

Adriana Moțatu (ed.)
Ioana Nely Militaru (ed.)

Diversity and Interdisciplinarity in Business Law



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Editors:

Adriana Moțatu

Activity

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Publications

Adriana Moțatu is author of numerous books and articles from which we mention the books in co-authorship: *Studii de caz: Drept penal, Drept civil, Drept comercial (Case Studies: Criminal Law, Civil Law, Commercial Law)*, Milena Press, Bucharest, 2006; *Dicționar juridic român-francez-englez-portughez (Romanian-French-English-Portuguese legal dictionary)*, Milena Press, Bucharest, 2016.

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Preface

Editors

Lecturer Adriana Moțatu, PhD.

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Law Department, Bucharest University of Economic Studies

This volume contains the scientific papers presented at the Seventh International Conference „Perspectives of Business Law in the Third Millennium” that was held on 24 November 2017 at Bucharest University of Economic Studies, Romania. The conference is organized each year by the Department of Law at Bucharest University of Economic Studies together with the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: www.businesslawconference.ro.

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

- *Business Law and Investments.* The papers in this chapter refer to the heraldic insignia of institutions and societies in contemporary law, the punitive damages and the extent of its application in the Iraqi and Romanian competition laws, the situation in which the trademark owner is not also the user, considerations regarding the cases of nullity of fusion, the loyalty and non-competition obligation of the directors and associates of trading companies, intermediate contract in international trade, public-private partnerships and investments.
- *Criminal Law in Business Context.* This chapter includes papers on: fraud management in the Romanian criminal law, the embezzlement of public auctions in the Romanian law, some considerations on deceit offense in the Romanian criminal law, considerations on the subjective aspect of corruption offenses, customs offenses in comparative law, new specific techniques of investigation for the economic offences.
- *Business Tax Law.* The papers in this chapter refer to the legal status of the digital certificate used for submitting tax returns online in Romania, a view on the VAT split procedure in Romania, considerations about the Bitcoin currency, tax mediation in the Portuguese legal system,

- *Labor Law*. This chapter includes papers on: emigration of Croatian workforce after country joined the European Union, collective dismissal in Turkish labor law, the inclusion of persons with disabilities on the Romanian labor market.
- *Business Law and Information Society*. This chapter includes papers on: the right to information and the information society, legal reform of European Union data protection.
- *Environmental Law and Business*. The papers in this chapter refer to the role of environmental protection in the current international context and to the „Green” obligations regarding new constructions and their impact upon the real-estate market.

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical sciences, who are interested in recent developments and prospects for development in the field of business law 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 contemporary business law.

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BUSINESS LAW AND INVESTMENTS

Prolegomena to the Study of Heraldic Insignia: from the Medieval Coat of Arms (XIV-XVI Century) to the Heraldic Insignia of Institutions and Societies in Contemporary Law. Evolution, Legal Regime, Effects, Legal Protection, Prohibitions

PhD. student **Claudiu Ramon D. BUTCULESCU**¹

Abstract

This paper addresses certain issues regarding the legal status of heraldic symbols used by institutions and companies, in the framework of contemporary law, viewed from a historical perspective. The analysis starts with the legal regime of the medieval crests and coat of arms, and continues with the analysis of the rights that legal entities can exercise over the heraldic insignia, especially contemporary institutions and companies. The rights stemming from the use of heraldic insignia by institutions and companies are analyzed also from a legal perspective, both in terms of the ownership of such symbols, and from the perspective of the rights of use, which companies or institutions may have concerning with respect to these heraldic signs. To the same purport, the analysis concerning the continuity of legal rights over heraldic insignia is briefly studied, starting from the historical sources of the heraldic elements to the current civil law and regulations. Also, the article presents proposals for a law on the protection of heraldic elements related to the protection of historical crests and symbols, as well as a comparative analysis of European and international legislation on this matter. At the end of the paper, short conclusions are presented, in which the author seeks to clarify the legal status of heraldic insignia that can be used by legal persons, as well as certain prohibitions and legal safeguards.

Keywords: coat of arms, heraldry, intellectual property, emblem

JEL Classification: K10, K40

1. Introductory aspects

Heraldic science is an auxiliary science of history, studying the use of symbols identifying individuals, institutions, corporations, etc.² In specialized literature it was stated that heraldry is the science concerning the coat of arms, and studies the coat of arms of counties, cities, noble families etc.³ The beginnings of the right to wear a coat of arms lie in the medieval period. For example, in the

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² <https://www.britannica.com/topic/heraldry>

³ Aurelian Sacerdoţeanu, *Îndrumări în cercetări istorice*, „Graiul literar” Typography, Bucharest, 1943, p. 21

tapestry of Bayeux some emblems can be seen on the shields of Norman knights, although in the literature it has been shown that they are not likely to have heraldic significance because the same knights have different symbols in the illustrations depicted in the tapestry⁴. Heraldic signs in the past were genuine identifying attributes of people. In this paper, issues related to the rights related to the use of these heraldic emblems will be analyzed. The most common name of a heraldic sign is the coat of arms, which was usually linked to the feudal nobility, known as the noble coat of arms. To be able to concretely analyze the legal regime of these nobility coat of arms, it is first necessary to analyze their way of acquiring. In a reference work in the field of heraldry, it is stated that "according to classical doctrine, several ways of acquiring nobles are known: a) the so-called assumed or self-styled coat of arms, in which case the original owner of the heraldic sign is also its creator b) the grants of arms in which the coat of arms is conferred upon a person by a certain sovereign."⁵ The sovereign was considered "*fons honorum*," a fountain of honor, with full control over the coat of arms⁶. From this classification by one of the most prestigious researchers in the field of heraldry, we can begin a brief analysis of the legal status of these coats of arms. First, the rights are different nature, in relation to their way of acquiring. Thus, we can assume that in the case of coat of arms created and assumed by their possessors, they acquired a right of ownership, even if unrecognized by the sovereign and thus legally ineffective, whereas in the case of the conceded arms, the acquired right was one of use but acknowledged by a concession act, such as a grant of arms. Of course, in the case of the concession, the grant could also include the conditions under which the right to wear a coat of arms could be exercised, but it also brought with it the benefit of unanimous recognition by all the subjects of the sovereign. At the same time, it is plausible to believe that the legal regime of the two categories of armorial bearings was different. Regarding granted arms, things seem simple, in the sense that the temporal applicable law according to the *tempus regit actum* principle was the law in force at the time of issuing the grant and the right to use the coat of arms was subject to special conditions entered in the respective grant of arms. In the case of the self-styled coat of arms, it is more difficult to determine precisely the applicable law, all the more so since it is difficult to identify the time at which that coat was first made or used. However, we appreciate that these heraldic signs were probably governed by customary rules, derived in turn from natural law. For example, *jus valachicum* was an ensemble of unwritten customary norms⁷, which in turn had their source in conceptions circumscribed to natural law. As for the nature of the rights to wear the coat of

⁴ Stephen Slater, *The complete book of Heraldry*, Anness Publishing Ltd., London, 2014, p. 12.

⁵ Dan Cernovodeanu, *Știința și Arta Heraldică în România*, The Scientific and Encyclopaedic Publishing House, Bucharest, 1977, p. 40.

⁶ Arthur Charles Fox-Davies, *A complete guide to Heraldry*, T.C.&E.C. Jack, London, 1909, p.27.

⁷ Andreea Ripeanu, *Contribution of Romanian Feudal Law to the Development of Juridical Science*, Supplement of Valahia University Law Study, 2015, p. 238.

arms circumscribed to the two categories, there were similarities and differences. The coat of arms, both self-styled and granted, had the character of incorporeal goods meant to contribute to the image of the bearer. However, the right to wear a self-styled coat of arms was a principal and complete right, because its creator had all three attributes of property, even if the sovereign could forbid the use of the coat by its creator. The right to wear the self-styled coat of arms was also non-opposable. Without the sovereign's confirmation, the right itself was not recognized. Once confirmed, the right that had been exercised previously, was opposable *erga omnes*. With regard to the right to wear the coat of arms granted by the sovereign, we can see that the possessor has only a right of use. Moreover, he could not be considered a possessor in the modern sense of the word, but only a precarious detainee who possessed in the name of the sovereign, who in turn had the right of disposition on that coat. Another interesting aspect of the nature of these rights concerned the transferability of the right by conventional means or inheritance. In principle, in the case of grants, the conditions of transmissibility were stipulated in the concession diploma. If the coat of arms holder no longer existed and there were no persons who could legitimately use the coat of arms after his death, we consider that all rights of use returned to the owner of the property right, namely the sovereign, and if the form of government would no longer allow the right to wear a coat of arms, the heraldic emblems previously granted should be considered as part of the state domain, having the character of inalienable rights. In the case of the self-styled coat of arms, it must be distinguished between personal and family arms. A personal coat, as were most of the Boyar sealings in Wallachia, for example, probably could not be legally transmitted, having *intuitu personae* character, non-transmittable and closely related to the holder. Being transferable only if the social or family traditions allowed this sort of transferred. As far as the self-styled family arms are concerned, we can presume that they could be passed on by inheritance, although at least one interesting legal issue appears in both cases: did the successors acquire a preexisting right or in fact become holders of a new right? We appreciate that both theories can be supported with convincing arguments. Thus, if the self-style arms involved the existence of a right of property, there is no impediment to it being transmitted, at least by way of succession. On the other hand, in view of the personal character of these rights, the ownership of the coat of arms would have ceased with the death of the owner, possibly with the right of the heir to use part or the entirety of the coat of arms in relation to the provisions legal or lack thereof, in relation to family customs.

All these questions have been analyzed from the perspective of the possibility of their integration into the requirements of the present law, without considering the more complex situations of their recognition and validity in the medieval period.

2. The current legal regime of the rights of individuals to wear heraldic insignia

The individual is the individual subject of law, the holder of rights and obligations. Regarding the possibility for the individual to have the right to wear heraldic insignia, we will confine ourselves to analyzing the emblems of private nature without going into the more generous space of the heraldic signs conferred by various authorities under the law (decorations, orders, insignia, etc.).

Firstly, it is necessary to establish the legal framework and the law applicable to such rights. In Romania, the right of a natural person to create a heraldic sign, coat of arms, emblems is not expressly regulated, but there are special provisions limiting this right in the sense that certain prohibitions or limitations are imposed by law on the use of specific heraldic emblems. For example, by art. 10 of the Law no. 102/1992, the arms of the municipalities, towns and communes are approved by the Government, at the proposal of the county councils or, as the case may be, of the local councils, with the approval of the National Commission for Heraldry and Genealogy. Also, the Romanian state's right regarding the State coat of arms of Romania is protected, given that the state is the holder of the rule of law and a legal personification of the nation⁸.

Considering that the right to wear a coat of arms by individuals is not expressly regulated, we consider that the legal norms governing these juridical situations are stated within article 1 of the Romanian Civil code as such these rights are regulated by legal customs or the general principle of law.

Regarding the nature of the heraldic arms in the present Romanian law, granted heraldic emblems can no longer be envisioned, given that the form of government of Romania is republican and the concession of coat of arms usually accompanied the establishment of a noble status. Moreover, noble titles have been abolished since the 19th century, and the Romanian Constitution of 1923, art. 10, par. (2) stated that "the titles of nobility are and remain unadmitted in the Romanian State". We consider that, with regards to the coat of arms created and assumed by their owners, they may be subject to the regime of Law no. 8/1996, regarding copyright, which stipulates in art. 7, par. (1), lit. g) that works of graphic or plastic art, such as sculpture, painting, engraving, lithography, monumental art, scenography, tapestry, ceramics, glass and metal, drawings, designs and other works of art intended for practical use are subject to copyright law. Moreover, art. 9, par. (1) lit. c) of the same law stipulates that the official symbols of the state, public authorities and organizations such as: the coat of arms, the seal, the flag, the emblem, the badge and the medal cannot benefit from the legal protection of copyright. That means following a *per a contrario* argument that

⁸ Cătălin-Silviu Săraru, *The State and the separation of powers*, „Juridical Tribune”, volume 5, issue 2, December 2015, p. 274.

the symbols that are not official and do not belong to the state, the public authorities and the organizations, respectively: the coat of arms, the seal, the emblem, etc. may be subject to copyright protection. Of course, the exercise of such rights must be done in good faith, under the provisions of article 14 of the Romanian Civil code, which enshrines the obligation of individuals to exercise their rights and obligations in good faith. Breach of good faith in the exercise of such rights leads to the occurrence of an abuse of law, which will have the effect of invalidating the right and possible damages for the person who has abusively exercised the right. Such abuse of rights consists in the use of a heraldic emblem which previously belonged to other persons, without its permission or in the case of deceased persons, without having any connection with the latter. A graver offence is the use without rights of historical heraldic insignia used by various illustrious persons over time, since these insignia, in the form of seals, coats, bearings, are genuine identifying attributes of the person concerned, and unjust use of these heraldic signs creates a misleading appearance of the new user's connection with the previous one. Regarding the protection of these heraldic signs, we appreciate that these rights, subject to the law no. 8/1996, can cover both the moral rights of the author and the patrimonial rights of the author and may also be subject to active plurality in the form of authorship. In the doctrine, it has been shown that there can be active plurality in non-patrimonial relations, in the case of co-authorship regarding intellectual property rights⁹.

3. The current juridical status concerning the rights of legal entities to wear heraldic insignia

According to the Law no. 26/2000 regarding the Romanian Trade Register, the attributes of identification of a national company, comprises optionally an emblem. The same normative act, at article 30 defines the emblem as a sign or name that distinguishes a trader from another of the same type. The methodological norms of Law no. 26/2000 stipulate that for the purpose of registration, the emblem is subject to the verification of the general and special conditions of legality, availability and distinction, by comparison with registered or reserved emblems. It follows from the text that the emblem of the company must be distinct from other registered or reserved emblems. Regarding the possible resemblance of the company's emblem with other earlier heraldic signs, the same methodological rules provide for the prohibition of the registration as emblems, without the authorization of the competent authorities, of figurative names and representations, which include reproductions or imitations of armorial bearings, flags, emblems, official seals, coat of arms, etc. From the wording of art. 62, par. (3) of the

⁹ Gabriel Boroï, Mona-Maria Pivniceru, Tudor-Vlad Rădulescu, a.o., *Fișe de Drept civil : partea generală. Persoane. Drepturi reale principale. Obligații. Contracte. Succesiuni. Familie.*, Hamangiu Publishing House, Bucharest, 2016, p. 32.

Methodological Norms, it follows that the enumeration is not exhaustive and can be extended to other graphic elements.

Concerning the right of companies to bear heraldic signs of historical origin as emblem, even if there are no explicit prohibitions, we consider that, based on the same principle of good faith, the adoption of a similar emblem of a heraldic sign of historical origin is an abuse of law that can be sanctioned as such.

4. Comparative aspects regarding the regulation of the right to wear heraldic signatures

In Romania the right of individuals to wear heraldic insignia is protected only generically by the provisions of copyright law. In the legal systems of other state there are specific regulations and jurisprudential approaches. It should be noted that in the past, in Romania, the identification attributes of individuals enjoyed wider protection. For example, it is useful to mention the existence of a Romanian law in 1895 which protected the surname and forbade administratively taking on names that have historical significance. Unfortunately, in Decree-Law no. 646 of August 13, 1945, we no longer find this kind of protection of names, which has led to a diminution of the protection of this right. In Germany, article 12 of the German Civil Code (BGB) stipulates the protection of the rights regarding names¹⁰. In countries where the form of government is represented by monarchy, there are rigorous regulations regarding the right to wear coat of arms, whether of a noble origin or not. In countries where the form of government is the republican, usually armorial bearings, which belong to the nobility, have been abrogated, although some states recognize in a form or other noble arms acquired before the republic.

There are also states where the republic is the form of government, but which regulates the right to wear coat of arms, including those of private interest, by special laws. For example, in the Republic of Moldova, in 2011, law no. 86/2011 on public symbols was enacted. Although at first sight it may be thought that the subject matter of the respective law concerns only the state symbols, in fact the law also regulates the juridical regime of private coat of arms. Thus, in article 3 of the said law, particular symbols are defined as public symbols indicating the identity of individuals (individuals and families), and heraldic signs are defined as emblems, coat of arms and other public identification insignia designed according to heraldic science and art¹¹. Article 7 of the cited normative text enumerates the particular symbols, such as: personal or family coat of arms, banner, the family anthem and the personal or family armorial seal. Regarding

¹⁰ https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0048 (consulted on 5.10.2017).

¹¹ <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=340408&lang=1> (consulted on 5.10.2017).

the recognition of these particular symbols, the law specifies that they can be recognized by filing an application to be registered with the General Armorial of the Republic of Moldova, based on the owner's request and the decision of the National Heraldic Commission. As to the use of these symbols, the law provides that they can be used without limitations, but at the same time without violating the legitimate rights and interests of citizens or public order. Of course, the wording is interesting in that the use of private symbols according to the law, could be interpreted on a *per a contrario* basis that the rights and legitimate interests of non-citizens are not relevant from this point of view. In any case, the legislative initiative is worthy of praise because it regulates an area that in the Romanian legal system is left almost unregulated.

5. Proposals regarding the improvement of the legal regime of heraldic insignia

Given that legislation is inadequate in the Romanian legal system on the protection of heraldic insignia, we believe that it is necessary to lay out a rigorous legal framework to protect these rights both with regard to historical symbols and with regard to the future use of these rights. A first step in this direction would be the adoption of a law clearly regulating the rights of individuals to use and register heraldic insignia, including the sanctions that may be applied in the event of non-observance of the rules of exercise or in the case concerning abusive use of such insignia. Also, the creation of a Romanian State Armorial, which would include private heraldic insignia, besides the heraldic emblems of the states and public authorities, would be more than welcome. Also, heraldic insignia of a relevant historical significance, even if they are not currently used by the Romanian state, should be made legally unavailable, so that they cannot be used either in part or in full, except for their use in research papers, scientific analysis, etc. Also, this armorial should include heraldic insignia of natural and moral persons, created a registered by abiding certain rules imposed by the heraldic science and art and approved by the National Commission of Heraldic and Genealogy. Once legally drafted and created, they can be included in this armorial, acquiring an *erga omnes* opposing effect, being also juridically protected.

6. Conclusions

In this article we tried to present the legal regime of heraldic insignia, starting from the legal status of medieval coat of arms. As a result of the analysis we have carried out, it may be concluded that in the medieval period the right to wear a coat of arms could be a real property right or a right of use depending on the source from which the right to wear the coat of arms emanated. In the present, we appreciate that the field that should legally regulate the right to wear heraldic

insignia is insufficiently developed. Therefore, in order to provide sufficient protection both for the historical symbols contained in past heraldic representations and for the constitutive rights that may arise as a result of the heraldic representation in the contemporary society, it is necessary to adopt specific legislative measures regulating the rights and obligations in this legal area.

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Punitive Damages and the Extent of its Application in the Iraqi and Romanian Competition Laws

PhD. student **Al Jashami Muhammed Khariy QSAIR**¹

Abstract

Punitive damages continue to take a large part of the jurisprudential debate between law scholars between supporters and opponents for reasons of constitutionality. This research is an attempt to determine the possibility of applying punitive damages in competition laws. The researcher adopts the method of analyzing and comparing legal texts. The results of the study highlight the importance of punitive damages in competition laws.

Keywords: *punitive damages; competition law; fines; consumer.*

JEL Classification: K22

1. Introduction

Punitive damages serve dual purposes of retribution and deterrence. In an attempt to “compensate” the injured person for the loss suffered. Where a defendant has engaged in particularly egregious conduct, however, punitive damages can be awarded in addition to compensatory damages. A punitive damages award will generally exceed the actual value of the harm caused by the defendant. Although the permissible motivations behind awarding punitive damages are somewhat unsettled, it is generally accepted that punitive damages serve the dual purposes of deterrence and retribution, for instance, there is some doubt about the compensatory rationale of punitive damages, explaining that today punitive damages should be understood as “quasi-criminal” “private fines” designed to punish and deter the misconduct at issue. The purpose of competition laws in the world is to prevent and punish acts against legitimate competition and to prevent the bad intention of monopolizing the market by means of fraud. It works to protect the interests of consumers, which clearly shows the need to deal with any kind of seriousness with any violation of consumer rights and protect it from fraud or deception by the creators Employers seem to think the idea of punitive damages is the most effective way to achieve the objectives of the competition law, but the handling of national legislation does not refer to this position clearly.

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2. A quick look at the meaning and origin of punitive damages

Punishment is granted for two basic purposes: punishment and deterrence, punishing the defendant for misconduct or acting with intent to harm others or for a defective product that resulted in harm to others, intentional negligence or defamation. The second purpose is to deter others from committing the same act in the future². Punitive damages differ from compensatory damages. Compensatory damages are awarded to compensate a person for an injury suffered by the party for an act committed by another person. Its purpose is to compensate the injured party and restore the situation to what it was before the accident. The claimant cannot receive punitive damages without first proving that the defendant is liable for compensatory damages, and punitive damages can only be awarded if compensatory damages are awarded and vice versa³.

Punitive damages may be awarded in a civil lawsuit for injury caused by a faulty product, a tort (such as negligence or libel), or breach of a contract. The amount of money that may be awarded as punitive damages differ widely from state to state. Some states have legislated laws that limit the award to a specific dollar amount (such as \$500,000) or a definite multiple of the compensatory damages. Some states use both types of caps. These caps may apply only to doubtless types of cases. For example, a cap of three times the compensatory damages amount may apply only to lawsuits enclosing pollutants⁴ Lord Devlin's comments on the application of punitive damages. The only three cases where compensation is allowed to be punitive, for the purpose of punishing the defendant rather than merely compensation for the claimant, in cases, oppressive, arbitrary or unconstitutional actions by the servants of government.

Where the defendant's conduct was calculated to make a profit for him. Where a statute expressly authorizes the same.⁵

² Thomas J. Collin, *Punitive Damages and Business Torts: A Practitioner's Handbook*, American Bar Association, 1998, p1.

³ William Schwarzkopf, John J. McNamara, *Calculating Construction Damages*, Aspen law & Business, 2001, p4.

⁴ Marianne Bonner, punitive damages, available on: <https://www.thebalance.com/punitive-damages-462466>.

⁵ *Rookes v Barnard* [1964] UKHL 1 is a UK labour law and English tort law case and the leading case in English law on punitive damages and was a turning point in judicial activism against trade unions. It is noted that the courts in the United States of America have seen many decisions that included punitive damages of large amounts unprecedented and created a doctrinal controversy, for example, *Liebeck v. McDonald's Restaurants* (1994), *BMW of North America, Inc. v. Gore* (1996), and *State Farm Auto. Ins.v Campbell* (2003).

3. Define the concept of competition law and antitrust

Competition law is a law that consolidates or intends to safeguard market competition by regulating anti-competitive conduct by companies⁶. Competition law, or antitrust law, has three main elements:

- preventing agreements or practices that restrict free trading and competition between business. This includes in particular the repression of free trade caused by cartels.

- forbidding abusive behavior by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include unfavorable pricing, tying, price gouging, refusal to deal, and many others.

- overlooking the mergers and acquisitions of large corporations, including some joint ventures⁷. The main objectives are to maintain and encourage competition in order to enhance the efficient use of resources while protecting economic freedom of employment various market participants. Competition policy has generally been considered to be achieved or maintained. A number of other objectives also include: pluralism, decentralization of economic decision-making, Prevention of misuse of economic power, promotion of small businesses, equity, equity and others Social and political. It has been observed that these "complementary" objectives tend to differ⁸. The objective of competition policy is to contribute to public welfare and economic growth by promoting market conditions in which the nature, quality and price of goods and services are determined by competitive market forces. In addition to benefiting consumers and the judicial economy as a whole, such a competitive environment rewards companies that respond efficiently to consumer demand. In general, competition law and policy prohibits: (a) basic cartels / abstract restrictions; (b) other anti-competitive conventions; (c) unilateral anti-competitive behavior that exploits or extends market dominance or market power; anti-competitive mergers and acquisitions⁹. Traditional competition policy, in its narrow sense, is the enactment and enforcement of competition laws governing anti-competitive practices. However, in its broadest sense, competition policy encompasses more fundamental aspects of economic policy aimed at promoting market principles throughout the economy. For example, competition policy includes a policy of regulatory reform that eases market entry barriers and ensures equal employment opportunities for market participants; injecting market principles into the privatization process of state-run enterprises; playing

⁶ Richard Whish, David Bailey, *Competition Law*, OXFORD, university press, eight edition, 2015, p5.

⁷ see: competition law, available on https://en.wikipedia.org/wiki/Competition_law#Principle

⁸ See: *The objective of competition law and policy*, Note by the Secretariat, CCNM/GF/COMP (2003)3.

⁹ See: *Competition Law and Responsible Business Conduct*, Global Forum on Responsible Business Conduct, Paris on 18-19 June 2015.

the role of pro-competitive agents to ensure sectorial policies follow market principles; and developing a culture of competition by instilling a competitive mentality in market players¹⁰. With regard to the European Union, its competition law deals with Cartels, mergers, anti-competitive agreements, excesses in a dominant position and state intervention as well as the enforcement of competition rules. This is done through two specific elements of EU competition law that define the scope of general application or jurisdiction. While the first element refers to the concept of undertaking, which is used to determine the scope of competition law in terms of personal jurisdiction, the second element relates to the application of competition law in the European Union depending on the dimension of the case. The competition law of the European Union includes multiple objectives. The main objectives are to achieve market integration and protect consumer welfare, freedom of action and equity¹¹. It is important to mention here that the Treaty on the Functioning of the European Union (TfEU)(2007), has given the EU exclusive jurisdiction in establishing the rules of competition necessary to operate the domestic¹². Some this is the same principle adopted by the World Trade Organization, which came close to defining the objectives of competition law than in the European Union, when it was decided that the competition law aims at : control the provisions relating to price freedom, determine the rules governing the freedom of competition and determine the obligations of producers, traders, persons providing services and other intermediaries in order to avoid any action that violates the rules of competition and to ensure transparency of prices and overcome monopoly practices or practices aimed at influencing legal competition and preventing abuses price control and control of economic concentration¹³. It is clear that the purpose of competition law is to maintain and strengthen the competitive structure of markets for goods and services. The obvious issue in simple economic theory is that the major winners of competitive market structures are consumers of goods and services. Full competition ensures that all consumers who value a certain good or service in more than the cost to the community to produce good or provide service, will get it at a price that reflects the exact social cost¹⁴. As for the strengths and weaknesses of the Romanian competition system, the legislative and regulatory framework of the Romanian competition system is fully in line with the standards established by the international community on compe-

¹⁰ See: *The Role of Competition Policy in Economic Reform*, October 2001.

¹¹ See: Elements and Goals of EU Competition Law European Essay, available on: <https://www.uniassignment.com/essay-samples/law/elements-and-goals-of-eu-competition-law-law-european-essay.php#ftn2>.

¹² See: Article 3, paragraph (b).

¹³ See: *The Executive Regulation of Competition Law, chapter1, article 2 for WTO*, available on: www.wto.org/english/thewto_e/acc_e/sau_e/WTACCSAU59A6_LEG_4.pdf - 41k - 2016-07-26.

¹⁴ See: *Fernando Gómez Poma, EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics perspective, Barcelona, January 2003, p4.*

tition law. It is well anchored in European competition law policies and enforcement standards and practices and appears to be in line with the OECD recommendations, which are particularly relevant to competition law¹⁵. In an analytical study of the competition law in Iraq and Romania, there is a clear consensus between the two laws on the scope or purpose of the law: protecting, maintaining and motivating legitimate competition, preventing monopoly and creating a competitive environment to enhance consumer interest and improve quality for goods and services offered in the market¹⁶. As for the scope of the law in terms of persons and place, we find that both the Iraqi and Roman law extended the validity of this law to both natural and moral persons. It should be mentioned here that the Roman law was more accurate through the non-recognition of the nationality of the perpetrator, Romania or other countries¹⁷. As for the scope of the law in place, the two laws make the provisions of the law apply to acts or activities committed within the national territory, as well as those that are committed outside the national territory when they have effects within those national territories, and this is a very important issue for two reasons, the second relates to the protection of the consumer, and the second relates to punitive damages, as some countries refuse to apply such compensation, which creates some kind of conflict in the case imposed on violators of the provisions of competition law¹⁸. The question that we would like to look for here is: what is the relationship of competition law to the determination of compensation or the amount of damage? In other words, what are the strengths of competition law that can open the door to the application of punitive damages? The answer can be determined by that Punitive damages are a means of punishing the defendant in a civil action and are based on the theory that the interests of the affected society and individuals can be met by imposing additional damages on the defendant. The objectives of punitive damages are to punish the defendant to misconduct and to deter the defendant and others from similar misconduct in the future, the conduct that justifies such damage includes bad faith, fraud, deception, oppression, obscene, violent, brutal, wicked, and reckless. These aggravating circumstances usually refer to cases in which the defendant has acted intentionally or in a manner that does not comply with the rights and interests of the plaintiff and society¹⁹. The second important point here is to what extent the competition laws include the material penalties or

¹⁵ See: *Competition Law and Policy in Romania*, A Peer Review, 2014, p. 84.

¹⁶ See: *Article 1 of Romania Competition Law 21/1996*, published in the *Romanian Official Journal*, Part I, no. 88 of April 30, 1996; also see: *article 2 of Iraqi Competition Law and Prevention of Monopoly No. 14 of 2010*.

¹⁷ See: *Article 2, paragraph A of Romanian law*, and *article 3, paragraph A of Iraqi law*.

¹⁸ See: *Article 3, paragraph A of Romanian law*, and *article 3, paragraph A of Iraqi law*. Also: *article 31, paragraph 14 from India competition Act, 2002 No. 12 OF 2003*. also: *article 5 from Egyptian law to protect competition and prevent monopolistic practices No. 3 of 2005*. Also: *article 1 from Hungarian competition Act (Act LVII of 1996)*.

¹⁹ See: David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363 (1994), p373.

the monetary fines that formed the salient feature of these compensations, which made them extraordinary compensation and raised their unexpected amounts of jurisprudential argument that continues to this day compared to compensation compensatory and the principle of full compensation prevailing and approved in most Laws of States , especially with those who see compensation as a way to restore the situation to what it was as if nothing had happened²⁰.

4. Acts prohibited by competition law and conform to the content of punitive damages

Most of the laws of competition in the countries of the world prohibit a range of actions in order to ensure freedom of competition and prevent monopoly in the market and consumer protection and the prevention of fraud, especially in business and the exploitation of the legislation itself. We note here that punitive damages aimed at the essence of consumer protection from the methods of fraud pursued by the producer or supplier or supplier with the intention of making a profit at the expense of the consumer²¹. This point is clear in Iraqi law when addressed in some detail. The law prohibits any written or oral practices or agreements that constitute a breach of competition and prevent monopoly, as well as behavior that impede the entry of enterprises to the market, especially the loss sale²².

5. Penalties in competition law and their compatibility with punitive damages

It is necessary to say that punitive damages are unforeseen damages, in the sense that they are unforeseeable damages. This matter is subject to each issue and its circumstances. However, as long as the compensation determined by the court is not double compensation for losses and losses, it can be said that we are

²⁰ For example, in case *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), an Alabama jury awarded \$4,000 in compensatory damages (lost value of the car) and \$4 million in punitive damages, which was later reduced to \$2 million by the Alabama Supreme Court. Also: *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

²¹ In *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, the court affirmed a punitive damages award against the manufacturer of a tampon, in an action by a plaintiff who contracted toxic shock syndrome. The evidence showed that adequate testing would have revealed an association between tampon use and toxic shock, that the manufacturer's testing was inadequate, and that the manufacturer decided not to do any further testing even with faced with consumer complaints. The appellate court affirmed the award of punitive damages, holding that the evidence demonstrated that the manufacturer had acted in conscious disregard of the safety of others. (174 Cal.App.3d at 869).

²² See: article 10 of Iraqi competition law. Noting that the Romanian competition law is not far from this point and there is a great match between Article 10 of the Iraqi law with article 5 of the Romanian law.

facing punitive damages. This applies in the case that the law in the state did not set a standard for determining such compensation or did not provide for punitive damages. Accordingly, with reference to the competition law and the importance of the issues dealt with in this law, it has set a complete chapter of penalties in case of violation of its provisions, the amount of the fine cannot be matched with the importance of the issues of competition law, which we believe that the legislator was better to keep the general rules in liability and compliance it is. The Romanian competition law was more clear and forceful in the case of fines imposed in the case of violations of its provisions. The percentage method was used to impose the amount of the fine rather than the lump sum, a method that achieves the idea of punishment and deterrence. It also approaches the idea of punitive damages²³.

6. Conclusion

Punitive damages is two-way compensation that complements each other, punishing the wrongdoer at the present time, and ensuring future individuals, the best weapon in the face of those who use fraud, deception or bad faith to earn money by such illegal methods, exposing individuals as consumers ,also, the competition law works to guarantee freedom of competition, prevent monopoly, confront unfair competition, and all related to the production and manufacture of goods and services, ensure consumer safety, ensure that companies and manufacturers work fairly and achieve consumer welfare. But competition law still work in an inefficient way with those who violate the rules of legitimate competition. We believe that the competition laws in Iraq and Romania have dealt with all the joints of the competition well, especially the Roman law, which adopted the percentage method in calculating the fine as a punishment for violators of the law. However, both jurists are still far from resort to punitive damages, although it is the best weapon in the face of violators of competition rules.

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²³ See: Romanian competition law in the Article 56 that: (1) The following deeds are deemed offences and shall be sanctioned by fines of up to 10 % of the aggregate turnover of the financial year prior to the sanctioning.

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When the Trademark Owner is not also the User. Consequences for the Asset Valuation. The Judiciary Technical Expert's Point of View

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Abstract

The intangible asset valuation is increasingly important both to the judicial practice and private activity. There are dozens of intellectual property trials in Romania annually, of which a significant number are related to the violation of rights and, implicitly, to the assessment of the prejudice. Wishing to remain the owner of the intangible asset even when the company enters into a potential insolvency procedure, the owner of the company protects his asset by his own name, but forgets or fails to establish a transfer of rights agreement between himself and his company - usually a license, so that the use by the firm of their own asset, e.g. a trademark, be fully legal. The fair valuation of the asset as well as of the loss must have as main source the accounting data of the parties to the process. This paper highlights both the difficulties encountered in the evaluation process when the trademark owner is not the user, and some of the consequences for the asset evaluation process. The material is based on real-life situations in the practice of over 20 years as a judicial expert of the author and seeks to be a real support in the act of justice.

Keywords: intellectual property, counterfeiting, tacit licence, title holder, evaluation, unfair competition, transactional relationships

JEL Classification: K49, L14, M29, O34

1. Introduction

The ever growing number of specialised papers on topics from the field of intellectual property assets demonstrates the interest of specialists in this spe-

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cialised branch of the Law. Numerous academic law books, true wells of Romanian theory^{2,3,4,5,6,7} and judicial practice^{8,9,10,11,12,13} in the field of intellectual property, are complemented by collections of cases on the dockets of foreign courts, specialised books on topics from the field of intangible asset valuation authored by foreign specialists with a rich practice in the field^{14,15,16}, as well as by Romanian articles and books in the fields of Engineering and Economics dealing with either risk¹⁷ topics from this law-engineering-economics borderline field, or implications in the act of justice of the industrial/intellectual legal technical expert reports.

From all the intangible assets of the intellectual property, the trademark is the most frequently encountered subject both in economic transactions and in activities of a criminal nature.

Two completely different situations reflect the title of this paperwork.

² Eminescu, Y., *Dreptul de autor. Legea nr.8 din 14 martie 1996 comentată* Ed. LUMINA LEX, Bucharest, 1997.

³ Căpăţină, O., *Dreptul concurenţei comerciale. Concurenţa Patologică. Monopolismul*, Ed. Lumina Lex, Bucharest, 1993.

⁴ Căpăţină, O., *Dreptul concurenţei comerciale. Concurenţa neloială pe piaţa internaţională*, Ed. Lumina Lex, Bucharest, 1994.

⁵ Căpăţină, O., *Dreptul concurenţei comerciale. Concurenţa onestă*, Ed. LUMINA LEX, Bucharest, 1994.

⁶ Eminescu, Y., *Regimul Juridic al Mărcilor*, Ed. Lumina Lex, Bucharest, 1996.

⁷ Înalta Curte de Casaţie şi Justiţie, *Jurisprudenţa Secţiei civile şi de proprietate intelectuală pe anul 2006. Recursuri în interesul legii în materie civilă*, Ed. Hamangiu, 2007.

⁸ Ciutacu, F., *Dreptul de proprietate intelectuală. Dreptul de autor. Dreptul de proprietate industrială. Culegere de speţe. Modele de contracte*, Ed. Themis Cart, Slatina, 2005.

⁹ Spineanu-Matei, O., *Proprietate intelectuală. Mărci/Brevete de invenţie/Desene şi modele industriale/Dreptul de autor şi drepturile conexe. Practică judiciară*, Colecţia Jurisprudenţă, Ed. Hamangiu, Bucharest, 2006.

¹⁰ Spineanu-Matei, O., *Proprietate intelectuală (2). Mărci/Brevete de invenţie/Desene şi modele industriale/Dreptul de autor şi drepturile conexe. Practică judiciară 2006 - 2007*, Colecţia Jurisprudenţă, Ed. Hamangiu, Bucharest, 2007.

¹¹ Spineanu-Matei, O., *Proprietate intelectuală (3). Mărci/Brevete de invenţie/Desene şi modele industriale/Dreptul de autor şi drepturile conexe. Practică judiciară 2007 - 2008*, Colecţia Jurisprudenţă, Ed. Hamangiu, Bucharest, 2009.

¹² Spineanu-Matei, O., *Proprietate intelectuală (4). Mărci/Brevete de invenţie/Desene şi modele industriale/Dreptul de autor şi drepturile conexe. Practică judiciară 2009*, Colecţia Jurisprudenţă, Ed. Hamangiu, Bucharest, 2010.

¹³ Romiţan, C.R., *Protecţia penală a proprietăţii intelectuale*, colecţia "Studii Juridice", Ed. C.H. Beck, Bucharest, 2006.

¹⁴ Posner A. Richard, *Intellectual Property: The Law and Economics Approach*, Journal of Economic Perspectives—Volume 19, Number 2—Spring 2005.

¹⁵ Smith V.G., Parr L. R., *Proprietatea intelectuală. Evaluare, exploatare, daune pentru contrafacere*, Editura IRECSO, Bucharest, 2008

¹⁶ Spence, M., *Intellectual Property*, Clarendon Series, Oxford University Press, 2007

¹⁷ Fântână, R.S., *Managementul integrat calitate-risc al proprietăţii intelectuale*, Ed. LUX LIBRIS, Braşov, 2016, p.106-110

The first refers to the situation of illegal use¹⁸ of the trademark.

The increasing number of intellectual property lawsuits – the only field addressing the exclusive right to exploit an asset in Commercial Law – gives rise to grounds for a thorough analysis:

- A) The ever growing number of piracy acts (copyright) and counterfeiting (industrial property) demonstrate, not necessarily in a cumulative way:
 - a. The lack of a proper legislation;
 - b. Lenient penalizing measures and provisions;
 - c. Case files assigned to unspecialised courts of justice;
 - d. Inconsistent decisions ruled by the various courts;
 - e. Assignment of non specialised prosecutors to the criminal cases;
 - f. Inconsistent jurisprudence in the matter;
 - g. The lack of court's/criminal investigators' responsibility in the case of erroneous rulings/findings;
 - h. The possibility to annul – even during the court action for the ascertaining counterfeiting and valuation of the prejudice – of an invention patent even when the illegal user or debtor in default for the payment of the moneys due to the inventor, are those who promoted the invention;
 - i. "Efficiency" of theft as compared to the punishment inflicted;
 - j. The poor material condition of the author of the invention;
 - k. The lack of a real and immediate protection of the inventor in front of an abusive employer who violates his/her rights;
 - l. The impossibility of the inventor employed by a multinational corporation to follow up on the potential implementation of their invention in production units located abroad;
 - m. Possible extra-judiciary levers at the disposal of the employer who uses their influence on grounds of the significant contribution to the state budget claiming issues of social nature of production stoppages;
 - n. The risk of the counterfeiting manufacturer to be declared insolvent on grounds of the amount of the prejudice established in the expert report; faced with a social danger (unemployment and release of funds from the state budget to cover the unemployment benefits), the State may influence a compromise solution, etc.
- B) The increasing number of unfair competition cases demonstrates:
 - a. The existence of insufficient contractual provisions referring to the work-related confidential information or even the lack of such provisions in the individual work contract;

¹⁸ As regards the extent of meaning of the notion "trademark use", see the provisions under Art. 36, paragraph (2), complemented with the provisions under Art. 46, paragraph (2) of Law 84/1998, the version enforced as of May 08 2014.

- b. A lack of minimal juridical understanding at an organisational level;
- c. Lenient penalizing provisions;
- d. Assigning case files to unspecialised panel of judges;
- e. Lack of unitary jurisprudence in the matter;
- f. Assignment of non specialised prosecutors to the criminal cases;
- g. Lack of unitary solutions given by the criminal investigators;
- h. The lack of court's/criminal investigators' responsibility in the case of erroneous rulings/findings;

All these situations represent as many economic risks in the field of intellectual property¹⁹. The valuation of the prejudice refers not only to the marketed counterfeited product but also to the stocks, materials or equipment which were directly used throughout the entire period of the counterfeiting in the process of committing the violations provided for under Art. 90. To assess the prejudice and to preserve the evidence the provisions under the Emergency Ordinance No. 100/2005²⁰ of the Government shall apply.

The method to enforce the procedure may be found in the Civil Procedure Code under the section dedicated to the provisional measures in the matter of intellectual property rights.

A calculation formula for establishing the total value of the prejudice resulting following trademark counterfeiting (V_{contraf}) is presented below²¹:

$$V_{\text{contraf}} = \sum_{i=1}^n (V_{si} + V_{mvi} + V_{echi}) + \sum_{j=1}^m (V_{sj} + V_{mvj} + V_{echj}) \quad (1)$$

where:

- i – counterfeiting manufacturing companies; $i = 1, \dots, n$;
- V_{si} - the value of the counterfeited merchandise on stock at company i ;
- V_{mvi} - the value of the counterfeited merchandise manufactured and sold by company i over the entire period of counterfeiting;
- V_{echi} - the value of materials or equipment directly used in the perpetration of the offences under Art.90 over the entire period of counterfeiting;
- j - companies trading counterfeited goods; $j = 1, \dots, m$;
- V_{sj} - the value of the counterfeited merchandise on stock at company j ;
- V_{mvj} - the value of the counterfeited merchandise sold by company j ;

¹⁹ Fântână, R.S., *Managementul integrat calitate-risc al proprietății intelectuale*, Ed. LUX LIBRIS, Brașov, p.106-110

²⁰ Government Ordinance No.100 of July 14 2005, on the securing of the industrial property rights, published in the Official Gazette No. Y643 of July 20 2005

²¹ Fântână, R.S., *Expertiza Mărfurilor de Import – Export*, Ed.”Pro Universitaria”, Bucharest, 2010, p.212.

Vech_j - the value of materials or equipment used directly to perpetrate the offences

provided for under Art.90 by trader *j*.

The second situation refers to some distinct cases²² which may be ranged in the so called “tacit licence, a subject also dealt with in the field of know-how and technology transfer, including patented inventions”²³:

- a) Wishing to remain the owner of the intangible asset trademark ZENIT even if company Q may face an eventual insolvency, the owner of company Q in Brasov protects the asset under his own name but forgets or does not wish to draw up a right transfer contract between his company and himself – usually a licence contract, so that the use of the trademark by the company be fully legal. In the same classes of Nice activities, Company T of Craiova counterfeits the trademark ZENIT. Company Q sues in court Company T. To assess the prejudice caused by counterfeiting the trademark ZENIT, it is necessary to evaluate the trademark.
- b) The football club ALFA is holder of the trademark TM. Being short of finances ALFA offers GAMA the right to use the trademark and the players without asking anything in exchange. Over a period of several years, the GAMA club invests in the players, promotes the trademark, buys and sells players (the generic term for such operations is “player transfer”) so that the GAMA football club gains a good international renown together with the trademark TM. At a certain moment in time, the football club ALFA decides to stop GAMA club to use the trademark TM and tenders the trademark for sale. The trademark TM must be evaluated.

2. A study of the ZENIT case

Let us assume that an individual, say XY – who is not an authorised freelancer – owns his own company Q and unfolds activities specific of Nice classes 20 and 42.

The same individual XY registers to his own name the trademark ZENIT which protects products and services of the Nice Classes 20 and 42.

XY uses the trademark ZENIT within company Q without having previously signed and registered a licence contract for the trademark between the holder and the company Q.

According to the provisions under Articles 34, 35 and 42 of Law No. 84/1998²⁴, any modification brought to the status of a trademark is opposable to

²² The cases are real but the location and company names and trademarks are fictitious for confidentiality reasons.

²³ Ashish, A., (1995), *Licensing tacit knowledge: intellectual property rights and the market for know-how*, Economics of Innovation and New Technology, Volume 4, Issue 1, pages 41-60.

²⁴ Law nr.84 of April 15 1998, up-dated and republished, on the trademarks and geographical indications, published in the Official Gazette No. 337 of May 8 2014.

third parties once it is registered in the Trademarks register at the State Office for Inventions and Trademarks and after it is published in the Official Gazette for Industrial Property under the section Trademarks.

A few years later, it is ascertained that the company T of Craiova counterfeits/uses without any right the trademark ZENIT. Company Q sues in court Company T.

Under certain conditions, to assess the prejudice caused by counterfeiting a trademark it is necessary to evaluate the trademark. It is not the purpose of this paper to enumerate all the methods used to assess an intangible asset, but we can affirm that one of the most accurate, distinctly identifiable intangible asset valuation methods is DCF (Discounted Cash Flow). This method takes into account real bookkeeping data specific of the asset which is being assessed which it separates from the past and current data of the holder of the trademark. The turnover, expenses, gross profit, net profit are specific of the user of the trade mark for which it is also necessary a forecasting study for the following 3 to 5 years. The calculation is made in the present taking into account all the real data from the near past in order to be able to foresee the future evolution the data of which is then updated for the present by taking into account all the micro- and macro-economic risks. The future data as foreseen, updated and aggregated shall give us the estimated selling value of the asset.

In our case however, the holder XY of the trademark ZENIT cannot offer economic data because he did not use the trademark.

The user of the trademark ZENIT, company Q, can find himself in two positions, both permitted by the Law:

- a) User of trademark which is not registered to the name of company Q, according to Art. 6, paragraph 4, letter b) of Law 84/1998 against which there is no complaint as long as the holder of the opposable, identical trademark is the owner of the Company Q which uses the trademark ZENIT. In this situation, method DCF is applicable.
- b) User under tacit licence of the trademark ZENIT²⁵. The tacit licence also known as the “tacit operational licence”²⁶ is accepted as an ethical form of business relation. Law No. 84/1998 refers to this tacit licence both under Art. 38 and Art. 48²⁷. In this situation the calculation is done by

²⁵ Also see Fântână, R.S., *Brand Assessment In The Case Of Tacit License. Case Study*, 7th International Conference, The Knowledge Society in the Space of United Europe, as part of the 14th “Timisoara Academic Days”, Tibiscus University of Timisoara, Faculty of Economics, 29-30 of May, 2015, and/or to the Journal, *Anale. Seria Științe Economice. Timișoara*, Volume No. XXI / 2015

²⁶ Collier, J., Roberts, J., *Introduction: An Ethic for Corporate Governance?*, *Business Ethics Quarterly*, Vol. 11, No. 1 (Jan., 2001), pp. 67-71, Published by: Cambridge University Press

²⁷ Text: “ART. 48, alin.(1) *The holder of a previous trademark who knowingly accepted for a continuous period of 5 consecutive years the use of a trademark subsequently registered, cannot ask for the annulment nor can he oppose the use of the subsequent trademark for the products and*

taking into account an average royalty of 4% of 25% of the sales made by using the trademark. The percentage of 25% refers to that part of the income which is considered to be due to the use of the trademark, the remaining 75% being considered as a result of the normal marketing activity.

The difference between variants a) and b) is substantial.

It is obvious that where possible, the trademark holder will claim the value obtained at point a). But it is also possible that by noticing the indecision in establishing a fair relation between XY the trademark holder and the company actually using the trademark, the court may decide to downgrade the prejudice if the defendant seizes the opportunity.

The calculated value of the trademark ZENIT has a partial contribution to the recovery of the prejudice, namely just for the period over which the company T fails to submit in court actual data of the counterfeiting activity as requested. For the period for which there are actual data, the entire income obtained from the counterfeiting activity shall be presumed as prejudice caused to company Q or, to the holder XY, as the case may be.

3. A study of the trademark TM of the ALFA football club

The football club ALFA is holder of TM trademark. For lack of funds, ALFA offers GAMA club the right to use the trademark and the players free of charge. Over a period of a couple of years, the GAMA club invests in its players, makes transfers, promotes the trademark using modern strategies (brand image, trademark extension to other products and services) so that the GAMA club with the TM trademark gains a good international reputation. At some point in time, the ALFA club decides to stop the GAMA club to use the TM trademark and puts the trademark up for sale. The TM trademark must be evaluated.

In this case too, ALFA, the holder of TM trademark cannot offer economic data because they did not use the trademark. In other words, TM trademark cannot have a value for the ALFA holder. The GAMA club can offer real economic data about the expenditures incurred by the promotion of the TM trademark as well as with reference to the profit obtained by using a performing management. However, we must bear in mind that GAMA club was permitted to use the trademark and the players but the respective assets have not been transferred to the ALFA club.

It would be unfair if the appraiser assessed the TM trademark in the benefit of the ALFA club using the bookkeeping data of the GAMA club and the other way round. Also, if the appraiser looked for official public data or for mass

services for which the said trademark was used except for the case when the subsequent registration was requested in bad faith”.

media sourced market data about the GAMA club, such data would have a high degree of uncertainty; they could be construed as general culture data and their use in a case file submitted to a court decision should be done with caution or even avoided. Anyhow, the value of the trademark calculated as above cannot be considered as favourable to the ALFA club because it is a form of a *parasitic attachment* whereby the ALFA club would economically benefit by the advantages brought by GAMA club to the TM trademark.

In the French Law doctrine, parasitic attachment is treated as “an unfair competition act distinct of confusion. According to the French doctrine the economic parasite consists of the deed of an economic agent to rely on the efforts of another economic agent, competitor or not, to take over clients”²⁸.

4. Conclusions

The purpose of the paper is to offer to the specialists in legal matters a facet of the judiciary *technical* reality. Given its technical character and as opposed to legislation, the paper can be interpreted very strictly, with little margin for manoeuvring: bookkeeping data are exact; so are the engineering data; the economic prognosis calculation (although it is not part of accounting, the prognosis relies heavily on accounting data) can be interpreted within the boundaries of an interval of values. The solutions to tackling the scenarios presented above apply to situations where the court is faced with two contradicting technical reports prepared by separate technical experts. Practice shows that these approaches enable the court to reach efficient conclusions with a minimal level of subjectivity.

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Considerations Regarding the Cases of Nullity of Fusion. Nullity for Majority Abuse. Aspects of Comparative Law

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Abstract

In this article we will present the nullity causes that occur in the merger of commercial companies. In the first part we will enumerate some definitions of the concept of nullity of the merger (section 1), then we will analyze two nullity causes, to distinguish the nullity of the merger from the nullity of the company (section 2). In section 3 we will analyze the concept of majority abuse as a variety of abuse of the law by proposing, de lege ferenda, the incorporation of this situation among the causes of the nullity of the merger (section conclusions).

Keywords: merger nullity, company nullity, abuse of law, abuse of majority.

JEL Classification: K20, K22

1. Introductory considerations

The nullity concept of fusion of companies was consecrated² by dispositions of article 22 from Directive 2011/35/E.U. of the European Parliament and Council from 5th of April 2011 regarding the fusion of joint-stock companies. The aspects concerning the conditions and effects of declaring nullity of fusion are regulated by art 251 from the Law of companies 31/1990. Regarding the concept of nullity of fusion, in the doctrine there have been presented more opinions about its definition. Therefore, a first opinion³ states that the notion of nullity of fusion is actually a development of the concept⁴ of nullity of the juridical act.

Another author⁵ finds the notion of nullity of fusion/dividing of societies, without reaching the complexity and profoundness of the nullity of societies, as representing a development of the notion of nullity of the juridical act, as it concerns the nullity of the juridical operation, which is realized by the plurality of juridical acts and doings that are in an interdependence relation. Independent

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² Mataragiu A. C., “Fuziunea instrument de restructurare a societăților comerciale, PhD. thesis, Timisoara, 2012, p. 290.

³ Schiau I., Prescure T., *Legea societăților comerciale nr.31/1990. Analize și comentarii pe articole, Second Edition Revised, Enlarged and updated*, Hamangiu, Bucharest, 2007, p. 728.

⁴ As in the society law has the tendency to rewrite for its own benefit juridical institutions borrowed from civil law to delimitate the juridical the juridical reports that it wants to regulate imperatively. See Gheorghe C., *Nulități de drept comercial*, C. H. Beck, Bucharest, 2010, page 53.

⁵ Schiau I., Prescure T., op. cit., page 728.

from the doctrinaire opinions expressed, according to the nature of the protected interests and of the legal norms that are violated⁶, the nullity of the fusion can be absolute or relative.

We consider that the nullity of the fusion of societies is to not be confused⁷ with the nullity of the company, the latter being regulated by dispositions of article 56 from the Law 31/1990. In accordance with the dispositions of the quoted article, the nullity of a company matriculated in the Commerce Registry is declared by the Court when one of the hypotheses prevailed in the law text is followed. By analyzing the causes, which can be cited in the declaration of nullity of society, we observe that the nullity of the fusion of companies is not one of them. This is explained by the fact that the fusion nullity has as objective for the fusion operation, and does not bring into discussion⁸ the existence of the said companies. In this regard, we can cite⁹ a decision pronounced¹⁰ by the commercial department of the Supreme Court, which can target an operation of division. We consider that this conclusion is valid also in the case of the procedure of fusion of societies.

2. The causes of nullity of the fusion

Regarding the cases where the nullity of the fusion can be requested, they are presented in detail in article 251¹¹, paragraph (2) from the Law of companies 31/1990. Therefore, a first case when nullity of fusion can be demanded refers to

⁶ In a certain author's opinion, this aspect makes the difference between the nullity of the fusion and the society nullity. Therefore, Schiau I. states that the nullity of society implies always causes of absolute nullity.

⁷ To the extent that in building the newly-created company the legal dispositions were violated by the invocation of dispositions 56 from the law of newly-created societies, it could lead to the cancelling of the fusion and, subsequently, to the liquidation of the society. We assess that such a solution is in a glaring contradiction with the norms that regulate the nullity of the fusion which state that the dissolved societies without liquidation will retroactively resume their existence.

⁸ Adam I., Savu C. N., *Legea societăților comerciale. Comentarii si explicații*, C. H. Beck, Bucharest, 2010, page 918.

⁹ C. S. J., s. com., decision no. 517/2003 in <http://www.avocatura.com/>

¹⁰ The Supreme Court stated: "*the action of cancelling the decision of the general assembly not exercised by the complainant is not to be confused with the action against an act subsequent to the assembly such as the protocol of division, therefore it cannot be requested to cancel the latter for the reasons that refer to the decision of the general assembly of the stock owners.*"

¹¹ Romanian law extended the nullity of the fusion to all types of societies without restricting it only to joint-stock companies, as it was prevailed in the directive.

¹² the non-fulfillment¹³ of the legal¹⁴ obligation¹⁵ of¹⁶ submitting¹⁷ the fusion¹⁸ to the judicial control¹⁹. In this situation, the fusion is realized without being authorized by the judge delegated by the Registry of Commerce, which, according to law, has the power to realize the legality control²⁰ after the submission of the project of the companies' fusion.

In this case, the closure from the judge of Commerce Registry with which they decide on what they had found from the analysis of the project of fusion. In literature, it is considered²¹ that this first case represents a real cause of nullity of the fusion, which is similar to the one prevailed in article 56, when the nullity of the society is pronounced because of the lack of closure from the judge of the Registry of Commerce. If previously, there was a verification by the delegated judge²² of certain irregularities, these will not be²³ invoked as a cause for nullity after the fusion.

In this regard, we can cite a decision²⁴ from the Court of Teleorman, which represented the subject of an appeal at the Court²⁵ of Appeal from Bucharest. Furthermore, according to article 249, paragraph (b) of the Law no. 31/1990 republished, the fusion produces effects since the date of the last general decision,

¹² Rosu C., Fanu-Moca A., *Drept societar*, PH Mirton, Timisoara, 2004, page 210.

¹³ Schiau I., Prescure T., op. cit., page 729.

¹⁴ Adam I., Savu C. N., op. cit., page 919.

¹⁵ In judicial practice, it is stated that the realization of an opportunity control over the decision concerned is unacceptable, as it would be the equivalent of an interference in the activity of administration of the society that contravenes the stipulations of Law of societies no. 31/1990 in C.S.J., s.com., decision no. 6200/2001 in C.J. no. 9/2002, page 55.

