, 92-96 and 109 CRD.

policies are addressed both to competent authorities and to credit institutions. Furthermore, a competent authority is obliged to confirm the EBA, within 2 months of the issuance of a guideline, whether it complies or intends to comply with that guideline and, in the event that the competent authority does not comply or does not intend to comply, it shall inform the EBA, stating its reasons. This is the so-called 'comply or explain' procedure and, in case an authority confirms it intention to comply with the Guidelines, it means it is assuming the commitment to interpret the legally binding provisions of the Union legal framework in accordance with the interpretive criteria contained in the EBA Guidelines. The ECB confirmed its intention to comply with the EBA Guidelines on sound remuneration policies in full.

As for the Guidelines themselves, they are a very suitable tool for guiding both supervisors and credit institution on practical aspects of the implementation of remuneration rules. They facilitate the identification of which CRD rules are to be applied to all employees of a credit institution and which ones to identified staff only. They also clarify how the different stages of the remuneration procedure, from the setting of the bonus pool, the determination of the accrual period (which is the period of time for which the performance is assessed; the award (i.e., the granting of variable remuneration, independently of the actual point in time where the remuneration is effectively paid, and the vesting, which is the effect by which the staff member becomes the legal owner of the variable remuneration; i.e., the actual payment.

One aspect on which the EBA Guidelines are particularly useful is that they develop the requirement of the CRD that variable remuneration is not paid through vehicles or methods that facilitate the non-compliance with the CRD or the CRR, i.e., the circumvention of the rules. Many questions which we receive in the Legal Services of the ECB require us to assess if remuneration schemes applicable to a member of staff, or to a category of members of staff, are compliant with the CRD objectives, despite seemingly comply, at least formally, with the relevant requirements. The EBA Guidelines provide[22] with some hints useful to check whether a circumvention exist: if the remuneration qualifies formally as fixed remuneration in accordance with the wording of the guidelines, but not its objectives; if there is no effective risk alignment, positive performance or sustainable according to the institution's financial situation; or when the remuneration is paid through vehicles that provide disproportionate returns on investments on instruments of the firm that are significantly different from conditions for other investors who would invest in such a vehicle.

6. Conclusions

Finally, the supervision of remuneration schemes is interesting because

[22] See paragraph 164 et seq. of the EBA Guidelines on Sound remuneration Practices.

it is a reflection, on a smaller scale, of the whole universe of banking supervision. At the beginning of my dissertation, I explained that remuneration is an easy concept to grasp, as everyone receives a compensation in return for his/her professional activity. However, a remuneration question may end up in an assessment related to a completely different field. I will use some examples:

(i) The supervisor may need to assess if the instruments awarded by the credit institution to identified staff as remuneration fulfil the relevant criteria of the CRD, i.e., that they are (until the adoption of CRD V) a mix of shares or other Additional Tier 1 or Tier 2 instruments that adequately reflect the credit quality of an institution as a going concern[23]. This means that a question apparently on remuneration may need to be solved by doing an assessment more closely related to the own funds of an institution. (ii) Another example relates to the application of remuneration rules at consolidated and individual level. In particular, the identification of material risk takers has to be conducted by credit institutions both at individual and consolidated level, which means that also managers of branches and subsidiaries in third countries, or offshore entities, have to be assessed. So, a question in principle related to the identification process may end up by the ECB having to map the (sometimes quite complex) structures of the group, to determine which managers would be captured on the different levels of consolidation. (iii) And lastly, the process of checking whether a remuneration scheme effectively is effectively aligned with the risk appetite and framework seems easy at first but, which risks have to be considered? How much weight is each of them to be given? How to reflect such risks in the three levels that need to be considered for conducting the risk alignment (at the level of the individual, business unit and the full organisation).

I would like to end my intervention by stating that remuneration, of course, is not exempt of controversy. There are authors[24] that consider that the interference of the legislator (and consequently, of the supervisor) in the compensation schemes of banks is too intrusive and does not ensure that risks in the long-term can be effectively avoided. The credit institutions themselves often argue that the restrictions on remuneration are an impediment for attracting the right talent. The legislator, on the other hand, seems to be convinced of the advantages that the regulation of remuneration has had for financial institutions in general, since more and more financial sectors have joined the group on which remuneration is subject to special rules.

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[23] These instruments are defined in the Commission Delegated Regulation (EU) No. 527/2014 of 12 March 2014 supplementing Directive (EU) No. 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration (OJ L 148, 20.5.2014, p. 21)

[24] See, for example Gregg, P. Jewell, S. and Tonks, I., *Executive Pay and Performance: Did Bankers' Bonuses Cause the Crisis?,* „International Review of Finance", March 2012, DOI 10.1111/j.1468-2443.2011.01136.x.

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3. Commission Delegated Regulation (EU) No. 527/2014 of 12 March 2014 supplementing Directive (EU) No. 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern and are appropriate to be used for the purposes of variable remuneration.
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5. Commission Delegated Regulation (EU) No. 604/2014 of 4 March 2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile.
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9. Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006).
10. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013).

11. Gregg, P. Jewell, S. and Tonks, I., *Executive Pay and Performance: Did Bankers' Bonuses Cause the Crisis?,* „International Review of Finance", March 2012, DOI10.1111/j.1468-2443.2011.01136.x.
12. Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012.
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The professionals' duty to inform versus the duty to advise the consumers in the field of banking services: are the legal remedies adequately shaped?

Assistant professor **Juanita GOICOVICI**[1]

Abstract

The study addresses the issue of the level of interweaving between the banking obligation to inform and the obligation to advise in relations with consumers in the field of banking services, while accentuating the roles played by the informative formalities in this specific domain. While the epitome of the professionals' duty to inform the consumers is represented by the banking professionals' mandatory legal obligation to present, in the pre-contractual phase, a set of neutral substantial information available to the consumer on the objective, technical contractual terms, oriented towards the formation of a valid, informed consent, the specific content of the pre-contractual duty to inform the consumers refers to: (a) the informing of the consumer on the essential characteristics of the financial services; (b) the informing of the consumers on the security of a banking investment product the risks of which are superior to the average acceptable risks. The banking professionals' duty to advise the consumers designates the obligation to orientate the consumer's choice which regards the potential contractual terms, oriented towards the providing of value judgements fixing the pertinent references for the consumer's option for the most adequate contractual terms, especially in terms of the evaluating of the opportunity to accept a particular configuration of the contractual terms. Particularised by its specific functions, consisting in the orienting of the client's choice between different types of offers elaborated by the professionals, the duty to advise the consumers permits the calibrating of the contractual field as correlated to the consumer's specific, concrete necessities. Implying the providing of subjectively calibrated advise, of individually configured value judgements or of personally adapted financial advice, the banking professional's obligation to advise the consumers imbricates an effort to personalize the information, directly correlated with the individual necessities of the profane consumer, while distinguishing between two types of performance: (a) the expressly solicited financial or judicial advise; (b) the duty to advise the consumers in the hypotheses of accentuated judicial technicity of the contractual terms.

Keywords: *duty to inform, duty to advise, financial services, consumer, informative formalities*

JEL Classification: K12, K22

1. Introduction

Intrinsic to the process of forming the informed consumer consent, the

[1] Juanita Goicovici - Babeș-Bolyai University of Cluj-Napoca, Romania, juanita.goicovici@law.ubbcluj.ro.

obligation to provide information and advice incumbent to banking professionals continues to raise questions for legal practitioners, fuelled, at least in part, by the iridescence and entanglement they entail in related matters, such as the information formalism applicable to credit agreements.

The mechanisms for delaying the formation of consent, such as the legal term of prior reflection and the imperative term of cancellation/withdrawal from the contract are connected, in turn, to the obligation of transparency incumbent on the bank creditor.

The literature of the last decade has insisted on the practical implications of the non-compliant fulfilment of information and counselling obligations in the pre-contractual stage, as well as on the overlapping elements that intervene in the light of the requirements of the informative formalism incidental to consumer credit agreements[2].

The recent jurisprudence, under the French banking law (Cass. Fr. civ. 2e; May, 20th, 2020[3]) in the field of banking professionals' obligation to advise the consumers, retained that, in the pre-contractual phase, the consumer may obtain the engaging of the bank representatives' liability, in terms of compensatory damages, for the culpable non-performance of the duty to advise the consumer on the (in)adequacy of the contractual terms of an insurance contract covering the risk of the debtor's insolvency based on physical invalidity, work incapacity of loss of employment, associated with an immovable property investment credit contract concluded by the consumer. In such cases, the literature sees the transformation of the obligation to guide the decision of the party into a duty of substitution in the position of the consumer to decide on the appropriateness of contracting[4], the professional being required to signal certain potential consequences, in the hypotheses in which the professional expects, based on his/her knowledge.

That a decision in accordance with the consumer's choice would result in

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[2] Cate, Fred H., „The Failure of Fair Information Practice Principles", *Consumer Protection in the Age of the Information Economy* (2006), 4-8, available at SSRN: https://ssrn.com/abstract=1156972, accessed on April 8, 2021; Andreu, Lionel, Binctin, Nicolas and Delebecque, Philippe, *Opérations bancaires et contrats commerciaux* (Paris: L.G.D.J, 18e édition, 2018) 203-209; Beguin, Etienne and Biquet-Mathieu, Christine, *Le crédit hypothécaire au consommateur* (Bruxelles: Larcier, 2017), 117-121; Bonneau, Thierry, *Droit bancaire* (Paris: L.G.D.J, 13e édition, 2019), 92-114; Boucard, François, *Les obligations d'information et de conseil du banquier* (Marseille: Presses Universitaires d'Aix-Marseille - P.U.A.M., 2002) 137-142.

[3] Hacene-Kebir, Anaïs, „Obligation d'information du banquier: la preuve de la perte d'une chance", at https://www.dalloz-actualite.fr/flash/obligation-d-information-du-banquier-preuve-de-perte-d-une-chance, accessed on April 8, 2021.

[4] Lasserre-Capdeville, Jérôme, *Le droit du crédit à la consommation* (Paris: L.G.D.J, 1re édition, 2021), 115-116; Ilieva, Mihaela, *La protection des consommateurs et les droits fondamentaux dans l'Union européenne* (Bruxelles: Bruylant, 2021), 221-219; Hattab, Rasha, *De l'obligation de conseil des prestataires de services d'investissement* (Strasbourg: Presses Universitaires de Strasbourg - P.U.S., 2006), 81-94; Marain, Gaëtan and Pasqualini, François, *Droit du crédit bancaire* (Bruxelles: Bruylant, 2020), 94-102; Mazeau, Laurène, *La responsabilité civile des professionnels exploitant une activité à risque* (Marseille: Presses Universitaires d'Aix-Marseille - P.U.A.M., 2013) 56-71.

legal or economic effects detrimental to that consumer[5].

We consider that the practical reverberations of the establishment of autonomous obligations to inform and advise consumers in the pre-contractual phase[6] deserve a separate approach, including in terms of relevant legislation and recent case law on consumer financial services, including in view of the establishing of the professionals' liability for non-execution/non-compliance of these obligations.

The questions to which this study aims to answer can therefore be listed as follows: the material spheres of incidence of the information obligation and the advisory obligation of banking professionals can be delimited, in terms of their specific function or the typical role they play? Do these mechanisms play a role in relations with consumers? What are the informative contents full of banking services and at what point does the informative message sent to the consumer in the pre-contractual stage start to become superabundant?

The civil liability of the financial services professional may be engaged for non-execution of the obligation of advice, respectively of the obligation to inform in relations with consumers and, in case of an affirmative answer, may not be the non-execution of these obligations representing legal grounds for repairing the damage caused to the consumer by poor advice or lack of transparency in providing essential information?

Firstly, it should be noted that the structure of this study is established on the following pillars: as a starting point, we consider it necessary to define the notion of banking advisory obligation, while proposing benchmarks for delimiting the advisory obligation in relation to the obligation to inform the consumers.

The secondary section of the study is allocated to the issue of specific functions played by the two categories of obligations incumbent on the banking professional in the pre-contractual phase, in view of the information asymmetries between the parties to the accession contracts, so that in the third section we insist on the progressive formation of credit agreements addressed to consumers, as well as on the alternative mechanisms for moderating the consumer's impulsivity: the term of prior reflection and the term of withdrawal from the credit agreement, after its signing.

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[5] Picod, Nathalie and Picod, Yves, *Droit de la consommation* (Paris: Sirey, 2020) 118-131; Piedelièvre, Stéphane, *Droit de la consommation* (Paris: Economica, 3e édition, 2020) 54-68; Ribaj, Artur and ILollari, Orkida, „Asymmetric Information versus Banks' Costumer Trust, Albania Case Linked with SEE Countries" (June 24, 2019), 3-6, available at SSRN: https://ssrn. com/abstract=3409406 or http://dx.doi.org/10.2139/ssrn.3409406, accessed on April 8, 2021.

[6] Scafeș, Răzvan, „Obligația de informare a consumatorilor din perspectiva O.U.G. nr. 52/2016", *Revista de Științe Juridice* 2 (2016):188-197; Neau-Leduc, Philippe, Neau-Leduc, Christine and Périn-Dureau, Ariane, *Droit bancaire* (Paris: Dalloz, 6e édition, 2018) 115-119; Păunescu, Alexandru, „Informația și riscul - componente asimetrice ale contractului de credit", *Revista Română de Drept Privat* 2 (2017): 68-74, Pellier, Jean-Denis, *Droit de la consommation* (Paris: Dalloz, 2021) 216-233.

Secondly, it is necessary to refer to the methodology followed in this contribution, which is based on doctrinal approach to French and Romanian Banking law and Consumer Law. It should be pointed out that the study of the law (in this case a judicial made concept or doctrine) is partly based directly on primary empirical sources (relevant case-law from the national courts), but mostly on secondary theoretical sources (general textbooks, academic monographies and journal articles focusing directly or indirectly on the problematics of superabundant information and duty to advise in business-to-consumer credit agreements, as well as commenting caselaw).

Therefore, it must be added that the nature of the contribution is not only descriptive, but also analytical, since it primarily aims to assess the most recent academic debates in a neutral and critical way and to offer a different perspective of looking at the problematics of the autonomous obligations to inform and advise consumers in the pre-contractual phase in business-to-consumer credit contracts.

The main purpose of the paper is to highlight the intercalations installed between the requirements of the information formalism in the matter of credit agreements for consumers and, on the other side, the use of preventive mechanisms (obligation of information/advice, as well as the use of the European standardized debtor information form) characterized by information asymmetries and informational discrepancies[7] between the contracting parties.

2. The notion of the banking advisory obligation. Delimitation of the obligation to advise by reference to the obligation to inform

2.1. Existence of information asymmetries in credit agreements, as species of accession contracts

The epitome of the adhesion banking contracts[8] is represented by the contract whose clauses are elaborated in a unilateral manner by the participating professional, the consumer not having the possibility to discuss or negotiate them, but only to adhere or not to the global set of private norms in question; the consumer will be able to choose, if he intends to conclude the contract, to accept one or another of the offers thus formulated[9]. The negotiation of the clauses of the contract concluded with the professionals is not totally refused to the consumer, episodically this being able to intervene regarding some clauses inserted in the bank credit contract.

In the context of the existence of information asymmetries in credit

[7] Chen, Peng, *L'information précontractuelle en droit des assurances* (Marseille: Presses Universitaires d'Aix-Marseille - P.U.A.M., 2005) 98-102.

[8] Goicovici, Juanita, „Opozabilitatea condițiilor generale de bancă față de consumatori", *Studia Universitatis Babes-Bolyai Iurisprudentia* 1(60) (2015): 67-83.

[9] Pop, Liviu, „Obligația de informare precontractuală – mijloc juridic de protecție a consimțământului la încheierea contractelor", *Dreptul* 6 (2017): 46-70.

agreements[10], as species of accession contracts, the advisory obligation designates the obligation of the financial services professional to guide the consumer's choice, aimed at setting by value judgments, the relevant benchmarks for the latter option, especially with regard to the appropriateness of contracting[11]. In view of its practical reverberations, the obligation to advise is characterized by its specific function, to guide the consumer's choice between the different types of offer made by the banking professional and, implicitly or explicitly, to calibrate the contractual body in relation to real economic needs. of the consumer.

The counselling operation proves to be more complex than the informative one, the latter involving the delivery to the consumer of technical data, with neutral, objective content[12], while counselling involves the issuance of subjective, personalized benchmarks, value judgments or advice adapted to the particular needs of the consumer[13].

Judicial practice (especially the French courts' jurisprudence[14]) has held, within the obligation to advise, the existence of the duty of the consumer to deter the consumer, to discourage the conclusion (in certain terms) by the consumer of a legal act whose effects would jeopardize the economic safety of the consumer. In such cases, the literature[15] sees the transformation of the obligation to guide the decision of the party into a duty of substitution in the posture of the consumer in order to decide on the appropriateness of contracting, the professional being obliged to refuse to insert certain contractual terms, in the hypotheses that a decision in line with the consumer's choice would have certain undesirable legal or

[10] It should be noted that the legal provisions in force set out specific requirements for commercial advertising in the field of consumer credit, correlating them with the repression of unfair/incorrect commercial practices; thus, according to art. 6 of the Extraordinary Governmental Ordinance no. 52/2016 amending and supplementing the provisions of Extraordinary Governmental Ordinance no. 50/2010 (Information and practices prior to the conclusion of the credit agreement), „(1) All advertising and promotional materials relating to credit agreements must be accurate, clear and not misleading. (2) The use of formulations which may create unfounded expectations on the part of the consumer as to the availability or cost of a credit shall be prohibited. (3) The provisions of par. (1) and (2) do not prejudice the provisions of Law no. 363/2007 on combating incorrect consumer practices in relation to consumers and harmonizing regulations with European consumer protection legislation, as subsequently amended and supplemented." It should be noted that the legislator uses the phrase „formulations that may create unfounded expectations to the consumer regarding the availability or cost of a loan", as situations that are found within the perimeter of prohibited commercial practices".

[11] Gheorghe, Anca Nicoleta, Spasici, Carmen and Arjoca, Dana Simona, *Dreptul consumației* (Bucharest: Hamangiu, 2012), 70-72; Goicovici, Juanita, „Obligația de consiliere", *Revista Română de Drept al Afacerilor* 4 (2005): 15-27.

[12] Mohty, Ola, *L'information du consommateur et le commerce électronique* (Rennes: Presses Universitaires de Rennes - P.U.R., 2020) 98-110.

[13] Tandeau de Marsac, Silvestre, *La responsabilité des conseils en gestion de patrimoine* (Paris: LexisNexis, 2006) 115-117; https://www.economie.gouv.fr/dgccrf/credit-a-consommation-loyaute-linformation-precontractuelle, accessed on 08.04.2021.

[14] Boucard, François, *Les obligations d'information et de conseil du banquier* (Marseille: Presses Universitaires d'Aix-Marseille - P.U.A.M., 2002) 113-121.

[15] Picod, Nathalie și Picod, Yves, *op. cit*., 118-131; Piedelièvre, Stéphane, *op. cit*., 54-68.

economic consequences; compliance with mandatory technical/legal parameters must be taken into account by the professional, otherwise the court may proceed to a division of liability for the damage caused, taking into account both the fault of the consumer and the competing fault[16] of the professional debtor of the counselling obligation which has been violated.

We note, first of all, that the object of the obligation of advice incumbent on professionals in the field of banking services is invariably wider than that of the obligation of information, as the professional cannot limit himself/herself to stating factual issues, but must highlight the opportunity to the consumer and/or financial opportunity to conclude the contract or even to subrogate to the decision of the consumer, in the event that the economic objectives described in the contract text would be jeopardized.

The performance of the counselling obligation therefore involves not only alerting the consumer to the technical aspects of the provision of the financing service, but also assuring the consumer, as debtor that he/she has contracted on appropriate terms, according to his/her concrete needs. Thus, in a referential decision[17], the French Supreme Court held that for banking professionals are incumbent a number of contractual obligations, tacitly included in the contractual

[16] Cayrol, Nicolas, *La notion de dommages-intérêts* (Paris: Dalloz, 2016) 86-101; Demolin, Pierre, *L'information précontractuelle et la Commission d'arbitrage* (Bruxelles: Larcier, 2014) 119-131.

[17] Hacene-Kebir, Anaïs, „Obligation d'information du banquier: la preuve de la perte d'une chance", *loc. cit. supra.* In the discussed case (Cass. Fr. Civ. 2e, 20 May 2020, n ° 18-25.440), in order to guarantee the repayment of a loan granted by the bank creditor, the consumer debtor concluded an insurance contract with an insurance company intended to cover the risks of death, incapacity and disability. He subsequently suffered an accident at work; after taking over the payment of the loan instalments, the insurer informed him of his refusal to maintain the insurance contract, as his functional disability rate does not exceed the minimum stipulated in the contract. The consumer sued the bank for damages, for breach of contract for these obligations of information, advice and warning. The appellate court rejected his request, reiterating that, although the bank's failure to fulfil its obligations is not disputed, the borrower does not show that, fully informed, it had taken out other types of insurance covering incapacity for work. For the judges of the panel appointed to rule on the appeal, it turned out that the insured did not lose the chance to take out insurance to guarantee him the risk of a total incapacity for work. The debtor in the credit agreement appealed, challenging the appellate court's reasoning that another insurance contract would necessarily have been concluded if all the information had been provided by the bank in a transparent manner. The French Court of Cassation censured the reasoning of judges of first instance under Article 1147 of the French Civil Code, in its original version. By the pronounced decision, the court of appeal recalls that any loss of a chance as a result of non-performance of the professional's obligations gives rise to the right to compensation. The appellate court considered that, by requesting additional evidence regarding the possibility that, if the banking professional had pertinently fulfilled his obligation to inform and advise, on the adequacy or not of the insurance calibrated according to the characteristics of his situation, the consumer would have concluded a more appropriate contract, in specific contractual terms, the court of appeal violated Article 1147 of the French Civil Code. Concerning the incidence of Article 1147 of the French Civil Code, the French Court of Cassation found the bank's professional fault justifying the incurrence of contractual liability. The legal text quoted states that "the debtor is ordered, where appropriate, to pay damages, either for non-performance of the obligation or for delay in performance, whenever it does not justify the fact that the non-performance is due to a foreign cause not attributable to the debtor, although there is no bad faith

field, even if they were not expressly provided for by the parties. In this respect, the obligations of information, advice and warning are mentioned.

The judges of the appeal, through the technique known as the „praetorian extension of the contractual content"[18], added to the mandatory content already established by the parties at the time of the contract a number of implicit obligations, deriving from the requirements of good faith/contractual loyalty, without being expressly taken into account by the parties. In order to justify an extensive approach to contractual clauses, in particular as regards the guiding principle of the binding force of the contract, the French Court of Cassation based its analysis on the text of art. 1134, par. 3 and art. 1135 of the French Civil Code (in the version in force at the time of the decision), as well as the implicit will of the parties and the nature of the contracts in question (non-negotiated contracts).

These premises are intended to strengthen the quality of contractual relations, in particular because in most cases they are contracts concluded between professionals and non-professionals or consumers, thus presenting a certain information asymmetry that needs to be corrected by mechanisms such as the obligation to inform, advice or the obligation to warn the consumer.

In the field of financial services, the obligation to provide information is focused on the need to provide the consumer with objective information[19] on the legal and economic effects of the proposed contract, thus the information set out must be clear, precise and complete.

On the other hand, the obligation to advise, which complements the first, implies, for the banking professional, to decide in agreement with the consumer on the opportunity of his/her client to conclude the contract provided in view of his/her personal circumstances.

The advice given is, in this sense, subjective, since the debtor must make a value judgment regarding the usefulness and efficiency of the transaction, which can go so far as to advise the consumer not to conclude the contract in the (disadvantageous) terms stated. The warning duty, specific to the bank creditor, is to warn the customer about the risks inherent in the proposed transaction, so that the consumer is adequately aware of their advantages and disadvantages[20].

A distinct case is represented by the requested counselling; while intending to give the purchased service a special destination, the consumer may seek

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on his/her part" (our trans., - J.G.). This refers to the fault of the contracting party, proof of which must be provided by the other party. By reference to the cited text, the French Court of Cassation identified, in the discussed case, that the bank creditor had not correctly fulfilled some of its obligations (the obligation to provide information/advice) and that, in that regard, it had committed a fault permitting to engage its contractual liability.

[18] *Ibidem.*

[19] Boucard, François, *Les obligations d'information et de conseil du banquier* (Marseille: Presses Universitaires d'Aix-Marseille - P.U.A.M., 2002), 87-112; Hattab, Rasha, *op. cit*., 81-94.

[20] Hacene-Kebir, Anaïs, „Obligation d'information du banquier: la preuve de la perte d'une chance", *loc. cit. supra.*

the advice of the professional, aimed at clarifying the limitations and shortcomings of the contractual terms.

The specificity of consumer initiative counselling lies in widening the strict scope of the counselling obligation from the area of exceptional technicality to the area of relative technicality, so that the counselling sought may occur when, in the absence of the profane debtor's request, the counselling obligation would not have arisen, as referring to financial services whose typical characteristics are known to the average consumer, (as a standard).

We must mention, first, that the obligation of advice imposed on banks/ financial service providers and credit intermediaries when concluding credit agreements with consumers (unnamed personal needs loans, pre-affected credit for the purchase of a product/financing of services; mortgage loans and real estate loans, overdrafts, etc.) of art. 18 of the Extraordinary Governmental Ordinance no. 50/2010 on consumer credit contracts, as amended, becomes applicable complementary to the effects of the performance of the pre-contractual information obligation regulated by art. 14 of the cited Extraordinary Governmental Ordinance.

Professionals' failure to comply with the legal provisions relating to the obligation to advise on consumer loans constitutes a misdemeanour, sanctioned with a misdemeanour fine according to the text of art. 86, par. (1) of the cited Extraordinary Governmental Ordinance, with the amendments brought by the adoption of the Extraordinary Governmental Ordinance no. 52/2016 on credit agreements offered to consumers for real estate, as well as for amending and supplementing the Extraordinary Governmental Ordinance no. 50/2010 on credit agreements for consumers[21], and the finding of contraventions and the application of sanctions provided by art. 86 falls within the competences of the representatives of the National Authority for Consumer Protection (NACP), upon notification form consumers, consumer associations or *ex officio*, if, in violation of legal provisions, consumer interests are or may be affected (art. 87 of Extraordinary Governmental Ordinance no. 50/2010 on credit agreements for consumers); at the same time, the consumer may rely in these cases on legal remedies belonging to the common civil law, such as reluctantly committed fraud by the professional or error on the substance of the contract (in its dematerialized sense) to obtain the cancellation of the credit agreement the basis of a flawed consent (remedy which entails potential disadvantages for the consumer, as it retroactively involves the repayment of the borrowed capital, as a result of the cancellation of the agreement and the return of the parties to the situation prior to the contract).

[21] Published in Off. M. no. 727/20 sept. 2016, amended by the Extraordinary Governmental Ordinance no. 19/2019 for the amending of certain regulations.

2.2. Informational asymmetries and their correction through the mechanism of the bank obligation of advice

In the case of ancillary insurance contracts of a real estate investment credit, in the French case law it has been accepted the solution according to which the banking professional is obliged to provide information and advice on the insurance to be concluded by debtors, insisting on the calibration of contractual terms, destined to meet the specific needs of the consumer. In order to give this obligation a precise content, accompanied by strong legal remedies, the French Court of Cassation has previously ruled that the obligation to advise the creditor on ancillary insurance contracts is due to any debtor, whether or not he/she is sufficiently informed[22].

Returning to the perimeter of Romanian law, it is noteworthy that the provisions of art. 18 of the Extraordinary Governmental Ordinance no. 50/2010, as subsequently amended, refers distinctly to the obligation of banking professionals to provide consumers with "additional explanations" that would allow them to calibrate credit conditions[23] (respectively, terms in ancillary contracts, such as insurance contracts or establishment of real or personal guarantees) by reference to the actual financial situation of the debtor, respectively by reference to his/her concrete needs (so-called "personalization of counselling"). This legal duty is seen as an application of the advisory obligation, which differs in principle from the banking obligation to inform by its specific function (orientation of the client's choice) and by its specific object (providing explanations, value judgments, detailed, customized or personalized assessments, and not of simple technical data, as in the case of the obligation to inform). In our opinion, the execution by the bank representatives of the pre-contractual information obligation does not equate to the fulfilment of the additional obligation of advice, as these are legal

[22] French Court of Cassation, Civ. 1re, dec. of 30 September 2015, no. 14-18.854, Dalloz actualité, 16 October 2015, *apud* Hacene-Kebir, Anaïs, „Obligation d'information du banquier: la preuve de la perte d'une chance", *loc. cit. supra.*

[23] According to the provisions of art. 11 of the Extraordinary Governmental Ordinance no. 52/2016, „1) Both creditors and, where appropriate, credit intermediaries or designated representatives shall provide the consumer with appropriate explanations regarding the proposed credit agreement or contracts and any ancillary services, in order to enable the consumer to assess whether the proposed credit agreements and ancillary services are adapted to his needs and financial situation. 2. Explanations shall include at least the following: a) the pre-contractual information provided in accordance with the provisions of art. 9, in the case of creditors, and with the provisions of art. 9 and 10, in the case of credit intermediaries or designated representatives; b) the essential characteristics of the proposed products; c) the specific effects that the proposed products may have on the consumer, including the consequences in the event of non-payment by the consumer; d) if there are ancillary services grouped with a credit agreement, specify whether the components can be terminated separately, as well as the implications for the consumer, if he does so. (3) At the express request of the consumer, these explanations shall be further detailed or explained by the creditor, before signing the contract, in the form of a note, annexed to the contract."

obligations with contents if not diametrically opposed, at least (partially) separable, even if the purposes of both species of pre-contractual information remain complementary.

Therefore, beyond providing objective data on the technical parameters of the loan, the consumer has the right to be advised on the appropriateness of the various lending offers of the bank (respectively, on the optimal options for contracting adjacent insurance contracts), so as to select the contractual option that is the most appropriate[24].

2.3. Distribution of the burden of proof on the performance of pre-contractual information and counselling obligations

As the burden of proving compliance with the obligation to provide information and advice lies with the banking professional[25], the consumer cannot be required to prove (as a negative fact) the non-performance of these obligations or non-compliance in the pre-contractual stage. It has been held in the case law of the Court of Justice of the European Union[26] that the burden of proof on the correct fulfilment of the obligations of professionals lies with them, as the protection afforded by Directive 2008/48/EC on consumer credit agreements and repealing Directive 87/102/EEC[27] is ineffective should the consumer had been asked to provide proof of non-compliance with these obligations by the professional. In the interpretative key proposed by the CJEU's judges, the consumer does not have the means to provide this proof, while a diligent professional creditor must be aware of the need to collect and preserve evidence that he/she has complied with his/her obligations.

Thus, depending on the specific circumstances of the case, if the evidence of a breach of the obligation to provide information or advice is easy to obtain, there are no intricacies or difficulties pertaining to the risk of insufficient evidence.

Otherwise, if this evidence is difficult to obtain or even impossible to provide in relation to the content of the discussions in the pre-contractual stage,

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[24] Bonneau, Thierry and Lepage, Aghate, *Information, numérique et innovations* (Paris: Éditions Panthéon-Assas, 2020) 66-82.

[25] „Crédit à la consommation: la preuve du respect de l'obligation d'information pèse sur le prêteur" commentaire sur Cass. civ. 1ère, 5 juin 2019, n° 17-27.066, FS-PB, published on 13.08.2019, available at http://vivaldi-chronos.com/banque-credit-banque-credit/credit-a-la-consommation-la-preuve-du-respect-de-lobligation-dinformation-pese-sur-le-preteur/, accessed on 08.04.2021.

[26] C.J.C.E. (4th chamber), dec. of 18 dec. 2014 in case C-449/13, CA CONSUMER FINANCE/ BAKKAUS, available at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A62013CJ0449, accessed on 09.04.2021.

[27] The consolidated text of Directive 2008/48/EC on consumer credit agreements, as amended by Directive 201190/EU, Directive 2014/17/EU, Regulation (EU) 2016/1011 and Regulation (EU) 2019/1243 of 20 June 2019 is available at https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:02008L0048-20190726&from=EN, accessed on 09.04.2021.

the consumer rights that the provisions of Directive 2008/48/EC seek to protect would be affected referring to their content, should the consumer be the one who has to bear the burden of proving a negative fact consisting in the non-execution of the information/advice obligation incumbent on the banking professional[28]. In the light of the same principle of effectiveness[29], the Court has ruled that the provisions of Directive 2008/48/EC exclude, due to a standard clause, the interpretation according to which the national judge must consider that the consumer has recognized the full and correct fulfilment of the creditor's pre-contractual obligations (should the consumer had acknowledged that he/she had received and read the standardized European information sheet).

The significance of the interpretation provided by the CJEU in relation to the burden of proof of the fulfilment of professional obligations in relations with consumers should not be underestimated; the position of the European court can undoubtedly be transposed for the burden of proving pre-contractual information/advice obligations arising from special legal provisions on consumer credit.

Thus, it is the bank creditor's mission to demonstrate that he has effectively fulfilled his duty to provide the essential information on a durable medium; therefore, the prudent creditor will ensure that it has pre-established evidence of the fulfilment of these obligations towards the consumer debtor.

[28] The *ex-officio* examination by national courts of the fulfilment of the obligation to provide information incumbent to financial services professionals was retained in Decision C - 377/14 of 21 April 2016 concerning a reference for a preliminary ruling made in Case C-377/14 pursuant to Article 267 TFEU of the Krajský soud v. Praze (Prague Regional Court, Czech Republic), by decision of 24 June 2014, received by the Court on 7 August 2014, in the proceedings of Ernst Georg Radlinger, Helena Radlingerová v. Finway as, in which the CJEU held that „Article 10 (2) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on consumer credit agreements and repealing Council Directive 87/102/EEC must be interpreted as meaning that a national court litigation relating to claims arising from a credit agreement within the meaning of this Directive must examine of its own motion compliance with the obligation to information provided for in that provision and determine the consequences arising in accordance with national law from infringement of that obligation, provided that the penalties comply with the requirements of Article 23 of that Directive." The full text of the decision is available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=255DC827B8EFD2F6943E3118B8A54C00?text=&docid=176802&pageIndex=0&doclang=EN&m&d, accessed on 04/09/2021.

[29] For further developments on this concept, see Mendez-Pinedo, Elvira M., "The principle of effectiveness of EU law: a difficult concept in legal scholarship", *Juridical Tribune - Tribuna juridica* 11 (1) (2021): 5-29.

3. Timing the progressive formation of credit agreements addressed to consumers

3.1. Alternative mechanisms for tempering consumer' impulsivity: the term for prior reflection

These mechanisms cover, first of all, the legal reflection period of 15 days from the receipt of the credit offer, until the moment of effective acceptance of the offer, respectively the cases of credit contracts terminated by exercising the optional right of cancellation[30] (or unilateral termination/withdrawal from the contract), when, within the reflection period of 14 days after the signing of the contract[31], the initial legal will of the consumer debtor must be subsequently joined by a "confirmatory will" of the consumer, expressed "negatively" or followed by the exercise of the legal right of revocation within the interval set by the legislator.

At the same time, the concept of progressive formation of the credit contract concluded by consumers presents - in the field of establishing the role played by the optional right of withdrawal in the genesis of the final contract – the advantage of a dynamic vision of contract formation, which takes into account the fact that it is not reducible as between the final agreement – as a possible end point – and the beginning of the legal approximation between the parties to the credit agreement, the consent of the contractual partners is gradually formed, with a certain dose of caution and, implicitly, with the printing of a precise role for the consumer's right of withdrawal from the credit agreement within the legal interval of 14 days from the moment of its signing.

As it results from the provisions of art. 9 of the Extraordinary Governmental Ordinance no. 52/2016, the duration of 15 days provided in par. (2), letter b) is a period of reflection for the consumer before concluding the credit agreement; according to paragraph 6 of this Article, "During the period of reflection: (a) the information contained in the European Standardized Information Form (EFSI) may not be changed and constitutes a firm commitment to the creditor; (b) the offer is irrevocable to the creditor; (c) the consumer may accept the offer at any time during the reflection period. In this case, the consumer expressly waives, in writing, the use of the reflection period by a separate document." From the final thesis of art. 9, par. (6) of the O.U.G. no. 52/2016 results that the legal

[30] Farhat, Raymond, *Le droit bancaire* (Paris: L.G.D.J, 2e édition, 2018) 91-116; Dekeuwer-Défossez, Françoise and Moreil, Sophie, *Droit bancaire* (Paris: Dalloz, 11e édition, 2016) 218-226; Éréséo, Nicolas and Lasserre Capdeville, Jérôme, „Chronique de droit du crédit aux consommateurs (Juillet 2018-Juillet 2019)", available at https://www.actu-juridique.fr/affaires/bancaire-credit/chronique-de-droit-du-credit-aux-consommateursjuillet-2018-juillet-2019/, accessed on April 8, 2021.

[31] The Extraordinary Governmental Ordinance no. 50/2010 (with subsequent amendments) regulates, for the first time, the consumer's optional right to withdraw consent in credit agreements, allocating an exercise period of 14 days from the date of signing the contract.

term of prior reflection is regulated in supplementary, non-imperative terms, being possible the waiver of the consumer to the benefit of this term of thought (reflection on the content of the credit offer), the consumer can opt for immediate signing of the credit agreement, even before the expiration of the 15-day pre-reflection period. Instead, from the moment of signing the credit agreement, there is a legal interval of 14 days for exercising the consumer's right to withdraw from the contract, a right that the consumer cannot give up in advance, the legal provisions being imperative in this regard.

3.2. Imperfect palliatives: the term of withdrawal from the contract and the informative formalism

Some remarks should be made, first, regarding the credit offer, as a vector of information and the use of the standardized form.

The standardized European consumer debtor information form contains specific references, in a concise manner, to the most important elements of the credit agreement, in order to prevent situations where in the pre-contractual phase the consumer's attention would be distracted by less relevant ancillary elements, to the detriment of understanding the main rights and obligations and issues related to the total cost of the loan, in an attempt to counteract the risk of exacerbated, unfocused consumer information at the pre-contractual stage[32].

[32] The legislator drew, in the text of art. 8 of the O.U.G. no. 52/2016 additional exigences on the content of essential (significant) information provided to consumers when concluding credit agreements, applying these requirements including for the activity of credit intermediaries: "1. Creditors or, where appropriate, credit intermediaries and designated representatives shall provide clear and easy-to-understand general information on credit agreements, on paper or on another durable medium or in electronic form. 2. General information shall include at least the following: a) the identity and address of the registered office and the working point of the creditor and, as the case may be, of the credit intermediary or of the designated representatives; b) the purposes for which the credit can be used; c) the forms of the guarantee, including, where appropriate, the possibility that it may be located in another Member State; d) possible duration of credit agreements; e) the types of interest rates available, indicating whether the interest is fixed and / or variable, together with a brief description of the characteristics of a fixed interest rate and a variable interest rate, including the implications for the consumer; f) if loans in a foreign currency are available, an indication of the foreign currency (s), including an explanation of the implications for the consumer when the credit is in foreign currency; g) a representative example of the total value of the credit, the total cost of the credit to the consumer, the total amount payable by the consumer and the total annual interest rate (TAIR); h) an indication of possible additional costs, which are not included in the total cost of a consumer credit, to be paid in connection with a credit agreement, as well as the fact that, if part of these costs is prior to the conclusion of the contract, the fact that they must be paid regardless of whether or not the contract is concluded; i) the various methods available for repaying the loan, including the number, frequency and amount of the periodic instalments; j) where applicable, a clear and concise statement that compliance with the terms and conditions of the credit agreement does not guarantee repayment of the full amount of the loan under the credit agreement; k) a description of the conditions directly related to the early repayment; l) the fact that an assessment of the good by an authorized valuer is necessary, as well as any related costs for the consumer arising therefrom; m) an indication of the ancillary services related to the contract, which the consumer is

The informative formalism, as an alternative to the sanctioning/ repression of potential consent alterations, implies, for the bank creditor, the obligation to insert in the contractual text some obligatory mentions listed in the legal text with imperative (mandatory) value.

The informative formalism thus describes[33] the formal requirements imposed by the legislator regarding the contractual relations between professionals and consumers, as an improved technique to protect the consumer's consent when concluding contracts with financial services professionals; having a legal origin, the informative formalism implies the obligation for the professional to insert, in writing, in the contractual text proposed to the consumer, the mandatory minimum mentions established by law, in order to inform the consumer about his/her rights and obligations generated by certain consumer contracts.

4. Excessive information, as hypostasis of fraud in credit agreements

The issue of providing the consumer, in the pre-contractual phase, with an inadequate amount of information, in order to mask certain limits of the service or to shield legal or economic consequences detrimental to the consumer, is related to questions contexed to the possible alteration of consumer consent in these cases.

As a result of coping with overabundant information, the vigilance and understanding of the average consumer may be exceeded by being provided by the bank creditor with a set of inadequate volumetric data and information, which the consumer may be tempted not to read or, due to the large volume of information, to ignore the essential aspects attached to the total cost of the credit or attached to other essential economic aspects in the respective contract.