¹⁶ Bodu S., *Legea societăților-comentată și adnotată*, Edition 2017, PH Rosetti, page 1260.

¹⁷ Tulească L., *Drept comercial. Întreprinderile comerciale*, PH Universul juridic, Bucharest, 2016, page 350.

¹⁸ In practice, judicial control resumes at the verification of the fulfillment of the legal conditions regarding the adoption of the decisions subjected to this verification, and its objective is their content.

¹⁹ Șandru D-M., *Dreptul societăților în România*, PH Universitara, Bucharest, 2017, page 366.

²⁰ The control of the decision concerned will have as an objective the legality of its adoption, but not its opportunity.

²¹ Schiau I., Prescure T., op. cit., page 730.

²² In one cause there was solicited the annulment of the fusion, invoking the fact that the mentions realized based on the previous project of fusion were not radiated (C.A. Craiova, sec. com., dec. no. 23/19.01.2005 in Gavrilă S. P., op. cit., pages 568-569).

²³ I.C.C.J., 2nd s. civ., dec. no. 4654/2012 in the *Legea societăților adnotată*, PH Rosetti International, Bucharest, 2014, page 221.

²⁴ Court of Teleorman, sent. Com. No. 668/22.12.2008, <http://www.avocatura.com/speta>

²⁵ By analyzing the concerned administrated evidences, the Court finds that: "the exception of the lateness of formulating the action in annulment by the appellant-complainant is motivated by the following reasons: according to article 251, par. (3) from Law no. 31/1990 republished, the procedures of annulment and declaration of nullity of the fusion or the division cannot be initiated after the expiration of the period of 6 months since the fusion/ division became effective, based on article 249 or if the situation has been rectified"

which approved the operation. In the cause, the date prevailed in article 249, paragraph (b) in the law was the 26th.09.2007, the date when the General Assemblies of the commercial companies took place, both of the absorbed company, and the absorbing society, Assemblies which approved the operation of fusion.

The second cause of fusion nullity regards the situation where the decision of one of the companies that voted the project of fusion is null²⁶ or annulable. In the specialty literature, it is considered that this new situation incorporates more cases²⁷ of absolute²⁸ or relative nullity of the juridical act, represented by the decision of the General Assembly of the shareholders. The decision, which approves the project of fusion under the conditions stipulated in article 246 from the Law of societies 31/1990, represents the societal will. As an author remarked, “the decision of the General Assembly is, therefore, the juridical trade taken in the assembly²⁹, based on the majority principle, by manifesting the will of the shareholders specially convoked for the realization of the unitary and general interest of the company, which binds even those not attending and those who voted against. In the doctrine³⁰, it is determined that, even an internal will act is presented, by representing a modifying act, and by the obligations of publicity imposed by the law, it has at the same time the nature of an act of exteriorized will, which can reach the third parties.

If the decision of the General assembly concerning the fusion was adopted respecting the legal prevails and the stipulations from the constitutive act, it becomes compulsory for all associates, no matter their opinion regarding the fusion. The decision of the General Assembly becomes opposable to third parties after its publication, as prevailed by article 242, paragraph (2) from the Law of companies. The analysis of the causes of the General Assembly’s decision nullity implies its examination from the perspective of respecting the conditions of form and substance, which are stated by the law.

²⁶ The decision of the General Assembly regarding the fusion was annulled because, on one hand, the calculation of the capital was realized erroneously, and, on the other hand, the report of the experts was not presented, thus braking the right of information of the associates of I.C.C.J., s. comp. decision no. 285/31.01.2008 in Gavrila S.P., op. cit., pages 549-553.

²⁷ The Instance disposed the annulment of the fusion because they observed that the obligation of information of the associates (Court Brasov, s. com. Sent. No. 21/30.03.2003, final(source: www.jurisprudenta.org) in Bejan F., Fusion and division of the commercial companies, Ph.D. thesis, Bucharest, 2013, page 112).

²⁸ The Court annulled the decision of the General Assembly because they noticed that the right to information of the associates was violated by publishing an incomplete convocation (I.C.C.J., s. com., decision no. 1942/21.03.2005, in Gavrila S.P., op. cit. 558-559).

²⁹ Georgescu I.L., *Drept comercial Român*, Volume I, PH All. Beck, Bucharest, 2002, page 297.

³⁰ Gheorghe C., *Societăți comerciale. Voința asociaților și voința socială*, PH All. Beck, Bucharest, 2003, page 77.

In order to be able to establish if the decision³¹ was taken in legal circumstances³² we have to analyze, on one hand, if the object or the cause of the juridical act represented by the decision are lawful, and, on the other hand, if at the adoption of the decision the associates/ shareholders³³ manifested their consent³⁴ freely and had³⁵ the necessary legal capacity.

We mention that the decision has to be examined from the perspective of meeting the conditions of form in the hypothesis in which the law imposes the authentic form. In regard of form³⁶, which the decision of the General Assembly must take, as a rule it can be drafted as an act under private signature, outside the hypothesis in which, following the fusion, there are transmitted to the beneficiary company land/constructions, similar to the situation of constituting the company (when, applying the principle of judicial symmetry, the authentic form compulsory for transmitting immobile goods implies the coerciveness of authentication of the constitutive act).

Also concerning the respecting of the substance requirements, we must analyze if the decision complies with the legal imperatives, and, at the same time, if it respects the dispositions prevailed in the constitutive act of the companies engaged in the fusion. An example from the judicial practice in which the nullity of the General Assembly's decision represented the cause³⁷ which determined the nullity of the fusion is a decision of the Court of Appeal Ploiesti. Therefore, the cause of absolute nullity consisted of not respecting the quorum required by law to obtain an available decision.

³¹ The decision of the General Assembly was annulled if the legal majority met, as at its adoption there was an administrator who had a conflict of interests.

³² The Court annulled the decision of the Assembly because it found that the conditions regarding the quorum were not respected (Court Buzau, sent. no. 1231/27.10.2009 in Bejan F., op. cit., page 70).

³³ As in the associates/ shareholders who voted the modification of the constitutive act, braking through this decision the legal dispositions or the constitutive act, do not have the right to request the annulment of the concerned decision, see Leaua C., *Societăți comerciale.Proceduri speciale*, PH. C.H. Beck, 2009, page 171.

³⁴ Meaning that the legal dispositions of the law of companies regarding the action in annulment of the General Assembly's decision are not applicable in the case of vitiation of the shareholders' consent, in such a situation being applicable the dispositions of common right. See Georgescu I.L., op. cit., volume II, pages 439-451.

³⁵ Meaning that the lack of the consent or the associate's (shareholder's) incapacity will not affect the operation in relation to the other associates, and the nullity will only affect the tainted juridical relation, and not the modifying act altogether. See Mataragiu A. C., op. cit., page 74.

³⁶ In the case of not respecting the written form of the decision regarding the fusion, the sanction is not nullity, but the non-existence (Mataragiu A. C., op. cit., page 80).

³⁷ C.A. Ploiesti, Decision no. 153/20.06.2008, <http://www.avocatura.com/speta>

3. Nullity for the abuse of majority

The General Assembly represents the collective will of the juridical person, and not the will of the associates seen as individuals, such that the adoption of decision is governed by the principle of majority³⁸ or of unanimity. It must be pointed out that, in company law, the decisions reflect the will of the majority³⁹ and serve⁴⁰ the interest⁴¹ of the society, both⁴² for the majority⁴³ and the minority⁴⁴ shareholders.

When⁴⁵, by⁴⁶ adopting⁴⁷ a⁴⁸ decision⁴⁹, the objective⁵⁰ is⁵¹ the favoring⁵² the majority⁵³ in the⁵⁴ detriment⁵⁵ of the minority⁵⁶ shareholders⁵⁷, there is⁵⁸ a basis⁵⁹ for⁶⁰ requesting⁶¹ the Court⁶² the annulment⁶³ of the concerning decision⁶⁴. Contrariwise, by analyzing article 251 from Law 31/1990 of societies, and article

³⁸ Gerota D. D., *Curs de societăți comerciale*, PH Fundatiei Culturale “Regele Mihai I”, Bucharest, 1928, page 140.

³⁹ Ruellan C., *La loi de la majorite dans les societies commerciales*, Thesis Paris II, 1997, page 86.

⁴⁰ Vaisse S., *La loi de majorite dans les societes anoyne, contribution a l'etude de la nature juridique de la societe anoyne*, Thesis Paris, 1967, page 62.

⁴¹ Cass.com.24 Janvier 1995 n°93-13273, Bull.civ.IV, n°27, R.J.D.A.1995, n°439.

⁴² Cass.3 ème civ., 16 décembre 2009.

⁴³ In the common law system, the abuse of rights consists, in contrast continental law, in the braking of the fiduciary obligation of loyalty of associates to the company and to the other associates.

⁴⁴ Favario T., *L'abus de majorite in, L. 'abus en droit de des societes*. “Journal des societies”, 2011, n°86, p.24.

⁴⁵ Rives-Langes J.L., *L'abus de majorité*: R.J.com.nov.1991, n°special, p.65.

Cass.com., 1^{er} juil.2003, n°99-19.328, Bull.Joly Sociétés 2003, p.1137.

⁴⁶ Cass.com., 4 oct. 2011, n° 10-23.398, Bull.civ.IV, n°150, D.2011, p.2470.

⁴⁷ C.A.Orléans, 19 févr.2009, n°R.G.: 08/02457.

⁴⁸ Tricot D., *Abus de droit dans les sociétés, abus de majorité et abus de minorité*, R.T.D.com.1994, p.617.

⁴⁹ Couret A., *L'abus et le droit des sociétés*, Dr. et Patrimoine 06/2000, p.66.

⁵⁰ Sousi G., *L'intérêt societal dans le droit francais des sociétés commerciales*, 1974, p.134.

⁵¹ Tricot D., *Abus de droit dans les societes* : R.T.D.com.1994, p.617.

⁵² Com.18 avril 1951, Bull.civ.III, n°175, J.C.P.G., 1961, II, 12164.

⁵³ Cass.com.24 janv.1995: Rev.sociétés 1995, p.46.

⁵⁴ Cass.com., 18 avril 1961, Etablissement Piquard, J.C.P.1961, II, n°12164.

⁵⁵ C.A.Versailles, 1^{ère} ch., 22 sept. 2011, n° 09-08.248.

⁵⁶ Cass.com., 30 mai 1980: n°78-13.836, Bull.civ. IV.n°223, Rev.sociétés 1981, p. 311.

⁵⁷ Lepoutre E., *Les sanctions des abus de minorité et de majorité dans les sociétés commerciales*, Dr.et Patrimoine 12/1995, p.69.

⁵⁸ Com.18 juin 2002, J.C.P.E, 2002, p.1728.

⁵⁹ Kengne G., *Le role de juge en matiere d'abus du droit de vote*, P.A., 12 juin 2000, no. 116, p.10

⁶⁰ Com.18 avril 1961, Bull.civ.III, n°175, J.C.P.G. 1961, II, 12164.

⁶¹ The active procedural quality to introduce the action of annulment is owned by the associates, the creditors of the concerned companies, the Public Ministry, and any interested person.

⁶² C.A.Rennes, 11 déc. 2007, n°06-04.140.

⁶³ Cass.22 avril 1976, Rev.societes 1976, p.476.

⁶⁴ Lesourd N., *L'annulation pour abus de droit des délibérations d'assemblées générales* ,R.T.D. com., 1962, page 13.

L. 235-8⁶⁵ from C. com. Fr., we notice⁶⁶ that the abuse⁶⁷ of majority⁶⁸ is not⁶⁹ specifically provided among the causes which can start an action of annulment of fusion.

This circumstance is not of nature to prevent⁷⁰ a Court⁷¹ seized with a request of annulment to approve it when the basis of such an action is the abuse of majority, as it is stated⁷² in the Romanian doctrine, and the Anglo-Saxon doctrine respectively⁷³. We mention that the New Civil Code, including a codification of the doctrine and jurisprudence regarding the abuse of rights, brings a substantial modification of conception, which will influence the following solutions of jurisprudence.

Therefore, the abuse of right⁷⁴ was expressly established by the dispositions⁷⁵ of article 15 and article 1353⁷⁶ from the New Civil Code. According⁷⁷ to dispositions of article 15 in the N.C.C, no right can be exerted in the scope of hurting or harming another, or in an excessive and unreasonable way, contrary to

⁶⁵ “La nullité d'une opération de fusion ou de scission ne peut résulter que de la nullité de la délibération de l'une des assemblées qui ont décidé l'opération ou du défaut de dépôt de la déclaration de conformité mentionnée au troisième alinéa de l'article L.236-6. Lorsqu'il est possible de porter remède à l'irrégularité susceptible d'entraîner la nullité, le tribunal saisi de l'action en nullité d'une fusion ou d'une scission accorde aux sociétés intéressées un délai pour régulariser la situation.

⁶⁶ Ruellan C., *La loi de majorite dans les societes commerciales*”, These Paris II, 1997, p.86.

⁶⁷ Meaning that the abuse of majority does not reside in the abusive use of the right to vote or of the will of the associates, but in the abuse in interpretation of the principle of majority. See Stărc-Meclejan F., *Votul asociaților în societățile comerciale. Reglementare. Doctrină. Jurisprudență*, PH C. H. Beck, Bucharest, 2011, page 299.

⁶⁸ In the traditional Anglo-Saxon law the theory of the abuse of right is not presented. Thus, in American law, the abuse of right is present under the form of violating the right to property, of the copyrights, and of the related rights, or under the form of bad faith.

⁶⁹ It means that, even though it is not a violation of the law, the abuse of majority is sanctioned similarly to the conflict of interests. See Bodu S., *op. cit.*, page 672.

⁷⁰ Bertrel J-P., *Jeanin M., Acquisitions et fusions des sociétés commerciales*, 2^e éd. Litec, 1991, p.64.

⁷¹ The Court admitted the action of the shareholder, who invoked the fact that the majority shareholders closed transactions with the company in their exclusive interest, aiming to obtain benefits exclusively in their interest, thus violating the interests of the minority shareholders, (*Menier v. Hooper's Telegraph Works* (1974) 9 Ch. App.350).

⁷² Nabasque H., *La fusion apres aquisition peut constituer un abus de pouvoirs*; R.J.D.A.1996, p.432.

⁷³ Byers M., *Abuse of right : An old principle, A new age*, Ed.McGill, 2002, p.382.

⁷⁴ Meaning that, in the legislation of companies, the legal foundation for sanctioning the right abuse is represented in the dispositions of article 136, Law of societies 31/1990. See Mataragiu A.C., *op.cit.*, p.198.

⁷⁵ Ungureanu C.T., Voicu C. and others, *Noul Cod civil. Comentarii, doctrină și jurisprudență*, PH Hamangiu, 2012, pages 34-35.

⁷⁶ A., Chelaru E., Constantinovici R., Macovei I., *Noul Cod Civil. Comentariu pe articole*, C. H. Beck, Bucharest, 2012, page 1410.

⁷⁷ Ungureanu C.T., Voicu C. and others, *Noul Cod civil. Comentarii, doctrină și jurisprudență*, PH Hamangiu, 2012, pages 34-35.

good-faith; and, according to article 1353, that⁷⁸ who causes a prejudice by exerting their rights is nor compelled to fix it, except in the case where it was exerted abusively.

We consider that it would be useful, *de lege ferenda*, the completion of article 251, paragraph (2) to include the abuse of right as a reason for nullity of companies' fusion. From the judicial practice, we can cite a decision of the Court of Appeal Timisoara⁷⁹, in which is considered an abusive of right the execution of an operation, even essential to the commercial company, as long as it has as an objective the favoring of the interest of certain associates, in the detriment of the others. In this regard, we can⁸⁰ invoke a decision of the Courthouse of France, decision which had as object the preferential treatment of the associates, considered to be of nature to break the equality between the associates/ shareholders.

When we speak of equality⁸¹ between the shareholders and the associates, we take into consideration their equality in relation to the constitutive act, meaning that they should have the same juridical state, as bearers of rights and obligations which derive from shares or societal parts, without considering the equality of means of which they dispose for influencing the decision making inside the company. In literature, it is considered that it would be fairer to talk⁸² about the equality of treatment of the shares and societal parts, and not the equality between the shareholders/associates.

Contrariwise, we must mention⁸³ that inequality is institutionalized⁸⁴, as the decisions inside the companies are made by the majority. Also, as it is opined in the doctrine⁸⁵, the majority targets the votes, and not the persons, as only one person can hold absolute majority or even almost-entirety of the voting rights in a company.

Therefore, he titles held give the same rights/obligations, but not the same powers, the latter being conditioned by the number of representative titles of the holder. As we mentioned above,⁸⁶ the abuse⁸⁷ of majority presumes⁸⁸ a behavior⁸⁹ of nature to prejudice⁹⁰ the rights or interests of the minority shareholders.

⁷⁸ Baiaș Fl. A., Chelaru E., Constantinovici R., Macovei I., op.cit., p.1411-1412.

⁷⁹ C.A.Timișoara, s.civ., dec.no.158/26.10.2009.

⁸⁰ Cass.com., 18 avril 1961, Etablissements Piquard, J.C.P., II, n 12164.

⁸¹ Cass.com., 18 avril 1961, Etablissement Piquard, J.C.P.1961, II, n°12164.

⁸² Catană R.N., *Rolul justiției în funcționarea societăților comerciale*, Lumina Lex, Bucharest, 2003, page 245.

⁸³ Catană R.N., op.cit p.245.

⁸⁴ Ruellon C., *La loi de la majorité dans les sociétés commerciales*, These Paris II, 1997, p.46.

⁸⁵ Catană R.N., op.cit p.245.

⁸⁶ Schmidt D., *Le conflit d'intérêt dans les sociétés*, Joly.ed., version nouvelle, 2004, p.25.

⁸⁷ Cass.1^{re}civ., 4 fevr.2006, J.C.P. E., 2006, n°2441, p.1694.

⁸⁸ C.A.Aix-en Provence, 8 ème, ch., 26 janv.2012, n°11-04.959.

⁸⁹ Paillusse J., *L'efficacité des entreprises et la légitimité du pouvoir*, P.A.19 juin 1996, p.27.

⁹⁰ Ripert G., *La règle morale dans les obligations civiles*, L.G.D.J., 1949, p.150.

In order to be able to qualify a behavior as majority abuse, there must be comprised simultaneously 2 elements, one objective and one subjective. The objective element consists in breaking the equality between the shareholders and associates, and the subjective one presumes that this breaking is realized consciously⁹¹, with the intention of creating prejudices. The jurisprudence, and also the French doctrine⁹² favorable to the institutional theory regarding the judicial nature of the company, admits the superiority of the societal interest in relation with the personal interests of the minority/majority associates.

This situation imposes the minority or majority shareholders/associates to adopt a behavior which contravenes the societal interest⁹³. The Courts of law seized with actions of this matter admit the existence of majority abuse when they find⁹⁴ that a decision is adopted⁹⁵ with *the violation of the societal interest favoring the majority in the detriment of the minority*.

The victim of the majority abuse⁹⁶ must prove that the decision adopted is contrary to the societal interest⁹⁷, and that by adopting it, it was produced⁹⁸ a rupture between the shareholders/associates of the concerned company. In this regard, we can cite a decision⁹⁹ of the Court of France, which stated that a decision of the General Assembly of the associates regarding the fusion can be annulled for abuse of majority as long as it is contrary¹⁰⁰ to the societal interest, and it has as scope the favoring of the majority in the detriment of the minority.

However, it must be mentioned that, in the French jurisprudence, in this matter it was never constant. Thus, in a decision¹⁰¹, the Court rejected the action which invoked the existence of the majority abuse, as it determined that the complainant could not prove that the actions of the majority associate are contrary to the societal interest. In another decision¹⁰² of the French Court, they confirmed the decision of the court of first instance by which the societal decisions were made, because they appreciated that they were contrary to the societal interest, as

⁹¹ This means that the adoption of decision of good-faith excludes the abuse of majority, even if the rights of the minority shareholders are affected. See Bodu S., op.cit. p.672.

⁹² Dondero B., *Quand l'abus de pouvoir chasse l'abus de biens sociaux*, Bull.Joly Sociétés, juil.2011, n°7, p.579.

⁹³ In the regard of the existence of a societal interest in the relations of the associates, but only in relation with the third parties. See Bojin L., *Acțiunea în anularea hotărârii Adunării Generale a Acționarilor*, PH Universul juridic, Bucharest, 2012, pages 112-113.

⁹⁴ Schmidt D., *Les conflits de interets dans la sociétés anonymes*, Pratique des affaires, ed.Joly, 1999, p.130.

⁹⁵ C.A.Rouen, 6 juil.2004, n.02-3304; R.J.D.A.2/05.n.146.

⁹⁶ Cass.com., 6 juin 1990, D.1992, p.56.

⁹⁷ C.A.Rennes, 2^e ch.19 juin., n°04/06898. Mazureau c/S.A.S.Charal.

⁹⁸ Merle P., *Droit commerciales : Societes commerciales*, ed.Dalloz 6^e, 1998, p.625.

⁹⁹ Cass.com., 18 avr.1961:Bull.civ., III, n°175.

¹⁰⁰ Schapira J., *L'interes social et la fonctionnement de la societe anonymes*, R.T.D.Com.1971, p.66.

¹⁰¹ Cass.3^e, civ., 18 juin 1997, D.Aff.1997, p.1011:Bull. Joly societies, 1997, p 968.

¹⁰² Cass.3^e, civ., 18 juin 1997,D.Aff.1997,p.1011:Bull.Joly sociétés 1997, p.968.

they wanted to prevent the minority associate to obtain a just ransom for the societal parts they were possessing. In the cause, the majority associates decided in the Extraordinary General Assembly the absorption of the company by a joint-stock company which had an inferior capital.

An aspect which generated debates in the specialty literature refers to the content of the notion of contradiction with the societal interest. Therefore, in the French doctrine¹⁰³ it is appreciated that the simple fact of the disappearance of the company, which transfers its patrimony in the case of the fusion, does not suffice to introduce an action of annulment of the decision concerned, because is not per se a proof of the violation of the societal interest.

In this regard, we can cite a decision¹⁰⁴ of the Court of Appeal from Paris, which rejected an action of annulment based on majority abuse, as the complainant could not prove the violation of the societal interest of the absorbed company. In French law, the action by which it is requested the annulment of the decision, which was made by majority abuse, is prescribed in a term of 90 days, which is calculated since the day of its adoption by the commercial company.

4. Conclusions

The concept of nullity of companies' fusion was consecrated in the disposition of article 22 in the Directive 2011/35/E.U. of the European Parliament and Council on 5th of April 2011 regarding the fusion of joint-stock companies. Aspects concerning the conditions and effects of the declaration of nullity of companies' fusion are regulated, in Romania, by article 251 from Law 31/1990 of companies.

By analyzing the causes of fusion nullity, we observe that they are not included in the reasons based on which it can be solicited the nullity of commercial company, particularly of the companies involved in the reorganization.

Furthermore, we appreciate that, when, by adopting a decision in a General Assembly of a company, the objective is the favoring of the majority in the detriment of the minority shareholders, there is a basis for requesting the Court an annulment of the decision concerned for the abuse of right, under the conditions presented and analyzed in the previous sections. Also, we consider that it would be useful, *de lege ferenda*, the completion of article 251, paragraph (2) of Law of commercial companies no. 31/1990 in the regard of the abuse of right among the causes which attract the nullity of companies' fusion.

¹⁰³ Cozian M., Viandier A, Deboissy F., *Droit des sociétés*, Litec, 27^e éd.2014, p.730.

¹⁰⁴ C.A. Paris, 3e ch.sect.B, 26 mars 2009, n°07/04287, C. et a.c/ SA Cofradim et a.

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The Obligation of Loyalty and Non-Competition of Administrators / Directors and Associates of Commercial Companies

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Abstract

Being the manager of another's assets is no longer a simple contractual relationship under the current circumstances. The duty of diligence, honesty and loyalty of the administrator towards the beneficiary receives a legal consecration in the new Civil Code as a sign that the general rule evolves sometimes anticipating the need to change the special rule. In this context, to talk about the loyalty of administrators considering the provisions of the Law no. 31/1990 on societies and about the tripartite partnership-administrator-associate-trading company from the perspective of diligence and honesty, why not extending the discussion to so-called fiduciary duties is a welcome approach for the authors, having in mind that there is sometimes a fierce demarcation line between negligence and fraud and inherent business risk. Another aspect that this article proposes for analysis is that of the noncompetitive obligation of associates from the perspective of the Civil Code and Law no. 31/1990 on societies, given that, although specific elements of competition are found in all areas and sectors of activity and between the different subjects of the legal relationship, it is undoubtedly that the most fierce competition is to be found in commercial activities, being exercised either by businesses operating on the relevant market or by those who coordinate them .

Keywords: administrator, commercial companies, loyalty, diligence, non-competition

JEL Classification: K15, K22

1. Preliminary specifications

The items specific to loyalty and competition are found in all areas and sectors of activity, as well as between the different subjects of the legal relations. However, there is no doubt that the fierce competition is encountered in the sphere of commercial activities.

As regards the obligation of loyalty and non-competition, this study does not aim to cover all situations where such obligations of the administrator or associate may be considered as breached, given the variety of interpretations and practical situations deriving not only from the application of the corporate law

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but also from the rules specific to the financial, fiscal or insolvency segments, but its primary objective is to identify the regulations defining the content of such an obligation.

2. The obligation of loyalty and non-competition of administrators

2.1. The obligation of loyalty

According to article 72 of the Law no. 31/1990³, the obligations and liability of administrators are governed by the provisions on the mandate and those specifically provided by this law, so that the legal nature of the relationship between the administrator and the company is a dual one, namely contractual and legal. In this case, we can say that, besides the obligations incumbent on the administrator as a trustee, he also has other obligations provided by law. Likewise, the article 209 of the Civil Code stipulates that the legal entity exercises its rights and fulfills its obligations by its management bodies, represented by the natural persons or legal entities who, by law or by its articles of incorporation or regulations, are designated to act in the relations with third parties, individually or collectively, in the name and on behalf of that legal entity.

According to article 209 3rd paragraph of the Civil Code, the relations between the legal entity and those who make up its management bodies are subject, by analogy, to the rules of the mandate, unless otherwise provided by law, by its articles of incorporation or regulations. As stated in the doctrine, the content of the mandate can not be exclusively contractual, given the public interest in the legal regulation of companies.⁴

In addition, the legislator almost entirely takes over an institution found out in the Civil Code of the province of Quebec, namely the Management of the properties of other persons, established in articles 792 - 857, contained in 5th Title of the 3rd Book called "About properties", thus creating the general framework applicable to all cases of management of properties by a third party, according to article 792, 3rd paragraph of the Civil Code, the provisions of this title becoming applicable to any management of the properties of other persons, unless the law, its articles of incorporation or the concrete circumstances require the application of another legal management system.

In the generous scope of this legal framework, the obligations of the administrator may be divided into two categories, namely those expressly provided by law, for example under article 73 of the Law no. 31/1990 and those having a less specific content, namely the so-called fiduciary obligations based on the notion of trust connecting the management body to associates and company. This

³ republished in the Official Gazette no. 1066 of November 17, 2004.

⁴ Stanciu D.Cărpénaru, *Tratat de drept comercial român*, 5th edition, Publishing House Universul Juridic, Bucharest, 2016, p 222.

category of obligations is established both in the general rule, considering the Civil Code, and the special rule, namely the Law no. 31/1990. Thus, the article 213 of the Civil Code provides that the members of the management bodies of a legal entity must act in its best interests, with the due diligence imposed on a good owner, and article 803 of the Civil Code, whose marginal name is, suggestively, "The obligation of diligence, honesty and loyalty" resumes the idea of the article 213 stipulating that the administrator should act with the diligence of a good owner in the management of his properties.

Moreover, the legislator adds to the 2nd paragraph that "the administrator must also act with honesty and loyalty in order to achieve the best interests of the beneficiary or the intended purpose". Similarly, the article 2018, 1st paragraph, of the Civil Code regulates the fact that in the case of a pecuniary mandate, the trustee is required to execute the mandate with the diligence of a good owner (in this case, it was chosen only the thesis on the pecuniary mandate provided by the article 2018, 1st paragraph, taking into account the presumption established by article 2010 of the Civil Code, 1st paragraph, the final thesis). The Companies Act also contains provisions on "fiduciary" obligations of administrators, in the article 144¹, establishing for the members of the Board of Directors the obligation to exercise the mandate with loyalty, in the interest of the company (4th paragraph) and with the due diligence of a good administrator (1st paragraph), introducing for this case an instrument of decoding the obligation, namely *"the business decision"* on which we will come back.

As regards the interest of the company, although it is not defined in the special law, we consider appropriate to relate to the text of article 1881 of the Civil Code providing that, by the company contract, two or more persons mutually undertake to cooperate in conducting an activity and to contribute to it with cash contributions, with goods, with specific knowledge or performances, in order to share the benefits or to use the economy that may result.

The diligence obligation incumbent on the administrator is outlined starting from "the diligence of a good owner in the management of his properties". However, for determining the scope of this criterion, the extreme approaches should be avoided, namely to use an overly extended approach leading to liability only in case of gross negligence, or a rigid approach leading to the activation of liability for levissima fault. As a reference, the article 1480 of the Civil Code may be useful, the rule of the 1st paragraph being enacting and optional, "the debtor is required to perform his obligations with the diligence of a good owner in the management of his properties, unless otherwise provided by law or contract", while the 2nd paragraph provides as a criterion the nature of the activity carried out for the hypothesis of the performance of the obligations inherent in a professional activity. As we specified in reviewing the fiduciary obligations contained in the Companies Act, *"the prudence and due diligence of a good administrator"* is decoded by the business decision. In this respect, according to article 144¹, 2nd

paragraph, of the Law no. 31/1990, the administrator does not breach the obligation of prudence and due diligence if, when making a business decision, he is reasonably entitled to consider that he is acting in the best interest of the company and on the basis of appropriate information. For the purposes of the 3rd paragraph of article 144¹ of the Law no. 31/1990, the *business decision* means any decision to take or not to take certain measures regarding the management of the company.

Upon the interpretation of these provisions jurisprudence provided that *"However, the law only protects against negligence and fraud, not against the risks inherent in the business, when a decision taken in good faith can turn into failure. As long as the administrator's judgment is not affected by a personal stake, he is properly informed about the nature of the business and he is convinced that the taken decisions are in the interest of the company, the administrator is released from liability. Therefore, the obligation of prudence and due diligence provided by article 144¹ of the Law no. 31/1990 is not violated if, at the time of making a business decision, the administrator is reasonably entitled to consider that he is acting in the best interests of the company and on the basis of appropriate information".*⁵

Another limitation on liability for breach of prudence and diligence was considered by the jurisprudence the censorship by the decision-making body of the company, namely the general meeting of shareholders as an exponent of the social will. Thus, the court considered that "in accordance with Article 144¹ of the Law no. 31/1990, the responsibility of the administrator may only act for the acts undertaken in the execution of the mandate received from the company or for its own decisions in connection with the management of the company, and not for those belonging to the general meeting. The legality analysis carried out by the court in the context of the conduct of administrators, circumscribed to the provisions of Article 144¹ of the Law no. 31/1990, can not interfere with the opportunity of the administration act, which can be censored by the decision-making body of the company, namely the general meeting, under the conditions and the cases provided by law".⁶

In order to summarize, as also provided in doctrine, a good owner is an honest man with a behavior consistent with the good faith who will do everything to fulfill his undertaken obligation as if he were working for himself⁷.

We may consider that the obligation of prudence and due diligence includes the obligations incumbent on the administrator to supervise the activity carried out by directors or staff (article 144² of the Companies Act) and exercising

⁵ decision no. 2827 of September 27, 2011, given by the High Court of Cassation and Justice, available at <http://www.scj.ro>.

⁶ decision no. 326 of February 28, 2017, given by the High Court of Cassation and Justice, available at <http://www.scj.ro>.

⁷ Dimitrie Gherasim, *Buna-credință în raporturile juridice civile*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1981, p. 79.

the information faculty provided by law with regard to the operative management of the company (article 143¹ of the Companies Act).

Although not specified, the obligation of loyalty must include good faith, since the two cannot exist separately, the good faith, provided by article 14 of the Civil Code, representing the assumption underpinning the whole edifice of civil obligations and the exercise of civil rights⁸. Apparently, the issue of a dichotomy may arise in this construction, for example in the case of administrators who make a decision in good faith for the interests of the company but contrary to the wishes of its associates, but we consider that the interest of the legal entity absorbs the own interest of the associates, *affectio societatis* being one of the central elements of the company contract, an element which must be maintained throughout its existence so that, although according to article 1914, 1st paragraph, of the Civil Code, the administrator, in the absence of the associates' opposition, can perform any act of administration in the interest of the company, and the opposition in this case must be understood as coming in support of the social interest and not as a discretionary possibility of the associate. The content of the obligation of loyalty may also include the requirements foreseen by articles 144³ and 144⁴ of the Companies Act providing the prohibition imposed on the administrator to participate in deliberations on the operations in which he has an interest, as well as the obligation to notify them, respectively the crediting of the administrators by the company through certain operations provided by law. In this respect, the article 803, 2nd paragraph, of the Civil Code provides that the administrator must act with honesty and loyalty in order to achieve the best interests of the beneficiary or the intended purpose and the article 804 of the Civil Code forbids the administrator to exercise his duties in his own interest or of a third party, being required to avoid a conflict between his own interests and his duties of administrator.

The judicial practice has extensively interpreted the above mentioned provisions, showing that *"although there is no legal qualification of the actions falling into the area of conflicts of interests, it is obvious that the appellant, when submitting for approval the two legal operations: granting a credit to SC P.I.B. SRL and the issuing of collateral guarantees, could not satisfy at the same time the requirements of his duties as a member of the Board of Directors of the credit institution, as well as the interests of obtaining favorable credits by SC P.I.B. SRL which owned 49% of the share capital of the above company, where the appellant was the administrator. Given the commercial relations and the economic interests of the companies in the P. group, it is obvious the lack of objectivity and impartiality at the time of the vote given by a person having powers/capacities*

⁸ Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, (coordinators), *Noul Cod civil. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2014, page 15.

*both within the companies and within the credit institution, but which do not converge to a common interest"*⁹

As regards the obligation of loyalty incumbent on the shareholders, although it is not expressly stipulated by law, we consider that it arises from the content of article 136¹ of the Companies Act providing that the shareholders must exercise their rights in good faith, observing the company and other shareholders' legitimate rights and interests. In support of this assertion, we invoke the jurisprudence in this field providing that *"The exercise in good faith of the shareholders' rights may be interpreted in terms of an obligation of loyalty incumbent on the shareholders to the company, which is the consequence of the common intention of the shareholders to set up a company to conduct a business in order to obtain a profit, as well as to refrain from any action contrary to the general interest of the company. As regards the general interest of the company, it is represented by the common intention of the shareholders to associate and to jointly conduct a business in order to obtain a profit, aiming the prosperity of the company as its sole purpose and main direction. If the shareholders' own interests no longer coincide with the general interest of the company, and their actions only aim to achieve their own interests, violating the essential psychological element of the company contract - affectio societatis, represented by the shareholders' wish to collaborate in conducting the business for which the company was set up, this will lead to the violation of the general interest of the company, with the effect of preventing the operation of the company and finally its disappearance"*¹⁰.

2.2. The obligation of non-competition of the associates

The Law no. 31/1990 treats differently the obligation of non-competition, according to the legal forms of company provided by it. The Civil Code also contains several regulations relating to the obligation of loyalty and non-competition of associates.

2.2.1. The obligation of non-competition regulated by the Civil Code

The Civil Code expressly, but generally, provides the obligation of non-competition of associates. Mainly, the provisions of article 1903 within the chapter dedicated to companies regulate the obligation of non-competition in the Civil

⁹ decision no. 2907 of May 19, 2011 given by the High Court of Cassation and Justice, Administrative and Fiscal Litigations Department, available at <http://www.scj.ro>.

¹⁰ decision no. 4199 of December 2, 2010 given by the High Court of Cassation and Justice, Commercial Department, <http://www.scj.ro>. For the detailed analysis of the companies regulated by the Law no. 31/1990, see Stanciu. D. Cărpănu, Gheorghe, Piperea, Sorin David, *Legea societăților comerciale. Comentariu pe articole*, the 5th Edition, C.H. Beck Publishing House, Bucharest 2014.

Code.¹¹ Specifically, the legal text provides that "the associate cannot compete with the company on his own account or on behalf of a third party, or to perform, on his own account or on behalf of another person, any operation that could be detrimental to the company".

As it can be seen, the legislator does not expose in detail or condition in any way the prohibition of competition of associate to any damage caused to the company he competes with and where he is an associate. Consequently, certain measures, such as the exclusion of an associate from the company, may be taken independently of the existence or non-existence of the damage.

Furthermore, the prohibition of competition operates both directly ("on its own account") and indirectly ("on behalf of a third party"). The text is not very clear if it envisages the competition exercised for itself or for a third party or the competition exercised by "itself" or by a third party. This is because both hypotheses are operable and both create the constituent elements of the competition actions. More specifically, the competition may be exercised directly and immediately by the associate by carrying out operations as an authorized natural person, a holder of an individual enterprise or a member of a family enterprise (as it is known, these forms of exercise of economic activities by natural persons do not have legal personality and that is why we argue that these forms represent ways of direct exercise of competition operations) or indirectly, such as, for example, a company with the same business or a similar business.

The competition may also be exercised for itself or "on behalf" of a third party, namely for any other natural person or legal entity. It is therefore noticed that the first hypothesis envisages the instrument and the way in which the competition is made, and the second hypothesis concerns the outcome of the competition, namely the benefits resulting from the breach of this obligation. Of course, although the text does not provide, the legal instrument by which the prohibition of competition is disregarded, as well as the real beneficiary of the outcome of such actions can only lead to worsening of the treatment applicable to the competing associate¹².

It should be noted that the texts of the Civil Code do not define the competition and do not stipulate the operations thereof. From the analysis of the pro-

¹¹ For analyzing this article, also see Gh. Piperea, in FL. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, (coordinators), *Noul Cod civil. Comentariu pe articole*, the 2nd edition, C.H. Beck Publishing House, Bucharest 2014, page 2062; C.M. Niță, in the pages 272-273, *Noul Cod civil. Comentarii, doctrină și jurisprudență*, 3rd Volume, articles 1650-2664, Hamangiu Publishing House, Bucharest, 2012.

¹² Vasile Nemeș, " *Obligația de neconcurență a asociaților societăților comerciale*", in the volume of the Conference " Counterfeiting, competition and ownership of traditional products in the European Union", Universul Juridic / Legal Universe Publishing House, coordinating editors, V. Roș, C. Romițan, Bucharest, 2-3 of November 2017, pages 233-234.

visions of the Law no. 31/1990 we can conclude that, in most situations, the competition is made by exercising the same type of trade with the victim company or a similar trade.

As a sanction, the article 1903, 3rd paragraph, provides that the benefits resulting from any of the prohibited activities are attributable to the company and the associate is held liable for any possible damages. Therefore, there are essentially two legal effects of the breach of the non-competition obligation, according to the regulation of common law (meaning the Civil Code), namely the appropriation of the benefits as a result of competition and the coverage of the damage caused to the competed company. The Civil Code does not provide the possibility of excluding the associate from the company for such actions, as in the case of the companies regulated by the Law no. 31/1990¹³.

2.2.2. The obligation of non-competition according to the regulation of Law no. 31/1990

According to the regulation of Law no. 31/1990, the obligation of non-competition is regulated differently, according to the legal form of the company. More specifically, as regards the general partnership (company), the article 82 provides that *“the associates cannot take part, as associates with unlimited liability, in other competing companies or in companies having the same business or to perform operations on their own account or on behalf of other persons, in the same type of trade or in a similar trade, without the consent of the other associates.”*

It is easy to notice that the competition actions may occur by setting up companies “having the same business” or by operations “in the same type of trade or in a similar trade.” As in the case of competition regulated by the Civil Code (article 1903), the competition may be directly exercised by any form of economic activities, through a natural person, regulated by the Government Emergency Ordinance no. 44/2008, or through an independent company set up by it. As regards the latter method, namely the competition through another company, it is noted that the prohibition is limited only to the “associate with unlimited liability”. This means that, according to the regulation of positive law, the prohibition concerns the general partnership (company) and the capacity of active partner in the limited partnership and active partner in the partnership limited by shares¹⁴.

As regards the joint stock company and the limited liability company, the Law no. 31/1990 does not directly provide such prohibitions for associates. It should not be forgotten that there are certain prohibitions for the members of the administration and management bodies of the two legal forms of company. For

¹³ also see V. Nemeş, quoted works, page 234.

¹⁴ *Ibidem*, page 235.

the limited liability company, the article 197, 2nd paragraph, provides that the administrators cannot receive, without the authorization of the associates' meeting, the mandate of administrator in other competing companies or having the same business, or to do the same type of trade or other competing trade, on his own account or on behalf of another natural person or legal entity, under the sanction of revocation and liability for damages.

On the same line are the provisions relating to the joint stock company, regulated by the article 153[^]15, according to which the directors of a joint stock company, in the unitary system, and the members of the Board of Directors, in the dualist system, cannot be, without the authorization of the Board of Directors or of the Supervisory Board, directors, administrators, members of the Board of Directors or of the Supervisory Board, censors or, as the case may be, internal auditors or associates with unlimited liability in other competing companies or having the same business, or to do the same type of trade or other competing trade, on their own account or on behalf of another person, under the sanction of revocation and liability for damages.

Likewise, the article 153[^]16, 1st paragraph, provides that a natural person may simultaneously exercise no more than 5 mandates of administrator and/or member of the Supervisory Board in joint stock companies whose head office is located in Romania.

The prohibition does not apply if the person elected in the Board of Directors or in the Supervisory Board is the owner of at least one quarter of the total shares of the company or is a member in the Board of Directors or in the Supervisory Board of a joint stock company holding the above mentioned quarter.

As regards the obligation of non-competition of shareholders, also may be brought as a legal argument the provisions of article 136[^]1 according to which the shareholders must exercise their rights in good faith, observing the company and other shareholders' legitimate rights and interests. Or, there is no doubt that by doing an identical or similar trade, directly or by other legal entities, we are in the presence of a conduct that cannot be considered a good faith and, obviously, such a conduct is contrary to the legitimate interests of the company and of the other shareholders¹⁵. There is no such regulation for the limited liability company, but this does not mean that the associates of this legal form of company are exempt from the obligation to exercise their rights in good faith, observing the company and other associates' legitimate rights and interests.

3. Exclusion of associates for breach of the obligation of loyalty and non-competition

An issue that is not consistently regulated by the Law no. 31/1990 concerns the exclusion of the competing associate from the limited liability company

¹⁵ *Ibidem*, page 236.

and, as the case may be, of the shareholder from the joint stock company, as a sanction of breach of the non-competition obligation. For the general partnership (company) and for the active partners in the limited partnerships, the rules are clear, meaning that the Law no. 31/1990 expressly provides such a possibility (article 222, 1st paragraph, letter c). As regards the two categories of companies, the solution is different since the law does not provide the possibility of excluding the shareholder from the company, in case of the joint stock company, and for the limited liability company, the exclusion is possible only under certain conditions¹⁶. Therefore, in the absence of an express provision in the Law no. 31/1990 and the “silence” of the Civil Code, the only theory that can be sustained is the impossibility of excluding the shareholder from the victim company. The solution is based on the reasoning according to which the exclusion of the shareholder from the company is the most drastic sanction and it cannot be applied in the absence of an express legal provision. This is not the case of the limited liability company, where the article 222 of the Law no. 31/1990 provides that may be excluded from the general partnership (company), from the limited partnership or from the limited liability company:

“..... d) *the associate administrator who commits fraud to the detriment of the company or uses the registered signature or the share capital for his own benefit or for the benefit of other persons*”.

The text also envisages the associate administrator who, by performing actions of competition against the company, may be considered he falls under the legal phrase “*commits fraud to the detriment of the company*”. The actions of competition may also be performed through material acts by which the competing associate “...*uses the registered signature or the share capital for his own benefit or for the benefit of other persons*”. On such reasoning, if it is found that the associate administrator is guilty of actions of competition, regardless of the form in which they are materialized, we consider that there are sufficient arguments to order the exclusion on the ground that such practical situations lead to the conclusion that the associate “*committed fraud to the detriment of the company*”. In the cases where the associate of a limited liability company is not the administrator thereof, in the absence of an express provision in this respect, he cannot be excluded from the company even if he violated the obligation of non-competition¹⁷.

In the judicial practice, the law courts have a different approach relating to this issue.

Thus, in one case it was decided: “*As regards the counterclaim, it was noted that from the corroboration of article 222, 1st paragraph, letter c), arti-*

¹⁶ *Ibidem*, page 238.

¹⁷ Civil judgment no. 2372 of May 7, 2015, Tribunal Bucharest, the 6th Civil Department, available at www.jurisprudenta.com

cle 223, article 80 and article 82 of the Law no. 31/1990, it follows that the exclusion of an associate from a limited liability company may be ordered if, by his action, commits one of the actions provided by article 80 or 82 of the Law no. 31/1990.

...The court found out that the applicant had committed actions that are forbidden to an associate. Thus, as noted in the above described factual situation, the applicant, after not having carried out activities in the defendant company, on February 2015 started to carry out production activities as an employee, associate or supporter of the company competing with the defendant company, attracting on her side other employees on the shift she was coordinating in the defendant company.

In conclusion, the applicant did not support the company she had committed herself to develop it, as an associate, but she has committed actions that led to the cessation of the activity of this company. Therefore, the court found out that the conditions for admissibility of the action brought by the defendant in the counterclaim are met and ordered the admissibility of the application and the exclusion of the applicant from the defendant company.”¹⁸.

At the same time, in another case, it was noted “...According to the article 222, 1st paragraph, letter c), of the Law no. 31/1990,

Considering these legal provisions relating to the limited liability company, as a rule referring to the provisions of article 80 and article 82 of the Law no. 31/1990, the defense of the defendant applicant of the counterclaim cannot be accepted since these legal texts are not applicable to the associates of a limited liability company.”¹⁹

The High Court of Cassation and Justice decided against the above solutions, stating that “*if the company from which the exclusion is requested is a limited liability company, and the associate whose exclusion is required is an associate with limited liability, the hypothesis of article 222, letter c) – concerning an associate with unlimited liability who interferes in the management without having such a right or he/she does not comply with the provisions of articles 80 and 82 – is not applicable, being incident only to partnerships: general partnerships and limited partnerships whose associates have an unlimited liability, including their own properties, not to the mixed ones, namely the capital companies and partnerships, whose associates have a limited liability to the subscribed capital*”²⁰. On the same issue, the High Court of Cassation and Justice decided that “*in the absence of an express provision stipulated in the articles of association, it is not possible to exclude from a limited liability company an associate who is not*

¹⁸ decision no. 101 of March 16, 2016 given by the Court of Appeal of Galați, available at <http://www.rolii.ro/>

¹⁹ decision no. 729 of September 17, 2015 given by the Court of Appeal of Timisoara, available at <http://www.rolii.ro/>

²⁰ High Court of Cassation and Justice, the 2nd Civil Department, the Decree no. 3590 of October 29, 2013, in S.J. no. 8/2014, pages 15-16.

*an administrator since there is no case of exclusion provided by law, while the one provided in article 222, letter a) is no longer applicable at this time, the letters b) and c) apply only to the associate with unlimited liability, and the letter d) applies only to the associate administrator.”*²¹ In our opinion, the solution given by the High Court of Cassation and Justice is the right one, being in strict compliance with the relevant legal provisions in this field.

4. Conclusions

Although the special Law was not particularly concerned about the obligation of the directors or associates to be loyal or uncompetitive to society, the economic reality has raised the issue of non-fulfillment of these obligations, more precisely, of the forms in which we can consider that we are in the presence of a violation of the Law. Apart from the clear meaning of loyalty or non-competition, the manifestations under which the detachment from the sense of these meanings may appear are more and more varied. The Civil code proves to be a useful tool in defining these manifestations, but we must not forget that the special rule should be applied as a matter of priority. As we have attempted to illustrate in this paper, especially by the proposed jurisprudential exam, the special rule provides solutions without necessarily clarifying the essence of these obligations in the context of the partnership society-administrator- shareholders. relationship. The aim of this article was to surprise some aspects of this relationship that, beyond *affectio societatis*, are more of societal ethics.

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²¹ decision no. 3840 of November 24th, 2011 given by the High Court of Cassation and Justice available at <http://www.scj.ro>

Agency Contract in International Trade

Laura RUDNYANSZKY¹

Abstract

Cooperation is, at the same time, a crucial condition of the new international economic order, expressed via the lato sensu international trade which embraces a limitless range of economic, technical, financial, banking and similar operations. The legal relations between the states acting as sovereign powers (de jure imperii), between them and the international government organizations, as well as the organizations falling within the sphere of public international law regulation and, more precisely, of international economic law and of international development law as branches of international public law, when such legal relations refer to the field of international economic cooperation. International commercial law and international public law also feature important points of convergence, essentially stemming from the element of internationality that characterizes in equal measure the legal relations that represent their subject of regulation. Thus, the fundamental principles of international public law also apply to within the international commercial law relations and, a fortiori, to those which involve the participation of the state. The correlation between these two legal subjects is more obvious in certain situations, such as in terms of the consequences exerted by interstate economic agreements on international trade agreements.

Keywords: convention on agency, international economic cooperation, international trade, legal operations.

JEL Classification: K33, K12, A10

1. Introduction to contracts on agency in international trade

Agency represents the activity carried out by a person via another person, stakeholder. However, agency implies representing the stakeholder. As representative, the agent may work on behalf of the principal or on their own behalf

Agency applies when one person, the agent, has the authority on behalf of another person, the principal, to conclude legal agreements with third parties². Agency relations are established between three persons: the principal, agent and third party. They act as an apparent derogation from the rule according to which conventions only generate effects between the contracting parties (art. 2096 NCC.).

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² Art. 1 of the "Geneva Convention on Agency in the International Sale of Goods" as of February 17, 1983.

The derogation is valid to the extent to which there are no contrary legal provisions or incompatibilities with the nature of such right³.

After the power of authority, the agency may be legal, conventional and judicial. In international trade activities, the brokerage for concluding commercial business between partners from different parties may only be done by conventional agency. In order to generate legal effects, conventional agency must meet the following conditions:

- to feature an agency authorization;
- the agent must act within the limits of the authorization received;
- the agency relation must be communicated to the third party⁴;

Legal documents concluded by the agent without authorization or by exceeding the powers granted only binds the agent if such are subsequently ratified. The ratification may be explicit or tacit, acting as a power of attorney.

In international terms, adopting a harmonized regulation applicable to agency compatible with various legal systems contributes to the elimination of obstacles in international exchanges and favors the development of international trade.

Under the auspices of specialized international bodies, the Convention on Agency in the International Sale of Goods was concluded on February 17, 1983 in Geneva, while the Convention on Law Applicable to Agency was concluded on March 14, 1978 in Hague.

Also with regards to the international regulations on agency, the UNIDROIT 2004 Principles and the sample agreements issued by the Paris Chamber of Commerce⁵ also play an important part.

Due to the development and evolution of the human society in general, we are witnessing a continuous multiplication and diversification of agreements concluded between various natural and legal persons.

The terms of special agreements represent an intermediate link between the general theory on obligations, which establishes the rules of conclusion and execution for agreements in a general and abstract manner and the individual agreement that specifically connects two or more persons⁶.

Business, in general, is a complex activity for the manufacture and circulation of goods. Currently, it implies dense trade relations, on various markets located at great distances, where competition is severe, thus implying the necessity of cooperation between traders or goods manufacturers with certain persons, in

³ T.R. Popescu, *Dreptul Comerțului internațional (International Commerce Law)*, Didactic and pedagogical Publishing House, Bucharest, 1976, p.246.

⁴ I.N. Fiñescu, *Curs de drept comercial (Commercial Law Course)*, vol. I, Bucharest, 1929, p.139.

⁵ See the International Agency Contract samples, Publication no.644 as of 2002 and the Occasional Intermediary Contract samples, Publication no.619 as of 2000.

⁶ Florin Aurel Moțiu, *Contractele comerciale de intermediere fără reprezentare (Commercial Agency Contracts without Representation)*, Lumina Lex Publishing House, Bucharest, 2005, p.7.

order to represent their interests or to facilitate the performance of trade operations, such persons being known as agents.

The agent may establish a profession in this type of operations, being independent from the trader on behalf of whom they act, without the necessity of own investments, and only using their skills, credit and professional prestige, recording important benefits, proportionate to the operations subject to their agency.

2. Characters of the legal relations of international commercial law

2.1. Commercial character

Trade relations are those stemming from trade deeds and acts of merchant.

The Romanian Commercial Code uses the notion of "acts of merchant" in a broad sense, because it implies both the legal deeds and the stricto-sensu acts.

The following conceptions are known in the definition of trade:

The subjective conception is based on the capacity as merchant of a person taking part in the judicial relation; (e.g. German law includes all the operations performed by the merchant throughout the course of their profession). The capacity as merchant is the only one prevailing for the consideration of subjective acts of merchant. Therefore, the intention or purpose followed by the conclusion of acts is irrelevant

According to this conception, the person's capacity as a merchant determines a legal presumption of trade.

The objective conception, that is based on the nature of operations carried out or the object of the regulation

This includes operations concerning capital circulation (commercial purchase and sale, banking operations, stock exchange operations, operations for the establishment of a trade company, drafting operations) and the production activity of enterprises (operations carried out by supply, insurance, construction and manufacture enterprises, publishing house, public spectacle, transport and delivery enterprises, print shops and libraries, etc.).

The objective acts of merchant are not defined, we could only find a list thereof.

Thus, the Romanian Commercial Code (based on the objective criterion), lists the legal deeds and acts that the law considers as "acts of merchant." Taking into account the criterion underlying their establishment, such are called objective acts of merchant

The Romanian pre-war doctrine, as well as the post-war doctrine concluded that the list in art. 3 of the Com. Code is for exemplification purposes. The same criterion is also found in normative acts in force prior to 1990 (foreign commercial law – law no. 1/1971 which in art. 3 para. (I) establishes the deeds and acts deemed as international trade operations. Similar provisions were also found in the law no.

71/1969 on economic contracts, in art. 61. A mixed conception that combines both the subjective and the objective criteria.

2.2. International character

The international character of legal relations subject in international commercial law is given by the existence of the element of extraneity.

Not all relations containing a foreign element are subject to the law currently assessed. The trade relation must include extraneity capable of making it susceptible to fall under several law systems.

The identification of these criteria, elements may be done either via an international convention or via the internal laws of the state whose system constitutes *lex causae*.

The methods used are identical to those in International Private Law.

In Romanian law, both considering the international conventions to which Romania is a part of, as well as the internal laws, two criteria are regulated for defining the *international character or legal relations* subject in international commercial law, namely:

- a subjective criterion, for the natural or legal persons to have their domicile, or headquarters respectively, in different states
- an objective criterion, namely that the merchandise, work or service or any other good subject in the legal relation is part of the international (transit) circuit, meaning, at least one border must be crossed for the execution of such legal relation.

The international regulations where the subjective criterion is established are the following:

a) The European Convention on International Commercial Arbitration, Geneva, 1961, that refers to natural persons having "*their habitual place of residence or their seat in different Contracting States*;"

b) The Convention of Washington from 1965 on the Settlement of Investment Disputes Between States, that refers to persons who are "nationals" of other states;

c) The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, that states that "*it applies to contracts for sale of goods between parties whose places of business are in different Contracting States*", and the "nationality of the parties" is taken into account for applying the convention (art. 1). Where the party does not have a place of business, reference shall be made to his habitual residence (art. 10 let. (b));

d) The Convention on the Limitation Period in the International Sale of Goods, New York, 1974, according to which "*a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States; where a party does not have a place of business, reference shall be made to his habitual residence*." The nationality of the parties is not taken into account (art. 2);

e) The European Agreement establishing the association between Romania, on the one hand, and the European Community and the Member States thereof, on the other hand, signed on February 1, 1993 in Brussels.

Art. 49 thereof provides the location where the alternative “registered office” is located compared to the one where the “central management” is located, and compared to the main “place” of business as a criterion for defining a “company” as “communitarian” or “Romanian.”

The international conventions in the field of transport features the second objective criterion (the international criterion)⁷.

These conventions imply, in general, *that a transport is international if the point of departure and the point of arrival for goods are located within the territories of two different states.*

Such provisions are found in the Convention of Warsaw for the unification of certain regions relative to international aerial transport (art. 1);

The Convention on international through railway traffic SMGS. (art. 1 para. 1);

The Convention on the contract for the international carriage of goods by road CMR (art. 1, pet. 1); The Uniform Rules on the contract for the international carriage of goods by rail – CIM - (art. 1 para. 1).

In Romanian law, *the international character* of trade relations is provided by certain criteria.

Therefore:

- Law no. 35/1991 states that “*foreign investors mean natural and legal persons having their domicile or, as applicable, headquarters abroad*” (art. 4), the criterion used is thus the headquarters or domicile, as applicable;

- former LD no. 54/1990 abolished by the occurrence of law 208/2002 states that the organization of activities also implying subjects of international commercial law may only be done by the citizens having their domicile in Romania (art. 1 para. (2));

- Law no. 105/1992, on the regulation of the private international law, implies the condition that the seller and purchaser be domiciled, or, in the case of legal persons, headquartered or trade place, in different states, so as to consider the commercial sale-purchase (art. 88-89).

It is noted that unlike the old regulation in art. 3 para. (1) of Law no. 1/1971 on the regulation of foreign trade activity the criterion of “partner nationality” has disappeared⁸.

⁷ See C. Hamangiu, I. Rosetti-Balanescu, A. Baicoianu, *Tratat de drept civil (Civil law treatise)*, vol. I, Ed. Nationala S. Cornei, Bucharest, 1928, p. 171

⁸ See D. Cosma, *Teoria generala a actului juridic civil (General theory of the civil judicial act)*, Scientific Publishing House, Bucharest, 1969, p. 96.

3. International economic and technical and scientific cooperation

Recently, we have oftentimes encountered in specialized literature and in the modern economic doctrine the term of *international economic collaboration*, which also refers to international trade in its broadest sense

The notion of deeds and acts of foreign trade should be viewed broadly, including both deeds and acts of trade itself, as well as those of international economic and technical and scientific cooperation.

4. Fundamental types of agency contracts

International agency does not include uniform law norms to a sufficient extent; this is why lately we have seen efforts being made in this regard within the Institute for the Unification of Private Law - UNIDROIT. On the same line, Bucharest housed the UNIDROIT Diplomatic Conference in 1979

4.1. The commercial mandate contract

The commercial mandate contract has undergone a judicious regulation in Romanian law, being taken over from the Civil Law of modern states as trade relations intensified, and the business representation became a vital necessity, the institution of the mandate from Civil Law was borrowed by Commercial Law which differs from the former not by structure, but by its function.

The commercial mandate may be defined as the contract whereby a natural or legal person called Attorney in fact undertakes towards another person called Principal to fulfill the task assigned in their name and on their behalf. Therefore, the crucial feature is the fact that the Attorney in fact does not meet the trade operations in their name, although they are most frequently a merchant, but in the name and on behalf of the Principal.

Unlike the civil mandate, the commercial mandate is characterized by a series of proper elements:

- if according to civil law, the mandate may be legal, judicial or conventional, the commercial mandate arises in all cases only as a result of a convention (contract), whereby its limits are established;
- the commercial mandate is always an onerous contract, with the Principal being obliged to remunerate services provided by the Attorney in fact proportionate to the amount of business concluded;
- the commercial mandate granted for a certain trade operation implies the authorization of the Attorney in fact to draft the deeds necessary for the execution thereof (regardless if the parties have expressly provided this authorization in the contract concluded); in other words, the Attorney in fact is independent in their activities, being able to bind the Principal beyond the provisions of the mandate expressly granted, if such deeds are necessary for the proper fulfillment of the business assigned;

- if according to civil law, the cancellation of the mandate may be done *ad nutum* by the Principal, as the commercial mandate is fundamental for a common interest it cannot, according to practice and doctrine, be unilaterally cancelled, unless solid grounds are provided; otherwise, cancellation is deemed as an abusive exercise of rights, with the defaulting party being liable for the damages caused to the injured party.

5. The international contract of commercial mandate

The “Agent” is a common occurrence within the international commercial activity, sometimes even indispensable. This situation was aided by the expansion of the geographical area of international trade and the frequency of operations on various markets, which, due to the fact that it could not be covered by the manufacturers and merchants from the country of origin of the goods, forced them to contact local agents in order to gain presence on the respective markets.

Agency operations were carried out in the beginning via the civil law mandate, which was gradually adapted to the requirements of commercial undertakings, becoming, in time, one of the legal instruments capable of facilitating the development of commercial operations, evermore complex, especially at an international level.

Circumstances occur when a person does not wish or is unable to personally conclude a legal deed. In this case, either due to comfort or benefit, either due to a lack of time or to the impossibility of travel to the location where certain legal operations are to be carried out, such person may conclude the legal deed via a conventional representative chosen by themselves. In other words, we are in the presence of a legal relation of mandate. The origin of the mandate contract is found in Romanian law; Romanians have achieved such performances in drafting contracts, that such remain unchanged in terms of drafting, elements or effects. The mandate contract also representing a conclusive example in this regard.

The commercial mandate does not always correspond to this definition, and art. 374 of the Com. Code, respectively Law 71/2011 identify the first differences, showing that, unlike the civil one, the commercial mandate is not presumed to be free and that it has a special object, the management of commercial business. This special object of the commercial mandate, the special function thereof, that of brokering commercial business, implies the existence of special norms concerning the commercial mandate.

5.1. Notion and features of the mandate contract

The commercial mandate is a contract whereby a person, the Attorney in fact, undertakes, pursuant to an assignment received from another person, the

Principal to manage commercial acts⁹. The mandate contract originates from Romanian law, is received by Civil Law and is also applied to commercial subject area.

The commercial mandate contract is used in the agency activity of commercial agents. They have the capacity of merchant, independently and professionally exercising the agency activity.

The two institutions, civil and commercial, are similar in terms of structure and different in terms of the function fulfilled. The qualification of a mandate is given by the nature of the object, the commercial mandate has a specific object, comprising of the management of commercial business in the name and on behalf of the Principal.

The acts must be commercial for both the third party and the Principal.¹⁰

The proper elements characterizing the configuration of the commercial mandate are the following:

- The commercial mandate may be called conventional, arising from the agreement of the contracting parties;
- The representation is related to the type of contract and not the essence thereof;
- The mandate is always onerous, as the Attorney in fact is remunerated with an amount established in the contract;
- The Attorney in fact is authorized to perform all the acts necessary for the execution of the operation with which they were charged, even if such is not expressly provided;
- The freedom of action and independence granted to the Attorney in fact also allow the binding of the Principal in case of a representation feature;
- The commercial mandate is only cancelled with cause;¹¹

In order to conclude the contract, the volition of the Attorney in fact must be free and without any coercion or undue influence whatsoever. As the act is concluded for another person, the Attorney in fact must have impaired judgment.

As the holder of the contractual rights and obligations, the Principal must be able to conclude acts of trade.

The commercial mandate contract is used in the brokerage activity of commercial agents. They have the capacity of merchant, exercising agency independently and professionally, commercial.¹²

⁹ Art. 1532 Romanian Civ. Code art. 374. Romanian Comm. Code.

¹⁰ I.N.Fințescu, op.cit., p.380.

¹¹ M. Hacman, *Drept comercial comparat (Compared Commercial Law)*, vol. I, Curierul Judiciar Publishing House, Bucharest, 1930, p.580 and following.

¹² St. Carpenaru, *Drept comercial român (Romanian commercial law)*, All, Bucharest, 1995, p.135 and following.

The simple agreement of the parties is sufficient for concluding the contract. No special form is necessary. The mandate may be tacit, also being applicable for the commercial mandate. Thus, the mandate receipt may also be tacit and arise from the results of the performance thereof by the Attorney in fact.

The mandate must not be confused with representation. The representative is a legal cooperator of the mandate, i.e. they are not a simple broker, sending a decision from one person to another. They collaborate of their own volition for the conclusion of a legal deed. The cooperation between the representative and the person represented is judicial, not material.

Therefore, when we appreciate the validity of a deed concluded by representation, we refer not only to the will of the person represented, but to the will of the representative. The will of the latter must not be vitiated by error, violence or duress. Otherwise, the act may be cancelled.

Moreover, if the object purchased by the representative features defects and the person represented has not been informed of such defects, the person represented may prevail and may resort to the provisions of the Commercial Code and those of the Civil Code in terms of latent defects of an asset. If, however, the representative is informed of the defects of the assets and goes forth with the purchase, the person represented shall be presumed to have been informed of the defects, even if they have not been informed thereof in fact.

In terms of the mandate, the Attorney in fact is oftentimes a judicial collaborator of the Principal, i.e. they represent. Then the mandate is unified with the representation. Yet they may also remain distinct. Thus, in the case of the fee, the broker is the Attorney in fact, but they are not the representative of the principal, concluding the business on their behalf, although for the principal.

Representation is the feature distinguishing the contract from a commercial mandate, employee as a rule from the service location. The object of the mandate is to conclude legal deeds for and on behalf of the Principal, which implies the legal representation of the Principle, while the lessor's obligations implied the fulfillment of material acts, which exclude representation.

The legislator expresses the conception concerning the extent of powers for a general Attorney in fact according to commercial law which provides: "*compared to the third, the tacit mandate of the alleged is deemed general and includes all the acts necessary for the trade exercise for which it was granted.*"

5.2. Effects of the contract

5.2.1. Obligations of the attorney in fact

The Attorney in fact must carry out the mandate and inform the Principal on the operations performed.

The execution operations imply the fulfillment of the mandate according to the authorization received.

The Attorney in fact shall observe the instructions provided by the Principal, without being able to take other measures, however, they shall have the possibility, by virtue of the Principal's interests, to waive the instructions received or to take the measures deemed necessary.

In the absence of provisions to the contrary, the Attorney in fact may be replaced by another person, who shall perform their contractual obligations, in part or in full.

Legal deeds must be concluded by the Attorney in fact within the limits of the mandate. The Attorney in fact must therefore fulfill the mandate according to the instructions provided from the beginning or throughout the business, and according to practices in the absence of instructions. If they fail to comply with the instructions received from the Principal, they shall be liable for damages. They shall be liable for any damage arising from the failure to observe instructions, even for damages arising from force majeure. The Attorney in fact will however be held liable for the lack of due diligence in choosing the person or providing the instructions. The obligation to inform the Principal, upon request, on the operations carried out by the Attorney in fact, is determined by the relations existing between the parties. Depending on the understanding thereof, the Attorney in fact may provide recurrent notifications or reports.¹³

Commercial law states that the Attorney in fact is due to inform the Principal, without delay, on the performance of the mandate. The veritable representation implies the participation of the Representative's own volition. They cannot be deemed a simple passive instrument of the person represented or a simple spokesperson.

Within the legal deed concluded for and on behalf of the person represented, the representative manifests their own will, having a freedom of initiative in the manner of fulfilling the mandated, and only being restricted by the mandate limits and type of representation.

The Attorney in fact must pay damages to the Principal, when they fail to observe the instructions, both for the actual damage (*daunum emergens*), as well as for the unrealized gains (*lucrum cessans*).

As shown, the Attorney in fact who does not observe the instructions received shall be liable for the injuries caused to the Principal. They shall be liable for both the actual injury, as well as for the unrealized gain. The Attorney in fact shall be liable for the damage of assets entrusted for keeping within the mandate, except for those arising from Acts of God, force majeure, defect or nature thereof. The Attorney in fact's liability shall fall within the general principles of commercial liability.

¹³ I.N. Fintescu, *Curs de drept comercial (Commercial Law Course)*, vol. I, edited by Al. Th. Doicescu, Bucharest, 1929.

Therefore, the person entrusted with the assets, the Attorney in fact, must prove the existence of an exonerating cause, thus, in the case at hand, of a limitative cause provided by the commercial law. The plaintiff, the Principal, must not prove the Attorney in fact's fault; such is presumed.

As the mandate is an onerous contract the liability of the Attorney in fact shall be assessed *in abstracto*. As a result, the Attorney in fact shall be liable regardless of the type of fault.

5.2.2. Effects for the person represented¹⁴

The essential effect is that the deed concluded by representation directly generates all the active and passive consequences for the representative's person and patrimony: in principle, as if they had performed such deed in person. The representative becomes holder, creditor or debtor, within the legal relations established by the representative, from the moment of concluding the deed, even if the deed is ratified later, therefore, only then has the initial irregularity or representation been eliminating.

As the real party to this deed is the representative, the deed validation conditions, e.g. the ability to hold or to acquire the asset subject in the deed, shall be assessed for the representative. Moreover, also due to the fact that the representative is both party and beneficiary of the deed, they shall be liable to third parties for the damages caused to them by the representative upon concluding the deed, regardless of their own liability assumed by the representative in such a situation towards the same third parties. As a result, the deed represents an entirety: "*the representative cannot separate the effects in order to invoke those that are advantageous to them and to reject the correlative obligations and risks. They shall personally be liable to the contracting third party.*"

Also, a third party contractor can not appeal against a representative with any action arising from the act, unless he has assumed a personal obligation with the representative. However, he is personally responsible for the damage-related facts in his capacity as representative.¹⁵

In Romanian law, the legal acts concluded by representation generated effects "*for the persons who were present and actually taken part in the drafting of the legal deed, so for the representative.*"

¹⁴ Ion Dogaru, *Dreptul Comerțului internațional (International Commerce Law)*, Print House of the University of Craiova, 1989, p. 123; T.R. Popescu, *Dreptul Comerțului internațional (International Commerce Law)*, Editura Didactica si pedagogica, Bucharest, 1976, pg. 331-333; St. Carpenaru, *Drept Comercial român (Romanian Commercial Law)*, All, Bucharest, 1995, p. 408-410.

¹⁵ Virgil Benisache, *Curs de drept comercial (Commercial Law Course)*, Ramuri Publishing House, Craiova, 1924, p. 175.

5.2.3. Effects to third parties

The contracted third party – party to the deed concluded by representation – establishes direct legal relations solely with the representative. They are only bound to the same and also they may only claim the rights resulting from the deed from the same.

If the Principal delays the provision of an answer for a period exceeding the one provided by the nature of the business, they shall be considered to have accepted the performance of the mandate, even if the Attorney in fact has exceeded the mandate limits.

In fulfilling their obligations, the Principal must act with the due diligence of a good merchant, being held liable for *culpa levis in abstracto*. In the assessment of the due diligence, one shall consider the object of the contract, the Attorney in fact's specialization and the amount to be remunerated.

5.2.4. Obligations of the Principal

The Principal must pay the remuneration due, create the conditions necessary for the execution of the mandate and to settle the expenses incurred by the Attorney in fact.

As the commercial mandate is onerous, the Principal must pay the remuneration established for the execution of the tasks.

In the absence of a convention between the parties, the remuneration amount shall be determined by the court of law. Only the fault of the Attorney in fact may exempt the Principal from the payment of the remuneration.

The obligation to create the conditions necessary for the execution of the mandate consolidate the principle of collaboration between the contracting parties in reaching the desired completion.

Correspondingly, the Principal shall submit the technical documents, drawings or advertisements and any other useful information with the Attorney in fact.

Unless the parties have agreed otherwise, the Principal must pay the Attorney in fact for all the expenses necessary to fulfill the mandate.

The Principal must pay for all the expenses made and losses incurred during the execution of the mandate. The Principal shall also pay interest for the amounts paid by the Attorney in fact, if the latter is not in default during the execution of the mandated. The reduction of expenses cannot be requested by the Principal if such are deemed exaggerated.

In order to ensure the fulfillment of their claims, the Attorney in fact has privilege over amounts or assets of the Principal, found on them in order to carry out the mandate. The passion of the Principal's assets, under the contract, grants the Attorney in fact the right of retention until the settlement of their own rights.

If the assets are sold by the Attorney in fact, the privilege shall survive in terms of the price.

In principle, the validity conditions for the contract of commercial mandate are the ones required for any contract: consent, capacity, object and cause. Below we shall only highlight the specific features of these conditions implied the commercial aspect of the contract.

5.3. Object of the contract

The object of the commercial mandate contract is the management of commercial business. Therefore, the object of the commercial mandate contract is legal deeds where, according to the Commercial Code and other commercial laws, represent acts of merchant. These acts must be acts of merchant for the Principal.

The acts of merchant are listed in the commercial law. In our opinion, this listing is not limitative, as most of the doctrine considers. As a matter of fact, it is clear that the legislator has only listed the most frequent acts of merchant, leaving the court to decide on the capacity of acts of merchant of other acts.

Upon obtaining the capacity of merchant, all legal deeds and actions of the merchant are presumed to be commercial.

5.4. Termination of the contract

The commercial mandate contract is terminated upon the fulfillment of due obligations, expiry of the deadline stipulated by the parties or the impossibility of execution caused by Acts of God.

Due to the mutual trust existing between the parties, the mandate also ceases upon the termination thereof by the Principal or by the death of the Attorney in fact.¹⁶ Also within the particular reasons for termination, the Attorney in fact may renounce the mandate, subject to the prior information of the Principal in due time. However, they shall only receive the expenses necessary for the fulfillment of the mandate, as well as the remuneration corresponding to the results recorded.

Unlike the regulations of Civil Law, commercial practice applies the theory of common interest mandates. The party injured by the termination of the mandate may claim damages. If the termination is unilateral, the injured party is not obliged to prove the abusive exercise of rights or bad faith of the party terminating the mandate.¹⁷

¹⁶ Ioan Macovei, *Dreptul comerțului internațional (International Commerce Law)*, Vol II, C.H. Beck Publishing House, Bucharest, 2009, p.40.

¹⁷ T.R. Popescu, op.cit., p.250 et seq.

There are two more additional cases of mandate termination, however these provisions have become unenforceable due to the abolition of the provisions concerning the lack of capacity for married women.

By applying the general principles, it showed that “*the Principal or Attorney in fact who, without just cause, by termination or renouncement cease the execution of the mandate, shall be liable for damages.*”

If a just cause for mandate termination exists, the Attorney in fact is not entitled to claim damages, nor to complain about the termination of the mandate via the courts of law.

6. Brokerage contract¹⁸

Brokerage has been deemed of special importance by modern society, due to the generic impossibility of merchants to meet and get acquainted; for this reason resorting to broker services is implied, which, in most cases, are professionals, exhibiting knowledge to be exploited for the purpose of concluding the contracts for which they are contracted; The importance of this contract firstly results from its frequency of use, and secondly due to its unnamed character, as such is not regulated by the current laws.

The brokerage contract¹⁹ is an agreement whereby a person, called broker, undertakes to find a contractor for the person who assigned them with the task of contracting, called client, in exchange for an amount of money (compensation) called brokerage rate.

The following features result from the definition:

- the facilitation by the broker of a relationship between the parties for the purpose of concluding a contract;
- the existence of the concordant will of the parties in the relationship;
- the broker's independence.

The brokerage contract is a variation of the mandate contract. The Broker acts as an Agent, capacity whereby they broker the finding of commercial partners for the representative. However, they are not part of the contracts concluded.

The contract ceases when the broker facilitates a direct contact between the future parties.

While the mandate contract usually implies representation, the brokerage contract features no representation. The broker professionally carrying out an agency activity, without taking part in the conclusion of the contract.

On the other hand, object of the mandate contract is represented by the conclusion of legal deeds for and on behalf of the Principal, while the Broker only carries out a material activity.

¹⁸ Lucian Sauleanu, Armand Calota, *Contractul de curtaj (The Brokerage Contract)*, RDC 7-8/1999 Lumina Lex, Bucharest.

¹⁹ also known as the court settlement contract.

Where the mandate contract is for consideration, the mandate must pay the remuneration even if the trustee has not fulfilled the mandate, unless the failure to fulfill the mandate is due to the trespasser's fault.

Instead, the broker shall not receive the remuneration established in case of failure to find a contractor for the person who charged them with this task.

“If no fault may be imputed to the Attorney in fact, the Principal cannot be exempt from such indemnity and payment (of the fee n.n.) even when the business failed, nor reduce the amount of expenses or advance payment motivating that such could have been lower.”

Modern society places a high importance on the brokerage contract, due to the unprecedented development of contractual relations and the generic impossibility of merchants to meet and get acquainted²⁰.

Therefore, merchants resort to brokers, who have certain knowledge to be exploited for the purpose of concluding the contracts for which they are contracted.

The Broker is an agent whom, having a professional title and in exchange for remuneration, facilitates a contact between two persons who wish to conclude a mutual contract. They are deemed to be merchants to the extent to which they carry out general agency activities.

6.1. The legal nature of the brokerage contract

Compared to the mandate contract, the most important difference is that, while the mandate contract features representation, the brokerage contract is without representation²¹.

Although the Commercial Code only recognizes the business agency activity as an act of merchant, the current laws find applications of this activity in various fields. One such application is the agency for securities called the *Law of the capital market* as an activity carried out by persons authorized under the law, including the purchase and/or sale of securities or rights related or arising therefrom, as well as accessory or related operations authorized by the National Securities Commission²²; the difference between agency in commercial business as provided by the commercial law and agency of securities is that the parties of the latter are no longer put into contact for the purpose of concluding the contract, but the securities company performs the sale and purchase orders of clients, without the intervention of the latter²³.

²⁰ See F.A.Moțiu, *Contractul de curtaj (The Brokerage Contract)*, in the Annals of the Western University of Timișoara, series Jurisprudence, no. 1-2/2000 Western University of Timișoara Publishing House, 2000, p. 65-77.

²¹ Art. 108 from the *Commercial Code Charles the 2nd*.

²² Also see *“Regulation no. 3/1996 on the authorization and exercise of securities agency services”*.

²³ See Ion Turcu, *Teoria și practica dreptului comercial român (Theory and Practice in Romanian Commercial Law)*, vol. I, Lumina Lex Publishing House, Bucharest, 1998, p. 118.

According to the capital market, a securities agent is a legal person duly authorized by the National Securities Commission to perform professional securities agency services, as fact of commerce, either individually (dealer), or via third parties (broker). The categories of operations that can be brokered by dealers or brokers are provided in strictly limitative manner, the first and most important being the sale and purchase of securities on behalf of clients.

Another category of agents is represented by brokerage agencies and brokers acting within commodities markets. The only persons who may carry out brokerage services are brokerage agencies and brokers whose activity mainly consists of the negotiation of offers and conclusion of contracts on the cash market, with deadline payment or with options in the account of third parties – subject of commercial law or on their own behalf. Transactions on the commodities markets are done based on the sale/purchase offers to be negotiated by brokers subject to a market order. The sale/purchase offers, containing an irrevocable expression of will, must be firm and expressly formulated.

Unlike the Attorney in fact, the Broker professionally carries out an agency activity, without taking part in the conclusion of the agreement, being a merchant whose activity professionally comprises of facilitating the connection between persons who want to contract. In principle, their role is to search, upon their client's request, for a potential contractor susceptible to meet the conditions established by the client.

Thus, the broker is only an agent between the client and their future contractual partners, who facilitates and enables the conclusion of commercial transactions, however without intervening in the contracts concluded between them.

The brokerage contract is different from the commission contract, considering that the parties whose contact is facilitated by the broker conclude the contract envisaged between themselves, while in the commission contract, the consignee concludes the legal deeds for which they were authorized in their own name, but for the principal.

6.2. Parties to the brokerage contract

The parties to the brokerage contract are the Broker and the Client.

The Broker is an independent merchant, natural or legal person, acting on their own behalf, undertaking the obligation to facilitate the contact between the client and potential contractor for the conclusion of a determining contract. They are not part of the merchant dependent category, considering the relations between the dependent auxiliary and merchant are based on representation, not applicable for relations between Brokers and Client.

The other part of the brokerage contract is the Client, they are a person who resort to the Broker's services, in order to find a business partner.

In order to be able to intervene in a brokerage contract, the Client undertakes to submit an offer with the Broker containing the elements of the future

contract with third parties. From this perspective, the broker was deemed to be an “offer carrier”²⁴.

The offer must represent a real, conscious and serious expression of will, provided for the purpose of generating legal effects, because only thus is the Broker able to search for a contractor for the Client.

Furthermore, it must be firm, otherwise it may only be considered as an advertisement offer, which does not imply an actual commitment, only an invitation to concrete negotiations.

6.3. Effects of the brokerage contract

The conclusion of a brokerage contract generates rights and obligations for both contracting parties, the brokerage contract being, as we have shown, a bilateral contract (synallagmatic). These rights and obligation being interdependent and conditional, depending on the finding by the broker of a contractual partner for the Client.

The fundamental feature of the brokerage contract is that the broker must enable the contact between those who want to contract, without being involved in the conclusion of the contract between the same, the minimal obligations of the parties of the brokerage contract resulting from this essential characteristic²⁵.

6.4. Obligations of the broker

The main obligation of the Broker is to find a contractor for the Client in order to conclude a contract; this obligation depends on results, and not due diligence, as the finding of such contractor is the essence of the brokerage contract. Only the achievement of this result enables the Broker’s right to remuneration, respectively the Client’s obligation to pay such remuneration.

The Broker reserves certain obligations resulting from the professional exercise of their responsibilities; for the fulfillment of such responsibilities, the Broker must act in good faith and with the due diligence of a *pater familias* bonus.

Art. 104 of the Commercial Code Draft of 1938 established the following obligations for the Broker: the obligation to keep commodity samples until the performance of sale contracts concluded based on the same; to be liable for the existence of titles and authenticity of the last signatures applied to registered titles held; to submit with the purchasers a list signed by them with the titles negotiated, indicated the number and series thereof.

The Broker is liable if they enable a connection between the Client and a dummy trade company; although the Broker does not guarantee for the solvency of the parties, they are however liable in case of enabling a connection between a

²⁴ L. Săuleanu, A. Calotă, op.cit., p.212.

²⁵ F.A. Moțiu. op.cit., p.227.

person whose insolvency is flagrant²⁶. As stated before, the Broker's mission ceases upon the conclusion of the contract, yet they shall be liable if the failure to execute the contract occurs by their fault.

The Broker has no obligation in terms of contract execution, except when the contract has provided that they represent one of the parties or have undertaken to perform certain operations. Note that under no circumstances shall the fiscal obligations associated with the commercial operations subject in the brokered contract fall to the Broker.²⁷

French doctrine has shown that in the professional exercise of their responsibilities, the Broker has several obligations, as follows:

- The obligation to not disclose information on their client;
- The obligation to provide accurate information on the operation subject in the contract;
- The obligation to guarantee the identity of the contracting parties.

6.5. Obligations of the client

The main obligation of the Client within the brokerage contract is to pay the remuneration set to the Broker. However, in exchange for agency services, the Broker is entitled to a remuneration, called brokerage rate.

The brokerage rate may be fixed or calculated according to the net or gross value of the Client's invoice or of the contracts concluded²⁸.

If no clause concerning the remuneration paid to the Broker has been provided within any clause by the Client and Broker, such shall be due according to the presumption that the brokerage contract is onerous. The amount thereof, in this case, shall be established by the court of law depending on the activity actually provided by the Broker for the Client²⁹.

6.6. Remuneration (brokerage fee)

In exchange for the agency services, the Broker shall receive an amount of money, called brokerage rate, thus the remuneration paid to the Broker is itself called brokerage rate; the brokerage rate is due upon conclusion of the contract, regardless of the execution thereof; as established by legal practice, once it is

²⁶ this obligation does not hinder the performance by the broker of an investigation to conclude if such party is solvable or not.

²⁷ See in this regard SCJ, Contentious – Administrative Division, Dec. no. 659 as of March 28, 1996, in the Revista de Drept Comercial no. 5/1997, p. 93 and *Buletinul jurisprudenței pe anul 1996*, Proema Publishing House, Baia Mare, 1997, p. 453-456.

²⁸ C.Turianu, V.Pătulea, *Drept comercial. Practică judiciară adnotată (Commercial Law. Annotated Legal Practice)*, op.cit., p.169.

²⁹ Court of Cassation, 3rd Division, decision as of May 27, 1896, in the Journal for Court of Cassation Decisions, 1896, p. 910.

found that the agent has enabled the agreement between the parties in order to conclude business, the Broker's mission ceases, and the Client must pay the remuneration established, regardless of the fate of the contract³⁰; however, the parties may establish within the brokerage contract that the remuneration payment be conditioned by a certain circumstance (e.g., that the remuneration be paid after the sale price has been collected³¹); on the other hand, the Broker's right to remuneration requires more than the actual finding of the agreement of the parties for the conclusion of commercial business, thus, the consent concerning all contract clauses is necessary; therefore, if the parties agree on the object and price of the sale-purchase agreement, and no agreement has been reached on the payment of an earnest payment, the Broker cannot request the payment of the remuneration³².

If the contract is not concluded, the Broker has no right to remuneration, except when the parties put into contact simulate the cessation of negotiations and conclude the contract afterwards. If the conclusion of the contract fails by fault of the Client, although the Broker had found a contractor and obtained all the conditions imposed, the Broker shall not be entitled to remuneration, only to damages³³.

The payment of the brokerage rate shall be made by the person stipulated in the contract; in the absence of such a clause from the contract, the remuneration is to be paid together by both parties. If the contract, concluded by agency provided by the Broker, is renewed, the Broker may request a new remuneration; however, such aspect is still being subject to debate within the doctrine.

7. Conclusions

In conclusion, the agency represents a legal instrument frequently occurring in practice, both within internal commercial relations, as well as within international trade, when a merchant, regardless of their object of activity, does not take direct part in the conclusion of contracts, but resorts to agents who conclude such contracts for the merchant or on their behalf

Agents must be distinguished from economic operator employees who are tied to them via labor contracts. Must be distinguished from representative or ushering commercial travelers whose role implies the prospecting of economic agents' clientele and the receipt of orders for the economic agents.

³⁰ Court of Cassation, 3rd Division, decision no. 505 din 1923, in judicial practice in the commercial subject area, vol. I, Lumina Lex Publishing House, Bucharest, 1991, p. 137-138; Cass. III, April 6, 1921, in the *Pandectele Române* (The Romanian Pandects), 1921, III, p. 37.

³¹ Court of Cassation, 1st Division, decision no. 145 din 1947, in judicial practice in the commercial subject area, vol. I, Lumina Lex Publishing House, Bucharest, 1991, p. 138.-139.

³² Court of Cassation, 1st Division, decision no. 864 din 1925, in judicial practice in the commercial subject area, vol. I, Lumina Lex Publishing House, Bucharest, 1991, p. 138.

³³ Iași Trib., March 2, 1910, in M. A. Dumitrescu, *Codul de comerț adnotat* (Annotated Commercial Code), Cugetarea Publishing House, Bucharest, vol. I, 1926, p. 33.

Agents must also be distinguished from distributors belonging to distribution chains who group a manufacturer and all their merchants charged with the sale of the related products around a trade company.

The function of intermediaries is the help given to the economic agents to carry out their commercial operations, the activity of the intermediary is also in the interest of the co-contractor in the effective contract of goods or services rendered.

The agency criterion is represented less by the idea of representation, and more by the provision by the agent of an activity in the interest of another person.

With regards to the provisions of the New Civil Code, as the changes brought by this new normative framework were analyzed within each chapter, I believe the new regulation will generate an impact on the business environment, because it implies a uniform approach to obligational relations. The traditional separation into civil relations and commercial relation is waived, and legal differences are established depending on the professional, and respectively non-professional capacity of those involved in the obligational legal report.

The fundamental change of notion, the proposed revision of the contract regulation, including those especially designed for professionals, the inclusion within the Civil Code of the regulation of contracts specific to the banking environment are legislative solutions estimated to have a significantly positive impact on the development of the business environment.

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Antitrust Law in the United States of America

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Abstract

United States antitrust law is a collection of federal and state government laws that regulates the conduct and organization of business corporations, generally to promote fair competition for the benefit of consumers. (the concept is called competition law in other English-speaking countries.) The main statutes are the Sherman Act 1890, the Clayton Act 1914 and the Federal Trade Commission Act 1914. These acts restrict the formation of cartels, the mergers and acquisitions that could substantially harm competition. and the abuse of dominant position.

Keywords: *United States of America, antitrust, federal.*

JEL Classification: K 33

1. Introduction

European competition law is one of the areas of competence of the European Union.

Competition law (antitrust as it is known in the United States) is regulating the exercise of market power by large companies, governments or other economic entities. EU competition policy was adopted in advance of economic integration. There were introduced antitrust provisions with its founding act, the Treaty of Rome. The competition policy of the European Union is to prevent intervention by member governments that can distort the free market by discriminating in favour of State companies or granting other aid to certain companies in the public sector/private sector (State aids)².

In the field of competition law, politics is more important in the United States. The heads of the regulatory bodies are politically appointed and their budgets are voted by the U.S. Congress.

The activism of antitrust policies during the Clinton Administration was replaced by a laxer vision during the Bush years.

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² See Catalin-Silviu Sararu, *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in Catalin-Silviu Sararu, *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, p. 47.

2. General aspects

An important area of divergence is what is called monopoly leveraging in the United States is called dominant position in European language. Most U.S. courts considered that it is not unlawful for a firm with a monopoly in one market to use its monopoly power in that market to gain a competitive advantage in neighboring markets, unless by so doing it serves either to maintain its existing monopoly or to create a dangerous probability of gaining a monopoly in the adjacent market as well.³

According to European competition law, it is an abuse of dominance for a firm that is dominant in one market to use that position to gain a competitive advantage in a neighboring market in which it is not dominant even if the conduct is not shown to be likely to create a dominant position in the second market unless the dominant firm can show a legitimate business justification for its conduct.⁴

3. Legal background

We can consider differences between the EU and US competition law to have significance for three reasons.

The first reason is that there is a high and increasing degree of interdependence between the regulatory regimes of individual jurisdictions.

Usually, when a multinational enterprise operates in the EU, it operates too in the United States. For matters such as abuse of dominance, firms generally must adjust their behaviour to that of the most restrictive major jurisdiction with competition laws.

The second reason is referring to the process of enforcement. Even when the EU and United States are enforcing the same substantive standards and ordinarily reach the same assessment of the same commercial practice, differences in the procedure for investigations and agency decision-making can impose costs on affected enterprises. In the situations when it is possible to achieve simpler, more common procedures, the EU and US agencies can reduce the cost of executing routine transactions without any reduction in the quality of their substantive analysis.⁵

1 Hristo, H, Georgieva, R. *The EU and US Divergence on Competition Law*, Eur 324 A Working paper, 2014, p. 9.

⁴ *Ibidem*, p. 9.

⁵ Kovacic, W. *Competition policy in the European Union and the United States: convergence or divergence in the future treatment of dominant firms?* FTC Statements, 2008, https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf, p. 8, (consulted on 5.11.2017).

The third reason is the development of new competition systems around the world. The EU and the United States are spending substantial resources on technical assistance for new competition policy systems and for countries adopting of new competition laws. The greatest majority of the 80 or so jurisdictions that have adopted new competition laws in the past 30 years have civil law systems. Their competition systems usually use an administrative enforcement model that resembles the EU regime. Few civil law countries have established competition systems using United States adversarial prosecution model. Because the EU institutional panorama is more compatible with the institutional construction in most civil law countries, many transition economies are inclined to look first to EU models in designing and implementing their competition systems. This condition means that EU, rather than US, norms tend to be more readily absorbed into the newer competition policy regimes.⁶

The general trend of competition policy in the two countries is going toward common acceptance of substantive standards and the analytical concepts that support the implementation of those standards.

Important fields in which the two systems have substantial convergence are the agreement on the goals of competition policy, the treatment of cartels and horizontal mergers, and recognition of the dangers of state-imposed restrictions on competition.

A matter of difference is the treatment of dominant firm behaviour.⁷

In general terms, European doctrine and policy are imposing greater restrictions on dominant firms than the US competition law.

The main statutory texts of the EU and the United States create a basis for differences in the treatment of dominant firm conduct.

The US antitrust laws are not the same with the excessive pricing prohibition in article 82.

The Commission has not used its excessive pricing authority expansively, but the EU member states wanted to apply this measure under their own competition laws. The terms of article 82 also provide a less certain basis for determining that the prosecutor must show that denominated forms of abuse had actual or likely anti-competitive effects.

The interpretations of article 82 by the Court of First Instance (CFI) and the Court of Justice created a wider zone of liability for dominant firms than the decisions of the US courts under Section 2 Sherman Act.

US courts said that courts and enforcement agencies commit greater errors by intervening too much rather than too little. This perspective does not appear in EU jurisprudence or in speeches by EU enforcement officials.⁸

⁶ *Ibidem*, p. 9.

⁷ *Ibidem*, p. 9.

⁸ *Ibidem*, p. 11.

4. US antitrust law regime

In the United States of America, the Sherman Act created competition law.⁹

Section 1 of the Sherman Antitrust Act, 1890 provides that any contract, trust or both which are in restraint of trade within the US is illegal and the penalty was either a fine for or imprisonment not exceeding three years or both. Section 2 makes it a felony to monopolize trade as provided for under section 1.

Section 2 of Clayton Act, makes price fixing illegal and section 3 covers product tying, refusal to deal, exclusive dealing, coercive monopoly and barrier to entry. Sections 7, 8 and 10 prohibit market concentrations, which determines the formation of cartels and merger control.¹⁰

The Hart-Scott-Rodino Antitrust Improvement Act of 1976 provides the necessity of approval from the Department of Justice and the Fair Trading Commission in cases of large companies merging.

US Supreme Court specified the three ingredients needed to establish monopoly as consisting of fixing prices to injure the public, limiting production and reduction in quality of productivity.¹¹

In US around 75% of antitrust cases are brought to court by third parties.

This enforcement by “private attorneys general” is far cheaper on the federal, state and local authorities and the large number of individuals automatically makes enforcement of competition law very strong.

The US Supreme Court has also held that foreign governments have standing to sue in private actions in the U.S. courts.¹²

Every moment domestic U.S. antitrust law were affected by the global market. From the beginning, while the Sherman Act was being drafted, Congress recognized the close relationship between tariff levels and the effectiveness of internal U.S. laws against restraint of trade.¹³

High tariffs are equal with greater power for the huge businesses that were arising in the late nineteenth century. As a result, it was a greater need for regulation of monopolistic practices.

The main institution enforcing competition (antitrust law) is the U.S. Department of Justice (DOJ).¹⁴

⁹ Kusi-Appiah, F. *Implication of Competition Law Enforcement in the Electricity Sector: Comparative Analysis of the UK and the US*, 2016, https://erranet.org/wp-content/uploads/2016/10/Kusi-Appiah_Paper_Award2016.pdf (consulted on 5.11.2017), p. 2.

¹⁰ *Ibidem*, p. 2.

¹¹ *Ibidem*, p. 2.

¹² *Ibidem*, p. 5.

¹³ *Ibidem*, p. 5.

¹⁴ Wood, D.P. *United States antitrust law in the global market*, Indiana Journal of Global Legal Studies, Volume 1, Issue 2, 1994, p. 412.

Since 1933 is acting through its Antitrust Division to carry out its manifold responsibilities.

The Department is the only entity entitled to seek criminal sanctions for antitrust violations," and it has used that authority aggressively. It is also entitled to seek civil injunctions against conduct violating any of the antitrust laws;' to sue for treble damages on behalf of the United States; to review mergers and acquisitions meeting statutory size-of-person and size-of-transaction tests under the Hart-Scott-Rodino premerger notification procedures; and to engage in competition advocacy in the courts.

Along with the Federal Trade Commission (FTC), the DOJ represents the interests of the United States in competition law matters in international fora, such as the Organisation for Economic Cooperation and Development, the United Nations Conference on Trade and Development, and many bilateral arrangements.

With the exception for criminal jurisdiction, the FTC shares with the DOJ the responsibility at the federal level to enforce the antitrust laws.¹⁵

Even its jurisdiction over "unfair methods of competition" pursuant to § 5 of the FTC Act, the FTC may condemn any practices that are either actually or potentially harmful to competition, whether or not they literally fall under one of the other antitrust laws.

The Clayton Act directly authorizes FTC enforcement of its provisions regarding to price discrimination, tying arrangements, mergers and acquisitions, and interlocking directorates.

The FTC does not impose monetary fines. Its typical sanction is the "cease and desist" order or, in a merger case, an injunction or an order to divest-in general, equitable measures.

State attorneys general had some power to enforce the federal antitrust laws.

But it was not until the 1980s that they became more visible and more active.

Before that time, the states could sue for recovery of damages to the state itself, or they could sue on behalf of a class of political subdivisions where state law permitted.

The Supreme Court confirmed in that the state could not seek damages for injury to its "general economy."

However, similar suits for injunctive relief were and are permissible. Two key developments combined to invigorate state enforcement efforts. The first was the addition of sections 4c through 4h to the Clayton Act in 1976, which permit a state attorney general to bring a *parens patriae* action for injuries to the property of natural persons residing in the state.

¹⁵ *Ibidem*, p. 413.

The U.S. antitrust law allows private parties to sue for damages or for injunctive relief to enforce any of the antitrust laws.¹⁶

The concept of the "private attorney general" is a central part of the enforcement structure.

For private plaintiffs, monetary penalties serve an important compensatory function as well as the more traditional deterrence function. The sheer number of persons with an incentive to detect and prosecute antitrust offenses changes the entire character of the U.S. law, especially as compared with virtually all other systems, in which private enforcement plays a minor role or no role at all.

The existence of private parties is creating more difficulties for government policymakers in their efforts to control developments in antitrust law through the exercise of prosecutorial discretion, since the courts perform deal with the full range of issues."

It is the judiciary that has the greatest influence on antitrust policymaking, not the administrators of the laws.

The *Parker v. Brown* doctrine is often known as the state-action exemption to the federal antitrust laws.

In reality, it evolved from a decision of the Supreme Court decision that the 1890 Congress law did not intend to subject the states in their sovereign capacity to the Sherman Act, and thus, the Sherman Act simply did not cover a California action that creating a raisin growers' cartel. In the *Parker* case, the Court avoided the necessity of deciding whether a state law that conflicted with the Sherman Act would be preempted according to normal principles of federal supremacy.¹⁷

The first important effect of *Parker* for the global market is its effect on the competitiveness of various U.S. sectors.

Some state and local regulatory schemes derogated from the competition principle in the service of other public goals and affecting interstate and foreign commerce, they will impose the same policy choice on the nation as a whole.

Other state regulatory systems are designed to address market failures, and thus may have a negligible or a benign effect on international competitiveness.

A second effect of *Parker* is mostly external.¹⁸

The ability of U.S. trade negotiators to open foreign markets for U.S. producers can face difficulties due to the network of state and local regulations that are inconsistent with federal competition laws, such as "Buy America" laws that permit boycotts against foreign producers," and local monopolies.

¹⁶ *Ibidem*, p. 414.

¹⁷ *Ibidem*, p. 421.

¹⁸ *Ibidem*, p. 423.

It is difficult, sometimes, for the trade negotiators to persuade foreign governments that operate their own (often extensive) monopolies to allow access for U.S. firms, local restrictions in the U.S. as equivalent barriers.

5. Conclusions

European and American antitrust policies are closer and closer.

Nevertheless, the two regimes maintain and will continue to maintain their distinctive features.

In particular, European antitrust analysis is moving closer to the American approach of emphasizing efficiency-based case-by case analysis of restrictive agreements among firms, but differences remain.

Europe may move closer to the American approach of assessing the efficiency.

Although the European Commission adoption of American-style merger guidelines suggests greater future convergence, contrasting merger assessments may continue to be similar periodically.

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Public-Private Partnerships: No Investment without an Investor-State Dispute Settlement or Investment Court System

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Abstract

Investor-state dispute settlement (ISDS) is arguably a neutral procedure that is used for international arbitration. Similar to other types of labour, judicial or commercial arbitration, ISDS is also designed to resolve conflicts through the use of impartial approaches that are founded in law. This arbitration alternative has become increasingly commonplace in recent years and there are currently more than 3,000 such ISDS agreements in place around the world. It is important to note, though, that ISDS is an umbrella term that subsumes a number of different types of approaches, varying in terms of process and scope. The role played by ISDS in problems solving has made entities claim that there is no international investment without ISDS. This paper seeks to examine the role of ISDS to resolve problems in procurement contracts such as PPP.

Keywords: PPP, ISDS, NAFTA, dispute settlement, investment.

JEL Classification: K23, K33, K41, K42.

1. Introduction

Although definitions vary, a useful definition provided by Deye states that public-private partnerships (PPPs) are “long-term, performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance.”² In recent years, PPPs have assumed new importance and relevance for many countries seeking viable alternative strategies for economic development, and many of these initiatives have met or exceeded expectations. In order to realize the full benefit of PPPs, however, it is vitally important to have an investor-state dispute settlement (ISDS) and an investment court system (ICS) in place. To determine the facts as well as the importance and relevance of these institutions and their implications for PPPs, this study presents a review of the literature to describe the purposes of ISDSs and ICSs for the purposes of PPPs, and a discussion concerning prevailing discriminatory practices in Romania, the United Kingdom (UK), the European Union (EU) and elsewhere. In addition, a comparison of ISDS and the World Bank’s International Centre for Settlement of

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² Andrew Deye (2015, Annual), “US Infrastructure Public-Private Partnerships: Ready for Takeoff?” *Kennedy School Review*, 15, p. 6.

Investment Disputes (ICSID) for the purposes of PPPs is followed by an examination of foreign investment protection in the EU, UK and Romania, as well as a comparison of methods and practises used on how PPP investor could be protected. In addition, an examination of the circumstances under which a host state could be sued by investor state for infringement of investment clauses at host state is followed by a comparison of current regulatory approaches and their associated criticisms. Finally, a summary of the research and important findings concerning investor-state dispute settlement and the investment court system as they apply to public-private partnerships are provided in the study's conclusion.

2. What is investor-state dispute settlement and investment court system (ICS) for the purposes of PPP (Public Private Partnerships)?

Investor-state dispute settlement (ISDS) is a neutral procedure that is used for international arbitration. Similar to other types of labor, judicial or commercial arbitration, ISDS is also designed to resolve conflicts through the use of impartial approaches that are founded in law. This arbitration alternative has become increasingly commonplace in recent years and there are currently more than 3,000 such ISDS agreements in place around the world. It is important to note, though, that ISDS is an umbrella term that subsumes a number of different types of approaches, varying in terms of process and scope. Although ISDSs differ in these respects, they all share some common reasons for governments using them, including the following:

1. To resolve investment conflicts without creating state-to-state conflict;
2. To protect citizens abroad; and,
3. To signal to potential investors that the rule of law will be respected.³

While these outcomes appear desirable on their face, ISDS agreements have also been the source of criticisms from opponents who maintains that domestic courts are the more appropriate venue for these types of conflict resolutions.⁴ Likewise, and as discussed further below, opponents of ISDS agreements cite the provisions of NAFTA Chapter 11 which “are primarily concerned with its invocation by corporate entities and its potential to effectively overturn or significantly weaken NAFTA states' ability to legislate or regulate in the public interest.”⁵ Yet other critics argue that ISDS places an inordinate demand on national resources and that some cases brought before ISDS arbiters are frivolous and a

³“Investor-State Dispute Settlement (ISDS)” (2017), *Office of the U.S. Trade Representative* [online] available: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>, (consulted on 1.11.2017), p. 1.

⁴ “Investor-State Dispute Settlement” (2017), p. 2.

⁵ William L. Owens and Andrew R. Fitzpatrick (2015, Annual), “Investment Arbitration under NAFTA Chapter 11: A Threat to Sovereignty of Member States?” *Canada-United States Law Journal*, 39, p. 55.

further waste of scarce resources.⁶ Finally, critics also maintain that the ISDS approach limits the regulatory ability of national governments.⁷

Conversely, proponents of the ISDS alternative argue that “providing a neutral international forum to resolve investment disputes under international law mitigates conflicts and protects citizens.”⁸ In support of this assertion, Cingotti, Eberhardt and Grotefendt point out that, “[The ISDS] is already in thousands of trade and investment agreements and has been used by companies around the world to challenge public interest regulations from environmental protection to public health measures.”⁹ Some salient examples of the ISDS approach in action include TransCanada’s decision to sue the U.S. over the Keystone XL oil pipeline project and tobacco giant Phillip Morris decision to sue Uruguay concerning its national anti-smoking laws.¹⁰ Moreover, other advocates of ISDS cite the need for the assurance of compliance with international due process standards.¹¹

In contrast to ISDS, the investment court system (ICS) advocated by critics of the Transatlantic Trade and Investment Partnership (TTIP) is based on the argument is that large multinational corporations will be the primary beneficiaries of the ISDS mechanism by lowering compliance standards and wielding inordinate influence on the adjudication process through ISDS.¹² Despite these criticisms, the European Commission has discounted the concern over lowered standards and has pledged to support all relevant environmental and safety rules and has called for the replacement of the contentious ISDS with an ICS system. In addition, Nowicka also notes that, “The EC has also decided to focus on another line of argument, which is that TTIP will be designed to invigorate the backbone of the European Union's economy- Small and Medium-Sized Enterprises (SMEs).”¹³ While these processes continue, there have been some reports of discriminatory practices with respect to PPPs around the globe, and these issues are discussed further below.

⁶ Owens and Fitzpatrick (2015, Annual), p. 55.

⁷ “Investor-State Dispute Settlement (ISDS)” (2015), p. 4.

⁸ “Investor-State Dispute Settlement (ISDS)” (2015), p. 5.

⁹ Natacha Cingotti, Pia Eberhardt, Nelly Grotefendt, Cecilia Olivet and Scott Sinclair (2016, April), “Investment Court System put to the test,” *Friends of the Earth Europe* [online] available: http://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/icstest_web.pdf, (consulted on 1.11.2017) p. 2.

¹⁰ Cingotti et al. (2016, April), p. 2.

¹¹ Ursula Kriebaum (2015, Annual), “Does TTIP Need Investor-State Dispute Settlement?” *Proceedings of the Annual Meeting-American Society of International Law*, 109, p. 203.

¹² Olga Nowicka (2015, October 1), “Small Business, Big Opportunities? TTIP and the EU's SMEs.” *The Polish Quarterly of International Affairs*, 24(4), p. 79.

¹³ Nowicka (2015, October 1), p. 80.

3. PPP and discriminatory practices in Romania, the UK and the EU

Could there be discrimination in bidding, awarding and execution of procurement contracts in the three legal entities above?

Pursuant to Romanian law 233/2016, local as well as foreign enterprise can be awarded PPP contracts; therefore, there can be no discriminatory practices applied to these awards. In reality, though, there remains a lack of a clearly defined list of industries of applications together with a number of limitations and restrictions set forth under Romania law that operate to exclude some enterprises. The current list of industries of application of PPPs in Romania extends only to the following:

- Contracts which are assigned to carry out a relevant activity in the public utility sectors: gas, heat and electricity, water, transport, postal services, exploration or extraction of oil, gas, coal or other solid fuels, as well as ports or airports;
- Provision or operation of networks providing a public service in transport by rail domain, through automated systems, with tramway, trolley, bus or cable;
- Production, transport or distribution of electricity;
- Production, transport or distribution of drinking water;
- Evacuation or treatment of sewage;
- Hydraulic engineering projects, irrigation or drainage;
- Exploration or extraction of oil, gas, coal or other solid fuels;
- Making available to carriers by air, sea or inland waterway, airports and maritime or inland ports or other transport terminals;
- Production, transport or distribution of gas or heat;
- Postal services;
- Management of courier services;
- Services with added value related to electronic mail provided entirely by electronic means;
- Postal financial services; and,
- Logistics services.¹⁴

By contrast, with respect to PPPs in the UK, analysts at APMG conclude that, “There may be “discriminatory” changes in law specifically addressed to the project company. When a change in law is considered discriminatory, full compensation should be provided to the private partner.”¹⁵ The UK’s certification

¹⁴ Lizeta Aneziane and Dalina Dumitrescu (2014, February). “Public Private Partnerships in Romania versus Albania: The Challenges to Improve Legislation for Attracting More Financial Resources,” *European Scientific Journal*, 1, p. 1857.

¹⁵ “Changes in Law – Specific and Discriminatory Changes in Law” (2017), *APMG International* [online] available: <https://ppp-certification.com/ppp-certification-guide/141-changes-law-%E2%80%93-specific-and-discriminatory-changes-law>, (consulted on 1.11.2017), p. 3.

guide also cautions that any future changes in the laws regarding the administration of PPPs should “take back the risks of specific changes in law as long as they are significant in terms of consequences or impact. A good common approach is to share the risk — but always provide a cap in the overall exposure of the private partner, so the risk is quantifiable.”¹⁶ In addition, the UK’s certification guide also notes that, “Even discriminatory changes are dealt with in different manners in some countries. For example, the Private Finance Initiative (PFI) contract standards (version 4, 2007) in the UK also considers discriminatory changes adequate for shared risk treatment rather than providing full compensation.”¹⁷

With respect to discriminatory practices related to PPPs in the EU, consultants at the European PPP Expertise Centre point out that, “As far as procurement of PPP is concerned, the procurement options to choose from may be more limited under national laws and specific legal advice is required for each jurisdiction.”¹⁸ The resolution of these and other types of discriminatory practices may depend on which venue, ISDS or the World Bank’s International Centre for Settlement of Investment Disputes ICSID, is used to arbitrate conflicts as discussed further below.

4. ISDS and ICSID - Compare and contrast for the purposes of PPP

In order to facilitate the implementation and growth of PPPs, there has been increasing attention paid to standardizing a number of their features. Although it remains too early to tell, some analysts expect standardization will have a number of valuable outcomes, including most especially the reduction in the amount of time required to launch a PPP, on average from 7 to 3 years. One such initiative was launched by The Public-Private Infrastructure Advisory Facility (PPIAF) and World Bank pursuant to a request of the G20. This initiative included the drafting of model PPP contract language which has been submitted to the G20 Meeting of Finance Ministers and Central Bank Governors for future dissemination to developing and developed countries alike; however, the collaborators conceded that only certain parts of the contract were amenable to standardization and there remains a need to negotiate the more complex aspects of PPP contracts on a case-by-case basis.¹⁹

¹⁶ “Changes in Law” (2017), p. 4.

¹⁷ “Changes in Law” (2017), p. 4.

¹⁸ “Procurement of PPP and the use of Competitive Dialogue in Europe” (2016), European PPP Expertise Centre [online] available: <http://www.eib.org/epec/resources/epec-procurement-and-cd-public.pdf>, (consulted on 1.11.2017), p. 5.

¹⁹ Steven Shrybman (2015, November 6), “A Standard Contract for PPPs the World Over: Recommended PPP Contractual Provisions Submitted to the G20,” *Heinrich, Boll & Stiftung* [online] available: <https://us.boell.org/2015/11/06/standard-contract-ppps-world-over-recommended-ppp-contractual-provisions-submitted-g20>, (consulted on 1.11.2017), p. 3.

By contrast, the World Bank reports that, “States have agreed on ICSID as a forum for investor-state dispute settlement in most international investment treaties and in numerous investment laws and contracts.”²⁰ Founded in 1966 pursuant to the Convention of the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”), the ICSID Convention is “a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank’s objective of promoting international investment.”²¹

As an independent and neutral body, the ICSID provides an objective venue for the resolution of disputes. Moreover, because it is readily accessible to national governments and investors alike pursuant to free trade agreements, investment treaties or in its capacity as an administrative registry, the ICSID enhances the investment climate by promoting confidence in the processes that are used for dispute resolution.²²

5. Foreign investment protection in the EU, the UK and Romania

There are some methods and practises available that can serve to protect PPP investors, including the substantive legal protections afforded by the right to “fair and equitable treatment”, “full protection and security”, “free transfer of means” and the right not to be directly or indirectly expropriated without full compensation through the nationalization of assets that are applicable to the EU, the UK and Romania alike. For instance, the EU’s expanded authority concerning foreign investment has introduced some novel legal issues concerning the traditional format that has been used for international investor-state arbitration initiatives.²³ In response to the challenges that are expected to be made to its expanded authority, the EU’s European Commission has introduced a new regulation concerning the financial obligations that emerge from arbitrations, and a proposed regulation with amendments has been approved by the Council of the European Union as well as the European Commission that will provide substantive legal protections for PPP investors.²⁴

Likewise, foreign investment protections in the UK for bilateral investment treaties also stipulate the need for “fair and equitable treatment in accordance with international law.”²⁵ Similarly, in an effort to attract new investments,

²⁰ “About ICSID” (2017), *World Bank* [online] available: <https://icsid.worldbank.org/en/Pages/about/default.aspx>, (consulted on 1.11.2017), p. 2.

²¹ “About ICSID” (2017), p. 3.

²² “About ICSID” (2017), p. 3.

²³ Freya Baetens and Gerard Kreijen (2014, November), “Determining International Responsibility under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know.” *Vanderbilt Journal of Transnational Law*, 47(5), p. 1203.

²⁴ Baetens and Kreijen (2014, November), p. 1203.

²⁵ James Harrison (2013, *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations*. Edinburgh: Edinburgh University Press, p. 104.

Romania ensures foreign investment protections through the expeditious processing of contract disputes and has entered into bilateral treaty agreements with nearly 100 other countries to date.²⁶

6. Circumstances under which a host state could be sued by investor state for infringement of investment clauses at host state

According to Kingsbury and Shill, “Investment treaty arbitration is a growing field, with more than 300 treaty-based disputes publicly known and many new arbitrations being initiated each year.”²⁷ Identifying the specific circumstances under which host states can be sued by investor states for investment clause infringements, though, has become one of the more troubling aspects of investor–state arbitration due in large part to the potential for multiple proceedings to be filed against the host state by local subsidiaries as well as foreign shareholders in their capacity as investors.²⁸ Moreover, the problem becomes even more complex in those cases where local companies make the decision to settle their claim but investors determine that continuing the arbitration proceedings against the state are in their best interests.²⁹

The locus standae of an investor/state contract violation—consider if an investor has a locus standi to bring actions for treaty violations and if a state has a locus standi for the same.