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obliged to purchase in order to obtain the credit or to obtain it in accordance with the terms and conditions presented and, where applicable, the fact that the ancillary services may be purchased from another supplier than the creditor; n) where the conclusion of an insurance contract is obligatory for the consumer, this shall be clearly stated, as well as all the modalities and terms that the consumer has at his disposal to prove the insurance. The creditor's actions are also clearly stated if the consumer has not proved the existence of an insurance contract, under the conditions established by the contract; o) a general warning about the possible consequences of non-compliance with credit agreement commitments; p) a warning regarding the risks involved in taking out a loan."

[33] Fortich, Silvana, *Essai sur le formalisme contemporain dans la protection du consentement contractuel*, Université Panthéon-Assas - école doctorale de droit privé, Universidad Externado de Colombia, Thèse de doctorat en Droit Privé en cotutelle (2016) 46-52, available at https://docassas.uparis2.fr/nuxeo/site/esupversions/87b35b8b-d199-4dab-97bb-05a1d2b507d0?inline, accessed on 08.04.2021; Goicovici, Ana-Juanita, *Creditele pentru consum și de investiții imobiliare. Comentarii și explicații* (C. H. Beck, București, 2014) 53-58; Goicovici, Juanita and Golub, Sergiu, „Formalismul informativ - privire specială asupra creditului pentru consum", in Vasilescu, Paul (ed.), *Consumerismul contractual. Repere pentru o teorie generala a contractelor de consum* (Cluj-Napoca: Sfera Juridică, 2006), 84-101; „Les effets du formalisme informatif", available at https://www.labase-lextenso.fr/ouvrage/9782275051765-538, accessed on 08.04.2021; „La configuration du formalisme informatif", available at https://www.labase-lextenso.fr/ouvrage/97 82275051765-534, accessed at 08.04.2021.

Anticipating these issues, the legislator provided in the text of art. 12 of the Extraordinary Governmental Ordinance no. 50/2010 on consumer credit agreements, as subsequently amended, that any additional information that the creditor may deliver to the consumer must be provided in a separate document, which may be annexed to the form „Standard European credit information for consumers", without altering the content of the standard form, which must be maintained within the parameters of an easy-to-read text, which contains easy-to-read information.

The intention behind the legal regulation is thus to avoid the bank creditor's attempts to crowd the space for essential information in the contract documents, including details that may invariably distract the consumer from the essential aspects of the cost and conditions of the loan (in particular, the calculation method for the fixed interest rate or for the variable interest, the penalties incurred in case of late payment, monthly/annual fees, etc.).

It should be noted that the essential information listed by the legislator, such as that relating to the annual interest rate, cannot be included in the attached general contracting conditions, but must be expressly mentioned in the text of the main contract. Consequently, the failure to state the actual annual interest rate in a consumer credit agreement, as required by Directive 2008/48/EC on consumer credit agreements, as subsequently amended, may be a decisive factor in the analysis by national courts. whether or not a clause in a consumer credit agreement, relating to its cost, is drafted in a clear, transparent and comprehensible manner[34].

Therefore, we argue that the inclusion in the European standard information form of information other than those listed by the legislator can be considered a form of fraud (malicious manoeuvres) committed by the professional creditor, generating for the consumer the possibility to request the bank creditor to pay damages for non-compliance with the obligation to inform in the pre-contractual phase, but it remains for the court to assess, on a case-by-case basis, whether or not additional information included in the standardized form that generated an overabundant information situation was to cause the consumer's error on some decisive aspects at the conclusion of the contract.

5. Conclusions

Intersecting a series of other mechanisms for delaying the formation of consumer consent at the conclusion of credit agreements, the obligation of pre-contractual information is seen as a legal obligation of the professional in the field of bank financing services to deliver objective, neutral data with technical content to the consumer, which are appropriate for the purpose of the latter forming an

[34] It should be noted that the national court has the possibility to assess, even *ex officio*, whether the omission to mention the effective annual interest in the clause on the total cost of credit to the consumer may give this clause an abusive character, within the meaning of art. 3-4 of Directive 93/13 on unfair terms in consumer contracts.

informed consent.

On the other hand, far from being seen as merely a mechanism which doubles the execution of the information obligation incumbent on professionals, the advice obligation is seen as an obligation to guide the client's choice (by communicating subjective data) and even as an obligation to deter (discourage) the consumer, whenever the contracting in the respective terms would be economically pernicious or would contrast with the imperative legal norms or with the incident deontological norms, including from the perspective of the banking prudence principle.

The performance of the obligation to advise therefore implies a higher degree of involvement of the banking professional, who must indicate to the consumer, in a transparent manner, appropriate benchmarks on the appropriateness of contracting under those conditions, facilitating the consumer's choice of relevant contractual terms and helping the consumer to form his/her choice according to his/her concrete economic needs. The plethora of legal mechanisms used in this regard include: (1) the obligation to provide pre-contractual information with predetermined content; (2) the obligation of advice incumbent on professionals in the field of banking services; (3) the obligation to provide contractual information at the stage of the generating of the contractual effects (during the contractual relations established with consumers); (4) the informative formalism, aiming at the obligation to include in the text of the contract certain obligatory legal mentions; (5) avoidance of excess information, by excluding from the information form provided to the consumer overabundant information (which will be provided using the annexes of the concluded contract).

A selective survey and analysis of literature revealed that, by including inadequate data by supersized volume, informative documents risk becoming plethorically abundant in the field of banking services, and the informative message sent to the consumer in the pre-contractual stage risks becoming overabundant.

From this perspective, we concluded that the civil liability of the professional in the field of financial services for non-execution of the obligation of advice, respectively of the obligation to inform in relations with consumers, and the non-performance of these obligations can represent a legal basis for obliging the banking professional to the payment of damages for the reparation of the detriments caused to the consumer by the deficient counselling or by the lack of transparency in the provision of certain essential information.

Last but not least, the issue of providing the consumer, in the pre-contractual phase, with an inadequate amount of information by volume, in order to mask certain limitations of the service or to shield legal or economic consequences detrimental to the consumer, is linked to a possible alteration of consumer consent, in these cases.

Faced with overabundant information, the average consumers may see their vigilance and understanding exceeded, by the bank creditor using an inade-

quate set of volumetric data and information to shield or mask the legal and economic consequences of contracting for the consumer.

In this perimeter, we consider that the legal remedies are appropriate, implying the obliging of the creditor to pay damages by engaging its contractual liability (for non-performance of the obligation to inform during the development of credit agreements), respectively tort liability for fraud committed in the pre-contractual stage, by the non-fulfilment of the obligation to inform or to advise/ warn the consumer on the potential undesirable (legal/economic) implications of the contractual terms.

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The development of the resolution framework and the establishment of the Corporation for Deposit Insurance in South Africa

Assistant general counsel **Shenaaz MEER**[1]

Abstract

Financial institutions are regarded as too big to fail if they are so systemically important that if they do fail, they cannot be closed or liquidated without having a devastating impact on the financial system, the economy and consumers. Governments in the past, to avoid such outcome have been obliged to support such institutions using taxpayer funds. The consequence meant that shareholders and creditors shared in the good times of profits and risktaking, but taxpayers had to unfortunately bear the burden of such losses and the impact on governmental finances became a heavy burden to bear. The practical process for triggering a resolution and activating certain steps will need to be set out and determined. The mechanisms and operational elements will need to be embedded and integrated in existing systems and processes both at the Resolution Authority and in various financial institutions. All policy discussions and proposed legislative amendments will and has involved a robust public participation process as FSLAB steers its way through the Parliamentary process. Industry has been involved in prior consultation and multiple interventions will co-create this complex discipline and has contributed to the collective understanding to ensure the implementation of an effective regime in South Africa.

Keywords: *financial institutions, South Africa, deposit insurance, financial system.*

JEL Classification: K20, K22, K42

1. Introduction

Financial institutions are regarded as too big to fail if they are so systemically important that if they do fail, they cannot be closed or liquidated without having a devastating impact on the financial system, the economy and consumers. Governments in the past, to avoid such outcome have been obliged to support such institutions using taxpayer funds. The consequence meant that shareholders and creditors shared in the good times of profits and risk-taking, but taxpayers had to unfortunately bear the burden of such losses and the impact on governmental finances became a heavy burden to bear.

A study of 187 banking crises in 126 countries in a period between1970-2009 illustrates the impact of the crises on the economy. The crises in the financial sector spills onto health, education, gender, declines in life expectancy, de-

[1] Shenaaz Meer - assistant general counsel at South African Reserve Bank, shenaaz.meer@resbank.co.za.

cline in primary school enrolment and worsening of poverty and income equality.[2]

One of the key regulatory reforms that the Group of Twenty (G20) introduced after the global financial crises aimed to introduce additional regulatory requirements on systemically important financial institutions to make them more resilient and to introduce measures to ensure that they can be resolved to reduce the probability of failure.

In 2011 (revised 2014), the Financial Services Board published the Key Attributes for effective Resolution Regimes that was adopted in 2015 as an international standard to end the phenomenon of "Too big to fail".

2. What have we done so far in South Africa?

In 2011 National Treasury (NT) of South Africa published broader policy paper "A safer financial sector to serve South Africa better". This led to the emergence of the Twin Peaks regulatory framework, through the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (FSRA) establishing a Prudential Authority as a prudential regulator and a Financial Sector Conduct Authority (FSCA) as a conduct regulator.

This legislation gave the South African Reserve Bank (SARB) the mandate for financial stability and in effect extended the regulatory perimeter allowing for more intensive and intrusive supervision. It also provided the framework for designating and dealing with systemically important financial institutions.

In line with South Africa's commitment to implement the key attributes and end "Too big to fail", in 2015 NT, the South African Reserve Bank (SARB) and the FSCA published a second specific policy paper "Strengthening South Africa's Resolution Framework for Financial Institutions". In 2015, the Banks Amendment Bill was introduced in response to a local bank failure to allow for transfer of assets and liabilities and to separate the struggling entity into a good versus bad bank to enable resolution. In 2017 SARB published a discussion paper entitled "Designing a Deposit Insurance Scheme for South Africa".

Finally, the Financial Sector Laws Amendment Bill, 2018 (FSLAB) was published on 27 September 2018 for public comment by 7 November 2018 and is currently working its way through South Africa's Parliamentary system. In effect, the FSLAB now designates the South African Reserve Bank (SARB) as resolution authority and establishes both the Corporation for Deposit Insurance and Deposit Insurance Fund. The FSLAB aims to enhance SARB's ability in its role as resolution authority to deal with the failure of certain financial institutions and to mitigate the impact of such failures on financial stability.

In effect, the FSLAB will amend the current framework for dealing with banks and systemically important financial institutions, systemically important

[2] National Treasury presentation to the Standing Committee on Finance 15 March 2021.

non-bank financial institutions and relevant holding companies by, amongst others, going beyond the traditional curatorship or business rescue framework. It aims to ensure that the impact or the potential impact of a failure of a designated institution on financial stability are managed appropriately

3. Analysing the regulatory gaps in South Africa to prepare for the resolution framework

South African regulators needed to analyse the current regulatory gaps to prepare for both the resolution framework and the deposit insurance scheme. In this regard the current Banks Act, 1990 (Act No. 94 of 1990) provides only for curatorship, which was limited in scope and did not apply to non-bank financial institutions. In addition, the Companies Act, 2008 (Act No. 71 of 2008) provides for business rescue proceedings of entities in South Africa but did not address or give due regard to the nature and complexities of large, complex financial institutions operating across multiple jurisdictions. The Insolvency Act, 1936 (Act No. 24 of 1936) was limited and certainly did not provide depositors with any preferential rights in the creditor hierarchy and was in fact only limited to liquidation proceedings.

There was no specific legal provision allowing for resolution planning for systemically important financial institutions or systemically-important non-bank financial institutions and holding companies. The current norm was that bail outs occurred on a non-standardised, on a case by case basis and not in accordance with defined legally structured principles of law. It was clear that South Africa needed to have stabilisation powers to include bail in, a dedicated depositor scheme and introduce protection measures to depositors in liquidation.

Therefore a need was identified to consolidate the fragmented law and to introduce enabling powers, and enabling structures such as a Resolution authority, to take responsibility for the development of resolution plans and the resolution framework, the Corporation for Deposit Insurance, the Deposit Insurance Fund, introduce a set of secondary legislation, align multiple sets of regulation and to introduce a new proposed creditor hierarchy and co-operation methodology in accordance with International principles.

3.1. Summary of the main provisions of FSLAB[3]

Clause 166A designates the SARB as Resolution Authority and specifies the resolution functions that will be performed by the Governor. Clause166B and C introduces the SARB's resolution objectives and functions that is in performing its resolution functions, it is to assist in maintaining financial stability and provide

[3] Summary of clauses extracted from the Financial Sector Laws Amendment Bill [B-2019].

recognition of the protection to vulnerable depositors. It shall allow access to funds whilst having due regard to the rights of shareholders, creditors and employees and this must take place through the orderly resolution of designated institutions. The SARB may in addition consider any impact that its action may have on the financial stability of a foreign jurisdiction where a designated institution is registered.

Clause 29 A sets out the scope of the financial institutions that fall within the ambit of the resolution chapter that are to be regarded as "designated institutions". These institutions include banks, systemically important non-bank financial institutions, their holding companies and other entities within financial conglomerates, the latter of whom are not excluded by the Governor. Banks in fact are intentionally designated because of their deposit taking and payment system role. If an entity operates within a group, it is envisaged that the designated institution will need to conduct an assessment to determine resolution entities and resolution support entities. The SARB would of course be responsible for setting requirements, providing guidance, reviewing assessments and providing notification on group entities excluded as designated institutions.

Resolution plans itself are covered by Clause 166E and 30. This requires the SARB to plan for the potential need to place a designated institution in orderly resolution. It is an important consideration to incorporate resolution and resolution support entities into a resolution plan, to give guidance on group structuring to improve resolvability and to generally ensure that designated institutions have enough loss absorbing capacity in resolution. This is some of the work that lies ahead after the legislation is promulgated.

The FSLAB furthermore provides for standards (secondary legislation) to be issued for resolution planning and related matters by enabling standards to be provided to designated institutions.

Specific Powers that are introduced in the Bill is the power to place a designated institution in resolution. Clause 166J enables the SARB to make a recommendation to the Minister who then makes a determination.

Other powers introduced by FSLAB are:

a) Creation of bridge companies - Clause 166 F provides the Resolution Authority with the ability to create bridge companies.

b) Management and Control - Clause 166M entitles the SARB to assume management and control of a designated institution in resolution.

c) Introduction of resolution practitioners - Clause166O provides the SARB with the right to appoint a resolution practitioner.

d) Transfer of shares is set out in Clause 166P. Such transfer requires the approval of the SARB for any shares to be traded by a designated institution.

e) Transfer of assets and liabilities - Clause166S enables the SARB to transfer the assets and liabilities of a designated institution in resolution.

f) Restructuring and a bail-in mechanisms are introduced by Clause 166S and T. These clauses provide the SARB with the necessary powers to recapitalise

a designated institution in resolution subject to specific conditions and safeguards. Recapitalisation must be sufficient to meet regulatory capital requirements and restore market confidence. Further studies and work will occur in this identified area. The idea is that the introduction of this mechanism in the law will necessitate a shift from a culture of bail outs from taxpayer funds to a system where creditor and shareholders are provided correctly so with the ability to absorb losses of institutions that profited when times were good.

On the matters of safeguards and creditor hierarchy:

a) Clause 166U introduces powers to be exercised in a manner that respects the creditor hierarchy in liquidation.

b) No creditor worse off rule - Clause 166V – Powers may not be exercised in a manner that leaves a creditor worse off than it would have been should the designated institution have been placed in liquidation.

With regard to covered deposits:

a) The Corporation of Deposit Insurance was created to ensure that bank depositors have reasonable and timeous access to their covered deposits.

b) The definition section of FSLAB specifically defines the scope and limitation of cover for deposits covered by the Deposit Insurance Fund.

c) On payment itself, Clause 166Z reimburses covered depositors or support a resolution action that protects covered depositors.

d) The limit of coverage per qualifying depositor is set to be prescribed by the Minister in accordance with Clause 166AA.

On the Corporation for Deposit Insurance: (Part 6):

a) Clause 166AE establishes the Corporation for Deposit Insurance which is set through the provision of deposit insurance to establish, maintain and administer the Deposit Insurance Fund and in so doing support the SARB in its financial stability mandate. In doing so, it is also a function of the Corporation for Deposit Insurance to promote awareness among financial customers of the protection afforded by these legislative changes. The affairs of the Corporation for Deposit Insurance are managed and controlled by a Board of Directors, which exercise their powers in accordance with this law. It is the function of the Corporation for Deposit Insurance to establish and implement effective governance systems having regard to internationally accepted standards. The Board may establish multiple committees but must establish an investment committee to review the investment portfolio of the Deposit Insurance Fund.

b) Membership of the Corporation for Deposit Insurance is set out by Clause166AF and is structured to ensure that all banks will be members of the Corporation for Deposit Insurance from the date such banks are licensed or registered in terms of the relevant financial sector laws that allow such banks to hold covered deposits.

c) The Corporation for Deposit Insurance may charge deposit insurance levies from its members to fund the operations of the Corporation for Deposit Insurance and for administration of the Deposit Insurance Fund.

On the Deposit Insurance Fund itself (Part 7):

a) Clause 166 BD establishes the Deposit Insurance Fund. The Corporation for Deposit Insurance may apply money standing to the credit of the Deposit Insurance Fund consistent with the investment strategy. Deposit Insurance Premiums in accordance with Clause 166BF are to be collected from members to provide funding.

b) Members are to maintain an amount in the fund as liquidity for payout as set out u Clause 166BG.

The essence of resolution itself is to manage a failing bank or systemically important financial institution, systemically important non-bank financial institution or holding company by taking pre-emptive measures to make the orderly resolution of large and complex financial institutions feasible. The FSLAB only forms the foundational work for the resolution framework and there are several practical areas that have been identified by the internal teams within the SARB as requiring of further development.

These include:

- resolution strategies supporting the development of feasible resolution plans; resolvability;
- loss absorbency;
- the logistics of valuation; funding in resolution;
- operational continuity in resolution, including stays and updating of service level agreements;
- access to financial market infrastructures;
- interconnectedness;
- disclosures;
- wind-down of non-material activities and entities, including trading; and
- exit from resolution.

4. Conclusion

The practical process for triggering a resolution and activating certain steps will need to be set out and determined. The mechanisms and operational elements will need to be embedded and integrated in existing systems and processes both at the Resolution Authority and in various financial institutions. All policy discussions and proposed legislative amendments will and has involved a robust public participation process as FSLAB steers its way through the Parliamentary process. Industry has been involved in prior consultation and multiple interventions will co-create this complex discipline and has contributed to the collective understanding to ensure the implementation of an effective regime in South Africa.

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The escrow contract, a mechanism for guaranteeing and securing private and public contractual relations

PhD. student **George-Bogdan IONIȚĂ**[1]

Abstract

The present study aims to analyse the formation mechanism but also the effects that the use of the escrow contract produces in the contractual relations between the parties. The necessity and utility of the study results from the fact that the Romanian legislation does not expressly regulate the escrow contract, therefore falling within the scope of unnamed contracts. The thesis from which this research is founded is based on the purpose and role of the escrow contract, namely, to generate an "additional guarantee" to the parties already involved in a main contractual relationship, which will be ancillary grafted to the escrow contract. Thus, a first objective of the research will aim to analyse the formation method, the particularities but also its effects in the relations between the parties but also the relationship between the main contract and the accessory one. A second objective of the research will materialize through the careful study of legal texts that directly refer to and regulate the use in certain areas, such as privatization or insolvency, of escrow accounts in order to secure already existing contractual relations between the parties. In order to carry out this research, the aim will be to study the updated legislation that refers to the subject of the escrow account contract, the relevant jurisprudence but also the specialized doctrine in the field.

Keywords: *escrow contract, unnamed contracts, additional guarantee, privatization, securing contractual relations.*

JEL Classification: K12

1. Escrow contract architecture - preliminary considerations

An escrow contract may be defined as an ancillary agreement whereby a party named depositor entrusts a sum of money or one or more movable property to another party called an escrow agent, who undertakes to keep the money or goods deposited following to remit them at a later stage to another party, called the beneficiary, in the event that the latter fulfils the conditions set out in the main contract[2]. As can be seen, the escrow contract is a tripartite and ancillary agree-

[1] George-Bogdan Ioniță – Bucharest University of Economic Studies, lawyer in the Bucharest Bar, Romania, ionita.bogdan.george@gmail.com.

[2] See also the definition provided by Government Emergency Ordinance no. 146/2002 on the formation and use of resources carried out through the state treasury "b) escrow account - account opened by public institutions with credit institutions, based on an agreement between two or more parties, in which certain amounts in lei are kept at their disposal or in foreign currency, within a limit and under agreed conditions". Reference made in the paper, Sergiu Golub, *Delimitation of*

ment which is used as a guarantee mechanism for the performance of the obligations set out in the main contract concluded between the depositor and the beneficiary.

The escrow contract is not regulated in Romanian legislation, being part of the scope of unnamed contracts[3]. Thus, art. 1168 of the Civil Code, establishes the legal regime of unnamed contracts to which the rules of Chapter I, Book V, of the New Civil Code, respectively art. 1166-1323. If these rules are not sufficient, the special rules regarding the contract with which they most resemble will apply. In this regard, it should be noted that in the specialized doctrine it has been appreciated that with regard to the escrow account contract it can be qualified as a kind of bank deposit contract[4]. But going further in the analysis, we can consider that, in fact, the escrow account contract is part of the category of bank deposit contracts - guarantee because the purpose for which this type of contract is concluded is to facilitate the conclusion or execution of another contract (main)[5].

As can be seen from the formation of the escrow contract, there must be the agreement of the will of a depositor, an escrow agent and a beneficiary.

As for the depositor, it can be a natural or legal person who will entrust an amount of money or a good/movable property to another person (escrow agent).

The escrow agent is usually a credit institution[6], which has the obligation to ensure the preservation of the amounts of money or movable property/goods deposited by the depositor until the conditions set out in the main agreement are met. In fact, the escrow agent is a third party in relation to this main contract on which the escrow contract is grafted.

The beneficiary may also be a natural or legal person, to whom the escrow agent will remit the sums of money or goods deposited in the escrow account in the event that he meets the conditions set out in the main contract.

Continuing the analysis regarding the escrow contract, we will determine what its legal characteristics are.

First, the escrow contract is a contract for consideration because each

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trust from other contracts or legal operations, Romanian Journal of Business Law, no. 1 of 2017.

[3] For the development of the issue related to unnamed contracts, see also the paper, Adriana Almășan, *Architecture of unnamed contracts: construction and arrangement,* in L. Bercea (ed.), *Unnamed contracts in business,* National Conference on Commercial Law, Cluj, June 8-9, 2017, Universul Juridic Publishing House, Bucharest, 2017.

[4] Flavius Baias (coord.), *The new civil code. Commentary on articles*, 2nd edition, Hamangiu Publishing House, Bucharest, 2016, pp. 2307-2308.

[5] Rada Postolache (Coord.), *The deposit contract and its varieties*, C.H. Beck Publishing House, Bucharest, 2010, p. 146.

[6] See Emergency Ordinance 99/2006 on credit institutions and capital adequacy, as subsequently amended and updated, published in the Official Monitor no. 1027 of 27.12.2006. According to art. 3 - Credit institutions, Romanian legal entities, may be set up and operate in compliance with the general provisions applicable to credit institutions and the specific requirements set out in Part II of this emergency ordinance, in one of the following categories: a) banks; b) credit cooperative organizations; c) savings and lending banks in the housing field; d) mortgage credit banks.

party seeks to obtain an advantage in return for its obligations[7]. It is a commutative contract, since from the moment of its conclusion, the existence of the rights and obligations of the parties is certain, and their extent is determined or determinable[8].

We appreciate that it is also a real contract, as for its valid conclusion it is necessary to remit the sums of money or the good/goods to the escrow agent. It is also a contract *intuitu personae*, manifested especially in terms of the quality of the escrow agent. In this regard, the depositor and the beneficiary will seek to conclude such a contract with an escrow agent with a good reputation in the market and who can offer all the necessary guarantees in the successful execution of the contract.

Regarding the substantive conditions, the parties to the escrow account contract must meet the conditions provided by law, namely: capacity, consent, object and cause.

With regard to the capacity of the parties, we consider that, referring to the storage contract where the delivery of a good in storage is qualified as an act of administration[9], in the case of the escrow contract we must take into account the finality and purpose of the contract, at a certain point the sums of money or goods that are the object of the contract are deposited in the care of the escrow agent, in case the conditions established in the main contract are met, the sums of money or goods will be sent to the beneficiary.

In such a case, we can see that we are in the presence of a final exit from the assets of the depositor of the goods that are the subject of the escrow contract, being an act of disposition[10] initiated by the main contract. Therefore, as regards the ability of the depositor and the beneficiary to contract, it will relate to the main contract, as the escrow contract is an ancillary agreement created in order to complete and secure the performance of the obligations set out by the parties in the main contract.

As regards the capacity of the escrow agent, he will have to meet the conditions laid down by the relevant law[11].

With regard to the consent of the parties, it must be serious, informed and not vitiated. In the matter of defects, we consider that we can find as a defect of consent the error regarding the person of the beneficiary or the nature of the object of the escrow contract.

As for the object of the contract, it will mainly be represented by sums of

[7] See 1172 paragraph (1) of the Civil Code.
[8] See 1173 para. (1) C. civ.
[9] Florin Moțiu, *Special Contracts*, 6th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2015, p. 304.
[10] Gabriel Boroi, Carla Anghelescu, *Civil law course. General part*, 2nd edition revised and added, Hamangiu Publishing House, Bucharest, 2012, p. 117.
[11] See art. 32-44 of the Emergency Ordinance 99/2006 on credit institutions and capital adequacy but also see art. 205-211 C. civ.

money[12]. It can also be represented by securities or software products[13]. It should be mentioned that only movable property and not real estate can be the object of the contract. Whether it is sums of money or other goods, the object of the contract must meet the general conditions provided by law, the object must be possible, be lawful, exist, be determined or determinable and be in the civil circuit[14].

With regard to the cause of the escrow contract, it must exist, be lawful and be moral[15].

Regarding the formal conditions, we consider that it is necessary to conclude the contract in written form *(ad probationem)*[16].

2. The specific effects of the escrow account contract

Regarding the effects of the escrow account contract (the rights and obligations of the parties) we will analyze them in relation to each contracting party.

Thus, as regards the escrow agent, it is mainly obliged to receive the goods entrusted by the depositor to the warehouse. At the time of storage, the escrow agent also has the obligation to check and inventory the goods that are the object of the contract.

Given the *intuitu personae* of the contract, the escrow agent will not be able to waive the obligation to keep the returned goods in storage by transferring them to another escrow agent[17]. Moreover, the escrow agent is a third party compared to the initial contract, he will not be liable for the result of the main contract, but his liability will be strictly limited to the obligations assumed in the escrow account contract.

Another obligation of the agent is that of strictly observing all the provisions and guidelines established by the depositor, regarding the time when the agent will have to remit the sums of money or goods to the beneficiary. The escrow agent is also obliged to have a neutral and equidistant attitude towards both parties throughout the contract.

If the conditions of the main contract are met, the escrow agent will have to deliver the goods to the beneficiary in accordance with the provisions drawn up by the depositor. In the event that the conditions provided in the main contract are not met, the escrow agent will proceed to return the amounts of money or the

[12] In the case of sums of money, the parties have the possibility to stipulate the interest for these deposited amounts.
[13] Jorg Menzer (Coord.), *Book of Contracts, Models. Comments. Explanations*, edition 3, C.H. Beck Publishing House, Bucharest, 2013, p. 336.
[14] Carmen Tamara Ungureanu (Coord.), *The new civil code, Comments, doctrine and jurisprudence*, Vol. II. Art. 953 -1649, Hamangiu Publishing House, Bucharest, 2012, pp. 487-498.
[15] See art. 1236 C. civ.
[16] According to art. 1241 C. civ.
[17] We consider that by obtaining the express agreement of the parties this obligation can be assigned.

good/goods to the depositor.

In connection with the obligations assumed by the contract, the escrow agent will be entitled to pay a certain amount of money as payment for the services provided and to cover all expenses incurred in the execution of the escrow contract.

With regard to the rights and obligations of the depositor, he is mainly obliged to pay for the services and activities provided by the escrow agent[18] as well as all expenses incurred in the performance of the contract.

An important obligation on the part of the depositor concerns the establishment of exact instructions and provisions regarding the removal of the good from the escrow deposit and its delivery to the beneficiary in the event of fulfillment of the conditions of the main contract.

Another obligation that can be assumed by the depositor is the one regarding the insurance of the good that is to be the object of the escrow contract. With regard to the rights of the depositor, he will have the right to deposit the goods in the escrow account and to be handed over to the beneficiary in compliance with the conditions set out in the main contract, based on the instructions given to the escrow agent.

With regard to the rights and obligations of the beneficiary, he will mainly be obliged to take over the goods when the escrow agent remits them from the account, in accordance with the instructions and provisions sent by the depositor. Also, as mentioned above, the beneficiary may also be obliged together with the depositor to pay for the services and activities provided by the escrow agent in accordance with the agreement of the parties. The beneficiary may also be required to pay the property insurance premium if the parties so decide.

The escrow contract may be concluded for a limited period of time, usually during the period in which the obligations set out in the main contract of the parties are to be fulfilled.

In accordance with the provisions of art. 1321 of the Civil Code, the escrow account contract will terminate by execution, the agreement of the parties, unilateral termination, expiration of the term, fulfillment or non-fulfillment of the condition, as well as for any other reasons provided by law[19].

3. Legislative applications and references of the escrow account contract in various matters of law

Although, as we mentioned in the previous sections, the escrow account

[18] The parties may provide that the amounts be borne jointly or solely by one of them.

[19] Also, clauses regarding force majeure may be inserted in the escrow contract, the provisions of art. 1351 of the Civil Code, it will also be possible to establish provisions regarding contingency or even to establish a criminal clause. Important attention must be paid to the parties' confidentiality clause as some of the information stipulated in the contract may concern professional secrecy, technical or financial information which is not normally made known to the general public.

contract is not expressly regulated in Romanian legislation, this fact did not prevent the legislator from referring to the use of such an instrument in certain areas of law.

A first area in which we notice in particular that the legislator understood to refer to the escrow account contract is the field of privatization of some companies owned by the Romanian state.

In this sense, we find Ordinance 33/2006 on some measures to complete the privatization of Banca Comerciala Română - SA, which establishes *"opening an escrow account in order to collect the price from the sale-purchase contract of shares concluded between A.V.A.S*[20] *and Erste Bank der Oesterreichischen Sparkassen AG".*

Also, the law 555/2004 regarding some measures for the privatization of the National Petroleum Company "Petrom" - S.A. Bucharest stipulates that *"payment for shares issued by the company and subscribed by the buyer upon the increase of the share capital is considered validly made ... on the date on which the amount of the contribution is paid into the Escrow account for the subscription price, opened and administered by the Escrow agent in the benefit of society*[21]*".*

Moreover, the law 36/2008 regarding some measures for the privatization of the Commercial Company "Automobile Craiova" - S.A., stipulates that "*the operations of payment and collection of the purchase price of the shares will take place through the foreign currency bank account opened by A.V.A.S. to a bank agreed by the parties, as well as through the escrow account set up for the purpose of completing the transaction at the same bank*[22]*".*

Also, in the matter of privatization we find the law 563/2004 regarding some measures for the privatization of the Commercial Company for Natural Gas Distribution "Distrigaz Nord" - S.A. Târgu Mureș and the Natural Gas Distribution Company " Distrigaz Sud " - S.A. Bucharest. In this sense, art. 5 stipulates that "*the amount of EUR 20 million of the purchase price shall be retained in the escrow account for the purchase price and after the completion*

[20] Specialized institution of the central public administration, with legal personality, subordinated to the Government, organized according to the Government Decision no. 837/2004 on the organization and functioning of the Authority for State Assets Recovery, with subsequent amendments and completions.

[21] At the base there is the privatization contract, signed on July 23, 2004, between the Romanian Ministry of Economy and Trade, through the Office of State Participations and Privatization in Industry, and OMV AKTIENGESELLSCHAFT from Austria, whose object is represented by the sale-purchase of 12,739. 341,312 shares of the company, representing 33.34% of the company's share capital, and the increase of the company's share capital with a number of shares that would allow the buyer to hold, after subscription by the company's minority shareholders, EBRD and buyer, 51% of the company's share capital.

[22] The opening of the escrow account was the sale-purchase agreement concluded between AVAS, as seller, and "Ford Motor Company", as buyer, on September 12, 2007, a contract for the sale of AVAS, respectively the purchase by "Ford Motor Company" of a number of 13,716,318 shares of "Automobile Craiova" - SA, representing 72.40316% of its share capital.

date, for the period provided for in the privatization contracts, to cover, in whole or in part, any obligations of the seller, resulting from the increase of the net indebtedness of each of the companies[23]".

Apart from the field of privatization, another area in which the escrow contract is expressly referred to is that of insolvency. Thus, according to art. 75 paragraph (8) of Law 85/2014 stipulates that *"the amounts of money existing in the debtor's account at the date of opening the procedure and on which a movable mortgage is constituted, as well as the cash guarantees (cash collateral) will be distributed at the simple request of to the creditor by the judicial administrator / judicial liquidator to the creditor holder of the movable mortgage, to cover his due receivables, within 5 days from the creditor's request. In the case of amounts related to an escrow account, in case of opposition, they will be transferred to the account provided in art. 39 para. (2)*[24] *after the verification by the syndic judge of the fulfillment of the substantive conditions of the contract".*

Also in fiscal matters, the legislator understood to refer to the Methodological Norms of 2016 for the application of Law no. 227/2015 on the Fiscal Code regarding the fiscal treatment of some amounts resulting from escrow accounts. Thus, in the application of art. 91 letter b) of the Fiscal Code are considered interest income *"interest obtained for current accounts, escrow accounts, demand deposits, collateral and term deposits, including certificates of deposit".*

Also, the same methodological norms establish "*The 50% quota provided in art. 224 para. (4) lit. c) of the Fiscal Code also applies to other interest income, paid in a state with which Romania has not concluded a legal instrument based on which to exchange information, such as interest on loans, interest in the case of contracts financial leasing, interest on intragroup loans, as well as interest on collateral deposits, escrow accounts, considered interest on term deposits according to the norms of the National Bank of Romania, but only if these transactions are qualified as artificial".*

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[23] The privatization contract of Distrigaz Sud, concluded between the Romanian Ministry of Economy and Trade, through the Office of State Participations and Privatization in Industry, as seller, and GDF International, as buyer, and Gaz de France, as bidder and guarantor , having as object the sale-purchase of a number of shares representing a percentage of 30% of the share capital of this company and the increase of its share capital with a number of shares that would allow the buyer to hold, after subscription, 51% of the share capital of Distrigaz Sud. The privatization contract of Distrigaz Nord is approved, concluded between the Romanian Ministry of Economy and Trade, through the Office of State Participations and Privatization in Industry, as seller, and E.ON Ruhrgas AG, as buyer, having as object the sale-purchase a number of shares representing a percentage of 30% of the share capital of this company and the increase of its share capital with a number of shares that would allow the buyer to hold, after subscription, 51% of the share capital of Distrigaz Nord.

[24] Payments will be made from an account opened at a unit of a bank, based on orders issued by the debtor or, as the case may be, by the judicial administrator, and during the bankruptcy, by the judicial liquidator.

4. Conclusions

As can be seen from the study, the escrow account contract is a useful tool in carrying out any transactions that have a certain importance and that often involve very large sums of money. Although we can say that the lack of an express regulation in the Romanian legislation makes the knowledge and use of escrow accounts less "convenient", certainly the advantages they offer make up for this legislative disadvantage.

Specifically, we consider that the use of an escrow account contract has the role of securing the legal relations between the parties, as one of the benefits in the initial contract (usually the one related to the payment of the price) is "transparent" by depositing sums of money in the account. open. Thus, the beneficiary party has the certainty and confidence that by fulfilling the conditions of the main contract the payment obligation of the other contracting party will be executed.

Moreover, in addition to the role of securing legal relations, the escrow account also fulfills the function of guarantee, because in terms of the person of the escrow agent (usually a bank), once deposited the amounts of money or goods in the account, their availability it is "certain and guaranteed" in order to remit the sums or goods according to the main contract concluded between the parties.

Other advantages of opening an escrow contract are that, in general, the escrow agent does not impose a certain threshold for setting up the deposit and the account can also be opened in other currencies such as euros or dollars.

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A contemporary overview of the factoring agreement

Associate professor **Sónia de CARVALHO**[1]

Abstract

Modern factoring resulted from the adaptation, in the 15th and 16th centuries, of the Atlantic trading posts to the commercial activity between England and the United States, in which, by virtue of their intensity, commercial warehouses took on a more financial than commercial feature. In the course of this evolution, these intermediaries, in addition to the distribution and consultancy tasks, began to guarantee the fulfilment of the transaction (del credere factors), often granting advances to European producers on the price of goods before sold. The factors thus became known as the 'financiers of European industry'. This sophistication of the intermediary conceived in European merchant schemes was at the origin, between the 16th and 19th centuries, of the colonial factoring, the predecessor of the modern factoring, in which the factor, in addition to distributing the products of European exporters, with special focusing on the textile field, in the New World markets, start collecting its credits, which in the meantime were assigned to it, and financing, through the provision of advances on sales. Later, colonial factoring gave way to old line factoring, which has assumed since the beginning a financial nature, providing a new range of services. In the old line classic scheme, the factor thus assumes four essential tasks: collection and management of assigned credits; provision of consultancy services; financing through the granting of advances on assigned credits and guarantee of the debtor's compliance and solvency. The financing role is undoubtedly one of the main reasons that motivate the use of this contract. Indeed, the need to attain financing, in addition to banking, with a greater incidence in times of credit restriction, is pointed out by many authors as one of the main justifications for the use of factoring in Europe. The crisis currently experienced worldwide following the Pandemic COVD 19 and the role that this contract can play in the economic recovery, through the financing the SMEs, justifies the analysis of the evolution of this contract, as well the legal framework in Portugal.

Keywords: *factoring, financing, contract, Portugal.*

JEL Classification: K20, K22, K42

1. Introduction

Factoring is "*the product of the contemporary needs of commercial management*"[2] whose contours and evolution were traced by mercantile practice and contractual freedom and not by the skillful hand of the legislator.

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[1] Associate Professor at Portucalense Infante D. Henrique University, Department of Law, Researcher at IJP - Portucalense Institute for Legal Research, Lawyer, Porto, Portugal, scarvalho@upt.pt.

[2] Menezes Cordeiro, *Da cessão financeira (Factoring),* Lex-Edições Jurídicas, 1994, p. 25.

Modern *factoring* resulted from the adaptation, in the 15th and 16th centuries, of the model of the Atlantic trading houses, to the mercantile activity between England and the United States, in which, due to their intensity, trading posts took on a more financial than commercial feature.

European traders began by copying the traditional mercantile mechanisms, which were essentially based on the delivery of goods to third parties, resident in the colonies, who sold the traders' products, either on the domestic or foreign market, in their own name but on behalf of the traders, from whom they charged a commission. These third parties were true agents acting on behalf of the principal.

The British colonies in North America soon revealed themselves to be potential markets for the metropolis' products and not to mere transit points for goods and raw materials. However, these colonies were a new, unknown and distant world, and it was necessary that these "*commissioners",* who gradually settled on the coast, took on a wider function than that of a mere distributor and started to provide consultancy services regarding the strategy to be followed in the sale of products, taking into account factors such as clientele, price, interest and the size of the market.

In the course of this evolution, these intermediaries, in addition to their distribution and advisory functions, began to take on the task of guaranteeing the proper performance of the transaction (*del credere factors*), often providing European producers with advances on the price of goods before they were sold[3]. These new functions are explained by the personal knowledge of the financial capacity and honesty of their clientele and the fiduciary relationship that was established with the principal[4]. The factors thus became the "*financiers of European industry"*[5].

2. The emergence and evolution of factoring

2.1. Colonial factoring

This sophistication of the intermediary conceived in the European mercantile schemes was at the origin of the appearance*,* between the 16th and 19th centuries, of the embryo of the current factoring, the *colonial factoring* in which the factor, apart from distributing the products of the European exporters, with special focus on the textile area, in the markets of the New World, also assumed the functions of collection of their credits, which, in the meantime, were assigned to him, and financing, through the concession of advances on sales.

The economic agents then had the perception that *"There are many ways*

[3] Rolin, S., *El Factoring* (tradução espanhola Galvez –Piñero y Pidal), Madrid, 1975, p. 16.
[4] See Fossati /A. Porro*, Il factoring*, p. 4 ff and Zuddas, *Il contratto de factoring*, p. 5.
[5] See Zuddas, *Il contratto di factoring*, p. 5 and Aldo Frignani, *Prime decisioni dei giudici italiani* p. 5.

of raising cash besides borrowing. One is by selling book debts"[6].

However, as the factor assumed a more financial function, the English legal system had to adapt to overcome limitations traditionally imposed on factors, such as the impossibility of selling assets entrusted to them by the principal on credit or through exchange, the most serious being the prohibition on pledging the principal's assets[7].

In this context, English jurisprudence recognized, in order to protect the factor, the existence in his favour of a special security, the *Factor's Lien,* over the merchant's property in order to overcome the fact that, under *Common Law,* possession of the debtor's property had, until the beginning of the 19th century, been the only valid form of guarantee[8].

The creative and flexible English jurisprudence, as early as 1755, admitted, in the case of *Kruger v. Wilcox,* the existence of the *factor`s lien* on the goods of the merchant deposited in the warehouses of the *factor,* as a means for the latter to guarantee the claims which it held against the former. In 1775, in *Drinkwater v Goodwin,* the factor was recognized as having *"a lien on the price of goods in the hands of the buyer"*[9].

The growth of the English textile industry supported by *colonial factoring* and the obstacles created by *common law* principles eventually triggered the need for *factoring to* be the object of legislative treatment. Thus, in the period between 1823-1889, numerous laws known as *Factors Acts* were enacted, which provided for special forms of guarantees for the *factor,* even when he was not in possession of the goods and documents relating to the commercial transactions in which he intervened[10].

Curiously, it was at the end of the 19th century that *factoring* began a period of decline in England. In fact, the development of means of communication, the appearance of alternative forms of credit and insurance, the development of large factories and the closer relationship between industrialists and suppliers of raw materials eventually reduced the use of services provided by factors[11].

The same, however, did not happen in the United States.

The declaration of independence in 1776 and the consequent adoption of

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[6] *Chow Young Hong v. Choong Fah Rubber Manufactory,* cited by Freddy Salinger, *Factoring: The Law and Practice of Invoice Finance*, 3rd Edition, Sweet & Maxwell, London, 1999, p. 5.

[7] See R. Munday, *A legal history of the factor*, p. 244.

[8] Peter Coogan, *Article 9º - An Agenda for the next decade*, 1977, Yale LJ, Vol. 87, 1977-78, p. 1014 ff, refers that "*the only way to create a valid security interest in personal property was by physical pledge – the transfer of possession of property (collateral) by the debtor (the pledgor) to the creditor or secured party (the pledgee)".*

[9] *Kruger vs Wilcox,* (1755) and *Drinkwater v Goodwin (1775).* Cfr. Giuseppe Tucci, *Garanzie sui crediti dell'impresa e tutela dei finanziamenti – L´esperienza statunidense e italiana*, Giuffrè Editore, Milano, 1974, p. 52 ff.

[10] For a detailed analysis of *Factors Acts* of 1823–1889, see R. Munday, *A legal history of the factor*, cit, p. 246-250 and *Anson´s Law of Contract*, updated by J Beatson, 28th edition, Oxford University Press, Oxford, 2002, p. 673.

[11] See Roderick Munday, *A legal history of the factor*, p. 250.

protectionist measures made *factoring* flourish in the former colony.

Under the influence of the protectionist measures imposed by the United States at the end of the 19th century, which practically put an end to the import of textiles from Europe[12], and with the development of means of communication and transport[13], factoring loses its initial vocation for the external market and for commercial distribution, turning towards the internal market. As a result of this protectionism, the American industrial expansion began, with characteristics that would also end up favouring *factoring*.

In fact, this new clientele, with special focus, again, on the textile industry, presented some financial shortcomings. American textile companies, despite enjoying a reasonable distribution network, had no alternative means of financing than banks. As they needed to borrow money to buy expensive machinery, they soon ran out of bank credit[14]. The lack of liquidity of these companies was aggravated by the practice of very long credit maturity periods, equal or superior to 180 days[15].

In addition to these features of the American industrial fabric, it should be noted that the American banking system has no knowledge of the discount banking system[16].

Thus, the factors, which until then had represented English fabric producers, although timidly beginning to develop the role of financier, taking advantage of the experience they had gained, their knowledge of the market and their own capital, began to increase their financial function, which included managing and collecting their customers' debts, guaranteeing their fulfilment and granting advances on the debts assigned to them. The *trade factor was about* to give way to the *finance factor*[17]. The *old line factor* that inspired European *factoring was* born[18].

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[12] A *"McKinley Tariff Act*" of 1890 imposed very strong restrictions on European imports, subject to a 49.5% customs tax on the value of imported European textiles. See Peter Biscoe, *Law and Practice of credit factoring*, Butherworths, London, 1975, p. 34.

[13] Merchants undertook the storage, selling and shipping the products, taking the traditional distribution functions away from the factor. See Aldo Frignani, *Prime decisioni dei giudici italiani,* cit., p. 6 and Renato Clarizia*, I contrati per il finanziamento dell´impresa*, cit., p. 419.

[14] Zuddas, *Il Contratto di Factoring*, cit., p. 6 notes that it was because of the factoring association to companies that had already exhausted their respective credit ceilings with the Bank, that it became a common opinion that only companies with financial and economically weak problems resorted to factoring.

[15] See Fossati /A. Porro*, Il factoring,* p. 4.

[16] Ibid., p. 4.

[17] Omar Pace/Daniele Cherubini, *Il factoring quale strumento della finanza d´impresa*, Jandi Sapi Editori, 2001, p. 4 ff.

[18] Regarding the sophistication of primitive factoring by the Americans, S. Rolin, *El factoring*, p. 21 refers *"Que tentacion la de devolver la pelota al viejo continente y hacerle descubrir de nuevo esta técnica, corregida y aumentada".*

2.2. Old line factoring

As we have already analysed, the fact that the United States was in the midst of a period of industrial growth, aided by the absence of discounting in commercial practice, contributed greatly to the triumph of the *old line factor*[19].

As we have already mentioned, the textile and clothing companies that the factor knew so well were also the ones that most needed the *finance* and guarantee from the *finance factor* to face the everlasting market volatility and lack of financial solidity. It is not surprising, therefore, that *factoring* companies were concentrated around major textile centres such as *New York* and *Boston*[20]. To illustrate this link between the textile industry and *factoring,* Skilton's phrase "*Factors and the textile trade go together" is a perfect example*[21].

Old line factoring is distinguished from *colonial factoring* by the financial nature assumed by the factor and the functions it provides to its customer.

In the classic *old line* scheme*,* the customer assigns to the factor part or all of the credits arising from his commercial activity, the latter assuming the management and collection of such credit. The factor, at the request of the customer, grants him advances on the value of the credits assigned, assuming the fulfilment and solvency of the debtor. At the same time, the *factor* provides consulting services. We would like to make a brief parenthesis here just to point out that, for the overwhelming majority of the doctrine[22], the rendering of commercial advisory services is not seen as an autonomous function, the *old line factor* being attributed a *"triple function*[23]*" (*management and collection, financing and guarantee of the debtor's *del credere* risk). In our opinion, the provision of consulting services is a fourth function of the *old line factor*[24], since it was the knowledge of the market and of the clientele acquired by *colonial factoring* that enabled the factor to cope with the end of the colonial market following the independence of the United States and the application of protectionist measures, evolving into the scheme of the *old line factor*, then limited to the American domestic market.

In return for providing these services, the *factor* receives a commission and interest when funds are advanced.

The *old line* thus assumes four essential functions: collecting and managing the assigned credits; providing consulting services; financing the customer by granting advances on the assigned credits; guaranteeing the debtor's compliance and solvency. This does not mean that all these functions are provided simultaneously.

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[19] When it was introduced in 1913 by the Federal Reserve Act it had little impact since its function was ensured by the old line factor and accounts receivables finance companies.
[20] Roderick Munday, *A legal history of the factor*, p. 252.
[21] *The factor´s lien on merchandise*, Wisconsin LR*,* 1955, p. 368.
[22] Garcia-Cruces, *El contrato de factoring,* cit, p. 48, José Carlos Pires, *O contrato de factoring,* p. 33.
[23] Expression used by José Carlos Ferreira Pires*, O contrato de factoring*, p. 16
[24] Luís Miguel Pestana Vasconcelos, *Dos contratos de Cessão Financeira (Factoring)*, p. 69.

As far as the financing function is concerned, the *old line factor* may take the form of *conventional factoring in* which financing is provided to the customer through the granting of advances on the invoices assigned, or the form of *maturity factoring* in which the factor does not grant any advances on the credits assigned, only crediting the value of the invoices assigned, in the current account of the assignor, on their due date. In the latter modality, the factor does not provide any financial function to the client, although it may assume the credit guarantee. On the other hand, the *old line,* in a diametrically opposed field to *maturity factoring,* can take the form of *credit cash factoring* or *discounting factoring* in which the financial function reaches its full extent, since all the ceded credits are anticipated.

In relation to the function of guaranteeing the fulfilment and solvency of the debtor, *factoring* may assume more than one modality, namely non-recourse and recourse factoring. In the first modality, the risk of insolvency or financial incapacity of the debtor is transferred to the factor, while in the second, the grantor guarantees the factor the risk of the solvency of the debtor. In the latter, the factor, in the event of insolvency or incapacity of the debtor, has a right of recourse against the assignor. These different modalities focus on the insurance function of the factor and the assumption of the *del credere risk* by the factor.

Although *old line factoring* may assume some deviations, as we have analysed, with regard to the financing and guarantee function, its mandatory feature is that the assignment of credits is notified to the debtor.

Bearing in mind that, as we will analyse, it was the classic scheme of the *old line* that became successful in Europe in the sixties and began to be practised by European *factoring* companies, it therefore seems appropriate to us to make a detailed analysis of each of the functions that the *old line factor* traditionally performs.

2.2.1. Collection and management of assigned credits

Within the scope of this function, the factor, once the credit has been assigned, is responsible for managing and collecting it on the due date.

In this way, the client transfers a large part of the administrative and collection services to the factor, and his customers' accounts are centralised in a single account, managed by the factor, which sends him the respective statement on a monthly basis. This service has benefited small and medium-sized companies, which have been able to transform a fixed cost, that was often extremely expensive due to their weak structure and organisational capacity, into a variable cost. Small and medium-sized companies are thus free to focus on their core business and improve their productivity.

As regards the recovery of credits, the intervention of the factor promotes the success of the underlying commercial operation, especially when credits are assigned without recourse, a situation in which the factor assumes the default of

the debtor, leaving him, in the face of his default, to resort to the courts to obtain payment of the credit. The collection is, therefore, fully assumed by the factor.

When the credit is assigned with recourse, in the case of default by the debtor, the right assigned is retransferred to the assignor, being charged by the factor, if there was an advance granted. In this type of *factoring,* the judicial collection of the credit falls to the assignor, and it is certain that the factor, in many situations, places its legal service at the disposal of the assignor, although the respective cost is charged to the latter[25].

2.2.2. The guarantee of compliance and solvency of the debtor

In relation to the function of guarantee of the debtor's solvency and compliance, if certain requirements of the factoring contract are met, the factor may accept the assignment in the aforementioned non-recourse modality, transferring to its legal sphere the risk of insolvency or mere non-compliance of the debtor. This function allows the entrepreneur to transfer to the *factor,* in situations of economic crisis, the losses resulting from the insolvency of the debtor. In this operation, the *factor* must necessarily make a careful analysis of the economic and financial situation of the debtor assigned. In light of this analysis, a ceiling is set by the factor within which it assumes the risk of insolvency and default of the debtor[26].

2.2.3. Financing

The financing function is, without a doubt, one of the main reasons that motivate the use of this contract. In fact, the need to obtain financing, other than bank financing, with greater incidence in times of credit restriction, is pointed out by many authors as one of the main justifications for the use of *factoring in* Europe.

This financing function consists of the factor granting advances of between 80% and 100% of the nominal value of the credits transferred. These advances allow the monetisation of trade receivables which companies have against their debtors, since it is commercial practice for the seller to grant the buyer a certain period of time for payment after delivery of the goods. However, this practice often causes serious liquidity problems for the company, particularly in small and medium-sized enterprises characterised by their lack of financial solidity, in expanding companies and at times of restrictions on bank credit.

Old line factoring has thus made it possible for companies to obtain immediate liquidity without having to resort to banks and securities. This financing is beneficial for both the assignor and the assignee. The assignor finds a safe and

[25] R Ruozi/B Rossignoli, *Manuale del factoring*, Milano, 1985, p. 46.

[26] Luís Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring)*, p. 71, note 140, maintains that, among us, the factor guarantees compliance and not just the debtor's solvency.

constant way of keeping its treasury balanced, benefiting from the management and consultancy services of the assignee, who, as Luís Miguel Pestana Vasconcelos underlines,[27] has every interest in the success of the activities of the assignor company, as he is the guarantee of the profitability of his investment.

Liquidity, on the other hand, as highlighted by the same author, brings the transferor a series of advantages, namely, it allows the entrepreneur to have the financial cash flow to make immediate purchases, placing him in a position that allows him to negotiate, with his suppliers, the best contractual conditions and discounts, which can go up to 4% of the business value[28]. Also, according to the same author, it improves the company's *current ratios,* which allow estimating the company's capacity to satisfy future obligations. At the same time, it enables the reduction of short-term debts without recourse to bank debt and, simultaneously, creates favourable conditions for the granting of credit by the banks.

We cannot, however, fail to mention that financing obtained through *factoring,* rather than substituting bank financing, has come to serve as a complement to it. In fact, the scope of *factoring* is limited to short and medium term credits, while the need for bank financing for long term investments and operations remains[29].

Financing plays such an important role in *old line factoring* that, as we have already mentioned, it has even led to the splitting of the same into dogmatic categories, depending on whether or not there was financing of the grantor.

Conventional factoring corresponds to the most typical and complete expression of the *old line,* in which the factor acquires the credits it has approved, for which it has assumed the risk of the debtor's default, simultaneously providing management, accounting, collection and consultancy services. In some situations, it is the factor that notifies the debtor. In this type of arrangement, the factor may grant the assignor advances on the transmitted credits, normally between 80% and 100% of their value[30] .

On the other hand, there is *maturity factoring,* whose main difference is the provision of all *conventional* services, with the exception of financing. The assignor only receives the amount corresponding to the credit assigned, through two forms: F. M. P. (*fixed maturity period)* in which an average maturity period is defined by the *factor* for the assigned credits*,* in which the assignor is credited with the value of the same, and P. A. P. *(pay as paid)* in which the assignor only receives the value of the credit after the factor has successfully collected the credit

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[27] *Dos contratos de cessão Financeira (Factoring)*, p. 73.

[28] Ibid., p. 73 ff.

[29] See José Manuel Bracinha Vieira, *Alguns aspectos económico-financeiros do factoring*, Lisboa, 1970, p. 33, Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring)*, p. 74. On the confrontation between bank financing and factoring see José Bracinha Vieira, *Alguns aspectos,* p. 31.

[30] Also known as "complete factoring", it is considered, among us, the most current modality. José Fernando Sousa, *O factoring em Portugal*, p. 266 ff.

from the assigned debtor[31]. Coexisting with these categories of *factoring* is *credit cash factoring* or *discounting factoring* whose main function is financing, with the assignor being granted advances on the nominal value of the credits assigned[32].

Factoring is often given a pejorative connotation and associated with companies in poor financial health, particularly because of its strong link with the fragile textile industry. However, this does not seem correct to us because the factor is, above all, an investor who wants to recover the investment made, and, therefore, has no interest in subsidising financial weaknesses.

2.2.4. Provision of consultancy services

The factor's interest in the success of its client credit led it to assume and develop a commercial consultancy function, through which, taking advantage of the in-depth knowledge it acquires of the companies needs and potential of the various markets in which it operates, offers advice and recommendations to the assignor that will enable him to make the activity profitable. This function is an important contribution towards characterizing the financial solvency of the companies with which the assignor intends to do business. As we know, small and medium-sized companies have great shortcomings in the area of management and market knowledge and have few means of information about the economic and financial situation of their clients, often being limited to information provided by banks and market reputation. The factor fills lack of SME's in the area of management, organisation, promotion and commercial planning. The factor, as has already been said, is an element of simplification, specialisation, rationalisation and information[33].

In short, *old line factoring,* as we have analysed, was conceived for short term credits whose underlying legal operation consists of the transfer of commercial credits from the respective holder to the factor, as a rule, through the assignment of credits, with the necessary notification of the debtor. The factor, within the scope of this contract, may assume the financing of the assignor, by providing advances on the assigned credits, the guarantee of compliance and solvency of the debtor, the latter depending, obviously, on the verification or not of an assignment of credits without recourse, the collection and management of credits and, with increasing relevance, the function of commercial advisor. This varied range

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[31] On this distinction, we follow closely Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring)*, p. 41 ff and João Caboz Santana, *O contrato de factoring. Sua caracterização e relações factor-aderente,* Ed. Cosmos, Lisboa, 1995, pp. 29 ff, José Fernando Sousa, *O factoring em Portugal*, p. 266 ff.

[32] Garcia-Cruces, *El contrato de factoring*, p. 58, Considers this modality a figure close to the discount with provision of typical factoring services. Also in this sense, Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring),* p. 42.

[33] Slogan created by C Galvada/J Stoufflet, *Le contrat dit de factoring*, JCP, I, 1966, 2044, n.º 29 ff.

of services offered by the factor, which is not exhausted in mere financing, has been responsible for the growing recourse to *factoring,* even after the credit crisis of the eighties was overcome[34].

2.3. New line factoring

Due to the requirements of the North American market and the introduction of *factoring* in markets as diverse as the clothing, electronic instruments, mechanical equipment, furniture and pharmaceutical industries, factoring companies took on a very broad credit dimension, becoming true financial operators, offering, in addition to the traditional *old-line* services, a varied and complex set of financial services and products. Some are closer to traditional *factoring,* such as *non-notification factoring* and *undisclosed factoring,* while others have little to do with it, such as *commercial financing, inventory financing, hire purchase financing, confirming, renting and leasing.*

2.3.1. Non-notification factoring

This type of *factoring* contrasts with *notification factoring* or *factoring with notification,* characteristic of *old line factoring,* in which the assignor is - obliged to notify the debtor of the assignment of the credits to the factor*,* to which is added, generally, the duty to mention on the invoices that the obligation will only be considered fulfilled through the payment to the factor. The factor assumes the collection of the credits.

Non-notification factoring is a form of *factoring* used in the United States whereby the debtor is not notified of the assignment of the credit.

In this modality, the client transfers to the factor all his credits, which, in turn, assumes the risk of insolvency of the debtor and grants him advances on the values of the credits assigned. The assignment is not, however, notified to the debtor, nor does the creditor assume the collection of the credits*,* which remains in the hands of the client, who acts as an agent without representation of the factor, being required to transfer to him the amounts received for payment of the funds advanced and the commission for the services rendered by the creditor[35]. These services correspond to the traditional functions of financing and guaranteeing credits and consultancy[36]. Once the credit is collected, the factor compensates with the advance payments with it and debts the *factoring* commissions and

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[34] See José Gallardo Rodriguez, *El factoring como figura económico-financiera,* in "Jornadas sobre Factoring", Universidad Complutense, Madrid, 1992, pp. 37 ff, Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring),* p. 78.

[35] Cfr. Theodore Silbert, *Financing and Accounts Receivables*, Harvard BR, 1952, p. 46.

[36] These are the functions that distinguish Non-Notification factoring from Accounts receivable financing, a very similar figure, but in which the guarantee of the transmitted credit is not assumed by the financing entity. See Zuddas, *Il contratto di factoring*, p. 18 and 19. G. Tucci, *Garanzie sui credit*, p. 63 ff.

other expenses, crediting the remaining amount to the assignor 's account[37].

It should be noted that, in certain situations, it is the factor itself that has an interest in resorting to this modality, since, for companies with many small amounts of credit, the effort made by the factor to obtain the respective collection is disproportionate to the value of the credits, making the *factoring* commission extremely expensive[38].

Non-notification factoring was born in the United States to remedy the bad reputation resulting from recourse to *factoring,* which, since the beginning of the 20th century, has been seen as a sign of a lack of economic solidity and as a solution of last resort for companies in a very precarious economic situation. This is accentuated by the fact that many companies have their own means of collection and are unwilling to pay the factor a commission for a service that they are capable of providing themselves[39] .

It should, however, be pointed out that this modality carries more risks for the factor since there is less control of the assignor account, which increases the possibility of fraud and damaging administration. The factor must take special precautions, namely by developing a more demanding analysis of the counterparty in these contracts.

This modality has seen reasonable development in Europe, and is widely used in export *factoring*, where there is a fear that the presence of the factor in the operation may hurt the susceptibilities of the foreign client, but where it is important to have the guarantee of good payment[40].

2.3.2. Undisclosed factoring

In Great Britain, for the same reasons that led to the use of *non-notification factoring in the USA, undisclosed factoring* emerged in the early 1960s.

This contract consists of the conclusion of two contracts, a contract of sale, whereby the factor purchases the goods from its customer, and a contract of commission whereby the customer resells the goods to the purchasers, in its own name, but on behalf of the factor. In this way, he obtains the advanced payment of the credits assigned and is not liable for the proper conclusion of the operation, acting as a simple commission agent. The factor, in this modality, does not assume the management and collection of credits, only performing a guarantee, financing and consulting function.

This contract is essentially financial in nature and the final cost of the operation is lower since, as we have seen, not all the services of traditional *factoring* are provided.

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[37] Cfr. R Ruozi/B. Rossignoli, *Manuale del factoring*, p. 26.
[38] See Gianluigi de Marchi/ Giuseppe Cannata, *Leasing e Factoring*, 4ª ed., Milano, 1986, p. 275.
[39] This modality of *non-notification factoring,* the called confidential *factoring*, has little expression in the Latin market and none in Portugal.
[40] *Vd.* João de Sousa Uva, *Factoring – Um instrumento de gestão*, Texto editora, 1991, p. 21.

As in *non-notification factoring*, there are, in this contract, greater risks for the factor, as the customer in a difficult situation may make the result of the sale of goods already sold to the factor its own, which imposes greater demands on the factor in the analysis of the customer's financial situation and reputation[41].

This figure also known as *money without borrowing* does not contain global clauses, which is why the client is always free to decide whether or not to contract with the factor[42].

The factor may, through this contract, finance long-term operations, provided they do not exceed five years and capital amounts above certain minimum values are involved[43]. This type of *factoring is* essentially aimed at the trade of industrial equipment, allowing the purchaser to pay in the long term, while the seller, who is the factor's client, receives cash[44].

Italian legal theorists classify this contract as *quasi-factoring*[45].

In fact, this contract does not use the traditional figure of the assignment of credits but uses different legal techniques. However, this is not a reason to separate this contract from *factoring,* because if we consider the functions that it performs, we will verify that it performs all the functions of traditional *factoring,* with the exclusion of the management and collection of the credits[46].

2.3.3. Bulk factoring

In this modality, the client of the factor assumes the management of its credits, and the factor may provide financing and credit guarantee services.

Normally, the factor only advances funds and does not provide any services. In practical terms, this modality is very close to the discounting of invoices with the difference that the credits are effectively assigned to the factor, with a corresponding notification to the debtors by means of a imprint on the invoice informing the debtor that payment should be made to a bank account in the name of the factor.

This method is essentially used by companies belonging to the same economic group, which have their own collection services and take their own risks. It is also often used when very small invoices are involved, which would make

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[41] On the *Undisclosed Factoring*, Zuddas, *Il contratto di factoring*, p. 126.

[42] Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring)*, p. 47.

[43] It seems to us that this modality of factoring is not admissible in our legal system since n.º 1 of the article 2.º in DL n.º 171/95, of 18.07, conditions the factoring activity to the acquisition of short-term credits, which obviously is not compatible with the undisclosed factoring 5-year terms.

[44] This figure is very similar to forfaiting, which we will analyse later. See Zuddas, *Il contratto di factoring*, p. 127.

[45] Cfr Zuddas*, Il contratto di factoring*, p. 126.

[46] There are authors who have divided factoring into two large groups: distributive credit factoring, which includes contracts with conventional notification, and industrial credit factoring, which includes this contract of British origin. See Renzo Bianchi, *Il factoring e i problemi gestionali che comporta*, Torino, 1970, p. 99.

the *factoring* commission excessively onerous[47].

In view of paragraph b) of n.º 2 of article 1 of the Unidroit Convention, in which it is required as a condition for the qualification of the legal transaction as a *factoring* contract that the factor renders at least two of the functions originally rendered by the *old line factor,* it seems to us that this modality, in the majority of the cases, cannot be qualified as *factoring,* since often only the financing service is rendered[48].

2.3.4. Partial factoring, split factoring and split risk factoring

These modalities originated in the United States, where they are still practised exclusively.

In *partial factoring,* the customer assigns only a part of his credits and is responsible for managing the remainder[49].

In *split factoring,* part of the receivables is assigned to one factor, while the other part is assigned to another factor. Often this division is due to the nature of the products.

In *split risk factoring,* the factor and the customer share the credit risk.

2.3.5. Selective transfer credit

This modality has the particularity of excluding the globality clause. In effect, it is the transferor who chooses which credits to cede to the factor. The *factoring* company reserves the right to approve or not the credit and not to grant any postponement and only delivers the amount of the credit twenty days after its maturity[50].

In the meantime, a new modality has appeared, *factoring by exception, which is* similar to the one we have just discussed, but in which advances can be granted[51].

2.3.6. Mill agent factoring or drop shipment factoring

This modality is essentially intended to meet the financial requirements of small and medium-sized enterprises that want to launch new products on the market, but do not have the necessary structure for their production and marketing.

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[47] This modality is not used among us, although a similar system is used in other financial services. See João de Sousa Uva, *Factoring – Um instrumento de gestão*, Texto editora, 1991, p. 20.

[48] See Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring),* p. 49.

[49] G de Marchi e G Cannata, *Factoring e Leasing,* p. 277.

[50] Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring),* cit, p. 50, refers that the period between the payment of the credit and its maturity exists to face the risk that the factor bears, given the non-existence of a globality clause.

[51] In this respect, G de Marchi/ G Canatta, *Leasing e Factoring*, p. 53 ff.

In this case, the factor, the *jobber* and the *manufacturer* are involved in the operation. The factor guarantees the manufacturer, with whom its client has signed a production contract, the payment for all supplies previously approved. The manufacturer sends the goods directly to the purchasers, but always on behalf of the jobber, who, in his relations with the purchasers, appears as the real seller. The manufacturer issues an invoice and sends it to the jobber, who then draws up his own invoices which he sends to the customers and in which he must indicate the assignment of credits to the factor. The jobber and the manufacturer send the invoices issued to the factor, who will settle the amount in full with the producer and pay the designer the difference between the two invoices, corresponding to the profit of the operation, after deducting the *factoring* commission and any interest.

Some authors reconcile this operation to *factoring*[52]. However, other authors believe that it is no longer possible to frame it within the already vast limits of the *factoring* contract[53].

In fact, only two of the traditional functions of *factoring* are present in this operation, namely financing and collection, the latter being only a consequence of the construction used.

As Luís Miguel Pestana Vasconcelos observes, the function of a factoring *agent* is to finance the production of a small company that does not have the means to manufacture its products. If we think of the financing function of *factoring,* we can see that it is quite diverse, consisting essentially of providing liquidity to short term credits, solving the cash-flow problems of companies with long payment terms[54].

On the other hand, the function of the guarantee provided is also different. Firstly, because the guaranteed credits are not those of the designer, but those of the manufacturer, arising from the production contract entered into with the factor's client and subject to approval by the *factor*.

Thus, although this figure has some similarities with *factoring,* it has a very different purpose.

2.4. Indirect factoring

This system originated in Italy in the early 1980s. Some industrial groups joined forces with *factoring companies* to set up *factoring* companies that would provide their services exclusively to companies in the group[55].

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[52] Ruozi/B Rossignoli, *Manuale del factoring*, Milano, 1985, p. 26 ff.

[53] See Luís Miguel Pestana de Vasconcelos, *Dos contratos de cessão Financeira (Factoring),* p. 51.

[54] Ruozi/Rossignoli*, Manuale del factoring*, Milano, 1985, p. 27.

[55] In March 1980, Olivetti Fin – Factoring, SpA was formed. This was the pioneer and had, as its exclusive corporate purpose, the financing through factoring of the suppliers of the Olivetti group, as well as of the Olivetti concessionaires with regard to the purchase of Group products. Later

The operation essentially consists of the following: the factor guarantees to the seller the acquisition of the credits arising from the supply contracts concluded with the factor's customer and settles them immediately. As regards the buyer, the factor grants a deferment of payment. The customer pays the commission and interest, while benefiting from certain advantages, such as a discount[56].

This model has some particularities in relation to traditional *factoring.* Firstly, the client and debtor are the same company and the services are provided not to the client, but to third parties.

As Luís Miguel Pestana Vasconcelos observes, this modality is a way of providing financial resources, characteristic of bank credit, through the use of credit assignments[57].

The author[58] considers that although this operation is practiced under the name of *factoring* and by *factoring* companies of the *old line,* it should not be included in the already broad concept of *factoring,* since it is a purely financial business, entered into by these companies, due to market demands and competition from financial companies. However, the typical financing function of *old-line factoring* is quite distinct, since it essentially consists of making advances on short-term debts.

3. The legal framework of the factoring contract in Portugal

The first legislative reference to *factoring* occurs in DL n.º. 46/302, of 27.04.1965, with reference to para-banking institutions[59]. Article 1.º, n.º 4 identifies as one of the four types of para-banking institutions, *"Companies whose object is to effect the collection of credit from third parties, in whatever form used for this purpose, particularly those carrying on any system of activity known as factoring"*[60].

Merchant Factors International S p A. followed the example of Olivetti, Cfr. Zuddas, Il *contratto di factoring,* p. 74.

[56] See R. Ruozi, *Il factoring indirecto*, in "Il factoring" (coord por Roberto Ruozi e Gian Guido Oliva), Milão, 1971, p. 77 ff, R Ruozi/R Rossignoli, *Manuale del factoring, Milano, 1985,* cit p. 82 ff

[57] Luís Miguel Pestana de Vasconcelos, *Dos contratos de cessão Financeira (Factoring),* cit, p. 53.

[58] Ibid, p. 53.

[59] These institutions were admitted, albeit not expressly, for the first time in DL nº 41.403 of 27/11/1957. See Menezes Cordeiro, *Da cessão financeira (Factoring)*, cit, 31.

[60] This diploma, as already mentioned, was intended to regulate parabanking institutions, and the contract and factoring activity remained unregulated. However, despite this lack of regulation, the foundation of two factoring companies was authorized*, International Factors Portugal, S. A.* in 1965 and *Heller Factoring Portuguesa*, S A, in 1972. See João de Sousa Uva, *Factoring - um instrumento de gestão*, cit, p. 12. As referred by Teresa Anselmo Vaz, *O contrato de factoring*, cit, p. 58, these companies adopted, as regards the transfer of credits, the credit assignment institute as a legal instrument, without this being legally required. This is in line with the evolution of *factoring*, outlined by us in Section II, in relation to the other countries in Europe, with the exception of France and Belgium, for the reasons set out there. These companies adopted, as regards the transfer of credits, the credit assignment institute as a legal instrument, without this being legally required.

In 1986, DL n.º 56/86, of 18.03 was published, with the purpose, according its official summary, to systematize *"the juridical-economic bases of factoring activity in the country".* The legislator, modestly, assumes in the preamble that, given the embryonic phase of *factoring* in our country, "*it was considered preferable, in this first systematization test, to establish very general parameters of the activity by law".*

After reading its 29 articles, we can only agree with Menezes Cordeiro and consider that the articles went beyond what was intended in the preamble[61].

In fact, the law devotes more attention to factoring companies, imposing on them "an extensive and sometimes duplicated web of rules"[62], referring only in Articles 1.º, 3.º, 4.º and 5.º to the factoring activity and the respective contract[63].

Thus, Article 1.º stated that *"The factoring activity consists in the acquisition, in accordance with the applicable legislation, of short term credits, derived from the sale of products or the provision of services, in the internal and external markets*"[64]. The n.º 2 stated that *"The factoring activity includes complementary actions of collaboration between the companies involved and their clients, namely credit risk studies and legal, commercial and accounting support for the good management of the credits transacted".*

Article 2.º contained a light reference to *factoring* activity*,* defining in nº. 2 the concepts of factor, adherent and debtor for the purposes of the law.

Article 3.º, under the heading "Factoring Contracts*",* stated in n.º 1 that "*The set of relations between the factor and each of the adherents is governed by factoring contracts"*, requiring, in n.º 2, that the credits transmitted under factoring contracts must be supported by invoices or equivalent documentary representation.

Articles 4.º and 5.º dealt with the payment of the claims transferred and the factor's remuneration.

By virtue of Articles 19.º and 20.º and of article 21.º of the Lei Orgânica do Banco de Portugal, approved by DL n.º 644/75, of 15.11[65], *factoring* companies and their respective activity were subject to the regulatory and supervisory

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[61] Menezes Cordeiro, *Da cessão financeira (Factoring),* cit, p. 34.

[62] Ibid, p. 36.

[63] The summary, somewhat pretentious, proves to be out of step with the slightly more modest reality of the diploma, which, despite its 29 articles, devotes few provisions to the contract, striving more to regulate companies that have such an activity for object. See Rui Pinto Duarte, *Notas sobre o contrato de factoring***,** cit, p. 142, Damião Vellozo, *Sociedades de factoring, Sociedades de risco,* Editora Rei dos Livros, Lisboa. 1990, p. 20 ff, João Caboz Santana, *O contrato de factoring, Sua caracterização e relações factor-aderente*, p. 35.

[64] The concept of short-term credits in the writing of this article is an indeterminate one. However, the literature marks the short term in the period between 30 to 180 days. See Mauro Bussani/Paolo Cendon, *I Contratti Nuovi*, cit, p. 260.

[65] Subsequently, articles 22 and 23 of the Organic Law of Banco de Portugal, approved by Lei Orgânica do Banco de Portugal, approved by DL n.º 337/90, of 30.10. With the changes introduced by Lei n.º 5/98, of 31.01 to the Lei Orgânica do Banco de Portugal, having In view of its integration in the European System of Central Banks, this matter is now regulated in articles 15.º and 17.º.

powers of the Banco de Portugal. These powers were exercised through Aviso n.º 5/86 of 18.04 and, subsequently, Aviso n.º 4/91 of 25.03. In addition to imposing the written form of the contract, they governed certain aspects relating to the execution of the contract, not considered in DL n.º 56/86[66].

This law has been much criticised by legal scholars.

In this sense, Rui Pinto Duarte considers that the legal concept set out in Article 1.º of DL n.º 56/86 is both excessive and flawed[67].

In excess, to the extent that the Author classifies as redundant the reference that the *factoring* activity is exercised, "*under the terms of the applicable legislation"*, and unnecessary the allusion to "*internal and external market"*, as he understands that nothing indicated that its absence could lead to a restrictive interpretation[68].

In the Author's opinion, it is also flawed because it does not make any reference to the services provided by *factoring* companies, considering that the acquisition of credits referred to in Article 1 is nothing more than the legal form by which such services are provided[69].

Teresa Anselmo Vaz also considered that, in this diploma, the legislator relegated the *factoring* contract to second place, not taking a position on the legal questions underlying it, opting instead to focus on its economic and financial aspects[70].

Menezes Cordeiro considered this diploma as a reflection of the prolixity of the Portuguese economic legislation[71], pointing out that it is the most extensive regulation of the countries legally close[72].

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[66] Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão Financeira (Factoring),* cit, p. 107, note 259, refers that Banco de Portugal, through these notices, made it mandatory to include certain clauses in the contracts entered into by factoring companies, contributing unquestionably to regulate the content of the contractual type of factoring. The fact that factoring contracts must be written, imposed by al a) of article 1.º of Aviso n.º 5/86 of 18.04 and maintained in al a) of article 1.ç of Aviso n.º 5/86 of 18.04 and the mandatory transmission of credits opened by a factoring contract through periodic proposals by the adherent to the factor imposed by paragraph c) of article 1.º, al. c) of article 1.º of Aviso 4/91 of 25.03. The Author considers this obligation imposed in al. c) of art. 1.º of Aviso n.º 4/91 is extremely criticized, as it made it impossible for the factor to be agreed with the client in the sense that the latter make a global assignment of future credits. We cannot forget, however, that these notices did not intend to establish the legal regime of the factoring contract, being certain that nothing prevented the factor from entering into factoring contracts in spite of the impositions contained in the Notices. This is so, because the violation of these rules, as the Author refers, did not result in the nullity of the contract, but only the penalty of the infringer by Banco de Portugal.

[67] *Notas sobre o contrato de factoring*, cit, p. 143.

[68] Ibid, p. 143.

[69] Ibid, p. 143.

[70] Teresa Anselmo Vaz, *O contrato de factoring*, cit, p. 58 ff.

[71] Menezes Cordeiro, *Da cessão financeira (Factoring),* cit, p. 36.

[72] Menezes Cordeiro, *Manual de Direito Bancário*, p. 761.

The Author considers that this diploma *"was victim of a double philosophy of strict speciality and detailed regulation"*[73].

The solution adopted by this Author was not to regulate the *factoring* contract, whose regulation should depend on the autonomy of the parties and the application of general principles[74].

João Caboz Santana, in opposition to Rui Pinto Duarte, maintains that Article 1.º, by itself, does not provide sufficient elements for the construction of a concept of *factoring*. The Author explains that the contours of the factoring contract are found from the combination of Article 1.º, which describes the *factoring* activity, with Article 2.º, which defines the subjective requirements for *factoring,* as well as the legal concepts of factor, adherent, and debtor, the subjects involved in the contract and, in the specific case of the debtor, affected by *factoring.* In the author's opinion, Article 4.º, in which the legislator addresses the form of payment for the credits transmitted also offers elements for defining the contract, although the possibility of the transmission of credits being *pro solvendo* or *pro soluto* is left open[75].

Thus, the Author sustains, from subjective and objective elements, the existence of a concept of *factoring* as being the contract "*by which one of the parties (the adherent) undertakes to assign to the other, for consideration, the totality of his present and future short-term credits resulting from his professional activity, which, if he accepts the assignment, assumes or not the risk of the debtor's solvency and receives in exchange, a determined commission, calculated on the value of the credits assigned, which will also pay the accounting and legal support inherent to the good collection of those credits*"[76].

This Author ends up recognising, in some contradiction with the position taken about the existence in the law of sufficient contours for the construction of the concept above mentioned, that the legislator limits himself to describing the *factoring* activity, not providing sufficient elements in the references that he makes to the contract to characterise, its content and regime, under the legal point of view[77].

At this point, we must agree with the Author, and with all those who consider that this law did not bring anything new as to the legal framework of *factoring in* relation to what already existed, arising from the business *praxis.* So much so that Article 3.º, dedicated to the factoring contract*,* states a Lapalisse's truth, paraphrasing José Carlos Pires[78], ruling that the *factoring* companies celebrate *factoring* contracts with their clients. In fact, no reference is made to the

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[73] Menezes Cordeiro, *Direito Bancário – Relatório*, Almedina, Coimbra, 1997, p. 98.
[74] Ibid*,* p. 98.
[75] João Caboz Santana, *O contrato de factoring,* cit p. 27.
[76] Ibid, p. 27 ff.
[77] Ibid, p. 35. The Author ends up considering this contract atypical. In our opinion, in view of the position adopted by the author, it seems to us that it would be more coherent for him to admit the existence of an open legal type, in the DL nº 56/86, de 18/03.
[78] *O contrato de factoring*, cit, p. 87, note 236.

material content of the *factoring contract.*

However, it will always be said that, in our opinion, this law may be accused of having erred by excess in the sense that it went much further than what was intended: to launch the economic-legal bases of the *factoring* activity.

We do not agree with the criticism made by Rui Pinto Duarte and, implicitly, by Teresa Anselmo Vaz, relative to the absence of the material content of the *factoring* contract and of an answer to the legal questions it raises.

Firstly, we must not forget that in Law *omnis definitio periculosa est*[79] and secondly, it does not seem to us, from the reading of the preamble and the articles, that the legislator intended to regulate the *factoring* contract, but the *factoring activity*[80].

This clear lack of a specific legal regime has led literature to consider the *factoring* contract atypical, notwithstanding DL n.º 56/86 of 18.03[81].

With the enacting of DL n.º 298/92 of 31.12, which approved the Regime Geral das Instituições de Crédito e Sociedades Financeiras (General Regime of Credit Institutions and Financial Companies), also known by RGICSF, the *factoring* company changed from a para-banking institution to a financial institution, according to h) of Article 3.º, having also been extended the exercise of *factoring* to banks, through b) of n.º 1 of Article 4.º. The detailed regulation that DL n.º 56/86 offered regarding to *factoring* companies was transferred to the RGICSF[82].

DL n.º 58/86 of 18.03, in the sequence of the reforms undertaken after the publication of the RGICSF, was finally revoked in 1995, as had been anticipated, by DL n.º 171/95, of 18.07[83]. The legislator expressly refers in the respective preamble that he intended with the alterations introduced to *"clarify and deregulate the factoring contract regime"*, seemingly accepting Menezes Cordeiro's

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[79] As reminds Maria João Tomé, *Algumas notas sobre a natureza jurídica e estrutura do contrato de factoring,* DJ, 1992, p. 253.

[80] Rui Pinto Duarte, *Notas sobre o contrato de factoring*, cit., p. 143, admits the dangers of the definition in law and the intelligence that resides in the decision not to regulate certain aspects.

[81] Teresa Anselmo Vaz, *O contrato de factoring*, cit, p. 78, Maria João Vaz Tomé, *Algumas notas sobre a natureza jurídica*, cit, p. 273, Caboz Santana, *O contrato de factoring,* cit, p. 35, José Carlos Pires, *O contrato de factoring,* cit, p. 86.