According to the definition provided by *Black’s Law Dictionary*, “locus standi” simply means “a right of appearance in a court of justice, or before a legislative body, on a given question.”³⁰ In this context, investor’s may have a locus standi to “challenge measures by claiming that the host state breached the fair and equitable treatment standard under the treaty, arguing that the standard includes an obligation of the host state to act in a ‘proportional manner’ when adopting measures that affect the relevant investment.”³¹ Likewise, Páez-Salgado points out that if investors breach a contract or otherwise violate relevant legal frameworks, “The host state’s authorities might verify the unlawfulness of the

²⁶ “Romania Foreign Investment” (2017), Santander [online] available: https://en.portal.santandertrade.com/establish-overseas/romania/investing?&actualiser_id_banque=oui&id_banque=18&memoriser_choix= (consulted on 1.11.2017), p. 4.

²⁷ Benedict Kingsbury and Stephan W. Schill (2010), *Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest –The concept of proportionality*. Oxford: Oxford University Press, p. 75.

²⁸ Daniela Páez-Salgado (2017), “Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?” *Journal of International Dispute Settlement*, 8(1), p. 101.

²⁹ *Ibidem*, p. 101.

³⁰ *Black’s Law Dictionary* (1991), St. Paul, MN: West Publishing Co., p. 941.

³¹ Daniela Páez-Salgado (2016, April), “Violations of Fair and Equitable Treatment in Investor–State Arbitration.” *World Arbitration and Mediation Review*, 10(1), p. 37.

investor's act and apply the corresponding sanction, such as a fine or the cancellation of the contract."³²

7. The choices: ISDS v NAFTA-comparison of NAFTA Chapter 11 and ISDS

The continuing relevance of the North American Free Trade Agreement (NAFTA) remains unclear at the present time due to the new U.S. president's commitment to renegotiation its terms, but at present, chapter 11 of the NATFA, the "most innovative and certainly the most controversial part of the entire agreement,"³³ affords a number of protections for investors. For instance, the salient portions of chapter 11 of the NAFTA, Article 1103 ("Most-Favored-Nation Treatment") are set forth in Table 1 below:

Table 1

Chapter 11 -- Investment, NAFTA

Section/Article	Contents
Section A: Article 1102 National Treatment	<p>1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p> <p>2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p> <p>3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.</p> <p>4. For greater certainty, no Party may:</p> <p>(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or</p> <p>(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.</p>

³² Paez-Salgado (2016, April), p. 37.

³³ Marcia J. Lewis (2003, Winter), "Arbitration under NAFTA Chapter 11: Past, Present, and Future." *Houston Journal of International Law*, 25(2), p. 301.

Section/Article	Contents
Section A: Article 1103: Most-Favored-Nation Treatment	<p>1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.</p> <p>2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of another Party.</p>
Section A: Article 1104: Standard of Treatment	Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.
Section A: Article 1105: Minimum Standard of Treatment	<p>1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.</p> <p>2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.</p>

In sum, the provisions set forth in Table 1 above provide the protections for investors that are based on “equitable treatment” and “international reciprocity”; these provisions also describe the process by which arbitration will take place in those cases where a signatory country breaches these requirements. According to Owen and Fitzpatrick, “This dispute settlement mechanism provides foreign investors with the authority to proceed directly against a NAFTA government, a standing that represents a meaningful departure from past practice when such disputes were traditionally handled between national governments.”³⁴

By contrast, the overarching objective of ISDS is to provide enhanced security for investors in those states that lack a sufficient “rule of law.”³⁵ Notwithstanding this laudable objective, critics of the ISDS alternative counter that, “The fact that the U.S. is insisting on the same provisions in Europe, where legal safeguards are as strong as they are in the U.S., suggests another motive: the desire to make it harder to adopt new financial regulations, environmental laws,

³⁴ Owens and Fitzpatrick (2015, Annual), p. 56.

³⁵ Joseph Stiglitz (2016, March 28), “Beware of TPP’s Investor–State Dispute Settlement Provision,” *Roosevelt Forward*. [online] available: <http://rooseveltforward.org/beware-tpps-investor-state-dispute-settlement-provision/>, p. 3.

worker protections, and food and health safety standards.”³⁶ Despite the arguments that ISDS serves to prevent discrimination against foreign companies to the contrary, many such entities have successfully sued to protect their interests even in those cases where they were not provided any additional protections beyond those that are conventionally afforded to domestic firms in identical circumstances.³⁷ In reality, though, critics charge that the ISDS framework actually operates to provide “**reverse discrimination**” that favors foreign enterprises. In this regard, Stiglitz emphasizes that: „a foreign firm can sue the U.S. government in private arbitration for cash rewards if it thinks government actions violate the new rights and privileges granted by TPP, but domestic American firms have no such recourse in U.S. courts. Two arbitrators can, in effect, undermine decisions of Congress and the president, ordering billions of dollars in payments for their lost investment value and guesstimated lost profits”.³⁸

Indeed, pursuant to the provisions of the Trans-Pacific Partnership’s ISDS framework, foreign investors enjoy standing to sue for a wide array of issues, given the nebulous agreement standard to provide a “*minimum standard of treatment*”, a phrase fraught with a lack of definitional clarity that has been applied by arbitrators in the past in ways that go far beyond the actual content of the bilateral agreements or the laws of the host country in providing preferential treatment to foreign investors.³⁹

8. Comparison of ISDS and dispute settlement unit, a mechanism of the World Trade Organisation

There has been a significant increase in the number of investor-state dispute settlement (ISDS) cases filed over the past decade and a half and the pace of filings is also increasing.⁴⁰ For instance, by the mid-1990s, there were only a few ISDS cases filed, but the outcomes of several high-profile cases resulted in an explosion in filings, with more than 30 new cases being recorded by one arbitral body each year during the period from 2003 through 2010, as well as more than 50 new cases each year from 2011 through 2013.⁴¹ According to Tienhaara, “As of the end of 2014, there were 608 known cases. By then, 101 governments had responded to one or more ISDS claims.”⁴²

³⁶ Stiglitz (2016, March 28), p. 3.

³⁷ Ibidem, p. 3.

³⁸ Ibidem, p. 4.

³⁹ Ibidem, p. 4.

⁴⁰ Kyla Tienhaara (2017), “Investor–state dispute settlement” in *Regulatory Theory: Foundations and Applications*, Canberra: The Australian National University, p. 876.

⁴¹ Ibidem, p. 876.

⁴² Ibidem, p. 876.

There has also been a change in the types of ISDS cases that have been filed in recent years, with a growing number of cases extending beyond the traditional areas that have been the focus of the ISDS framework in the past. For instance, Ienhaara reports that, “Rather than solely involving straightforward incidences of nationalisation or breach of contract, modern investor–state disputes often revolve around public policy measures and implicate sensitive issues such as health and environmental protection.”⁴³

These trends in ISDS filings are congruent with mission of the World Trade Organisation’s (WTO’s) dispute settlement unit (DSU) that seeks to guarantee health and environmental protections for states’ citizenry. In this regard, experts at the International Centre for Trade and Sustainable Development emphasize that “[The WTO’s dispute settlement unit] is critical for developing countries in defending their trading, and ultimately developmental rights and interests.”⁴⁴

9. Criticisms of ISDS and its future

One of the overarching criticisms that have been directed at the ISDS concerns the potential for the loss of intellectual property rights. For instance, according to Yu, “The ISDS mechanism has generated quite a controversy, as this mechanism will allow private investors to resolve international disputes with host states concerning all forms of investments, including those in the intellectual property field.”⁴⁵ Indeed, one American lawmaker has harshly criticised the ISDS mechanism by noting that it provides “large multinational corporations the right to challenge laws they don’t like—not in court, but in front of industry-friendly arbitration panels that sit outside any court system.”⁴⁶

Despite these criticisms, the ISDS mechanism appears to have a viable future unless and until reforms are implemented to address these concerns. For example, in May 2016, Austria, Finland, France, Germany and the Netherlands presented a proposal to the EU Council’s Trade Policy Committee for the adoption of the ISDS mechanism EU-wide.⁴⁷

⁴³ Ibidem, p. 876.

⁴⁴ “Practical Considerations in Managing Trade Disputes” (2012, December), ICTSD Programme on International Trade Law [online] available: <http://www.ictsd.org/downloads/2013/02/practical-considerations-in-managing-trade-disputes.pdf> (consulted on 1.11.2017).

⁴⁵ Peter K. Yu (2017, January 1), “The Investment-Related Aspects of Intellectual Property Rights,” *American University Law Review* 66(3), p. 830.

⁴⁶ Senator Elizabeth Warren (D-Mass.) as cited in Yu (2017), p. 830.

⁴⁷ “The future of ISDS in the EU: leaked non-paper reveals proposal for EU-wide investment agreement” (2016, May 30). *Herbert Smith Freehill*. [online] available: <http://hsfnnotes.com/publicinternationallaw/2016/05/31/the-future-of-isds-in-the-eu-leaked-non-paper-reveals-proposal-for-eu-wide-investment-agreement/>, p. 4.

10. The impact of ISDS on the capacity of governments to implement reforms and legislative policy programs in investment and FDI attractions

In order to attract greater levels of foreign directive investments (FDI), there must be assurances in place that guarantee investors that their interests are protected from unwarranted interference or influence from sovereign states. Despite criticism to the contrary that the ISDS mechanism limits the capacity of governments to implement reforms and legislative policy programs, advocates counter that the ISDS mechanism is an essential component for the provision of these assurances to foreign investors. In this regard, Owens and Fitzpatrick conclude that the “ISDS mechanism is a necessary tool of investor protection and has not eroded the power of sovereign states to regulate in the public interest.”⁴⁸

11. The ISDS and principles of democratic accountability

Depending on the respective domestic institutions and laws that are in place, the resolution of ISDS disputes frequently involves that assignment of a specific national agency to represent respondent states. This specific national agency may exercise substantial or complete authority concerning the type of litigation that will be used, as well as the arguments that should be addressed or excluded and any terms of settlement that should be used. As Johnson and Guven point out, “This raises issues for the intra-governmental and intra-national distribution of powers. A wide range of similar situations could arise in which the settling entity adopted positions contrary to the prerogatives of other national agencies, the intent of legislatures, or the rights of subnational governments.”⁴⁹

Likewise, other authorities maintain that democratic accountability will be diminished by the increased use of the ISDS mechanism because it “threatens principles of good governance, including government accountability, respect for the rule of law, transparency, and respect for citizens’ rights and interests under domestic law and international human rights norms, that are posed by the settlement of treaty-based investor-state disputes.”⁵⁰

12. Do governments give foreign investors preferences in EU, Romania and UK through investor preferences clauses?

⁴⁸ Owens and Fitzpatrick (2015, Annual), p. 56.

⁴⁹ Lise Johnson and Brooke Guven (2017, March 13), “The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest.” *Investment Treaty News*. [online] available: <https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/>, (consulted on 1.11.2017), p. 4.

⁵⁰ “The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest” (2017). *Columbia Center for Sustainable Investment*. [online] available: <http://ccsi.columbia.edu/2017/04/21/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest/>, (consulted on 1.11.2017), p. 2.

Investment preferences clauses in the EU (including the UK until Brexit proceedings have been completed) include the following:

- *Free transfer of funds* (e.g., import and export of capital, dividends, profits and eventual compensation for expropriation is free);
- *Nationalization protection and compensation clauses* (e.g., direct and indirect nationalization as well as prompt, adequate and effective compensation for the full value of the investment in case of expropriation in the public interest is guaranteed); and,
- *Full protection and security* (e.g., are the investments adequately protected by the authorities of the host country in cases of social unrest (strikes) and civil disturbances or even civil war?).⁵¹

Although Romania has recently proposed a new law that would permit the country to terminate bilateral investment treaties with other EU member-states, EU law guarantees investors and their investments in the EU Member States “proper and equal protection.”⁵²

13. Recent case laws

The real-world application of the principles of fair and equitable treatment for all stakeholders in PPPs has resulted in some mixed outcomes, with investors prevailing in some cases and national governments in others and a review of these cases is provided below.

S.D. Myers v. Canada

In this case, Canada was ordered to pay S. D. Meyers, an American waste disposal enterprise, more than \$5.5 million based on Canada’s ban against toxic industrial waste exports despite the fact that such exports were prohibited by an international treaty that was applicable to both Canada and foreign enterprises. The outcome of this case underscores the potential for investors to receive preferential treatment in their suits against states under NAFTA’s chapter 11 provisions. As an attorney for S. D. Meyers put it after the decision in this case, “It wouldn’t matter if a substance was liquid plutonium destined for a child’s breakfast cereal. If the government bans a product and a U.S.-based company loses profits, the company can claim damages.”⁵³ In addition, other chapter 11 cases that were lost by the government for similar reasons include *Occidental v. Ecuador*, *Ethyl Corporation v. Canada*, and *Dow AgroSciences v. Canada*.

⁵¹ *Investor-State Dispute Settlement in the EU*. (2014, September), Directorate-General for External Policies of the Union, p. 13.

⁵² Crina Biltag (2017, March 14). “Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties.” *Kluwer Arbitration*. [online] available: <http://kluwerarbitrationblog.com/2017/03/14/green-light-for-romania-to-terminate-its-intra-eu-bilateral-investment-treaties/>, (consulted on 1.11.2017), p. 3.

⁵³ As cited in Stiglitz (2016, March 28), p. 5.

Apotex v. the United States

By contrast, there have also been some precedential cases won by the government in NAFTA chapter 11 proceedings, including the following. In the case, *Apotex v. the United States*,⁵⁴ the dispute involved an initiative by the U.S. Food and Drug Administration that operated to prevent the Canadian claimants from exporting drugs produced in Canadian facilities to Apotex's U.S. subsidiaries.⁵⁵ The Tribunal rejected all three of Apotex's claims that the U.S. government's interpretations of federal law were violative of chapter 11 provisions and dismissed all of the firm's claims and ordered it to pay the legal fees and arbitral expenses of the U.S. government. Other cases in which the government has prevailed in similar situations include *Chemtura Corporation v. Canada* and *Philip Morris v. Uruguay*.

14. Is ISDS hunting ground for lawyers?

Although one ISDS expert claims that, "No investor wakes up in the morning and says OK let's start a claim against country X or Z today, that is ridiculous,"⁵⁶ it has become increasingly clear that the ISDS mechanism is rife with litigious opportunities and the increased number of cases being resolved in this fashion indicates that international law attorneys are well positioned to take advantage of these trends.

15. Does ISDS protect multinationals?

Many critics claim that not only are multinationals protected by the ISDS mechanism, they are afforded unjust protections. For instance, the editors of *The Economist* point out that, "Multinationals have exploited woolly definitions of expropriation to claim compensation for changes in government policy that happen to have harmed their business."⁵⁷

16. Conclusion

Although it is clear that private investors participating in public-private partnerships require and deserve some level of protections for their interests, the

⁵⁴ ICSID Case No. UNCT/10/2.

⁵⁵ Lucas Bastin (2013, Annual), "Amici Curiae in Investor-State Arbitrations: Two Recent Decisions." *Australian International Law Journal*, 20, p. 97.

⁵⁶ Nikos Lavronos (2016), "GIP in documentary on investment protection." *Global Investment Protection*. [online] available: <http://www.globalinvestmentprotection.com/index.php/gip-in-documentary-on-investment-protection/> (consulted on 1.11.2017).

⁵⁷ "The arbitration game" (2014, October 11). *The Economist*. [online] available: <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> (consulted on 1.11.2017).

research showed that the investor-state dispute settlement mechanism has been the source of a significant amount of controversy concerning how it actually operates to provide foreign investors with preferential treatment in arbitrations. The research also showed that such preferential treatment varies by venue, with Romania being cited for potential discriminatory practices while the EU and UK have more rigorous mechanisms in place. These modest differences, however, have not prevented disputes over interpretations of law and their applicability to myriad situations that were not anticipated when these mechanisms were designed and implemented. The overarching issue to emerge from the review of the relevant literature was that the extent to which investor-state dispute settlement or investment court systems are in place will be the extent to which public-private partnerships will be encouraged, so it is essential for policymakers to address the criticisms that have been directed at these institutions in order to attract the foreign direct investments that are needed for major capital projects that can benefit a nation's citizenry that would not otherwise be possible.

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CRIMINAL LAW IN BUSINESS CONTEXT

Fraud Management in the Romanian Criminal Law. Direct Implications in Business Environment

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Abstract

In this paper we have investigated the fraudulent management offense, taking into account the provisions of the new Criminal Code. In this review, we have insisted on the constitutive content of the offense, the elements of differentiation between the rules in force and those laid down in the Criminal Code of 1969, as well as the transitional situations. We have also highlighted the continuation of the tradition of Romanian law, a tradition which implies the incrimination of this fact starting with the adoption of the first Romanian Criminal code of the modern period, namely the Criminal Code of 1864. We have also insisted upon presenting the implications of this crime in the business environment, emphasizing the need to prevent and combat this crime more effectively, contributing to increasing mutual trust in the business environment and, implicitly, to increasing confidence in the Romanian state institutions. The novelty elements are represented by the examination carried out in accordance with the new law, as well as the presentation of the judicial practice in the matter. The work is a small part of the criminal law course, the special part to be published at the Universul Juridic Publishing House at the beginning of next year. This paper may be useful to the business environment, law faculty students, and practitioners in the field.

Keywords: *Offense; preexisting elements; constitutive content*

JEL Classification: K14

1. Introduction

One of the crimes encountered quite frequently in recent years in business (but not limited to) is the offense of fraud management.

As regards its legal content (according to the provisions of Romanian law, the fraudulent offense consists in the act of a natural or legal person who has or must take care of the administration or preservation of goods, of causing damage to another natural or legal person, with the occasion of the administration or preservation of those goods.

If the deed is committed by the legal administrator, the liquidator of the debtor's property or by a representative or prepaid of the debtor, the deed is considered to be more serious and is sanctioned accordingly.

Also, if the facts to which we have referred to above are committed in order to gain a patrimonial benefit, they are considered to be more serious being punished more harshly.

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In accordance with the provisions of art. 117 par. (1) from G.E.O. no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units², with the subsequent modifications and completions, the offense of fraudulent management committed by the legal administrator, the chief authorizing officer of the administrative-territorial units, as well as any representative or submitted thereof is considered be more serious, being sanctioned accordingly.

With regard to this offense, the recent doctrine has argued that “the incrimination of the fraudulent act of deception is justified, as the author, through its commission, violates the obligations incumbent upon him or under his assumption regarding the administration or preservation of the good of another, thereby causing patrimonial damage to the injured party.

In addition to material injury, the perpetrator also causes a moral lesion, which consists in disregarding the confidence given by the injured party, abusing his confidence.

For these reasons, fraud management, as a group classification, is part of the category of offenses against patrimony, but it belongs to the subgroup of patrimonial offenses committed by disregarding the trust granted and affecting those patrimonial social relations, the formation of which is always based on trust”.³

2. The Criminal Code in force in relation to the previous law

The offense of fraud management was also laid down in the Criminal Code of 1969, in a similar way in art. 214, between the two regulations being both elements of resemblance and difference.

Thus, in the new law the expression in “bad faith” was dropped, this requirement not being mentioned in the content of the norm of incrimination from art. 242, par. (1) Criminal Code.

For the old law the reason for the existence of this requirement in the text of art. 214, par. (1) Criminal Code of 1969, was to exclude fault as a form of guilt. Since the new law has established the rule that the act committed by fault is an offense only when the law expressly provides for it (article 16, par. (6), Thesis II, Criminal Code), the mention of this phrase is not more justifiable.

In art. 242, par. (2) Criminal Code, the first aggravated method is foreseen and may be retained in the situation in which the deed referred to in par. (1) is committed by some persons who have the capacity of judicial administrator, liquidator of the debtor's property or representative or prepaid thereof; we note that there was no such provision in the previous law, but this is still provided in art. 144 of Law no. 85/2006.

² Published in the Official Monitor of Romania, Part I, no. 299 of 24.05.1999.

³ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *Explicațiile Noului Cod Penal, vol. III, Art. 188-256/Explanations of the New Criminal Code, Vol III, Art 188-256*, Ed. Universul Juridic, Bucharest, 2015, p. 513.

The aggravated mode provided for in paragraph (3) was mentioned in a similar wording in paragraph (2) of the previous law.

We specify that in the new law the provisions of par. (3) of art. 214 Criminal Code of 1969, according to which if the property is privately owned, unless it is wholly or partly owned by the State, the criminal action for the deed referred to in paragraph (1) moves to the prior complaint of the injured person.

We should mention that by Decision no. 5 of February 4, 1999⁴, the Constitutional Court upheld the exception of unconstitutionality and found that the provision “*unless it is wholly or partly state property*” provided by art. 214, par. (3) of the Criminal Code is unconstitutional.

A last difference between the two regulations we report concerns the penalties of criminal law that are lower in the new law [imprisonment from 6 months to 3 years or fine in the case of par. (1) of the new law, the imprisonment from 6 months to 5 years in the case of the old law and the prison from 2 to 7 years in the new law, the prison from 3 to 10 years in the old law in the case of par. (3)].

3. The preexisting elements

3.1. The legal object

The *special legal object* consists of “patrimonial social relations whose formation, development and development impose a minimum of confidence in the person who received the property of another in the administration or preservation of the property that would not cause damage to the owner of the respective goods.”⁵

3.2. The material object

In the doctrine, it was argued that “In the case of fraudulent misconduct, unlike the offense of abuse of trust, the deed concerns a universality of goods (the whole or part of a person's property) and not certain or some singularized movable goods. In this universality can come goods of all categories: mobile and immobile, fungible and unfit, consumables and non-consumables, real rights and claims, etc.

The fraud management could regard any of these assets, the material object of the offense will be the property in respect of which the patrimony owner has been harmed (assets stolen, consumed, waste, destroyed, receivable or remitted, etc.). The abusive act will thus implicitly reveal the material object of the

⁴ Published in the Official Monitor of Romania, Part I, no. 95 of 5th March 1999.

⁵ Ilie Pascu, în George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *op. cit.*, p. 514.

offense; in the case of a plurality of abusive acts there will naturally be a plurality of material objects.”⁶

In the case of par. (2), the material object may consist of the debtor's assets and rights (including those acquired during the insolvency proceedings) which may be subject to forced execution under the conditions governed by the Code of Civil Procedure for which the administration has been executed or conservation by which damage was caused.⁷

In another opinion, it was argued that the *material object* consists “in principle of the universality of mobile and / or immobile, consumable or non-consumable goods belonging to another person; as an exception, may be a material object and a single good (for example, the minor receives an extra 1,000 hectares of land that is managed by his parents, who can commit fraud management in this context).”⁸

3.3. The subjects of the offense

The *active subject* of the examined offense may be any natural or legal person who is responsible for managing or preserving the property of another natural or legal person.

In the recent doctrine it has been stated that “The charge may of public or private law and may refer to the administration or preservation of the property of an individual or other legal person; the assignment may be given in writing or verbally, indefinitely or as determined. Formal conditions are indifferent, because there are no formalities required for the assignment.

Persons entrusted with the administration or preservation of the assets of another could be, for example, the guardian, the custodian, the guardian, the executor, the tenant, the person who received a mandate in this respect, etc.

A person who manages the goods of another, based on a natural or natural situation, cannot commit fraudulent management; for example, the parent who administers the assets of his child, the husband who manages the property of his wife.

The charge must be effective, that is, the perpetrator has actually put in the state and the right to exercise the administration or preservation of the goods of another, that is, to take possession of the goods and to take possession of them.

⁶ Vintilă Dongoroz în Vintilă Dongoroz (consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *Explicații Teoretice ale Codului Penal Român, vol. III/ Partea specială/Theoretical Explanations of the Romanian Criminal Code, Volume III, Special Part*, Ed. Academiei Republicii Socialiste România, Bucharest, 1971, p. 518.

⁷ Ilie Pascu, în George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasile, *op. cit.*, p. 514.

⁸ Mihail Udriș, *Drept penal, Partea specială, Sinteze și grile*, Ediția 3/ *Criminal Law, Special Part, Syntheses and Grids*, 3rd Ed., Ed. C.H. Beck, Bucharest, 2016, p. 269.

We believe that the guarantor in business (which, according to article 1.332 Civil Code is to continue the management until he can abandon it without the risk of a loss or until the person, either personally or through a representative or, as the case may be, his heirs are able to take over) may commit fraudulent management because, although not specifically entrusted with the administration, it is obliged to take care of the interests of the owner with the diligence that a good owner submits to the administration of his property (Article 1.334 of the Civil Code)”.⁹

In the case of the aggravated normative way provided in art. 242, par. (2) Criminal Code, the active subject is qualified in the sense that it must have one of the following qualities: a judicial administrator, a liquidator or a representative or a prepaid agent. The absence of this special feature expressly provided in the text of the incrimination will lead to the lack of criminal liability of the active subject of the offense in this way.

The court administrator is in compliance with the law¹⁰, a compatible insolvency practitioner authorized under the law, designated to exercise the powers provided by law or established by the court, in the insolvency proceedings, during the observation period and during the reorganization procedure.

The liquidator of the debtor's property is the person appointed by the syndic judge in the event of bankruptcy, according to the provisions of art. 57, art. 59-62 and art. 140 par. (6) of the Law no. 85/2014 on insolvency and insolvency prevention procedures.¹¹

The representative of the legal administrator or the liquidator of the debtor's property is the person empowered to exercise his attributions, according to the law.

Prepared for the insolvency practitioner is the individual who is employed on the basis of an individual employment contract that operates under the coordination of the employer and his beneficiary.¹²

The examined offense may be committed in any form of criminal participation.

In the doctrine, it was argued that “There is a co-author in the case where the charge to manage has been given to two or more persons and they together have committed fraudulent acts of manipulation. There are no coauthors, but distinct fraudulent offenses, if each of the persons who have been assigned the task

⁹ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *op. cit.* pp. 514-515.

¹⁰ Emergency Government Ordinance no. 86/2006 on the organization of the activity of insolvency practitioners, republished, as subsequently amended and supplemented, published in the Official Monitor of Romania, Part I, no. 724 of 13 October 2011, art. 2.

¹¹ Published in Official Monitor of Romania, Part I, no. 466 of 25 June 2014.

¹² Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *op. cit.*, p. 515.

of preserving or administering the goods has committed self-inflicting acts separately without having cooperated in committing such acts. Other people may contribute to fraudulent crime as instigators or accomplices.”¹³

In court practice, it was decided that “In fact, the defendant - head of the lime factory - ordered the release of a larger quantity of lime than the one paid for the amount of 40,000 lei; it is argued that this would constitute, according to the law, the fraudulent management offense. It is clear from the job description that the defendant had as the main task the management of the production process and the dispatching of the result of the work (lime), in the course of which he responded. It is not, therefore, a conservation or management activity. Conservation of a good involves guarding and preserving it, as long as it is protected from destruction or degradation, and management involves an activity that includes, besides preservation, also those necessary to properly manage the nature and destination of the goods. The correct framing of the defendant's deed is that of stealing committed as an author.”¹⁴

Also, “The person who has acquired the capacity of manager of a tenant association under a civil convention has the status of manager with duties of manager; as such, the appropriation by the administrator of some money from the patrimony of the association constitutes the offense of embezzlement and not the fraud management.”¹⁵

In case the active subject is the *legal administrator, the liquidator of the debtor's property, or a representative or prepaid person*, it will retain the aggravated way; it is also possible for the co-authorship, when all co-authors have the special quality required by the law. It is not necessary for the instigator and the accomplice to have this special quality.

The passive subject is the natural or legal person to whom the assets entrusted to manage or preserve of the direct active subject, which has been harmed by fraudulent acts (active subject).

The examined offense may have a plurality of passive subjects when the managed estate is made up of property in the individual or co-owned property.

In the case of the aggravated normative way provided in art. 242, par. (2) Criminal Code, the passive subject is the debtor in insolvency.

For the existence of the offense there are special conditions of time and place.

4. Structure and legal content of the offense

4.1. Premise situation

¹³ *Ibidem*, p. 515.

¹⁴ C.A. Constanta, Criminal Section, Decision No. 108/1994, in R.D.P. no. 2/1995, p. 147, in Mihail Udriou, *op. cit.* (2016), p. 270.

¹⁵ C.S.J., Criminal Section, Decision no. 5312/2001, available on www.legalis.ro, in Mihail Udriou, *op. cit.* (2016), p. 270.

In the case of the offense under consideration, the premise is “the legal relationship resulting from an assignment given to a person to administer or conserve the fortune or part of another's property.

According to the provision in art. 214 of Criminal Code, the assignment must concern either the administration or the preservation of assets or both.

The premise situation must have a legal existence, i.e. the task of administering or conserving must be given by the competent body or the entitled person”.¹⁶

4.2. The Constitutive content

4.2.1. The objective side

The **material element** of the objective side is not described in the text of incrimination, but may consist of an action or inaction of a natural or legal person that causes damage to another natural or legal person in the course of managing or preserving the entrusted assets.

Managing goods means the actual activity of management according to the nature and purpose of the asset in question, and by conservation means taking specific measures to protect the goods in question in order to avoid their destruction, deterioration or degradation.

Regarding the differences between the abuse of trust and fraudulent management, the doctrine expressed the opinion that “The act of executing fraudulent management is fundamentally different from the abuse of trust, because the fraudulent administrator does not acquire the good of another, he does not have it unfairly or refuses to return, as the subject is actively involved in the case of abuse, but on the contrary preserves the good of another, which he has in use, but manages the good in such a way that it causes the material damage to the owner. For example, a fraudulent offense is committed to one who, by entrusting him with the administration or preservation of goods, uses them for his own personal interest, degrades or fails to take the necessary steps to preserve them, causing damage or doing repairs to the property under management, paying prices much higher than those that are usually paid, or employing assisting personnel over real management needs or with exaggerated wages or tolerance of scams or waste of goods etc.”¹⁷

In the case of aggravated way provided in art. 242, par. (2) of the Criminal Code, the material element of the objective side consists in any damaging

¹⁶ Vintilă Dongoroz in Vintilă Dongoroz (consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *op. cit.*, p. 519.

¹⁷ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămașanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *op. cit.*, p. 517.

action or inaction performed by the judicial administrator, the liquidator of the debtor's property or a representative or prepaid thereof.

Essential Requirements

According to the doctrine, “for the damaging action to complete the objective side of the fraudulent offense, two essential requirements must be met.

First of all, damaging action must be taken when managing or preserving goods, that is to say, in connection with the fulfillment of the duty given to the manager. It cannot therefore constitute the fraudulent management offense the deed of a manager who, in a situation outside his custody, has harmed the person to whom the assets were managed.

Secondly, damaging action is a violation of the care that the manager has to have in administering or preserving the assets being managed. This means that any damaging inaction that would not constitute a breach of the care normally required of a manager, it would not be able to complete the content of the fraudulent offense.”¹⁸

Synthesizing, we find that in order to complete the material element of the objective side, it is necessary to meet cumulatively two conditions, namely: the harming action or the inaction to be committed during the administration or the preservation of the goods, and this action or inaction represents a violation of the normal behavior which the manager must manifest in relation to the entrusted goods.

The immediate consequence is the creation of “a factual situation contrary to the one that would have existed in the complex of managed assets if the manager did not commit the damaging action. The immediate consequence, that is to say, the illicitly challenged situation, may concern the state of the goods being managed, the decrease in their quantity, the weakening of the property to capitalize on some goods, etc. This fact represents a patrimonial diminution corresponding to the damage caused and constitutes the materialization of the patrimonial relations protected by the law.”¹⁹

Causal connection. In order to “complete the objective aspect of the fraudulent management offense, it must be stated that there is a causal link between the factual situation of the assets managed and the abusive conduct of the manager, because only in this case can the factual situation be considered the abusive action as abusive, and the abusive action can be described as damaging (for example, the abuser has abused some of the assets in the managed facility, these goods are subsequently found in a very bad state, but it is found that this is not the case of abusive use of the manager, but because of unforeseen circumstances)”²⁰.

¹⁸ Vintilă Dongoroz in Vintilă Dongoroz (consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *op. cit.*, p. 520.

¹⁹ *Ibidem*, p. 520.

²⁰ *Ibidem*, p. 520.

In certain circumstances, the causal link between the incriminated action or inaction and the immediate consequence arises from the materiality of the act, and it is not necessary to be demonstrated by the judicial bodies.

In the judicial practice it was decided that “The act of the defendant - a manager at the buffet of a consumer cooperative - who, in bad faith, produces a loss of RON 4,788,000 and being informed that his management will be verified, staged a breakage, after which he notified the police and the insurance company from which, as a result of his statement about theft, he managed to receive compensation in the amount of 2,000,000 lei, constitutes the fraudulent, deceitful and fake offenses in statements in real contest”²¹.

4.2.2. The subjective side

The subjective element in the case of the offense under investigation is intentional in both ways (direct and indirect), which implies that the perpetrator has realized that the behavior taken against the assets managed causes a patrimonial damage to the injured person and has pursued or accepted this result.

In the aggravated way provided in par. (3) qualified intention by purpose is direct.

Essential requirements. In the case of the type and aggravated way provided for in par. (2), the purpose and motive have no relevance to the existence of the offense, which are only relevant for the individualization of the criminal law penalty.

If the fraudulent offense is committed in order to obtain a patrimonial benefit, then it is fulfilled the requirement of the incrimination rule in par. (3).

5. Forms, ways, sanctions

5.1. Forms

Preparatory acts, although possible, are not sanctioned by the law.

The *attempt* in the case of the examined offense is not sanctioned.

However, it is worth mentioning that the attempt in the aggravated ways provided in art. 117 par. (1) and par. (2) from G.E.O. no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units, is sanctioned.

The *consumption* of the offense takes place at the moment when the material acts that constitute the material element of the objective side were executed and the immediate result was achieved.

²¹ C.A. Bucharest, Criminal Section I, decision no. 1402/1998, in C.P.J.P. 1998, p. 148, in Mihail Udroi, op. cit. (2016), p. 271.

Given that the deed is continued, we will also have a moment of *exhaustion of the offense*, which will coincide with the execution of the last action or inaction.

5.2. Ways

The offense of fraud management provided in the provisions of art. 242 Criminal Code, presents a simple or type normative way, and three worsening normative modalities.

The simple normative way is provided in the provisions of art. 242, par. (1) Criminal Code and it consists in causing damage to a person (physical or legal) in the course of the administration or preservation of its property by the natural or legal person who has or ought to have taken care of the administration or preservation of those assets.

The first aggravated normative way is provided in the provisions of art. 242, par. (2) Criminal Code, to be retained under the conditions in which the deed referred to in par. (1) was committed by the administrator, by the liquidator of the debtor's property or by a representative or prepaid thereof.

In this aggravated way, the active subject is qualified, namely the court administrator, the liquidator or the representative or the agent, and with regard to the passive subject, we can appreciate that he is also qualified, as he must be the debtor in insolvency proceedings. In the absence of these qualities of the active or passive subject, the facts of the active subject do not meet the constitutive elements of the fraudulent offense in this enforced normative way.

The second normative way is provided in the provisions of art. 242, par. (3) Criminal Code, to be retained when the facts provided for in para. (1) or par. (2) of the art. 242 Criminal Code, were committed in order to obtain a patrimonial benefit, even if for certain reasons related to the concrete circumstances of committing the act, the said purpose was not achieved.

According to recent doctrine, the fraudulent offense committed in this aggravated way “has a subsidiary character, being retained only if the act is not a more serious crime”.²²

In court practice it was decided that “From the documents filed by the civil party and the accountancy expertise carried out during the trial at the first instance, a number of elements arise which reveal the bad faith of the defendant L.C. at the time of managing the store, in order to acquire material benefits. Thus, it was found that the defendant did not draw up management reports in some cases or made them flawed or filed them late for accounting, facts for which he was penalized several times by the company's management, noting that there was no sign of interest on his part for the management to be well organized and the documents to be handed over in due time to the accountancy, in order to have

²² Mihail Udriou, *op. cit.* (2016), p. 272.

time to add points. The accounting expertise also made the distribution of the damages, the two defendants, also taking into account the updating index, establishing in the charge of the defendant L.C. a prejudice of 1,033,444,834 lei. Also, testimony shows serious issues about how to manage the store. Thus, witness N.A. said that there were no notes of reception of goods received in the store, and the witness M.A. declared that when goods were found to be missing, they were charged to the staff, but the imputation decisions were not enforced.²³

We must further specify that fraudulent management in this aggravated way can be done only with direct intent, which is qualified by purpose.

The third aggravated normative way will be retained if the act committed in the simple way (type or basic), or in any of the two aggravated normative ways mentioned above (respectively those provided in art. 242 par. (2) and par. (3) of the Criminal Code], caused material damage exceeding 2,000,000 lei, the special limits of the prison sentence being increased by half.

We should specify that in the provisions of art. 117, par. (1) and (2) of G.E.O. no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units, there are envisaged two more aggravated normative norms of the fraudulent administration in case the act is committed by the administrator, the chief authorizing officer of the administrative-territorial unit in insolvency, as well as by any representative or agent of that person, if the act does not constitute a more serious crime.

Facts are multiple, depending on the concrete circumstances of committing each act.

5.3. Sanctions

In the case of the simple normative way provided in par. (1) the sanction provided by the law is imprisonment from 6 months to 3 years or a fine. In the case of the aggravated normative arrangements provided in par. (2) and par. (3) of art. 242 Criminal Code, the sanction is imprisonment from one to five years and respectively prison from 2 to 7 years.

For the fraudulent bankruptcy offense provided in art. 117 from G.E.O. no. 46/2013, the sanction is imprisonment from 3 to 8 years in case of par. (1) and imprisonment from 5 to 12 years in the case of par. (2).

6. Supplementary explanations

6.1. The link to other offenses

²³ I.C.CJ, Criminal section, decision no. 1956/2005, available on www.legalis.ro, in Mihail Udrioiu, *op. cit.* (2016), p. 272.

The examined offense presents some elements of resemblance to the other offenses that are part of the group of crimes against the patrimony by failing trust.

Also, the most obvious common elements are those of the abuse of trust, because “both facts touch upon the minimum of trust and probity that must exist in certain patrimonial relations, relationships in which it could not form, develop and strengthen only on the basis of trust and confidence in the trust. Also, the immediate active subjects are qualified; to the abuse of trust, the author is a person who holds the property which is the material object of this crime on the basis of a title, and for the fraudulent management, the author is the person who manages or preserves the good.”²⁴

6.2. Some procedural aspects

For the offense committed in the ways stipulated in the provisions of art. 242 Criminal Code and art. 117 from G.E.O. no. 46/2013 the jurisdiction at first instance belongs to the court and criminal prosecution competence belongs to the criminal investigation bodies of the judicial police under the supervision of the prosecutor in the prosecutor's office attached to the competent court to hear that case at first instance.

As we have mentioned in the analysis of the other crimes, if the active subject is of a certain quality, the jurisdiction at first instance may belong to the tribunal, the court of appeal or the High Court of Cassation and Justice, and the criminal prosecution to be carried out by the competent prosecutor.

Also, the jurisdiction may lie with the tribunal in whose constituency the offense was committed, if the prosecution is carried out by D.I.C.O.T or D.N.A. The criminal action moves to the prior complaint of the injured person.

7. Legislative and transitional situations

7.1. Legislative precedents

In the Criminal Code of 1864 fraudulent management was regarded as a variant of the abuse of trust, as provided in art. 330 where it was stated that: they would be punished by *imprisonment from 1 month to 1 year*:

1. Guardians, curators, executors, will executors, guardians of seizure, fund managers who, in bad faith, work in harming the persons or things entrusted to their control or administration;

²⁴ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *op. cit.*, p. 519.

2. *Agent, exchange agents, dispatchers, commissioners and other persons exercising a profession with which they are specifically entrusted with public authority, if in the affairs entrusted to them they bring bad faith to those who entrusted their business.*"²⁵

The jurisprudence of the time held that "*Acts of bad management by a guardian in itself is not the offense provided by art. 330 Criminal Code. For its application, a fraudulent intention is required, which consists in the knowledge that the acts committed by the trustee and who are charged with it are unlawful and that they cause prejudice to the minor whose business the tutor guides. That element must be determined by court judgment* (Case II, 201, 27 April 84, p. 376)."²⁶

In the Criminal Code Carol II the offense of fraudulent management was provided in the provisions of art. 539-541.

According to the provisions of art. 539: "He who is in charge of administering, caring or overseeing the property of another, and as such, causes material damage to the one whose interests he is obliged to support, commits the fraudulent offense and is punished by correctional imprisonment for 6 months 3 years and correctional interdiction from one to two years.

The punishment is the correctional prison from one to five years, the fine from 2,000 to 10,000 lei and the correctional interdiction from 2 to 5 years, if the author does fraudulent management in order to gain a material benefit."²⁷

In the doctrine of time it was considered that fraudulent management is "a form or a variation of trust abuse" and that this act "*has its own being, independent, that is, it is incriminated as an independent offense.*"²⁸

We note that the examined offense is presented in a simple way and in an aggravated way, as the author commits the act in order to obtain a material benefit.

From the comparative examination of the provisions of art. 539 of the Criminal Code Carol II with those contained in art. 542 of the Criminal Code, it is noted that among them there are many elements of similarity, which confirm the accuracy of the incrimination made during the interwar period by the Romanian legislator.

²⁵ George St. Badulescu și George T. Ionescu, *Codul penal adnotat, cu jurisprudență și doctrină română și franceză, cu o prefață de I. Tanoviceanu/ The Supplemented Criminal Code, with jurisprudence and French and Romanian doctrine, with a preface by I. Tanoviceanu*, Ed. Tip ziarului Curierul Judiciar 5, Ed. Rahovei, 5, 1911, p. 478.

²⁶ *Ibidem*, p. 478.

²⁷ Traian Pop, in Const. G. Rătescu, I. Ionescu-Dolj, I. Gr. Periețeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *Codul Penal Carol al II-lea Adnotat, vol. III, Partea specială, II, Art. 443-603/ The Criminal Code Carol II Adnotat, Volume III, Part II, Art. 443-603*, Ed. Librăriei COCEC & Co., S.A., Bucharest, 1937, p. 519.

²⁸ *Ibidem*, p. 519.

Under art. 540 of the Criminal Code Carol II provides for several aggravated normative ways, if the active subject is qualified in the capacity of administrator or director of a company, of which we mention: the fact of making a false statement, to collect or to pay dividends or participations in any form for unrealistic benefits; the act of provoking on the stock exchange or by spreading false news, decreasing or raising the value of the company's claims in order to obtain benefits; the act of buying or selling, on behalf of society, actions of other societies, at a damaging price, in order to obtain for himself or for another material benefit.

In art. 541 it provides that in the case of the offenses provided in art. 539 and 540, criminal proceedings are initiated in the prior complaint of the injured party, with some exceptions concerning the cases in which the offense was committed by certain persons with special qualities, cases in which the criminal action is initiated *ex officio*; among these categories of people we mention: guardian, curator, legal advisor, custodian, bankruptcy syndicate etc.

In the Criminal Code of 1969, the fraudulent management offense was provided in a single normative way, after which several changes occurred.

7.2. Transitional situations. Applying the more favorable criminal law

In the simple way (type), the two incriminations are the same, with differences only in terms of the sanctioning regime, the new law presenting limits of lower penalties, as well as the alternative sanction with fine.

If no attenuating circumstances or aggravating circumstances are found, the more favorable law will be in the new law, which, in addition to the lower penalty limits, also provides for alternative punishment with the fine.

We appreciate that, given the existence of attenuating circumstances, the more favorable law may be the old law.

8. Conclusions

The examination revealed that the offense of fraudulent management was also laid down in the Criminal Code of 1864, the tradition of incrimination of these acts continuing to the present day.

The new incrimination, in relation to the previous one, brings a number of novelties, among which we mention the renunciation of the phrase “bad faith”, which is justified by the new provisions of the Criminal Code in force, according to which the committed offense is punishable only when the law provides for this possibility.

In our opinion, the most important change concerns fitting the text within the requirements of Decision no. 4/1999 of the Constitutional Court, according to which the provision “except the case it is wholly or partly state property”.

We appreciate that the changes in the structure of the legal norm complemented by those regarding the limits of punishment are in line with the requirements of European criminal law and correspond to the needs of defending these special social values.

On the other hand, the implications of this crime in the business environment should also be taken into account where trust between partners must prevail over other objectives.

As a general conclusion, we consider it extremely useful to maintain the incrimination in the current legislation, in the context of a fairly high crime rate and the need to maintain confidence in the business environment.

In the business environment, an extremely sensitive area, it is necessary to intensify the prevention and fighting activities of the authorities in the field, the ultimate goal being to increase trust between partners and state institutions with attributions in this field.

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The Embezzlement of Public Auctions in the Romanian Law. The Consequences of the Offense in the Business Environment

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Abstract

In the present paper we have proceeded to examine the offense provided in the provisions of art. 246 of Criminal Law (embezzlement of public auctions) in the light of the provisions of the new law. The novelty elements brought by this paper are the examination of the offense according to the regulations of the law in force. Representing a novelty in the Romanian doctrine, examining the offense may be useful first of all for the business environment, students of law faculties, and theoreticians. As it is a new incrimination in the Romanian law, it can also be useful to practitioners in this field. The paper is part of an academic course to be published collectively early next year. The implications of this offense in the business environment are relevant.

Keywords: *offense; constitutive content; forms; modalities; sanctions.*

JEL Classification: K14

1. Introduction

The offense of embezzlement of public auctions consists of the act of a natural or legal person to remove, by coercion or corruption, a participant from a public auction or the act of the participants in a public auction to be understood to distort the decided price.

The incrimination of this act was determined by the development of crime in this area, the judicial practice demonstrating that in many cases the participants in public auction, in order to remove potential controversies and aiming at influencing the bidding price in the smallest way, choosing various fraudulent actions.

Such facts, in the absence of a rule of incrimination, were framed in relation to the concrete circumstances of committing the offense of deception, abuse of office, bribery, false intellectual or fake material in official documents.²

We should point out that there is no such incrimination in the 1969 Criminal Code.

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² See also Constantin Duvac in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *Explicațiile Noului Cod Penal, vol. III, Art. 188-256/Explications of the New Criminal Code, vol III, Art. 188-256*, Ed. Universul Juridic, Bucharest, 2015, p. 564.

2. Preexisting elements

2.1. The legal object

The legal object is constituted by the social relations “regarding the good conduct of the competition in the public auctions, as well as the social relations that appear and develop around this social value”³.

2.2. The material object

In the Romanian doctrine, the vast majority of authors appreciate that in the case of the offense of embezzling public auctions we do not have a material object.⁴

In another opinion, it is considered that “in principle, the misappropriation of public auctions does not have a material object. However, the above sentence cannot be generalized as, in the case where the action of removing a participant from a public auction takes place through physical constraint, the body of the injured person is the material object of the offense. We refer to those situations in which the physical constraint does not by itself embody the constitutive elements of the offense provided in art. 193 or in art. 194 Criminal Code (for example, the situation in which the removal of a participant in a public auction takes place by pushing it out of the room in which the auction would take place) and the cases in which the person's body will be the material object of one of the two offenses.”⁵

If the participant in the public auction was removed by corruption, the amounts of money or the respective benefits (if they have a physical existence) are not a material object of the offense in question, but the goods acquired by committing the deed provided by the criminal law, if they are not returned to the

³ Constantin Duvac, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasiu, *op. cit.* (2015), vol. III, p. 566.

⁴ Tiberiu Medeanu, *Deturnarea licitațiilor publice (Infracțiuni contra patrimoniului prin nesocotirea încrederii)/Embezzlement of Public auction (Offense against patrimony by mistrust)*, in Petre Dungan, Tiberiu Medeanu, Viorel Pașca, *Manual de drept penal, Partea specială, vol. I/Handbook on Criminal Law, Special Part, vol. I*, Ed. Universul Juridic, Bucharest, 2010, p. 358; Alexandru Boroi, *Drept penal, Partea specială/Criminal Law, Special part*, Ed. C.H. Beck, Bucharest, 2014, p. 265; Norel Neagu, *Deturnarea licitațiilor publice (Comentariu)/ Embezzlement of Public auction (commentary)*, in Vasile Dobrinioiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Paun, Maxim Dobrinioiu, Norel Neagu, Mircea Constantin Sinescu, *Noul Cod penal comentat, Partea specială, Ediția a II-a/The new criminal code commented, the Special part*, 2nd Edition, Ed. Universul Juridic, Bucharest, 2014, p. 305.

⁵ Constantin Duvac, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasiu, *op. cit.* (2015), vol. III, p. 566.

injured person and insofar as they do not serve to compensate him, shall be subjected to special confiscation (Article 112, line (1), letter (e) of Criminal Code). If these goods are not found, the court will, instead of them, confiscate the money to the value of the goods.⁶

Also, “the goods bought by the participant in the public auction, declared adjudicated, as a result of committing the offense provided in art. 246, it is not its material object, but *goods acquired by committing the act provided by the criminal law*, as provided in art. 112, line (1), letter e) Criminal Code”⁷

According to the doctrine, “It may be sold by public auction, under certain conditions provided by law: the movable and immovable property of the debtor (article 758-859 of the Civil Procedural Code); the property of the minor under the authorization issued by the guardianship court (article 145, article 147, article 148 of the Civil Code); the lands belonging to the destroyed buildings, in whole or in part, and the building materials that resulted, at the request of the co-owner (article 657 Civil Code); the goods that are indivisible or are not comfortably divisible in nature and which belong to the co-owners (article 67 of Civil Code); the found goods (article 944 Civil Code); goods sold and unpaid by the buyer (article 1.726 Civil Code); goods whose assignment to associates is prohibited by the law in the event of liquidation (article 1.946 of the Civil Code)”⁸.

2.3. The subjects of the offense

The active subject under the first normative approach is not qualified, it could be any person taking a removal action, a participant in a public auction, by coercion or corruption.

Under the second way, the active subjects are qualified in the sense that they have the capacity to participate in the public auction.

In accordance with civil law provisions it may participate “any person who has full exercise capacity and the ability to acquire the auctioned goods, if not generally known to be insolvent, may participate in a public auction. The pursued debtor cannot be the adjudicator either personally or through an interposed person. The pursuing or intervening creditors cannot, either personally or through interdependent persons, adjudicate the goods offered for sale at a price lower than 75% of the price set by the bailiff or the expert appointed by him, in the case of movable goods, or in the price the start of the first auction, in the case of real estate.

In order to be accepted at the auction, participants must file at least 10% of the auction starting price for the goods they intend to buy, at the latest by the

⁶ *Ibidem*, pp. 566-567, apud, Constantin Duvac, *Deturnarea licitațiilor publice/ Embezzlement of Public auction ...*, op. cit., p. 88.

⁷ *Ibidem*, p. 567.

⁸ *Ibidem*, p. 567.

beginning of the auction, at the disposal of the bailiff. The pursuing or the intervening creditors are not required to lodge this guarantee.”⁹

We state that an active subject of this crime may also be a legal person.

The criminal participation in the commission of the offense in the case of the first normative way is possible in all its forms (co-author, instigation and complicity).

In the latter case, the active subjects may be at least two participants, who of course may be instigated or helped by other people who do not have the required legal status of the active subject (that of a public bidder).

The *Passive subject* may be a natural or legal person who has suffered a public auction executed for her benefit, a subsequent misappropriation.

3. Structure and legal content of the offense

3.1. The premise situation

The premise situation is the pre-existence of a public auction by the bodies authorized by law (the bailiff or the financial bodies).

Thus, “the initiation of a *public auction* is preceded by the seizure of the *debtor's movable assets*. If within 15 days from the seizure of the movable goods was not paid the due amount, all the accessories and the execution costs, the bailiff will proceed to the sale of the assets seized through sale by public auction, direct sale or in other ways permitted by the law. The bailiff will proceed to the sale by auction of the seized goods in the absence of the parties' agreement or if the direct or amicable sale is not carried out.

When executing the seizure, the bailiff is obliged to identify and evaluate the seized property (directly or through an expert appointed by him), except where this is not possible. Goods will be valued at their value in relation to average market prices in that locality.”¹⁰

3.2. The constitutive content

3.2.1. The objective side

In the case of the examined offense, the objective side includes *the material element, essential requirements, immediate result and the causal connection*.

The material element of the objective side is achieved by the following alternative actions: removal by coercion or corruption of a participant in a public

⁹ *Ibidem*, p. 567.

¹⁰ *Ibidem*, p. 568.

auction or by an understanding between the participants in a public auction in order to distort the final price.

Removing a participant from a public auction through coercion or corruption is “to remotely, remove, prevent, withdraw”¹¹ a natural or legal person from a public auction or abandon it.

Corruption removal involves offering a sum of money, a good or an advantage to another auctioneer in order to give up the bid to participate in a public auction.

According to the doctrine, “in the absence of an explanatory criminal provision to impart a meaning other than the usual or that used in the Code of Civil Procedure, the terms of the *public auction* and *adjudication price* used in art. 246 Criminal Code will have the meaning shown in the civil procedural law, the eventual change of the meaning of these rules by the compilers, which also duly influences the legal content of the rule of criminality examined (referral rule).”¹²

The public auction is “a procedural means which ensures that the debtor's assets are valued by their forced sale, which is used whenever the recovery of the claim cannot be made in another way more convenient for the creditor”¹³. The public auction is not an equivalent notion to the *electronic auction*¹⁴ regulated by G.E.O. no. 34/2006.

The sale of seized property in order to obtain the amount of money necessary to cover the creditor's claim, the execution costs and, possibly, the claims of intervening creditors, is the second step of the movable or real estate prosecution.

Auctioning will be achieved publicly by the bailiff, who will offer the mobile goods for sale through 3 successive shouts. The price at which the auction starts is that provided in publications or advertisements.

The mobile good adjudicates the one who, after three successive calls, made at intervals of choice and surplus, offers the highest price, and when there is only one competitor, he offered the auction starting price.

¹¹ *Ibidem*, p. 570.

¹² *Ibidem*, p. 570, apud, Constantin Duvac, *Deturnarea licitațiilor publice/ Embezzlement of Public auction...*, *op. cit.*, p. 91.

¹³ Mircea Costin, Ion Leș, Mircea Șt. Minea, Dumitru Radu, *Dicționar de drept procesual civil/Dictionary of civil processual law*, Ed. Științifică și Enciclopedică, București, 1983, p. 292. Within the same meaning see Dumitru Rădescu, Elena Rădescu, Georgeta Stoican, *Dicționar de drept civil și proceduri civile/Dictionary of civil law and civil procedures*, Ed. C.H. Beck, București, 2009, p. 578.

¹⁴ Electronic auction is the repetitive process after a first complete auction evaluation, in which bidders have the opportunity, exclusively by means of electronic means, to reduce the prices presented and / or to improve other elements of the offer; the final evaluation must be carried out automatically by the electronic means used - art. 3 letter n) from G.E.O. no. 34/2006. The electronic auction shall be used by the contracting authority in the situations and conditions provided in art. 161-169 of G.E.O. no. 34/2006.

If the auction start price is not reached, at the same time the mobile asset will be re-sold, in which case the auction will start at a price of 75% of the price specified in the publications or announcements and the good will be sold to the which will offer the highest price.

If the price of 75% is not offered in the publications or advertisements, the auction will be postponed to another deadline, for which the advertising formalities will be again fulfilled. At this time, which may not be longer than 20 days from the date of the first auction, the auction will start at 50% of the initial price in the publications or advertisements. If that price is not obtained, the movable goods will be sold at the same price, even when only one bidder has been presented at the auction.”¹⁵

The second action by which the material element of the objective side is achieved is the understanding between the participants, which may consist of a direct or mediated understanding by another person whereby the participants in a public auction decide to distort the final price.

The Essential requirements. In the case of the first normative way, for the existence of the offense it is necessary to take the removal action after a person (physical or legal) has obtained the status of a participant in a public auction¹⁶.

Removal action must be done through *coercion* or *corruption*.

By the removing action of the participant from a public auction by *coercion* is meant “to force a person to accept to withdraw from a public auction, an activity that he would not willingly do so¹⁷.

Constraint must be on the occasion of a state of fear under whose control the psychic freedom of the person subject to coercive action is affected.

Constraint can be exercised through material violence (physical constraint - *vis absoluta*) or threatening (moral constraint - *vis compulsiva*).

Removing a participant from a public auction through corruption is to offer or promise money or other goods or benefits for such a purpose. It is necessary for the corruption activity to have achieved its purpose or to remove the respective participant from that public auction.”¹⁸

In the event that one or more participants in a public auction have been removed by a natural or legal person in ways other than coercion or corruption, the act will not meet the constituent elements of the offense under examination; we have some suggestions, recommendations, tips, requests, etc.

¹⁵ Constantin Duvac, in George Antoniu, Tudorel Toader (coordonatori), *op. cit.* (2015), vol. III, pp. 570-571.

¹⁶ See also Constantin Duvac, *Deturnarea licitațiilor publice/Embezzlement of Public auction ...*, *op. cit.*, p. 95.

¹⁷ *Ibidem*, p. 96.

¹⁸ Constantin Duvac, in George Antoniu, Tudorel Toader (coordonatori), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasiu, Constantin Duvac, *op. cit.* (2015), vol. III, pp. 573-574, apud, Constantin Duvac, *Deturnarea licitațiilor publice/Embezzlement of Public auction ...*, *op. cit.*, p. 96.

In the case of the second regulatory approach, the essential requirement lies in the necessity of the intervention of the understanding on the occasion of the participation of the natural or legal person in a public auction.

The immediate consequence is a state of danger for social values protected by the rule of the examined incrimination.