[82] The DL n.º 298/92 of 31.12, has, however, been altered by several diplomas, the most recent and profound change imposed by DL n.º 201/2002, of 26.09.

[83] With the entry into force of DL n.º 171/95, there are authors who maintain that Aviso n.º 4/91 issued under arts. 19.º and 20.º of DL n.º 56/86, was tacitly revoked, since it was issued under a diploma that was revoked (art. 10 DL n.º 171/95), a position to which we also adhere. See António Pinto Monteiro/Carolina Vicente, *Sobre o contrato de cessão financeira ou de factoring*, BFDUC, Volume Comemorativo, 2003, p. 531. These Authors draw attention to the fact that the RGICSF attributes, among others, the competence to Banco de Portugal to issue notices, which will not be exclusively addressed to factoring companies, but to credit institutions in general. In favor of maintaining Aviso n.º 4/91 in everything that does not contradict the DL n.º 171/95, see Mafalda Oliveira Monteiro, *O contrato de factoring em Portugal,* cit., p. 36. With some doubts raised by the fact that the issuance of this notice derives from the Organic Law of Banco de Portugal, but pending for the tacit revocation of the notice, see Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão financeira (Factoring)*, cit, p. 195, note 259.

criticism.

In this law, the legislator dedicates only two articles, Articles 7.º and 8.º, to the *factoring* contract and its operation, limiting itself to imposing in Articles 7.º, n.º 1 the written form, in n.º 2 requiring the assignment of credits to be accompanied by the respective deeds and in Article 8.º stating some rules relating to the payment of the credits assigned, namely the anticipation of payments[84].

In n.º 1 of Article 1.º , the legislator refers to *factoring* or financial assignment[85], in a vague way, as being *"the acquisition of short term credits derived from the sale of products or rendering of services, in the internal and external markets".* The second paragraph adds that factoring activities include "*complementary actions of collaboration"* between *factoring* companies and their clients, "*namely the study of credit risks and commercial and accounting legal support for the good management of the credits transacted"*[86].

Article 4.º, on the other hand, established the principle of exclusivity, that is, only *factoring* companies and banks could normally conclude *factoring* contracts[87]. This article was expressly revoked by Article 4.º of DL n.º 186/2002 of 21.08 that introduced in Article 1.º the Credit Financial Institution, abbreviated

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[84] With regard to art. 8, which practically reproduces Article 4 of DL n.º 56/86, Menezes Cordeiro criticizes the way in which the legislator established limitations on the payment of the credits transmitted, alerting to the possibility that doubts may arise regarding the interpretation of the article. Indeed, nº 3 seems to prevent advance payments in relation to the due date, although n.º 2 allows them. In the Author's interpretation, only prepayments for non-existent credits are not allowed, and prepayments on account of the assigned credits are allowed, even if they are not overdue. This is for Menezes Cordeiro one more example that it would be all easier if the Portuguese legislator, following the example of the legislators of industrialized and post-industrialized countries, abandoned the idea that everything has to be regulated in detail. We agree with the author. See Menezes Cordeiro, *Manual de Direito Bancário*, cit, p. 761 and 773.

[85] The legislator seems to accept the term financial assignment suggested by Menezes Cordeiro to translate factoring. In that regard, Romano Martinez, *Contratos Comerciais*, *Apontamentos*, Principia, Lisboa, 2001, p. 66, note 10, Expresses doubts about considering the factoring contract as named, taking into account the use by law of two designations - factoring and financial assignment. Conversely, considering the factoring or financial assignment contract named see Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão financeira (Factoring)*, cit, p. 182. Pinto Monteiro/Carolina Cunha, *Sobre o contrato de cessão financeira ou de Factoring,* p. 17 and José Carlos Pires, *O contrato de factoring,* cit, p. 91. It is curious to note that in Article 3.º, dedicated to the identification of the subjects involved in the activity of factoring or financial assignment, the legislator attributed the designation of "factor" or "assignee" to the factoring companies or banks referred to in n.º 1 of Article 4.º to who recognizes, in paragraph 2, the designation of a factoring or financial assignment company. However, they keep the expression "adherent" to designate the client. For the sake of consistency, we understand that, when referring to the client, the legislator could have included the term assignor. Thus, there would be total harmony with the fact that it admits two expressions form the same contract, reflected in double naming of *factoring* legally accepted.

[86] This Article 2.º is quite similar to Article 1.º of DL n.º 56/86, with the difference that the legislator, perhaps sensitized by the criticism of Rui Pinto Duarte, decided to delete the expression "under the terms of the applicable legislation"

[87] With the exception of Caixas de Crédito Agrícola Mútuo.

to IFIC, with the objective that these institutions could develop the activities allowed to *factoring* companies. These IFIC, by virtue of an Article 2.º of the above-mentioned law, are subject to the RGICSF.

In relation to the deregulation promised in the preamble, we verified that DL n.º 171/95 abolished the reference, existing in Article 5.º of DL n.º 56/86, to the factor's retribution and the redundant definition of *factoring* contract contained in n.º 1 of Article 3.º of DL n.º 171/95.

DL n.º 171/95 kept the obligation for *factoring* contracts to be made in writing, an obligation already imposed by the Bank of Portugal in Aviso n.º 5/86 of 18.04 and later in Aviso n.º 4/91 of 25.03.

Factoring is also included in the Stamp Duty Code and its General Table. In effect, the customer of a factoring company*, by virtue* of the provisions of articles 1.1, 2.2 and 3.f) or 3.g) and of item 17.1 of the General Tax Table (TGIS) approved by Law 150/99, of 11th September, as amended by DL n.º 287/2003, of 12.11, Law n.º 12-A/2010, of 30.06, is obliged to pay stamp duty. However, it is not enough to enter into a *factoring* contract*; it* is essential, as stated in the above-mentioned article, that any form of finance to the customer by the factor results from that contract. Therefore, tax will only have to be paid under the terms of Item 17 of the TGIS in the hypothesis of the factor paying the client all or part of the credits in advance, under the terms of the provisions of n.º 2 of Article 8.º of DL n.º 171/95[88].

There are authors who consider that, given the fact that the regulation of the *factoring* contract in this diploma is so vague, it remains an atypical contract[89].

4. Legal typicity

Before investigating whether a *factoring contract* is a socially typical contract, we believe it is essential to distinguish between a legal type and a social type. Thus, it is necessary to keep in mind that contractual types may be legal or extra-legal. In a simplified manner, we may consider that legal types are those typified in law and extra-legal types are those typified in business practice[90].

Under the principle of private autonomy, enshrined in Article 405.º of our Civil Code, the parties may enter into contracts other than the types pre-established by law and simultaneously modify the rules governing a certain type of

[88] It should be noted that the factoring contract, as a contract reduced to writing, is subject to the payment of stamp duty, under the terms of n.º 8 da TGIS. See Ac of RP of 15.06.1999, CJ, Year XXIV, Tomo III, 1999, p, 219 ff.

[89] Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão financeira (Factoring)*, cit, p. 183 ff, José Carlos Pires, *O contrato de factoring - Estrutura e Causa,* cit., p. 89 ff.

[90] Cfr. Mota Pinto, *Cessão da posição contratual*, cit, p. 94, Maria Helena Brito, *O contrato de concessão comercial*, Almedina, 1990, p. 155, Pinto Monteiro/Carolina Vicente, *Sobre o contrato de cessão financeira. ou de Factoring*, cit, p. 521 ff and Pedro Pais de Vasconcelos, *Contratos Atípicos*, Almedina, Coimbra, 1995, p. 59 ff.

contract according to the interests which they intend to satisfy with the contractual relationship created. The economic foundation of this principle lies in the need for the parties to be able, at their discretion, to adapt the contract to the concrete purposes they intend to pursue[91].

For this reason, the legal types do not exhaust the contractual types. In fact, in addition to the types typified in the law, there are other contract types in practice. These types are the social types, types that emerge from business practice[92].

Thus, if, traditionally, contractual typicality, herein understood as a means of regulation through types, was identified and exhausted in the legal typicality, with the consequence that only the contracts governed by the legislator were considered typical, nowadays it also encompasses social typicality[93].

There are no exact criteria for assessing whether or not a contractual practice constitutes a business type, not least because social typicality itself is gradable[94]. There is, in fact, a set of indications collected by legal scholars which make it possible to distinguish the social type from other situations of business practice.

The social typicality proves to be, from the outset, quite important in the discovery of Law, because through the reconnection of concrete contracts to the corresponding extra-legal types of the criteria for the interpretation and integration of the stipulated regulation are found. Basically, as Pedro Pais Vasconcelos states, "*the regulatory model constituted by the social type functions as the dispositive law in the legal type*"[95].

The social type, besides being a phenomenon that imposes itself on the legal order, is an instrument of rationality, economy and evolution, facilitating the negotiation between the economic operators, simplifying the discussion on the validity and legal discussion of the contract in question, since the respective discipline will be drawn up by literature and jurisprudence[96].

Thus, it is possible to find contracts that are legally atypical but socially typical, nevertheless some authors, following the admissibility of social typicality, reserve the category of atypicality only for contracts that do not correspond neither to legal types nor to social types[97].

In this sense, the *factoring* contract, as in other legal systems, is not an

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[91] Cfr. Maria Helena Brito, *O contrato de concessão comercial*, Almedina, 1990, p. 155.
[92] Pedro Pais de Vasconcelos, *Contratos atípicos,* cit, p. 59 ff.
[93] In this respect, see Pinto Monteiro/Carolina Vicente, *Sobre o contrato de cessão financeira ou de Factoring*, cit, p. 521. On the admissibility of social typicality, see the biography named by Maria Helena Brito, *O contrato de concessão comercial*, cit., p. 169, note 57 and referred by Rui Pinto Duarte, *Tipicidade e atipicidade dos contratos*, Almedina, Coimbra, 2000, p. 33, note 63.
[94] Pedro Pais de Vasconcelos, *Contratos atípicos,* cit, p. 60 ff.
[95] Ibid, p. 62.
[96] See Maria Helena Brito, *O contrato de concessão comercial,* cit, p. 169 and Pedro Pais de Vasconcelos, *Contratos Atípicos*, cit, p. 60 ff, Against the relevance of social typicality in the Portuguese context, see Rui Pinto Duarte, *Tipicidade e atipicidade dos contratos*, cit, p. 42, note 82.
[97] Maria Helena Brito, *O contrato de concessão comercial,* cit, pág. 169-170.

atypical contract, in the sense that it has no model either in law or in practice.

The *factoring* contract performs a relevant socio-economic function, is uniformly designated, apart from exceptional attempts at translation, has a very high degree of dissemination, presents contractual clauses common to the various legal systems and has merited much attention from case law, although in our country this is still scarce, and from literature, which recognises its social typicality[98].

In relation to the type, more important than detecting the presence or absence of the essential elements, is to ascertain whether or not the specific case, *e.g.* a contract, can be traced back to the general framework, being essential to determine the intensity with which those elements exist in the specific case. The question of the submitting a concrete case to a type is no longer posed in terms of alternative but in terms of degree or intensity. Thus, it is possible to submit it to types that are in a relationship of similarity and not of identity. A complex reality can be led to a type and not be subsumed into the concept[99].

In Legal Science, concepts are used preferentially, because, by allowing an operation in exclusively logical terms, they provide, therefore, a guarantee of certainty and security to the system.

Thus, the legislator, even in matters such as contracts where the type could be relevant, chose to privilege concepts. Our legislator, similarly, to the German, French and Spanish legislator, constructs contract types as authentic concepts, as will be the case of the contracts typified in our Civil Code[100].

The legal types, by default, are open, without a determined and fixed number of characteristics. However, the legislator, in attention to the value of certainty in Law, did not receive the open types from the practice, having them closed, crystallized in concepts[101]. This transformation of the open type into a closed type makes subsumption possible[102].

Thus, it is necessary to bear in mind that when we refer to contracts and

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[98] Cfr. Maria Helena Brito, *O «factoring» internacional e a Convenção do Unidroit*, cit, p. 17, Menezes Cordeiro, *Da cessão financeira (Factoring),* cit, p. 84, José Carlos Pires, *O contrato de factoring - Estrutura e Causa*, cit, p. 90, Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão financeira (Factoring)*, cit, p. 188, Pinto Monteiro/Carolina Cunha, *Sobre o contrato de cessão financeira ou de Factoring*, cit, p. 523, Pedro Pais de Vasconcelos, *Contratos atí*picos*,* p. 213, Zuddas, *Il contrato di factoring,* p. 205 admits that the factoring contract is a social type, but no longer a jurisprudential type. It should also be noted that the factoring companies' use of general contractual clauses, in the general part of the contracts, leads to a natural uniformity that enhances the social character of the contract.

[99] See Maria Helena Brito, *O contrato de concessão comercial,* cit, p. 159 ff.

[100] The tendency is for jurisprudence to bring the contract back to a legal type. See Sacco, *Autonomia contrattuale e tipi,* RTDPC, part II, 1966, p. 798 ff. In this way, Pinto Monteiro/Carolina Cunha, *Sobre o contrato de cessão financeira ou de Factoring,* cit, p. 524, note that the interpreter has a tendency to deny the existence of a legal typification where he does not find a closed type.

[101] As refers Maria Helena Brito, *O contrato de concessão comercial,* cit, p.162, typical contracts are not 'types' in the technical sense.

[102] Ibid, p. 162; Pedro Pais de Vasconcelos, *Contratos atípicos*, cit*,* p. 39 ff.

inquire about the respective legal type, we can find the *closed type,* i.e. a concept, formed by a set of elements - all of equal importance - whose subsumption requires the verification of all of them. The subsumption of the contract to the type is made by means of an alternative judgment of application or non-application of the concept.

However, we can also find the legal type in a technical sense, being certain that these are, by essence, open, elastic, not having, therefore, defined and firm boundaries*,* not being possible to determine with certainty where the type begins and where it ends. As they do not contain definitions, they are not susceptible of subsumption[103]. As to the latter, it is not a matter of assessing whether the concrete case is or is not subsumable, but rather, whether the latter, to a greater or lesser extent, is in line with it.

Bearing these introductory considerations in mind, the first impression caused by DL n.º 171/95, of 18.07, with the consequent revocation of DL n.º 56/86 and the Avisos that regulated it, is that there is no legal definition of the contract, being practically exempt from regulation in the Portuguese legal system[104].

In effect, it seems to us that we can safely say that DL nº. 171/95, of the 18.07, does not contain any definition of a *factoring* contract, nor does it establish the application of a legal regime. The complexity of the social type that we analysed above is not, in any way, regulated by this law.

However, there are authors who maintain that DL n.º 171/95 contains elements that, from the point of view of the subjects and contents of the contract, are sufficient to delimit a global framework for the contract, not in the sense of a detailed legal framework, proper of a closed type *factoring* contract, but fit to an *open type.*

Pinto Monteiro and Carolina Vicente[105], develop, in this sense, a very interesting position because, although they sustain that DL n.º 171/95 does not establish a closed legal type, they understand that the legislator, when in Article 1.º mentions that "*the present law regulates factoring companies and the factoring contract",* wanted to provide a legal type of *factoring,* although open. The legislator disciplined the subjects, the object and the services. Thus, the Authors maintain that the content of the contract is given through the definition of the services to be provided by the factor, in Article 2.º(2) (management services), Article 8.º(1) (collection of credits) and Article 8.º(2) (anticipation of funds); the

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[103] Cfr. Pedro Pais de Vasconcelos, *Contratos atípicos,* p. 43.

[104] Menezes Cordeiro, *Da cessão financeira (Factoring), cit*, p. 34–36, 82-84, Rui Pinto Duarte, *Notas sobre o contrato de factoring*, cit, p. 141 ff, Maria João Tomé, *Algumas notas sobre a natureza jurídica e a estrutura do contrato de factoring*, cit, p. 251 ff, 270 ff, Teresa Anselmo, *O contrato de factoring*, cit, p. 78, already considered the factoring contract to be legally atypical, before DL n.º 171/95.

[105] Pinto Monteiro*, Sobre o contrato de cessão*, cit p. 524 ff.

definition of the services to be provided by the customer in Article 2.º(1) (assignment of credits) and Article 7.º(2) (forwarding of documents); the definition of the subjective element in Article 4.º(1) when attributing the exclusivity of the factoring to banks and *factoring* companies and Article 2.º(1)when attributing the quality of supplier or service provider to the counterparty and, finally, by defining the objective element, specifying in n.º 1 of Article 2.º which credits are the object of the contract

For the Authors, these typifying elements provide the global image of the contract. The Authors explain that it is not enough for the factor to be one of the entities referred to in Article 4.º and he contract to have a financial component, considered essential in Article 2.º n.º 2, to qualify it as a factoring contract. As an example of the openness of the type, it is accepted that a contract that does not include credits management, but offers risk coverage, a function that is not even mentioned in the law, or includes an assignment of credits of medium and long-term credits may be considered as factoring contract according to DL n.º 171/95.The qualification as an open type is not an alternative between *yes* or *no,* but a *more* or *less that* can only be verified in the concrete case[106].

Despite being very coherent, we view this position with many reservations, since DL n.º 171/95 does not even contain all the functions of the *factor,* for example, the function of guaranteeing the credit risk and also because with the revocation of article 4.º by Article 4.º of DL n.º 186/2002 of 21.08, *factoring* activity is no longer exclusive to banks and *factoring* companies, one of the strongest arguments used in defence of this position.

However, we do not consider this to be a settled issue, and it is certain that until the revocation of Article 4.º of DL n.º 171/95, we had more doubts in rejecting the existence of a very open type of legal *factoring* contract.

Thus, even if we were to consider the *factoring contract as* approximating to an *open type,* in light of the insufficiency of the text of the law, we cannot conclude that there exists in our legal system a legal type to which the factoring contract could be subsumed. In our opinion, in order to consider the *factoring contract* to be legally typical, it would be necessary that DL n.º 171/95 contained "*the complete model of the typical discipline of the contract",* a regulatory model that can be of greater or lesser scope, being, however, necessary that the legal regulation correspond, at least approximately, to the social type in order to provide the parties with the basic discipline of the contract[107].

However, in light of the reading of the legal text, this is far below the complex of rights and duties established between assignor and factor in contractual *practice,* namely the existence of an exclusivity and globality clause*,* the mechanisms of credit approval, the modalities "with recourse" and "without recourse" of the assignment of credits and the respective particularities regarding,

[106] Pinto Monteiro/Carolina Vicente, *Sobre o contrato de cessão financeira ou de Factoring*, cit, p. 526 ff.
[107] Pedro Pais de Vasconcelos, *Contratos atípicos,* p. 210.

for example, the factor's right of recourse.

Only, we can extract that the *factor* will always have to exercise the function of management and collection of the rights ceded (Article 8.º, n.º 1) and provide commercial consulting services (Article 2.º, n.º 2). This will be the minimum scheme that the factoring contract, concluded between the parties, could assume. It will, however, be far below the business practice, which prevents a legal type being inferred from it[108].

As Menezes Cordeiro observes[109], the *factoring contract,* pursuant to Article 7.º of DL n.º 171/95, is subject to being concluded in writing, everything else resulting from the autonomy of the parties and general principles. The legislator, in our opinion, left the *factoring contract to the* free regulation of the parties, under contractual freedom[110].

This lack of legal regulation means that the *factoring* contract, from a legal point of view, must be considered atypical[111].

It should only be pointed out that, at this moment, we can already conclude that the rules existing in the Civil Code relative to the assignment of credits (Article 577.º and ff), the rules of the Commercial Code relative to the current account (Article 344.º and ff) are applicable to the *factoring* contract, as it is clear that within the scope of this contract a current account is established for the updating of credits and debts that arise during the course of the contract[112].

However, and as we have already mentioned, the fact that the *factoring*

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[108] See Luís Miguel Pestana de Vasconcelos, *Dos contratos de cessão financeira (Factoring)*, cit, p. 173.

[109] Menezes Cordeiro, *Direito Bancário - Relatório*, cit, p. 98.

[110] Menezes Cordeiro, *Do contrato de franquia («Franchising»): autonomia privada versus tipicidade negocial*, ROA, Ano 48, Lisboa, Abril 1986, p. 66, warns against the excesses of legal typicality in contracts.

[111] Luís Miguel Pestana Vasconcelos, *Dos contratos de cessão financeira (Factoring),* cit, p. 183 ff, considers this contract atypical since it does not have its own legal regime, an idea that is immediately reinforced by the dynamics and functions that the factor may or may not assume. Also, in the sense of atypicality, see Romano Martinez, *Contratos comerciais, Apontamentos*, cit, p. 66 and José Carlos Pires, *O contrato de factoring - Estrutura e Causa*, cit, p. 90.

A different question is whether we should consider it a pure atypical contract or a mixed atypical contract in the sense that this atypical result from the modification of a certain type or the combination of several types. Pais de Vasconcelos, *Contratos atípicos,* p. 211. Menezes Cordeiro, *Manual de Direito Bancário*, cit, p. 763, mentions a mixed typicality with elements of promise to sell future credits, risk-taking, provision of various services. In the sense of the mixed atypicality of the factoring contract, see Ac of RL, of 27.05.2001, CJ, XXVI, III, p. 102 ff.

[112] Pinto Monteiro/Carolina Vicente, *Sobre o contrato de cessão cessão financeira ou de Factoring,* cit., p. 537, observe that it will be more difficult to apply rules that integrate the discipline of certain contracts, in particular, the purchase and sale, mutual, mandate. Such difficulty does not result, in our opinion, from the affirmation of the legal characteristic, which, for the reasons already mentioned, does not occur, but because it is an autonomous contract whose social characteristic is evident. Thus, such standards can only be applied analogously. The same happens with the provisions regarding the agency contract that some doctrine, as already mentioned, intends to apply to the factoring contract, namely, art. 28 and 30 referring to the termination and termination of the contract., See Menezes Cordeiro, *Manual de Direito Bancário*, cit, p. 771.

contract is not a legal type does not prevent it from being a social type, raised by business *praxis*[113].

There is therefore no legal type of *factoring* contract*,* but rather a social type[114].

5. Conclusions

As we have seen, from the historical evolution of factoring from the 16th century to the present day, this contract reveals great versatility, assuming several outlines.

The historical evolution of *factoring* was the criterion that we decided to use for the presentation of the various types of *factoring*.

In effect, the literature has pointed out several criteria to establish the typology of *factoring,* namely the type of *factoring* company*,* the method of execution, the financing function and the geographic area, criteria that, despite not being autonomous, are present in our exposition.

Following Menezes Cordeiro, we concluded that the factoring contract, under the terms of Article 7.º of DL n.º 171/95, is subject to written celebration, everything else resulting from the autonomy of the parties and the general principles. The legislator, in our opinion, left the factoring contract to the free regulation of the parties, under contractual freedom.

This absence of legal regulation means that the factoring contract, from a legal point of view, has to be considered atypical.

The fact that the factoring contract is not a legal type does not prevent it from being a social type, built by the praxis.

There is, therefore, no legal type of factoring contract, but a social type.

Finally, the analysis of the characteristics assumed by the factoring contract, allowed us to conclude that it has a complex, articulated and variable cause, depending on the conditions negotiated by the parties.

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[113] Maria Helena Brito, *O contrato de concessão comercial, cit.,* p. 168 ff.

[114] The analysis of national jurisprudence courts, among which we highlight the decisions of Supremo Tribunal de Justiça 05.06.2003, Proc. n.º 03B1466, 3.05.2012, Proc. 6018/05.0TBSXL.L1.S1, STJ 13.09.2012, Proc. 384/09.5TVPRT.P1.S1, 15.01.2013, Proc. 345/03.8TBCBC.G1.S1, Tribunal da Relação do Porto 15.11.2018, Proc. nº 596/15.2T8PVZ.P1 Tribunal da Relação de Lisboa 13.07.1995 Proc. nº 0083866, 27.11.1997, Proc. n.º 0018742, 14.05 2015, Proc. 649/13.1TVLSB.L1-8, available at www.dgsi.pt , allow us to sustain that there is a jurisprudential type. The decisions of Supremo Tribunal de Justiça 18.11.2010, Proc. nº 129/03.0TVLSB.L1.S1, Tribunal da Relação de Guimarães 4.03.2010, Proc. 196831/ 08.0YIPRT.G1, Tribunal da Relação do Porto 11.10.2018, Proc n.º 24142/16.1T8PRT.P1 considerer applicable to factoring contract the assignment of credits framework. Jurisprudence seems to have absorbed the social type of factoring, although it still reveals ignorance of the special complexities of the contract and avoids dwelling, with some exceptions, on the legal nature of the contract. Thus, it seems to us that there is some identity between the social and jurisprudential type, the latter not deserving particular emphasis in the absence of treatment of the legal nature of the contract. See Sacco, *Autonomia contrattuale*, cit, p. 790, regarding the separation between legal, social and jurisprudential types.

In fact, the factoring contract can operate a basic set of functions (financing, credit risk taking, consultancy, management and collection), which are articulated differently in the different individual credit transmission contracts.

Among other advantages, provides immediate cash inflow as this sort of finance shortens the cash collection cycle, provides analysis and useful information about the credit standing of the customers, reduces the bad debt and the administrative and management costs.

For this reason, it can be particularly relevant for companies in the economic recovery after the COVID pandemic

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5. Brito, Maria Helena, *O contrato de concessão comercial*, Almedina, Coimbra, 1990.
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11. Cordeiro, António Menezes, *Da cessão financeira (Factoring),* Lex, Lisboa, 1994.
12. Cordeiro, António Menezes, *Do contrato de franquia («Franchising»): autonomia privada versus tipicidade negocial*, ROA, Ano 48, Lisboa, 1988.
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16. Frignani, Aldo, *Prime decisioni dei giudici italiani in tema di factoring,* na compilação "Factoring, Leasing, Franchising, Venture capital, Leveraged buy-out, Hardship clause, Countertrade, Cash and Carry, Merchandising, Know-how", 6º edição ampliada e actualizada, G. Giappichelli Editore, Torino, 1996.
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ACTIVITY, ORGANIZATION AND FUNCTIONING OF CREDIT INSTITUTIONS. FINANCIAL LAW TOPICS

Corporate financing

Lecturer **Sebastian BODU**[1]

Abstract

Two are the external sources of corporate financing: equity and debt. These are exclusive and can be combined in turn (other sources of external financing no longer exist, but only variants thereof). Capital with which a company is financed is its engine, no company being able to operate without capital regardless of the industry. Funding may be private or public. Private financing is provided through banking credit or equity contracted through direct negotiation with investors. Each mode of financing has advantages and disadvantages, not only in terms of financial costs (direct) but also indirect costs. Internal funding source is self-financing, i.e. reinvesting the company's profit instead of distributing it in the form of dividends. Balancing the use of internal and external financing sources, as well as the share of an external source in relation to another external source, primarily depending on the cost of financing (direct or opportunity) is a difficult, important and complex decision. The more the company is and/ or the more attractive for investors, the more varied the range of financing options and the cost structure that is heavily influenced by rating agencies. Conversely, a small company without too many development prospects will not have access to all available sources in the market and will have to confine itself to small bank loans. A specific form of finance is the financial assistance. This is crucial in performing Leverage Buyouts or Management Buyouts. Although it was prohibited by the first form of the Second Companies Directive, now it is fully permitted provided that the company complies with the acquisition of its own shares, this being protected both the creditors and the shareholders. Unfortunately, Romania did not transpose the last form of the former Second Companies Directive (2006), not even after the recast or codification by Directive 2017/1132.

Keywords: *acquisition of the own shares, contributions, company, corporate finance, currency, debt, financial assistance, leverage buyout, management buyout.*

JEL Classification: K20, K22, K42

1. Corporate finance sources

It is known that the "engine" of an enterprise is capital. It can come from different sources, either in the form of equity or in the form of debt[2]. As a consequence, managing the financing sources is a vital issue for the functioning of a company, in the absence of such sources, the company being unable to obtain the necessary resources to carry out its activity. A company has a choice of several

[1] Sebastian Bodu - is lecturer with the Romanian Notarial Institute in Bucharest, Romania. He is Ph.D. in Corporate Law with the Academy of Economics, Bucharest, Romania (2002), and an EMBA with Kennesaw University, Atlanta, USA (2004), bodu.sebastian@gmail.com.

[2] Dimitriu, V. (1902). *Commercial Law Text Book*. Iași, Lithographie, p. 249.

funding options from the two source forms. Once the funding has been procured, attracted amounts turn into resources, i.e. assets that are used in revenue generating operations. The fundamental objective of a company is to maximize the wealth of its shareholders, that is to say, the fair market value of the company, and, therefore, all the shares issued and held[3]. In order to do this, the company must develop its operations, grow as a business, and for this purpose it needs investment to be financed either from the two sources – equity and debt – also called *external financing sources*, or self-financing, also referred to as a source of internal funding, as well as a combination of these.

The two types of external financing source – equity and debt – are exclusive (other sources of external funding no longer exist but only variants) and can be combined in turn. Funding through new contributions can be done through equity (ordinary shares, preference shares, convertible preferred shares). Debt financing can be done by banks loans, loans from other financial institutions, shareholders or any third party willing to finance the company, including through the issuance of simple or convertible bonds, or it can be done in the form of leasing or credit-supplier[4] (financing by convertible into share capital is called *mezzanine finance*). Of all these, bank loans are the largest share in the domestic and European-continental economy[5], as opposed to the US and UK markets where the issuance of financial instruments prevails. Even in the United States or the United Kingdom, issues of financial instruments are, however, specific to large, listed companies, the smallest and medium-sized ones, usually resorting to institutional loans as well (Bank of England. Quarterly Bulletin. 2018 Q1).

Regardless of source – equity or debt – funding may be private or public. Attracting an investor to subscribe new shares issued by the company or taking a debt are the private forms of financing. *Public form* is the way to attract financing from the capital market through the issuance of financial instruments in the form of a public offering, in which case, in addition to the provisions of the general law or the company's law on the operation, the capital market regulation apply to protect the investors. Each model of financing has advantages and disadvantages, not only in terms of financial costs (direct) but also indirect costs. Indirect costs are compliance with the securities regulation regarding both reporting and transparency requirements, as well as the rules of the stock exchange where its securities are traded. But perhaps even more indirect costs are the loss of control over voting rights in the company as a result of dilution of initial shareholders. The advantage of listing is, first of all, the liquidity of the market on which the securities traded, investors being able any time convert their investment in cash at the market price, which makes the investment in securities a more secure than the

[3] Prunea, P. (2001). *Capital Market. The Chronic of the Risk Challenge.* Bucharest: Economic Publishing House, pp. 281.
[4] Popa, I.et. al. (1997). I*nternational Commercial Transactions.* Bucharest: Economic Publishing House, p. 407.
[5] Prunea, P., *op. cit.* (2001), p. 266.

investment in the stock of a closed-end company.

Accounting records are based on the source of funding and the liquidity of the debt resulting from financing, with a synthetic accounting account specifically allocated to that form of finance, accounts in the same class or in different classes. If the company has unpaid shares from a previous issue, calling for debt to finance is the only option[6]. From the investor's point of view, the financing of the company must be attractive, i.e. it should have a better return than another similar financing opportunity. A funny example is the issuance of bonds denominated in hard currency by a Russian vodka producer paying an interest of 20% p.a. or 25% in vodka. According to the bidder, "vodka is used as a 1000-year exchange currency"[7].

Financing from internal sources (or self-financing) means reinvesting the company's profit instead of distributing it in the form of dividends[8], which implies that the shareholders give up their share of net profit, capitalizing on the company and increasing its value, starting with the accounting one (net assets). This is quite rare, with only very profitable companies being in the position of not resorting to external sources, and that, as I said, is due to the reduction or suppression of dividends (Apple, Inc., for example, had a policy of retaining and reinvesting all profits by 2012 that allowed it to self-finance). Self-financing therefore means buying money for investments (buying assets) from its own corporate operations, money that, if distributed as dividends in full, would be to the detriment of the capitalization of the company, which would, from the point of view of financial view – not accountant[9] – a decapitalization. Increasing the value of a company means increasing the value of shares, and such an increase has a twofold consequence: (i) improving the financial ratios of the company and (ii) reducing the cost of financing from sources external. However, if the company's investments funded from the retained (capitalized) profit are unprofitable, i.e. the company bears losses, its value decreases as a direct consequence of the unprofitable nature of those investments. In theory, self-financing is the cheapest method of corporate finance, cheaper than a donation, but this is certainly more theoretical, especially since the donation is not financing; the definition of financing is the return of the money invested, in a time-frame, with the addition of a yield[10].

The investor's gain is an expense for the financed company, and the company's best interest is to have the lowest financing cost. In case of self-financing,

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[6] Toma, St. (1916). *Commercial Law Text Book*, 3rd Ed. Bucharest: Edited by Mill. Ionescu Berbecaru, p. 273.

[7] Higgins, R.C. (1996). *Analysys for Financial Management*, 6th Ed. Boston: Irwin McGraw-Hill, p. 146.

[8] Băcanu, I. (1999). *The Legal Capital*. Bucharest: Lumina Lex Publishing House, pp. 134; Pătulea, V. (2009). *Financing of commercial companies. Shareholders equity, legal capital*. Bucharest: Hamangiu Publishing House, pp. 276.

[9] Oroviceanu, C. (2010). *Considerations on Art. 15324 of the Companies Law*. Bucharest: Romanian Business Law Review 10, p. 65.

[10] Pătulea, V., *op. cit.* (2009), p. 23, 24.

the cost is not direct, but indirect, what the investor would have done with the money he could withdraw in the form of dividends to invest in something else, at a better return. As a conclusion, self-financing is not free, but has a cost: the opportunity one. It is true that, depending on the size of company, this cost is viewed more objectively or more subjectively.

The larger the company (by shareholders), the more costly it is; conversely, the smaller the company, like a partnership (or a single member company), the cost is more subjective because the shareholder is also sentimental to the company, his participation being not only an investment but also a personal business, professional satisfaction, a self-paid job, or even a way of life.

Balancing the use of internal and external financing sources, as well as the share of an external source in relation to another external source, primarily depending on the cost of financing (direct or opportunity one) is a difficult, important and complex decision. The analysis of all funding options is called *financial management*, and, when it comes to costs, falls primarily under the responsibility of the Chief Financial Officer.

The financiers, in their turn, are interested in the gain obtained from the company and the priority rank of the financier on the assets of the company, all of which are interdependent. For example, corporate creditors have priority over shareholders, who are residual creditors[11], and preferential shareholders have a priority (dividend distribution and shares redemption) over ordinary shareholders. Among them, creditors only take precedence based on legal priority (privilege) and lien registered in their favor. According to Art. 2333 par. (1) of the Civil Code, a *privilege* is the preference given by law to a creditor considering his claim and the company cannot agree subordination among creditors, because the preference on certain assets, as in the case of privileges[12], is the result of a favor granted directly by the law[13].

Attracting finance is a three-step operation. The first step is to establish its size, depending on the investments to be funded, necessary for the development of company. The second step is to determine how much funding can be provided from internal sources, i.e. from the retained profits to which shareholders are willing to give up by not distributing or distributing limited dividends, because what uncovered balance is taken from an external source.

The third step is the choice of the external source, i.e. the issue of new shares or the indebtedness, or a combination of them. The decision is not easy because it is necessary to analyze the direct and indirect risks and costs of each source. If these costs are considered too high, the company can re-analyze the investment plan and give up (some of the) costs that are too high that can lead to

[11] Kershaw, D. (2012). *Company Law in Context*, 2nd Ed. Oxford: Oxford University Press, p. 709.
[12] Deleanu, I. (2002). *Parties and third parties. Relativity and opposability of legal effects*. Bucharest: Rosetti Publishing House, p. 183.
[13] Zlătescu, V.D. (1970). *Creditor's guarantees*. Bucharest: Romanian Academy Publishing House, p. 48.

financial difficulties[14]. Financing costs are quantified as the *rate of return*. The cost of equity financing is higher than that of debt financing[15], with the rate of return being higher for equity than for debt.

The reason why the return on equity financing (referred to as the "Internal Rate of Return"/IRR, that is that discount rate applied to a company as a business after an investment in the form of share capital, for which the present net value equals 0) is higher than the (external) rate of return on a debt finance (i.e. interest rate) is that financing in the form of equity is more risky than in the case of debt financing (total risks include the risk of the industry and, in addition to foreign investment, country risk) because creditors are preferred to shareholders in claiming the assets, according to the *theory of risk and return* that says the two are in a direct relationship of proportionality: the higher the risk, the higher the investor's earnings, hence the more expensive financing.

It is true that the Internal Return Rate is an expectation, an investment projection and not a contractual element such as the interest rate, but equity providers such as private equity funds sometimes convert the forecasted earnings into a debt (total risks include the risk of the industry and, in addition to foreign investment, country risk) as debt investors can remain with a simple expectation at risk of insolvency, in the absence of sufficient security from the debtor.

The cost of equity financing – that is, dividends and/or the capital gain obtained from the sale of shares – is strictly financial, non-deductible, while interest on debt is not only a financial cost but also an accounting one and is fiscally deductible. However, the direct financial cost is not the only criterion in choosing the source of funding but only one of them, other indirect costs being the lien given by the company or the involvement of the investors in the company decision.

Securing the debt with assets as a lien for the claim of the lender is an indirect cost that may occur on debt financing, while dilution (including losing the control stake) is an indirect cost associated with equity. Also, excessive debt does not only mean high direct financial costs, which reduce profit, but also increase the risk of insolvency, a risk that is absent when the company is financed through equity[16]. An interim financing option, which reduces the risk of insolvency and at the same time allows for the maintenance of decisional control, is the issue of preferred shares.

The more the company is and/or the more attractive for investors, the more varied the range of financing options and the cost structure that is heavily

[14] Higgins, R.C., *op. cit.* (1996), p. 191,194.
[15] Şcheaua, M. (2000). *Companies Law no. 31/1990, commented and annotated*. Bucharest: All Beck Publishing House, p. 85; Cărpenaru, St. D. and Predoiu, C. and David, S. and Piperea, Gh. (2001). *Companies, Regulations, doctrine, jurisprudence*. Bucharest: All Beck Publishing House, p. 446.
[16] Kershaw, D., *op. cit*. (2012), p. 715.

influenced by credit rating agencies. Conversely, a small company with little developmental prospects (know-how, patents, operating licenses, etc.) will not have access to all available sources in the market and will have to confine itself to small bank loans[17]. In all cases, there is no credit financing in any form (bank credit, leasing or debt issue) that is not influenced by the company's debt-to-equity ratio: the lower the ratio, the more borrowing space and vice-versa.

Also, when indebtedness complements funding by equity or self-financing, the financial leverage effect is created and the shareholders will want their equity contributions to be as small as possible and the indebtedness the highest, to develop the business with someone else's money.

The concept of "Other Peoples' Money" is in fact the fundamental principle of corporate finance, as it maximizes the most important financial ratios: *Return On Equity* (ROE) and *Return On Assets* (ROA), though at the same time it is a two-edged sword: if the debt financed investment produce the estimated returns, the company (and its shareholders) earn; if not, then borrowing costs will create financial difficulties for the company[18].

A perfect ratio of indebtedness exists only in an ideal theoretical market, so the corporate executives must find the optimum ratio in the given conditions, which implies a good knowledge of the market and its prospects. In other words, a company's decision to indebt is more than pertinent, up to a point, because the money drawn from debt has the leverage effect on shareholder money, the latter taking advantage of the fact that the money (especially those borrowed through long-term indebt such as certain bonds) are invested in wealth-generating assets that bring a higher return on their cost (interest), which increases the value of their shares[19].

Leveraged recapitalization takes place when the company borrows intensely (especially through bond issues) in order to distribute and pay dividends to shareholders, so that assets, economically speaking "belong" to both categories of investors (shareholders and creditors) because they secure the repayment of debt, and the company's revenues is used more to pay these debts. By distributing dividends, the value of market shares increases significantly, but the value of the company decreases due to capital outflows in the form of dividend payments and because of worsening the debt-to-equity ratio, with creditors sometimes becoming more concerned with the company than shareholders.

The strategy of recapitalization through indebtedness is used by a company's management in an attempt to increase shareholders' equity, but not by increasing the value of the company but by distributing dividends[20]. This method

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[17] Ferran, E. (2011). *Principles of Corporate Finance Law*. New York: Oxford University Press, pp. 270, 342.
[18] Higgins, R. C., *op. cit.* (1996), p. 180.
[19] Downes, J. and Goodman, J. E. (1995). *Finance & Investment Handbook*. New York: Barron's Financial Guides, p. 534.
[20] Haas, J.J. (2011). *Corporate Finance (In a Nut Shell),* 2nd Ed. St. Paul: West, p. 616.

is sometimes used by the company's management to avoid a hostile takeover, sometimes comes from the shareholders' initiative.

2. Financial assistance

In accordance with Article 106 (2) of the Romanian Companies Law (no. 31/1990, recast), a company may not extend down payment or loans or provide guarantees for the subscription or acquisition of its own shares by a third party, since such an operation would, from a financial point of view, amount to an acquisition of its own shares. Where the purpose of the acquisition of existing shares, from its shareholders, with borrowed money or with guarantees offered by the issuing company itself, the transaction shall be referred to as *financial assistance*.

This name is not necessarily a technical one, found in ordinary business language, but one which designates, in general terms, the financial support given by a company in situations considered not in its interest, but it is widely known in its particular form of loan or guarantee granted for the purchase by a third party of its own shares.