The causal connection between the incriminated actions and the immediate result must exist, resulting from the materiality of the act (which does not need to be demonstrated by the competent judicial bodies).

3.2.2. The subjective side

The subjective side includes the subjective element and essential requirements.

According to the doctrine “In the first normative way, the action of removing a participant from a public auction can be done with a direct or indirect intention. In the second way, the understanding between the participants can only be done with a direct purpose-qualified intention (misappropriation of the adjudication price).”¹⁹

In another opinion it is considered that the offense subject to examination can be committed both *with direct intention* and *indirect intention* in both ways and other authors consider that in both normative modalities the offense under investigation is committed only with direct intent.

We appreciate that for both normative means, the guilty force of the offense is only direct intention.²⁰

The Essential requirements. According to the recent doctrine, “The purpose of the text is related to the action of understanding among the participants, which must have as a purpose the misappropriation of the adjudication price. This essential condition has a sense of purpose outside the incrimination. As such, the pursuit of this purpose by the perpetrators is sufficient to consume the offense.”²¹

¹⁹ *Ibidem*, p. 575.

²⁰ See the case of the first opinion Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *Noul Cod penal, Partea specială, Analize, explicații, comentarii, Perspectiva Clujeană/ New Criminal Code, Special Part, Analyzes, Explanations, Comments, The Cluj Perspective*, Ed. Universul Juridic, București, 2014, p. 265; in the case of second opinion: Tiberiu Medeanu, *Deturnarea licitațiilor publice (Infrațiuni contra patrimoniului prin nesocotirea încrederii)/ Embezzlement of public auctions (Crimes against patrimony failing to trust)*, in Petre Dungan, Tiberiu Medeanu, Viorel Pașca, *op. cit.*, vol. I, p. 359; Alexandru Boroi, *op. cit.*, 2011, p. 229; Irina Kuglai, *Deturnarea licitațiilor publice (Comentariu)/ Embezzlement of public auctions (Comment)*, in Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglai, Lavinia, Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *Codul penal, Comentariu pe articole, art. 1-446/ Criminal Code, Comment on Articles, Art. 1-446*, Ed. C.H. Beck, Bucharest, 2014, pp. 532-533.

²¹ Constantin Duvac, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, Constantin Duvac, *op. cit. (2015)*, vol. III, pp. 573-574, apud,

The mobile with which the perpetrator acted is of no legal relevance as to the existence of the offense, but his knowledge is nevertheless important in the individualization of the criminal law penalty.

4. Forms, modalities, sanctions

4.1. Forms

Although possible, the *preparatory acts* are not punished by the legislator.

The attempt is possible and is sanctioned according to the provisions of art. 248 of Criminal Code, referring to art. 33 of the Criminal Code.

An attempt will be retained, in the case where a natural or legal person (the active subject of the offense) attempts to remove by constraint or corruption a bidder, but fails (for various reasons), or if, while attempting to establish an agreement between participants in a public auction for the purpose provided in the incrimination text, it is not actually achieved.

Consuming the offense is achieved at the time of committing one of the alternative actions incriminated by the legislator and the occurrence of the immediate consequence.

Exhaustion may occur if the offense is committed in a continuing form. This situation may be “in the case of carrying out more criminal activities during the preparation and running of the auction, at different time intervals, but in the same criminal resolution and in relation to the same passive subject or under art. 238 of Law no. 187/2012. In this case, the embezzlement of the public auctions will also have a moment of exhaustion, from which will flow all the legal consequences of the act that will occur at the time of the last incriminated action.”²²

4.2. Ways

Simple normative modalities. Considering the way it is described in the incrimination rule, the offense under consideration presents two simple regulatory modalities: removal of a natural or legal person from a public auction, through coercion or corruption and understanding between partners in conducting a public auction in purpose of distorting the final price.

In the first normative way, two variants are included, in which the concrete way in which the removal action is carried out, namely by coercion or by corruption.

The examined offense does not present any aggravated normative means.

Constantin Duvac, *Deturnarea licitațiilor publice/ Embezzlement of public auctions ...*, op. cit., p. 97.

²² *Ibidem*, p. 577.

The *factual modalities* are different, these being generally determined by the concrete circumstances of committing each individual act, the perpetrator, etc.

4.3. Sanctions

The sanction provided by law is one to five years imprisonment.

5. Complementary explanations

5.1. Link to other offenses

The examined offense has some links to the offenses that are part of this group, while maintaining the peculiarities of each of them.

5.2. Some procedural aspects

For the considered offense, the jurisdiction in the first instance belongs to the district court in which the offense was committed and the criminal prosecution competence belongs to the criminal investigation bodies of the judicial police under the supervision of the prosecutor in the Prosecutor's Office attached to the competent court to judge that case in the first instance.

In relation to the quality of the active subject of the offense, the jurisdiction may also belong to the tribunal, the court of appeal or the High Court of Cassation and Justice.

The criminal action moves *ex officio*.

6. Legislative precedents and transitional situations

6.1. Legislative precedents

The offense examined was also provided in art. 266 of the Criminal Code of Carol II.

According to the text we have referred to:

“Any person who, by any means, hinders or disturbs free competition in auctions made by public authorities or removes competitors from them, commits the offense of impeding competition in public auctions and is punished by corrective prison from 2 months to one year; and fine from 2,000 to 10,000 lei.

If this is done by more people understood for this purpose, the punishment is the correctional prison from 6 months to 2 years and a fine from 2,000 to 10,000 lei.

The punishment in par. 1 shall also apply to the bidder or competitor who requests or receives, directly or indirectly, money, promises or any other profit,

and then, due to this cause, refrains from participating in the sale or auction or withdraws his offer.

The doctrine of time appreciated that “The denial of free competition in auctions in art. 266, is also an offense against the public administration, which is interested in making public auctions right.

That is why this crime has always been the object of the Romanian legislator's concerns, for apart from art. 351 of the Criminal Code of 1864, inspired by art. 412 of the French Code, there is also art. 55 of the Law on the alienation of state property of April 7, 1889.

Article 266 differs from the old texts in that it incriminates the act committed by any means while the old texts provided only the means of violence and threat.

It should be noted that this protection is enjoyed only by the auctions made by public authorities, whether administrative or judicial, and whatever the subject of the auction. So the actions made by individuals do not enjoy this special protection.

The Romanian Code, in order to remove some fairs, that were made between those interested by offering *filodorme* to bidders, to remove them from auctions, formally criticized the bidder who would ask for or receive money or other profit in order to refrain from bid or withdraw its offer.

A material element is required for the offense to be committed, such as disturbing or preventing the auction, or removing competitors, have occurred. If it was only an attempt, the act is not punished.”²³

If we perform a comparative examination between the regulations of the Carol II Criminal Code and the regulations in force, we find the existence of certain elements of similarity, which shows some continuity for incrimination of this fact, except for the period 1945-1989.

6.2. Transitional situations. Applying more favorable criminal law

As it is a new offense, there will be no question of applying the more favorable criminal law, being applicable the law in force, but only for the acts committed after 01.02.2014. The committed acts before that date are not punishable, if they do not meet the constituent elements of another offense, such as deception.

²³ I. Ionescu-Dolj (Commentary) in, Const. G. Rătescu, I-Ionescu-Dolj, I. Gr. Periețeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *Codul penal Carol al II-lea Adnotat, vol. II, Partea specială I, Art. 184-442/ Criminal Code Carol II Supplemented, vol. II, Part I, Art. 184-442*, Editura Librăriei SOCEC & Co., S.A., Bucharest, 1937, p. 173.

7. Conclusions

Although the offense of embezzlement of public auctions was not found in the Criminal Code of 1969, it existed in the Romanian criminal law provided for in the provisions of art. 266 of the Carol II Criminal Code.

In order to justify the introduction of this incrimination in the Explanatory Memorandum it is stated that “with regard to the diversion of public auctions, the practice of recent years has shown that in a few cases the participants in a public auction have made use of various fraudulent operations in order to move away from auction of potential participants, thus altering the final price.”²⁴

We highlight the direct links this crime has with the business environment in Romania, in the conditions in which, during this transition period, which seems to be no longer the case, were sold at auction numerous goods that were in the past state-owned. On the other hand, we consider that further incrimination of this fact is justified, the purpose of which is to remove from the activity itself the natural or legal persons intending to participate in a public auction.

The effects of these actions by different natural or legal persons in the process of conducting public auctions determine in all circumstances a lack of confidence from the business environment in these operations, regardless of the organizers.

As a general conclusion, we appreciate that the examination under consideration highlights the need to introduce and maintain this incrimination in the context of maintaining a climate of mutual trust in the proper conduct of such procedures in the business environment.

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²⁴ Codul penal/Criminal Code, Ed. C.H.Beck, Bucharest, 2009, Expunere de motive/Explanations, p. 46.

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Some Considerations on Deceit Offense in the Romanian Criminal Law. Implications in Business Law

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Abstract

In the present study we have examined the constitutive content of the fraud offense in the light of the provisions of the new law. Against the backdrop of controversy in doctrine and judicial practice, we have insisted upon mentioning and summarizing the incriminations which in their essence constitute special forms of the crime of deception, such as: insurance fraud, misappropriation of public auctions, illegally obtaining funds and offense stipulated in art.18¹ of the Law no. 78/2000. Last but not least, we have presented some opinions expressed in the recent doctrine, as well as Decision no. 4/2016 of the CCCJ, the competent body to hear the appeal in the interest of the law. The novelty of the study relates to the examination of the constitutive content of the offense of deceit, with direct reference to doctrine and judicial practice in the matter, references to the offenses that constitute the special forms of this crime, the decision of the Supreme Court, and the implications of this crime in the environment business. The work may be useful for students of law faculties as well as for theoreticians and practitioners of criminal law. This research continues the research in this field, which will be materialized by the publication of a criminal law course, the special part.

Keywords: *constitutive content; special forms of the crime of deception; judicial practice*

JEL Classification: K14

1. Introduction

The deceit is the deed of a natural or legal person who, in order to obtain an unfair material advantage for himself or another person, misleads another natural or legal person by presenting as true a false or untrue act of a true deed.

In addition to the type of normative way, the offense that we submit to the examination also presents an aggravated way that will be taken into account when the act is committed by the use of names or lying qualities or other fraudulent means.

The doctrine of the second half of the last century considered that “Deceit is part of the patrimonial crimes (against the beast) in terms of group classification and, in the context of its specificity, in the subgroup of patrimonial offenses committed through an act of deception, that is, an act of misleading by forgery of

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truth, on the occasion of the formation, modification or termination of a patrimonial legal relationship.

Deceiving personal or private property is a deed that presents a degree of social danger against which a criminal sanction is necessary, because by doing so, the minimum of good faith and trust that is necessary for normal training, development of the patrimonial social relations based on good faith on one side and trust on the other.”²

Considering the subject of the study, we will examine the constitutive content of the offense of deceit, continuing with the general examination of the crimes that were considered in the doctrine as special forms of the crime of deception, formulating opinions on the effects of these types of crimes in economic activity in Romania.

2. The Criminal Code in force in relation to the provisions of the 1969 Criminal Code

The offense of deceit was also provided in the Criminal Code of 1969 in art. 215, in a different way from the original version adopted with the entry into force of the 1969 Criminal Code.

Besides some elements of similarity, there are many elements of differentiation between the two regulations, all of which are to be examined below.

Thus, as similar elements, we mention the marginal name as well as the inclusion of the offense in the group of crimes against patrimony.

Also, the legal content of the offense in the simple normative (type) way of paragraph (1) and in the aggravated mode provided for in par. (2) Criminal Code, is identical to that mentioned in art. 215, par. (1) and par. (2) of the Criminal Code of 1969, with the exception of penalty limits.

In both regulations, the aggravated normative way was maintained, which was retained in case of particularly serious consequences.

As elements of differentiation we note the renunciation of the current legislator to the incrimination of the two aggravated normative modalities stipulated in art. 215, par. (3) and (4).

Significant differences also arise with regard to the sanctioning regime, the penalties provided for in the new law being much lower, respectively: imprisonment from 6 months to 3 years compared to the 6 months to 12 years imprisonment in the old law, for the offense provided in paragraph (1) of art. 244 Criminal Code and art 215 of the Criminal Code from 1969; the imprisonment from one to five years in the new law, compared to the imprisonment from 3 to 15

² Vintilă Dongoroz in Vintilă Dongoroz (scientific consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *Explicații Teoretice ale Codului Penal Român, vol. III, Partea specială/Theoretical Explanations of the Romanian Criminal Code, Special Part*, Ed. Academiei Republicii Socialiste România, Bucharest, 1971, pp. 525-526.

years in the old law, for the aggravated norms stipulated in art. 244 par. (2) Criminal Code and art. 215 par. (2) Criminal Code from 1969; the increase of the special limits by half in the case of particularly serious consequences in the new law, the 10 to 20 years imprisonment and the prohibition of some rights in the old law.

The last significant distinction we report concerns the possibility of reconciliation that removes criminal liability into the new law, a provision that does not exist in the old law.

3. The structure and legal content of the offense

3.1. The premise situation

The doctrine emphasized that “The offense of deception against personal or private possession is carried out in its simple form even at the moment when subtraction of the deceitful action is obtained by fraud, taking a patrimonial provision, naturally in the structure of this offense it is excluded the existence of a *pre-existing situation*, that is to say of a legal relationship which preceded the commission of the deception and which is the precondition thereof.”³

Thus, in its type way provided for in the provisions of art. 244, par. (1) Criminal Code, the offense does not constitute a premise situation.

Instead, in the aggravated normative manner provided in paragraph (2) of the same article, when the offense of “deception in conventions” is found, it occurs the precondition of the existence of a convention (contract).⁴

3.2. The constitutive content

3.2.1. The objective side

For both types of offense, the objective side includes the material element, some *essential requirements*, *immediate wishes*, and the *causal connection*.

The *material element* of the objective side lies in the *misleading action*, which can be accomplished in two *distinct ways*, namely: either by presenting as true a false act, or by presenting as a lie a true deed.

To present as true a false act means “to invent, to cast, to believe that there is something (a certain state, a situation, a chance, a thing, a person, etc.) that in reality does not exist”⁵ and to present as a lie a true deed “is to hide the truth, to conceal, to make believe that there is something that actually exists”.⁶

³ Vintilă Dongoroz in Vintilă Dongoroz (consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *op. cit.* (vol. III), p. 528.

⁴ *Ibidem*, p. 528.

⁵ *Ibidem*, p. 528.

⁶ *Ibidem*, p. 528.

The “*false act*” is the one that does not correspond to truth, reality, in the sense that it does not exist or exists in other ways or in another form as the perpetrator presents it, so it invents facts or exaggerates them, distorts or conceals them, denies true deeds which they present as untrue.”⁷

Also, “in order to complete the material element, the active subject of the deed of deception should cause a person to believe these untruths, to be misled, and that person, as a result of this error, to commit an act of omission, resulting in damage to her or other person's property.”⁸

In the Romanian doctrine of the interwar period, it was argued that “The means or modes by which the agent makes the passive subject to believe the lies leaked, that is, induce or mislead or cause the illusion of truth, are not determined by law, and can be any. They can be: cunning, craftsmanship, fireworks, maneuvers, machinations, tricks, refinements, simulations, dissimulations, disguises, deformations, detentions, insinuations, expeditions, tricks, intrigues, grips”⁹.

In another opinion, it is claimed that “The act of deception may be accomplished by any means capable of provoking misleading. The mere lie (statement, allegation), as well as the mere reluctance (omission to reveal, silence), it can be means of delusion when they occur in correlation with circumstances or facts that make them appear to be veracity, consistency with reality (for example, on the day when the decision to convict an arrested person was pronounced, an individual presented to the convict's wife saying that his lawyer had been sent a sum of money for declaring the appeal, and for the concrete circumstances he was believed and the victim was deceived).

He does not import if the passive subject has left too easily convinced; the law punishes the illicit action of those who induce others to mislead in order to profit, precisely to defend those who are imprudent and confident because the cautious and diligent defend themselves, in general, by themselves.”¹⁰

Within the par. (2) fraud is punishable by fraudulent means, exemplified only by the use of names or lying qualities (which of course fall into the category of fraudulent means).

⁷ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *Explicațiile Noului Cod Penal*, vol. III, Art. 188-256/*The explanations of the New Criminal Code*, vol. III, art. 188-256, Ed. Universul Juridic, Bucharest, 2015, p. 535.

⁸ *Ibidem*, p. 536.

⁹ Traian Pop, in Const. G. Rătescu, I. Ionescu-Dolj, I. Gr. Periețeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *Codul Penal Carol al II-lea Adnotat*, vol. III, *Partea specială, II, Art. 443-603/Criminal Code of Carol II Supplemented*, volume III, *Special part, II, Art. 443-603*, Ed. Librăriei COCEC & Co., S.A., Bucharest, 1937, pp. 550.

¹⁰ Vintilă Dongoroz in Vintilă Dongoroz (scientific consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *Explicații Teoretice ale Codului Penal Român*, vol. III, *Partea specială/Theoretical Explanations of the Romanian Criminal Code, Special Part*, Ed. Academiei Republicii Socialiste România, Bucharest, 1971, p. 529.

Using *lying names* it is meant “to use a name that the perpetrator does not actually have, whether it belongs to another person, or that it is purely imaginary. If the act of misleading a person for the purposes of the rule of incrimination of the deed of deception, the perpetrator makes use of a name under which he is usually known, though not his name or vice versa, which makes use of his true name, but he is also commonly known under another name, he cannot be accused of using false names.”¹¹

In interpreting the action of using *some liar qualities*, it is necessary first to clarify the notion of quality that a natural or legal person may have in terms of the meaning of the law.

Thus, according to the doctrine, “The quality of a person assumes the position, condition or rank that this person has in society. We may be in the presence of the use of a false quality in misleading a person if the offender misleads a fake academic, professional or nobility title; or a decorative or honorary function to which he / she is not entitled; or is a member of a scientific, charitable or professional society, when he is not a member of a scientific society, is given the status of a civil servant or a false national, a false civil status, a false family; in the legal and economic relations with other persons he presents himself a liar, a suspect as a delegate, his associate or his agent, or simply a mediator, when in fact he acts on his own and in his own interest.”¹²

Concerning the ways of committing, another author claims that “the act may also be committed when a contract is concluded or executed, *but it is not necessary for misleading to be decisive for the conclusion or performance of the contract of injured person (such a requirement was explicitly stipulated by the old Criminal Code in the case of fraud in conventions, by failing to include in the New Criminal Code such a requirement will practically extend the incidence of the rule of incrimination in matters of deception into conventions)*; the false created a reality that must relate to facts or circumstances that could be verified at the time of the conclusion or performance of the contract.”¹³

In court practice, there were different views in the case of damage caused in the same cause to the general budget of the European Union or to the budgets administered by it or on its behalf, and to the state budget, namely whether the use of or presentation of false documents, inaccurate or incomplete, which results in unfairly obtaining funds from the general budget of the European Union or from the budgets managed by it or on its behalf, will be taken as a single offense,

¹¹ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasiu, *op. cit.*, p. 537; the author makes reference to Traian Pop, in Const. G. Rătescu, I. Ionescu-Dolj, I. Gr. Periețeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *op. cit.*, p. 554.

¹² *Ibidem*, p. 537.

¹³ Mihail Udroi, *Drept penal, Partea specială, Sinteze și grille/Criminal Law, Special Part, Syntheses and Grids, 3rd Ed.*, C.H. Beck, Bucharest, 2016, p. 278.

or, in a single case, a second hypothesis, in the ideal contest with the crime of deceit, if the old law is more favorable, namely with the crime of illegal obtaining of funds, if the new law is more favorable or the deed was committed under its ruling.

Thus, following the appeal in the interest of the law formulated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, the Supreme Court ruled that "The act of using, within the contracting authority, through an action of the author, the documents or statements as being inaccurate, which resulted in obtaining funds unfairly from the European Union budget or from the budgets managed by it or on its behalf, as well as funds from the national budget, it compiles the constitutive elements of the single offense provided by art. 181, par. (1) of the Law no. 78/2000 on the prevention, detection and sanctioning corruption, regardless of whether the more favorable criminal law is the old law or the new law"¹⁴.

Also, in the judiciary practice there were different opinions regarding the legal framing of the person who issued a check on a credit institution or on a person knowing that there is no necessary provision or coverage or the deed to redeem it, after issuing the supply, in order to obtain for himself or for another unjust material use.

In this respect, the 9-judge panel of the High Court of Cassation and Justice decided that:

"1. The issuance of a check, knowing that for its valorization there is, at the date of issuance, no necessary provision or cover, is the offense provided in art. 84, par. (1) point 2 of the Law no. 59/1934, unless the act constitutes a crime punishable by a more severe punishment. This legal classification is incidental, *inter alia*, when the recipient of the check has missed the account and accepting it under these circumstances. When the beneficiary is unaware of this circumstance, being misled in order for the perpetrator to obtain an injurious material benefit while also causing a damage to the owner of the check, the deed constitutes the crime of deception.

2. The issuance of a promissory note for which recovery at the due date does not have the necessary cover does not constitute an offense in the absence of subjective or objective elements corresponding to the constitutive content of a criminal act. When the beneficiary is induced or misled when concluding or executing a contract by presenting as false the fact that there is a cover in the account

¹⁴ Mandatory jurisprudence for the application of the new Criminal Codes, decisions of the Constitutional Court, the preliminary rulings of the High Court of Cassation and Justice on the dissolution of certain legal matters, appeals in the interest of the law, 2nd Edition, revised and added, Ed. Hamangiu, 2016, pp. 538-551; ICCJ, Complete RIL, Decision no. 4 of April 4, 2016, published in the Official Monitor of Romania, Part I, no. 418 of 2 June 2016.

for collection in such a way that without this error the deceived person would not have concluded or executed the contract, is the crime of deception.”¹⁵

Subsequently, this issue was clarified by the adoption of Decision no. IX / 2005¹⁶ by which the High Court of Cassation and Justice, United Sections, accepted the appeal in the interest of the law and, in application of the provisions of art. 215 Criminal Code of 1969, established:

1. The act of issuing a check on a credit institution or a person, knowing that there is no provision for, or cover for, his capitalization, as well as the act of withdrawing, after issue, the provision, in whole or in part, or to forbid the trace from paying before the expiry of the presentation period, in order to obtain for himself or for another unjust material benefit, if a damage to the owner of the check occurred, constitutes the crime of deception provided in art. 215 par. (4) of the Criminal Code.

2. If the beneficiary of the check is aware, at the time of issuance, that there is no availability necessary to cover it, the act constitutes the offense provided in Art. 84 par. (1) point 2 of the Law no. 59/1934.

Although the decision in question was pronounced by the Supreme Court prior to the entry into force of the Criminal Code, in my opinion it remains current and in the application of the provisions of art. 244, par. (1) and par. (2) Criminal Code.

Thus, in interpreting this decision, the fact of issuing a check on a credit institution or a person, knowing that there is no provision for, or cover for, his capitalization, and the act of withdrawing, in whole or in part, after the issue (given that the check had the financial cover on the transaction at the time of issuance), or to forbid the trader from paying before the expiry of the presentation period, in order to obtain for himself or for another unfair material benefit, a loss to the owner of the check, constitutes the crime of deception provided in the provisions of art. 244 par. (1) or par. (2) Criminal Code.

The doctrine expressed the view that in this hypothesis, “the offense of deception provided in art. 244 par. (1) or (2) of the New Criminal Code, which will not absorb the offense provided in art. 84, point 2 of the Law no. 59/1934, regarding the legal object and the constitutive content of these crimes, the concurrence of crimes between fraud (art. 244 of the New Criminal Code) and the offense provided by art. 84 point 2 of the Law no. 59/1934¹⁷; if the beneficiary of

¹⁵ ICCJ, the 9 judges panel, the decision no. 338/2004, available on www.legalis.ro, in Mihail Udroui, *op. cit.* (2016), pp. 282-283.

¹⁶ Official Monitor of Romania, Part I, no. 123 of 9 February 2006.

¹⁷ See Irina Kuglay in, Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *Codul penal, Comentariu pe articole, art. 1-446, Ediția 2, revizuită și adăugită/Criminal Code, Comment on articles, art. 1-446, Ed. 2, revised and added*, Ed. C.H. Beck, Bucharest. 2016, p. 522.

the check knows, at the time of issue, that there is no necessary funds to cover it, the act is the offense provided by art. 84 point 2 of the Law no. 59/1934”,¹⁸

In the same sense, in the judicial practice it was decided that “The act of issuing a check on a credit institution or a credit institution or a person, knowing that for its capitalization there is no provision or the necessary cover, as well as the deed of withdrawing, after issue, the provision, in whole or in part (at the time of issuing the check with financial coverage), or to forbid the trace from paying before the expiry of the presentation period (at the time of issuance, the check was financially covered) to obtain for himself or for another an unfair material benefit, if the damage to the owner of the check is the crime of deception provided in art. 244 par. (1) and (2) of the New Criminal Code, which will not absorb the offense provided in art. 84, point 2 of the Law no. 59/1934 with respect to the legal object and the different constitutive content of these crimes, the concurrence of crimes between the offense of deceit (article 244 New Criminal Code) and the offense provided by art. 84, par. (1) point 2 of the Law no. 59/1934. Relevant in this respect are the provisions of art. 244, par. (2) IInd thesis New Criminal Code, according to which if the fraudulent means by which deception is committed, it constitutes the offense itself, the rules of the contest offense shall apply. Similarly, the Court considers that Decision no. IX / 2005 on appeal in the interest of the law of the ICCJ, the United Sections (Official Monitor, No 123 of 9 February 2006) cease to have effect, because it took into account the provisions of art. 215, par. (4) of Criminal Code 1969, incorporating incrimination under the Special Law (article 84 (1) (2) of Law No 59/1934). Therefore, the Court notes that the provisions of art. 474¹ Criminal Procedure Law 1969 on the cessation of the effects of the appeal in the interest of the law pronounced by Decision no. IX / 2005 issued by the High Court of Cassation and Justice, United Sections, provisions according to which the effects of the decision cease in the case of repeal, the finding of unconstitutionality or the modification of the legal provision that generated the problem of unlawful law is terminated, unless it subsists in the new regulation”¹⁹.

We disagree with the opinion of the Oradea Court of Appeal, claiming that the decision no. IX / 2005 on appeal in the interest of the law of the ICCJ, the United Sections (Official Monitor No. 123 of 9 February 2006) cease to have effect, because it took into account the provisions of art. 215, par. (4) Criminal Code 1969 which incorporated the incrimination of the Special Law (article 84, par. (1) (2) of Law no 59/1934) and the incidence of the provisions of art. 474¹ of Criminal Procedure Code 1969, according to which the effects of the decision cease in the case of repeal, the finding of unconstitutionality or the modification

¹⁸ Mihail Udriou, *op. cit.*, p. 279.

¹⁹ C.A. Oradea, Criminal Section, Decision no. 642/2015, unpublished, in Mihail Udriou, *op. cit.*, p. 279.

of the legal provision that generated the problem of loose law, unless it subsists in the new regulation because:

- art. 474¹ to which the Oradea Court of Appeal refers is provided in the Code of Criminal Procedure in force and not in the 1969 Code of Criminal Procedure;
- the crime of fraud through checks was not abrogated, the text of art. 215, par. (4) Criminal Code since 1969, the provisions of art. 244, par. (2) Criminal Code; this also results from the provisions of art. 215 par. (4) of Criminal Code of 1969 which refer to art. 215, par. (2) of the same code; the text of art. 215 par. (2) of Criminal Code of 1969 and art. 244 par. (2) of Criminal Code, are identical in their legal content, the only difference being the penalty limits that are lower in the new law.

Therefore, we appreciate that the provisions of Decision no. IX / 2005 issued by the United Sections of the High Court of Cassation and Justice in an appeal in the interest of the law is in force and produces legal effects, which are found in the very same decision of the Oradea Court of Appeal mentioned above.

In another case, it was decided that “The evidence that the prosecution has to prove by reference to the constitutive elements of the crimes of deception and money laundering were: a) misleading in order to cause injury to the victims, in the case of the crime of deception; b) the use of money produced by the offense of deceit in the contracts concluded by the defendant in his own name. The court considers that both elements are evidenced by the documents filed in the case file: (i) although the defendant has agreed with the two British citizens to found a commercial company in which they have the status of associates and shareholders, he did not take steps to set up a new commercial company, still working through its firm; (ii) changed the name of his firm to correspond with the name of the firm he had agreed to set up with the injured parties; (iii) the defendant created a web page stating that SC U.D. SRL Bistrita is a trading company “owned and led by Mr. J.S.R. in collaboration with British investors”, the main activity being “in its own real estate and industrial building projects on light metal structure”; (iv) transmission by the defendant by e-mail to the injured parties of the registers of the expenses incurred by the economic agent for the realization of the real estate project; (v) the defendant J.S.R. has obtained permits to build holiday homes or mansard apartment blocks on his or her name or SC. WET. SRL Bistrita and edited buildings, but injured parties D.M and R.J.M. they have never been associated with commercial companies (town planning certificates and building permits issued by Bistrita City Hall); (vi) In a short period of approximately 1 year, without investment or capital contribution, the defendant J.S.R. through SC U.D. SRL Bistrita, obtained the total amount of 1,263,755 euros from the two injured parties; (vii) Defendant J.S.R. has withdrawn sums of money from the SC cashier WET. SRL Bistrita. By the payment order of 23 June 2008, the company paid the associate J.S.R. the amount of 71,000 RON as a loan repayment; (viii) the defendant J.S.R. bought a S motorcycle on his name, on 24 May

2007, a T. trailer on 18 September 2007 and a P brand car on 14 November 2007, and a villa house built under the B.H. was registered on the company on 22 October 2008 (the patrimony of the defendants J.SR and SC U.D. SRL Bistrița). Consequently, the court notes that the constitutive elements of the crimes of deception and money laundering are met.”²⁰

At the same time, it has been decided in court practice that not all breaches of a civil obligation stemming from a contract may lead to the conclusion that a crime of deception has been committed. Thus, “The failure to fulfill a civil obligation within the term stipulated in the contract does not constitute an offense if at the time of the conclusion of the contract the accused has not been prosecuted for obtaining an unfair advantage (for example, no fraudulent means were used, without which the contract would not have been concluded, and both parties have known the method of payment and agreed to this). Omission of a civil obligation does not automatically constitute an offense. From the field of civil law it goes to the criminal law only when, either at the conclusion of the convention or during its execution, the party that did not observe the convention used deceitful / deceptive means to persuade the other party to execute term obligations or, as the case may be, on agreed terms. The defendants did everything that the law and commercial tradition allowed to meet their obligations. The failure to pay the defendants' firms is not the consequence of a misleading action of injured parties. This does not mean, however, that the issue of the promissory note under any circumstances, without the need for the necessary cover, entails the contractual liability of the perpetrator. The function attributed to the promissory note is in such cases to cause misleading the conclusion of the agreement, the account statements, the paying bank, the payment amount being such as to convince the other party of the seriousness and the payment options of perpetrator. To complete the content of the offense, deluding, misleading action about the possibilities, conditions and form of payment must be guilty in the form of intent. Under the latter aspect of the intention to deceive the civil parties, the court of appeal and the appeal have correctly arrived at, assessing the conditions for the issue of promissory notes, the circulation of goods and sums received, the relations between the accused persons and the civil parties, to the conclusion of disbursement”.²¹

Also, “the act of claiming and receiving money by misleading the injured person with regard to the circumstance that the act for whose failure the perpetrator claimed and received the money regards his duty to serve, meets the constitutive elements of the crime of deception, and not those of accepting bribery”²² or

²⁰ I.C.CJ, Criminal Section, Decision no. 1274/2014, available on www.scj.ro, in Mihail Udrioiu, op. cit., pp. 279-280.

²¹ I.C.CJ, Criminal Section, Decision no. 1274/2014, available on www.scj.ro, in Mihail Udrioiu, op. cit., pp. 280-281.

²² I.C.CJ, Criminal Section, Decision no. 3622/2004, available on www.legalis.ro, in Mihail Udrioiu, op. cit., p. 281

“Obtaining a loan from the bank, guaranteed by an apartment that the debtor does not own at the date of the conclusion of the contract, but acquires it by buying later, when the mortgage inscription is established in favor of the bank, but not paying the price, after one month's consent to the cancellation of the sale-purchase contract, renouncing the apartment and missing the guarantee bank, constitutes the crime of deception and not a civil act, non-respecting the contractual clauses”²³ or “Obtaining by manager of a bank loan for the declared purpose to be used to finance the business company activity and the use of money for another purpose, in the absence of any real commercial activity of the credited company, the guarantee of the loan by mortgaging a building burdened by tasks, the concealment of this situation and the non-repayment of the loan within the term meet the characteristic features of the crime of deception.”²⁴

Essential requirements. In the old or even recent doctrine, it was argued that in the case of the way stipulated in the provisions of art. 244 par. (1) Criminal Code, for the existence of the objective side, the incriminating provision does not provide for any essential requirement.²⁵

Instead, according to the recent doctrine²⁶ of the existence of the offense under the aggravated normative way provided in paragraph (2) of the same article, the essential requirement presupposes that the deception is carried out by fraudulent means.

In the doctrine, “various practical assumptions have been held in which the offense of deception consisting in the false presentation of reality can be objected in cases such as:

(i) *upon the conclusion of an insurance contract or any other matter related to its execution in addition to the realization of the insured risk;*

(ii) *if the false presentation is not objected or is not accompanied by any of the material acts described in art. 245 par. (1) New Criminal Code;*

(iii) *to the auction participant, other than any means of coercion or corruption;*

²³ C.S.J., Criminal Section, Decision no. 3351/2001, available on www.legalis.ro, in Mihail Udrioiu, *op. cit.*, p. 281

²⁴ C.S.J., Criminal Section, Decision no. 3980/2001, available on www.legalis.ro, in Mihail Udrioiu, *op. cit.*, pp. 281-282.

²⁵ Vintilă Dongoroz in Vintilă Dongoroz (scientific consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *op. cit.*, p. 529; Ilie Pascu, în George Antoniu, Tudorel Toader (coordonatori), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasiu, *op. cit.*, 538.

²⁶ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasiu, *op. cit.*, p. 538.

(iv) *any understanding between bidders if it is not intended to distort the price.*”²⁷

Immediate result. In order to complete the objective aspect of the offense of deceit, in any of its normative ways, it is necessary that “the act of deception by which the material element was made would have immediately led to the creation of a situation contrary to that which should have existed if the misleading (misleading) action would not be taken. The immediate consequence therefore lies in the patrimonial act performed or omitted by the deceived person, an act that would not have been consented to by knowing the truth.

In order for the immediate effect to be effective in the content of the offense of deception, an essential requirement must be fulfilled, namely the immediate result, “causing damage”.

The civil consequence of the act (the damage) therefore constitutes, in the case of the simple variant of the offense of deceit (article 215, par. (1), an essential requirement for the existence of this crime.

This requirement is also essential for the special variant of deception (article 215, par. 3), so that in order to complete the objective side and therefore the existence of the offense, it is necessary for the immediate consequence, i.e. the change of the factual situation resulting from that the conclusion or performance of the contract under the act of deception should be detrimental”²⁸.

We appreciate that the immediate consequence is to cause damage to a natural or legal person. It is not necessary for the active subject of the offense to have obtained for himself or another a patrimonial benefit, the offense remaining even if the intended purpose has not been achieved.

Causality connection. For the existence of the offense it is necessary to ascertain the existence of the causal link between the act of deception, through which the material element is achieved and the immediate consequence.

However, the *Causality connection* often results from the materiality of the act.

3.2.2. The subjective side

According to the doctrine, “alluring, misleading, to constitute the material element of the crime of deception must be subjectively committed with will and intention (guilt).”²⁹

With regard to the *subjective element*, “there is an intention to deceive or to mislead when the perpetrator realizes that the action he performs leads to a

²⁷ Mihail Udriou, *op. cit.*, p. 283, apud, Irina Kuglai in Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *op. cit.*, pp. 523-524.

²⁸ Vintilă Dongoroz in Vintilă Dongoroz (consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *op. cit.*, p. 530.

²⁹ *Ibidem*, p. 530.

deception, intended to provoke in the mind of the one to whom he is committed false knowledge of reality and provides that due to this alteration of truth, the deceived one will take a provision that will cause him material damage.”³⁰

So, being qualified by purpose, the intention can only be direct, having no legal relevance for the existence of the offense, the mobile that determined the active subject to commit the offense.

In judicial practice, it was decided that “Intention, as a subjective element of the crime of deception, presupposes the subjective attitude in relation to which the accused person's conduct can be criticized. Criminal liability intervenes because the accused person has used his ability to understand and foresee facts for the purpose of fraudulent results. In case of intent, reaching the fraudulent result is the very source of the act of conduct. The criteria for assessing guilt therefore arise from the external behavior of the person accused, which is capable of clarifying the meaning and purpose of the actions taken by the accused. The motivation for conduct is reflected in how the person acted. The offense of deception is directed against the patrimony, so that the diminution of the victim's heritage must be anticipated by the accused person, and the conduct of the accused person adapted for that purpose. Judicial research should clarify whether or not fraudulent means have been used to conclude a contract and whether unrealistic means have been used to maintain the injured party's trust in the reality of the deal between the parties. Criteria for assessing intention in the case of fraud in the conventions in question when issuing a check / promissory note are, for example: 1. the conduct of the accused person in connection with other contracts or payment instruments prior to the date of the facts in the notice. There are taken into consideration, for example, the measures taken to comply with the contractual or payment clauses, the consistency of the measures with the aim pursued, the attitude towards compliance with the rules governing the matter, the turnover of the goods or the proceeds; 2. the different or consistent character of the conduct of the accused person in relation to the facts in the case deducted from the judgment. In addition to the above criteria, the determining factors for the conclusion of the agreement, the knowledge of the contracting parties of the manner in which the contract will be conducted, i.e. when and how to pay, the existence of unforeseeable circumstances, the issuance of checks after the banking interdiction, shall be assessed.”³¹

In another case, the supreme court ruled that “There are elements that are capable of clarifying the existence of factual support of the nature of the criminal offense: the conduct of the person accused of misleading about the conclusion / implementation of the contract, the lack of any measures for compliance with

³⁰ *Ibidem*, p. 530.

³¹ Mihail Udriou, *op. cit.*, p. 284; I.C.C.J., Criminal Section, Decision no. 2040/2012, available pe www.scj.ro.

contractual clauses or for payment, coherence of measures with the aim of misleading victims, attitude towards compliance with the rules governing the commercial area in which the accused person is alleged to have acted. Criteria for the assessment of guilt are complemented by the determining elements for the conclusion of the convention, for example, knowing by the Contracting Parties how the contract will be carried out, when and how to pay, the existence of unforeseeable circumstances.”³²

In the two cases of the Supreme Court, the criteria to be taken into consideration when assessing the guilt of the active subject of the crime of deception, which are to be taken into consideration by the Romanian courts, are accurately stated.

If the deceived person was misled by the fault, the act would not constitute an offense.

So, “he does not commit the deceit offense, in the course of patrimonial relations, imprudently considered to verify as being truthful the allegations he made about the existence or non-existence of deeds.”³³

In this respect, in the judicial practice it was decided that “the subjective element specific to the crime of deception is absent and, consequently, the act does not constitute an offense if the perpetrator acquires animals from the population with a view to their valorization at the slaughterhouse with a tender with the promise of subsequent payment of the price followed by non-payment of this price if the non-payment of the promised price is not due to the will of the purchaser of the animals³⁴; or the defendant's action to agree with the injured party to sell him a dwelling, receiving from him a car and a sum of money, since the injured party knew with certainty at the conclusion of the convention that the defendant is not the owner of the dwelling.³⁵ It cannot be remembered that the defendant was in bad faith and presented the injured party with a situation inconsistent with reality, in which case, if he knew it, he would not have concluded with the defendant the credit agreement, since the documents show that, in the application for the loan, the defendant indicated that, in order to guarantee the loan, he assigned to the bank his receivables he had to receive as a result of two export contracts and the two contracts were presented to the bank without the defendant altering them in some way, their content may present any unrealistic situation as to their performance.”³⁶

³² *Ibidem*, pp. 284-285; I.C.C.J. Criminal Section, Decision no. 1032 of 26 March 2013, apud Lavinia Valeria Lefterache, *Probe și prezumții în procesul penal/Evidence and Presumption in the Criminal Proceedings*, Ed. Universul Juridic, Bucharest, 2015, p. 144.

³³ Vintilă Dongoroz in Vintilă Dongoroz (consultant & coord.), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *op. cit.*, p. 530.

³⁴ C. A. Bucharest, I Criminal Section, decision no. 194/1999, in CPJC 1999, pp. 99-100.

³⁵ C. A. Bucharest, I Criminal Section, decision no. 807/2000, in CPJC 2000, pp. 91-92.

³⁶ Ilie Pascu, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Daniela Iulia Lămășanu, Ilie Pascu, Marieta Safta, Constantin Sima,

Essential requirements. According to the recent doctrine, “For the achievement of the subjective aspect of the offense against the patrimony, the intention of the perpetrator to mislead the victim is to be accompanied by an essential requirement, namely, “*in order to obtain for himself or for another unjust patrimonial benefit.*” This requirement characterizes the intention, which becomes so qualified by the aim pursued by the perpetrator. As far as the purpose of the perpetrator's action is concerned, its existence is sufficient, without the necessity of its realization, that is to say the actual obtaining of the patrimonial benefit. In other words, the requirement refers to the purpose of the action, not the outcome.

The patrimonial use must be unjust, that is contrary to law, illegitimate, in other words, the perpetrator has no legitimate title to obtain it.”³⁷

4. The special forms of the crime of deception provided by the Romanian law

In the Romanian criminal law, the offense of deceit can also be analyzed through other legal norms that protect specific social values.

We have here the offenses stipulated in the provisions of Law 78/2000 and the offenses stipulated in art. 306 and even art. 245 Criminal Code.

In view of their importance, we will make some clarifications about each of these rules, considering each of them having a negative impact on the business environment, with some particularities in business law.

4.1. The deceit in Law no. 78/2000 on the prevention, detection and sanctioning of corruption, with subsequent amendments and completions³⁸. Obtaining funds illegally

Prior to Romania's accession to the European Union, against the background of the need to intensify the fight against corruption and implicitly to meet the imposed conditions, Law no. 78/2000 for the prevention, detection and sanctioning corruption acts, a normative act with major implications in the subsequent evolution of Romania as a member state of the European Union.

The legal act in question provides for three groups of offenses, namely:

- corruption offenses (article 289-292 Criminal Code, including when committed by persons referred to in article 308 of the Criminal Code);
- crimes assimilated to corruption offenses (those provided in articles 10-13 of the Special law);

Tudorel Toader, Ioana Vasiu, *op. cit.*, p. 539. The author refers to I.C.C.J., Criminal Section, decision no. 3765 of 1 July 2004, in B.J., Database.

³⁷ *Ibidem*, p. 539.

³⁸ Published in the Official Monitor of Romania, Part I, no. 219 of May 18, 2000.

- offenses directly related to the offenses of corruption, i.e. offenses against the financial interests of the European Union (provided in articles 181-185 of the special law).

Taking into account the subject of the study, we will proceed to the general examination of the specificities of crimes against the financial interests of the European Union, with direct reference to those of deception.³⁹

From the study of the legal content of the offenses in question it results that only those provided in art. 181 and art. 183 presents identity elements with the offense of deception provided in the provisions of art. 244 Criminal Code.

Thus, according to the provisions of art. 181 of Law no. 78/2000, the offense in question without having any marginal name shall be retained in the case where a natural or legal person uses or presents in bad faith false, inaccurate or incomplete documents or statements, if the act has the unfair advantage of funds from the general budget of the European Union or budgets managed by or on behalf of the Union.

In par. (2) of that article provides for another means of committing the offense consisting in the omission to provide knowingly the data required by law

³⁹ Section 4. Offenses directly related to corruption offenses

Section 4¹. Offenses against the financial interests of the European Union

Art. 18¹. (1) The use or presentation in bad faith of documents or false, inaccurate or incomplete statements, if the act results in unfairly obtaining funds from the general budget of the European Union or from the budgets administered by it or on its behalf shall be punished by imprisonment from 2 to 7 years and having forbidden certain rights.

(2) With the punishment stipulated in paragraph (1) shall be sanctioned by the omission to provide, knowingly, the data required by law to obtain funds from the general budget of the European Union or budgets administered by or on its behalf if the act has the unfair effect of such funds.

(3) If the facts provided in paragraph (1) and (2) have caused particularly serious consequences, the special penalty limits are increased by half.

Article 18² ...

Art. 18³. (1) The use or presentation in bad faith of false or inaccurate or incomplete documents, resulting in an illegal diminution of the resources to be transferred to the general budget of the European Union or to the budgets managed by it or on its behalf, they are punished by imprisonment from 2 to 7 years and the banning of certain rights.

(2) With the punishment stipulated in paragraph (1) is sanctioned the omission to provide knowingly the data required by the law if the act results in illegal diminution of the resources to be transferred to the general budget of the European Union or to the budgets managed by it or on its behalf.

(3) If the facts provided in paragraph (1) and (2) have caused particularly serious consequences, the special penalty limits are increased by half.

Art. 18⁴. The offenses referred to in art. 181-183 are punishable.

Article 18⁵. Infringement by the director, the administrator or the person with decision-making powers or control over an economic operator of a service duty by failing to fulfill it or by failing to fulfill it, if the deed has resulted in the commission of by a person under his / her control who acted on behalf of that economic operator for one of the offenses provided in art. 181-183 or committing a crime of corruption or money laundering in connection with the European Union funds shall be punished by imprisonment from 6 months to 3 years or by fine.

to obtain funds from the general budget of the European Union or from the budgets managed by it or on its behalf, if the act results in the unfairly obtaining of these funds.

In par. (3) there is an aggravated way of assimilation and typing, which will be taken into account when those facts have produced particularly serious consequences.

Regarding the sanctioning regime, we note that in the case of the type and the assimilated way, the punishment provided by the law is imprisonment from 2 to 7 years and the prohibition of certain rights, and in case of aggravated mode, the special limits of punishment increase by half.

The second offense of deception is provided in the provisions of art. 183 of the law (without a marginal name) and consists in the deed of the natural or legal person who uses or presents in bad faith false or inaccurate or incomplete documents or statements resulting in an illegal diminution of the resources to be transferred to the general budget of the European Union or to the budgets managed by or on behalf of it, with the imprisonment of between 2 and 7 years and the prohibition of certain rights.

In par. (2) an offense is assimilated to the variant in par. (1) which consists in the omission to provide knowingly the data required by law if the act results in an illegal diminution of the resources to be transferred to the general budget of the European Union or to the budgets administered by or on its behalf.

The punishment provided for by the law in the case of the type and the assimilated type consists of imprisonment from 2 to 7 years and the prohibition of certain rights.

In par. (3) there is also an aggravating normative way which will be taken into account when the above mentioned facts have produced particularly serious consequences, in which case the special limits of punishment increase by half.

In art. 18⁴ it is stated that the attempt in case of the offenses stipulated in art. 18¹-18³ is punishable.

In art. 18⁵ it shall be sanctioned the breach of fault by the director, the administrator or the person responsible for the decision or control within an economic operator of a service duty, by failing to fulfill it or by its faulty fulfillment, if the deed has resulted in the commission of a person who is under his/her control and who acted on behalf of that economic operator of one of the offenses referred to in art. 181-183 or committing a crime of corruption or money laundering in connection with the funds of the European Union.

The sanction provided by law is imprisonment from 6 months to 3 years or a fine.

In art. 306 of Criminal Code is the offense of *illegal obtaining of funds*, which consists in the act of the natural or legal person to use or present false or inaccurate or incomplete documents or data for receiving the approvals or guarantees necessary for the grant obtained or guaranteed from the funds, if it results

in unfair obtaining of these funds. According to the provisions of paragraph (2) of the same text, the attempt is punished.

According to the High Court of Cassation and Justice “The use or presentation of inaccurate or incomplete false or inaccurate or inaccurate documents is a concrete way of misleading the public authority granting the funding, resulting in the approval of the public funding of a person who is not entitled to obtain them, since in fact it does not meet the eligibility requirements laid down by law. However, the offenses provided by art. 244 par. (1) and (2) Criminal Code and art. 306 Criminal Code differ from each other in that, in the latter case, the damage is presumed, and it is irrelevant whether the fraudulently obtained funds were or were not used as intended. Thus, even if the project for which the funding was obtained has been fully respected, irregularities regarding the manner of obtaining also give the absolute presumption of damage caused to the financier by the defendant's conduct. The rule provided by art. 306 Criminal Code penalizes a specific misleading form committed by using or presenting false or inaccurate or incomplete documents or data for receiving the approvals or guarantees required to provide funding obtained or guaranteed from public funds. By providing untrue information contained in documents or false, inaccurate or incomplete information, on which the granting of public funding or guaranteed by public funds depends - and not co-financed from the national budget, such as the misappropriation of European funds - the offender is presented as eligible for receiving those funds. By concluding, the High Court appreciates that the text of art. 306 Criminal Code establishes a special incrimination, justified by the particularities of the finding of the damage, which is absolutely presumed by the very fact that the fraudulent obtaining of the funds I.C.C.J., the competent body for resolving the appeals in the interest of the law, Decision no. 4/2016 (Official Monitor No. 418 of 3 June 2016)]”⁴⁰.

We do not intend to analyze the constitutive content of the offenses referred to above, but we consider it necessary to highlight some of their peculiarities regarding the holding of the offense contest or a single offense.

Thus, we mention that two different orientations have emerged in judicial practice with regard to each of the two more favorable criminal law assumptions.

In the case where the old law was considered to be more favorable, some courts incorporated the deed into the single offense provided by art. 181 of Law no. 78/2000, considering that the offense of using or presenting documents or false, inaccurate or incomplete statements, resulting in unfairly obtaining funds from the general budget of the European Union or budgets administered by it or on its behalf by art. 181 par. (1) of the Law no. 78/2000 on the prevention, detection and sanctioning of corruption acts cannot be accepted in an ideal contest with

⁴⁰ Irina Kuglay in, Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *op. cit.*, p. 697.

the crime of deception provided by art. 215 par. (1), (2), (3) of the Criminal Code of 1969, requiring only the detention of the offense under the special law.

These courts have held that the objective aspect of the crime of unjustly obtaining European funds can be achieved either through a commissive action, (1), which implies the submission of false or inaccurate, incomplete documents or statements, or through an omission in the case of par. (2) when knowingly failing to provide data required by law, which, if known, would lead to the non-granting of funds, in both ways of committing the act being misled by the competent authority to decide on the eligibility of a project; and to provide funds from community budgets.⁴¹

The same courts considered that “as an atypical form of the crime of deception, the offense provided by art. 181 of Law no. 78/2000 on the prevention of the discovery and sanctioning of corruption acts cannot be held in real contest with the offense of deception provided by art. 215 par. 1,2,3 of the previous Criminal Code.”⁴²

Other courts have committed the offense provided by art. 181 of Law no. 78/2000 in an ideal competition with the one stipulated in art. 215 of the 1969 Criminal Code.

The courts that have ordered this legal classification have held that “the actions taken by the court have caused two separate budgets, both the budget of the Romanian state and the European Communities, by the same action of the defendant, being harmed by different social values”.⁴³

If the new law was considered to be more favorable, some courts have committed the offense provided for in the provisions of art. 18¹ of Law no. 78/2000, in an ideal contest with the offense provided in art. 244 Criminal Code, while other courts have committed the offense provided for in art. 18¹ of Law no. 78/2000, in an ideal contest with the offense provided by art. 306 Criminal Code.

By solving the appeal in the interest of the law, the Supreme Court ruled that “The act of using in the contracting authority, through an action of the author, inaccurate documents or statements, which resulted in obtaining unfairly funds from the European Union budget or from the budgets administered by it or on its behalf, as well as from funds from the national budget, shall meet the constitutive elements of the single offense provided by art. 181 par. (1) of the Law no. 78/2000 on the prevention, detection and sanctioning corruption, regardless of whether the more favorable criminal law is the old law or the new law”.

⁴¹ I.C.C.J. RIL par. 4. of the Decision no. 4 of April 4, 2016, published in the Official Monitor of Romania, Part I, no. 418 of 3 June 2016.

⁴² I.C.C.J., RIL, par. 4.11 of the Decision no. 4 of 4th April 2016.

⁴³ I.C.C.J., RIL, par. 5.1 of the Decision no. 4 April 4, 2016; there are exemplified the Criminal Sentence no. 640 of July 11, 2010 of the 2nd District Court of Bucharest, remaining final by Decision no. 2.386 of December 11 of the Bucharest Court of Appeal, Criminal Section I.

4.2. Insurance fraud

Provided in the provisions of art. 245 C. pen., insurance fraud is the deed of the natural or legal person who destroys, degrades or renders unprofitable, hides or alienates an insured asset against destruction, degradation, wear, loss or theft in order to obtain, for himself or for another, the insured amount.

In par. (2) of the same article is sanctioned the act of the person who, in order to obtain for himself or for another, the sum insured, simulates, causes or aggravates injuries or bodily injuries caused by insured risk.

According to the recent doctrine, “The offense provided in art. 245 Criminal Code however, concerns only certain acts committed strictly in connection with the execution of an insurance contract, more precisely in connection with the obtaining of the insured amount. Consequently, the false presentation of the reality upon the conclusion of an insurance contract, or any other aspect related to its execution besides the realization of the insured risk, will constitute the offense of deception provided by art. 244 Criminal Code (as consumed or tempted)⁴⁴. Similarly, when the act of false presentation of reality does not consist or is not accompanied by any of the material acts described in art. 245 par. (1), it shall state the offense provided by art. 244; the mere false declaration of a good as stolen in order to obtain the insured amount constitutes, in the absence of an act of concealment or alienation, the offense of deceit (for a similar act, accompanied by an act of alienation⁴⁵, note that the deed would be presently provided by article 245 of the Criminal Code)”.⁴⁶

4.3. Other special forms of deceit

Other special forms of deceit are the offenses of *misappropriation of public auctions* and *fraudulent bankruptcy* in the ways provided by art. 241, par. (1) letter a) and b).

According to the recent doctrine, “The false presentation of reality to the auction participant, *except for any means of coercion or corruption*, may constitute a material element of deception, and the provisions of art. 246; so, any understanding between the participants in an auction, if it is not for the purpose of misappropriating the price, may the circumstance of an act of false presentation of the fact that constitutes the crime of deception rather than that provided by art. 246.

⁴⁴ See V. Pușcașu, *Noul Cod penal adnotat/The New Supplemented Criminal Code*, *op cit*, 2014, p. 567).

⁴⁵ See also CSJ, Criminal Section, Decision No. 5137/2001, in B.J. 2001, p. 243, apud V. Pușcașu, *Noul Cod penal adnotat/The New Supplemented Criminal Code*, *op cit*, 2014, p. 578.

⁴⁶ Irina Kuglay in Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *op. cit.*, p. 696.

In the ways provided by art. 241 par. (1) letters a) and b), fraudulent bankruptcy is a special form of the deceit offense.”⁴⁷

5. Conclusions

The examination of the constitutive content of the deceit offense highlighted some of its peculiarities, as well as some direct implications in business law.

At national level, the crime of deception presents a fairly high crime rate with some fluctuations in terms of increases or decreases over certain periods.

With all the preventive measures introduced in the recent years, including the legislative one, the crime rate in the business environment remains at a rather high level.

Thus, if we relate to committing this offense in the business environment, starting from its legal object, which consists of patrimonial social relations involving goodwill and mutual trust between business partners, we note that deception is an offense with implications direct to the general evolution of a state's economy.

Against the background of the need to more effectively defend these social values, in the recent years, several legal rules have been adopted which, in essence, constitute special forms of the crime of deception.

In those circumstances, it was absolutely necessary to establish, in concrete cases, which norm is incidental, namely the basic offense (the deceit, referred to in article 244 of the Criminal Code), or one of the assimilated offenses (one of the offenses provided for in article 181 of Law No. 78/2000, the illegal obtaining of funds provided for in article 306 of Criminal Code, the misappropriation of insurances provided for in article 245 of Criminal Code, the misappropriation of public auctions provided for in article 246 Criminal Code, etc.).

On the other hand, it was important to establish, if there is an ideal contest of crimes, between the offense of deception in the type of offense and one of the crimes that constitute them, the forms assimilated to the crime of deceit (we consider the crimes at which we referred to above).

If the doctrine did not come with a unitary point of view, the judicial practice did not excel in this respect, as there were different solutions adopted by the Romanian courts.

On this background, the High Court of Cassation and Justice, the competent body to judge the appeal in the interest of the law (the appeal promoted by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice) was adopted, Decision no. 4/2016 which stated that the act of using, in the contracting authority, through an action of the author, documents or inaccurate statements, which resulted in unfairly obtaining funds from the EU

⁴⁷ *Ibidem*, pp. 696-697.

budget or from the administered budgets either on its behalf, as well as funds from the national budget, the constitutive elements of the single offense provided by art. 181 par. (1) of the Law no. 78/2000 regarding the prevention, detection and sanctioning of corruption, regardless of whether the more favorable criminal law is the old law or the new law.