The idea of banning loans or guarantees granted by the company to a third party to buy its own shares from a shareholder was the subject of the 12th resolution of the International Congress of Stock Companies held in Paris in 1889. From there it was taken over by European legislation and, further, by the former Second Companies Directive, in its original form (77/91/EEC). It was transposed into the Romanian Companies Law by Law No. 441/2006, although the Directive had already been amended on a proposal from the United Kingdom on these issues by Directive 2006/68/EC, amendments (optional) which had not been transposed. Perhaps on the occasion of a new companies' law, motivated by the adoption of the Directive (UE) 2017/1132 (hereby referred as the 'General Companies Directive'), such a transposition should be made.

Article 64 of the General Company Directive provides in paragraph (1) that, where Member States allow a company, directly or indirectly, to advance funds, lend or provide guarantees for the acquisition of its own shares by a third party, they shall subject these transactions to the conditions set out in paragraphs (2) to (5), i.e.: (i) transactions take place under the responsibility of the administrative or management body under fair market conditions, in particular as regards the interest received by the company and the guarantees offered to the company for the loans and down payment referred to in paragraph (1), which involves an analysis of the solvency of the third party or, in the case of transactions involving several parties, of each party concerned; (ii) the management body shall submit the transactions, for prior approval, to the general meeting, acting by a two-thirds majority of the attending capital, but Member States may also provide for an absolute majority; (iii) the meeting shall act on the basis of a written report from the managing body containing the reasons for the transaction, the interest which the

transaction presents to the company, the conditions under which the transaction is carried out, the risks it entails to the liquidity and solvency of the company, and the price at which the third party is deemed to purchase the shares; (iv) that report shall be communicated to the trade registry for the purpose of ensuring publicity in accordance with Article 16 of the General Companies Directive; (v) the total financial assistance granted to third parties may not result in the company's net assets being reduced below the value of the share capital and legal reserves, also taking into account any reduction in the net assets that may have occurred as a result of the acquisition, by or on behalf of the company, of its own shares in accordance with Article 103^1 to 104 of the Romanian Companies Law; (vi) the company shall enter in the balance sheet liabilities a reserve which cannot be distributed, by an amount corresponding to the total financial aid. Paragraph (5) of Article 64 of the General Company Directive provides that, where a third party acquires, with the financial assistance of a company, the company's own shares within the meaning of Article 104 of the Romanian Companies Law or subscribes to shares issued in the context of an increase in the subscribed capital, that acquisition or subscription shall be made at a fair price.

Where the European provisions on financial assistance are not transposed, the only general derogation from the prohibition provided for in Article 106 (1) shall be that of the Member State concerned. (1) of the Romanian Companies Law is, by law, that of paragraph (6) of Article 64 of the General Companies Directive, i.e. where the loan is granted by a credit or financial institution.

We believe that this derogation is valid when the loan (credit) is not expressly given for the acquisition of the institution's shares or when it is given without a specific purpose (such as, for example, personal needs credit or overdraft), otherwise the financial institution cannot control what the borrower does with the amount credited, including the possible purchase of shares of the institution, for example on the capital market. The prohibition is also not valid where the loan is granted to the company's employees.

The excessive protection of social creditors by Romania's non-transposition of the provisions of Article 64 of the abovementioned General Companies Directive, an article which stands as a model for regulatory derogatory from the prohibition of financial assistance of a third party with a view to acquiring the shares of the financing company, puts a barrier to the realization of *Leveraged Buyouts* (*LBO*), although there are arguments for such transactions to nevertheless be allowed on the basis of other articles of the Romanian Companies Law, similar (but not identical) to those of Article 64 of the Directive. LBO is the operation in which a vehicle company is formed by one or more investors (generally investment funds), with a minimum capitalization, who buy the shares of another company (target company) with money from a loan secured with the assets of the target company, leaving the loan to be repaid from the cash flow of the target company. Where the vehicle company is set up by the managers of the target

company, we have a *Management Buyout* (*MBO*)[21]. After the purchase of 100% of the shares of the target company, the loan to the vehicle company is taken over by novation by the target company, which thus makes the repayment. If, however, the acquisition did not cover 100% of the shares, but the majority thereof, a takeover of the debt is prejudicial to the minority shareholders of the target company, so that, in the absence of an approval of the novation with a vote of 100% of the share capital, the decision of the general meeting is void for majority abuse and the repayment of the loan will continue to be the responsibility of the vehicle company, from dividends and other income received from the target company; another variant conveyed in the discussions of practitioners is the merger between the target company and the vehicle company, which leads to confusion as a borrower or guarantor with that of a borrower.

Prohibition on financial assistance was introduced in the English law of 1929 on a proposal from the Greene Commission, which considered it abusive to borrow and then the loan to be taken over and paid by the cash company whose shares you buy with the loan given by the company itself. Today, when takeovers of companies through loans are commonplace, the ban on financial assistance has become redundant. Moreover, it has been proven that financial assistance can be a solution to reinvigorate the companies taken over. In particular, the legislation (s. 681(2), *Companies Act*, 2006) began from a time to allow payments from the company taken over, if such payments represented dividends, which shows that the problem is not one of using the company's resources taken over to repay the loan, but one of protecting the creditors of that company, as well as its minority shareholders, from which it is apparent that the prohibition of financial assistance is not one related to the transaction itself , loan or guarantee, but, as I said, one related to the protection of social creditors and minority shareholders.

It may therefore happen that the loan is granted for anything other than the acquisition of the company's own shares, but it is never recovered, which shows that the prohibition on the plano of financial assistance is not justified. For this reason, the Jenkins Commission proposed in 1962 relaxation, which was done in 1981 only for unlisted companies, if the rules of protection of creditors were respected[22].

The former Second Society Directive was amended in 2006 under pressure from the United Kingdom, expressly regulating financial assistance[23].

In order to understand the rationale for reticence of financial assistance, it must be said that the transaction is, from a legal point of view, an economic

[21] Miller, Jr., E.L. (2008), *Mergers and Acquisitions. A Step-By-Step Legal and Practical Guide*. Wiley, Hoboken, p. 295.
[22] Davies, P. L., and Worthington S. (2012), *Gower and Davis' Principles of Modern Company Law*, 9th ed. London: Thomson Reuters (Professional), pp. 360-361.
[23] Edwards, V. (2003), *EC Company Law*, 2nd edition. New York: Oxford University Press, p. 75.

alternative to the acquisition of its own shares, which is why, moreover, it is regulated – both in the Romanian Companies Law and in the General Companies Directive in the context of articles relating to the acquisition of own shares.

The reluctance therefore comes as a result of the fact that, through financial assistance, it results in the realization of the shareholders' claim similar to their sale to the issuer itself, but not directly, but to a third party who buys them with money borrowed from the issuing company or from a creditor guaranteed by it (more correctly, with a large part of the money, the LBO/MBO transactions also have a minimum equity component).

The reluctance also comes as a result of the fact that the realization of the claim only by some of the shareholders is discriminatory towards the others. Another reason for reluctance is that financial assistance can be used to manipulate the capital market by stimulating the share price of the company providing the assistance. The prohibition of financial assistance is therefore regarded, from this point of view, as a prohibition on the trading of its own shares by the company[24].

In relation to the foregoing, I consider that financial assistance should be permitted when it takes place in compliance with all the conditions of Articles 103^1 and 94 (1). (1) the second sentence of the Romanian Companies Law, as if the shares were acquired by the issuer (except, of course, the 10% threshold), i.e. (i) the neutrality of the company's management, (ii) the completeness of the payments, (iii) the protection of creditors from the refunds to shareholders and (iv) the non-discrimination of shareholders between them. If the transaction is carried out for the purpose of market manipulation, the provisions of the Romanian Law on Issuers of Financial Instruments and Market Operations on Market Abuse shall become applicable.

Management neutrality requires financial assistance to be approved by the general meeting of the company. The protection of creditors shall take place in so far as the assets of the excess net company cover the amount of the loan (granted or guaranteed by the company) as well as the value of any own shares already held by the company, i.e. the general corporate pledge shall be respected. The protection of shareholders (minority) shall be made by their participation in the sale of the shares to the tenderer, in proportion to their share of the share capital.

Where financial assistance is granted to a member of a management body (director, member of the directorate, administrator or member of the supervisory board), there are incidents and the provisions of Article 144^4 of the Romanian Companies Law, so that, in the absence of authorization from the general meeting of shareholders, the transaction is voidable.

It is, of course, *de lege ferenda*, it would be preferable to fully transpose the provisions of Article 64 of the General Companies Directive, especially since Article 273 (a) (c) of the Romanian Companies Law criminalizes the granting of

[24] Ferran, E., *op. cit.* (2011), p. 315.

loans or advances on the company's shares or the provision of guarantees 'under conditions other than those laid down by law'[25], how prosecution bodies could interpret financial assistance being a serious reason why such operations are unfortunately almost non-existent in Romania.

Given that the purpose of the prohibition of financial assistance by English law is to protect the company's shareholders and creditors, it is expected that financial assistance complying with the protection criteria will not be unlawful, a solution which should also have been followed by the courts.

However, it happened that an English court declared financial assistance illegal in all cases and imposed criminal fines on administrators, as if the purpose of the prohibition of financial assistance were to prevent the administrators from carrying out the transaction under criminal penalties (see Victor Battery Co. Ltd. vs. Curry's Ltd., [1946] Ch. 242). This decision, considered 'a calamity', was resumed 20 years later by another English court (Curtis's Furniture Stores Ltd. vs. Freedman [1966] 1 WLR 1219), but it was rejected by the Australian courts, which thus helped the English ones "see the light". Currently the indictment of managers for financial assistance complying with the protection criteria would be considered 'heretical'[26].

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[26] Davies, P. L., and Worthington S., *op. cit.* (2012), p. 371-372.

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Debt moratorium during the state of emergency and the state of alert

Coordinating director **Ciprian CHIOREAN**[1]

Abstract

The regulation of the application of the debt moratorium was rolled out by adaptation and implementation at the level of the internal law, so that its effect is the one expected by the union of the European legislative framework with the internal legislative framework. Although there is a common goal, despite the guidelines set out by the E.B.A., there is no unitary vision at the level of European states regarding the moratoriums implemented, the solutions adopted by each EU Member State being diverse. Since the beginning of the SARS-CoV-2 coronavirus pandemic, credit institutions have come to the aid of customers who were financially vulnerable, by implementing appropriate, concrete and effective measures to enable them to continue to meet their payment obligations. For the elaboration of this study was used the comparative analysis of the whole regulatory framework and the exposition of the way in which it was implemented at the level of each state affected by the pandemic.

Keywords: *debt moratorium, bank, banking regulations, pandemic.*

JEL Classification: E50, G21, G01, K23

1. The internal legislative framework of the moratorium

By the Decree of the President of Romania no. 195 of March 16, 2020, on the establishment of the state of emergency on the territory of Romania, issued pursuant to art. 93 paragraph (1) and art. 100 of the Constitution, the state of emergency was established on the entire territory of Romania duration of 30 days. As stated in the Preamble to this decree, the state of emergency was established and "taking into account the fact that the failure to take urgent measures, exceptionally, in the social and economic field, to limit SARS-CoV-2 coronavirus infection among the population would have a particularly serious impact, mainly on the right to life and, in the alternative, on the right to health of people, stressing the need to establish a state of emergency to reduce the negative effects on the economy caused by measures taken at national and international level to combat the spread. SARS-CoV-2 coronavirus."

By the Decision of the Parliament no. 3/2020 for approving the measure adopted by the President of Romania regarding the establishment of the state of

[1] Ciprian Chiorean - Vista Bank Romania; Vice President of the Association of Legal Advisers in the Financial-Banking System, ciprian.chiorean@vistabank.ro.

emergency on the entire territory of Romania[2], adopted pursuant to art. 93 paragraph (1) of the Constitution, the state of emergency was approved on the entire territory of Romania, for a period of 30 days, from March 16, 2020, as an exceptional measure adopted by the President of Romania.

Following the expiration of the 30 days of state of emergency, the state of alert was established on the entire territory of Romania, a state which, at present, has been extended until May 13, 2021[3].

By Government Emergency Ordinance no. 37/2020 on the granting of facilities for loans granted by credit institutions and non-banking financial institutions to certain categories of debtors[4]*,* the government has instituted a series of measures to reduce the effects of the pandemic on debtors, by regulating a legislative moratorium on debtors who submitted applications by May 15, 2020, an extended deadline of June 15, 2020, by Government Emergency Ordinance no.70/2020 regarding the regulation of some measures, starting with May 15, 2020, in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus, for the extension of some terms, for the amendment and completion of Law no. 227/2015 regarding the Fiscal Code, of the National Education Law no. 1/2011, as well as other normative acts[5].

Government Emergency Ordinance no. 37/2020 includes the following legislative solutions:

- definitions of terms: a) creditors - credit institutions defined according to Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, approved with amendments and completions by Law no. 227/2007, with subsequent amendments and completions, and non-banking financial institutions defined according to Law no. 93/2009 regarding the non-banking financial institutions, with the subsequent modifications and completions, as well as the branches of the credit institutions and of the non-banking financial institutions from abroad that carry out activity on the Romanian territory; b) debtors - natural persons, including authorized natural persons, individual enterprises and family enterprises operating according to the Government Emergency Ordinance no. 44/2008 on the development of economic activities by authorized natural persons, individual enterprises and family enterprises, liberal professions and those exercised under special laws, regardless of the form of exercise of the profession and legal entities in credit agreements, respectively leasing, except for credit institutions defined according to Government Emergency Ordinance no. 99/2006; c) letter of guarantee - the irrevocable and unconditional commitment by which the

[2] Published in the Official Gazette of Romania, Part I, no. 224 of March 19, 2020.
[3] By Government Decision no. 432/2021 on extending the state of alert on the territory of Romania starting with April 13, 2021, as well as establishing the measures applied during it to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 369 of April 9, 2021.
[4] Published in the Official Gazette of Romania, Part I, no. 261 of March 30, 2020.
[5] Published in the Official Gazette of Romania, Part I, no. 394 of May 14, 2020.

National Credit Guarantee Fund for Small and Medium Enterprises, hereinafter referred to as FNGCIMM, undertakes in the name and on behalf of the state to pay to the creditor the amounts representing deferred interest on mortgages, contracted from an individual creditor, who benefits from the facility to suspend payments under the conditions of this emergency ordinance, for which FNGCIMM, based on the mandate granted by the Ministry of Public Finance, provides a guarantee on behalf of and the state account based on the agreement concluded with the creditor provided in letter a). The validity of the letter of guarantee is of maximum 5 years; d) guarantor - the state through the Ministry of Public Finance represented by the F.N.G.C.I.M.M. for guarantees granted in the name and on behalf of the state; e) state guarantee - express, unconditional and irrevocable commitment assumed by F.N.G.C.I.M.M., in the name and on behalf of the state, which covers the loss incurred by the creditor, as a result of the credit risk according to the letter of guarantee provided in letter c); f) mortgage loan - a loan granted by a creditor to a natural person debtor, secured by a mortgage on a real estate, and a loan involving a right related to a real estate, as they are regulated by the Government Emergency Ordinance no. 52/2016 on credit agreements offered to consumers for real estate, with subsequent amendments and completions, as well as for the amendment and completion of Government Emergency Ordinance no. 50/2010 on credit agreements for consumers, as well as loans granted through the "First House" program, approved by Government Emergency Ordinance no. 60/2009 regarding some measures in order to implement the "First House" program, approved with modifications and completions by Law no. 368/2009, with subsequent amendments and completions; g) credit risk - current or future risk of negative impact on profits and capital as a result of non-fulfillment by individual debtors of their obligations to repay interest suspended on payment, related to the facility guaranteed by the state [art.1];

- the measure of suspension of the payment obligation concerns the due rates, representing capital installments, interest and commissions, related to the loans granted to debtors by creditors until the date of entry into force of the emergency ordinance/law [art.2 paragraph (1)];

- the measure of suspension of the payment obligation shall be applied, at the request of the debtor, up to 9 months, but not more than 31 December 2020 (art. 2 paragraph (1));

- the measure of suspension of the payment obligation applies both to the obligations arising from the credit agreements and to those arising from the leasing contracts [art.1 letter b) and art.2 paragraph (1)];

- with regard to the interest rate regime, it is provided that the interest due by debtors corresponding to the due amounts whose payment is suspended is capitalized at the balance of the existing credit at the end of the suspension period, and the capital thus increased is paid in installments until after the suspension period.

As an exception, for mortgage loans contracted by individuals, the interest

related to the suspension period is calculated according to the provisions of the credit agreement and represents a distinct and independent claim in relation to the other obligations arising from the credit agreement. For this receivable the interest is 0% and the payment by the debtor of this receivable will be made in installments, in 60 equal monthly installments, starting with the month immediately following the end of the deferral period [art.4].

- regarding the conditions for granting the moratorium, it is provided that the measure is granted exclusively to debtors whose income was directly or indirectly affected by the serious situation generated by the COVID-19 pandemic, according to the rules of application of the emergency ordinance [art.2 para. (6)] and that the facility can be granted only for loans that do not have arrears on 16 March 2020 (date of establishment of the state of emergency in Romania) or, if there were such arrears, have been paid by the date of request for suspension the obligation to pay [art.2 paragraph (5), in the initial form]; debtors of legal entities must cumulatively meet the following conditions: a) interrupt the activity totally or partially as an effect of the decisions issued by the competent public authorities according to law, during the declared state of emergency, and hold the emergency certificate issued by the Ministry of Economy, Energy and Business Environment or hold the certificate for emergency situations issued by the Ministry of Economy, Energy and Business Environment, which states, based on the declarations on the debtors' own responsibility, the decrease of revenues or revenues by at least 25% in March 2020 by reporting at the average of January and February 2020 or the partial or total interruption of the activity as an effect of the decisions issued by the competent public authorities during the period of the declared state of emergency; b) is not insolvent at the date of requesting the suspension of the loan repayment, according to the information available on the website of the National Office of the Trade Register [art.2 paragraph (6), in its initial form];

- for mortgage loans contracted by individuals, the state, through the Ministry of Public Finance (MFP), guarantees 100% interest payment, and, for this purpose, MFP is authorized to mandate the National Credit Guarantee Fund for Small and Medium Enterprises (FNGCIMM), in order to issue letters of guarantee in the name and on behalf of the state in favor of creditors; the granting and performance of state guarantees is done on the basis of a guarantee agreement concluded between the F.N.G.C.I.M.M. and creditors [art.5].

- by the Law for the suspension of loan repayment [6], Parliament adopted the same type of measure - legislative moratorium, but in much more favorable conditions for debtors. However, between the date of submission of this legislative proposal for the suspension of the repayment of loans (March 24, 2020) and until its adoption by the first notified Chamber (March 31, 2020), the Senate reg-

[6] Adopted by the Parliament but declared unconstitutional by Decision no. 155/2020 of the Constitutional Court.

istered for debate and approval the draft law on approval of the Emergency Ordinance Government no. 37/2020, normative act that provides similar measures. The regulatory differences between the Government Emergency Ordinance no. 37/2020 and the Law for the suspension of loan repayment concerned the content of the notion of creditor, the conditions for granting the measure of suspension of the payment obligation or the interest regime. Also, the law adopted by the Parliament did not provide for any guarantee mechanism or any deadline for formulating requests for suspension of loan repayment.

Subsequently, the Parliament also adopted the Law for the approval of the Government Emergency Ordinance no. 37/2020[7], by which it resumed legislative solutions similar to those contained in the Law on the suspension of loan repayment, regarding the non-capitalization of interest and looser conditions for ascertaining the difficult situation in which debtors are legal entities. In addition, it introduced art. 2 paragraph (11) in the Government Emergency Ordinance no. 37/2020, an article that provides a new category of debtors, respectively debtors affected by all types of droughts to benefit from the provisions of the emergency ordinance amended by October 31, 2021, unlike "ordinary" debtors, ie those of credit that can capitalize on their rights provided only until December 31, 2020. He also introduced para. (9) in art. 2 of the Government Emergency Ordinance no. 37/2020, which stipulates that the measure provided in art. 2 para. (11) mentioned above shall be granted exclusively to debtors affected by drought according to the provisions of the joint order of the Minister of Internal Affairs and the Minister of Agriculture and Rural Development.

By Art. II of the Government Emergency Ordinance no. 67/2020 regarding the amendment of some normative acts and the extension of some terms[8], art. 6 letter a) of the Government Emergency Ordinance no. 37/2020, regarding the conditions for granting the measure to debtors legal entities, was amended as follows: "a) interrupt the activity totally or partially as a result of the decisions issued by the competent public authorities according to the law, during the state of emergency declared, and hold the emergency certificate issued by the Ministry of Economy, Energy and Business Environment or hold the emergency certificate issued by the Ministry of Economy, Energy and Business Environment, by which it is found, based on the debtors' own declarations, the decrease of revenues or revenues by at least 25% in March or April 2020 compared to the average of January and February 2020 or the partial or total interruption of activity as a result of decisions issued by competent authorities during the declared state of emergency".

By Government Emergency Ordinance no. 227/2020 to amend and supplement the Government Emergency Ordinance no. 37/2020 on granting facilities for loans granted by credit institutions and non-banking financial institutions to

[7]Adopted by the Parliament but declared unconstitutional by Decision no. 600/2020 of the Constitutional Court.

[8] Published in the Official Gazette of Romania, Part I, no. 382 of May 12, 2020.

certain categories of debtors[9], the Government has made a series of amendments and completions to the conditions for granting the legislative moratorium, extending the deadline for submitting applications until March 15, 2021, so that the creditor is in a position to analyze and issue the decision until March 31, 2021 under the conditions for granting the measure suspending the repayment of loans, they have been amended as follows:

- the provisions of the Government Emergency Ordinance no. 37/2020 benefit the debtors who have concluded a contract for obtaining a loan that has not reached maturity and for which the creditor has not declared the early maturity, on December 31, 2020 inclusive [art. 2 paragraph (4) of the Government Emergency Ordinance no. 37/2020, as amended by the Government Emergency Ordinance no. 227/2020];

- the measure of suspension of the repayment of credits can be granted only for the credits that do not register arrears at the date of requesting the suspension of the payment obligation [art. 2 paragraph (5) of the Government Emergency Ordinance no. 37/2020, as amended by the Ordinance Government Emergency no. 227/2020]; the debtor may choose by request sent to the creditor to suspend the obligation to pay the due installments related to the loans, representing capital installments, interest and commissions, for a period between a minimum of one month and a maximum of 9 months [art. 3 paragraph (3) of the Ordinance Government Emergency Ordinance no. 37/2020, as amended by Government Emergency Ordinance no. 227/2020];

- the debtors defined in art. 1 letter b), except for natural persons, must cumulatively meet the following conditions: a) present the declaration on their own responsibility, regarding the decrease by at least 25% of the average monthly income or receipts from the last 3 months prior to the request for suspension of reporting obligations at the similar period of 2019/2020, as the case may be; b) is not insolvent at the date of requesting the suspension of the loan repayment, according to the information available on the website of the National Office of the Trade Register [art. 61 of the Government Emergency Ordinance no. 37/2020, introduced by Government Emergency Ordinance no. 227/2020];

By Law no. 141/2020 for the approval of the Government Emergency Ordinance no. 67/2020 regarding the modification of some normative acts and the extension of some terms[10], art. 6 letter a) of the Government Emergency Ordinance no. 37/2020 has been amended, currently having the following content: "In order to benefit from the suspension of the repayment of installments, interest and commissions in accordance with the provisions of art. 2 par. 1), the debtors defined in art. 1 letter b), except for natural persons, must cumulatively meet the following conditions: a) interrupt the activity totally or partially as an effect of the decisions issued by the competent public authorities according to law, during

[9] Published in the Official Gazette of Romania, Part I, no. 1331 of December 31, 2020.
[10] Published in the Official Gazette of Romania, Part I, no. 647 of July 22, 2020.

the state of emergency decreed, and hold the emergency certificate issued by the Ministry of Economy, Energy and Business Environment or hold the emergency certificate issued by the Ministry of Economy, Energy and Business Environment, which states, based on the debtors' own statements, decrease of revenues or revenues by at least 25% in March and/ or April 2020 compared to the average of January and February 2020 or interruption partial or total erosion of the activity as a result of the decisions issued by the competent public authorities during the state of emergency declared".

By the Norms for the application of the provisions of the Government Emergency Ordinance no. 37/2020 regarding the granting of facilities for loans granted by credit institutions and non-banking financial institutions to certain categories of debtors, approved by Government Decision no. 270/2020[11], approved by Government Decision no. 270/2020, the conditions for granting and the procedure for suspending the repayment of loans were detailed.

On April 1, 2020, the Convention of April 14, 2020 was published to guarantee the amounts representing interest suspended on payments related to mortgages contracted by individuals, who benefit from the facility to suspend rates, under the Government Emergency Ordinance no. 37/2020 on granting facilities for loans granted by credit institutions and non-bank financial institutions to certain categories of debtors[12].

2. The European legislative framework of the moratorium

Pursuant to Article 16 of Regulation (EU) no. 1093/2010[13] of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision no. 716/2009/EC and repealing Commission Decision 2009/78/EC, the European Banking Authority (EBA) has developed a Guide on legislative and non-legislative moratoriums on the payment of loans in the context of the COVID-19 crisis, which has been in force since April 2, 2020. The guide presents the EBA's point of view on good supervisory practices in the European System of Financial Supervision or on how Union law should be applied in a given area. The competent authorities to which the guide applies must comply by integrating it into their practices, as appropriate (for example, by changing their legislative framework or supervisory procedures), including in cases where the guide is addressed primarily institutions.

Pursuant to Article 16 (3) of Regulation (EU) no. 1093/2010, competent authorities must notify A.B.E. if it complies or intends to comply with the guide or, failing that, gives reasons for non-compliance by 3 June 2020. In the absence of a notification by this deadline, the A.B.E. will consider that the competent

[11] Published in the Official Gazette of Romania, Part I, no. 285 of April 6, 2020.
[12] Published in the Official Gazette of Romania, Part I, no. 317 of April 16, 2020.
[13] Published in the Official Journal of the European Union L 331 of 15 December 2010.

authorities have not complied.

The guide specifies the prudential treatment of legislative and non-legislative moratoriums applied to the payment of loans introduced in response to the COVID-19 pandemic and has been amended and supplemented.

Criteria applicable to general moratoriums on payments

For the purposes of the Guide, a moratorium should be considered a general moratorium on payments if all of the following conditions are met:

(a) the moratorium is based on the national legislation in force (legislative moratorium) or on a non-legislative initiative to exempt from payment taken by an institution under a system of moratorium at the level of an industry or sector, agreed or coordinated with the sector bank or a significant part of it, possibly in collaboration with public authorities, so that participation in the moratorium is open and similar measures for exemption from payment are taken by the relevant credit institutions under this system (non-legislative moratorium);

(b) the moratorium applies to a large group of predefined debtors on the basis of general criteria, where all criteria for determining the scope of the moratorium must enable a debtor to benefit from the moratorium without a prior assessment of its creditworthiness; examples of such criteria include exposure or underexposure class, industrial sector, product range or geographical location. The scope of the moratorium can be limited to good paying debtors who did not have difficulty paying before the moratorium was applied, but it should not be limited to debtors who faced financial difficulties before the COVID-19 epidemic broke out.

(c) the moratorium only covers changes to the payment schedule, i.e. by suspending, postponing or reducing the principal's payments, interest or full installments for a predefined limited period of time; other loan terms and conditions, such as interest rates, should not be changed;

(d) the moratorium provides the same conditions for changing the payment schedule for all exposures subject to the moratorium, even if the application of the moratorium is not mandatory for debtors;

(e) the moratorium does not apply to new loan agreements granted after the date of the announcement of the moratorium;

(f) the moratorium was launched in response to the COVID-19 pandemic and was implemented before 31 March 2021.

Different general moratoriums on payments may apply to different general segments of debtors or exposures.

Criteria for exposures subject to moratoriums

For the purposes of the Guide, the total period until which the payment schedule for a particular loan agreement change in accordance with point 10 (c) as a result of the application of general moratoriums on payments may not exceed 9 months. However, this 9-month cap requirement does not apply to changes to the schedule of payments agreed to loan agreements before 30 September 2020 under a general moratorium on payments in which the total duration of the change

exceeds 9 months.

Classification according to the definition of restructuring measures due to financial difficulties

If a general moratorium on payments fulfills the above conditions and applies to all exposures of an institution covered by the moratorium, these measures should not change the classification of exposures by applying the definition of restructuring measures due to financial difficulties in Article 47b of the Regulation (EU) no. 575/2013 or to amend their treatment in the form of emergency restructuring in accordance with Article 178 (3) (d) of that Regulation. Consequently, the application of the general moratorium on payments should not, in itself, lead to the reclassification of the exposure as restructured as a result of financial difficulties (either performance or non-performance), unless an exposure was already classified as such at the time the moratorium was applied.

If institutions lend to borrowers who are subject to a general moratorium on payments, this does not automatically lead to the reclassification of exposures as restructured following financial difficulties. However, the classification must be taken into account on a case-by-case basis, in accordance with Article 47b of Regulation (EU) no. 1095/2010.

Applying the definition of default for exposures subject to payment moratoriums

If a general moratorium on payments fulfills the above conditions, it must be dealt with in accordance with points 16 to 18 of the EBA Guidance on the Application of the Definition of Default Status, issued pursuant to Article 178 of Regulation (EU) no. 1095/2010. Consequently, within the meaning of Article 178 (1) (b) of Regulation (EU) no. 182/2011 and in accordance with Article 178 (2) (e) of that Regulation, institutions must count the remaining days on the basis of the revised payment schedule, as it results from the application of any moratorium. Similarly, within the meaning of Article 47a (3) (c) of Regulation (EU) no. 1095/2010, the institutions must count the remaining days based on the revised payment schedule, as it results from the application of any moratorium. Throughout the moratorium, institutions shall assess the possible non-payment of debtors subject to the moratorium, in accordance with the policies and practices usually applicable to such assessments, including if they are based on automatic checks of indices of non-payment. When conducting manual assessments of individual borrowers, institutions should give priority to assessing borrowers where the effects of the COVID-19 pandemic are very likely to turn into long-term financial difficulties or insolvency.

When assessing the probability of payment of individual debtors after the end of the moratorium referred to in point 10, institutions shall give priority to the assessment of the following cases: (a) where debtors face late payment after the end of the moratorium; (b) where restructuring measures due to financial difficulties are applied shortly after the end of the moratorium.

Institutions shall carry out the assessment of the probability of payment on

the basis of the most recent payment schedule, as resulting from the application of the general moratorium on payments. If the borrower receives additional assistance measures instituted by public authorities in response to the COVID-19 pandemic that may affect its creditworthiness, these should be taken into account in assessing the improbability of payment. However, any form of credit risk mitigation, such as guarantees provided to institutions by third parties, should not exempt institutions from assessing the borrower's possible improbability of payment or affecting the results of such an assessment.

The competent national authorities must notify the A.B.E. on any recourse to general moratoriums on payments in their jurisdictions and to provide for each moratorium all of the following information:

(a) if it is a legislative or non-legislative moratorium;

(b) in the case of a legislative moratorium, if it is binding on the institutions or, if it is not mandatory, if the institutions are publicly encouraged, by various means, to use the moratorium;

(c) in the case of a non-legislative moratorium, the extent of the use of the moratorium by the banking sector in its own jurisdiction;

(d) the date from which the moratorium applies;

(e) the selection criteria for exposures subject to a moratorium, as referred to in point 10 (b);

(f) the conditions offered on the basis of the moratorium, including its duration.

3. The jurisprudence of the Constitutional Court on the measure of suspension of the repayment of credits

So far, the Constitutional Court has been notified 3 times regarding normative acts regarding the legislative moratorium.

For the first time, by Decision no. 155 of May 6, 2020, the Court analyzed the objection of unconstitutionality of the provisions of the Law for the suspension of loan repayment, finding that this law is unconstitutional, as a whole.

The Court noted that, as is clear from its title and the Explanatory Memorandum, the rule of law was to regulate the temporary suspension, up to 9 months but not more than 31 December 2020 of the obligation to pay installments, interest and commissions. related to loans granted to debtors by creditors until the date of its entry into force. However, the same area of regulation had the Government Emergency Ordinance no. 37/2020 on granting facilities for loans granted by credit institutions and non-bank financial institutions to certain categories of debtors, as well as the Law approving the Government Emergency Ordinance no. 37/2020 (currently in parliamentary procedure). In paragraphs 65-72, the Court conducted a comparative analysis of the regulations contained in Government Emergency Ordinance no. the interest regime, the establishment of a mechanism

for guaranteeing the payment of interest by the state, the suspension of any enforcement procedure and the formal conditions for granting the measure of suspension of the payment obligation. In conclusion, from this comparative analysis, the Court found in par. 73 and 74 that the criticized law - having the same object of regulation as the Government Emergency Ordinance no. 37/2020, which had already begun to take effect on the date of adoption of the criticized law - contradicts both the assumptions and conditions for granting the suspension of payment obligations and the effects of this suspension, without providing any provision for resolving the conflict between these regulations, generating situations of legislative instability and incoherence, with negative consequences on the application of the law to concrete cases, since it promotes legislative solutions not correlated with the legislation in force. At the same time, since the Government Emergency Ordinance no. 37/2020 established a deadline for submitting applications of 45 days from the date of its entry into force (deadline expiring on May 15, 2020) and has already produced effects from its entry into force, and the law does not contain any provision regarding the requests already solved or in the process of being solved, submitted on the basis of the Government Emergency Ordinance no. 37/2020, a possible entry into force of the criticized law generates several situations of legislative incoherence, with negative consequences on legal certainty and on the clarity and predictability of the law, consequences that affect both creditors and debtors of payment obligations. The Court did not note that the situation of legislative incoherence is all the more obvious as, at the date of adoption of the law which is the object of constitutional review, the Law for the approval of Government Emergency Ordinance no. 37/2020, on which occasion the Parliament, pursuant to art. 61 paragraph (1) and art. 115 paragraph (7) of the Constitution, could bring amendments and completions to this emergency ordinance of the Government, obviously in compliance with the constitutional principles and provisions.

Applying its considerations of principle regarding the obligation to comply with the legal requirements for the adoption of a normative act, the Court found in para. 77 of Decision no.155 of 6 May 2020 that the mandatory requirements for the adoption of any normative act, the observance of which is necessary to ensure the systematization, unification and coordination of legislation, generating a legislative parallelism, prohibited by the provisions of art. 16 of Law no. 24/2000, parallelism that determines inconsistencies and legislative instability. Consequently, the Law for the suspension of loan repayment contradicts the requirements of the legislation within the rule of law and the principle of security of legal relations, which determines the violation of the provisions of art. 1 paragraph (3) and paragraph (5) of the Fundamental Law.

Given the merits of the grounds for extrinsic unconstitutionality concerning the very regulatory object of the Law on Suspension of Repayment of Loans, the Court found that it was no longer necessary to examine the other criticisms of

extrinsic and intrinsic unconstitutionality and that Parliament was required to terminate it of the legislative process, as a result of the finding of the unconstitutionality of the law, in its entirety.

By Decision no. 600 of July 15, 2020[14], The Court analyzed the objection of unconstitutionality of the provisions of the Law for the approval of the Government Emergency Ordinance no. 37/2020 on granting facilities for loans granted by credit institutions and non-banking financial institutions to certain categories of debtors, finding that this law is unconstitutional, as a whole.

In paragraph 92, the Court held that, by adopting the amendments made in the decision-making chamber (Chamber of Deputies), the law approving Government Emergency Ordinance no. 37/2020 extends the field of regulation to the protection of borrowers affected by drought, in other words of people who have not been affected in any way by the SARS-CoV-2 pandemic. Therefore, although the Chamber of Reflection retained the scope of the emergency ordinance, the decision-making Chamber changed this scope, without the first Chamber being able to rule.

Thus, the sole article point 5 of the law approving the Government Emergency Ordinance no. 37/2020 extends the benefits provided by the approval law (such as non-capitalization of interest on ongoing loans) and for applications submitted before the entry in force of the law approving the Government Emergency Ordinance no. 37/2020, legislative solution that was not analyzed by the Senate. Also, the sole article point 8 of the approval law radically modified art. 6 of the Government Emergency Ordinance no. 37/2020, providing a greater flexibility regarding the conditions for ascertaining the situation of difficulty in which the debtors of legal entities defined in art. 1 letter b) following the declaration of a state of emergency in order to benefit from the facilities regulated by the legislator, in the sense that only a declaration on their own responsibility is required according to which they have totally or partially interrupted the activity and the incomes or revenues the average of the last two months. Thus, it is no longer necessary to obtain an emergency certificate issued by the Ministry of Economy, Energy and Business Environment. Also, among the new beneficiaries of the amended legal provisions were introduced the local public authorities.

Examining the above amendments, the Court found, in paragraphs 95-97, that they make major, substantial, legal differences between the form adopted by the Senate as the first Chamber notified and that adopted by the Chamber of Deputies as the decision-making Chamber, which violates the principle of bicameralism, enshrined in art. 61 para. (2) and of art. 75 of the Constitution. Therefore, even if, compared to the form adopted by the Senate, there is no significantly different configuration between the forms adopted by the two Houses of Parliament, the law approving the Government Emergency Ordinance no. 37/2020 con-

[14] Published in the Official Gazette of Romania, Part I, no. 393 of October 12, 2020.

tains a number of solutions. norms that, in terms of the substance of the regulation, deviate considerably from the concepts on which the Senate ruled and the legislative solution pursued by the Senate, given that it could not rule on changes in the decision-making chamber, respectively the Chamber of Deputies.

In accordance with its relevant case law[15], the Court did not analyze the other aspects of unconstitutionality invoked, as the vice of unconstitutionality affected the law as a whole.

By Decision no. 100 of February 17, 2021[16], the Court examined the objection of unconstitutionality of the Law on the approval of the Government Emergency Ordinance no. 168/2020 for the completion of the Government Emergency Ordinance no. 70/2020 on the regulation of certain measures, starting with May 15, 2020, in the context of the determined epidemiological situation. for the spread of the SARS-CoV-2 coronavirus, for the extension of some terms, for the modification and completion of Law no. 227/2015 regarding the Fiscal Code, of the National Education Law no. 1/2011, as well as other normative acts and for the modification and completion of the Government Emergency Ordinance no. 37/2020 on the granting of facilities for loans granted by credit institutions and non-banking financial institutions to certain categories of debtors, finding that it is unconstitutional, as a whole.

By art. II of this law, the Government Emergency Ordinance no. 37/2020 is amended and supplemented as follows:

- paragraph 7 is inserted in Article 2, with the following content: "(7) For any extension of the term provided in paragraph (1), the facilities provided in Article 4 paragraph (1) shall apply."

- Article 4 paragraph (1) is amended, with the following content: "(1) The interest due by debtors as well as the related commissions corresponding to the due amounts whose payment has been suspended shall not be capitalized at the balance of the existing credit, at the end of the suspension period."

In paragraph 30 of this decision, the Court noted that, through the amendments approved at the level of the Chamber of Deputies, in the normative content of the criticized law - the law approving the Government Emergency Ordinance no. 168/2020 was introduced, for the first time, a new article, respectively art. II. This article regulated amendments to the Government Emergency Ordinance no. 37/2020, namely, on the one hand, the application of the facilities provided in art. 4 para. (1) of the Government Emergency Ordinance no. 37/2020 for any extension of the term provided in par. (1) in art. 2 of the same normative act and, on the other hand, the establishment of the capitalization interdiction to the existing credit balance, at the end of the suspension period, of the interest due by debtors

[15] See Decision no. 619 of October 11, 2016, published in the Official Gazette of Romania, Part I, no. 6 of January 4, 2017, Decision no. 140 of March 13, 2019, published in the Official Gazette of Romania, Part I, no. 377 of May 14, 2019, paragraph 84, or Decision no. 58 of February 12, 2020, published in the Official Gazette of Romania, Part I, no. 205 of March 13, 2020, paragraph 62.

[16] Published in the Official Gazette of Romania, Part I, no. 280 of March 19, 2021.

and of the afferent commissions, as regulated by art. 4 para. (1) of the Government Emergency Ordinance no. 37/2020. By introducing the mentioned amendments, for the first time, at the level of the Chamber of Deputies, as a decision-making Chamber, the principle of bicameralism is violated, which presupposes that the adoption of the law is the result of the will of the entire legislative authority. Thus, the form of the law adopted by the Chamber of Deputies contains, practically, a new regulation, foreign to the matter and scope of the draft law which, initially, according to the Government's approach, had as object only the approval of the Government Emergency Ordinance no. 168/2020, amending and supplementing the Government Emergency Ordinance no. 37/2020, as it does not exist as an intention to regulate the initiator at the time of presenting the draft law to the Senate, as the first Chamber competent to be notified. Thus, regarding the law subject to constitutional review, the texts that modify the normative content of the Government Emergency Ordinance no. 37/2020 were never debated at the level of the first notified Chamber, which was the Senate, but were introduced for the first time, being submitted to debate and approved in the decision-making Chamber, i.e. in the Chamber of Deputies. The Court found, in paragraph 33, that the law subject to constitutional review was adopted by the Chamber of Deputies in violation of the principle of bicameralism, as, on the one hand, it reveals essential differences in legal content and configuration between the forms adopted by the two Chambers of the Parliament and, on the other hand, deviates from the objective pursued by the initiator of the bill and respected by the first notified Chamber - the Senate, namely the approval of the Government Emergency Ordinance no. 168/2020, which determines its unconstitutionality, in its entirety, by reference to the provisions of art. 61 para. (2) and art. 75 of the Constitution.