Although this problem is solved in the sense that the Romanian courts will adopt a single position in the sense mentioned in the aforementioned decision, there remain many questions as to the possibility of a concurrence between the offense of deception and other crimes which in essence there are special forms of deception.

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Considerations on the Subjective Aspect of Corruption Offenses

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Abstract

The group of corruption offenses in the New Criminal Code presents certain changes to the old legislation and to the subjective side of these types of offenses. Accepting and offering bribes can now be done with both direct and indirect intent because the legislator has removed the condition of purpose from the subjective side of the offenses. In this way, the range of acts considered to be illicit acts of bribe was expanded and there is no need to prove the existence of other psychic processes additional to those specific to guilt. It is sufficient for the activities that make up the material element of the facts to be made in connection with certain acts of service. Influence peddling has also been reformulated, and from its content the psychic processes of the purpose that characterized the intention have disappeared, therefore, this offense can be committed with the form of guilt of intent in both its forms: direct or indirect. The only incrimination in the group of corruption offenses that has maintained the essential requirement of the purpose in the content of the offense is the buying of influence, and the psychic processes of purpose are expressed by an equivalent expression, having the meaning of finality. In this sense of finality, the psychic processes of purpose may have several meanings, and in the case of the offense of buying influence, the meaning of expression used by the legislator is to adopt or obtain a certain conduct.

Keywords: *subjective aspect, corruption offenses*

JEL Classification: K14

1. Corruption offenses in the former and current Criminal Code

Corruption offenses are found in Chapter I, entitled „Corruption Offenses”, of Title V on corruption offenses and malfeasance while in office.

In the current Criminal Code, the chapter includes the following incriminations: accepting bribes, taking bribes, influence peddling and buying of influence. This latter incrimination has been taken up with some modifications from Art. 61 of the Law no. 78/2000 on the prevention, detection and sanctioning of corruption acts, completing in this way the group of corruption deeds described and incriminated in the Criminal Code.

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The analysis of the subjective aspect of these crimes reveals some differences from the old regulation, with consequences regarding the form of guilt and the factual possibilities of committing.

As regards the offense of *accepting bribes*, according to article 254 of the former Criminal Code, the offense consists in the act of an official who, directly or indirectly, claims or receives money or other benefits that do not belong to him or her or accepts the promise of such benefits or does not reject it, *in order to fulfill, to not fulfill or to delay the performance of an act concerning his or her duties or with the purpose of acting contrary to these duties*. Article 255, which incriminated the act of taking bribes, defined it as the promise (although more correctly it would have been the term “promise”, since the other alternative ways of committing the deed were specified with the help of nouns deriving from verbs), offering or giving money or other benefits *in the ways and purposes* shown in art. 254.

At present, the Criminal Code in force incriminates in art. 289 the act of *accepting bribes* as the act of a civil servant who directly or indirectly, for himself or for another, claims or receives money or other benefits that do not belong to him or her or accepts the promise of such benefits, *in connection with the fulfillment, the non-fulfillment, the urging or the delay of the performance of an act which falls within his or her duties or in connection with the performance of an act contrary to these duties*. Bribery, as mentioned in art. 290 consists in promising, offering or giving of money or other benefits, *under the conditions* shown in art. 289.

As it can be seen, both in the previous regulation and in the current regulation, bribery is defined by reference rules, and art. 254 (Criminal Code 1969) and art. 289 (Criminal Code) are the compliant rules by which the content of the offense is comprehensible. Consequently, the considerations that will be made regarding crimes of accepting bribes are also valid with regard to taking bribes.

By comparing these texts, it is worth mentioning that in the current regulation, the actions forming the material element of the two offenses are carried out “in connection with” acts compliant or contrary to the duties of office, unlike the previous regulations contained in art. 254 and 255 of the Criminal Code 1969. According to the former text, bribery supposed an official’s act who directly or indirectly claimed or received money or other benefits that are unjustified, or accepted the promise of such benefits or did not reject it “in the purpose of” fulfilling, not performing or delaying the performance of an act concerning his or her duties of service or “in order to” act contrary to these duties.

Further addressing the offenses of *influence paddling* and *buying of influence*, according to article 257 of the former Criminal Code, the legislator defines the first of the offenses as receiving or claiming money or other benefits or accepting promises, gifts, directly or indirectly, for oneself or for another, committed by a person who has influence or leaves the impression he or she has an

influence on an official, *to make* that person or not to do an act falling within his or her job duties.

The purchase of influence, as we said, was incriminated in Art. 6¹ of the Law no. 78/2000 for the prevention, detection and sanctioning of corruption acts and consists in receiving, offering or giving money, gifts or other benefits, directly or indirectly, to a person who has influence or who thinks to have an influence on an official, *to cause them to do or not to do an act that falls within his or her job duties*.

Currently, according to art. 291 of the current Criminal Code, the offense of influence peddling consists in claiming, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or gives the impression that he or she has influence on a civil servant who promises to cause him or her to fulfill, not to perform, to urge or to delay the performance of an act falling within his or her duties or to act contrary to these duties.

The following article of the new Criminal Code, art. 292, defines the purchase of influence consisting in the promise, offering or giving of money or other benefits, for himself / herself or for another, directly or indirectly, to a person who has influence or gives the impression that he or she has an influence on a civil servant, in order *to determine to fulfill, not to perform, to urge or to delay the performance of an act falling within his / her duties or to perform an act contrary to these duties*.

By comparing the texts of the current Criminal Code with those of the old Criminal Code, it is interesting to analyze the consequences of this way of expression of the legislator, the subjective aspect of the offenses and the actual ways of committing the deeds.

Thus, as regards the subjective aspect of the offenses of taking and accepting bribes of the Criminal Code 1969, described in Art. 254 and 255, the doctrine unequivocally clarified that the form of guilt that these deeds could be accomplished with was that of direct intent, qualified by the purpose pursued by the perpetrator.

The introduction of the goal condition into the constitutive content of incriminations at that time had the role of protecting the proper conduct of relationships in the office against the temptation that some officials may feel about the fulfillment or failure to perform their duties and gaining undeserved benefits.

From the point of view of the expression used by the 1969 legislator for introducing the essential requirement of purpose, it is observed that the option of explicit expression was chosen by using the expression “for purpose of” which has the same meaning as in ordinary speech: *a goal* pursued by the active subject. Explicit expression always has the advantage of removing the doubt or confusion between notions or terms, being preferable in the course of enactment.

For *influence paddling* and *buying of influence* offenses, the subjective side included the essential requirement of the purpose expressed by the equivalent

expression “to”, and due to the presence of these specific psychological processes, deeds could only be performed with a direct intent, qualified by the aim pursued by the perpetrator. The requirement of the purpose has the meaning of finality pursued by the perpetrator in the sense of adopting or obtaining a certain conduct. It was not necessary for the offense to have the aim to be achieved, and proof of the existence of these psychic processes is sufficient.

2. Purpose in the content of the crime and its meanings

The essential requirement of the scope understood as purpose is solely the subjective side of the offense, and the purpose consists in certain conscious and specific psychological processes, attached to the psychic processes characteristic of guilt.

It is known that besides the significance of a purpose pursued by the perpetrator, in the content of the offense, the purpose may also have the meanings of *destination* and *outcome*, but in such situations, the psychic processes of purpose will characterize the objective side of the offense, without influencing the form of guilt with which the act is committed. These meanings are not found in the case of corruption offenses.

When “*purpose*” has the meaning of *goal* and complements the subjective side of a certain crime, it can be seen that these psychic processes could have several meanings, namely:

1) to *obtain advantages, benefits or rewards of any kind*; for example in the case of a crime of fraud (Article 244) when the purpose is to pursue an unfair patrimonial benefit;

2) to *commit or conceal a crime or other serious criminal offense*; this is the case of a crime of *qualified murder* (Article 189 paragraph 1, letter d) committed to facilitate or hide the commission of another offense; the offense of human trafficking;

3) to *adopt a certain behaviour*; here we can mention the offense of abusive investigation / ultra vires investigation (Article 280, paragraph 1), the purpose of which is to determine the person prosecuted or judged to give, not to make declarations, not to make false statements or withdraw those already given;

4) to *produce a definite consequence*; it may be mentioned here the offense of favouring the offender (Article 269, paragraph 1), the purpose being that of preventing or hindering the investigations, the criminal prosecution, the execution of a custodial sentence or the deprivation of liberty measures;

From this point of view, the requirement of purpose in the constitutive content of the offense of bribery in the Criminal Code 1969 could be understood in the sense of *adopting a certain conduct*²: that of fulfilling, of not accomplishing

² Elisabeta Botian, *Mobilul si scopul in dreptul penal*, "Nicolae Balcescu" Land Forces Academy Publishing House, Sibiu, 2011, p. 83.

or delaying the performance of an act his or her duties of service or in order to act contrary to these duties. The perpetrator commits any of the alternative actions of the material element for this purpose, conditional on the fulfillment / non-fulfillment of the service duties to pay undue benefits.

On the other hand, from the point of view of the possibility of reaching this goal, it has been decided in the judicial practice³ that the purpose as an element of the subjective side does not necessarily imply its realization on the objective side of the offense. There are cases where the purpose of taking bribes consists in committing a crime that meets the characteristics of an offense (most often when the perpetrator is acting contrary to his / her duties), but it will not be absorbed into the offense of bribery, but constitutes a distinct criminal act, the two offenses being in the situation of multiple offenses, which persist. In such a situation, the sense of the purpose condition is maintained, even if its meaning is different and it assumes the commission of a certain offense or unlawful action.

3. Subjective aspects of corruption offenses in the former and current Criminal Code

With the entry into force of the new Criminal Code, Article 289, which incriminates bribery, has been dropped, with the expression “for the purpose of”, and the legislator chose to use another expression, namely the phrase “in connection”.

This way of expressing of the legislator was most likely to justify the renunciation of the incrimination of unlawful acts (since the content of the bribery offense included those acts which, in the old regulation, were considered acts of undue advantage, Article 256 of the Criminal Code 1969), but it has consequences both for the objective and subjective aspect of the offense and for the sanctioning regime of certain acts that complement the content of the offense.

The phrase “for the purpose of” in the previous indictment explicitly expresses the psychic processes specific to the purpose in which the illicit activity was committed, but also induces the idea of a certain temporal order of actions incriminated against the intended purpose. First, the perpetrator claimed or received money or other benefits or accepted the promise of such benefits or did not reject it for a specific purpose: to fulfill, not to perform or to delay the performance of an act concerning his or her duties or to act contrary to these duties. Obviously, the incriminated action / inaction is located in time, before or at the most at the same time as the accomplishment / non-performance of the act of service, being, moreover, irrelevant to the existence of the offense if that purpose was or was not achieved. It was sufficient for the perpetrator to have committed at least one of the four alternative variants under which the material element was

³ Criminal decision no. 2083/20 April 2004 of the High Court of Cassation and Justice in *Buletinul Jurisprudenței. Culegere de decizii pe anul 2004*, Ed. All Beck, București, 2005, p. 769

presented, provided that the psychic processes of the intended purpose were proven, so that the act would constitute bribery.

Instead, the phrase “in connection” used by the legislator of the current Criminal Code has the following meanings: with regard to, referring to, with respect to. Any of the alternative actions contained in the material element (claiming, receiving or accepting the promise of money or other benefits) must be made in connection with the fulfillment / non-fulfillment of an act falling within the duties in the office. Both the temporal shade of chronological ordering of the action incriminated against the acts of service and the consecutive purpose of purpose-oriented action are lost. More specifically, the actions incriminated are in relation to the acts that form the duties, but this relationship is somewhat uncharacteristic. Therefore, the phrase “in connection” serves to connect the action incriminated with service acts and only has the role of introducing an essential requirement of the material element without having any influence on the subjective aspect of the offense. It is sufficient for the actions that make up the material element to be committed by the perpetrator in relation to his or her acts of service, whether or not they are committed before, during or after the performance of the act, so that the act constitutes the offense of bribery. This can be done with both direct intent and indirect intention because the essential requirement of the purpose from the subjective side of the offense disappears.

Moreover, the acts of receiving undue benefits from the old criminal legislation are embedded in the objective side of the new bribery offense, which has the effect of aggravating the criminal liability for this kind of deeds, although from the point of view of the social danger they are characterized by a lower degree of social danger, the official not having any unlawful initiative. Totally unjustified, the actions of claiming the use of service acts contrary to the duties of simple acts of receiving the services after performing a duty according to their duties are placed on the same level of equality from the point of view of social danger, without the official having manifested any unlawful initiative. The aggravation of criminal liability for acts of receiving undue benefits is in contradiction with the overall view of the new legislator that reduced the limits of punishment for other more serious crimes of corruption⁴ or other crimes and at most maintained the limits of punishment of crimes with high social danger.

For the subjective side of bribery, the choice of this expression (in connection) leads directly to the reconfiguration of the form of guilt with which such acts can be committed, since its meaning is quite different from that of the expression (for the purpose of) used by the legislator of the former Criminal Code. That is why we cannot agree with that part of the doctrine⁵ that states that the offense of bribery in art. 289 of the Criminal Code may be committed only with

⁴ Valerică Dabu, Remus Borza, *Primirea de foloase necuvenite. Dezincriminare*, „Revista de Drept Penal”, no. 3/2010, p. 38.

⁵ Alexandru Boroi, *Drept penal. Partea specială*, Ed. C.H. Beck, Bucharest, 2011, p. 374.

direct intent, motivating this view by the fact that the perpetrator realizes at the time of the act that the money or the benefits he or she claims or receives or which are the object of the promise he or she accepts, are not his or hers, and yet he or she wants to claim them or receive them or accept the promise they have been made. But this reasoning is specific to all the mental processes of intent and analyzes the aspect of the outcome that can be tracked or only accepted by the perpetrator.

Even if the perpetrator knows or realizes that the money or benefits in question are not right, the appreciation of the intention to commit the act as direct or indirect must be achieved by referring to the pursuit or just accepting the intended result. Thus, there may be perpetrators who commit bribery acts with the intention, through these facts, to disrupt the proper performance of the service in which they act and thus to discredit it, but most certainly, the perpetrators do not seek such a result, even if they foresee it and only accept the possibility of it to occur. In other words, most perpetrators do not take bribes to spoil or damage the reputation of the institution in which they work, but instead use that reputation and occupation in the institution to unlawfully complement their income, at the risk of these unlawful acts jeopardizing the proper conduct of that service. Obviously, such psychic processes are characteristic of indirect intention, but as mentioned, it is not excluded that sometimes bribery acts are committed with direct intent.

Currently, according to art. 291 of the current Criminal Code, the offense of influence peddling consists in claiming, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or gives the impression that he or she has influence on a civil servant who promises to cause him or her to fulfill, not to perform, to urge or to delay the performance of an act falling within his or her duties or to act contrary to these duties.

It can be noticed that this time the legislator renounced the essential requirement of the purpose from the content of the offense and as such, the deed can be committed both with direct intention and indirect intention. Instead, it is possible to identify a secondary, adjacent action of the material element that the perpetrator carries out, namely to promise the buyer of influence that he or she will cause the official to adopt a certain conduct in connection with the act of service. In the absence of such a promise, the act will not constitute the offense of influence peddling, but possibly that of abuse.

The following article of the new Criminal Code, art. 292, defines the purchase of influence consisting in the promise, offering or giving of money or other benefits, for himself / herself or for another, directly or indirectly, to a person who has influence or gives the impression that he or she has an influence on a civil servant, *in order to determine to fulfill, not to perform, to urge or to delay the performance of an act falling within his / her duties or to perform an act contrary to these duties.*

This incrimination is the only one in this group that has retained in the content, the essential requirement of purpose in the subjective side of the offense, the changes aiming only at a more complete formulation of the expected behavior from the civil servant. Therefore, the crime of buying influence can only be done with a direct intent, qualified for the intended purpose. The essential requirement of purpose is also expressed by the equivalent expression “to”, and the meaning of these psychic processes is that of the finality pursued by the perpetrator, in the sense of adopting or obtaining a certain course of conduct. It is not necessary for the offense to have the aim to be achieved, the proof of the existence of these mental processes being sufficient.

4. Conclusions

Accepting and offering bribes can now be done with both direct and indirect intent because the legislator has removed the condition of purpose from the subjective side of the offenses. In this way, the range of acts considered to be illicit acts of bribe was expanded and there is no need to prove the existence of other psychic processes additional to those specific to guilt. It is sufficient for the activities that make up the material element of the facts to be made in connection with certain acts of service. In fact, the acts of receiving undue benefits from the old criminal legislation are embedded in the objective side of the new bribery offense, which has the effect of aggravating the criminal liability for this kind of deeds. The aggravation of criminal liability for acts of receiving undue benefits is in contradiction with the overall view of the new legislator and has no reason or justification.

Influence peddling has also been reformulated, and from its content the psychic processes of the purpose that characterized the intention have disappeared, therefore, this offense can be committed with the form of guilt of intent in both its forms: direct or indirect. The buying of influence remains the only incrimination in the group of corruption offenses that has maintained the essential requirement of the purpose in the content of the offense. Therefore, the crime of buying influence can only be done with a direct intent, qualified for the intended purpose. The existence of purpose has to be proved.

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Customs Offenses: Notion, Award Criteria for Dangerous Socialment Facts to the Category of Customs Offenses. Comparative Study

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Abstract

In the course of this study, the investigation of customs offenses is attempted in accordance with the legislation of the Republic of Moldova and Romania in terms of the concept, evolution and the normative framework in force. The analysis carried out aims at: defining the concept of customs offense, as well as identifying the criteria on the basis of which a socially dangerous act is included in the category of customs offenses. Different research methods were used to carry out the study, including: analysis, synthesis, deduction, induction. However, the most used method was comparative considering the specifics of the subject under investigation. The concept of customs offenses, their scope, the limits of assigning socially dangerous acts in the category of customs offenses are strictly dependent on the normative framework of each state. In accordance with the criminal law of the Republic of Moldova or Romania, customs offenses are detrimental acts which may take the form of action or inaction committed intentionally, punishable by criminal penalties committed in the sphere of foreign economic activity in connection with the passage of goods across the customs frontier, the ignorance of customs regulations, facts that affect the values and social relations of the customs activity.

Keywords: *customs offence, socially dangerous deed, detrimental deeds, customs border, action, inaction, smuggling, evasion of customs payments.*

JEL Classification: K14

1. Introductory aspects of the concept of customs offenses

Damaging actions include customs offenses. But what do we mean by customs offense? What are the criteria according to which a certain offense is included in the category of customs offenses? Which concrete criminal offenses are included in the category of customs offenses? The present scientific approach is highlighted by the fact that it wishes to elucidate this issue by analyzing the criminal regulations in force.

The concept of customs offenses, the sphere of their extent, the limits of assigning socially dangerous facts to the category of customs offenses are strictly

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dependent on the normative framework of each state. It is the legislator who directly or indirectly, through the legislative technique used to adopt the law, determine the types of customs offenses and the criteria for assessing the harmful act committed as a customs offense.

In this context, the Romanian legislator differs from the Moldovan one, considering the technique of the first to insert the customs offenses into the normative act dedicated to regulating the relations in the customs sphere (Customs Code), as compared to the Moldovan one, which used the location all criminal offenses, including those in the customs sphere, in the single criminal law - the Criminal Code. Thus, in line with Romanian legislation, the identification of the concept of customs offense, the criteria for awarding socially dangerous acts to the category of customs offenses, as well as the concrete customs offenses, do not create any difficulty.

The Romanian legislator turned to the technical procedure for the placement of crimes of criminal offenses in the customs sphere in the Law on the Customs Code of Romania (CC Rom), no. 86/2006², which must be considered a special law with criminal provisions contained in art. 270-278. Because the crimes in question are covered by the Romanian Customs Code, the criminal offenses included in this law form the category of customs offenses. These are attributed to: smuggling (art.270 CC Rom), skilled smuggling (art.271 CC Rom), the use of unreal acts (art.272 CC Rom), the use of falsified documents (art.273 CC Rom).

Various methods of research were used in the study, including: analysis, synthesis, deduction, induction; however, the most used method was the comparative method, as the comparative analysis of the two states: Moldova and Romania, in the field of customs offenses.

The scientific material is structured in four sections: I. Introductory aspects of the concept of customs offenses; II. Defining the concept of customs offense, III. Criteria for assigning socially dangerous facts to the category of customs offenses, IV. General Conclusions.

Defining the concept of customs offense is indispensable for identifying the features of such a criminal category. This offense is a detrimental act (action or inaction), provided for by the criminal law, committed with guilt and punishable by criminal punishment, which affects the values and social relations of the customs activity. Also, smuggling is one of the many ways of defrauding the fiscal field, which is attributed in the category of offenses in the customs area even by the legislator, when it has inserted it into the Customs Code, but not in other normative acts. The customs and tax domains intersect, but do not overlap. By committing smuggling offenses, the perpetrator escapes from the legal obligation to pay the customs payments, which for the most part form the state

² Romanian Customs Code, Law no. 86/2006, published in the Official Gazette of Romania no. 350 of 19.04.2006.

budget, just like the tax / tax duties, only the source of the obligations to pay the customs payments and respectively, tax / tax duties is different. Compared with tax payments, customs are the result of passing goods across the customs border. However, customs offenses only form part of the crimes committed in the sphere of foreign economic activity.

2. Definition of the concept of customs offense

Considering that little attention is paid to the concept of customs offense in the literature of the Republic of Moldova, we will reproduce some definitions in the Russian doctrine, which can easily be extrapolated to the legal framework of the Republic of Moldova.

Thus, B.V. Voljenkin defines customs offenses as those socially dangerous facts directed at foreign economic activity³. Much more detailed is the definition given by M.A. Cociubei, according to which a customs offense is understood as any socially dangerous act (action or inaction) committed deliberately, provided for and prohibited by the criminal law, which affects the order and conditions of crossing the customs border of goods, means of transport, customs clearance, customs clearance and customs control⁴. A similar position is held by the Russian author G.P. Cacichina that defines customs offenses as socially dangerous deeds (actions or inactions) committed with guilt, forbidden by criminal law, which affects the social relations in the sphere of regulating the passage of goods and other objects across the customs border.⁵

Other authors point out that customs offenses are those socially dangerous, guilty, punishable offenses that affect the sphere of economic activity related to the order of removal and customs clearance of goods and valuables across the customs border, contrary to the prohibitions established by law⁶.

S.Iu.Ivanova understands, through customs offenses, the socially dangerous attacks committed with guilt, which essentially violate the activity of the customs bodies in achieving the tasks and objectives set by the legislation⁷.

In the vision of A.I. Tulenev customs offenses are those socially dangerous acts committed with guilt prohibited by the laws of the Member States of the Customs Union under the threat of punishment under the conditions of external

³ Voljenkin Boris Vladimirovici, *Infrațiunile în sfera activității economice*, Sankt-Petersburg, Publishing Press Center, p.179.

⁴ Kociubei Marina Anatolieвна, *Răspunderea penală pentru infrațiunile din domeniul activității vamale, teza abstractă pentru gradul de candidat al științelor juridice*, Rostov-pe-Don, 1998, p.11.

⁵ Kacikina Galina Pavlovna, *Contrabanda ca infrațiune vamală*: Self-referenced doctoral dissertation in legal sciences. Vladivostok, 2003, p.9.

⁶ Ivanova Svetlana Iurievna, *Infrațiunile vamale în noul Cod penal al Federației Ruse*. „Statul și dreptul”, 1998, No.11, p. 42;

⁷ Ivanova Svetlana Iurievna, *Asigurarea juridico-penală a activității autorităților vamale în Rusia*: Self-referenced doctoral dissertation in legal sciences. Ulianovsk, 1999, p.21.

economic activity related to the crossing of the customs border and which essentially violate the customs authorities' duties established by the legislation of the Member States of the Customs Union.⁸

We believe that the latter does not comply with the legal framework of the Republic of Moldova, because not only the individual but also the legal person are liable to criminal penalties for smuggling and evasion of customs payments.

As far as we are concerned, we believe that defining the concept of customs offense is indispensable to identify the features of such a criminal category⁹. As such particularities A.I. Tulenev highlights: the offense committed in the sphere of foreign economic activity; the passage of goods, valuables and means of transport across the customs border by importing, exporting and returning them; violation of customs and criminal law; the competence of the customs authorities to elucidate those violations. After L.D. Laricev, the customs offenses are characteristic of being committed in connection with the crossing of the customs border¹⁰. We also point out that customs offenses are committed intentionally and can take the form of action or inaction.

Additionally, we consider that, in order to define the customs offense, on the one hand, it is necessary to refer to the norm in para. (1) art. 14 CP of the Republic of Moldova, a norm that contains the legal definition of the offense in general, and on the other hand it is necessary to highlight the values and social relations injured or endangered by committing the criminal offenses stated.

Primo - according to par. (1) art. 14 CP of the Republic of Moldova, the offense is a detrimental act (action or inaction), provided by the criminal law, committed with guilt and punishable by criminal punishment.

Second - customs offenses are attentive to the values and social relations of the customs activity.

Considering the above mentioned criteria, in the end, *in accordance with the Moldovan criminal law, customs offenses are harmful deeds which may take the form of action or inaction, intentionally committed, punishable by criminal penalties committed in the sphere of economic activity external to the passing of the goods over the customs border, by ignoring the customs regulations, facts that are attentive to the values and social relations related to the customs activity, stipulated in art. 248 and 249 CP RM.*

As customs offenses, the injurious facts outlined above in the criminal legislation of the Republic of Moldova and Romania also demonstrate the title of

⁸ Tulenev Anatolii Ivanovici, *Infrațiunile vamale și starea curentă a utilizării cunoștințelor speciale atunci când sunt investigate*. „Cercetările științifice și inovațiile contemporane”, 2012, No. 11, The document is available online at: <http://web.snauka.ru/issues/2012/11/18472>, accessed at 31.03.2016.

⁹ Tulenev Anatolii Ivanovici, *Probleme actuale a terminologiei și conceptului de infracțiune vamală*, p.213, „Buletinul Universității de Stat din Kostroma”, 2012, №5. p.211-215, p. 213

¹⁰ Laricev Vasilii Dmitrievici, *Infrațiunea vamală*, Moscova, Publishing Examinare, 2001, p.95.

the International Convention signed in Nairobi on 9 June 1977¹¹, ratified both by the Republic of Moldova and by Romania, namely the International Convention on mutual administrative assistance for the prevention, investigation and repression of customs offenses. According to art. 1 of the aforementioned Convention, the term "customs offense" means any violation or attempted violation of customs legislation. It is common ground that by committing smuggling and evasion of payment of customs duties, the use of unrealistic documents or the use of forged documents violates the rules of the customs legislation, which once again shows that those facts are considered to be customs offenses.

3. Criteria for assigning socially dangerous facts to the category of customs offenses

Both simple and qualified smuggling, as well as the use of unrealistic acts, as well as the use of falsified acts are criminal offenses that damage the social relations inherent in the activity in the customs sphere. In this respect, D.Ticău, rightly, attributes to the category of customs offenses the act of using unreal acts and the use of counterfeit documents¹².

In accordance with the Romanian legislation, the criminalized offenses constitute the group of customs offenses, even if in doctrine¹³ it is shown that smuggling is one of the many ways of fraud in the fiscal field. However, the attribution of these facts to the category of offenses in the customs sphere was made even by the legislator, when he inserted in the Customs Code, but not in other normative acts, the norms that incriminate those facts. In our opinion, the customs and tax areas intersect, but do not overlap. It is true that, in most cases, by committing smuggling offenses, the perpetrator escapes from the legal obligation to pay the customs payments, which for the most part form the state budget, just like the tax / tax charges. Only the source of the obligations to pay customs and tax / tax taxes, respectively, is different. Compared with tax payments, customs are the result of passing goods across the customs border. So, they appear in relation to the development of customs relations.

In the same vein, we mention that, based on the number and content of the socially dangerous facts incriminated by the Customs Code of Romania, in the Romanian specialty the customs offenses are defined as acts consisting in crossing the border of the goods through places other than those established for the control customs clearance of weapons, ammunition, explosive or radioactive materials, narcotic and psychotropic products and substances, precursors and essential chemicals, toxic products and substances or, in free zones, goods the

¹¹ Official Journal of the Republic of Moldova, 2001, no. 078.

¹² Ticău Daniel, *Infrațiuni vamale. Controverse*, „Revista de Drept penal”, 2000, no.2, p.113-116.

¹³ Bujor Valeriu, Pop Octavian, *Criminalitatea în domeniul fiscal*, Timișoara, Mirton, 2002, p. 19.

import of which is prohibited on Romanian territory , with unreal or falsified transport or commercial documents¹⁴. The content of customs offenses is equivalent to the fact of crossing the customs border of goods by removing them from the customs authorities' mood in the precise and limiting circumstances determined by the law¹⁵.

F. Sandu calls the criminal offense in the customs field as a customs offense¹⁶. According to the author, the criminal offense in the customs field comprises all the committal acts (which may also be committed through an omission) that seriously or intentionally threaten or seriously injure the Romanian customs regime and which, constituting a manifest source of fraud or social indiscipline, are punishable by law¹⁷. The same position is O. Predescu, who uses the generic term "customs offense" to characterize the criminal offenses under the Customs Code.¹⁸

Thus, according to the **Romanian legislation**, a customs offense means all the criminal offenses provided for by the Customs Code committed intentionally, liable to criminal penalties and damaging the social relations inherent to the activity in the customs sphere.

Much more difficult is the determination of the concept of customs offense in the light of Moldovan legislation. The criminal law of the Republic of Moldova does not contain special criminal laws. The criminal code is the only criminal law. At the same time, the Criminal Code of the Republic of Moldova (CP of RM) does not contain a separate section covering the criminal charges. However, these can be deduced from the analysis of Chapter X of the Special Part of the Criminal Code entitled "Economic crimes".

Based on the classification of the spheres of economic activity, S.Brînză and V.Stati identifies several types of economic crimes, among which the crimes committed in the sphere of external economic activity, attributed to the crimes stipulated in art. 248 (smuggling) and 249 CP of RM (evasion of customs payments)¹⁹. I.Macari classifies the economic crimes in: a) crimes in the sphere of credit; b) offenses in the sphere of entrepreneurial activity; c) offenses in the financial and fiscal sphere; d) offenses on the securities market; e) trade-related offenses; f) offenses in the sphere of service of the population; g) offenses in the field of foreign trade; h) offenses concerning the insolvency of enterprises; i)

¹⁴ Voicu Costică, Boroî Alexandru., Sandu Florin, *Drept penal al afacerilor*, Bucharest, Rosetti, 2002, p.257.

¹⁵ Pasat Octavian, *Analiza juridico-vamală a contravențiilor, infracțiunilor vamale prevăzute de Codul vamal al României aflat în vigoare*. „Revista Națională de Drept”, 2014, no.2, p.68.

¹⁶ Sandu Florin, *Contrabanda – componentă a crimei organizate*. Bucharest, Publishing Național Imprim, 1997, p.6.

¹⁷ Ibidem.

¹⁸ Predescu Ovidiu, *Drept penal al afacerilor*, Bucharest, Continent XXI, 2000, p.259.

¹⁹ Stati Vitalie, *Infracțiuni economice: Note de curs*, Chișinău, CEP USM, 2014, p.21; Brînză Sergiu, Stati Vitalie, *Tratat de drept penal. Partea Specială. Vol.II*, Chișinău, Tipografia Centrală, 2015, p.17.

other economic offenses²⁰. In the opinion of the quoted author, smuggling and evasion of payment of customs payments form the group of offenses in the sphere of foreign trade.

In this context, we emphasize that, in theory, crimes committed in the sphere of external economic activity are called by some authors of customs offenses²¹. Also, S. Maimescu affirms that both offenses, although placed in economic crimes, are recognized as customs offenses committed in the customs field of the Republic of Moldova²².

In our opinion, a distinction is to be made between offenses committed in the sphere of foreign economic activity and customs offenses. These two categories do not overlap completely. However, customs offenses only form part of the crimes committed in the sphere of foreign economic activity. We support the position of A.I. Tulenev: crimes committed in the sphere of external economic activity should not be limited to the circle of customs violations. These include other offenses provided by the Criminal Code²³. So, the sphere of external economic activity, as a whole, encompasses the customs sphere as a party. According to art. 2 of the Law of the Republic of Moldova on state regulation of foreign trade activity, no. 1031 of 08.06.2000²⁴, external trade activity means the essential means of realizing the world circuit of material and intellectual values, which is reflected in all operations and activities having as object the exchange of goods, works and services on an international scale. According to art. 3 of the Law, the external trade activity is regulated by the provisions of the Constitution of the Republic of Moldova, laws, normative acts of the Government, as well as the norms of international law and international treaties to which the Republic of Moldova is a party. It follows from the cited rules that offenses committed in the sphere of external economic activity violate not only the rules of customs legislation²⁵. In the context, A.I. Tulenev notes that customs offenses can be grouped into a particular category characterized by certain features, including:

²⁰ Macari Ivan, *Dreptul penal al Republicii Moldova. Partea Specială*, Chișinău, CE USM, 2003, p.234.

²¹ Voljenkin Boris Vladimirovici, *Infrațiunile din sfera activității economice*, Sankt-Petersburg, „Presa Centrului-juridic”, 2002, p.428; Zdravomislav B.V., *Dreptul penal al Federației Ruse. Partea specială*, Moscova, 1999, p.225.

²² Maimescu Sava, *Cumulul infracțiunilor de contrabandă și de eschivare de la achitarea plăților vamale, prevăzute de legislația penală a Republicii Moldova*, „Studia Universitatis”, 2008, no.1(11), p.28.

²³ Tulenev Anatolii Ivanovici, *Probleme actuale a terminologiei și conceptului de infracțiune vamală*, „Revista științifică a universității de stat din Kostroma”, 2012, No. 5, p.212.

²⁴ Official Gazette of the Republic of Moldova, 2000 no.119-120.

²⁵ Garmaev Iurii Petrovici, *Infrațiunile din sfera activității economice externe și metodologia de expertiză criminalistică*. The document is available online at: <https://www.lawmix.ru/comm/5182/> accessed at la 31.01.2016

committing to external economic activity; prosecution for breach of customs regulations, etc.²⁶

According to Russian authors V.N. Andrianov and Iu.P. Garmaev, compared to customs offenses, the offenses committed in the sphere of external economic activity, *inter alia*, involve the following particularities: a) involves the presence of two or more states; b) participants in social relations are natural or legal persons entitled to carry out foreign economic activity, as well as foreign persons; c) the respective form of economic activity is regulated by the norms of law: customs, currency, banking, administrative, etc. ; d) an important role in regulating relations in the sphere of external economic activity is formed by the specificity of the legislation of foreign states, as well as of the international law.²⁷

Thus, customs offenses involve a breach of customs regulations. At the same time, offenses committed in the sphere of external economic activity may claim violations of regulations in other spheres than customs. It is precisely for these reasons that we are in the position that the offenses brought together under the marginal trade name of imported diesel for own consumption or its use contrary to its purpose (art.240¹ CP RM), recently introduced in the Criminal Code by the Law of the Republic of Moldova for the modification and completion some legislative acts, no. 223 of 03.12.2015²⁸, are to be included in the category of offenses committed in the sphere of foreign economic activity, but they are not classified as customs offenses. This is because it does not involve the violation of some customs restraints. In fact, as the normative act (extrapenal) for the norms of art.240¹ CP of Moldova, the Law of the Republic of Moldova on the petroleum products market, no.461 of 30.07.2001²⁹. The fact that they do not constitute customs infringements results, implicitly, from the legislative technique of locating the related contravention (internal marketing of imported Diesel fuel for own consumption or its use for purposes other than for its own consumption, if these actions do not constitute an offense) (para. (9) Art.277 Countervention Code of the Republic of Moldova)) along with other violations of the legislation on the petroleum products market, but not with the violation of the customs rules.

In conclusion, customs offenses are part of the offenses committed in the sphere of external economic activity. These, however, do not overlap. In accordance with the criminal law of the Republic of Moldova, only the offenses provided under art. 248 and 249 CP RM may be attributed to the category of

²⁶Tulenev Anatolii Ivanovici, *Infraacțiunile vamale și starea curentă a utilizării cunoștințelor speciale atunci când sunt investigate*, „Cercetările științifice și inovațiile contemporane”, 2012, No.11, The document is available online at: <http://web.snauka.ru/issues/2012/11/18472>, accessed at 31.03.2016.

²⁷Garmaev Iurii Petrovici, *Abordarea contemporană de elaborare a metodologiei investigării infracțiunilor în domeniul activității economice externe*, „Revista științifico-juridică siberiană”, 2003, No.1, p.66.

²⁸ Official Gazette of the Republic of Moldova, 2015 no.361-369.

²⁹ Official Gazette of the Republic of Moldova, 2003, no.76.

customs offenses. At the same time, *lato sensu*, these are part of crimes committed in the sphere of foreign economic activity.

So, conventionally, offenses under the name of smuggling marginal and those under the marginal margin of evasion of payment of customs payments can be referred to as customs offenses. This is because both offenses of smuggling and evasion of payment of customs payments are acts committed in the customs sphere. By committing these crimes, the social values and social relations of those who appear and develop in the customs sphere are damaged. So, as a fundamental criterion for grouping economic crimes in certain categories, it serves the sphere of economic activity in which they are committed. Given this criterion, economic crimes are classified into several categories, such as: tax offenses, crimes committed on the capital market, offenses committed in the sphere of competition, etc. The category of economic crimes also forms the customs offenses. As the offenses provided in art. 244, 244¹ and 250 CP RM are considered as tax offenses, as are the offenses provided in art. 248 and 249 CP RM should be classified as customs offenses. However, it is unambiguous that smuggling and evasion of customs payments on the one hand are committed in the customs sphere and, on the other hand, it challenges the social relations that appear and develop in connection with the activity customs. Here is another criterion for grouping economic crimes, namely: the object of similar generic attack. Both offenses of smuggling and evasion of payment of customs payments harm values and social relations related to customs activity.

Also, as a basis for highlighting the sub-group of customs offenses is the branch of customs law formed by juridical norms regulating the social relations between the representatives of the customs bodies and the subjects involved in the activity of crossing the goods across the customs border.

In addition, the legislator himself indirectly urges us to conclude that the criminal offenses listed above are part of the category of customs offenses. For example, the legal definition of smuggling (which mostly overlaps with the content of the criminalization rules under Art. 248 CP) is inserted, *inter alia*, in the regulations of the Customs Code of the Republic of Moldova, namely: 224 CC RM. With regard to the offenses of evasion of payment of customs payments, it is clear from the article title that these acts are committed in the sphere of customs activity. The criminalization of such acts is the result of the non-payment of the obligation to pay the mandatory customs duties established by law for the passage of certain goods over the customs border of the Republic of Moldova. Not the same opinion is V. Berliba, which includes the evasion of payment of customs payments in the category of tax offenses³⁰. After S.E. Semionov, the evasion of the payment of customs payments is a matter of both social relations

³⁰ Berliba Viorel, *Delictul fiscal: concept și manifestări*. Chișinău, Totex-Lux, 2011, p.134.

in the customs sphere and those in the fiscal sphere³¹. In our view, however, the offenses of evasion of payment of customs payments constitute customs offenses. *Primo* - at the risk of repeating it, we note that in classifying economic crimes, most theorists highlight the group of offenses in the sphere of external economic activity (the category of customs offenses), which includes the evasion of payment of customs payments. *Secundo* - from the title and the provisions of the norms of art. 249 CC of the RM show that the facts stated are customs offenses; the legislator sanctions the evasion of paying the customs payments, not the tax payments. *Tertio* - disposition of art. 249 CP RM being a blanket, refers to other normative acts of extrapenal nature, including the Customs Code, as the basic act of reference. *Quarto* - from the point of view of the legal technique, art. 249 CP RM succede art. 248 CP RM (which also includes several customs offenses). Thus, we consider that the Moldovan legislator deliberately did so, intending to establish the group of crimes that attack the social relations in the customs sphere. Hence, another argument - *quinto*: smuggling and evasion of payment of customs payments protects the same group of social relationships (legal object of common subgroup).

Moreover, in accordance with the provisions of art. 268 of the Code of Criminal Procedure³², competent to carry out criminal prosecution in respect of the offenses referred to in art. 248 and 249 CP of the Republic of Moldova is the criminal prosecution body of the Customs Service.

It is precisely from the above mentioned considerations that we consider that the offenses provided in art. 248 and 249 CC of the Republic of Moldova form the category of customs offenses under the criminal law of the Republic of Moldova.

At the same time, they are part of the economic crimes, which is dictated by the technical-legislative placement of the norms that criminalize these crimes. We consider that the Moldovan lawmaker rightly decided to place the art. 248 and 249 CP RM in Chapter X of the Special Part of the Criminal Code entitled "Economic crimes"; customs activity is one of the most important forms of the economic activity of the state. In this respect, it is clear from the Preamble of the Customs Code of the Republic of Moldova that it establishes the juridical, economic and organizational principles of the customs activity and is oriented towards defending the sovereignty and economic security of the Republic of Moldova. At the same time, *inter alia*, art. 11 of the CC of the Republic of Moldova stipulates as basic duties of the customs body: defense of the economic interests of the state; participation in the elaboration of economic policy measures regarding the passage of goods across the customs border.

³¹ Semionov Serghei Evghenievici, *Noțiunea și indicatorii infracțiunii vamale*, „Criminologia: ieri, astăzi, mâine”, 2009. No. 1 (16), p.201.

³² Official Gazette of the Republic of Moldova, 2003, no.104-110.

In conclusion, unhindered, we are in the position that in accordance with the criminal law of the Republic of Moldova, the prejudicial acts provided by art. 248 and 249 of the Criminal Code form the category of customs offenses, being correctly placed within the chapter of the Special Part of the Criminal Code intended for protection of the national economy as a fundamental social value.

4. General conclusions

As a result of the study, we advance the following general conclusions:

Between the definition of smuggling in the Customs Code of the Republic of Moldova and that of the Criminal Code of the Republic of Moldova, there is some inconsistency. In order to solve the divergences that have arisen both in the appreciation and the qualification of the smuggling, it would be appreciated that the norm of the customs law stipulated in art. 224 CC RM, to be fully complied with art. 248 CP RM, according to which the criminal investigation officers perform the qualification and prosecution³³.

The norms of criminalization in the criminal legislation of the Republic of Moldova are rules of blancheta, which are norms which, in order to find out their content, it is necessary to resort to some normative acts from the sphere of extra-penal. And the eloquent example in this respect is the Customs Code of the Republic of Moldova. To this is added other normative acts with extra-penal character. It is precisely for these reasons that the founding content of the criminalization rules in the Criminal Code is indispensable, and reference will be made to the normative acts of reference, first of all to the Customs Code.

There are no provisions in the Romanian Penal Code in the 2009³⁴ edition to incriminate socially dangerous deeds in the customs sphere. Neither in the Romanian Penal Code in the 1968 editorial office there was a legal norm to incriminate customs offenses. In fact, the Romanian Customs Code, no. 86/2006, should be considered a special law with criminal provisions aimed at sanctioning customs offenses.

Therefore, compared to the legislation of the Republic of Moldova, in Romania customs offenses are located under a special law, but not within the Criminal Code. In the Republic of Moldova, however, customs offenses are included in the Criminal Code; in accordance with paragraph (1), art. 1 CP of Moldova, the Criminal Code is the only criminal law of the Republic of Moldova. In Romania, the situation is different. In addition to the Criminal Code, other criminal normative acts, which, like the Criminal Code, come to criminalize and sanction various socially dangerous facts, but committed in certain spheres of social

³³ Pasat Octavian, *Analiza juridico-vamală a contravențiilor, infracțiunilor vamale comise pe teritoriul vamal al Republicii Moldova în conformitate cu Codul vamal din 2000*, „Revista Națională de Drept”, 2014, no.1, p.71.

³⁴ Romanian Criminal Code, Law no. 286/2009, published in the Official Gazette of Romania no.510 / 2009.

life. Thus, we conclude that in Romania's legislation the socially dangerous deeds committed in the sphere of customs activity are contained in a special law - the Law on the Customs Code.

It should be mentioned that the Customs Code of the Republic of Moldova contains the definition of smuggling. However, the normative act does not criminalize the smuggling facts, as it does not even criminalize the evasion of paying the customs payments. However, this Code does not contain criminal penalties for doing so. The Customs Code is a reference act for the Criminal Code.

The concept of customs offenses, the sphere of their extent, the limits of assigning socially dangerous facts to the category of customs offenses are strictly dependent on the normative framework of each state.

According to the criminal law of the Republic of Moldova, customs offenses mean harmful acts that may take the form of action or inaction committed intentionally, punishable by criminal penalties committed in the sphere of foreign economic activity in connection with the passage of goods across the customs border by ignoring the customs regulations, facts that are attentive to the values and social relations related to the customs activity, stipulated in art. 248 and 249 CP RM.

Crimes brought together under the marginal smuggling and marriages of customs clearance may be referred to as customs offenses, since both offenses of smuggling and evasion of customs payments are acts committed in the customs sphere, having therefore, the same legal subgroup object.

If in the CP of the Republic of Moldova in the 1961 editorial, according to which smuggling offenses were placed under Chapter I of the Special Part of the Criminal Code entitled "Offenses against the State", in accordance with the legal provisions of the current Criminal Code, the offenses under the name of smuggling are located within Chapter X of the Special Part of the Criminal Code - "Economic Offenses".

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New Specific Techniques of Investigation for the Economic Offences

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Abstract

The current paper focuses on the specific techniques of investigation for the economic offences as well as on the scientific results which have as a finality realizing the penal trial purpose, namely of finding truth and punishing perpetrators, guilty of committing offences in the economic field. In achieving the results of research, the classical methods of gathering evidence, specific for the forensic science, as the main ones are used, but, at the same time, it is insisted on the other innovative methods and techniques of comparative research as well as the analysis and synthesis in order to harmonize as much as possible all of the legal instruments the legislator provides the practitioners with on carrying out the purpose they were implemented for. As the main economic offences the tax evasion, money laundering, counterfeiting, trafficking in treasures, basically the underground economy will be analyzed. In carrying on the current research, certain proposal of de lege ferenda will be enunciated in purpose to improve the legal frame into force in this field.

Keywords: *specific techniques, forensic methods, economic offences, means of evidence*

JEL Classification: K13; K14

1. Introduction

The area of activity for the economic offences is one of the widespread and complex one and, at the same time, in a continuous change. This so-called "criminal progress" concerns more and more the judicial bodies confronted with developed cases, as the practice shows us.

First of all, I would like to state the economic field has a particular feature due to the fact that in this activity area impressive amount of money are obtained, the underground economy being as lucrative as it exceeds the imaginary limits, for example. Nevertheless, the attraction for this field is one of the most powerful and makes from the interested people real promoter of the organized crime culture.

Secondly, the legislator is also, most of the time, obsolete of such an avalanche of modalities of defrauding legislation into force on combating and preventing as much as possible such kind of offences. This is, among other causes,

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the reason for which the legislation in this field is amended frequently in order for the judicial authorities to be one step before the perpetrators.

This desideratum is realized most of the time, but there are cases in which the officials, invested with the legality, are obsolete of these forms of criminality, most of these having aggravated forms, as of organized ones.

It is well-known the fact that, Romania is faced with a precarious economic situation, featured by longevity and counteracting this kind of economic offences is a real challenge for the authorities. For this reason, the authorities have made efforts in order to create the favourable legal frame of fighting economic criminality. Among these legislative measures, adopting and implementing the new Code of penal law and the penal procedure Code, fiscal Code and fiscal procedure Code are relevant. The transposition of the legislation adopted at the European level in the home legislation has also as a consequence the improvement of the legal frame in the matter.

Thus, in carrying out the current paper, I started from the general frame of the research topic, featured by the economic offences as well as by the modalities of their investigation, using scientific techniques of "new generation", provided to forensic specialists, who help the judicial bodies invested with a case to find the truth and pronounce the appropriate legal and justified decision.²

The research methodology of the current topic is based on the qualitative one of characterizing attitudes, behaviours and professional experiences in the matter of investigation scientific techniques of the economic offences. In this area, certain of the most frequent types of economic offences, such as tax evasion, money laundering, counterfeiting, trafficking in treasures have been chosen.

The vulnerable points of this kind of offences have been identified, in accordance with both social and economic development as well as with the economic policies promoted by the government authorities, but, at the same time, the issue of forensic investigation from the point of view of the new specific techniques of investigation of the economic offences have been approached, providing the gathered results in the matter. These results are based on the primary research through the "first hand" observation I obtained in the end of conducting research on this topic as well as from both theoretical and practical experience, I have got during the entire research activity.

Doctrine has had a relevant contribution in couching opinions and formulating theories regarding the research of the economic offences I took into consideration in carrying out the current paper.

² See Delia Magherescu, *Modificarea învinuirii în prima instanță (Aspecte comparative)*, Wolters Kluwer Publishing House, Bucharest, 2016, p. 78.

2. Specific techniques of investigation in criminal matters

In criminal matters, regarding the investigation of criminal activities, in particular those which have a high level of social danger, such as the organized crimes, certain new technical-scientific methods, which have to come with the social development, in general, and with the technical progress, in particular, have been implemented. I have pointed out even the current topic consists in the investigation techniques of the economic offences, I took into account the opportunity to introduce it within the general context of the new techniques used by the judicial bodies in order to investigate all of the serious crimes.

Thus, the other fields are also under the protection of the complex, modern legislation, which has to harmonize the home legislation to the European one.³ One of these domains is that of the offences over the national security as well as of the terrorist attacks.

It was appreciated in such a manner, because of such acts committed over the national symbols or the civilians let visible traces, sometimes having serious consequences. The same reason is based on the legal feature of the serious crimes, such as those presented in the current chapter.

It is considered that, in order for the judicial bodies to find the truth in the penal trial, the evidence obtained after the forensic examination are always corroborated with other evidence, which have to help the judicial body, in particular the court of justice, to find the truth in order to solve fairly the penal cases and to pronounce the legal and justified decision.⁴

In this context, the forensic examination has a particular place. Doctrine has pointed out it is combined dialectically with the means of evidence, completing them in order to achieve the penal trial purpose. Not in the last time, it is also considered through its nature, "*the forensics... are linked indissolubly to different fields, such as the chemistry, biology, physics, anatomy etc.*".⁵

2.1. In the area of national security

The progress of technique occupies a special place, which has established the development of new techniques of investigation in criminal matters, as I stated above. They came as a requirement to the development of operating criminal methods themselves, so that it is the time for the authorities to counteract with a new scientific technique, a modern and higher one, being one step before the

³ See Gheorghită Mateuț, *Protecția martorilor. Utilizarea martorilor anonimi în fața organelor procesului penal*, Lumina Lex Publishing House, Bucharest, 2003, p. 31.

⁴ See Delia Magherescu, *op. cit.*, p. 182.

⁵ See "*Expertiza criminalistică fizico-chimică*", online available at: <http://www.creeaza.com/tehnologie/criminalistica/EXPERTIZA-CRIMINALISTICA-FIZIC892.php>; accessed at 09.11.2017.

criminality, as I provided in the first section, as a response to the criminal technical developed *modus operandi*.

Priority, these new evaluated techniques were implemented in the sensitive fields of organized crimes. At the same time, other maxim interest areas have been in the authorities' attention while they implemented this kind of new specific techniques of investigation. It is about the national security field ⁶ which more than ever needed a particular protection in this matter. It came on the increased base of the terrorism threats, came in the last years from the terrorist organization having a declared scope.⁷ In this context, it is speaking about a new concept of urban terrorism, as part of the contemporary terrorism, whose consequences are very difficult to be anticipated by the judicial bodies, as the attack modalities are more and more performed.⁸

Thus, this is one of the maximum interest field, whose protection the Romanian authorities are concerned and ensure it in a particular manner. However, this protection is linked to the prerogatives provided by the legislative authorities in order to obtain useful information in this area.⁹

Moreover, as the legislation regulates, this field is ensured by a lot of measures in the purpose to facilitate such investigation, more specifically using techniques, different from the other ones the science provided the forensic specialists with investigating other offences, as the economic ones.

Doctrine has highlighted this kind of techniques has a particular feature due to the fact that they are connected to the electronic surveillance and, for this reason, it has been argues that "... *they consists in the authorities' intrusions into exercising individual's fundamental rights*".¹⁰

Due to their preventive feature¹¹, they are disposed by the judicial bodies during the penal trial in order to avoid some intrusions into the citizens' private life.

2.2. In cases of terrorist attacks

In this kind of offences, it is about the crimes committed by arson or detonation, as the attacks released by the terrorist groups. In these cases, the diverse features of these technical phenomena as well as their *modus operandi* or even the varied evolution make from the offences committed by detonation as being

⁶ See Mihail Udrioiu, Radu Slăvoiu, Ovidiu Predescu, *Tehnici special de investigare în justiția penală*, C. H. Beck Publishing House, Bucharest, 2009, pp. 70-73.

⁷ See Jean Servier, *Terorismul*, European Institute, Iasi, 2002, pp. 63-73.

⁸ *Ibid*, p. 66.

⁹ See Mihail Udrioiu, Radu Slăvoiu, Ovidiu Predescu, *op. cit.*, p. 72.

¹⁰ *Ibid*, p. 74.

¹¹ See Doru Ioan Cristescu, *Interceptarea comunicărilor, înregistrările audio-video, filmările și fotografiile – procedee probatorii în procesul penal român*, "Pro Lege", no. 2/2001, p. 38 in Mihail Udrioiu, Radu Slăvoiu, Ovidiu Predescu, *op. cit.*, p. 75.

serious ones. It is also considered in this manner taking into consideration the several numbers of victims. Thus, the terrorist acts specific feature makes a difficult forensic investigation in order to establish the causes as well as the perpetrators.¹²

Nevertheless, the terrorist groups' *modus operandi* is an unmistakable one, which only takes into account the procedure of penal investigations, as I have already stated above, but the nature of cause which produces the detonation is a well-known by the investigators. More specifically, the detonation evolution and its consequences, which destroy the evidence so necessary for the entire penal investigation through the burning process, make difficult both the judicial bodies and the forensic specialists' activity. Moreover, the explosive materials used by the perpetrators in committing the criminal acts are destroyed through the same burning process.

The distinction between the arson and detonation consists in the fact that the last one is produced with a huge speed due to the high power of propagation and the high pressure, which occur the release of the instantaneous arson. The high level of temperature, which propagates the explosive material, produces the material burning from the crime scene, as in the cases of arsons too. This is the reason for which any detonation is followed totally by arson, on the other hand.

The deliberate arsons are a particular kind of offences, which have a special interest for the current paper. The doctrine has appreciated "*the reason of such act may consist in the revenge, ... hiding or favouring another offence*"¹³, on the other hand.

But, from the judicial point of view, the forensic specialist is interested in discovering of several evidence of the criminal activity on the crime scene related to the detonation, which will be administrated in the judgement. Such evidence can be the following:

- the cinders resulted from the burning materials from the surrounding environment, which can offer information to the forensic expert about their origin as well as if they are of animal nature, if they are produced by burning human tissues or they are burnt textile materials;
- partial carbonized elements also offer precious information to the forensic expert regarding the origin of the burnt fragments;
- elements proceeding from the ensemble of device which released the explosion and which can consist in splinters, electrical conductors or another pyrotechnic material used for making arm of releasing detonation.

¹² See Ionel Crăciun, Sorin Calotă, Victor Lencu, *Stabilirea și prevenirea cauzelor de incendii*, Tehnica Publishing House, Bucharest, pp. 18-32.

¹³ See Jean Gayet, *Manuel de police scientifique*, Payot Publishing House, Paris, 1978, pp. 185-187 in Emilian Stancu, *Tratat de criminalistică*, Actami Publishing House, Bucharest, 2001, pp. 240-241.

In cases of terrorism, released through detonations, the forensic expert's activity is a complex one. He is asked to provide useful information about the important issues the judicial bodies need, being dependent of the evidence from the detonation area. It is considered in this manner, due to the fact that the evidence must be pertinent, conclusive and effective. In this way, the forensic expert has a new method of analysing substances produced by detonation. Thus, analysing the explosive remainder materials from the physical-chemical point of view, it offers the conclusive answers both for expert and judicial body, who disposed that examination. In such cases, they are looking for bringing as much evidence as possible from the crime scene in order to confirm the hypothesis on the nature of detonation, if it was released by a handcrafted explosive device as well as the chemical elements it was made of.

The forensic expert has, in such cases, a very difficult duty, which consists in specifying exactly the nature of the used explosive material, what kind of material has propagated the explosion, the first inflammable material which burnt, what source of heat the perpetrator used in order to release the explosion and, not in the last time, if the explosion was released deliberately by a human or it was an instantaneous process free of a human intervention and action plan.

In carrying out these objectives, the activity of the National Institute of Forensic Examinations within the Ministry of Justice is an important one in this matter. Within the Institute several types of judicial examinations are carried out, but the physical-chemical examination is relevant for the current paper.¹⁴

The comparative method helps in gathering information in causes released by detonations. Thus, some examinations can be made "*examinations through: optic microscopy, electronics microscopy with deflexion (SEM-EDAX), chromatography in the coupled gaseous phase of table spectrometry (GC-MS) and the liquid phase chromatography (HPLC)*".

Following the statistical weight of the physical-chemical examinations carried out by the National Institute of Forensic Examinations, it can be observed they are made in a limited number, in comparison with the other ones made in the same Institute.