In accordance with its case law, in view of the finding of defects in extrinsic unconstitutionality caused by the adoption of the law, which is the subject of the referral, the Court found that it was no longer necessary to examine the other criticisms of intrinsic unconstitutionality made by the author of the objection the constitutional provisions of art. 15 para. (2), of art. 44 and of art. 135.

4. Implement moratoriums at the level of EU member states

Although there is a common goal, despite the guidelines set out by the A.B.E., there is no unitary vision at the level of European states regarding the moratoriums implemented, the solutions adopted by each EU Member State being diverse.

According to the Report prepared by the A.B.E. (First evidence on the use of moratorium and public guarantees in the EU banking sector) in November 2020, until June 2020 the volume of loans for which moratoriums were applied amounted to EUR 871 billion, about 6% of total loans granted by banks, of which about 60% are loans to companies and 40% to the population.

Countries such as France, Spain and Italy reported the highest volumes

of loans for which moratoriums were applied, while countries such as Cyprus, Hungary and Portugal reported the largest share of loans for which moratoriums were granted out of total loans, 50% for Cyprus and about 20% for Hungary and Portugal. On the other hand, countries such as Germany, Luxembourg and Latvia reported the lowest shares, as these countries have implemented large-scale debt restructuring measures on a large scale. Thus, countries such as Germany, Finland, the Netherlands or the Baltic States have recorded the most restructured loans by methods other than the application of moratoriums. In some countries, companies have applied for moratoriums to a greater extent, unlike others, in which individuals have applied to a greater extent. Thus, the first category of countries includes Croatia, Cyprus, France, Malta and Portugal, registering 10% more requests from legal entities, and the second category includes Greece, Spain and Sweden.

The Covid-19 crisis had a heterogeneous impact in terms of the affected sectors. The largest share, approximately 27%, is represented by the accommodation and food services industry, followed by education, entertainment, medical services and real estate services with a share of approximately 10%.

5. Conclusions

Since the beginning of the SARS-CoV-2 coronavirus pandemic, credit institutions have come to the aid of customers who were financially vulnerable, by implementing appropriate, concrete and effective measures to enable them to continue to meet their payment obligations (such as rescheduling, rescheduling, conversion to another currency, etc.). The legislative moratorium came to complete the range of these measures aimed at supporting customers of credit institutions who are temporarily in difficulty to meet their payment obligations, whether they are individuals or legal entities.

In fact, the National Bank of Romania mentioned in the Financial Stability Report of June 2020 that the risk of increasing the default rate of loans to the non-governmental sector is among the risks of moderate intensity in the next period. The same report shows that borrowers with a higher degree of indebtedness are characterized by a higher non-performance rate, as they may be more severely affected by the impact of the pandemic. Negative developments in borrowers' ability to repay loans are also mitigated by the implementation of measures by authorities and credit institutions, such as the possibility of suspending the payment of installments or making the regulatory framework more flexible.

The application of a moratorium does not automatically qualify an exposure as non-performing, but credit institutions must continue to monitor and further carefully assess the borrowers' likelihood of paying both during and after the moratorium period.

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3. Regulation (EU) no. 1093/2010 published in the Official Journal of the European Union L 331 of 15 December 2010.
4. Decision of the Constitutional Court no. 619 of October 11, 2016, published in the Official Gazette of Romania, Part I, no. 6 of January 4, 2017.
5. Decision of the Constitutional Court no. 140 of March 13, 2019, published in the Official Gazette of Romania, Part I, no. 377 of May 14, 2019.
6. Decision of the Constitutional Court no. 58 of February 12, 2020, published in the Official Gazette of Romania, Part I, no. 205 of March 13, 2020.
7. Decision of the Parliament no. 3/2020 for approving the measure adopted by the President of Romania regarding the establishment of the state of emergency on the entire territory of Romania published in the Official Gazette of Romania, Part I, no. 224 of March 19, 2020.
8. Decision the Constitutional Court no. 600 of July 15, 2020 published in the Official Gazette of Romania, Part I, no. 393 of October 12, 2020.
9. Decision of the Constitutional Court no. 100 of February 17, 2021 published in the Official Gazette of Romania, Part I, no. 280 of March 19, 2021.

Intensification of the anti-money laundering (AML) regulation and its negative impacts on payments industry

JUDr. Ing. **Marek BOČÁNEK**[1]

Abstract

New regulatory approaches in relation to money laundering have come with significant changes to the payment environment and affected entities within the industry markedly. Albeit this approach found justification and was enriched by terrorism financing regulations since 2001, such extraordinary pressure placed on banks has now resulted in a highly conservative stance taken by credit institutions towards their existing or new clients, namely due to their stringent risk-based approach. The objective of this article is to point toward the options of banks working together with clients rated as high-risk, instead of discriminating against them. Methods applied in this article will consist of analysis and synthesis or comparison of information obtained with subsequent deduction. The result of this study is the demonstration of options that may be applied instead of purely sanction-like approach. Thus, a more motivating system for businesses or certain industries may be formed, supporting the development thereof.

Keywords: Money laundering, compliance, AML/CFT, FATF, 5th AML Directive.

JEL Classification: K20, K22, K42

1. Introduction

Certainly, risks related to money laundering and terrorism financing (hereinafter referred to only as "ML/TF") are an aspect of modern society that may not be ignored, nor neglected. They have been reflected in the actual legislation of the European Union in a form of directives, with now the 5th Anti Money Laundering Directive (AMLD) being in effect,[2] and all payment institutions being impacted thereby.

Over the last decade, we could see significant efforts and approaches against tax havens, improvement of rules for transaction monitoring as well as increased pressure on the banking sector.

As a result, credit institutions, in particular banks, are bearing now the biggest burden of transaction monitoring, increased due diligence requirements

[1] Marek Bočánek – L.L.M., Masaryk University, Czech Republic, 107940@mail.muni.cz.

[2] Directive (EU) 2018/843 of the European Parliament and of the Council of May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing and amending Directives 2009/138/EC and 2013/36/EC In: *EUR-Lex* [legal information system]. Publications Office of the EU [cited on March 19, 2021]. The document is available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843.

and reporting to respective authorities. Based on this, we could see a significant shift from the original openness of banks to cooperating with higher risk entities, providing naturally bigger revenue potential, to now gradual closure and refusal of accounts of not only foreign entities, but also domestic ones, and even licensed ones (like electronic money institutions).

It might be expected that the current regulation is about to become stricter as based on the development at the international level, mainly because of the activities of the Financial Action Task Force (hereinafter referred to only as "FATF") or based on the legislation of the European Union, in particular of the 5th AML Directive where intensification is seen occurring gradually. Moreover, we can't neglect also the activities of the Basel Committee, Organisation of the Economic Co-operation and Development (OECD) and so on.

Nevertheless, the question is if the regulation in these days is achieving results it was intended for. This should represent the main incentive of the lawmakers, putting efforts to use adopted regulation to achieved planned objective. Of course, on one hand, we can see certain success e.g. in the introduction of evidence of ultimate beneficial owners (hereinafter referred to as the "UBOs"), however, deeper checks or transactions put a significant pressure on domestic banks that instead of required prevention and chasing of any suspicious transactions, these measures have started to form a barrier to the opening of accounts even for entities that do not pose such risks, e.g. local licensed companies that are already under the supervision of domestic supervisory bodies. In such situation, it is much easier for banks to simply avoid accepting such "risky" clients altogether instead of performing full due diligence (or even enhanced due diligence) and check the source and purpose of such executed transactions.[3]

The objective of this work is to evaluate the discrepancy between the expected outcome of regulation with the original intention thereof, and to find potential solutions that could provide more effective legal regulation of such legal relationships.

The hypothesis of this work is based on the fact that stricter regulation of AML/CFT results in riskier entities moving out of the banking sector, while the latter holds a key role in the prevention of ML/TF. This conversely results in predilection for unregulated or even illegal methods, allowing higher risk entities accessing the payment industry via a backdoor method, and results only in higher quality justification for the bending or circumvention of law resulting from the high demand for such accounts.

2. New features in the AML/CFT Regulation

The 5th AML Directive has brought further changes to the AML/CFT

[3] Right these checks of transactions and finding of links between them represent one of the key elements for the detection of criminal activities.

area, contributing to better transparency through the evidence of UBOs, the introduction of a category of virtual currencies that have not been specified before, and finally, adjustments for identification, deeper identification and control of the client, including remote identification and simplified identification.[4] Its mandatory transposition into Czech legal system was done on October 1, 2020 by the Czech Parliament as an amendment to Act No. 253/2008 Coll. on certain measures against money laundering and terrorist financing (hereinafter referred to as "AML Act"). As a new feature, auditors and tax advisors belong to reporting entities together with persons authorized to store cultural monuments or values, persons providing services related to virtual currency, trustees, real estate agents acting as intermediaries in the rental of real estate or persons managing property in a manner comparable to the management of an investment fund pursuant to § 15 of Act No. 240/2013 Coll., on investment companies and investment funds.[5]

Other regulations that will be affected by the transposition, are e.g. the Act No. 186/2016 Coll., on Gambling, as amended, and other related acts, including the amendment on the evidence of Beneficial Owners, proposed by the Ministry of Finance. The second of these is the bill on the evidence of beneficial owners, which was submitted by the Ministry of Justice.[6]

The entire process of making the AML/CFT regulation stricter from a global perspective was initiated mainly by the FATF activities, issuing regularly both, recommendations to lawmakers as well as evaluations of respective jurisdictions with respective proposals of improvements to existing legislation. The European Union cooperates with the monitoring body of the European Council - Moneyval, issues also recommendations and evaluating the legislation of individual countries, including the Czech Republic, which underwent an evaluation in 2018 for National Risk Assessment, where Moneyval pointed out the risks of inactive money laundering, with the risk of terrorist financing naturally playing a much lower role.[7] As stated by the Financial Intelligence Unit (Finanční analytický úřad), the National Risk Assessment aims to evaluate risks of ML/TF and prepares a report thereafter. This process is coordinated by the Financial Intelligence Unit and is governed by respective methodology of the FATF, 5th AML

[4] Jelínek, M. Co přinese nová AML směrnice?, *HSP&Partners* [online]. *akhsp.cz* [cited on March 19, 2021]. The document is available online at: https://akhsp.cz/co-prinese-nova-aml-smernice/.
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Directive and AML Act.[8]

In addition to the more extensive regulation of client identification, the consequences we are planning to address, another critical point is based on the tightening of sanctions, where the new AML Act introduces sanctions for breaches of obligations such as failure to report suspicious transactions, non-compliance with client order deferral, etc. up to the amount of CZK 130 million for financial credit institutions.[9] In the event that the offense is committed by a person who is the head of the reporting entity or is a member of the statutory body, that person may also be prohibited from undertaking the function of a member of the statutory body of any reporting entity and/or work as a senior employee of any reporting entity.[10]

As we can see in the FATF Recommendation, in particular in paragraph 35 (Sanctions) of the International Standards on Combating Money Laundering and Financing of Terrorism & Proliferation, countries should ensure effective, appropriate and dissuasive sanctions, both criminal, private or administrative, in order to sanction persons, individuals or entities, to meet the purpose of this recommendation. Here, the FATF states that sanctions should not only apply to financial institutions but also to their directors and senior management.[11] In practice, this means for banking institutions that the responsibility for high-risk clients will be borne by the compliance officer or equivalent, and subsequently by the director of the respective financial institution.

On the other hand, as stated in the 5th AML Directive, paragraph 46, "it is important to allow credit and financial institutions to exchange information not only between group members but also with other credit and financial institutions, with due regard for data protection rules set out in local regulation." In addition, I consider it necessary to mention article 2, stating that the aim of the new regulation is to "keep up with new trends", meaning "to take additional measures to ensure greater transparency of financial transactions, companies and other legal entities, as well as trust funds and other legal arrangements," while "improving the existing preventive framework and combating financing of terrorism more effectively. It is important to keep in mind that the measures taken should be

[8] Faú. Národní hodnocení rizik, *Finanční analytický úřad* [online]. *financnianalytickyurad.cz* [cited on March 19, 2021]. The document is available online at: https://www.financnianalyticky-urad.cz/hodnoceni-rizik/narodni-hodnoceni-rizik.html.

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[11] FATF. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, *FATF* [online]. *fatf-gafi.org* [cited on March 19, 2021]. The document is available online at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.

proportionate to the risks." In relation to this, we can mention also article 4, which states that "the integrity of the European Union's financial system depends on the transparency of companies and other legal entities, trusts and similar legal arrangements. The objectives of this Directive include not only the detection and investigation of money laundering, but also the prevention of its occurrence. Enhancing transparency could be a significant aspect that could help in prevention.[12]

3. Weaknesses of current AML/CFT regulation

From the above, we see two important aspects that both the FATF as well as the lawmakers expect from the 5th AML Directive, namely the proportionality of sanctions and the transparency. However, in order to achieve successful detection of money laundering crimes[13], it hinges entirely on the condition of seamless cooperation between financial institutions and reporting entities, with both ensuring transparency of the financial system, what I consider to be the most sensitive point of the current system, and one that I would like to point to in this article.

The current system, under which the 5th AML Directive operates, puts a strong emphasis on financial institutions, in particular banks, forming the core of the transaction system. Naturally, alternative methods are possible, however their basis remains dependent on banking institutions and omnibus accounts with them. For example, electronic money institutions are obliged (and in fact cannot work without) to open a so-called omnibus (or collection) account, called in the Czech Republic as an "account in specific regime" under sec. 41f of Act No. 21/1992 Coll., on banks.[14] Based on this, the AML/CFT obligations stay also with the bank where such an account is open. The same applies to virtual currencies, where, despite their anonymous nature kept within transfers from and to e-wallets, the end point is crucial, where a withdrawal or execution through a legal tender, otherwise known as fiat money, is performed. It can be either an exchange of virtual currencies, where virtual currencies are exchanged for fiat money through the account of the exchange, kept with the relevant banks, or in the bank of the buyer that may be an individual or entity, or at a service provider's bank that accepts virtual currencies. In connection with the restriction of cash transfers with an upper limit of CZK 270,000, pursuant to Section 4 of Act 254/2004 Coll.,

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[12] Directive (EU) 2018/843 of the European Parliament and of the Council of May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing and amending Directives 2009/138/EC and 2013/36/EC In: *EUR-Lex* [legal information system]. Publications Office of the EU [cited on February 15, 2020]. The document is available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843.

[13] This category includes also financing of terrorism, however, with regard to the Czech Republic, money laundering risk is represented significantly more.

[14] Act No. 2018/843, on Banks, as amended. In: *Zákony pro lidi* [online]. zakonyprolidi.cz [cited on March 19, 2021]. The document is available online at: https://www.zakonyprolidi.cz/cs/1992-21.

on the Restriction of Cash Payments,[15] banks have undeniably become a natural part of the wide majority of transactions, directly or indirectly.

Thus, instead of initially punishing individuals or organized groups involved in money laundering, lawmakers began to identify such criminal activities through banks. Based on the above, banks are the most likely place where it is possible to detect illegal activities and, historical evidence of successful actions by the United States in detecting illicit drug trafficking monies demonstrates that, for example such monies having been received from Mexico,[16] Afghanistan,[17] Guatemala,[18] etc.

However, it may be naïve to expect that this role of banks or of other financial institutions, involved in the transactions, in the detection of criminal offenses, is welcomed. Besides routine control, identification and standard storage of client data for a period of 10 years[19] their obligations include also reporting of suspicious transactions[20] to the Financial Intelligence Unit pursuant to sec. 18 of the AML Act.[21] From an economic point of view, this activity represents an unwanted burden for the banks, slowdown of commercial activities, increases expenditures etc. Over the last years, we have seen a significant expansion of staff in compliance departments, responsible for compliance with the AML Act. Besides this, it is necessary to take into account the natural risk appetite of banks and other reporting entities, taking into consideration the need of achieving profit, being in conflict with the general conservative approach preferred by the compliance department in relation to riskier categories of clients.

In such case, a natural logical flow will be that a bank would rather make a selective decision on who to cooperate with. These risks, important for the decision-making of banks, can be as follows:

1. Loss of a client that could provide higher profit compared to low or

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[15] Act No. 254/2004, on Restriction of Cash Payments, as amended in: *Zákony pro lidi* [online]. zakonyprolidi.cz [cited on March 19, 2021]. The document is available online at: https://www.zakonyprolidi.cz/cs/2004-254.

[16] FATF. Professional Money Laundering, *FATF* [online]. *fatf-gafi.org* [cited on March 19, 2021]. The document is available online at: http://www.fatf-gafi.org/media/fatf/documents/Professional-Money-Laundering.pdf.

[17] FATF. Financial flows linked to the production and trafficking of Afghan opiates, *FATF* [online]. *fatf-gafi.org* [cited on March 19, 2021]. The document is available online at: http://www.fatf-gafi.org/media/fatf/documents/reports/Financial-flows-linked-to-production-and-trafficking-of-afghan-opiates.pdf.

[18] Department of Justice, Florida. Director of Guatemalan Bank Arrested on Federal Money Laundering Charge and Money Laundering Charges Unsealed Against Former Guatemalan Presidential Candidate, *Department of Justice, Southern District of Florida* [online]. *www.justice.org* [cited on March 19, 2021]. The document is available online at: https://www.justice.gov/usao-sdfl/pr/director-guatemalan-bank-arrested-federal-money-laundering-charge-and-money-laundering.

[19] Or 5 years after the trade is closed, under certain conditions, see sec. 16 of AML Act.

[20] Or suspicious activity in the United States.

[21] Act No. 253/2008, on selected measures against legitimisation of proceeds of crime and financing of terrorism in: *Zákony pro lidi* [online]. zakonyprolidi.cz [cited on March 19, 2021]. The document is available online at: https://www.zakonyprolidi.cz/cs/2008-253#cast2.

medium risk clients (problematic mainly in a highly competitive environment, e.g. in the EU, USA);

2. Loss of correspondent bank relationships (in particular, worries about the loss of correspondent banking relationship using the most important currencies like EUR or USD)[22].

With regard to these risks, the bank faces the need of decision-making prior to entering a contractual relationship with new clients, namely whose clients and whose profile belongs to the riskier category, often determined based on one or more of the following determinants:

a) High-risk country (at the list of FATF,[23] OECD[24] or the EU[25]);

b) High-risk industry (gambling, gaming, forex, virtual currencies, pornography, arms, precious metals and raw materials);

c) Politically exposed person, also known as PEP (also family members or close associates);

d) Other (e.g., the same name, brand with an individual or entity, having a match in shared databases, used by compliance, like World-Check, Member Check etc.).

4. De-banking & minimizing of cooperation with more risky clients

Recent development is evidently proving the sentiment on the market, i.e. banks are closing the accounts of individuals or entities unilaterally in wide scale in an attempt to reduce exposure to risk.

We can see this shift in particular within the United States or Europe (as a continent) with remittance sector being hit markedly, as majority of the transaction lines require USD or EUR currency involved, meaning an involvement of correspondent banking.

A good demonstration of this came from Dow Jones, where the statistics from organizations showed (already in 2015) that the growing worries for business conduct are related to increased regulatory expectations, properly trained

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[22] E.g. scandal of Estonian branch of Danske Bank, where money laundering of Russian origin of around €200 billion occurred and subsequently (following this scandal), Danske Bank lost significant correspondent banks, more: BRUUN&HJEJLE. Report on the Non-Resident Portfolio at Danske Bank's Estonian branch, *Danske Bank* [online]. *danskebank.com* [cited on March 19, 2021]. The document is available online at: https://danskebank.com/-/media/danske-bank-com/file-cloud/2018/9/report-on-the-non-resident-portfolio-at-danske-banks-estonian-branch.pdf?rev=56b16dfddae94480bb8cdcaebeaddc9b&hash=B7D825F2639326A3BBBC7D524C5E341E.

[23] FATF. High-risk and other monitored jurisdictions, *FATF* [online]. *fatf-gafi.org* [cited on March 19, 2021]. The document is available online at: http://www.fatf-gafi.org/countries/#high-risk.

[24] OECD. List of Unco-operative Tax Havens, *OECD* [online]. *oecd.org* [cited on March 19, 2021]. The document is available online at: https://www.oecd.org/countries/monaco/list-of-unco-operative-tax-havens.htm.

[25] EU. Taxation: EU list of non-cooperative jurisdiction, *EU* [online]. *consilium.europa.eu* [cited on March 19, 2021]. The document is available online at: https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/.

AML staff, many false positive screening results, additional regulations and so on, while the regulatory fine was the least of their worries with only 9% in 2015.[26]

As the last development is proving, banks are increasingly reluctant to work with higher risk clients as well as with PEPs or persons (individuals or entities) coming from higher risk countries or other banks cooperating with such clients. Initially, it was cooperation with purported tax havens that was not being initiated (or closed), however the group of problematic countries or types of clients, that were being refused, was significantly extended by different areas, causing serious (sometimes even existential) issues to potential clients in relation to account opening.

Supporting statistics for this statements may be found within the statistical data of the Bank for International Settlements („BIS“) where the Committee on Payments and Market Infrastructure – CPMI – detected a drop of around 20% in correspondent banking since the beginning of 2019, and it would not be unreasonable to justifiably expect an even more significant drop during the Covid-19 period.[27] Only within 2018, the number of active correspondent banks dropped by 3.4%.[28] The main reason stated were higher costs of banks for cross-border transfers despite e.g. the high number of the working class remaining dependent on them to remit money back home. According to the World Bank, correspondent banks recommend that local banks avoid business relations with local remittance institutions, so-called "money transfer operators (or MTOs)."[29] Nevertheless, these institutions play an important role for the economy in less developed countries (e.g. India, Philippines and African countries) where high number of people work abroad and transfer their remuneration to their families. Thus, the impact on the entire society is more significant.

In this way, we see two important outcomes:

1. Individuals/entities interested in performing legal activities, might be (and often are) discriminated due to their origin/country of establishment or operations (e.g., Pakistani citizens, Albanian entities etc.), industry they work in (forex brokers, electronic money institutions, MTOs, cryptocurrency exchanges),

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[26] 2015 Global Anti-Money Laundering Survey Results: Detailed Report, *Dow Jones* [online]. *dowjones.com* [cited on March 20, 2021]. The document is available online at: https://images.dowjones.com/company/wp-content/uploads/sites/15/2015/03/Dow-Jones-ACAMS-AML-Survey-2015.pdf.

[27] CPMI: CPMI publishes new data on correspondent banking networks showing 20% reduction in relationships over seven years, *CPMI* [online]. *bis.org* [cited on March 20, 2021]. The document is available online at: https://www.bis.org/press/p190527.htm.

[28] Financial Stability Board: FSB action plan to assess and address the decline in correspondent banking: Progress report, *FSB* [online]. *fsb.org* [cited on March 20, 2021]. The document is available online at: https://www.fsb.org/wp-content/uploads/P290519-1.pdf.

[29] World Bank Group: The Decline in Access to Correspondent Banking Services in Emerging Markets: Trends, Impacts, and Solutions, *World Bank* [online]. *pubdocs.worldbank.org* [cited on March 20, 2021]. The document is available online at: http://pubdocs.worldbank.org/en/786671524166274491/TheDeclineReportlow.pdf.

affiliation with PEP[30]. These individuals or entities are forced to circumvent the system by method that represent grey area or are completely illegal (e.g., Iran);

2. Individuals/entities with the objective to perform illegal activities (or unregulated ones within a grey zone) prefer to employ alternative payment methods and forming more sophisticated if not fraudulent methods of transfers in different forms (by preparing fake invoices for standard services through payment agents, mirror/parallel transfers etc.)

Realistically (for different reasons that do not represent subject of this article) it is impossible to avoid motivation for illegal activities in full, instead it is necessary to count on greater efforts to carry out such illegal activities. It is pertinent therefore to recognize that historical experiences have already proven that banks may be the most valuable source of information and provide very important traces to identify and detect such activities as we have shown above when uncovering crimes within the United States, i.e., in relation to the narcotics distribution.

Conversely, in case of individual/entities planning to perform legitimate activities, it seems to be markedly easier to execute transfers in another way as the standard method employed – wire transfers, as it's often in fact the only executable way how they could operate.

Based on this, we should divide the proposal for solution of this issue into two different areas:

a) Necessity to prevent entities that are high risk but with legitimate business plans from leaving the banks for methods in a grey or illegal zone;

b) Enabling illegally acting entities or individuals with illegal intentions to use the banking institutions for their transactions, as this results in increase in transparency of their activities, thereby allowing for actual knowledge and then prevention of successful deployment of illegal activities.

To have a picture of how third world countries and their economies may be affected by AML/CFT regulations, consider Angola. According to the World Bank report, this African country has been adversely hit in practically each industry due to the dependence of the country on local remittance institutions.[31] Separately, Financial Times adds in its statistics, transfers from abroad into developing countries alone are more significant in volume that foreign investments, thus helping to increase the inflow of foreign capital into generally undercapitalized developing countries.[32]

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[30] A bizarre example of discrimination of PEP relatives is the refusal of savings account to a child of a mayor.

[31] World Bank Group: The Decline in Access to Correspondent Banking Services in Emerging Markets: Trends, Impacts, and Solutions, *World Bank* [online]. *pubdocs.worldbank.org* [cited on March 20, 2021]. The document is available online at: http://pubdocs.worldbank.org/en/786671524166274491/TheDeclineReportlow.pdf.

[32] Financial Times: Remittances: the hidden engine of globalisation, *FT* [online]. *ig.ft.com* [cited on March 20, 2021]. The document is available online at: https://ig.ft.com/remittances-capital-flow-emerging-markets/.

5. Avoidance of preference of illegal or grey payment methods by entities acting legally or with legal plans to conduct businesses

A crucial negative point of actual regulation is the pressure placed on banks by supervisory authorities that, has resulted in banks being under permanent stress and mistrust towards supervisory bodies, when in reality banks should be motivated to cooperate in tandem with respective authorities to prevent any effort (or uncover entire structures) of criminal activities related to money laundering. This can be achieved practically through suspicious transaction reporting, however, due to the tough sanctions on banks, which have only increased over time, even affecting directly compliance officers as well as the directors, resulting in an enormous number of suspicious transaction reports being filed with the financial intelligence units.

According to Jiří Hylmar, director of the analytical department of the Czech FIU, unjustified reporting of suspicious transactions represents around 70% of the total number of reported transactions.[33] Naturally, this points to two main consequence for it:

1. Time consuming overload for banks for which it's easier to report even a vaguely suspicious transactions that would have never been reported otherwise;

2. The compliance department's stance is it is safer to report such transactions in case of any doubt (what's generally a frequent issue due to the volumes of transactions) in comparison with the potential risks (regulatory, sanctions) faced by the bank for not reporting any such suspicious transaction.

Moreover, this fact points to useless overload of the FIU, demonstrating that the actual state remains imbalanced and leads to inefficiency and wasted manhours not to mention that the potential for a real risk being missed or being realized later due to the overwhelming number of total reports received.

Naturally arising from the need to report even the most minute suspicions or vaguely suspicious activities, it has resulted in rising costs on compliance departments. This in turn represents one of the main incentives for motivating banks to change their strategies, resulting (with few exceptions) in unwillingness to cooperate with individuals or entities that could represent higher risk for them, thus limiting access to the execution of transactions even to individuals/entities having only legitimate intentions as well (owing merely to their geographic location, industry, status etc.).

Thus, a banking institution prefers to avoid account opening altogether due to concerns over higher workload for its compliance department and also (in case of international transactions) due to being permanently under supervision of

[33] Such statistics was cited directly by Jiří Hylmar within his presentation at the „Conference on Recent Issues in the area of money laundering and financing of terrorism (Konference k aktuálním otázkám v oblasti boje proti legalizaci výnosů z trestné činnosti)" held on October 14, 2019, however its written version has never been published.

correspondent banks that might consider it as a useless risk for them (for practically the same reasons) as well. Thus, it's preferable to avoid certain categories of clients and exceptions are made only in case of significant volumes and profits generated by such client (in comparison with risks posed to the bank).[34]

In this way, we can see an elimination of clients requiring deeper checks thanks to the nature of their business or other reasons, stated above. As a result, such clients prefer the use of payment methods where they avoid these issues and even methods that represent grey or illegal areas (e.g., invoicing through other entities with lower risk profile, where marketing, consulting, IT services used to be popular) or less transparent or even anonymous methods (crypto-wallets).

As an example of such discriminated industries, we may mention fully licensed European electronic money institutions, [35] crypto services providers with legitimate intentions, IT services related to blockchain, cash incentive businesses. Most of them tend to be rejected by banks due to the unwillingness of a bank's compliance department to process their payments.

6. The need for banks to cooperate with illegally acting entities/ individuals for the purpose of easier detection of criminal activities

Another deficiency of actual regulation I see is the slowdown of detection of illegal activities caused by the unwillingness of banks to cooperate with higher risk individuals/entities and primary rejection of clients with such profile even before their proper identification, without regard to the fact if there are legal or illegal intentions, and solely based on the unwillingness of a bank to undertake additional and bigger risks instead of performing proper due diligence.

Thus, it's expected that illegally acting entities/individuals will automatically prefer other payments methods and services than the banking institutions, expecting the banks to conduct more extensive checks of their activities and identification of each client as well as transaction monitoring. This cognizance of extensive checks has therefore spurred a more sophisticated network of practically unrelated transactions of fictitious entities, or the employment of any other comprehensive systems for the purpose of money laundering with a preference of alternative payment methods.

In these days, we can see such transactions using popular virtual currencies/cryptocurrencies or e-wallets, thus avoid legal tender as much as possible from two basic reasons:

1. Existing compliance checks and risks related thereto;
2. Unwillingness of banks to cooperate with potentially higher risk entities/individuals.

Here I see another serious problem that further compounds the situation

[34] Banks tend to state general "AML reasons" to the client as a ground for their rejection.
[35] §68 et seq. of the Payment Services Act.

mentioned above – the insufficient education and experiences of employees in compliance departments. It often happens that this department employs people from different professions without prior economic or legal education and necessary experiences related to AML/CFT or regulatory compliance. This aspect of employing underqualified individuals, I find as crucially problematic, as banks often see the compliance department as a "necessary evil", the existence of such department being solely due to regulatory requirement, and a department that inevitably decreases the banks profit and business activities. This can be demonstrated also by statistics of reputable company Refinitiv, showing that 98% compliance officers admit that they are under pressure by management to increase turnover and 67% from them admit hesitating in cases of mandatory reporting due to "potential disruption of business relationship".[36]

However, taking into account statistics of Mr. Hylmar from FIU (FAÚ) above during his conference, we can see that in the Czech Republic, the trend of preventive reporting of each transaction prevailed, albeit having only a minor suspicion, in particular due to strict supervision of the Czech National Bank and potential fines related thereto. It is no surprise therefore that this has also resulted in the limited manpower of the FIU being overloaded and where that manpower resource could have been used for more serious issues in combatting money laundering.

At the end, a system where banks decide based on their ability to cover couple of more risky clients (with potentially bigger risk of ML) is formed. In case of existing clients, their economic value for bank is assessed, however, in case of new clients, banks are primarily reserved to initiate new cooperation. In this way, efficiency of general checks of transactions is reduced regardless of the real risks of such client or if such client is only discriminated based on his industry or origin.

This points to the issue that such system does not assist in combatting of ML effectively when illegally acting entities perform their transactions already within alternative payment methods or through a sophisticated system of entities, while often the entities having legitimate intentions are struggling with onboarding at banks.

7. Proposed approaches to improve current situation

As shown by the published study by Refinitiv, this is really an issue of a global proportion, where it's estimated that money laundering represents around 2% to 5% of global GDP (value from $1.6 trillion to $4 trillion).[37]

This is reflected also by sanctions that might look proportional to the extensive scale of this criminal activity. However, the side effects of such sanctions

[36] Stringham, Christopher. *Current trends in Money Laundering.* Refinitiv, 2019, p. 30.
[37] Ibid, p. 30.

is that, banks are now demotivated from taking on the role of cooperating with the respective authorities in the expected and most effective way – namely by banks choosing to close their doors to illegally acting entities or even simply refusing higher risk companies without even onboarding them or regardless of whether there is any evidence of any illegal activity, thus making the detection of any potentially illegal activity markedly harder.

The reluctance to onboard is naturally not surprising if we take into account the risks compliance departments and directors are exposed to from the status of their position (i.e. fiduciary liability). Based on this, compliance departments tend to reject entities that pose any kind of higher risks. Thus, the discrimination of entities and individuals are viewed as those that don't perform illegal activities from those that intend to perform illegal activities.

This situation points to the fact that actual regulation puts pressure on respective employees and in general, it has more of a fearful impact on financial institutions, lacking more constructive approach. Thus, issues occur even within relatively standard transactions of common clients, becoming (from time to time) subjects to the checks of FIUs, sometimes based on really minor reasons.[38]

Based on the above, this article focuses on the need of re-assessment of the actual sanction nature of regulation that has strictly repressive nature and does not evaluate cooperation, making as a result compliance department and its activities as a "necessary evil". Therefore, I believe the major problem of extreme sensitivity (and so, not their vigilant approach) of compliance departments and officers is their fear of potential sanctions (falling on their head), meaning that the legal regulation pushed them into an a priori dissuasive stance.

For the purpose of achieving cooperation between banks and higher risk entities or individuals, it's necessary to provide a motivation stimulus to compliance departments and respective officers. One way would be to completely relieve them from liability under the condition of their cooperation on potentially suspicious transactions, thereby avoiding their automatic sanctioning by fines or personal liability. If the employee, liable for suspicious transactions, sees the guaranteed option of being relieved from his/her liability for such case under certain conditions (cooperation with authorities), it's expectable that such an employee would be willing to process more transactions of clients, thus solving the issue of discriminated clients, intending to perform activities legally and not being able to open accounts for their economic activities.[39] Moreover, as a result,

[38] An example could be minor deviations in transactions from usual transactions, not representing any crucial risk.

[39] A very good example are the electronic money institutions of small scale, whose activities are practically hindered by the unwillingness of banks to open omnibus accounts for them (as they are territorially limited, they look primarily for local banks), so despite meeting all the licensing requirements, they may not be granted license; an interesting fact is that the Czech National Bank was even criticizing commercial banks for their approach, however, no real steps were undertaken in practice and in the Czech Republic (however, this issue exists in other member countries too),

also the illegally acting entities or individuals could experience more frequent opening of accounts, what could put them more into comfort with banking system, making the detection of their activities easier through the significantly more transparent system of wire transfers. This has already been proven in the United States and their combat on narcotics, as stated above.

The more options the employees of banks (and other liable persons) have to relieve them from a liability and sanction measures by subsequent cooperation and assistance in the area of combatting ML/TF, the higher transparency may be achieved in relation to the transfers of criminals. This could also positively result in the now unfairly discriminated legal but higher risk entities or individuals achieving easier operations within their businesses culminating in increased profits and subsequently higher tax contribution to the nation.

8. Conclusion

Actual AML/CFT regulation has brought numerous changes that might be considered positively or negatively. Undoubtedly of benefit, was the introduction of evidence of ultimate beneficial owners, improvement in the identification of clients of reporting entities, extension of their categories etc. However, with gradual strengthening of regulation and its stricter nature, the perspective of lawmakers has become overly stringent and possibly imbalanced resulting in missed opportunities of the banking institutions effectively playing their role of actively detecting and preventing genuine illegal activities. Major focus still lies on bank institutions, representing the core of money laundering detection within the financial system, supporting its defensive position.

Due to overwhelming threat of sanctions against banks and their employees, in particular against directors and compliance officers, banks tend to close their door for cooperation with clients with potential risks arising from their country of residence, citizenship, industry, status (PEP) etc. Nevertheless, such defensive position is not based on certain sophisticated categorization along with deeper assessment of activities, but on the basis of pre-set criteria most of the time, causing the discrimination of entities considered as being of higher risk regardless of whether such entities or individuals intending to perform legal activities. It may go without saying that that was most likely not the intention of lawmakers as such entities can be beneficial taxpayers.

Conversely, it was also demonstrated how allowing transactions to be executed even by individuals or entities performing illegal activities, was welcomed by respective authorities and the mentioned example with narcotics and their market in the United States, revealed through a system of transactions between involved individuals, how the banking system was positively useful in the

small EMIs represent a relatively weak institute, often having just one omnibus account, whose termination may stop the entire operations of the licensed company.

detection of such crimes.

I see this openness of banking industry to high-risk clients as a crucial point, having potential to reveal criminal activities as well as to prevent discrimination of residual clients affected by lack of trust of banks in relation to their critical parameters.

The main issue is excessive sanctioning in a purely repressive nature in actual regulation. This aspect I find completely unjustified and non-beneficial. By supporting the motivation of employees of financial institutions by providing them the option to be involved in crime detection even subsequently (so not strictly at the time when the transaction is performed) and thus, relieving them from liability in full, is the key point to turn the clients away from alternative payment methods back to the standard banking system as their preferred choice. This mainly as the alternative methods provide significantly reduced transparency and sometimes even do not follow the AML/CFT rules (e.g., in case of informal value transfer systems like hawala, fe ch'ien, chitti etc.).

The actual AML/CFT regulation represents still a relatively new system of legal institutes and we might expect that over the next decade, it's development will be intensive. However, lawmakers have to focus on real market and its actual behavior, as otherwise, the proposed regulation will not bring the expected results.

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Protection of the right to redemption of shares of banking company reorganized by merger – internal rules and European case law

Assistant professor **Andreea Corina TÂRȘIA**[1]

Abstract

The exercise of the right protected by art. 1 of Protocol no. 1 of the European Convention on Human Rights does not only depend on the obligation of the State not to interfere, but may require positive protective measures, especially when there is a direct link between the measures that the complainant can legitimately expect from authorities and the right to an effective observance of its "assets". Although art. 1 of Protocol no. 1 does not contain explicit procedural requirements, the Strasbourg Court has ruled that states have an obligation to provide judicial proceedings that can offer the necessary procedural guarantees and therefore allow local courts to rule effectively and equitably on any litigation between persons, both in cases involving state authorities and in cases involving only private parties. On the other hand, the European Court of justice has ruled that, in other circumstances, the right of withdrawal of shareholders in the event of a merger of the banking company may be limited on grounds of public interest, invoked in the context in which, banks or small groups of banks are not able to cope with, without excessive difficulties, for example in the case of financial deposits imposed by the newly established system of the European Banking Union. These situations highlight the serious shortcomings in resolving reimbursement of shares disputes, as they may raise the issue of reconciliation between shareholders' rights, based on Article 1 of the Protocol, and the general interest in consolidating the capital of the banking system and the need to maintain bank's stability.

Keywords*: shares, good, protection of assets, right of withdrawal, general interest of the bank, ECHR, CURIA.*

JEL Classification: K22, K33

1. Introduction

A large number of studies have been conducted by economists to test and choose the way providing the best results for strengthening banking companies in the European and global competitive market.

The studies have as an indisputable premise, the crucial role that the banking sector plays for the economic development of a country and the analysis is focused on identifying means of preventing and managing crises, in relation to the effectiveness of key accounting control systems, the responsibilities of supervisory authorities and the application of best practices for self-regulation.

Of course, in theory, the study of banking crises as cyclical phenomenon

[1] Andreea Corina Târșia – Faculty of Law, "Lucian Blaga" University of Sibiu, Romania, andreea.tarsia@gmail.com.

gives economists interesting ideas for research and possible suggestions on the measures and the time period necessary to prevent financial imbalances, and in case of their occurrence, to return, as soon as possible, to the profitability of the bank.

In general, in all the cases of economic analysis, recapitalization appears as a condition for the survival, stabilization or profitability of the bank, regardless of the situation of the banking company, such as, for example, the case of credit losses, caused by attacks coming from outside and which, being routed through mass-media, cause disparagement by withdrawing deposits or by targeting potential customers to other banks; it does not have sufficient funds and intends to expand the business or must eliminate serious irregularities in the administration committed by violation of laws, administrative or statutory provisions.

Depending on the level of losses incurred or financing needs, solutions may be subject to recourse to external contributions from hybrid funds, by contracting loans subject to the launch of various types of convertible bonds (with the option to convert into shares of the issuer or another company), or through derivative financial instruments (standard contracts: options, futures, forward, swap, having as object securities, i.e. shares/ bonds, exchange rate, interest rate, etc.).

However, for accessing opportunities for growth, lending bonds or purchase of derivatives are not sufficient resources for large investments requiring, in the context of relocation projects, strong banks, of a certain shareholding size and structure at European Union and global level.

In addition, the public interest in maintaining the stability conditions in the banking and financial system and the requirement to protect depositors' savings lead to consolidation processes in banks, operations performed by merger on the basis of a homogeneous set of rules adopted at EU level,

Therefore, the merger became[2] the phenomenon of wide concentration and integration of banking companies in a highly structured form, suitable for achieving a continuous improvement of competitiveness and for expanding the economic activity of the resulting bank in geographic markets other than the home one.

At first sight, shareholders' right of withdrawal in the event of merging the banking company may be limited on grounds of public interest invoked under rules which banks or small groups of banks are not able to cope without undue difficulty.