Table 1. Statistics of the forensic examinations carried out by the National Institute of Forensic Examinations

Type of examination	2012	2013	2014	2015	2016	Total
Physical-chemical	6	13	7	6	4	36
Detonations and arson	4	3	5	5	4	21
Total	10	16	12	11	8	56

Source: www.inec.ro

¹⁴ See "*Obiectivele expertizei criminalistice*" online available at <http://www.inec.ro/index.php/activitate/expertize>, accessed at 12.11.2017.

Analysing Table 1., presented below it can be observed the number of physical-chemical examinations is not a very high one in Romania. The current research was carried out at the national level, within the all six inter-counties laboratories as well as in Bucharest.¹⁵

Nevertheless, the complex feature of this kind of forensic examinations as well as their indefinite consequences, make them as complicated ones. It is true, the small number of this examination in Romania, based on the provocative arsons and detonations, makes from the reduced cases a justified one.

However, if we have to report these examinations to the total number of the forensic examinations carried out within the N.I.F.E. or within the inter-counties laboratories in the entire country, we can observe the proportion is a reduced one. A diagram is showed below in purpose to confirm the reasons stated above.

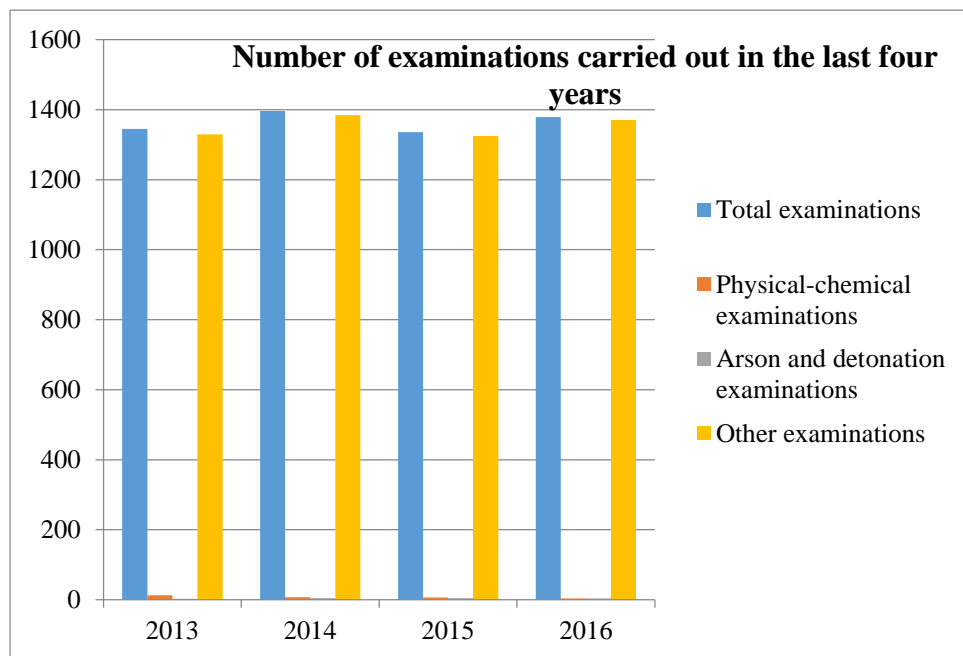
It is observed the reduced number of both physical-chemical and arson and detonation examinations, which are the objective for the current section, in comparison with the total of 1345 examinations carried out in 2013, the number of 1396 examinations carried out in 2014, 1336 examinations in 2015 and 1379 examinations in 2016 is insignificant. The difference between the total examinations carried out within the National Institute of Forensic Examinations and the two categories of examinations (physical-chemical and arson and detonation) is a huge one.

Other kinds of examinations carried out at the National Institute of Forensic Examinations are the graphology and documents, routing and ballistic, fingerprint identification, voice and speaking, photography and video images, working accidents.

Looking at the figure above, it is observed easier the fact that the number of examinations carried out at national level in the field of detonations, arsons as well as physical-chemical examinations have a reduced proportion taking into account the reason highlighted in the current section.

¹⁵ Such examinations are carried out in accordance with the Governmental Decision no. 368/1998 and the N.I.F.E. Regulation of organization and functioning within the Ministry of Justice of Romania, approved by the Minister of Justice Order no. 1901/C of 11 June 2015.

Figure 1: Total number of forensic examinations, the physical-chemical examinations and the arson and detonation ones carried out in the last four years



Source: own work

2.3. Cases of trafficking accidents

A specific feature for the trafficking accidents is the physical-chemical examinations. They help better forensic experts in understanding and finding out the circumstances of committing this kind of accidents. In this way, the evidence sampled at the crime scene is examined chemically and can consist in the following elements:

- textile materials;
- metal, plastic, glass elements;
- oil, diesel oil, petrol fragments;
- victim's clothes pieces.

In order to clarify all circumstances of committing trafficking accidents, the forensic expert must establish certain relevant elements, such as the causes of

producing accident, the guilty people of committing accident, the consequences resulted.¹⁶

The most important aspects relevant for the forensic expert are those regarding the vehicle braking dynamics, establishing the traffic speed, determining the moving direction as well as the other issues related to the technical desertions of the vehicle.

Doctrine¹⁷ has been constantly involved in the methodology of trafficking accident investigation. These aspects have been firstly directed to establishing the place, time and *modus operandi* conditions of committing accidents, settling and sampling them in purpose to examine the traces from accidents, establishing the technical-scientific methods which will be taken into consideration within this kind of accidents.

As a new element in the field of the trafficking accidents the forensic analysis of the evidence sampled from the place of accident is used successfully. It is carried out with the coupled microscope with spectrometer, which works both in the ultraviolet and visible radiation of UV-VIS type. In this regard, with this kind of device, the forensic expert establishes the colour and the colour shade of paint.

The physical-chemical examination can be carried out in this field using the optic stereomicroscope, which is conform with determining the paint coat, with its succession as well as with the textile beasts morphology.

At the same time, this kind of examinations also use X radiation fluorescence spectrometer. Using it helps the forensic expert to determine exactly the nature of inorganic component parts from certain elements, such as the paint, textile, glass, plastic, sol.

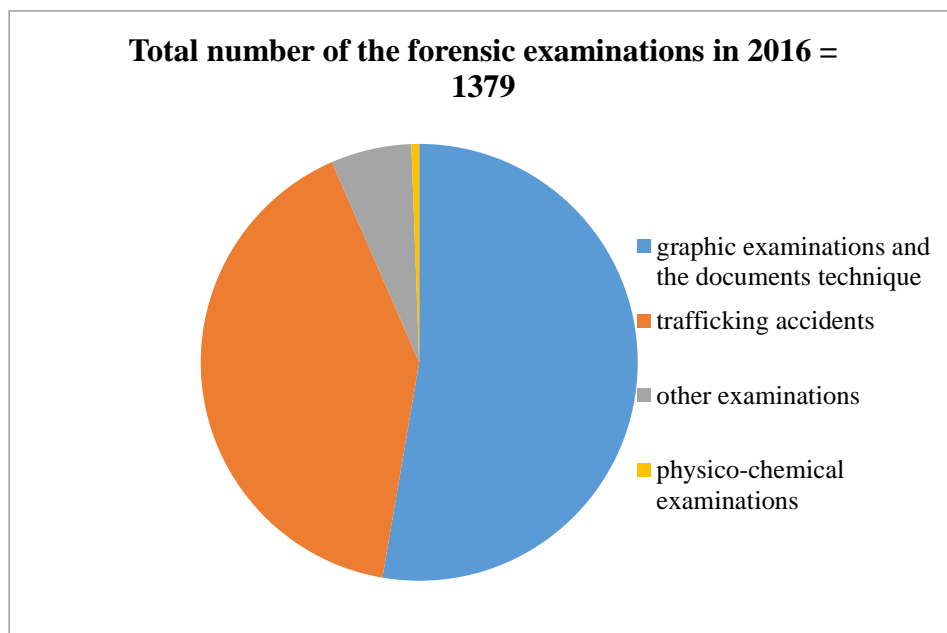
In the comparative research regarding the categories of forensic examinations carried out in 2016, it can be observed the highest weight belongs to the graphic examinations and the documents technique, having 53%, while those regarding the trafficking accidents mean a weight of 41% from the all examinations carried out in 2016. These two categories of examinations carried out in 2016 totalize 94 percentages.

Analysing statistical data provided by the National Institute of Forensic Examinations, it is easier to observe the highest weight is stated by the graphic examinations and the documents technique, followed by the trafficking accidents ones. It is reproduced below the relevance of the number of such examinations carried out in 2016 at national level.

¹⁶ Other aspects the forensic expert is called to determine are those related to the criminal offences, such as theft, robbery, murder, people sequestration etc.

¹⁷ See René Lechat, *La technique de l'enquête criminelle*, vol. II, 1960, pp. 543-564 in Emilian Stancu, *op. cit.*, p. 667.

Figure 2: The weight of the forensic examinations on graphic, the documents technique and trafficking accidents examinations



Source: own work

In conclusion, it is obviously the number of these examinations is a higher one compared with the number of the forensic examinations carried out in the field of detonation and arson or even those which are related to physical-chemical examinations, for example.

3. Specific techniques of investigation for the economic offences

The economic field is a vast one and knowing it helps the authorities, which are involved in adopting a legal framework favourable for carrying on the economic activities respecting legality and of good will conditions. Nevertheless, the practice of drawing up legislation has shown many times the legislation adopted in Romania is sometimes susceptible of the nullity action submitted to the Constitutional Court, but, in some cases, referential laws and the articles therein are stated unconstitutional by the Court's decisions.¹⁸

Beginning the penal proceedings takes place as a consequence of committing an offence. This conflict creates a legal relation of substantive penal law the

¹⁸ See Cătălin-Liviu Săraru, *Legea contenciosului administrative nr. 554/2004. Examen critic al Deciziilor Curții Constituționale*, C. H. Beck Publishing House, Bucharest, 2015.

legislator has given to the judicial bodies' competence of solving case. The judicial bodies need some specific knowledge from different areas of sciences than the legal one. In this manner, in order for them to administrate evidence for solving legally the penal law conflict, they need to utilize certain special means of evidence. The forensic examinations, with the data and information provided, belong to this category and help the instance to pronounce the legal and justified decision in a case.

Referring to the economic issues, they concern specialists from several points of view taking into consideration the offences in this field. In this section, it is analysed the forensic examination regarding the tax evasion, money laundering, counterfeiting and trafficking in treasures.

The most disputed aspects regarding the economic offences are those which refer to the administration of evidence and their examination, examining materials which means the produce of the economic offences, examining documents, banknotes, means of payment, currency as well as the other documents which can help in finding truth in an economic case and solving it.

Specific for the economic offence is using a fake document, especially a payment one, such as the cheque. Doctrine has referred to the "Spanish style" swindles, which although belonged to the 19th century, they are still into force.¹⁹

3.1. Tax evasion

This kind of offences is incriminated by Law no. 241/2015²⁰ on preventing and combating tax evasion and regulated at the article 7 (2) as being "... *the offence of ... printing, using, holding or providing for circulation deliberately of falsified stamps, banderols or typified forms, used in the fiscal field, having special condition.*"

The same law incriminates the other criminal acts related to the economic activities, such as:

- hiding the source of subject to taxation;
- omitting the account registration of the legal documents or the commercial activities;
- deteriorating, destroying or hiding the account documents.

Generally speaking, the economic offences are connected to the action of eluding from the national budget debts as a consequence they are serious crimes the legislator has incriminated as well. Committing such offences, along with the imprisonment punishment, the convicted person is subject to the confiscation of the offence goods, in this situation being into force the dispositions of article 249

¹⁹ See Marcel Le Clere, *Manuel de Police Technique*, Police Revue, Paris, 1973, p. 104, in Emilian Stancu, *op. cit.*, p. 626.

²⁰ Law no. 241/2005 adopted by the Romanian Parliament and published in the Official Journal no. 672 of 27 May 2005, up to dated by Governmental Urgency Ordinance no. 54/2010 on certain measures of combating tax evasion.

(4) of the Code of penal procedure regarding the special and extended confiscations.

Thus, the tax evasion dangerousness is given by the falsification of economic-financial documents, on the one hand, and by avoiding from the national budget tax payment, on the other hand. In accordance with the legislation in criminal and financial-fiscal matters into force, the main purpose of the Romanian authorities is given by determining economic companies to carry on legally their professional activities. Subsidiary, it is looking for the efficient gathering debts to the national budget in a higher per cent.

Regarding the forensic investigation methods, they have as the main purpose the identification of falsified payment and financial-fiscal documents, which are the material object of the tax evasion offence as well as establishing the offence objective feature. Moreover, the perpetrator's identification in order for the judicial bodies to establish the criminal liability and its form is also taken into account.

Doctrine has pointed out that *"in the forensic methodological field, during the criminal investigation, the judicial bodies must act in purpose to ensure for recovering caused damage, ..., the defalcated values as well as for making decision in order to prevent committing other offences"*.²¹

Certain primary aspects must be taken into consideration by the forensic expert. They consist in determining the material element of tax evasion, the goods nature and the damage value. At the same time, the defalcated amount of money, the falsified payment documents, the other falsified financial and accounting documents, trafficking in goods or money in the purpose of obtaining illegal profit must also be taken into consideration.²²

The forensic examination in the field of economic offences uses certain technologies, which are indispensable for this science.²³ The spectral analysis is one of them, which provide information to the forensic expert on investigating false traces.

In this area, it is also used frequently the luminescence analysis technique through electromagnetic radiation (ultraviolet and infrared), which has a significant applicability in the investigation of fakes, the falsified document material in cases having as an object the tax evasion offences.

The practitioners have stated that *"the technical investigation of documents, in particular those falsified through removing or covering text as well as investigating ink or the pencil features used in the fake by adding or by copying text"*²⁴ have as the forensic investigation method the infrared radiation.

²¹ See Emilian Stancu, *op. cit.*, p. 606.

²² *Ibid*

²³ See Anatol Rotaru, *Fizica și criminalistica*, in "Fizica și Tehnologiile Moderne", no. 4/2003, p. 51.

²⁴ *Ibid*

3.2. Money laundering

The concept of "money laundering" is the product of the market economy, arose together with the Romania's passing from the totalitarian governmental regime to the democracy and the liberalization of market economy principles.

Its notion is a complex one and consists in, among other issues, using a system of "financial engineering" for the perpetrator's declared purpose to turn an amount of "black money", obtained from criminal activities, into the other apparent legal ones.

Thus, it may not create the erroneous conviction on the illegal economic activities as being carried on exclusively in the private field. No, the offences of money laundering are usually met both in the private and the public field, where the civil servants or even the high respected dignitaries from the top of the governmental positions resort to such illegal methods in order to justify as much as possible huge amount of money, obtained from illegal activities, especially from the corruption offences.

The legal framework of the offences of money laundering is given by the Law no. 656 of 7 December 2002.²⁵ It regulates the notion of money laundering offence as being "... a) *changing or transferring goods, knowing the fact that they proceed from committing offences, in order to hide or dissemble their illegal origin or even in the purpose to help the perpetrator to elude himself from the penal investigation, judgement or executing penalty; b) hiding or dissembling real goods origin, situation, disposal, circulation or property or the rights over them, knowing the fact that the goods are the product of offences; c) getting, holding or using goods proceed from committing offences*".

²⁵ Law no. 656 of 7 December 2002 on preventing and sanctioning money laundering as well as on setting up some measures on preventing and combating financing terrorism, republished in accordance with the article IV from the Governmental Emergency Ordinance no. 53/2008 on modifying and completing Law no. 656/2002 on preventing and sanctioning money laundering as well as for setting up some measures of preventing and combating financing terrorism acts, published in the Official Journal no. 333 of 30 April 2008, approved by Law no. 238/2011, published in the Official Journal no. 861 of 7 December 2011, completed by Law no. 125/2017, published in the Official Journal no. 415 of 6 June 2017. Other legislative acts have applicability in the area of preventing and sanctioning money laundering, such as: the Governmental Ordinance no. 594/2008 on approving the Regulation on applying Law no. 656/2002 on preventing and sanctioning money laundering as well as for setting up some measures of preventing and combating financing of terrorism; Decision of the Plenum Office no. 496/2006 on approving the Norms on preventing and combating money laundering and financing of terrorism, standards of knowing customers and intern control for rap-porteur entities which are not surveilled preventively by the authorities; Decision of the Plenum Office no. 2742/2013 regarding the form and content of the Report on suspected transactions, of the Report on cash transactions and of the Report on external transfers; Governmental Decision no. 1437/2008 on approving the List containing third states which impose requirements similar with those regulated by the Law no. 656/2002 on preventing and sanctioning money laundering as well as for setting up some measures on preventing and combating financing of terrorism, online available at: <http://www.onpcsb.ro/html/legislatie.php?section=3>, accessed at 12 November 2017.

In cases of the money laundering offences the procedure of chemical analysis also intervenes on the financial-account documents in order to determine their authenticity as well as on the amount of money the judicial bodies have reasonable doubt from this point of view. In this matter, the forensic examinations having as main purpose the analysis through luminescence, specific for the cases of falsified documents as well as for the material of banknotes are carried out. The Roentgen radiation, which offers information of high - precision is also used.

The ultraviolet radiation and the analysis with such scientific method of investigation of the money laundering offences is one of the most used within the forensic laboratories. The doctrine has stated the ultraviolet radiations of UV type having a very good precision in such forensic investigation through using wave length of minimum 320 nanometres is also used most of the times.²⁶

3.3. Counterfeiting

As in the cases of tax evasion and money laundering, the counterfeiting supposes, among the other issues, an action of falsification, but in this case it consists in falsifying materials part of some products the perpetrator plans to commercialize them.

It is relevant to underline the fact that, within the forensic investigation procedure of the material object of counterfeiting, the forensic expert may use the scientific methods of analysing the constitutive element.

Regarding such method, it is significant in this case the "judicial chemistry", a new concept, came to revolutionize the scientific techniques of the forensic investigation of establishing the composition of textile, plastic materials or the other substances, such as rubber, metal etc.

Even at the first sight these chemical examinations would be useless in this matter, however I appreciate that they help contrary the forensic specialist in discovering certain circumstances connected to committing offences as well as with the *modus operandi* the perpetrator used in committing such offence.

Considering all these aspects, the judicial chemistry provides the scientific method of infrared spectra of comparing them with the known elements from the other materials. It is the most efficient method of the banknotes "marking", especial for those made from plastic due to the fact that it states indubitably a banknote is or is not authentically.

²⁶ See Anatol Rotaru, *op. cit.*, p. 53.

3.4. Trafficking in treasures

In the previous paragraph, we have just observed the special feature of committing the offences of money laundering is appreciate at a micro-level, otherwise the main feature of the offences of trafficking in treasures consists in replacing them with other falsified ones. As a consequence, the judicial body's necessity is that of establishing what goods are real ones and what of them a replica.

At the same time, an essential characteristic consists in the fact that the action area for these offences is a larger one, they being organized crimes which produce huge amount of money.

The forensic examination of analysing treasure goods or artefacts is met especially in the cases of pictures, where the forensic expert uses the scientific methods provided by the judicial chemistry in order to establish their authenticity.

As in the cases outlined above, in purpose to detect the fakes it is used the infrared radiations, as being the most efficient one among the methods used at present. In the same manner the Roentgen radiation which offers high precision in establishing the artefacts authenticity is used.

4. Conclusions

The long scientific process of the contemporary society evolution has had as a result a progress in the field of the criminal justice. It has been possible through marking a modernity factor not only in the criminal proceedings, but in the technical-scientific methods, which help the judicial bodies in solving penal cases as well.

In this manner, the sciences, such as physics, chemistry, biology, forensic medicine and anatomy, help the forensic expert in obtaining the most precise results the judicial bodies need. This is because, as I have pointed out in the current paper, the criminal phenomenon has developed very much in the last period of time, reaching an alarming level and the most varied modalities of committing offences. In this context, the criminal groups changed their strategy from committing petty offences to transnational ones, setting up real criminal networks of organized crimes.

The trafficking of any kind, from arms and counterfeiting goods to the artefacts and treasures trafficking, is a proof of the fact that the judicial body has taken into consideration the serious social danger created by those serious crimes and made the appropriate decision in order to combat and prevent as much as possible developing other forms of organized crimes.

This is the reason for which, during the forensic activity the fundamental principles of physics and chemistry are applied. In the last period of time, the

judicial chemistry has been properly outlined within the criminal sciences, helping the judicial bodies in solving correctly and legally the penal cases in such a manner to achieve entirely the scope of the penal trial.

In this context, Romania has to rethink a new action plan, a new strategy in accord with the European one, which must state a more efficient climate, a more viable one and for a long time, on combating the organized criminal phenomenon in the economic field.

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BUSINESS TAX LAW

The Legal Status of the Digital Certificate Used for Submitting Tax Returns Online, in Romania

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Abstract

This article analyses the legal status of the digital certificate in Romania, presenting first the steps a taxpayer has to take to submit online tax returns (section 1), the need to issue a power of attorney to the taxpayer's empowered person in order to obtain the electronic certificate (section 2), the importance of studying the legal nature of the digital certificate (section 3), why is not to be confused this digital certificate neither with the administrative fiscal act nor with an act of authority (sections 4 and 5), and which are the legal characteristics of the digital certificate as a legal act (in the Conclusions section).

Keywords: digital certificate, electronic signature, online tax returns, digital certification service provider.

JEL Classification: K34

1. Introduction

To submit on-line tax returns in Romania, a taxpayer shall go through the following stages:

- to empower a physical person through an authenticated power of attorney to represent the taxpayer in front of the competent General Directorate of Public Finance of the National Agency of the Fiscal Administration, to sign the tax returns to be submitted to the competent bodies, also by using the online system, based on a qualified digital certificate; this stage is not needed if the taxpayer, a specialist – moral person, has appointed an administrator, who is already acting as representative, under a general power of attorney, or under the decision of the general assembly of the respective commercial company;

- the empowered person, administrator or another person, shall obtain a qualified electronic signature certificate, issued by one authorized certification services providers; thus, he/she will be able to submit on-line tax returns, in the name and on behalf of the taxpayer; the signing with electronic signature² on the

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² According to art.5 in Law no 445/2001 regarding the electronic signature, with further modifications and completions, the electronic signature is assimilated, in terms of conditions and

tax return shall extinguish the fiscal obligation to submit the tax return; any delay in submitting it, that forced the taxpayer to pay penalties, shall allow the taxpayer-solvans to take a recourse action: either against the empowered person, or the provider of electronic certification services, or both, depending on the culpable act performed;

- to submit a request to the National Agency of Fiscal Administration (ANAF), in electronic format, to obtain the confirmation of the right to use the online tax return service;
- after receipt of confirmation, to submit the on-line tax returns.

2. Use of power of attorney as preliminary document to issue the digital certificate

If a person wants to submit on-line tax returns, in the name of another physical or moral person, thus exercising the right of the people to submit income/profit tax returns in electronic format, a right given by the Romanian Government, namely the Ministry of Finance, under art.2 para 4 in Op ANAF 2568/2010, the empowered person shall submit a power of attorney authenticated by the notary public, stipulating the right of the empowered person to sign in the name and on behalf of the mandatory. The power of attorney shall be submitted to any fiscal unit of ANAF (not necessarily only the competent one, depending on the fiscal residence of the taxpayer in the name of whom the tax return is submitted³.

The power of attorney for the electronic (digital) signature shall stipulate that right of the holder of the qualified certificate to sign the tax returns in the name of the taxpayer. In case the holder of the certificate is already the legal representative of the taxpayer in the name of whom he wants to sign the tax returns, this power of attorney is no longer needed.⁴

To keep in mind an important procedure: any power of attorney shall be signed in front of the notary public, this cannot be done on-line; in the absence of the power of attorney, even if the presence of the empowered person is not needed, (however, his/her personal details shall be made available to the notary public in order to make the power of attorney) the notary public shall refuse to write the power of attorney. "The on-line power of attorney" mentioned by the article in the fiscal law can lead to the misinterpretation according to which the

effects, with a written act under private signature. Law no 445/2001 was published in the Official Gazette no 429 of 31st July, 2001 and republished in the Official Gazette no.316 of 30 April, 2014.

³ In this respect, see Silvia Cristea „*Comentarii la Codul de procedura fiscala*”, Dareco, Bucharest, 2007, p.29-32.

⁴ Taken from the website: <https://notariat-tineretului.net/electronica-digitala-model-pret> , 17 July, 2017, from the article of Ms Ioana Surdescu and Oana Surdescu, Notary Public Professional Society, Power of attorney for electronic (digital) signature. The same website stipulates the documents needed to have the power of attorney authenticated by the notary public, the fee and their validity.

power of attorney can be made on-line, and the person who mandates may not go in person to the notary public to sign it in front of the notary public. Such an interpretation is wrong.

Regarding the validity of the power of attorney, although the statute of limitation is, according to the Roman Civil Code, 3 years (according to art.2015 in the New Roman Civil Code), the legislation in force regarding the qualified certificate stipulates the limitation of the duration of the certificate to 1 year. In October 2010, it became compulsory to submit the tax returns in electronic format, and the obligation applicable only to big and medium taxpayers - defined according to the regulations in force at that moment, and to their secondary offices - the other categories of taxpayers can use the optional on-line tax return (according to OpANAF 2520/2010). Starting with 2011, according to the provisions of the Fiscal Code, form 112 „Statement regarding the obligations to pay the social contributions, the tax on income and the nominal records of the insured persons”, shall be submitted through electronic remote data transmission by all physical and legal persons who have the capacity of employer or entities assimilated with employers, according to the law.

Regarding the usefulness to submit tax returns through electronic remote data transmission, ANAF posted on the internet⁵ a draft order proposing the obligation to submit the main tax returns via the internet, on the website of ANAF, by all categories of taxpayers. Exceptions from the obligation to send through the electronic remote data transmission are the tax returns submitted by physical persons and used to establish the tax on income and the compulsory social contributions.

3. Importance of studying the legal nature of the digital certificate

The question: *Is the digital certificate obtained by the representative of the taxpayer, or of the administrator, a fiscal administrative act or an act of authority, in the sense of the Law 554/2004 of the administrative contentious?* may have an answer in this section. We consider that the right answer is that the digital certificate is neither a fiscal administrative act, in the sense of art.46 in the Code of Fiscal Procedure, and nor an act of authority, because it is not a document opposable to third parties. Its sole usefulness is to create the possibility for the empowered person to submit the tax returns on-line, in the name and on behalf of the taxpayer. The tax returns, in print, were valid only signed and stamped⁶ by

⁵ See also the website: <https://www.contabun.ro/2017/07/20/anaf-propune-ca-anumite-declaratii-fiscale-sa-fie-depuse-obligatoriu-numai-electronic/>, accessed on 17 August 2017. The same website lists the categories of tax returns that can be submitted on-line.

⁶ Regulation of the European Parliament and of the Council no 910/2014 on the electronic identification and trust services for electronic transactions on the internal market admits as evidence the electronic seals, as form of identification of the person. The Regulation entered into force on 1 July 2016, abrogating the Directive 1999/93/CE. In December 2016, the European Commission assessed

the legal representative of the professional, either physical person or legal person. Since they can be submitted now in electronic format, hence the need to sign them in digital format. The power of attorney is the needed element to obtain a digital certificate, and the holder of the certificate acquires a specimen of electronic signature and can submit such tax returns on-line.

What happens when a digital certificate is submitted as evidence in court? Can the court accept it as evidence? If Yes, to what extent its contents is opposable and against whom? These are questions for which we shall formulate answers in the Conclusions.

4. Comparison with the fiscal administrative act

The requirements to meet for a legal document to be a fiscal administrative act are listed in art 46 in the Code of Fiscal Procedure. We believe that one of the reasons that prevent the digital certificate to be a fiscal administrative document is regulated in art.49 para1 lett. b in the Code of Fiscal Procedure, which lists the cases that trigger the nullity of the fiscal administrative act in the absence of the surname, name and capacity of the person empowered by the fiscal body – as the person competent to issue the fiscal administrative act. In the case of the digital certificate, this element is missing.

The doctrine⁷ considered that the lack of the name and of the capacity of the person empowered by the fiscal body is a case of absolute nullity on grounds that this cannot be invoked ex officio, by anyone (according to art. 49 para.2 Code of Fiscal Procedure). Irrespective if it's an absolute nullity or relative nullity, we consider that the digital certificate, not fulfilling one of the basic requirements of the fiscal administrative act, cannot be included in this category of documents.

On the other hand, the digital certificate does not fulfil the requirement to be a fiscal debt instrument, and it is not a declarative legal document either, as it does not have the character of a fiscal debt instrument, and cannot be an enforceable instrument⁸.

Last but not least, while the fiscal administrative document is a rights declarative document, we consider that the digital certificate has a right constitutive character, as we shall present in the Conclusions.

5. Comparison with the authority administrative act

the stage of the implementation of the Regulation no 910/2014, in the EU countries and published a document showing the status on the website https://ec.europa.eu/futurium/en/system/files/ged/compilation_ms_information_14122016.pdf>. In the sense of comments on the provisions of the Directive, in short named eIDAS, see E.A.Caprioli, P.Agosti., *Principales evolutions du regime de la signature, du cachet et de la copie numeriques*” in Actualite Juridique Contrat, Oct.2016, p.2-7.

⁷ See in this respect Silvia Cristea, *op. cit.*, p.34.

⁸ Idem, p.22.

In the provisions on the notion of administrative act in art. 2 in Law no 554/2004 regarding the administrative contentious⁹, we find that we cannot consider the digital certificate to be an administrative act in the sense of the above mentioned law, at least for the reasons mentioned below. Although it is a unilateral document, issued by the certification authority, the digital certificate does not come from a public authority¹⁰, but from a private company, namely an authorized certification services provider, that does not fulfil the requirements of a public body, or a territorial administrative unit that operates as public power. The digital certificate does not fulfil the requirements of an authority administrative document as it is defined in art.2 lett. C in Law no 554/2004, according to which it is the unilateral document with either individual or normative character, issued by a public authority, in order to execute or organize the execution of the law, thus causing, modifying or terminating legal relations”; in the case of the digital certificate, private law relations, not public law relations arise, between physical or legal persons that have the capacity of taxpayers, on the one hand, and the authorized certification services provider – private law legal person. For both parties, the goal is private, it pertains to the private law; among the contractual clauses, to note the liability of the provider to pay, instead of the taxpayer, the fiscal sanctions applicable for delays in effecting the payment/ tax in case the delay is imputable. Does the provider provide a public or a private service? The contractual service is completed by signing with the electronic signature the document filled in by the taxpayer’s empowered person that is to be sent and registered with ANAF. The date when the service is provided is the date when the taxpayer saves the electronic confirmation/receipt corresponding to the tax returns submitted to ANAF. It is, therefore, a private service, serving a public service, namely the service provided by ANAF - to collect the tax returns as public authority. We consider that the digital certificate, in this case, plays the role of a document subordinated to the fiscal document, namely the declaring of a fiscal debt, and the secondary document does not take over the public nature of the main document!

We consider the digital certificate to be a unilateral document because of the sole will of the taxpayer to pay one’s taxes included in it; and the requirement regarding the sole signature for the document to be valid is fulfilled because the document is signed only by the taxpayer, even if the mechanism of the electronic signature implies the performance of the authorized certification services provider, who plays the role of taxpayer’s empowered person.

⁹ Published in the Official Gazette no 1154 of 7 December 2004, with further modifications and completions.

¹⁰ According to art. 2 lett.b in Law no 554/2004, public authority is any public body or body of the field administrative units that operate as public power to respond to a public interest; private law legal persons that, under the law, have the status of public utility or are authorized to perform public services, are assimilated with public authorities, in the sense of this law.

6. Comparison between the digital certificate and the power of attorney

For the same reasons mentioned in the previous sections, the power of attorney is neither a fiscal administrative act nor an act of authority.

Like the power of attorney, the digital certificate is obtained to be used for another person. Both are unilateral manifestations of will. Unlike the power of attorney, the digital certificate is obtained on the name of the empowered person, on behalf of the taxpayer, being thus similar to the mandate without representation, not with the mandate with representation – to which the power of attorney resembles in terms of legal effects. For this reason, we distinguish another difference between the digital certificate and the power of attorney – the digital certificate can be used by other people (unlimited number) for several categories of tax returns, if these people gave the power of attorney to obtain digital certificates.

While the validity of the power of attorney is 3 years, the validity of the digital certificate is 1 year; it is compulsory to obtain a new certificate after expiry, which increases the costs¹¹.

7. Conclusions. Legal characteristics of the digital certificate. Advantages and disadvantages

In our opinion, the digital certificate is like a virtual „identity card”, rather an attribute of electronic identification of the holder. It allows creation of a unique electronic signature; that is why we consider it to be a private law document, even if it serves a document with public purpose.

It is, at the same time, a unilateral legal document, as it contains the will of the certification service provider, and it is also a document that requires communication to the recipient. In other words, to cause legal effects, it must be communicated to the empowered person. De facto, he/she will receive, from the service provider, the confirmation that he/she can fill in the tax return via email, and from that moment on, he/she can access the ANAF website to take the document for the tax return, in PDF format.

It is an onerous legal document; the empowered person shall pay for the service provider's service.

It is a right-constitutive legal document. In case of a new certificate, the empowered person acquires a new right to fill in fiscal forms, in the name and on behalf of the taxpayer. The revoking of the qualified digital certificate can be done by using the revoking service or by sending email to the technical support

¹¹ The cost to obtain the digital certificate is 46.9 euro. See in this respect the website of Digisign (<http://www.digisign.ro/ro>).

team, or by going to the office of the electronic certification service provider and requesting the revoking. The certificate is revoked within 24 hours from the request, upon the request of the signatory, after prior check of his/her identity. Among the reasons for revoking:

- The effect of a final and irrevocable court decision;
- The basic information included in the certificate no longer correspond to reality;
- Breach of confidentiality of the data to create the signature;
- Death or putting under interdiction of the signatory;
- Fraudulent use of the certificate;
- Evidence that the certificate has been issued based on forged or inaccurate information.

The process to obtain a new qualified digital certificate follows the procedure presented on the website of the digital certificate provider, upon the request of the signatory, and after prior check of the identity of the signatory;

The revoking shall not be taken as renewal of the digital certificate, which can be done in 2 ways: on-line renewal, with no costs, such as identification with the notary public or courier fees, and submittal of the contract (and possibly the stick including the digital certificate and the electronic signature – previously acquired, or renewal by the provider of digital certification services and sending of the documents with the terms and general conditions of the contract, of the statement authenticated with the notary public and the USB stick with the certificate, through courier - the second method implies an additional cost with the courier. The digital certificate may be suspended in the following cases:

- Upon the request of the signatory, after prior check of his identity;
- Following a final court decision;
- The information included in the certificate no longer reflect realities¹²

It is a legal act requirement for the rules applicable to the procedure to fill in the tax returns on-line, rules established by a pre-existing normative document of public law, namely Op ANAF 2520/2010.

It is an accessory legal document; although it is a private law legal document – expresses the will of the certification service provider – it serves a primary legal document of public law, namely for the taxpayer to execute a fiscal obligation consisting in the filling in of the tax returns on-line.

It is a causal legal document; the disappearance of the cause triggers the disappearance of the effect. To understand this aspect, let us take the example of the abrogation of the order issued by the ANAF president, or the example of the entering into force of a new order that forbids the filling in of the tax returns on-

¹² For details, see Mihaela Nițulescu, <http://www.elsa.ro/elsaro/revista/articolej-mihaela.htm>, and www.markmedia.ro, Irina Craciun 17 May 2004 - 23 May 2004.

line. If the obligation of the filling in the tax returns on-line, following the abrogation of the fiscal regulation that included it, the effect shall be also annulled, namely the need to issue the digital certificate.

It is a strictly personal legal document, in the sense that it can be used only by the empowered person, despite the fact that he/she acts as representative of the taxpayer.

It is a document purely and simply, it does not depend on a modality, such as the term of the requirement.

It is a typical legal document (mentioned in regulations), with a predetermined contents as stipulated in a pre-existing regulation, namely Law 445/2001 on the electronic signature and its application norms.

It is, lastly, a *uno actu* execution document, since, for the payment effected by the empowered person, the service provider has a stick with the digital certificate and the electronic signature, and the corresponding password; we have, therefore, a successive execution document, since the same certificate allows the filling in of several tax returns not only in a certain month but during the entire year for which it is valid,¹³ but actually it is a document with one-time execution, since the empowered person uses the same information on the stick to fill in the tax returns on-line, without need for a performance of the co-contracting party.

Due to the nature of the activity performed by the certification service provider, it is the result of a contract for service (in the sense of art.1851 the Roman Civil Code)¹⁴.

It cannot be taken as power of attorney or a fiscal administrative act, or an act of authority in the sense of the Law no 554/2004 (as stipulated in sections 4, 5 and 6 above).

To conclude, what are the disadvantages to use the digital certificate?

One, the issuer. Why to turn to a private electronic service provider, when the state itself¹⁵, through ANAF, or another specialized agency, could be the issuer for this certificate? The costs would diminish, the applicant's trust would increase, and the state would have a new source of funds for its budget. The time to go through the procedure receive the certificate would also diminish, since, currently, ANAF must „certify the digital certificate” obtained from the private

¹³ For details on the criteria to classify the legal documents, under which the legal characteristics above mentioned have been established, see S. Cristea, *”Dreptul afacerilor”*- 3rd ed., with modifications and improvements, Bucharest, University Publishing House 2012, p.219-240.

¹⁴ For the analysis of the legal status of the contract for services in the Roman law, see Dumitru Dobrev, *chap.VI.Contractul de antrepriza”* under coordination of Marilena Uliescu *„Noul Cod Civil.Studii și comentarii-vol.III.Partea a II-a, Cartea a V-a.Contracte speciale.Garantii”* , Universul Juridic Publishing House, Bucharest, 2015, p.190-217, ISBN 978-606-673-546-9. For details on the characteristics of the contract of services for electronic services in the French law, see E. A Caprioli, *„Signature et confiance dans les communications électroniques en droit français et européen,”* in *Libre droit, Mélanges Ph. Le Tourneau* : Dalloz, 2008, p. 55.

¹⁵ In this respect, see the website www.totundrac.info/2011/05/despre-utilitatea-certificatelor.html

issuer, before it is used on-line to submit the tax returns. According to the procedure in force, ANAF sends to the email of the tax payer the confirmation of the right to use the service before the taxpayer fulfils one's obligation to submit the tax return.

Second, the validity of the validity of the digital certificate, as long as it is limited to 1 year. Thus, the stationery costs and the costs incurred with the queuing at ANAF are replaced with the costs to re-issue the digital certificate.¹⁶

The advantages to use the digital certificate should not be underestimated:

- we can submit electronic tax returns for an unlimited number of Sole Identification Numbers (CUI), with only one qualified digital certificate. The request to use a digital certificate can be submitted, for each taxpayer represented, with any fiscal territorial unit subordinated to ANAF, according to OpANAF no 2568/2010.

- the electronic signature is compulsory to submit tax returns to ANAF and CNAS, hence the digital certificate becomes a MUST;

- it can be used by other institutions, such as ONRC, labour territorial inspectorates and various companies that use this system, and in submitting EU-funded projects;

- its use is related not only to the creation of the simple electronic signature, but also of the extended electronic signature, and the information inscription, thus contributing to higher reliability in using certain applications and websites; *de lege ferenda* we shall be able to witness the creation of new electronic identification attributes, such as of the electronic seals (as electronic stamp);¹⁷

- the system is complicated, it is based on two major elements: the user, who has a qualified digital certificate on his name, and the institutions or companies that receive the documents;

- the decisions to use this system was taken in 2001, when the Law of electronic signature entered into force;

- the advantages of the digital certificate are major: reduced costs and diminished time to process information, as it is a lot easier to sign documents in front of the computer¹⁸.

Regarding the capacity of evidence of the digital certificate, first, the usefulness of invoking the digital certificate may appear in case the taxpayer is in delay regarding the obligation to submit the tax return and wants to take back the loss incurred by paying the delay penalties¹⁹. The taxpayer will first turn to one's legal representative, who can call to court the service provider – who issued the

¹⁶ *Idem*.

¹⁷ For details, see: <https://inregistrare.certsig.ro/index.html>. eIDAS regarding the electronic signature made clear to everyone.

¹⁸ See hotnews.ro, on the electronic signature, accessed on 20 August, 2017.

¹⁹ Regarding the legal status, see: Silvia Cristea "Cumulul dobânzilor cu penalitățile de întârziere" Rev.de Drept Comercial no 6/2004, pp.85-98.

digital certificate. In practice, it is possible that, by refusing to pay the delay penalties, the tax payer may bring to court the General Directorate of the Public Finance, to which he/she sent the tax return, that he/she considered to be submitted in due time. As evidence, he/she may propose the tax return submitted on-line, and the digital certificate.

In this case, we can see that the only document that proves the legal relation arisen between the empowered person and the certification services provider is the electronic contract concluded, and, in its absence, the emails that have been exchanged between the two, plus the electronic proof of the payment for the performed service, and the digital certificate issued on the name of the empowered person. What will the court reply in case of submitting this certificate as evidence²⁰? In case one of the parties does not admit the writing or the electronic signature, the court will always order a specialized technical expertise. For this purpose, the expert of the specialist has to request the qualified certificates and any other needed documents, according to the law, to identify the author of the writing, the signatory or the holder of the certificate.

The rejection of the evidence in electronic format²¹ is not possible, so the judge will accept the digital certificate as evidence²².

Regarding the requirements and the legal effects of the document bearing the electronic signature, the Law no 445/2001 contains at least two articles in this respect.

Art.5, invoked above, places the equality sign between the extended electronic signature and the writing under private signature, in terms of requirements and effects. While art. 6 stipulates that the writing in electronic format to which an electronic signature is attached²³, if it is recognized by that person to whom it is opposed, has the value of authentic writing, both for those who signed it and

²⁰ For details on the liability of the service provider as liability to fulfill an obligation of result in the French law, see Ph. Le Tourneau „*Droit de la responsabilité et des contrats*”, Coll. Dalloz Action, D., 8th ed., Febr. 2010, Paris, p. 912, cited in the dissertation of the Master de Recherche Droit des Affaires, defended in 2011 at Université Paris 13 Nord, of Ms Virginie Etienne, entitled „*Le développement de la signature électronique*”, p. 35

²¹ For the equivalence of the legal value of the electronic documents with paper documents, see art.1 para 2 corroborated with art 16 in Law 148/2012 on the records of electronic commercial operations, published in the Official Gazette, Part I ,no 509 , of 24 July 2012.

²² To analyze cases in the French jurisprudence, proving recognition of the electronic signature as evidence, see V. Etienne, op.cit, p.26 citing the cases Cass. com., 15 Dec. 1992, Bull. civ. IV, n° 419, Cass. com., 2 Dec. 1997, previous, and analyzes, 2 solutions pronounced by the Court of Cassation and Justice.

²³ Regarding the legal value of the electronic signature in various law systems, see Haroun Hadj Mbarek „*La Dematerialisation des operations de Credits Documentaires Internatinaux*” - mémoire présenté à la Faculté des études supérieures de l'Université Laval pour l'obtention du grade Maître en Droit (LL.M.) Avril 2002, p.76-86.S also see the website: www.theses.ulaval.ca/2002/24062/24062.pdf (consulted on 1.10.2017).

their representatives. The other party can invoke the contents of art.8-11 in the Law no 445/2001, to the extent to which he/she does not recognize the legal value of the digital certificate.

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5. Silvia Cristea „*Comentarii la Codul de procedura fiscala*”, Dareco Publishing House, Bucharest, 2007, p.29-32;
6. Silvia Cristea „*Dreptul afacerilor*”- 3rd ed., with modifications and improvements, Bucharest, University Publishing House, 2012, p. 219-240.

II. Legislation

1. Law no. 445/2001 was published in the Official Gazette no 429 of 31 July 2001 and republished in the Official Gazette no 316 of 30 April 2014;
2. Law no. 148/2012 on the records of electronic commercial operations, published in the Official Gazette, Part I no 509 of 24 July 2012;
3. Law no. 135/2010 on the Criminal Procedure Code, with further modifications and completions, published in the Official Gazette no 486 of 15 July 2010.

A View on the VAT Split Procedure: the Estimated Effects of the Proposal for Regulation

Professor **Mihaela TOFAN**¹

Abstract

In the context of the recent global financial crisis, the methods to efficiently collect the revenues to the public budget became a constant concern for every government. This is a major concern within the EU too, the member states looking for appropriate regulation to insure the fiscal sustainability. VAT split procedure is one of the proposed means of action and it was anticipated in EU Commission Green Paper on VAT in 2010. The main objective of implementing this new procedure to collect VAT is to reduce and, if possible, to eliminate the VAT gap. In theory, the procedure is estimated to reach its best results in more than 15 years of activity but there are already delays in implementing it. Italy was the first state in the EU to opt for this new procedure of collecting VAT. Romania, Poland and UK are about to follow this trend, but major discussions are ongoing both among academics, practitioners of taxation and politicians. Romanian proposal of regulation for VAT split procedure is strongly criticized, but the goals of the prevision and the EU regulation development trend will impose, eventually, this collection mechanism for all the member states.

Keywords: VAT gap, split procedure, regulation.

JEL Classification: K34, K40

1. Introduction

Value Added Tax is an indirect tax applicable to transactions relating to the supply of goods, the importation of goods, the provision of services and the operations assimilated to them and it is due to the state budget. Designed as a progressive way of taxing goods, to avoid casual taxation (characteristic of turnover tax), value added tax (or, more simply and more commonly referred to as VAT) was adopted by the Common Market countries starting with January 1, 1970, being an evolved form of general merchandise taxation.²

VAT is a relatively new tax at the scale of the evolution of the rules of financial and fiscal law, regulated in the middle of the last century. In France, VAT was introduced by the law of 10 April 1954 and applies, in principle, to all

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² Sever Gabriel Bomboș, Mihaela Galanton, *Taxa pe valoare adăugată. Legislație. Doctrină. Jurisprudență*, C.H.Beck Publishing House, Bucharest, 2006, p. 1.

economic transactions constituting a supply of goods or services. The French specialists have described VAT as an unfair tax, because the ultimate consumer is the one who bears the total tax burden at each stage of the distribution. VAT is imposed on citizens without regard to the payer's personal situation; it is a brake on consumption and a brake on policies to relaunch economic activity through the market.³

Of course, these shortcomings of VAT are outweighed by its advantages. As an indirect tax, value added tax combats the overstocking and production process when the distribution / disposal process is not safe and imminent. Taxable persons are interested in selling production and collecting a tax to lower the tax on purchased goods, so product circulation is accelerated.⁴

Value added tax contributes to transparency and confidence in the relationship between the state and economic agents. Value-added tax is an indirect tax that has a better return and it possess the ability to prevent tax evasion because documents are requested for the purpose of deduction of the value of the goods purchased. Taxable persons acquire the goods on the basis of documents in order to be able to deduct the value added tax, which contributes to the correct assessment of the economic situation, ensures transparency and stimulates trade with documents in order.

The legal VAT regime differs as we look at a transaction between two partners in the same state or between partners in different states. In the second hypothesis, the situation is once more different as both partners may be from EU Member States or one of them is from one EU Member State and the other from a non-EU country. The regime applicable to the operations carried out in the latter scenario envisages that exports from EU countries are exempt from VAT and imports in any EU country are subject to VAT, on the basis of the tax system in that particular state.⁵

Legislative harmonization at EU level and the interest in optimizing VAT collection or for developing the VAT collection regulation are a constant concern both among the EU Member States, in general, and at the level of the European institutions, in particular.

³ Jean-Pascal Regoli, *Drept fiscal INTEC-CNAM Paris*, Economica Publishing House, Bucharest, 2000, p. 32.

⁴ Mihaela Tofan, *Obligațiile fiscale ale firmei*, CH Beck Publishing House, Bucharest, 2012, p. 186.

⁵ Emmanuel Disle, Jacques Saraf, *Droit fiscal. Manuel et applications*, Edition Dunod, Paris, 2008, p. 39-40.

2. Reason for a special VAT payment procedure

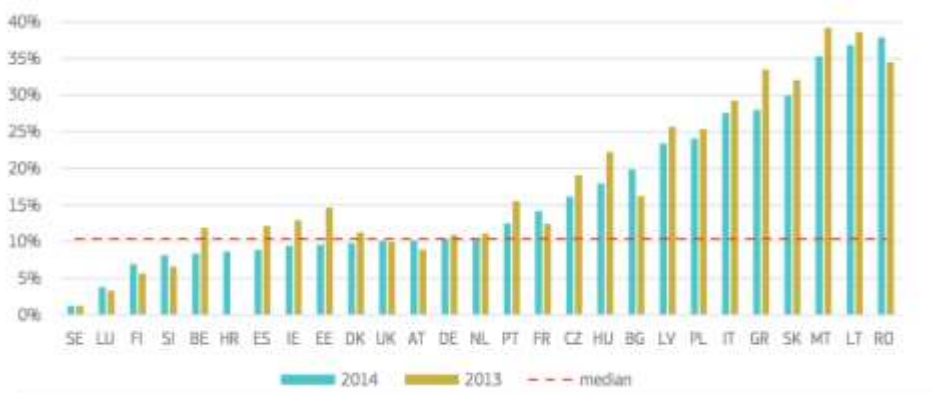
In the 1985 White Paper, the European Commission came to the conclusion that, with a view to removing barriers to the cross-border movement of goods and services, certain measures need to be adopted with regard to the VAT regime. Thus, the VAT return system was replaced in the state of export and the collection of VAT was placed in the state of importation, i.e the collection system in the home Member State. In order to eliminate a series of difficulties, it was concluded that the rule that should govern the application of VAT in the community area should be that of taxation in the state of origin and not in the state of consumption, which means that each trader must pay VAT to the usual rate in the country where they operate and to deduct VAT paid anywhere within the EU, on the VAT return of the country of origin.

Harmonization of VAT regulations has been achieved through the regulatory instrument specific to European law, namely through the Directive. Thus, the Council adopted Directive 2006/112 / EC (also referred to as the VAT Directive) on 28 November 2006, on the common system of value added tax. The original text has undergone several changes, an unofficial consolidated version being available in Romanian, as an official language of the EU.

Subsequently, since 2010, concerns have been stepped up to develop uniform VAT regulations, the main aim being to streamline the collection of this budgetary resource of the Member States, which meanwhile became a resource for the EU budget.⁶

The analyzes carried out for these purposes revealed that all EU Member States are facing considerable gaps in the collection of VAT to the state budget, the differences between estimated and actual VAT being worrying, at least in terms of the rigor of public budget management, and directly affecting social welfare. The statisticians showed that during 2014 the VAT revenue gap was 160 billion euros, ranging from a maximum of 37.9% uncollected VAT in Romania to just 1.2% of the estimated VAT for Sweden. In absolute terms, the largest VAT gap was recorded in Italy (EUR 36.9 billion) and the lowest difference between invoiced VAT and actual VAT received by the state budget in Luxembourg (EUR 147 million).

⁶ Dan Drosu Șaguna, Mihaela Tofan, *Drept financiar și fiscal european*, Ed. CH Beck, Bucharest, 2010, p. 16.

Figure 1. VAT gap in EU 2013 and 2014⁷

The same conclusions can be deduced from the analysis of the information available on the EU Commission website and for other years under consideration, in which the objective of the Green Paper on VAT launched in December 2010 is naturally highlighted to identify action lines for a system simpler, more efficient and more robust for regulating this tax. Harmonization of VAT regulations needs to respond to wider needs for reforming the single market in order to implement the measures included by the EU Commission in the Europe 2020 Strategy. As the VAT collection procedure has changed the least since its introduction, largely based on the system of unilateral declarations issued by VAT payers, eventually followed by an audit procedure by tax authorities, the European Commission has requested since 2009 a feasibility study identifying and proposing ways to improve and simplification of VAT collection, through modern means and techniques with the support of those providing financial intermediation services if such instruments could generate the estimated results.⁸ The proposals from the feasibility study outlined four possible directions for action to reduce the gap in VAT collection, namely:

- The client orders his bank to pay the price for the purchase of goods and services in such way that the amount actually paid to the supplier and the amount of VAT, which should be paid directly to the tax authority, is shared; this model involves major changes in the way business operations

⁷ European Commission Report on VAT collection in 2016, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09_vat-gap-report_final.pdf, (consulted on 1.10.2017), p. 16.

⁸ European Commission, *Green paper on the future of VAT – Towards a more simpler, robust and efficient VAT system* 2010, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/consultations/tax/future_vat/com%282010%29695_en.pdf, (consulted on 1.10.2017), p. 23.

are carried out for all the partners involved, and there are still some unclear issues about the procedure for cash and credit card transactions.

- All the information in the invoices issued is sent in real time to the tax authority with VAT responsibilities; the tax authorities would obtain the information needed to exercise control much faster than they are now obtaining, with many of the VAT fraud methods being removed. The implementation of the e-invoicing system should be generalized and it mandatory involves issuing bills in a uniform manner.
- The taxable person should be required to communicate pre-established information on transactions in a centralized database, collecting VAT details, a database accessible to both VAT payers and tax authorities. However, some states have already taken steps to implement this line of action and notable results have been recorded.
- Control and certification of the procedure whereby taxable persons are subject to VAT rules for each individual action; this manner of action has already been experienced by some of the EU Member States. The model should generate confidence-building between tax authorities and contributors, but the certification process of each VAT-operated operation is time consuming and requires considerable state's investment in additional qualified human resources.

Of the four methods of action identified to reduce the VAT gap, it appears that the first method, namely the split VAT payment method, is the one that has the greatest potential to reduce and, if possible, eliminate the differences between invoiced VAT and the one actually received by the public budget of each state.

Therefore, measures are needed to determine the steps to be taken to implement shared VAT payments for all EU Member States.

3. How should the split VAT payment work?

The split VAT model proposed by the European Commission as early as September 2010 is that any buyer pays VAT in a special VAT bank account that will be blocked and can only be used by the supplier for payment VAT to their suppliers' special VAT account. In this way, at an early stage of the VAT collection process, VAT collected is physically transferred to a blocked VAT bank account or even directly to the bank account of the tax authorities. The model also implies that the tax authorities are able to monitor and block funds from bank accounts specifically dedicated to VAT collection and payment, preventing taxable persons from using VAT funds paid to them for other purposes than VAT.

Even from the theoretical stage, the model can also generate negative effects, which can be partially offset if the tax authority returns VAT much faster than in the current VAT collection model. From the point of view of the benefits

generated, the new model is excellent because the tax authority can be sure that it will receive all the VAT collected from the transactions from one company to another (type of business to business or B2B). Positive results can only be generated if the model is mandatory and the chargeability of the tax would be set for all deliveries at the time of payment. Of course, within this model, B2B transactions are the most easily controlled, especially when using electronic money transfer (EFT).

The implementation of this new VAT procedure in any country that will amend its rules of procedure requires:

- high initial investment from all credit institutions; banks will have to adapt their payment facilities such as online banking programs as well as the way payments are managed using payment instruments made by their clients;
- limited direct investment required by the taxable person who will have to cover the operational costs for managing this additional blocked bank account;
- a large investment program by the bank of tax authorities that will be responsible for the management of blocked VAT accounts and will have to monitor the current VAT account of each taxable person and eventually generate VAT returns.
- a longer implementation phase, the prevision being that implementation could be completed in 2020.

The costs of assuming the VAT split procedure will vary for each EU Member State, depending on its particularities. The change requirements will depend on the maturity of the existing technology, the level of integration required with other older systems and the level of decentralization of the operations carried out by the tax authorities concerned. According to the estimates made in the event of the application of the VAT split model for the entire EU during 2016-2038 period, the minimum benefits of the splitting payment model, with regard to the anticipated reduction of the VAT differential minus the estimated investment and operational costs, is estimated to EUR 966 billion.⁹

4. Comparative analysis of the proposed regulations for the VAT split payment procedure

⁹ Study on the feasibility of alternative methods for improving and simplifying the collection of VAT through the means of modern technologies and/or financial intermediaries, https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/vat-study_summ_en.pdf, (consulted on 1.10.2017), p. 7.

Starting the 1st of January 2015, the Italian model for VAT splitting procedures was proposed as a measure to combat tax evasion; according to the proposed regulation, the VAT is paid directly into an account with the Italian Treasury for each payment made. In the beginning, the system was mandatory only for payments made in transactions with state institutions and public agencies. The deadline for applying the VAT sharing scheme is 31/12/2017, when the Italian government expects to fully implement e-invoicing for the public sector. According to the Decree-Law published on April 24, 2017, the divided payment mechanism will be extended in 2018 to:

- all services subject to VAT retention, including services provided by self-employed persons
- transactions with all public institutions, including controlled companies, are public institutions and companies listed on the Italian Stock Exchange.