However, the Court of Justice of the European Union has consistently held that „the reduction of tax revenue cannot be regarded as an overriding reason in the general interest which may be relied on to justify a principal measure contrary to a fundamental freedom”[3].

[2]Following the sovereign debt crisis and the contagion to the banks in 2007.

[3] Judgment of the Court (First Chamber) of 20 January 2021C-484/19, paragraph 68, first sentence; Judgment of 13 December 2005, Marks & Spencer, C-446/03, EU:C:2005:763, paragraph 44.

In this context of interfering the general interest with a fundamental right, it appears useful to address issues of identifying ways and means the application of which is legitimate and effective in achieving the purpose of disciplining relations between former shareholders and banking companies, following the withdrawal of the former from the company justified by its reorganization by merger.

2. On the stages of merger of banking companies

From a legal point of view, merger is a way of reorganizing the banking companies in which documents are drawn up and a series of operations are carried out, including determining receivables representing a sum of money.

The reorganization process is subject to three-pronged formalities, namely the authorization of the Romanian National Bank, the approval of third-party creditors and the judicial control of procedures and operations of all credit institutions involved in the reorganization. Regarding these formalities, it cannot be identified as one or the other main or preponderant, and the other accessories, but in any case, the entire reorganization operation has a legal basis including those rules imposed by the intended purpose.

The merger takes place under the supervision of the court through the judge-delegate and the court, and the fulfillment of legal formalities is attested by civil legal acts, documents, proceedings, etc. imposed by law.

In general these deeds and documents are: *merger project* which should indicate the financial resources necessary to meet the obligations resulting from the merger and which is to be made public by submitting to trade register; *asset situation* of companies participating in the merger, presented in the balance sheet to be highlighted, under assets, goods, cash, debtors, and under liabilities, creditors – third parties, withdrawn shareholders; *opposition* of creditors, bondholders (if formulated); *expertise* – which established the level of the amount due for withdrawn shareholders, the share exchange ratio using two calculation methods; *merger act* – drawn up in authentic form -, where appropriate, the final court decision on the merger.

3. On the obligation to repay the shares to withdrawn shareholders

According to the law[4], merger has consequences ipso jure, both real, on unification of the involved companies' assets, canceling the old shares and issuing new shares, and personal, on the disappearance of companies acquired or merged and the change of shareholders' status that become shareholders of the resulting company – in the case of a merger by acquisition – or of the acquiring company – in the case of a merger by absorbtion.

[4] For details see art. 238 et seq. of Law no. 31/1990.

Of course, the real effects also include the obligations located in the patrimonial liability of the resulting or acquiring company, as applicable.

The law establishes specific obligations on the company and managers, in order to protect, on one hand, the company, third party creditors and shareholders in general, and on the other hand, in order to protect social creditors minority shareholders.

With regard to the latter, the merger confers on them the right of withdrawal and the right to collect the claim as share price, the level of which is determined according to law by expertise, acquired by the company since the preparatory stage of the merger, for which reason, both in terms of law, and in terms of financial accounting, this debt is defined as being certain, liquid and exigible.

Coming down to the obligation to repay the shares to withdrawn shareholders, we emphasize that by submitting a shareholder's withdrawal request on a fixed date addressed to the issuing company, together with hand in the shares over, there occurs the effect of termination of personal relations between the shareholder and the company. The shareholder shall neither be entitled to participate in General Assembly meetings nor exercise other rights attached to the shares, outside economic rights to cashing the value of shares that s/he owned and possessed with the withdrawal declaration.

It should be noted that the administrators of the credit institution are required to obtain NBR's approval on the merger project and the annexed documents prior to publication through the trade register.

However, the will expressed on the method of payment of liabilities is materialized in the statement annexed to the merger project, which means that the NBR has also taken this declaration into account.

On the other hand, the law establishes the obligation to be released, both the merger project, and the declaration on how to settle the liability, by registration with the Trade Register, as well as by publishing the merger project either in the Official Gazette of Romania, Part IV, at parties' expense, in full or excerpt, or on its own website or web page (if it has one), for a continuous period of at least one month before the extraordinary general meeting which is to decide on the merger (art. 242 par. (1), par. (2) and par. (2^1) of Law no. 31/1990).

The right to reimbursement arises where the merger project, together with the attached documents prepared by the banking company *whose shares are quoted on the stock market,* has received approval from the National Bank of Romania and the information on the number of shareholders having exercised their right of withdrawal, the number of shares held by them, as well as the share they represent *in the subscribed and paid-in share capital of the company* were made public, being made accessible to the investing public in the Bucharest Stock Exchange and the Financial Supervision Authority (ASF).

Once the legal obligation of a financial-accounting nature is fulfilled by the declaration annexed to the merger project regarding the settlement of liabilities, the company performs its legal obligation to “give”, i.e. to transfer ownership

of the amount of money as price of the shares handed over ex ante to the company by the withdrawn shareholder.

Fulfillment of the second obligation by the issuing company, namely the obligation "to make" the payment of the debt to the withdrawn shareholder, questions the observance of the fundamental property right over this good, both under Article 1 of Protocol 1 of the European Charter, and art. 44 of the Romanian Constitution, by the debtor *joint stock* banking company participating in the merger and by its administrators.

4. Who and how guarantees the redemption of shares in relation to the right of withdrawal from joint stock companies?

The price of the shares handed over to the issuer by the withdrawn shareholder is a receivable, the extent of which must be determined in the manner provided by law, the relevant provisions being contained in Law no. 31/1990 on companies[5], Accounting Law no. 82/1991[6], respectively GEO no.99/2006 on credit institutions and capital adequacy[7], RNB Norm no. 5/2000 regarding merger and bank division[8].

The receivable, as it is determined (calculated) by law, through auditing, is determined definitively by the formality of approval by the judge delegated at the trade register, and the debtor company acquires it by entering the receivable in the merger documents, by the records in the Public Register of the ORC and by its accounting.

It follows that the procedure, the criteria for determining the amount to be reimbursed, the deadline by which the payment obligation must be voluntarily performed are established by law, verified throughout the merger by law enforcement bodies and censored by the *court, the role of which is to give authenticity and to make public and opposable erga omnes the completion of the merger, by pronounced court decisions.*

In other words, the law meets all the validity criteria of the receivable, meaning that, once the merger is completed, but no later than the deadline set by the imperative provisions of art.249 par. (1) letter. a and b of Law no. 31/1990, the share price is certain, liquid and exigible.

Therefore, based on the merger documents and the provisions of Law no. 31/1990 and of Law no. 82/1991, the acquiring company or, where appropriate, the new company created following the merger by acquisition, is the one required to pay the share price, and the obligation arises:

- as of the date of recording the new company or the last of the newly

[5] Initially published in the Official Gazette of Romania no. 126 of 17 November 1990, then in no. 1066 of 17 November 2004.
[6] Republished in the Official Gazette of Romania no.454 of 18 June 2008.
[7] Published in the Official Gazette of Romania no. 1027 of 27 December 2006.
[8] Published in the Official Gazette of Romania no. 474 of 29 September 2000.

created companies in the trade register, if one or more new companies are formed as a result of the merger;

- as of the date of recording the decision of the last general meeting which approved the transaction, with the exception where, by agreement of the parties, stipulated that the transaction shall take effect on another date, which cannot be however subsequent to the end of the current financial year of the acquiring company or beneficiary companies, nor prior to the end of last financial year of the company/companies transferring their assets, in case the reorganization is accomplished by merger by absorption.

5. Admissibility of demand for payment procedure for recovery of the share price

The meaning of the provisions of the Code of Civil Procedure regarding the payment order must be deciphered by reference to the specifics of the legal institutions identified in the corporate environment in which the norms incident to the merger procedure derogate from the provisions of art. 663 CPC et seq., which conditions the commencement and approval of enforcement by the existence of an enforceable title attesting certainty, liquidity, enforceability to the claim.

More specifically, in relation to the corporate sector, it is necessary to understand the purpose for which the legislator refers to the notions of „*bylaws, regulation, another document adopted by the parties, otherwise permitted by law".*

This is because art. 1014 par. 1 of the CPC considers that the obligations to pay sums of money are certain, liquid and exigible even if they have as their source a civil contract or a commercial contract, provided that they are materialized in a document, or „*if they are determined by bylaws, regulation or other document, adopted by the parties by signature or otherwise permitted by law".*

Therefore, in the conception of the legislator, the provisions of art. 1014 CPC are also applicable to claims that are determined by bylaws, regulation or other document adopted by the parties by signature, or otherwise permitted by law**.**

In the case of a merger, the document adopted by the parties by signature is the Declaration annexed to the Merger Draft, and another way permitted by law is the approval of the judge delegated to the trade register, as well as the registration of the share price in the accounting records of the issuing company.

Consequently, in the application of art. 1014 et seq. CPC., is the jurisdiction of the judge to ascertain the "manner permitted by law" on the basis of which the claim was determined by the documents and acts of the merger drawn up, endorsed and approved by the supervisory authority and the court by its delegated judge and in consideration of which to issue, on the acquiring company or on the newly formed company, as a debtor, the order for payment of the amount of

money as the share price, due to the withdrawn shareholder, as a creditor.

6. Protection of withdrawn shareholder and relevant ECHR case law

In some cases, the acquiring or resulting banking company refused to repay the shares or postponed sine die the fulfillment of the obligation to pay the price, motivating the existence of an adverse economic context and possible destabilization of the bank, by reducing assets below the legal threshold, caused by redemption of shares. In other cases, some national courts have rejected the withdrawn shareholder's claim for the issuance of a demand for payment on the grounds that the claim is not certain.

The two hypotheses represent interference with property rights protected by art. 1 to Protocol 1 of the Convention, as well as violation of the right to a fair trial as stipulated by art. 6 §1 of the Convention.

Thus, the European Court of Human Rights has ruled that, as the *claim is a property owned by* the person, and as it is sufficiently established to be enforceable, the claim that the property shall be handed over to him by payment of the price may constitute a request for taking "possession" within the meaning of Article 1 of Protocol No. 1 (Case *Stran Greek Andreadis Refineries v. Greece, 9 December 1994, §59, and case Burdov v. Rusia, nr. 59498/00, CEDO 2002-III, §40).*

Also, a claim established as enforceable by law must be equivalent to a good protected by art. 1 of the Additional Protocol no. 1 of March 20, 1952 to the EDO Convention. Consequently, failure or delayed enforcement of patrimonial rights is a violation of property rights (see: case *Barret et Sirjean v. France, 21 January 2010, no. 13829/03, §39-47; case Sud Est Réalisations v. France, 2 December 2010, no. 6722/05, § 49-61).*

With regard to the obligation not to leave on one's own account the person whose fundamental right has been violated, the ECHR ruled, in case *Burdov v. Russia*, nº 59498/00, §*30,* that it is primarily the task of national authorities to correct an alleged violation of the Convention, meaning that it is necessary and relevant, under the Convention, to investigate the claims of the alleged victim of a violation of a fundamental right at all stages of the procedure, including the *ex post facto* examination of the violation.

In relation to the issues analyzed regarding the situation of the shareholder who in the merger procedure is recognized the right to the share price but subsequently the acquiring company does not make the payment and the court denies him/her the right to receive payment, the Court has also included, along with the decision a favorable but insufficient "measure" for the observance of the right and the adoption of reparative measures by the authorities.

Thus, in cases *Eckle v. Germania*, 15 July 1982, § 69 et seq., *Amuur v. France* , 25 June 1996, §36; *Dalban v. Romania* [GC] nº 28114/95, §4, *Jensen v. Denmark*, no. 48470/99, the Court ruled that a decision or measure favorable

to the applicant is not in principle sufficient to extinguish the status of "victim", requiring national authorities to recognize explicitly and substantially, and to order remedial measures for violation of the Convention.

The ECHR has consistently explained that the "right to a court" which implies a right of access – i. e. the right to bring a case before a court in civil matters – it would be illusory if the internal legal order of a state were interpret in the sense that a final and binding judgment may remain ineffective to the detriment of a party. Therefore, the enforcement of a judgment in any jurisdiction must be considered an integral part of the "process" within the meaning of Article6. Relevant here are judgments issued in cases *Hornsby v. Greece, 19 March 1997, §40, and Burdov v. Russia (n° 2), no. 33509/04, § 65, 15 January 2009.*

In this regard, a possible refusal of the judge to find that the company is liable to pay a claim representing the price of the shares which, at the end of the merger, became certain, liquid and exigible, creates for the withdrawn shareholder the situation in which s/he is deprived both of the good and money and unjustifiably impedes the right of access to a procedure.

7. Conclusions

The topic under review therefore sheds light on the hypothesis in which an imbalance is emerging between the State's margin of appreciation in protecting the interests of banking companies and the severe restrictions on the exercise of individual rights, which can be reasonably justified only if they are motivated by overriding needs in the general interest.

By deciphering the details of the jurisprudence of the ECHR and of the legislation adopted at EU level, we arrive at the consequences generated by the non-application of the provisions of national law and European Union law, which may result in discrepancy between the theoretical right to a good and the reality of its implementation, blocked at the banking company level, at the level of the National Bank as a supervisory authority and even at the level of the national court. This situation leads to a violation of art. 1 of Protocol 1 and of art. 6 §1 of the Convention.

Therefore, in the context of the interference with the fundamental right to respect for property and the common interest in ensuring the stability of the banking system, the interference in the right to property should not be justified in relation to relatively small banking companies. This is because the temporary difficulties of such a company do not affect the banking system, which means that, within the legal framework of the merger, the obligation to reimburse the share price is assumed and recognized in a document that cannot be contested and whose legal effects are equivalent to those arising from an enforceable title.

In this respect, the task of the national judge is brought to light to distinguish, in a manner consistent with the Convention, the conditions for the delimitation between the "general interest" or "common interest" and the "legitimate

interest" on one hand, and the exercise of the subjective right and "abuse of rights" on the other hand.

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Jurisdiction of the Court of Justice of the European Union on implementing monetary policy. Case-law analysis

Professor **Mihaela TOFAN**[1]

Abstract

The paper presents the arguments of the Court of Justice of the European Union (CJEU) in case Dietrich (C-422/19) and case Weiss (C-493/17), which concern the analysis on the compliance of the national law and regulations adopted by the European Central Bank (ECB) with the primary sources of European law (Treaty on the Functioning of the European Union - TFEU) and with the mandatory rules of the Statute of the European System of Central Banks (ESCB). Pending disputes, both in Germany, have reopened the subject previously discussed in the case Gauweiler (C-62/14), concerning the adoption of rules alleging that monetary policy limits have been exceeded and that the ban on monetary financing has been infringed (Article 123 TFEU). In the case Dietrich CJEU examined the concept of means of payment accepted in the euro area, in the case Weiss there is an analysis on the program of acquisition of the public sector in secondary markets, formally adopted and implemented for more than three years, while case Gauweiler verified the conformity of the program for the purchase of government securities issued by euro area Member States. The paper reveals the competence of the CJEU to verify the rules by which monetary policy measures are implemented and it proves the extension of the EU monetary policy effects outside the euro area, through the influence of the CJEU jurisprudence in the legal system of all Member States.

Keywords: *monetary policy, European regulations, relevant case law, European Union.*

JEL Classification: E42, E58, K40

1. Introduction

In its most concise expression, the European Monetary Union involves the issuance and use of a single currency in a cross-border area, which replaces national currencies. This project is based on a broad set of measures,[2] such as:

- promoting a single monetary policy, through a single monetary authority, endowed with a substantial degree of independence; this is obviously the European Central Bank.

- the pursuit by the participating countries of common economic policy

[1] Mihaela Tofan - Director of the Jean Monnet Department of European Financial Law, University "Alexandru Ioan Cuza" of Iasi, Romania, mtofan@uaic.ro.

[2] Mihaela Tofan, *Drept financiar european*, „Alexandru Ioan Cuza" University of Iași Publishing House, 2019, p. 35.

guidelines, based on the recommendations of the Council of the European Union;[3] this goal is achieved by each member country through its own regulatory and executive authorities.

- the management, in each member country, of public finances in a manner compatible with ensuring macroeconomic stability. This objective is pursued through specific means to support financial, monetary and fiscal policies.

These measures necessarily involve the sustained and continuous work of the actors involved in the legislative process at European and national level, in collaboration with the authorities transposing the adopted regulations, in particular the implementing institutions. The role of the judiciary in the implementation of measures specific to monetary policy is less analyzed in the literature, although the control of legality can not be lacking in this complex area of economic life, with multiple effects at macro and microsocial level, but also with reflection on dynamics the process of European integration.

In the Member States of the European Union, censorship of the conduct of monetary policy through the courts is more difficult to highlight, but an analysis of recent case law of the Court of Justice of the European Union (CJEU) confirms the jurisdiction of the court in the areas of implementation monetary policy at EU level as well as the influence of Member States' legislation.

Our analysis focused on the way in which, through the jurisprudence of the CJEU, the power to settle disputes over monetary policy in the euro area is exercised, in accordance with the provisions of the Treaty on the Functioning of the European Union (TFEU),[4] in conjunction with the relevant provisions of the Protocol on the Statute of the European System of Central Bank and the European Central Bank.[5]

2. Conceptual clarifications

The achievement of Monetary Union was not an end in itself, but only a means of generating economic benefits and the effect of extended cooperation at Member State level but also at institutional level. The legal framework adopted in order to achieve this objective aimed at creating the European Central Bank, the institution entitled to coordinate the implementation of monetary policy, in accordance with the objectives pursued and in compliance with the legislation in

[3] Ioan Lazăr, *Dreptul finanțelor publice, vol. I – Drept bugetar*, Universul Juridic Publishing House, Bucharest, p. 306.

[4] Treaty on the Functioning of the European Union (TFEU), available at https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_2&format=PDF accessed on March 31, 2021.

[5] Protocol (No. 4) on the Statute of the European System of Central Banks and the European Central Bank, published in OJ C 202, 7.6.2016, pp. 230–250, available at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri = CELEX:12016M/PRO/04, accessed on April 1, 2021.

force.[6] A common currency removes the national segmentation of capital markets, encouraging the development of a single, large market in which the freedom of action of monetary regulators is on the one hand guaranteed by the principle of independence of action and on the other hand subject to control. of legality achieved both in the non-contentious phase and through the courts.[7]

At present, at the level of the euro area, there is some uncertainty as to the scope of the legal tender status and the consequences thereof.[8] The Dietrich case-law[9] analyzed concerns the status of the legal tender for euro banknotes, as set out in Article 128 TFEU, in the chapter on monetary policy.

According to Article 3 (1) (c) TFEU, the Union has exclusive competence for monetary policy for Member States whose currency is the euro. According to Article 11 of Regulation no. 974/98,[10] euro coins are the only coins with the status of legal tender in all participating Member States.

The first paragraph of Article 16 of the Protocol on the ESCB and of the ECB provides that the only body authorized to allow the issue of euro banknotes within the Union is the Governing Council; the European Central Bank (ECB) and national central banks may issue such banknotes within the Union.[11]

Pursuant to Article 10 of that Regulation, "from 1 January 2002, the ECB and the central banks of the participating Member States shall put into circulation banknotes with a face value denominated in euro. Without prejudice to Article 15, these banknotes with a face value denominated in euro shall be only banknotes that have the status of legal tender in all Member States."

According to Article 11 of that Regulation: "From 1 January 2002, participating Member States shall issue coins with a face value expressed in euros or cents and in accordance with the face values and technical specifications established. These currencies must be the only coins with the status of legal tender in all Member States. With the exception of the issuing authority and those persons specifically designated by the national law of the issuing Member State, no party shall be obliged to accept more than 50 coins in any single payment."

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[6] Mihaela Tofan, *Integrarea României în structurile Uniunii Monetare Europene*, C.H. Beck Publishing House, Bucharest, 2008, p. 83.

[7] Cosmin Flavius Costaș, *Drept financiar*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2019, p. 98.

[8] A. M. Andries, V. Cocriș, I. Pleşcău, *Low interest rates and bank risk-taking: Has the crisis changed anything? Evidence from the Eurozone*, „Review of Economic and Business Studies", 8 (1), 2015, pp. 125-148.

[9] Judgment of the CJEU from 26 Janury 2021, C422/19 și C423/19, available at https://curia.europa.eu/juris/document/document.jsf;jsesionid=95D9AE65B6C900CBF0EF2C442CC4E435?text=&docid=236962&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6014348, retrieved on 6 March 2021.

[10] Regulation (CE) no. 974/98 regarding euro, available at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:01998R0974-20090101&from=HR, retrieved on 23 March 2021.

[11] Dan Drosu Șaguna, Mihaela Tofan, *Drept financiar și fiscal european*, C.H. Beck Publishing House, Bucharest, 2010, p. 76.

Considering Recommendation no. 2010/191/EU[12] of the expert group composed of representatives of the ministries of finance and of the national central banks of the euro area, the definition of the legal tender means the cumulative fulfillment of the following conditions:

- obligation to accept: the creditor of a payment obligation may refuse euro banknotes and coins only if the parties have agreed to use other means of payment;

- acceptance at total face value: the monetary value of euro banknotes and coins is equal to the value indicated on banknotes and coins.

- ability to pay the payment obligation.

A debtor can settle a payment obligation by offering the creditor euro banknotes and coins. Acceptance of euro banknotes and coins in retail transactions must be the rule.[13] Therefore, a refusal can only be accepted if it is based on reasons related to the "principle of good faith" (for example, if a trader does not have cash available to give the rest). High-value banknotes in retail transactions can only be refused for reasons related to the "principle of good faith" (for example, the face value of the banknote is disproportionate to the amount owed to the creditor).

In the Weiss case,[14] the Governing Council of the ECB decided on 4 September 2014 to initiate a third covered bond purchase program and an asset-backed securities purchase program. In addition to the longer-term refinancing operations introduced in September 2014, these programs are intended to contribute to the transmission of monetary policy, facilitate the provision of credit to the euro area economy, relax lending conditions to households and firms, and contribute when inflation rates return to levels closer to 2%, in line with the ECB's main objective of maintaining price stability.

On 22 January 2015, the Governing Council decided that the acquisitions of assets should be extended to include a public sector asset purchase program (hereinafter referred to as the PSPP). Under the PSPP, national central banks in proportions that reflect their corresponding shares in the distribution grid for the capital of the ECB, and the ECB may directly purchase eligible marketable debt securities from eligible counterparties in secondary markets. This decision was taken as part of the single monetary policy, taking into account a number of factors which significantly increased the downside risks to the medium-term outlook for price developments, thus jeopardizing the achievement of the ECB's main objective of maintaining price stability.

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[12] Recommendation of the EU Commission no. 2010/191/UE, available at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32010H0191&from=EN, retrieved on 25 March 2021.

[13] Lucian Bercea, *Drept bancar. Studii,* Universul Juridic Publishing House, Bucharest, 2014, p. 112.

[14] Judgement of the CJEU from the 11 December 2018, case Weiss, C – 493/2017, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=208741&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6025951, retrieved on 20 March 2021.

This measure seeks to mitigate proportionately the risks to price developments by easing monetary and financial conditions, including those relevant to lending conditions for non-financial corporations and households in the euro area, thus supporting aggregate consumption and investment expenditure in the euro area and ultimately contributing to a return in the medium term of inflation rates to values lower than 2%. In the context of the ECB's reference interest rates being at the lower end and procurement programs focusing on private sector assets have provided significant but insufficient opportunities to combat the prevailing downside risks to price stability, Eurosystem monetary policy have been extended with this instrument, with high potential for transmission into the real economy.[15] It is estimated that due to its portfolio rebalancing effect, the substantial volume of acquisitions of the PSPP will contribute to the fundamental monetary policy objective of causing financial intermediaries to increase the provision of liquidity in the interbank market and loans to the euro area economy.

3. Pending disputes and questions referred to the CJEU

The pending dispute in case Dietrich, involves natural persons living in the State of Hesse, Germany, who proposed to pay in cash the audiovisual contribution due to the public service broadcaster in that State, a proposal rejected on the ground that this contribution could not be paid in cash it must be paid by direct debit, single bank transfer or permanent bank transfer. The creditor sent the applicants payment decisions establishing arrears of the audiovisual contribution, as well as penalties for delay.

The claimants in the main proceedings brought actions for annulment against those payment decisions and in October 2016 the competent German courts (*Verwaltungsgericht Frankfurt am Main* - Administrative Court, Frankfurt am Main, Germany) dismissed their actions. Subsequently, by judgments of 13 February 2018, the competent court (*Hessischer Verwaltungsgerichtshof* - High Administrative Court of the Province of Hesse, Germany) dismissed their appeals against those judgments.

Under German law, Article 14 (1) of the Law on the Federal Bank of Germany[16] provides that "without prejudice to Article 128 (1) TFEU, the Deutsche Bundesbank (Federal Bank of Germany) has the exclusive right to issue banknotes in application of this Regulation. Euro-denominated banknotes are the only legal unrestricted means of payment." The disagreements in the outstanding dispute arose in connection with the acceptance of the payment of the euro banknotes, for the settlement of the obligation to pay the audiovisual contribution, due

[15] I. Bilan, *Overview of the main theories on the economic effects of public indebtedness,* in European Integration-Realities and Perspectives Proceedings, Danubius University Publishing House, 2016, pp. 356-362.

[16] Gesetz über die Deutsche Bundesbank, available at https://www.bundesbank.de/dynamic/action/en/homepage/search/723378/general-search?query=regulation, retrieved on the 2 of April 2021.

monthly for any dwelling, by their holder. "The person obliged to pay the contribution for the public service broadcaster may not pay this contribution in cash, but only through the following methods of payment: 1. SEPA direct debit mandate, 2. single bank transfer, 3. permanent bank transfer."

In other words, German law includes a provision which limits the acceptance of payment of cash for a legally established obligation for each homeowner.

The claimants in the main proceedings appealed against those judgments to the referring court, the *Bundesverwaltungsgericht* (Federal Administrative Court, Germany), claiming that the third sentence of Article 128 (1) TFEU provided for an absolute and unlimited obligation to accept euro banknotes. as a means of payment for the payment of monetary debts. According to the claimants in the main proceedings, that obligation could be limited only by virtue of a contract between the parties involved, an authorization under federal law or European Union law. On the other hand, no practical reason, such as the significant number of taxpayers in the present case, would justify its removal.

The referring court emphasizes, as an introductory statement, that appeals should be allowed under national law and makes a comprehensive analysis of the unreserved acceptance of euro banknotes as a means of payment. However, the CJEU is committed to answering three issues on a preliminary basis.

First, the referring court raises the issue of compliance with EU law with the rules of German law on the limitation of the means of payment for the compulsory audiovisual contribution for each homeowner.

The TFEU does not contain any definition of the concept of "monetary policy", as is clear from the case law of the Court and adds that it is not in a position to decide whether the Union's exclusive competence in monetary policy lies in regulating the legal consequences of legal tender for euro banknotes, in particular on the obligation of public entities to accept such banknotes.

The referring court observes that the obligation of public entities to accept euro banknotes does not concern the objective of monetary policy, which is to maintain price stability, and does not have a direct link with the procedures listed in primary law for achieving that objective.

In particular, the power conferred by Article 128 (1) TFEU on the ECB and the national central banks to issue banknotes denominated in euro would not be limited or modified by this obligation. However, the referring court notes, in accordance with the relevant literature, that regulations on the effects of the legal tender status of euro banknotes and on the functioning of monetary circulation are the subject of the monetary policy.[17]

Furthermore, it would not be out of the question that such regulation, as a measure necessary for the use of the euro as a single currency, could be based on

[17] S. Nistor, S. Ongena, *The Impact of Policy Interventions on Systemic Risk across Banks*, in Swiss Finance Institute Research Paper No. 20-101, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580791, retrieved on 20 March 2021.

Article 133 TFEU and could therefore be regarded as falling within the exclusive competence of the Union, in accordance with Article 2 (1) and (6) TFEU.

Secondly, the national court points out that there is no question whether, in view of the Union's exclusive competence in the field of monetary policy for Member States whose currency is the euro, a national legislature is allowed to adopt a provision restricting legal means of payment, because under Union law, public entities of a Member State are prohibited from refusing to fulfill, in euro banknotes, payment obligations imposed by public prerogatives. In this context, the regulation of German law is contrary to EU law.

The referring court notes that euro banknotes have the status of legal tender within the Union and that the obligation to accept banknotes denominated in euro does not clearly follow from the concept of 'legal tender status', which is not defined either. in the TFEU, neither in the Protocol on the ESCB and the ECB, nor in Regulation no. 974/98. Furthermore, the referring court retains the definition of the legal tender in Recommendation 2010/191, according to which banknotes and coins denominated in euro are legal tender when the creditor is required to accept those instruments, subject to certain exceptions. The referring court points out, however, that, in accordance with the fifth paragraph of Article 288 TFEU, the recommendations of the institutions are not binding, so that the importance to be attached to that recommendation is uncertain.

Third, the referring court asks whether, in view of the Union's exclusive competence in the field of monetary policy for Member States whose currency is the euro, the German legislature was allowed to adopt rules which limit the scope of accepted legal tender.

In order to resolve disputes in the main proceedings, it is necessary to determine whether a national rule which provides for an obligation to accept euro banknotes in the performance of payment obligations imposed by public prerogatives may be applied where the Union has not exercised its exclusive competence. The referring court (*Bundesverwaltungsgericht* - Federal Administrative Court of Germany) considers that the Court's existing case-law does not answer those questions and, in those circumstances, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

"1. Does the Union's exclusive competence in the field of monetary policy for Member States whose currency is the euro preclude the adoption of a legal act by those Member States which requires public institutions to accept euro banknotes for payment obligations?

2. The legal tender status of euro banknotes contains a prohibition on the public institutions of a Member State from refusing to fulfill payment obligations through such banknotes or Union law allows rules excluding payment in euro banknotes for certain obligations established by prerogatives public?

3. If the answer to the first question is in the affirmative and the answer to the second question is in the negative, a legal act of a Member State whose

currency is the euro, issued within the exclusive competence of the Union in respect of monetary policy, may apply, if and to the extent that the Union has not exercised this competence?"

The Court's statement of reasons in Dietrich, arguing the possibility of adopting rules aimed at nuanced or even amending monetary policy rules by a national body such as the authority setting the audiovisual contribution regime at the level of a German state, leads to pending dispute in the Weiss case (C-493/17), which is more technical and has an impact on the regulations that implement the monetary policy adopted by the ECB.

In the Weiss case, several groups of individuals have lodged various actions with the *Bundesverfassungsgericht* (Federal Constitutional Court, Germany) concerning ECB monetary policy decisions concerning price stability measures, with the participation of the Federal Bank of Germany in their implementation. decisions or its alleged inaction on those decisions. In support of those actions, the applicants in the main proceedings submit, in essence, that the ECB decisions in question constitute an ultra vires act, as they disregard the division of powers between the European Union and the Member States under Article 119 TFEU, since they are not expressly covered by the ECB's mandate. defined in Article 127 (1) and (2) TFEU, and in Articles 17 to 24 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank and infringes Article 123 TFEU.

The *Bundesverfassungsgericht* (Federal Constitutional Court) states that, if the ECB decisions in question exceed the express mandate given to the ECB or infringe Article 123 TFEU, it should grant the requests made. In those circumstances, the *Bundesverfassungsgericht* decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

1. Article 123 (1) TFEU is infringed if, in the context of the program for the acquisition of public sector assets on secondary markets, one of the following procedures is carried out:

a) are details of purchases communicated in such a way as to certify that the Eurosystem will partially purchase the bonds issued by the Member States?

b) no details are published on the observance of minimum deadlines between the issuance of an instrument of a debt nature on the primary market and its acquisition on the secondary market, so that in this respect it is not possible to exercise judicial control?

c) are all the bonds purchased not resold, but preserved until maturity and are thus stolen from the market?

d) Does the Eurosystem purchase instruments with the nature of nominal marketable debt with a negative maturity yield?

2. Article 123 TFEU is infringed where the implementation of the decisions in question requires, due to the changing conditions on the capital markets as a result of the reduction of the bonds which may be acquired, a continuous

relaxation of the initial procurement rules and the restrictions. Does a bond purchase program, such as the PSPP, cease to have effect?

3. Infringes Articles 119 and 127 (1) and (2) TFEU, as well as Articles 17 to 24 of the Protocol on the ESCB and the ECB, as it goes beyond the ECB's mandate on monetary policy, which is governed by these rules and overlaps thus the competence of the Member States?

a) are the refinancing conditions of the Member States significantly affected as a result of the volume of the PSPP, which on 12 May 2017 amounted to EUR 1 534.8 billion?

b) in view of the improved refinancing conditions of those Member States and their effects on commercial banks, the ECB decisions in question have indirect economic policy consequences and their objectively quantified effects suggest that the economic policy objective of the program is a monetary policy objective?

c) do the decisions in question, because of the effects on economic policy, infringe the principle of proportionality?

d) does the lack of specific motivation in the decisions concerned block the control regarding the need to continue its application after the two-year term and its proportionality?

4. Infringes Articles 119 and 127 (1) and (2) TFEU, as well as Articles 17 to 24 of the Protocol on the ESCB and the ECB, on the ground that the economic impact of the application of more than two years, the need and the Does the measure justify a breach of the ECB's monetary policy mandate?

5. The possible provision for the unlimited distribution of risks between the national central banks of the Eurosystem in the event of non-payment of bonds by central governments and other similar issuers provided for in that Decision, in the first question, infringes Articles 123 and 125 TFEU, and Article 4 (2) TEU, if this may require a recapitalization of national central banks from budgetary funds?

4. The arguments of the CJEU and the effects of the judgment

In a concise approach, the acceptance of payments in euro banknotes and coins in euro area transactions should not be unilaterally censored by any of the Member States and the existence of disputes over this rule of principle seems unlikely. However, in relation to the pending dispute in the Dietrich case, the CJEU was asked to assess whether Member States could unilaterally order measures on the discipline of receipts and payments in their territory and to verify the compliance of these measures with primary and secondary law.

The CJEU must, in essence, determine whether Article 2 (1) TFEU in conjunction with Article 3 (1) (c) TFEU must be interpreted as meaning that, independently of any exercise by the Union of its exclusive policy for Member States whose currency is the euro, it opposes a regulation of a Member State

which obliges public entities to accept banknotes denominated in euro in the context of payment obligations imposed by public prerogatives.

In their written observations, the European Commission, the public service broadcaster of the Land of Hesse and the ECB expressed reservations about the interpretation of the rule of German law adopted by the referring court. It must be borne in mind that, as regards the interpretation of the provisions of national law, the Court is in principle required to rely on the qualifications resulting from the order for reference, adopting the views of the national court on the interpretation of the rule of national law. According to its settled case-law, the Court has no jurisdiction to interpret the national law of a Member State. The Court must therefore answer the first question based on the premises that the article relied on requires public entities to accept banknotes denominated in euro in connection with payment obligations imposed by public prerogatives.

According to article 3 para. 1 letter c) TFEU, the Union has exclusive competence in the field of monetary policy for Member States whose currency is the euro, but the TFEU does not contain any precise definition of the concept of 'monetary policy', but defines, in its provisions on that policy, the same the objectives of that policy and the means available to the European System of Central Banks (ESCB) to implement it (Case C-493/17 Weiss, paragraph 50).

In the Weiss case, the CJEU used arguments highlighted in the Gauweiler case law on the scope of monetary policy measures, noting that in order to determine whether a measure relates to monetary policy, it is necessary to relate mainly to the objectives of this measure and the means by which it implements them.[18]

The express medium-term objective set out in the text of the ECB decision challenged in the outstanding dispute is to return inflation rates to values below 2%, but close to that percentage. The EU treaties define as the main objective of monetary policy the maintenance of price stability, in general and in the abstract, without determining precisely how that objective was to be achieved in quantitative terms. It is not apparent from the arguments put forward that that objective is affected by the manner in which the ECB decision was adopted, nor does it go beyond the framework established by the TFEU. As the ECB contends and as the referring court points out, the specific objective set out in the ECB decision in question may be linked to the main objective of the monetary policy of the Union, as set out in Article 127 (1) and Article 282 (2) TFEU. In the present case, it is common ground that, in accordance with its underlying principle and modalities, the measures in place have an effect on both the balance sheet of commercial banks and the financing of the Member States which are part of that program and that such effects could be pursued through economic policy measures.

[18] Judgement of the CJEU from the 16 June 2015, case Gauweiler, C-62/14, Available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=3AC4C3CF11F19D725CE9689BA9D4ECE6?text=&docid=206471&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=269537, retrieved on 20 March 2021.

Article 127 (1) TFEU provides that, without prejudice to its main objective of maintaining price stability, the ESCB shall support the general economic policies in the Union and shall act in accordance with the principles set out in Article 119 TFEU. The principle of institutional balance and the independence of the ESCB guaranteed by Articles 130 and 282 (3) TFEU do not make a complete separation between economic and monetary policy. A monetary policy measure cannot be equated with an economic policy measure merely because it can produce indirect effects which can also be pursued in the context of economic policy (Case C-62/14 Gauweiler, paragraph 52).

The referring court erred in holding that any effect of a money market operations program should be regarded as an 'indirect effect' of it. In the Gauweiler case (C-62/14), the Court considered as indirect effects, without consequences for the classification of the measures in question, effects which, since their adoption, constituted the foreseeable consequences of those measures and which had to be accepted knowingly. Moreover, the conduct of monetary policy by the ECB involves permanent action on interest rates and bank refinancing conditions, with consequences for the financing conditions of Member States' government deficits (Case C-62/14 Gauweiler, paragraph 110). As the ECB has pointed out before the Court, the influence of the ESCB's monetary policy measures on price developments is achieved in particular by facilitating lending to the economy and by changing the behavior of economic operators and individuals in terms of investment, consumption and savings.

In order to influence the inflation rate, the ESCB is obliged to adopt measures that have certain effects on the real economy, which could also be pursued for other purposes in the framework of economic policy. In particular, when maintaining price stability requires the ESCB to try to increase inflation, the measures that the ESCB needs to take in order to relax monetary and financial conditions in the euro area to this end may involve action on government bond interest rates, in particular in view of the crucial role of these interest rates in determining the interest rates applicable to different economic actors (Gauweiler, C-62/14, paragraphs 78 and 108).

In these circumstances, to exclude any possibility for the ESCB to adopt such measures if their effects are predictable and knowingly prohibited would in practice prohibit it from using the means made available to it by the Treaties to achieve its policy objectives. monetary policy and could, in particular in the context of an economic crisis involving a risk of deflation, constitute a disruptive obstacle to the fulfillment of its primary law mission.

As is clear from Article 18.1 of Chapter IV of the Protocol on the ESCB and the ECB, in order to achieve the objectives of the ESCB and to carry out its tasks, as is clear from primary law, the ECB and the central banks of the Member States may, in in principle, to intervene in the financial markets through simple transactions of sale and purchase of marketable instruments denominated in euro.

Consequently, the measures provided for in the contested decision[19] use one of the instruments of monetary policy provided for by primary law (Case C-62/14 Gauweiler, paragraph 54). Therefore, the decision under review belongs to monetary policy.

Also in the Weiss case, the CJEU carried out an extensive analysis of the proportionality of the measures ordered with the objectives of monetary policy. It follows from Article 119 (2) and Article 127 (1) TFEU in conjunction with Article 5 (4) TEU that a monetary policy bond purchase program may be validly adopted and implemented only in so far as the measures which it entails are proportionate to the objectives of that policy, as set out in Case C-62/14 Gauweiler, paragraph 66. the acts of the institutions of the Union are such as to ensure that the legitimate objectives pursued by the rules in question are attained and do not go beyond what is necessary to attain those objectives (paragraph 67 of the case-law cited). With regard to the judicial review of compliance with these conditions, the CJEU recognizes a wide discretion of the ESCB, because when designing and implementing a money market operations program such as that provided for in Decision 2015/774, the ESCB makes choices that are technique and complex forecasts and assessments (Case C-62/14 Gauweiler, paragraph 68). The wording of the recitals in the preamble to that decision (ECB Decision 2015/774) shows that in order to have inflation rates below 2%, but close to that percentage, monetary and financial conditions will be relaxed, including those of non-financial corporations, and of households, to support aggregate consumption and investment spending in the euro area and to ultimately contribute to a medium-term return of inflation rates to those values. Therefore, in view of the evidence in the possession of the CJEU, it does not appear that the economic analysis carried out by the ESCB when adopting the economic policy measure in question is affected by an error of assessment.

In order to establish the proportionality of the measures taken, the CJEU notes that the measures were adopted in a context described by the ECB as marked, on the one hand, by a low level of long-term inflation, which could generate the risk of triggering a cycle of deflation and, on the other hand, the inability to counteract this risk by using other instruments available to the ESCB to ensure an increase in inflation rates. With regard to the latter, it appears, *inter alia*, that the reference interest rates have been set at a level close to the expected thresholds and that the ESCB has already implemented a private sector asset purchase program for several months. In view of the foreseeable effects and the objective pursued by the ESCB, the CJEU considers that the measures do not clearly go beyond what is necessary to achieve that objective.

[19] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a program for the acquisition of assets by the public sector in secondary markets (ECB/2015/10), published in OJ L 121, 14.5.2015, p. 20–24 available at https://eur-lex.europa.eu/legal-content/RO/TXT/?_uri=CELEX:32015D0010, accessed on 25 March 2021.

As regards the modalities for implementing the measures taken, the architecture of this program also helps to ensure that its effects are limited to what is necessary to achieve that objective, in so far as, inter alia, the lack of The selectivity of that program guarantees that the action of the ESCB will have an effect on the financial conditions throughout the euro area and will not meet the specific funding needs of certain Member States in that area.

Also, the choice, set out in Article 3 of Decision 2015/774, to make the purchase of bonds conditional on compliance with strict eligibility criteria has the consequence of restricting the effects of this program on the balance sheet of commercial banks, without its implementation having any effect. the effect of allowing these banks to resell securities with a significant level of risk to the ESCB. Moreover, the measures are temporary and their initial duration or successive extensions do not clearly exceed what was necessary to achieve the objective pursued, since they have always covered relatively short periods and were established taking into account the evolution of inflation rates.

Finally, the CJEU emphasized that, given the elements of the file and the wide discretion available to the ESCB, it is not clear that a more limited volume or duration of a government bond purchase program could have ensured, as efficiently and rapidly as the PSPP, an evolution of inflation similar to that pursued by the ESCB, in order to meet the main objective of monetary policy set by the treaty authors.

Third, it follows, as the Advocate General observed in point 148 of his Opinion, that the ESCB weighed the various interests at issue in such a way as to effectively avoid the possibility of manifestly disproportionate inconvenience in the implementation of the with the objectives pursued by it.

In particular, if, as the Court of Gauweiler has already held (Case C-62/14, p. 125), money market operations authorized by the authors of the Treaties inevitably involve a risk of loss, it is no less true that The ESCB has taken various measures to frame and take this risk into account. Since those rules have the effect of limiting the ESCB's exposure in the event of the issuer's default on a part of the bonds purchased and of ensuring that the bonds with a significant risk of default cannot be acquired, it follows that the ECB ensures constant monitoring of compliance. rules by the central banks of the Member States.

In addition, in order to avoid the possibility of the situation of a central bank of one Member State being weakened in the event of redemption incidents involving an issuer in another Member State, Article 6 (3) of Decision 2015/774 provides that each national central bank acquires the eligible securities of issuers in their own jurisdiction. The ESCB duly took into account the risks to which the significant volume of asset acquisitions might possibly expose the Member States' central banks and that, in view of the interests at stake, it considered that it should not introduce the general rule of losses.

With regard to possible ECB losses related to these acquisitions, the ESCB has not adopted any rules derogating from the ECB's general allocation of

losses regime; such losses shall be covered by the general reserve fund of the ECB and, if necessary, by decision of the Governing Council of the ECB, by monetary income for that financial year in proportion to and within the limits of the amounts allocated to the national central banks. shares paid into the capital of the ECB. It follows from those considerations that the monetary policy measures taken by the ECB by Decision 2015/774 do not infringe the principle of proportionality.

Returning to the Dietrich case, the CJEU noted that Article 119 para. 1 TFEU states that action by the Member States and the Union requires, under the conditions laid down in the Treaties, the establishment of an economic policy based on the close coordination of the economic policies of the Member States, the internal market and the definition of common objectives. open market, in which competition is free. The same article states (paragraph 2) that this action involves a single currency (euro), as well as the definition and application of a single monetary policy and a single exchange rate policy, in order to maintain price stability and without prejudice to this objective, supporting general economic policies in the Union, in accordance with the principle of an open market economy, in which competition is free.

It is therefore clear from Article 119 (2) TFEU that the action of the Member States and the Union consists of three elements, namely:

- a single currency, the euro,
- defining and organizing a single monetary policy, and
- defining and organizing a single exchange policy.

Therefore, the notion of 'monetary policy' is not limited to its operational implementation, which is, under Article 127 (2) TFEU, one of the fundamental tasks of the ESCB, but also implies a regulatory dimension that seeks to the status of the euro as the single currency. This interpretation of the concept of 'monetary policy' is supported by the main objective of that policy, as set out in Article 127 (1) and Article 282 (2) TFEU, namely to maintain price stability. If the status of the euro as a single currency could be understood differently and governed by different rules in Member States whose currency is the euro, the uniqueness of the single currency would be called into question and thereby seriously undermine the objective of maintaining it. price stability. Moreover, Articles 128 and 133 TFEU reaffirm this view of the status of the euro as the single currency.

Article 128 TFEU states (paragraph 1) that the ECB is the only one authorized to authorize the issuance of euro banknotes denominated in euro in the Union, that the ECB and national central banks may issue such banknotes and that the banknotes thus issued are the only legal tender. payment within the Union. The rules of primary law, together with the third sentence of the first paragraph of Article 16 of the Protocol on the ESCB and the ECB, state the legal tender status of these banknotes. In addition, since para. Article 2 stipulates that Member States may issue euro coins, subject to the approval of the ECB of the volume of the issue, the issuance of euro coins denominated in euro is implicitly

regulated.

Article 133 TFEU empowers the Union legislator to establish the secondary measures necessary for the use of the euro as the single currency. Therefore, Article 128 (1) and Article 133 TFEU are the legal basis for the uniqueness of the euro and are a precondition for the effective organization of the monetary policy of the Union.

In relation to the situation raised in the pending proceedings in Dietrich, the allocation of euro banknotes issued by the ECB and the national central banks to "legal tender status", Article 128 (1) TFEU and the third subparagraph of Article 16 sentence of the Protocol on the ESCB and the ECB enshrines the official status of these banknotes exclusively in the euro area, to the exclusion that other banknotes may also benefit from this status. Since Article 128 (1) TFEU does not refer to the law of the Member States to determine the meaning and scope of the concept of "legal tender status" which it refers to, it is a concept of European Union law which it must be given a uniform interpretation at EU level, which must be determined in the light of the regulations in which it is laid down but also of the context of those regulations and the objective pursued by them.[20]

The notion of "legal tender status" of a means of payment expressed in a monetary unit usually means that this means of payment cannot generally be refused on payment of a debt expressed in the same monetary unit, at its value. nominal, with the effect of extinguishing the obligation to pay. This interpretation is supported by Recommendation 2010/191, which specifically concerns the extent and effects of the legal tender status of banknotes and coins denominated in euro, in accordance with Article 11 of Regulations no. 40/94 and 974/98. Even if, under Article 288 (5) TFEU, the recommendations are not intended to have binding effect and are not capable of creating rights which individuals can invoke before a national court, they are part of the legal acts of the Union, thus that the Court may take them into account when providing useful information for the interpretation of the relevant provisions of European Union law. Recommendation 2010/191 contains the common definition of the concept of "legal tender status", stating that it contains an obligation in principle to accept banknotes and coins denominated in euro for payment purposes.

Allowing the Union legislator to establish the necessary measures for the use of the euro as a single currency, Article 133 TFEU, the successor to Art. 123 para. 4 EC, which succeeded art. 109 L para. 4 of the EC Treaty, primary law enshrines the need for uniform principles for all Member States whose currency is the euro, in order to protect the overall interest of the Economic and Monetary Union and the euro as a single currency and, consequently, to maintain price stability. This normative text only empowers the Union legislator to specify the legal regime of the status of legal tender granted to euro banknotes and such exclusive

[20] Judgement of the CJEU from the 16 July 2020, case AFMB Ltd, C-610/18, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=228669&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=6045869, retrieved on 20 March 2021.

competence excludes any competence of the Member States in this matter, unless they are empowered by the Union or to place implementing Union acts. Where a competence is conferred on the Union exclusively, the loss of competence of the Member States occurs directly and, unlike areas covered by a shared competence, whether or not the Union has exercised its competence is not relevant for the purposes of that loss.[21]

The exclusive competence of the Union in the field of monetary policy is without prejudice to the competence of the Member States whose currency is the euro to regulate the arrangements for the fulfillment of payment obligations, both public and private, provided that, among other things, otherwise, such regulation should not affect the principle that, as a general rule, it must be possible to settle an obligation to pay in such currencies. This exclusive competence does not prevent a Member State, in the exercise of its powers, such as the organization of general government, from adopting a measure requiring that administration to accept cash payments from those administered or, as envisaged in the two questions, which introduces, for reasons of public interest, a derogation from this obligation for payments imposed by public prerogatives, provided that certain conditions are met which will be specified in the examination of this question.

The CJEU answers the first and third questions referred in Dietrich that, regardless of any exercise by the Union of its exclusive competence in the field of monetary policy for Member States whose currency is the euro, European law precludes a Member State adopts a provision aimed at regulating the legal regime of the legal tender status of euro banknotes. However, a Member State may adopt, for its own activity such as the organization of general government, a provision which compels that administration to accept the payment in cash of pecuniary obligations which it collects.

With regard to the second question, it is for the national court to interpret the national legislation, the CJEU can only guide the national court in its decision.[22] As regards the reasons in the public interest relied on to justify the exclusion in the main proceedings in question of the payment of the audiovisual contribution in cash, the public service broadcaster of the Province of Hesse pointed out that, taking into account the approximately 46 million taxpayers in Germany, the obligation to pay the audiovisual contribution by scriptural means of payment is intended to ensure that this contribution is actually collected and to avoid significant additional costs. It is in the public interest that debts to public authorities can be honored in a way that does not involve an unreasonable cost, which would

[21] Judgement of the CJEU from 5 of May 1981, Commission/UK, 804/79, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61979CJ0804&from=EN, retrived on 20 March 2021.

[22] Judgement of the CJEU from the 2 of May 2019, case Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego, C-614/17, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=213589&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6050209, retrieved on 20 March 2021.

prevent them from providing the services provided at minimal cost. Therefore, the reason of public interest is likely to justify a restriction of cash payments, especially when the number of taxpayers from whom the claim is to be collected is very high. As regards the condition that the measures in question must not go beyond what is necessary to attain the objectives pursued, it is apparent from the order for reference that the legislation at issue in the main proceedings provides for legal aid other than cash (single bank transfer or permanent bank transfer).

The restriction at issue in the main proceedings appears to be both appropriate and necessary for the attainment of the objective of the effective recovery of the audiovisual contribution, since it avoids exposing the administration to an unreasonable financial burden in relation to the cost which it would incur it involves the widespread implementation of a procedure that allows taxpayers to pay the audiovisual contribution in cash. However, it is for the national court to determine whether such a restriction is proportionate to that objective, given that alternative legal means of payment of the audiovisual contribution may not be easily accessible to all persons, which would involve for people who do not have access to these means an opportunity to pay in cash.

The CJEU's answer to the second question is that the rules of European law relied on do not preclude national rules which exclude the possibility of extinguishing a payment obligation imposed by public prerogatives by means of euro banknotes, effect of disrupting the legal regime of the status of legal tender for these banknotes, and not to lead, in law or in fact, to an abolition of the use of those banknotes. Last but not least, the limitation of cash payments must have taken into account public interest reasons, be capable of achieving the objective of public interest pursued and not exceed the limits of what is necessary in order to achieve it, in the sense that it must other legal means are available to settle the payment obligation.

5. Conclusions

Irrespective of the exercise by the European Union of its exclusive competence in the field of monetary policy for Member States whose currency is the euro, European primary law prohibits a Member State from adopting a provision which, having regard to its purpose and content, modifies the legal regime of the euro. the legal tender status of euro banknotes. On the other hand, EU law does not preclude a Member State from adopting, in the exercise of its own competence, such as the organization of public administration, a provision restricting the use of cash to settle pecuniary obligations towards that public authority, if the reasons are in the public interest and do not go beyond what is necessary. At the same time, in exercising its powers in the field of monetary policy, while respecting the principles of institutional balance and independence, the ECB is empowered to take the necessary measures to achieve the objectives of the European Monetary Union (e.g. price stability).

The jurisprudential analysis of the relevant regulations in the field of monetary policy regulation at EU level reveals the competence of the CJEU to verify, including in the monetary field, both the conformity of national law with the rules adopted at EU level and the compliance of rules adopted by the EU. European institutions with responsibilities in the field of European primary law, with the rules adopted by the ECB and the ESCB being incidental in this situation.

Although the rules of European law aimed at the implementation of monetary policy have as their area of application the euro area countries, the judgment of the CJEU in cases where its monetary jurisdiction is exercised attributes to the pronounced solutions the effect enjoyed by the CJEU jurisprudence in all territories of EU countries.

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Registration of personal data in the record system of the Credit Bureau - an analysis of non-unitary case law

PhD. student **Loredana COSTINA**[1]

Abstract

The paper analyzes the legal regime of registration of personal data of individuals, debtors of banking companies and NFIs within the Credit Bureau (Biroul de Credit) S.A. The paper analyzes the provisions of Decision no. 105/2007 on the processing of personal data in record-keeping systems such as credit bureaus and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to data processing of personal character and regarding the free movement of these data and the conflict in time between the two normative acts, as it has been interpreted in the non-unitary jurisprudence of the courts. The results of the study show that, in the majority jurisprudence at the level of the Bucharest Tribunal, Decision no. 105/2007 continues to apply for the registration of late payments from credit agreements signed before May 25, 2018, although this decision is no longer in force. The implications of this conclusion are major for the activity of banking and non-banking financial institutions, the present paper arguing that for these credit agreements the records made in the database of Credit Bureau S.A. under Regulation (EU) 2016/679, the majority practice in these institutions, are illegal.

Keywords: *protection of personal data, credit bureau, GDPR, Decision no. 105/2007.*

JEL Classification: K29

1. Introduction

Assessing the credit risk of individuals is and must be a constant concern of banking financial institutions and non-banking financial institutions (NFIs). In order to assess this risk, in 2004 a number of 20 banks set up the Bureau of Credit S.A., a joint stock company, with wholly private capital.

The object of activity of the Credit Bureau S.A. is the collection and processing of data on individual customers of participants in the credit bureau's record system, in order to analyze the repayment capacity, the degree of indebtedness and the credit risk.

[1] Loredana Costina - Bucharest University of Economic Studies, Romania, loredana.costina@drept.ase.ro.

In practice, this means that each of the 69 banking and non-banking financial institutions currently participating in the Credit Bureau's record system[2] enters into the record system data on each individual who obtains a loan, namely: name, surname, domicile, CNP, data on the loan obtained and, in particular, of particular importance both for the lending activity and for the processing risks: data on late payments.

These data are updated every 30 days, depending on the number of days of delay being calculated the degree of indebtedness, each person being assigned a FICO® Score, which "*is the result of applying a statistical method that takes into account the following elements that provide predictability: payment history; current debt; duration of the credit account (s) (average number of months from the granting of loans); request for new credits (number of queries and credits granted in the last 6 months); the credit mix (types of loans).*"[3]

Access to customer data of each of the 69 participants is provided to all other participants, so that each of them can assess the risk of any new applicant for a loan, if he/she is registered with at least one loan he/she obtained from any other participant. The data are kept in the system for 4 years from the date of each registration.

Until 2007, the data were registered in the credit system of the Credit Bureau only under Law no. 677 of 21 November 2001 for the protection of individuals with regard to the processing of personal data and on the free movement of such data, and in practice there have been many problems of interpretation of the legal basis on which these data were processed.

As a result of this controversy and the need to increase the degree of protection of individuals concerned by processing, in 2007, the National Authority for Supervision of Personal Data Processing (hereinafter referred to as ANSPDCP) issued Decision no. 105/2007 on the processing of personal data carried out in record-keeping systems such as credit bureaus, under which personal data could be entered only with the consent of the data subject and reports on late payment could be made only with following a special procedure for informing the data subject 15 days before the date of each report. The method of processing personal data under this decision is analyzed in detail in this paper in the first section of it.

Decision no. 105/2007 of ANSPDCP was the legal basis for the processing of personal data in the record system of the Credit Bureau until 25 May 2018, when 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 pro-

[2] List of participants in the Credit Bureau, the document is available online at the address https://www.birouldecredit.ro/wps/portal/bcro/Home/cadrul_legal/lista_participanti, accessed at: 07.04.2021.

[3] The document is available online at the address https://www.birouldecredit.ro, accessed at: 07.04. 2021.

cessing of personal data and on the free movement of such data (hereinafter referred to as „GDPR") entered into force.

Since at the time of May 25, 2018, Law no. 677/2001 and Decision no. 105/2007, issued based on Law no. 677/2001, were repealed, Credit Bureau S.A. and all banking and non-banking financial institutions based their data processing in the credit bureau's accounting system considering, as shown by the analysis of the position of the participants and the Credit Bureau S.A. in disputes arising after 25 May 2018, that the GDPR applies to both the introduction of new data and the storage of data entered before 25 May 2018, both for processing under contracts concluded after the entry into force of the GDPR, and for the processing carried out under the credit agreements concluded prior to May 25, 2018. The legal basis used by *Biroul de Credit SA* and the participants is at this moment the legitimate interest, without applying any of the provisions of Decision no. 105/2007 on the need for prior information 15 days before each report. The interpretation of the GDPR in this sense is analyzed in detail in this paper in the second section of it.

Although this interpretation of the law is one that has simplified the activity of recording and storing the personal data of the debtors, the results of our analysis show that it is erroneous. The third section of this paper analyzes the non-unitary jurisprudence regarding the interpretation of the application in time of Decision no. 105/2007 and GDPR on the processing of personal data in the credit bureau's record system for credit agreements concluded before May 25, 2018.

As we will show, most of the judgments issued by the Bucharest Tribunal consider that the interpretation of the Credit Bureau S.A. and of the participants within the credit bureau's record system violates the principle of non-retroactivity of the law provided by art. 15 of the Romanian Constitution, the processing being subject to the provisions in force at the date of signing the credit agreement.

2. Processing of personal data under ANSPDCP Decision no. 105/2007

According to the provisions of Decision no. 105/2007, the data regarding the natural debtors in the credit system of the Credit Bureau are entered in compliance with a special procedure, depending on the type of personal data.

Regarding the data regarding the name, CNP and domicile of the debtor, the existence of the credit report and the amount granted, they were registered after obtaining the consent of the natural person, based on the express provisions of art. 8 para. (1) of Decision no. 105/2007.

Thus, according to art. 8 para. (1) of Decision no. 105/2007: *„the personal data of the credit applicants are transmitted to the record systems of the type of credit bureaus only with the written consent of the data subject, obtained by the participants on the date of submitting the credit application."*[4]

[4] Decision no. 105/2007 regarding the processing of personal data performed in record systems such as credit bureaus, published in the Official Gazette no. 891 of 27.12.2007.

Regarding the negative data, defined by the provisions of art. 2 point d) of Decision no. 105/2007, according to which: „*negative data - information regarding the delays in the payment of the obligations deriving from the credit relations of the natural persons"*[5], they cannot be entered only on the basis of the initial consent given for processing pursuant to art. 8 para. (1) of Decision no. 105/2007, but it is necessary and, in addition to this consent, to inform the natural person debtor about the fact that the delays in payment will be reported.

This information must be made 15 days before the date of each report of each delay in payment, pursuant to the express provisions of art. 8 para. (2) of Decision no. 105/2007. Moreover, each information must contain all the elements from art. 9 para. (1) of Decision no. 105/2007, the content of which we will detail below, as it results from the opinion of ANSPDCP and from the constant jurisprudence of the courts.

Thus, according to the provisions of art. 8 para. (2) of Decision no. 105/2007: *"negative data, including those resulting from the application of fees or interest rate increases, shall be transmitted to credit bureaus only after prior notification by the participants, in writing, by telephone, SMS or e-mail to the data subject on late payment and data transmission, made at least 15 calendar days before the date of transmission."*[6]

At the same time, according to the provisions of art. 9 para. 1 of Decision no. 105/2007: „*The participants are obliged to provide to the data subject on the date of prior notification provided by art. 8, clearly and precisely, the information provided by art. 12 para. (1) of Law no. 677/2001, amended and supplemented, including regarding: a) the personal data transmitted; b) the identity of the credit bureau or offices to which the data are transmitted; c) the categories of participants in the credit bureaus to which the data are transmitted; d) the period or periods of data storage within the record systems such as credit bureaus; e) the concrete ways of exercising the right of access, intervention and opposition, in relation to the participant and to the credit bureau/offices.*"[7]

As a result, the participants are obliged to provide the data subject to the date of prior notification provided in art. 8 para. (2), clearly and precisely, the information provided in art. 12 para. (1) of Law no. 677/2001, with subsequent amendments and completions, including those regarding:*"a) the personal data transmitted; b) the identity of the credit bureau or offices to which the data are transmitted; c) the categories of participants in the credit bureaus to which the data are transmitted; d) the period or periods of data storage within the record systems such as credit bureaus; e) the concrete modalities of exercising the right of access, intervention and opposition, in relation to the participant and to the credit bureau/offices."*[8]

[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid.

This is also the opinion of ANSPDCP, in the 2017 Annual Report of the National Authority for Supervision of Personal Data Processing, ANSPDCP reports a ruling in a dispute regarding the processing of personal data carried out in record systems such as credit bureaus, according to which an operator was sanctioned because the operator did not provide the data subjects with the information provided by art. 9 of Decision no. 105/2007 15 days before the date of each report, even if a summary information, without the content of art. 9 of Decision no. 105/2007 was, however, transmitted.

Thus, the ANSPDCP Report of 2017 clearly establishes the following: *"from the documents provided, it was found, for some of the clients, that the operator did not make a prior notification of the data subject to each payment obligation (in writing), as provided by art. 8 para. (2) of Decision no. 105/2007. In the case of other clients, although it sent a prior notice 15 days before the reporting, the operator did not provide them with the information provided by art. 9 of Decision no. 105/2007. Consequently, the operator was fined the maximum amount provided by law, and the report of finding/sanctioning was challenged in court. The court, analyzing the evidence administered in the case, found that the report of finding/sanctioning issued by the National Supervisory Authority is legally drawn up, fact for which the applied contravention sanctions were maintained. The decision became final by rejecting the appeal declared by the operator."*[9]

The jurisprudence of the Bucharest Court of Appeal is clear and constant in the sense that it is necessary to have a notification 15 days before the date of reporting to the credit bureau and this reporting must contain all the elements from art. 9 of Decision no. 105/2007. At the same time, these notifications must be sent, with all the elements provided by art. 9, each time it reports delays to the Credit Bureau, even if it refers to the same contract and even if it has made this information on another occasion, and the initial agreement on processing is not enough, not functioning as a "blank check".

Thus, by the Civil Decision no. 103/15.10.2018, the Bucharest Court of Appeal, Section VIII Administrative and Fiscal Litigation, in a litigation regarding the appeal of a banking financial institution against the ANSPDCP decision to apply the contravention fine, established the following: "*as the court of first instance correctly held, the notifications sent by the plaintiff regarding the non-fulfillment of the contractual obligations do not meet the requirements of provisions of art. 9 of the ANSPDCP Decision as it was not sufficient to inform the persons concerned that they are late in payment, that their data are processed in person and that they have the rights provided by Law 677/2001, but it was necessary to specify each time and concretely which are the personal data transmitted as well as the identity of the credit bureau or offices to which the data are*

[9] 2017 Annual Report of the National Authority for the Supervision of Personal Data Processing, p. 52, the document is available online at the address https://www.dataprotection.ro/?page=Rapoarte%20anuale&lang=ro, accessed at: 07.04.2021.

transmitted. The Court also notes that these prior notifications had to be sent each time the appellant-complainant reported to the Credit Bureau, even if they related to delays in the execution of the same contract, as the data subjects had the right to know exactly what data were transmitted including any changes in arrears."[10]

At the same time, by the Civil Decision no. 132/03.12.2018, the Bucharest Court of Appeal, Section VIII of the Administrative and Fiscal Litigation, established the following: "*each information must be punctual, concrete, optimal and accurate, so that, depending on the stage of execution of the contract, the client manages his situations in relation to the bank properly. Under these conditions, a general information does not equate to an information in accordance with the provisions of art. 8 para. (2) and art. 9 of Decision no. 105/2007, considering the specifics of the respective data processing. Also, the statements given on the client's own responsibility at the beginning of the contract cannot function as a blank check, on the basis of which any data are then processed, without prior information to the client, information that is necessary for the exercise of specific rights. The European Court of Justice has ruled that: '(...) this requirement to inform data subjects of the processing of their personal data is all the more important as it is a necessary condition for them to exercise their right of access and rectification of the data processed, defined in Article 12 of Directive 95/46, and their right to oppose the processing of those data, referred to in Article 14 of that directive.*"[11]

In the same sense, it was held by the Bucharest Tribunal, this time not in an administrative and fiscal litigation procedure, but in a litigation initiated by the data subject against the operator - the non-banking financial institution and the Credit Bureau SA, having as object obligation to do - deletion of personal data from the record system of the Credit Bureau.

By Civil Decision no. 3339/29.10.2019, the Bucharest Tribunal decided the following: "*the transmission of personal data to the Credit Bureau was conditioned by a prior notification of the plaintiff, a notification containing the elements indicated by art. 9 paragraph 1 of Decision no. 105/2007, elements that were not mentioned in the notifications sent by to the appellant (...) Or, even for the hypothesis in which through the contractual clauses regarding the loan repayment it was brought to the notice of the respondent borrower that in case of delay with payment obligations will be reported to Biroul de Credit SA information regarding its identification data and financial statements, by virtue of the lender's right in this respect, the provisions of art. 9 para. 1 of Decision no. 105/2007 shall be respected. Thus, this decision was issued on the basis of the*

[10] Civil Decision no. 103/15.10.2018, Bucharest Court of Appeal, Section VIII Administrative and Fiscal Litigation, published online in the database rolii.ro.
[11] Civil Decision no. 132/03.12.2018, Bucharest Court of Appeal, Section VIII Administrative and Fiscal Litigation, published online in the database rolii.ro.

existence of credit agreements, so it took into account the possibility of non-compliance with contractual obligations by debtors, but the transmission of financial situation and personal data to credit bureaus-established to be made after a prior notification of the debtor, notification containing the mentions indicated in art. 9 paragraph 1 of Decision no. 105/2007."[12]

3. Processing of personal data under the RGDP

On May 25, 2018, Regulation no. 679 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 and repealing Directive 95/46/EC (General Data Protection Regulation, hereinafter referred to as "GDPR") came into force.

Following the entry into force of the GDPR, Directive 95/46/EC and Law no. 677/2001, as well as Decision no. 105/2007 were repealed.

According to the provisions of art. 6 para. 1 of the GDPR, the processing of personal data is legal if and to the extent that at least one of the following conditions applies: "*a) the data subject has given his/her consent for the processing of his/her personal data for one or more specific purposes; b) the processing is necessary for the execution of a contract to which the data subject is a party or to take steps at the request of the data subject before concluding a contract; c) the processing is necessary in order to fulfill a legal obligation incumbent on the operator; d) the processing is necessary to protect the vital interests of the data subject or of another natural person; e) the processing is necessary for the fulfillment of a task that serves a public interest or that results from the exercise of the public authority with which the operator is invested; f) the processing is necessary for the purpose of the legitimate interests pursued by the controller or a third party, unless the interests or fundamental rights and freedoms of the data subject prevail, which require the protection of personal data, especially when the data subject is a child.*"[13]

At the same time, the provisions of the GDPR introduced special conditions regarding the consent, incompatible with the previous way of obtaining the consent from the individual debtors for the introduction of personal data in the accounting system of the Credit Bureau S.A.

If prior to the entry into force of the GDPR the data entry agreement in the credit bureau's record system was often inserted even in the credit agreement, without the real possibility to refuse consent for processing, this being a condition for granting credit, starting with May 25, 2018, this practice was discouraged by the Credit Bureau, being invoked the processing based on the legitimate interest

[12] Civil Decision no. 3339/29.10.2019 pronounced by the Bucharest Tribunal, published online in the database rolii.ro.

[13] Regulation no. 679 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 and repealing Directive 95/46/EC, published in Official Journal 119L of 04.05.2016.

and not the consent, pursuant to art. 6 para. (1) letter f) of the GDPR, as can be seen in the position of Credit Bureau S.A. expressed on the company's website: *"the legitimate interest of the Participants and of the Credit Bureau in connection with the joint processing of personal data is represented by the need to carry out the responsible lending activity, under the conditions of protection of data subjects, compliance with the legal framework on creditworthiness assessment and credit risk reduction and preventing the use of the financial-banking system for carrying out activities contrary to the law."*[14]

This orientation towards the use of the legitimate interest for processing after the entry into force of the GDPR takes into account the recitals of the Regulation and the express provisions we will analyze below, as well as the opinions of the European Data Protection Board (hereinafter "EDPS"), representatives of the data protection authorities of the EU Member States, representatives of the Community authorities and bodies and representatives of the European Commission. Its role is as an advisory body in the field of personal data protection, replacing the former Article 29 Working Party.

Relevant in this respect is Recital 171 of the Regulation, according to which: "*where processing is based on consent under Directive 95/46/EC, it is not necessary for the data subject to give his or her consent once again if the consent has been given in accordance with the conditions laid down in this Regulation.*"[15]

The opinion of the EDPS on the consent obtained prior to the entry into force of the GDPR is as follows: "*the consent obtained so far is still valid as long as it complies with the conditions set out in the GDPR.*"[16]

At the same time, in support of the opinion according to which the consent for the processing of personal data given on the occasion of signing the credit agreement does not comply with the condition that the consent is free, the relevant provisions are the provisions of art. 7 para. (4) of the GDPR, according to which: *"when assessing whether consent is given freely, account shall be taken as far as possible of, inter alia, whether or not the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data which is not is required for the performance of this contract."*[17]

At the same time, with reference to the express provisions of art. 7 para. (4) GDPR and Recital 43 of the Regulation, the EDPS Opinion is clear in the sense that: *"article 7 (4) of the GDPR indicates that, inter alia, the situation of integrating consent into the terms or conditions to be accepted with them or*

[14] Substantiation of the legality of the processing of personal data in the credit bureau system, p. 6, the document is available online at the address https://www.birouldecredit.ro/wps/wcm/connect/bcro/aa8a1818-04ef-4c07-9c35-fae0c2727ad7/, accessed at: 09.04.2021.
[15] Regulation no. 679 of 27 April 2016.
[16] CEPD, Guidelines 05/2020 on consent under Regulation 2016/679, Version 1.1, Adopted on 4 May 2020, p. 36, the document is available online at the address https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_ro.pdf, accessed at: 09.04.2021.
[17] Regulation no. 679 of 27 April 2016.

"binding" the performance of a contract or the provision of a service of the request for consent for processing personal data that are not necessary for the performance of the contract or service in question is considered extremely undesirable. If consent is given in this situation, it is presumed that it is not freely expressed (recital 43)."[18]

At the same time, the use of consent as a legal basis for the processing of personal data of individual debtors within the Credit Bureau does not serve the interest of participants to keep personal data for a period of 4 years from registration, regardless of the will of debtors, which is, of course, to delete this data as soon as it affects their credit risk. This is because the consent can be withdrawn at any time, and as a consequence the participant and the Credit Bureau S.A. have the obligation to delete these data, pursuant to art. 7 para. (3) of the GDPR: *„the data subject has the right to withdraw his or her consent at any time. Withdrawal of consent does not affect the lawfulness of the processing carried out on the basis of the consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. Withdrawal of consent is as simple as giving it."*[19]

4. The conflict in time between Decision no. 105/2007 and GDPR

For these reasons, following the entry into force of the GDPR and the repeal of Directive 95/46/EC and Law no. 677/2001, as well as Decision no. 105/2007, Credit Bureau S.A. and the participants - banks and NFIs - based their processing of personal data in the record system of the Credit Bureau on art. 6 para. (1) lit. f) of the GDPR, the legitimate interest, both for the data entered after May 25, 2018, and for the ongoing processing, both for the credit agreements concluded after the entry into force of the GDPR, and for the credit agreements concluded before May 25, 2018.

However, the position of the Credit Bureau S.A. and banking companies and IFNs was challenged in litigations that began after May 25, 2018 and in which debtors requested the deletion of personal data on debts in the credit bureau's record system for alleged breaches of obligation of notification under Decision no. 105/2007, based on credit agreements that were concluded prior to May 25, 2018.

In these types of litigation, for which the lawsuits were filed after May 25, 2018, following the entry into force of the GDPR and the repeal of Directive 95/46/EC and Law no. 677/2001, as well as Decision no. 105/2007, but the credit agreements were concluded prior to this date, therefore at the time when Decision no. 105/2007 was still in force, Credit Bureau S.A. and the participants made defenses before the courts according to which, since Decision no. 107/2007 is repealed, only the provisions of the GDPR are applicable, regardless of the date of concluding the credit agreement.

The solutions of the courts at the level of Bucharest, studied in the present

[18] CEPD, op. cit., p. 11.
[19] Regulation no. 679 of 27 April 2016.

analysis, were different in this respect, thus identifying a case of non-unitary jurisprudence.

Thus, by the civil Sentence no. 10022/08.10.2019 pronounced by the Bucharest District 3 Court, the court ruled in favor of the Credit Bureau S.A. and the financial institution, stating that: *„regarding the legal provisions that are applicable to the present case, the court holds that according to the provisions of art. VII of Law no. 129/2018: The lawsuits pending on May 25, 2018, remain subject to the law applicable on the date of their commencement. On the contrary, in the case of proceedings initiated after that date, the provisions of the new law, namely those of the General Data Protection Regulation, apply. Also, according to art. VIII of the same normative act indicated that the law creates the institutional framework necessary for the application in Romania mainly of the provisions of art. 51-55, art. 57-59, art. 62, 68, 77, 79, 80 and 82-84 of Regulation 2016/679. Moreover, according to the provisions of art. V, Law no. 677/2001 is repealed, all references to it being interpreted as references to the General Data Protection Regulation and its implementing legislation."*[20]

In the same sense, the District 6 Court ruled in an identical case. Thus, according to the Civil Sentence no. 900/05.02.2020 pronounced by the District 6 Court of Bucharest, it was established that: *„regarding the applicable legal provisions, regarding the legal provisions that are applicable to the present case, the court holds that according to the provisions of art. VII of Law no. 129/2018: "The lawsuits pending on May 25, 2018 remain subject to the law applicable on the date of their commencement." Per a contrario, in the case of proceedings initiated after this date, the provisions of the new law are applicable, more precisely, those of Regulation no. 679/2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC. Also, in art. VIII of the same normative act indicated that the law creates the institutional framework necessary for the application in Romania mainly of the provisions of art. 51-55, art. 57-59, art. 62, 68, 77, 79, 80 and 82-84 of Regulation 2016/679. According to the provisions of art. V, Law no. 677/2001 is repealed, all references to it being interpreted as references to the General Data Protection Regulation and its implementing legislation."*[21]

However, the two sentences were not confirmed by the Bucharest Tribunal, the appeal of the natural person concerned by the processing being admitted in both cases.

Thus, the Bucharest Tribunal admitted the entire appeal against the Civil Sentence no. 10022/08.10.2019 pronounced by the Bucharest District 3 Court and ordered the obligation of the Credit Bureau S.A. and of the financial institution in deleting the data regarding the debts of the plaintiff - appellant by Decision no.

[20] Civil sentence no. 10022/08.10.2019 pronounced by the District 3 Court of Bucharest, published in the database rolii.ro.

[21] Civil sentence no. 900/05.02.2020 pronounced by the District 6 Court of Bucharest, published in the database rolii.ro.

4092/18.11.2020 pronounced by the Bucharest Tribunal, Civil Section VI. The same was the solution of the Bucharest Tribunal in the appeal declared against the Civil Sentence no. 900/05.02.2020 pronounced by the District 6 Court of Bucharest, by Decision no. 4774/21.12.2020 pronounced by the Bucharest Tribunal, Civil Section VI, Credit Bureau S.A. and the participant being obliged to delete the data.

The appellants' arguments concerned the violation by the courts of first instance of the principle of non-retroactivity of the civil law provided by art. 15 para. (2) of the Romanian Constitution.

According to the provisions of Art. 15 paragraph (2) of the Romanian Constitution: "*The law provides only for the future, except for the more favorable criminal or misdemeanor law.*"[22]

At the same time, according to chapter VII of Law no. 129/2018, it only provides that: „*The lawsuits pending on May 25, 2018 remain subject to the law applicable on the date of their commencement*"[23], and we consider that the article must be interpreted in conjunction with the provisions of Chapter VI of Law no. 129/2018, which provide for the regime of contravention sanctions applied by ANSPDCP.

Thus, according to chapter VI par. (3) of Law no. 129/2018: „*If the General Regulation on data protection and the legal provisions for its implementation provide for a more severe sanction, the contravention committed before May 25, 2018 will be sanctioned according to the provisions of the normative acts in force at the date of its commission. In situations where, according to the General Regulation on data protection and the legal provisions for its implementation, the act is no longer considered a contravention, it is no longer sanctioned, even if it was committed before May 25, 2018*"[24].

As a result, we consider that the admission of appeals in the specified cases was the correct solution, as the court of first instance did not take into account the fact that the provisions of Chapter VII must be interpreted in the context of Chapter VI of Law no. 129/2018, which strictly refers to the contravention sanctions applied by ANSPDCP to operators who violate the provisions of the law, but not to civil actions initiated directly by individuals injured in their rights against operators.

Thus, only in the field of application of contravention sanctions can the GDPR retroactivity be retained and only when the contravention sanction provided in the new law is more favorable or no longer exists, as clearly specified in

[22] The Romanian Constitution of 1991, republished, Official Gazette no. 767 of 31.10.2003.
[23] Law no. 129/2018 for the amendment and completion of Law no. 102/2005 regarding the establishment, organization and functioning of the National Authority for the Supervision of Personal Data Processing, as well as for the abrogation of Law no. 677/2001 for the protection of individuals with regard to the processing of personal data and the free movement of such data, published in the Official Gazette no. 503 of 19.06.2018.
[24] Ibid.

the provisions of Chapter VI para. (3) of Law no. 129/2018, quoted above. Only in this context the interpretation of chapter VII in the manner made by the court of first instance can be constitutional, therefore only in the realm of issues related to the application of contraventions, because only with regard to these art. 15 para. (2) of the Constitution provides for the retroactivity of the law.

As a result, in the field of civil law, for the protection of the rights of the persons concerned, in direct actions under the obligation to do, directed by the natural persons against the operators who made an illegal processing, Chapter VII of Law no. 129/2018 is not intended to provide for a retroactive application of the GDPR, and not even the legislator has established such a provision, any contrary interpretation being clearly unconstitutional.

In view of these arguments, we consider that the provisions of Decision no. 105/2007 applies and not of GDPR in the case of entries in the records of Credit Bureau S.A. based on credit agreements signed before May 25, 2018, regardless of the date of entry of negative data on late payments.

In this sense, it is very clearly established in the jurisprudence of the Bucharest Tribunal in another decision, which this time supported the favorable decision of first instance obtained by the debtor natural person against the Credit Bureau S.A. and the NFI in question.

Thus, by the Civil Decision no. 3339/29.10.2019, the Bucharest Tribunal established that: „*As long as the legal provisions in force at the date of concluding the loan agreement were not observed when transmitting personal data to the credit bureau, the repeal of Law no. 677/2001 on May 24, 2018 cannot attract the removal of the obligations established by it and the effects of Decision no. 105/2007, both regarding the transmission and maintenance of personal data at the Credit Bureau.*"[25]

5. Conclusions

According to the provisions of the law on data protection with character in force until May 25, 2018, the records of late payments in the accounting system of Credit Bureau S.A. could be made subject to two conditions: (1) the existence of the data subject's consent and (2) the notification of the data subject 15 days before the date of each report of late payment to the Credit Bureau, which must contain all elements of art. 9 para. (1) of Decision no. 105/2007. As it was noted in the constant jurisprudence of the Bucharest Court of Appeal and in the jurisprudence of the Bucharest Tribunal, the simple initial consent does not work as a blank check in this matter, and the summary notifications, without respecting all elements of art. 9 para. (1) of Decision no. 105/2007 are not sufficient, such a practice subjecting banking and non-banking financial institutions to the risk of fines and to obliging them to delete data.

[25] Civil decision no. 3339/29.10.2019 pronounced by the Bucharest Tribunal, published in the database rolii.ro.

By the entry into force of the GDPR and the repeal of the previous legislation in the field of personal data protection, therefore also of Decision no. 105/2007, Credit Bureau S.A. and lending institutions based their processing on the legitimate interest, on the basis of law provided by art. 6 para. (1) of the GDPR, both for data entered after May 25, 2018, and for ongoing processing, both for credit agreements concluded after the entry into force of the GDPR, and for credit agreements concluded prior to May 25, 2018. The reasons were represented by the fact that consent under the GDPR became a weak legal basis, which exposed them to the risk of deleting all registered personal data.

However, the position of the Credit Bureau S.A. and banking companies and IFNs was challenged in litigations that began after May 25, 2018 and in which debtors requested the deletion of personal data on debts in the credit bureau's record system for breaches of obligation notification under Decision no. 105/2007, based on credit agreements that were concluded prior to May 25, 2018.

The non-unitary jurisprudence analyzed in the case shows that the interpretations of the courts are not unitary in this respect, but it is noted that at the level of the Bucharest Tribunal the majority opinion is in the sense that the abrogation of Law no. 677/2001 on May 24, 2018 cannot attract the removal of the obligations established by it and the effects of Decision no. 105/2007, both regarding the transmission and maintenance of personal data at the Credit Bureau for credit contracts signed before the date of entry into force of the GDPR.

In view of these, it is necessary that banking companies and NFIs continue to apply the provisions of Decision no. 105/2007 regarding the notification of debtors 15 days before the date of each reporting in the Credit Bureau, with all the elements from art. 9 para. (1) of Decision no. 105/2007, for credit agreements concluded prior to May 25, 2018, even if the reporting is made after this date.

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