The application of this special VAT payment procedure could in some cases generate significant positive financial effects for VAT payers, such as the constant and immediate recognition by the tax authorities of VAT credit balances. In such cases, under the current legislation, the VAT payer must choose between permitted alternatives, namely to opt for the amount recognized as a VAT credit to be offset by issuing specific certificates ("visti di conformità") or to be refunded by VAT refund.¹⁰

Also, a proposal to regulate the split VAT procedure was originally raised in Poland in 2015 and the bill was published in May 2017, anticipating a distinction in the application of the payment system procedure from 2018. This bill includes a procedure payable by the following scheme:¹¹

- The VAT paid by the buyer in the sales transaction is paid into a supervised specialized bank account of the seller. The account must be created by the banking institution that manages it, so that the tax authorities can make direct withdrawals at the moment of normal settlement of the supplier's VAT.
- The procedure is voluntary and optional, but there is a reward system for taxpayers who choose to use the new VAT payment system: any supplier that opts for it would be exempt from applying those provisions to support the fight against fraud (for example, the rules on joint and several liability for paying part of the VAT part of sales) will not apply.

¹⁰ *Italy | Change in law for VAT split payments*, available at <http://www.osborneclarke.com/insights/italy-change-in-law-for-vat-split-payments/>, retrieved on the 10th of November 2017.

¹¹ *Poland publishes draft law introducing split payments into VAT regime*, available at <http://www.ey.com/gl/en/services/tax/international-tax/alert--poland-publishes-draft-law-introducing-split-payments-into-vat-regime>, retrieved on the 10th of November 2017.

Of course, the biggest surprise in the context of implementing the shared VAT payment procedure is the United Kingdom of Great Britain and Northern Ireland, which will soon give up EU membership but not the benefits it has discovered in the time when it was a member state. Thus, the British government recently launched a consultation (20 March-30 June 2017)¹² on the feasibility of a VAT split mechanism for online sales of companies to other companies, but also for direct sales to their clients (business to business B2B and business to customers B2C). The consultation introduces the concept of split (or real-time) payment and seeks to group the justified views and evidence of the technical feasibility of real-time VAT collection by using card payment technology and submitting it directly to the tax authority. Advice on the design and development principles of the split payment system is also required.¹³

Thus, in the wider context of concerns in other EU Member States on shared payment of VAT, the Romanian Government's initiative seems justified. The Romanian model for VAT collection procedures is presented in G.O. no. 23/2017, which stipulates that all taxable persons and public institutions registered for VAT purposes, according to art. 316 of the Fiscal Code, will be obliged to open separate VAT accounts for receiving and making VAT payments, with two exceptions:

- natural persons who are not taxable persons and
- payers using credit cards (when the VAT collector will have to transfer it to the special account within 3 days)

According to the Romanian law model, VAT accounts will be opened, implicitly, to all treasury units at the tax authorities where taxpayers are registered. However, any taxpayer can opt to open an account at a commercial bank.

The VAT splitting mechanism will apply to all VAT-exempt supplies of goods / services, with the exception of transactions subject to special schemes (eg the special scheme for the small and medium enterprises SMEs, the special scheme for travel agents, the special regime for second-hand goods) and those subject to the reverse charge mechanism (Article 307, paragraphs 2-5 or Article 331 of the Fiscal Code).

In the initial version of the regulation, the VAT split procedure should be mandatory for all VAT payers, starting January 1, 2018. Following the Italian model already presented, and in the model in Romania, incentives are offered for

¹² <https://www.gov.uk/government/consultations/vat-tackling-fraud-on-goods-sold-online-update-on-split-payment>, retrieved on the 10th of November 2017.

¹³ Angela Fearnside - *Real-time VAT collection (split payment method)*, available at <https://www.taxadvisermagazine.com/article/real-time-vat-collection-split-payment-method>, retrieved on the 10th of November 2017.

the hypothesis where taxpayers opt for split VAT payment before being obligatory. Thus, according to art. 23 from O.G. no. 23/2017, the taxable person who opts for the VAT splitting procedure from 1 October 2017 (3 months in advance) will benefit from:

- a 5% reduction of the corporate income tax (or income tax for SMEs)) for the fourth quarter of 2017
- the cancellation of late payment penalties related to VAT main taxes on September 30, 2017, if applicable.

Without analysis and without challenging the possibility of obtaining positive results on the reduction / elimination of the VAT collection gap by applying the procedure of the split VAT in Romania, the critics have overcome the major mistakes they have identified in the regulatory proposal, such as:

- Additional costs for modifying management systems and systems for providing information;
- Additional bank charges with the new account, additional bank charges for account allocation new for each VAT payer;
- The risk of cash flow and taxpayer liquidity blocking as there are no approval deadlines procedures and sanctions for ANAF if not respecting them;
- Increase in payments, ie doubling the number of payments, each payment being made by two transactions: one relating to the actual price and the second to the payment of the VAT,
- Additional measures for VAT verification and management (the taxpayer's obligation to determine / verify the VAT account, the obligation to direct the state budget to the state budget, the amount representing VAT on purchases from suppliers and the obligation to communicate that they are not VAT payers, notification of suppliers on the special VAT account);
- Significant technical efforts to implement the new payment procedure and serious reserve on the possibility of compliance with the initial deadline set for application with (January 1, 2018);
- Discussions about the legality of changing the VAT procedure by less than 6 months before the date of the proposed date for generalized entry into force;
- Lack of clarification of the procedure all the procedural aspects (how to make payments in the case of factoring expenses, the breakdown of the amounts representing the forfeiture of the goodwill guarantees, the amounts paid on the basis of the settlement invoices in the name and on the account of another taxable person, the compensation etc.);

- Tightening the sanctioning regime (fines are significantly increased, up to 50% of the unpaid VAT amount in the supplier's / supplier's VAT account) can generate an adverse reaction such as tax evasion and tax evasion;
- Under current regulation, taxpayers' money is blocked in the special VAT account and can only be used with fiscal authority (ANAF) approval but ANAF does not have an explicit deadline for issuing the approval and, consequently, there is no sanction if this term is not respected;
- In the case of small and medium sized enterprises SMEs, the application of the procedure involves incurring costs on which these enterprises can not support, objectively speaking, affecting the financial security of the business.

From our point of view, companies with the most clients, with relatively low value operations (such as utility companies and telecommunication companies) will have the highest cost of applying the procedure, costs that can not be covered, realistically speaking, out of the volume of the proceeds and which can not be re-evaluated by the clients. Unfortunately, however, the current regulation does not even indicate the authorities' intention to support the costs of implementing the procedure not even in the case of SMEs, so even less will not cover these costs for large companies.

5. Conclusions

In order to reduce and, if possible, eliminate the gap between estimated and actual VAT, the split VAT is the model identified by the European Commission as a solution to be followed for all Member States. At this time of relatively early implementation of the VAT split and payment procedures in different EU Member States, an analysis of the underlying rationale reveals its justifiable character but also serious impediments that may limit the achievement of the positive outcomes. The procedure is expected to deliver the best results in more than 15 years of implementation, according to studies that have estimated the effects on the reduction of the VAT revenue gap for 2020-2038.

In the EU, Italy was the first state to implement this new VAT collection procedure followed by Romania, Poland and, surprisingly, by the UK. Romanian regulation is strongly criticized both by academic community members and by practitioners, but the objectives envisaged at the time of regulating the procedure and the EU trend will eventually require this collection mechanism to be mandatory for all taxpayers in all Member States. The effective procedure for implementing the shared VAT payment model differs from state to state and will only yield the best results through rigorous application, sustained analysis of progress made, and continuous improvement of the regulatory system.

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The Bitcoin Currency - a New Instrument Used in Conducting Business?

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Abstract

The Bitcoin „phenomenon” has spread its wings especially over the past two years, experiencing an unprecedented growth and being supported by several companies from the international scene. The result is the possibility of buying goods and services using the Bitcoin currency. But the most important thing is the state support which, at the present time, either does not exist, or is in the moment of granting, requiring time. Bitcoin is a cryptocurrency created and given to users (located in front of a computer connected to the Internet) who solve a special category of mathematical problems. Computers around the world „extract” Bitcoin, competing with each other. This extraction can become quite competitive among users because new Bitcoins are created at a predictable and fixed rate. The more users join the network, the more difficult it becomes to make a profit for each of them. Bitcoin is mainly used in the Hidden Internet - that portion of the Internet that is not accessible to the general public through a regular browser - in purchasing illegal goods and services.

Keywords: Bitcoin, criptocurrency, digital currency, transaction, banking institution.

JEL Classification: K22, K33.

1. The determination of the Bitcoin currency's characteristics

● **The emergence of the electronic currency.** In conducting business, the currency played an essential role since the Antiquity, constituting the „spark” that led to its expansion and giving some value to the goods that were its object. Materialized in the forms of sale, purchase, hiring or transport of goods, the business field had a strong commercial character, and the invention of the currency constituted a step forward in its evolution.

It is believed that currency appeared on the territory of the ancient state of Lydia (where nowadays Turkey can be found). This is apparent from the writings of Herodotus, who stated that „the first people, to our knowledge, are the Lydians, who monetized gold and silver coins for their own use.”² Furthermore, these coins were also adopted by great empires, such as Greece or Rome, and

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² Dan Drosu Șaguna, *Tratat de drept financiar și fiscal*, Ed. All Beck, Bucharest, 2001, p. 29.

adapted to their own rules and customs. For example, Greek coins „were embellished with relief patterns depicting portraits of gods and goddesses, The Pegasus horse, The Owl, the symbol of Athens, or other mythological images”, and the Roman coins „wore the portrait of the emperors, promoting the cult of the personality developed around them,”³ being made of bronze, silver or gold, and having different values.

Along the evolution of states on the international scene, it is no doubt that the currency has made a significant contribution to the value heritage of mankind. „Being, first and foremost, a socio-economic instrument, indispensable to any economy, it represented a historical institution, it followed and follows the evolution of human society.”⁴ In this situation, a special moment in the existence of the currency has been the emergence of the electronic computer and the launch of the Internet network during the 1960s in the United States of America, a network with about 50% of the world's population connected at the time of writing (out of a population of about 7.5 billion inhabitants, the number of Internet users is around 3.7 billion). The result is the creation of *the electronic currency*, in the late 1980s, as an alternative to its physical form. Also known as *digital currency*, it is a way of payment that exists only in this form, being, thus, intangible and transferable between entities or users through the computer and, more recently, through the smartphone. Perceived with reluctance at first, electronic currency is widely used today, making it much more „convenient” to acquire (in particular) goods and services in the *online* environment than physically from shopping centers.

In Romanian relevant literature⁵, electronic currency is defined as „a monetary value that holds a claim on the issuer and fulfills, cumulatively, the following conditions:

- a) it is stored on an electronic medium;
- b) it is issued in return of receipt of money, whose value cannot be less than the issued monetary value;
- c) it is accepted as a mean of payment by other entities than the issuer, also.”

A legal definition of electronic currency can be found in Law no. 127/2011 on the issuance of electronic currency⁶, that is, the „*electronically, including magnetic, stored monetary value, representing a claim on the issuer, issued on receipt of funds for the purpose of performing payment transactions, and which is accepted by a person, other than the issuer of electronic currency*”. It is

³ Rodney Castleden, *Invenții care au schimbat lumea. De la roată la mașina de calcul*, Ed. Meteor Publishing, 2015, p. 58.

⁴ Dan Drosu Șaguna, *op. cit.*, p. 43.

⁵ Lucian Săuleanu, Lavinia Smarandache, Alina Dodocioiu, *Drept bancar*, 2nd edition revised and added, Ed. Universul Juridic, Bucharest, 2011, p. 366.

⁶ Published in Official Gazette, Part I no. 435 from 22th of June, 2011.

possible to deduce, from this definition also, the same three characteristic features of the electronic currency.

● **Electronic currency, virtual currency and cryptocurrency.** After the emergence of electronic currency, another type of currency has grown in the online environment: we're referring about *virtual currency*. In the *Virtual Currency Schemes* volume, The European Central Bank has defined the virtual currency as „...a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community.”⁷ So, although there are often confusions, there should be no sign of equality between these two terms: the virtual currency is a category of electronic currency, which means that all virtual currency is electronic, and vice versa is not true (not all electronic currency is also virtual). The virtual currency, by name, is only used in the virtual space of the Internet. A practical example of virtual currency is the one used in videogames, such as *pokecoins*, in the Pokemon Go videogame. In this example, the electronic currency chosen by the user (for example, euro) will have to be exchanged with the game's virtual currency (*pokecoins*) for transactions during the game, and there is no possibility to change *pokecoins* back into the original electronic currency. In the overwhelming majority of cases, the use and value of virtual currency are situated on the platform in which they were created (in our situation, the videogame Pokemon Go). Unlike virtual currency, electronic currency is just an „embodiment” of physical money (for example, the value of the wallet on the PayPal electronic platform).

It should also be noted that according to a press release of the National Bank of Romania regarding the virtual currency schemes, this type of currency is „not a national currency or a currency at all, and its acceptance as a mean of payment is not legally binding”⁸.

Cryptocurrency (hereinafter Cc), in turn, is another type of electronic currency, a „hybrid” between the latter (hereafter Ec) and the virtual currency (hereinafter Vc). In a definition given by foreign doctrine, Cc represents „a digital asset that is constructed to function as a medium of exchange, premised on the technology of cryptography, to secure the transactional flow, as well as to control the creation of additional units of the currency”⁹. It is true that both Vc and Cc are used in the virtual space of the Internet but, unlike the former, which is usually

⁷ European Central Bank, *Virtual currency schemes*, volume published in october of 2012, p. 5, source: <http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf>, last accessed on 20.10.2017.

⁸ The press release was issued in 2015, source: <http://www.bnr.ro/page.aspx?prid=10016>, last accessed on 20.10.2017.

⁹ Usman W. Chohan, *Cryptocurrencies: A Brief Thematic Review*, University of New South Wales, Canberra, 2017, p. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024330, last accessed on 21.10.2017.

centralized¹⁰, the latter is not, usually, subject to any control by an institution or authority. More specifically, the decentralized Cc is produced by an electronic system collectively, at a rate that is formulated when the system is created and which is publicly known. In centralized banking and economic systems (such as, in our country, the minimum required reserves (RMOs) of credit institutions, denominated in lei and in foreign currencies, held within the National Bank of Romania), the boards of directors or the governments control the supply of currency by printage of monetary units. In the case of decentralized Cc, governments cannot produce new units of such currency and cannot provide support for corporations, banks or corporate entities that hold assets whose values is measured in this currency. As an example of Cc, we list *Bitcoin* (on which we will focus our attention hereinafter), *Ethereum* or *Primecoin*.

● **The launch of Bitcoin cryptocurrency.** Composed of the English terms *bit* (digital unit of measurement) and *coin*, Bitcoin currency was launched in 2009 by one or more programmers named Satoshi Nakamoto¹¹. In the Bitcoin launch document, the author/authors point out that in the online environment, commerce has come to rely almost exclusively on the service of financial institutions, being in use as trusted third parties, to operate electronic payments, and he/she/they plead/s for abortion of those third parties' services. Thus, „what is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party.”¹²

● **How is Bitcoin produced?** According to Satoshi Nakamoto's proposed algorithms, Bitcoin cryptocurrency is created and granted to users (located in front of a computer connected to the Internet) who solve a special category of mathematical problems. „Initially accessible to the user who possesses specialized knowledge and encountered repeatedly, these problems become more difficult and less frequent over time. A transparent, decentralized registry tracks the ownership and subsequent transfers of every bitcoin after it is *mined* by its initial owners.”¹³

This statement requires detail. So, in „traditional” banking systems governed by law, governments decide to print money when necessary. But in the situation of the Bitcoin cryptocurrency, there is no printing activity, but one of *discovery*. Computers from all around the world, commanded by users, „extract” Bitcoin, competing with each other. This extraction can become quite competitive

¹⁰ That is, it emanates from an institution, in our situation, the developer of the videogame. The developer has the obligation of money supply, collaborations with trained economists being concluded for such things.

¹¹ It is still not sure if there was only one person or a whole group under this name.

¹² Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, p. 1, source: <https://bitcoin.org/bitcoin.pdf>, last accessed on 22.10.2017.

¹³ David Yermack, *Is Bitcoin a Real Currency? An Economic Appraisal*, Working Paper 19747, Cambridge, Massachusetts, 2013, p. 5.

among users because the more people join the network, the more difficult it becomes to make a profit for each of them. For this reason, users (also called *miners*) must remain highly competitive to continue to receive Bitcoins as a reward for solving the above-mentioned mathematical problems.

Bitcoins extraction is the process of adding records of a new transaction in an electronic platform called *Blockchain*, which acts as a public register of all transactions concluded in the Bitcoin network. New transactions are added to batches or packages called *blocks* every 10 minutes or so, hence the name Blockchain (chain of blocks). This registry is required so that valid transactions can always be confirmed within the Bitcoin network.

To extract Bitcoin, a user needs, of course, a computer connected to the Internet and a mining software such as Bitcoin Miner, BTC Miner, CG Miner, BFG Miner etc. This program uses the computer resources (we are referring to the hardware part, such as the processor, the amount of RAM, the hard disk and the video card) to perform complex mathematical calculations. If a user manages to solve a math problem, he can create a new block and receive a certain number of Bitcoins as a reward, known as *the block reward*. „Every 210,000 blocks or every four years, the block reward is halved. It started from the sum of 50 bitcoins per block in 2009, going down by half (25 bitcoins/block) in 2014.”¹⁴

● **What is the value of a Bitcoin?** On October 26, 2017, a Bitcoin (BTC) was worth about 5,700 US dollars¹⁵, a spectacular growth if we take into account the very low value at launch.¹⁶ This increase is believed to have occurred as a result of the European crisis from 2009 to 2014. It is very important to note that the number of existing bitcoins will not exceed 21,000,000 and the explanation is the following: when the Bitcoin cryptocurrency was launched, the reward was 50 bitcoins/block after discovering 210,000 blocks, so $50 \times 210,000 = 10,500,000$ bitcoins extracted (50% of extraction performed). Therefore, the other part of 50% of the extraction remains, the reward being halved and the difficulty - increasing. Between 2013 and 2016, the reward halved to 25 bitcoins/block after discovering 210,000 blocks, so $25 \times 210,000 = 5,250,000$ bitcoins extracted (75% extraction). Furthermore, from 2016, until 2020, the reward reached 12.50 bitcoins/block after the discovery of 210,000 blocks, so $12.50 \times 210,000 = 2,625,000$ bitcoins to be extracted (87.5% extraction carried out). Similarly, between 2020 and 2024, the reward will reach 6.25 bitcoins/block after discovering

¹⁴ Source: <https://cointelegraph.com/news/how-are-new-bitcoins-created-a-brief-guide-to-bitcoin-mining>, last accessed on 23.10.2017.

¹⁵ Source: <https://www.coindesk.com/price/>, last accessed on 01.11.2017.

¹⁶ In 2010, a user-initiated auction for 10,000 bitcoins was launched on a forum, starting at \$ 50, but no buyer was found. Source: <https://bitcointalk.org/index.php?topic=92.0>, last accessed on 23.10.2017. But in the years to come, things completely shifted: for example, at the beginning of 2011, a bitcoin was the equivalent of a dollar, to reach about \$ 1200 (!) at the end of 2013.

210,000 blocks, so $6.25 \times 210,000 = 1,312,500$ bitcoins to be extracted (94% extraction). And so on, until the bitcoins are exhausted. These calculations are illustrated in the table below¹⁷:

Number of blocks	Bitcoin/block	Year (estimatively)
0	50.00	2009
52.500	50.00	2010
105.000	50.00	2011
157.500	50.00	2012
210.000	25.00	2013
262.500	25.00	2014
315.000	25.00	2015
367.500	25.00	2016
420.000	12.50	2017
472.500	12.50	2018
525.000	12.50	2019
577.500	12.50	2020
630.000	6.25	2021
682.500	6.25	2022
735.000	6.25	2023
787.500	6.25	2024

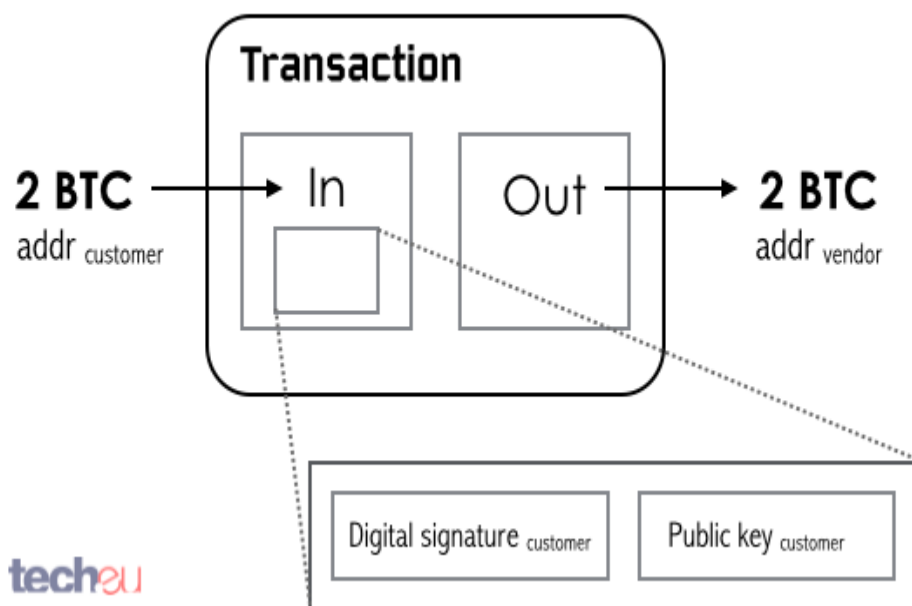
In addition, to calculate how many blocks are extracted per day, we divide the value of 210,000 (blocks) to 4 (years), resulting in 525 blocks/year. Furthermore, because one year has approx. 365 days, the number of the resulting blocks (525) is divided to 365, the result being approx. 1.4 blocks/day.

● **How is the Bitcoin cryptocurrency being used?** Bitcoin is based on a series of *public keys - private keys* relationships to secure transactions. A private key is structured as a secret number that allows the use of Bitcoins. Each user-owned Bitcoin wallet contains one or more private keys that are saved as files. Private keys are mathematically linked to all Bitcoin addresses generated for the wallet. Because these keys allow the user to spend Bitcoins, it's important to keep them safe. Private keys can be stored in computer files, but they can also be printed on paper¹⁸. Public keys are generated by private ones, representing the Bitcoin address (through which Bitcoins can be received).

¹⁷ A much more detailed model of this table can be found at https://en.bitcoin.it/wiki/Controlled_supply, last accessed on 23.10.2017.

¹⁸ A private key is depicted in several characters, summing up letters and numbers, making it very difficult to memorize, for example E9873D79C6D87DC0FB6A5778633389F4453213303DA61F20BD67FC233AA33262.

Note that the Bitcoin protocol is a series of transactions. These transactions are essentially a circulation of different types of data, in the form of *input transactions* and *output transactions*. Input transactions refer to Bitcoin addresses used to send a bitcoin *from* ..., and can only be spent using the private key associated with that address. The output transactions refer to the addresses used to send the bitcoin *to* Each Bitcoin transaction transfers a Bitcoin from one or more inputs to one or more outputs (hence transferring bitcoin from and to one or more addresses). Such a transaction is illustrated in the figure below¹⁹:



2. The advantages and disadvantages of using the Bitcoin cryptocurrency in business relations

- **The first Bitcoin transaction** took place in 2010, when a US user from Florida ordered two pizzas for 10,000 BTC.²⁰ It is noted, however²¹, that the company from which the two pizzas were bought did not directly accept Bitcoins, but

¹⁹ Sursa: <http://tech.eu/features/808/bitcoin-part-one/>, website accesat ultima oara la data de 05.11.2017.

²⁰ On a computer forum, he informed the other members of the transaction: „I just want to report that I successfully traded 10,000 bitcoins for pizza”, source: <https://bitcointalk.org/index.php?topic=137.msg1195#msg1195>, last accessed on 31.10.2017.

²¹ David Yermack, *op. cit.*, p. 6.

designated a broker who agreed to purchase the two pizzas using a credit card (powered by a real currency - most likely US dollars) and, therefore, accept the use of Bitcoins. In fact, much of the trade involving bitcoins continues to be carried out using intermediaries that facilitate the immediate exchange of bitcoins in conventional currencies, as companies have yet to build confidence in this cryptocurrency, especially due to the huge fluctuations that it had met throughout its existence.

Currently, a number of companies accept payment with Bitcoin, such as Overstock (www.overstock.com²²), Expedia (www.expedia.com - one of the world's largest travel companies)²³, Newegg (www.newegg.com, online platform specialized in the sale of computers and computer components)²⁴, Starbucks (the largest chain of cafes in the world) or even the Microsoft giant. We also note that on an international level, the Bitcoin cryptocurrency, even if not regulated by law, is not prohibited either (for example, in countries such as Canada, Mexico, the USA, Japan, Germany, Poland, Italy, France etc.). This is also the case in Romania, although the National Bank of Romania urges to avoid using this currency. Law no. 127/2011 defines only the electronic currency, and Bitcoin does not fall into this category because it is not issued by an entity and, therefore, does not have an issuance authorization from the National Bank of Romania. Meanwhile, in states like Canada, U.S.A. or Kosovo (!), Bitcoin ATMs that allow the purchase and sale of Bitcoins operate, although the ATM name is improper. These machines are not ATMs in the traditional sense and probably use this term due to users' language. Bitcoin machines are always connected to the Internet, allowing the introduction of cash in exchange for receiving Bitcoins as a receipt. These machines look like traditional ATMs but do not connect to a bank account; instead, they connect directly to a currency exchange in and out of Bitcoin.

● **Advantages.** Because Bitcoin currency is decentralized through a distributed *peer-to-peer* (P2P) network²⁵, there is no central server on which its existence depends. Thus, Bitcoin is not subject to any limitations and cannot be closed - an essential feature which translates in the fact that the continuous usage of this cryptocurrency is not subject to any approval, opinion or action by an external authority. Also, confidence is eliminated in configuring and using this cryptocurrency because it does not require trust in an entity for its operation. Each Bitcoin user controls his/her own money directly, without any interference, and

²² Please consult https://help.overstock.com/app/answers/detail/a_id/5794/c/4, last accessed on 31.10.2017.

²³ Please consult <https://www.expedia.com/Checkout/BitcoinTermsAndConditions>, last accessed on 01.11.2017.

²⁴ Please consult <https://promotions.newegg.com/nepro/16-6277/index.html>, last accessed on 01.11.2017.

²⁵ In a P2P network, tasks are distributed to all participants. In such a network there operates a file transfer between interconnected participating computers. Such a network can even reunite hundreds of computers.

is solely responsible for their security and use. As stated above, no third party (for example, a banking institution) needs to be required or, better said, mandated to hold or store the Bitcoins of a person. This feature of Bitcoin eliminates the risks associated with the need to trust the foreign authorities (for example, financial risks for banking institutions - credit risk, interest rate risk, liquidity risk, insolvency risk²⁶), aiming, in the future, to completely eliminate collaboration with centralized authorities everywhere.

Bitcoin owners benefit from anonymity, being hard to trace. Within the Blockchain register, the completed transactions are public, and can be viewed by anyone²⁷, but the addresses do not necessarily have to coincide with the identity of the participants in those transactions, so their personal data is hidden. Regarding anonymous data, Romanian Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data²⁸ provides that this is „data which, by reason of origin or specific mode of processing, cannot be associated with an identified or identifiable person” [art. 3 lit. f)]. Furthermore, in Opinion no. 4/2007, the Working Party Article 29 informs us that a natural person can be considered as being *identified* when, „within a group of persons, he or she is distinguished from all other members of the group”, and the natural person is *identifiable* when, „although the person has not been identified yet, it is possible to do it.”²⁹ A definition of the identifiable person is also found in Law no. 677/2001, namely „that person who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, psychological, economic, cultural or social identity.” In the context of using the Internet, a person can be identified through his computer's IP address, or through a profile on a social network, for example. We were just saying that Bitcoin owners are hard to trace, but not impossible. A way of identifying a user can operate when he or she posts a Bitcoin address on a computer forum. This address can be associated with that user's name and, in some cases, with his/her email address or profile on a social network.

Using Bitcoin cryptocurrency, the users have control of their own money, unlike the normal currency that a person usually deposits in a bank. We usually place our salaries and savings on a bank account and withdraw money from this

²⁶ Please consult Lucian Săuleanu, Lavinid Smarandache, Alina Dodocioiu, *op. cit.*, p. 143 and following.

²⁷ Please consult <https://blockchain.info/>, last accessed on 03.11.2017.

²⁸ Published in Official Gazette, Part I no. 790 from 12th of december, 2001.

²⁹ Working Group Article 29 is an independent European consultative body for the protection of personal data and privacy, and was created on the basis of Art. 29 of Directive 95/46 / EC. Therefore, the acts drafted by it are purely consultative, and are not binding on EU member states. Opinion no. 4/2001 can be consulted on https://www.google.ro/url?sa=t&rct=j&q=&es_c=s&source=web&cd=1&ved=0ahUKEwjXwrnR76HXAhVBAXoKHU6bDYEQFggIMAA&url=http%3A%2F%2Fwww.dataprotection.ro%2Fservlet%2FViewDocument%3Fid%3D288&usq=AOvVa3hbkD20dAykEhu6bjHoXnu, last accessed on 03.11.2017.

account according to our needs. Thus, we have the impression that banks are just custodians/depositories of our money. Well, this is wrong. Our money is now owned by the bank. They can do almost everything they want with it - for example, to create new money. Here's how: let's suppose there are 100 euros in X's bank account. But the bank keeps (holds) only 3 euros and lends 97 euros to Y to buy a good. In the bank's computer system, X still appears to have 100 euros in his account, but now Y has 97 euros in his account, for which there is no guarantee that Y will return them - just his promise. These are new money created as debt. When these 97 euros are spent, for example, in a store, the store owner, in turn, submits them to another bank, from where they are borrowed again to other people, each with numbers in their accounts showing that they have money. Therefore, X's 100 euros have multiplied, with thousands now in the banks' computer system. This process of borrowing far more money than a bank can hold in cash is called *fractional reserve banking*. Basically, banks have the right to give money on debt a certain percentage of times more than they physically have in their account. This is avoided by the use of Bitcoin cryptocurrency.

Regarding the taxing of operations involving the Bitcoin cryptocurrency, it is important to note that, even in states where there are still debates on the situation of Bitcoin legalization, it is usually subject to taxation. According to a specialist, in Romania, „from an economic point of view, transactions with Bitcoin behave the same way as transactions with foreign currency.”³⁰ For example, when a user buys a good in Euro, in the accounting system the payment will not be recorded in Euro effectively, the euro cash-in being actually expressed in Lei at a currency rate usually set by the National Bank of Romania. When performing the same transaction with Bitcoin, the same specialist informs us that „this is similarly done until the determination of the Bitcoin-RON exchange rate, which requires a credible institution accepted by the business partners.”³¹ In the Euro case, the exchange rate is regulated by the NBR. In the Bitcoin case, this exchange rate is not regulated by a state institution. Thus, „when a Bitcoin cashing is made, Lei will be registered in the accounting system at a rate that is calculated as an average of the rates from the main Bitcoin exchanges. Subsequently, depending on the entity's tax regime, the taxes on these cashings will be calculated and payed”³².

Most of all, Bitcoin is used in the Hidden Internet - that portion of the Internet that is not accessible to the general public through a regular browser. We have talked about the Hidden Internet on another occasion³³, so let's just say that:

³⁰ Daniel Cornea, *Bitcoin. Cum impozitezi un algoritm?*, article published in „Today Software Magazine”, No. 52, source: <https://www.todaysoftmag.ro/article/2101/bitcoin-cum-impozitezi-un-algoritm>, last accessed on 03.11.2017.

³¹ Ibidem.

³² Ibidem.

³³ Selișteanu Cătălin, *Internetul ascuns și contractul în formă electronică*, article published in „Revista Română de Drept Privat, No. 2/2016, p. 162.

1) it is often used to get information that is not commonly available, but also to commit criminal offenses, stepping on a land of illicit where activities seem to escape from the supervision of the law and 2) a special browser is needed to access it, because the websites that compile it have a completely different address from the usual ones, through which their identity is hidden (and which always change in order to not be detected). In the Hidden Internet, illegal businesses flourish, many of them thriving overnight. Here, one can buy prohibited weapons and munitions, fake papers, dangerous substances or drugs. It is no wonder, therefore, that in most of the cases, the transactions for these goods are drawn with Bitcoin, a currency who, not being emitted by a state institution, is not traceable, is anonymous³⁴. That's why many transactions „remain in the shadows,” far from the eyes and observations of the authorities.

● **Disadvantages.** Even though there are traders who accept payment with Bitcoin on the international scene, they still make up a minority, the currency being used rather little in business than the normal currency for the following reasons:

a) many people are not yet familiar with the *cryptocurrency* term, and if this term is not found in most of the national legislation, acceptance and later use becomes even more difficult. In this regard, in order to provide accurate information about Bitcoin, it is necessary to consult the specialized literature and websites that are often less credible than the word of the law;

b) the big companies that accept Bitcoin payment need to invest a lot of time and effort in the training of their employees regarding the use of this cryptocurrency. With such training, the staff of these companies will be of great help to customers in understanding how Bitcoin transactions work;

c) the difficulty of purchasing;

Nowadays, the discovery of new Bitcoins has become quite difficult because there are a few in existence (and in the future there will be fewer), and an investment in a high-performance computer to be used for this purpose cannot be made by anyone. In addition, the power consumption needs to be taken into consideration, as this computer must be turned on for a long time to „mine”. In another speech, there is a limited number of Bitcoins, and the demand is increasing. This aspect needs to be followed in the future.

d) its fluctuating value, which inspires distrust on traders (on October 26, 2017, 1 BTC was worth about 5.700 US dollars; surprisingly, on November 11, 2017, it was worth about 6.444 US dollars³⁵);

As you can see, the value of a single Bitcoin is very high. How would a merchant display, then, the Bitcoin price of a product that costs, say, 1 Euro? Taking the example above, if 1 BTC = 6.444 USD, then 1 USD = 0.000155 BTC. It is unlikely that we will see such a price.

³⁴ There are websites that accept payment *only* with the Bitcoin currency.

³⁵ Source: <https://www.coindesk.com/price/>, last accessed on 01.11.2017.

e) the danger of cyber attacks;

It is recommended for the Bitcoins that are stored in a person's computer system to be secured by various means, such as passwords, biometric readers, and multiple signing transactions, as password stealing or unlawful intrusion into the user's computer can occur at any time. It is noted that in recent years, as a result of the unprecedented evolution of electronic devices, the security of accounts in which users store their Bitcoins (called *Digital Wallets*) has become a „major difficulty for the Bitcoin industry.”³⁶ Moreover, human errors can occur, such as private key loss and, therefore, the failure to access one's personal Digital Wallet (Bitcoins do not disappear, they are present in the wallet, but become uncontrolled and, therefore, lost forever) or errors of the user's computer (hard disk drive malfunctions) with the same effect.

f) Bitcoin has not yet matured, and for its acquisition and circulation, many programs and services are in development.

3. Conclusions

„Bitcoin, like cryptocurrencies generally, is a complex scheme. Its implementation involves a combination of cryptography, distributed algorithms and incentive driven behaviour³⁷. Moreover, these are recent phenomena and there is thin academic literature, a nascent policy debate and limited understanding from the public about cryptocurrencies overall.”³⁸

In the Bitcoin network, users trade directly, unlike traditional payment systems, where different institutions (such as banks) intervene in the relationship between the payer and the payee. Each transaction is chronologically recorded in a public register, called blockchain, by the network participants. There is a reward for blockchain transactions, and Bitcoin participants compete (by solving a math problem) to make recordings. The reward consists in giving Bitcoins.

For Bitcoin to get out of the „unusual” or even „strange” state and establish itself as a trustworthy currency, its daily value must become more stable. At the moment of speaking, its immense fluctuation makes us think about it as a risky investment, rather than a means of payment. Also, Bitcoin faces difficulties due to the prices of goods expressed in decimal values (in our example, 0.000155 BTC), the reduced number of traders who accept it and the complicated process of obtaining it. The relatively high level of computer literacy needed to use this currency is a subsidiary obstacle to its widespread adoption. Finally, having no

³⁶ David Yermack, *op. cit.*, p. 14.

³⁷ A driven behaviour is a methodology in which an application or computer program is designed to describe how it should behave towards an external observer.

³⁸ Anton Badev, Matthew Chen, *Bitcoin: Technical Background and Data Analysis*, Finance and Economics Discussion Series, Division of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington D.C., 2014, p. 3.

connection with the computer systems of banks and, therefore, not having any protection, Bitcoin is vulnerable to cyber attacks.

The Bitcoin „phenomenon” has grown especially over the past two years, experiencing an unprecedented growth and being supported by several companies on the international scene. The result is the possibility of buying goods and services using the Bitcoin currency. But the most important thing is the state support, which at present either does not exist or is situated in the moment of granting, requiring time. Beneficial or harmful, an innovation or a risk, an evolution or an nvolution, Bitcoin is still in a full state of affirmation which requires attention. A specialist must be contacted when using it and its monitoring must be permanent, so it is interesting to see how it will be received or seen in the future. Will its value increase or collapse? Will Bitcoin mining still be profitable? Will Bitcoin tranzactions become a habit? These questions can only be answered following a careful oversight of the future events that will take place around the Globe.

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Tax Mediation in Portuguese Legal Ordinance: *De Iure Condendo*(?)

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Abstract

Mediation is an ADR which falls within the category of means of self-determination and which presupposes the intervention of a third party a mediator whose function is to bring the parties together in a dispute in order to conclude an agreement between them. In the Portuguese legal system, it is not possible to mediate disputes between taxable persons and the Tax Administration. There are several obstacles to the mediatability of litigation in tax matters. In particular, we are thinking about the principles of legality, the unavailability of the tax credit, and equality. In this paper, it is sought to ascertain if these obstacles are absolute, not allowing any openness to the legality of legal-tax disputes, or if, on the contrary, they are not absolute, making feasible the thinking of creating a relation between Law Taxation and mediation. Adopting a method based essentially on dogmatic analysis, it is believed that it is possible to recognize the legality of legal-tax disputes, albeit within certain limits. The mediation will allow a closer approximation between the parties - taxable person and the Tax Administration - thus contributing to the creation of a greater ethical-tax awareness and, in this way, to the reduction of litigation.

Keywords: litigation, mediation, legality, unavailability, equality.

JEL Classification: K34; K41.

1. Introductory note

The present text is entitled "Tax mediation in the Portuguese legal system: *de iure condendo* (?) " and we will focus on the possible mediation of litigation in legal and tax matters. Indeed, it is believed that mediation as a means of settling disputes may, on the one hand, to allow faster resolution of disputes involving the Tax Authorities and taxable persons and, on the other hand, to promote a closer approximation of the parties. To this extent, because it reconciles the parties, mediation can exercise a preventive function of new tax disputes.

Our investigation presupposes, essentially, a dogmatic analysis. In this context, we will identify and reflect on some of the positions of the doctrine, not only at the national level (Portuguese legal system), but also at the international level. Based on these positions, we will reflect on the possible mediation of litigation in tax matters. Reality, that does not exist in Portugal.

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Let us divide the present work into two fundamental parts. A first part will be called “Mediation in tax matters: what future for the Portuguese legal system?”. This part, in turn, is subdivided into four sub-parts: the first subpart will have as study object the “Notion of mediation: in particular, the distinction of related figures” and in it we will present a notion of mediation and distinguish it from others means of settling disputes such as conciliation and arbitration and the second subpart will have as its sub-theme “Obstacles to the mediatability of tax disputes and their overrun”, and we will now present the main obstacles to the mediatability of tax disputes and the respective way of overcoming. This second subpart will be divided into three sections, which take the following name: “The principle of legality”; “The principle of the unavailability of the tax credit”; “The principle of equality”. The third subpart is entitled “The constitutional requirement of the mediation of legal and tax litigation” and it seeks to assess the constitutional requirement of tax mediation. Finally, the fourth subpart has as its object “The process of mediation: a proposal *iure condendo*” and here is a proposal for a possible process of tax mediation. The second part of this paper will be titled “Tax mediation from a comparative law perspective: the American and Italian case - a brief reference” and a brief study of comparative law will be made. In the end, we will present the main conclusions of the present study.

2. Mediation in tax matters: which future for the Portuguese legal system?

2.1. Notion of mediation: the distinction of related figures

Mediation is an alternative means of settling disputes ² (MARL/ADR), together with conciliation and arbitration, among others ³. As to its classification

² The expression alternative dispute resolution mechanism was born in the USA in 1976 to mean a set of means of resolving litigation alternative to traditional means, such as recourse to State Courts (on the historical evolution of alternative means of dispute resolution, among others, can be seen Jerome T Barrett and Joseph P Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (Jossey-Bass: San Francisco, 2004); Carrie Menkel-Meadow, *Roots and Inspirations - A Brief History of the Foundations of Dispute Resolution*, in “The Handbook of Dispute Resolution”, ed. by Michael L. Moffitt and Robert C. Bordone (Jossey-Bass: San Francisco, 2005), pp. 13 a 32 (p. 13 a 32). Em especial, no ordenamento jurídico português, entre outros, pode ver-se Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios* (Almedina: Coimbra, 2014), em especial pp. 34 e 35.

³ With regard to mediation, conciliation and arbitration, it can be said that alternative dispute resolution means are the traditional means of alternative dispute resolution. However, there are others that have been implemented in various legal systems and which sometimes result in a perfect marriage between two of the traditional means of alternative dispute resolution. By way of example, the following alternative means of dispute resolution: o *mini trial*, o *private trial*, o *court annexed arbitration*, o *summary jury trial*, o *neutral listener*, o *neutral expert factfinding*, *med-arb* or *arb-med* (for further developments on these newer alternative dispute resolution means, it can be seen,

as an alternative means of settling disputes, there are no doubts. In fact, it is commonly accepted that mediation is a MARL. Less consensual, however, is what must be considered by true mediation, because in this respect there are several understandings of specialist doctrine, particularly when one seeks to distinguish between mediation and conciliation. Let us look, therefore, some positions of the thinkers of Law.

ÁNGELES DE PALMA DEL TESO⁴ defines mediation as a technique whereby a third party, mediator, seeks to approximate the position of the parties by promoting the exchange of different points of view and the composition of interests, exercising an active role in resolving the dispute, insofar as it can propose to the parties the content of an agreement which satisfies both parties. In an approximate sense, RAFAEL FERNÁNDEZ MONTALVO/PILAR TESO GAMELLA/ÁNGEL AROZAMENA LASO⁵, argue that mediation is a procedure by virtue of which a third-party, a mediator contributes to the settlement of a dispute between parties, seeking their approximation, through the composition of interests, and may even make proposals for agreement. EDUARD VINYAMATA⁶, in turn, defines mediation as a process of communication between the parties that requires the help of an impartial mediator who seeks the parties themselves to reach an agreement. Finally, RICARDO CASTILHO argues that mediation is based “on the art of language”⁷, with a view to re-establishing communication between the interveners in a given case. The mediation involves a third mediator, whose aim is to “help the parties to reach a consensus, using psychological methods, so that both conclude that they have somehow been successful at the end”⁸, but without being able to make compromise proposals.

The main difference found in the notions above proposed by the doctrine lies in the power of intervention of the third mediator. For some authors, the mediator plays a more active role and may even make proposals for agreement (thesis defended, among others, by ÁNGELES DE PALMA DEL TESO) for other authors, but in mediation the third mediator can only seek to bring the parties

inter alia Zulema D. Wilde and Luis M. Gaibrois, *O Que É a Mediação?*, ed. by (Trad.) Soares Franco (Agora Publicações, Lda.: Lisboa, 2003), pp. 21 a 24.

⁴ Ángeles de Palma del Teso, *Las Técnicas Convencionales En Los Procedimientos Administrativos*, in “Alternativas Convencionales En El Derecho Tributario: XX Jornada Anual de Estudio de La Fundación «A. Lancuentra»” (Marcial Pons: Madrid, 2003), p. 15 a 47 (p. 38).

⁵ Rafael Fernández Montalvo, Pilar Teso Gamella and Ángel Arozamena Laso, *El Arbitraje: Ensayo de Alternativa Limitada Al Recurso Contencioso-Administrativo* (Consejo General del Poder Judicial Madrid, 2004), pp. 31 e 32.

⁶ Eduard Vinyamata, *Aprender Mediación* (Paidós: Barcelona, 2003), p. 17.

⁷ Ricardo Castilho, *Mediação E Conciliação E a Efetividade Dos Direitos Fundamentais*, in “La Solución Extrajudicial de Conflictos (ADR) - Estudios Para La Formación En Técnicas Negociadoras”, ed. by Patricia Blanco Díez (Aranzadi: Navarra, 2011), pp. 37 a 44 (p. 42).

⁸ Ricardo Castilho, *Mediação E Conciliação E a Efetividade Dos Direitos Fundamentais*, in “La Solución Extrajudicial de Conflictos (ADR) - Estudios Para La Formación En Técnicas Negociadoras”, ed. by Patricia Blanco Díez (Aranzadi: Navarra, 2011), pp. 47 a 44 (p. 42).

together without having any power, regarding the proposed agreements (argued, among others by RICARDO CASTILHO).

In fact, the main difficulty lies, as mentioned above, in the distinction between mediation and conciliation. The two concepts are sometimes confused. Indeed, some authors consider mediation what other authors consider conciliation. The main complaint lies precisely in the power of intervention of the third mediator or conciliator. As a rule, those authors who defend a greater power of intervention by the mediator, defend a lesser power of intervention of the conciliator and those who defend a greater power of intervention of the conciliator, advocate a lesser power of intervention of the mediator.

Thus, there can be no unanimous concept of mediation, since there is no unanimity in the doctrine, nor in the legislation itself, which is often confused in this respect. The law of Portuguese mediation (LMP)⁹, for example, defines mediation as an “alternative form of dispute resolution, conducted by public or private entities, whereby two or more parties to a dispute voluntarily seek agreement with the assistance of a conflict mediator”¹⁰, the mediator being “a third party, impartial and independent, deprived of powers of imposition on the media, assisting them in the attempt to construct a final agreement on the subject-matter of the dispute”¹¹. Already in the law of the Spanish mediation (LME)¹², mediation has been conceptualized as being “aquel medio de solución de controversias, cualquiera que sea su denominación, en que dos o más partes intentan voluntariamente alcanzar por sí mismas un acuerdo con la intervención de un mediador”¹³.

The notion of mediation and mediation, provided for in the Portuguese legal system, seems to us to admit a greater power of intervention by the mediator, although it does not impose it, than the notion provided for in the Spanish legal order, which reinforces the idea that the parties must catch up “por sí mismas” an agreement. It seems to me, therefore, that the criterion of the power of intervention of the third party is not sufficient to distinguish between mediation of conciliation and thus to establish a less equivocal concept of mediation.

Regardless of the considerations *above* mentioned, we share the understanding of CÁTIA MARQUES CEBOLA¹⁴ when she refers the distinction between mediation and conciliation, that the difference between the two figures should not be confined to purely methodological or scientific questions. This is because, given the flexible nature of both litigation instruments, it can not be *ab initio* to describe with exactness and certainty what kind of methodologies or

⁹ Approved by law no 29/2013 april 19.

¹⁰ Article (2) al. a), of LMP.

¹¹ Article (2), al. b), of LMP.

¹² Approved by Spannish Law no 5/2012, july 6.

¹³ Article (1) by LME.

¹⁴ Cátia Marques Cebola, *La Mediación* (Marcial Pons: Madrid, 2013), p. 163.

techniques the mediator, or conciliator, will adopt in the context of the process of mediation, or conciliation.

Mediation must be distinguished from conciliation in that it has a procedural nature as opposed to the first. In fact, like MARIANA FRANÇA GOUVEIA¹⁵, we believe that conciliation, unlike mediation, is conducted by those who have the power to adjudicate, that is, by the judge, or arbitrator of the case. Mediation, unlike conciliation, is therefore presided over by a third party who, frustrated with obtaining the agreement, has no further contact with the process.

In this way, mediation can be defined as an alternative means of settling disputes involving a neutral, impartial third party whose purpose is to bring the parties together in order to reach an agreement and to suggest agreements, but that, when mediation is unsuccessful, has no contracting authority over the case. Thus, the concept of mediation is carved moving away, in our understanding, by the reasons given from the concept of conciliation. In the Portuguese legal system, it seems, even in most cases, that the legislator distances the mediation of the process, bringing it closer to conciliation. In fact, the attempt to conciliate normally takes place in a judicial procedure¹⁶.

The mediation is not confused, therefore, also, with the concept of arbitration. In fact, arbitration is an alternative means of settling disputes that requires the intervention of a third party to decide, with force of *res judicata*, the dispute between the parties. The arbitrators therefore exercise, like the Judge of the Court of State, a true and proper judicial function¹⁷. Contrary to mediation, whose possibility of consecration in the legal-tax system is equated in this paper, arbitration is already a reality in the Portuguese legal system. Arbitration in tax matters was

¹⁵ Mariana França Gouveia, *Curso de Resolução Alternativa de Litígios* (Almedina: Coimbra, 2014), p. 23.

¹⁶See Article 594 (3) of the Code of Civil Procedure (CPC), which does not say that the conciliation attempt is presided over by the judge. The same is for administrative proceedings, Article 87c (3) of the Code of Procedure in the Administrative Courts. Also in the arbitration jurisdiction, the Regulation of the Information, Mediation and Arbitration Center of the Notaries' Order (available in <http://www.notarios.pt/NR/rdonlyres/0F966738-9F4E-4627-92FC-55FC4F63E553/3963/RegulamentoArbitragem1.pdf>, with final access on 10/18/2017) enshrines in Article 28, the possibility for the parties to grant conciliatory powers to the Arbitral Tribunal.

¹⁷Portuguese constitutional jurisprudence has been directed in the sense that the arbitrators exercise a jurisdictional function. In fact, the arbitrators exercise a judicial function insofar as they declare the law of the case, that is, the 'arbitrator' carries out a legal function by which it declares the law (jurisdiction), although it can not execute it, rather than what happens with the 'Judge-employee'. Since 'this evident absence of potestas' on the part of the arbitrator, while not representing or embodying the legal-political organization of the State, is compensated with the 'auctoritas' (...) The decisions of the arbitrator are true and own jurisdictional decisions, with authority "(citation of Judgment of the Constitutional Court no. 52/92 of 03/14/1992, available online at www.tribunal-constitucional.pt last accessed 10/18/2017). Also in Judgment 62/91 of 03/22/1991, the Spanish Constitutional Court held that arbitration constitutes "un equivalente jurisdiccional, mediante el cual las partes pueden obtener los mismos objetivos que con la jurisdicción civil" (citation of the judgment available at www.tribunalconstitucional.es, last accessed 10/18/2017).

instituted in Portugal by Decree-Law No. 10/2011, of January 20¹⁸, targeting the legislator, with the consecration of this regime, three main objectives: i) to print a greater speed in the resolution of disputes that oppose the Tax Administration to the taxable person; ii) reduce the number of cases pending before administrative and tax courts; and, finally, iii) reinforce the Fundamental Right of access to the Law and the Courts.

In legislative terms, the only reference to mediation in tax matters known is contained in Article 124 (4) (o) of Law No 3-B / 2010 of 28 April authorized the consecration of a legal regime of arbitration in tax matters in our legal system and in which reference was made to a possible appointment of mediators or conciliators in the regime of tax arbitration centers¹⁹.

2.2. Obstacles to the mediatability of tax disputes and their overruns

As it was mentioned in relation to the concept of mediation, this is a means of settling disputes aimed at reaching an agreement, or more specifically, a transaction ²⁰ which, in the sands in which we move, must be established between the Tax Administration and the taxable persons. In this context, it can be

¹⁸ About the legal regime of tax arbitration we have already had the opportunity to look at other works. Among others, see Cláudia Sofia Melo Figueiras, *Arbitragem: A Descoberta de Um Novo Paradigma de Justiça Tributária?*, in "A Arbitragem Administrativa E Tributária - Problemas E Desafios", ed. by Isabel Celeste Monteiro da Fonseca, 2.^a edição (Almedina: Coimbra, 2013), p. 81 a 102; Cláudia Sofia Melo Figueiras, *Arbitragem Em Matéria Tributária: O Modelo Português*, in "Derecho, Filosofía Y Sociedad: Una Perspectiva Multidisciplinar", ed. by José Luis Castro Fírvida and Maria Victoria Álvarez Buján (Andavira: Santiago de Compostela, 2015), p. 303 a 317. In addition to our work, many other authors have been studying the subject in our legal system. See, among others, Jorge Lopes de Sousa, *Algumas Notas Sobre O Regime Da Arbitragem Tributária*, in "A Arbitragem Administrativa E Tributária - Problemas E Desafios", ed. by Isabel Celeste Monteiro da Fonseca, 2.^a edn (Almedina: Coimbra, 2013), pp. 227 a 242; Tânia Carvalhais Pereira, *Aspetos Práticos*, in "Guia Da Arbitragem Tributária", ed. by Nuno de Villa-Lobos and Mónica Brito Vieira (Almedina: Coimbra, 2013), pp. 63 a 87; Nuno Villa-Lobos and Tânia Carvalhais, *Arbitragem Tributária: Breves Notas*, in "A Arbitragem Administrativa E Tributária - Problemas E Desafios", ed. by Isabel Celeste Monteiro da Fonseca, 2.^a edn (Almedina: Coimbra 2013), p. 375 a 388.

¹⁹ In addition, in 2009, the Superior Council of the Administrative and Tax Courts and the Center for Administrative Arbitration signed a memorandum of understanding with the purpose of promoting the alternative resolution of tax disputes through the creation of a structured network of commissions conciliation, mediation and consultation, agreeing to propose to the Ministry of Justice legislative and regulatory changes for this network to be created.

²⁰ According to Luiz Dias Martins Filho/Luís Inácio Lucena the transaction is an agreement which is based on mutual concessions by the parties in order to reach a point of common interest which allows them to put an end to a conflict of interests or a dispute (Luiz Dias Martins Filho and Luís Inácio Lucena Adams, *A Transação No Código Tributario Nacional (CTN) E as Novas Propostas Normativas de Lei Autorizadora*, in "Transação E Arbitragem No Âmbito Tributário - Homenagem Ao Jurista Carlos Mário Da Silva Velloso", ed. by Oswaldo Othon de Pontes Saraiva Filho and Vasco Branco Guimarães (Editora Fórum: Belo Horizonte, 2008), p. 15 a 42 (p. 18)). In this case, the transaction is intended to end a litigation between the Tax Administration and taxable persons.

said that the agreements, in this case in particular the transaction, are real tax contracts, or in a broader sense, contracts in tax matters²¹.

Since mediation is aimed at establishing an agreement between those subjects, the establishment of mediation in tax matters in our legal system is not seen very favorably First, because the General Tax Law (LGT) in article 36, paragraph 2, states that "The essential elements of the tax legal relationship can not be changed by the will of the parties" and in paragraph 3, of the same article, which "The tax administration can not grant moratoria in the payment of tax obligations".

In fact, there are several obstacles that can arise to the mediability of legal-tax disputes. It is enough to think of three fundamental principles that are part of our legal-tax system, ie the principle of legality, the principle of equality and the principle of the unavailability of tax credit²².

Thus, the main obstacles to mediation in tax matters are of a principological nature. However, as will be seen, such obstacles in the field of principology do not and can not constitute an impediment at all to the mediability of tax disputes. Furthermore, it seems to me that the Constitution of the Portuguese Republic (CRP) itself does not prohibit, but rather requires the existence of alternative means of dispute resolution in tax matters, such as mediation.

2.2.1. The principle of legality

The principle of tax legality implies that the essential elements of taxes, as well as the general regime of taxes, are governed by the law of the Assembly of the Republic or authorized government decree law. Law to which the Tax Administration is bound by virtue of the principle of legality of the performance of Public Administration. A rigid understanding of this principle seems to remove, at the outset, any margin of consensus of the Tax Law.

However, it is not possible today to understand the principle of tax legality and the performance of the Administration in an absolutely rigid way and that prevents any margin of consensus between the Tax Administration and the taxpayer. Thus, it is understood that the principle of tax legality will be respected provided that the act constituting the use of means of achieve consensus , such as mediation, in the context of tax matters, derives from a law of the Assembly of

²¹ Regarding the tax contracts, is recommended José Casalta Nabais, *Contratos Fiscais - Reflexões Acerca Da Sua Admissibilidade* (Coimbra Editora: Coimbra, 1994).

²² How sustains José Juan Ferreiro Lapatza, when defending the introduction of consensual means in the scope of the Tax Law, soon arise several voices that ferociously defend the legality, the equality and the general interest (José Juan Ferreiro Lapatza, *Terminación Convencional de Los Procedimientos Inspectores*, in "Alternativas Convencionales En El Derecho Tributario: XX Jornada Anual de Estudio de La Fundación «A.Lancuentra»" (Marcial Pons: Madrid, 2003), pp. 315 a 325 (p. 324)).

the Republic or a decree-law of the duly authorized Government, which must consecrate the object of mediation; the requirements and impediments to the exercise of the function of mediator; the rules of the mediation process; principles applicable to the process; the costs of mediation; and, finally, the legal effects of the transaction obtained in mediation.

We believe, moreover, as some doctrine maintains, that “[if] the tax legality arose, historically, as a way of guaranteeing the participation of citizens in the definition of the taxes that would be required of them, in modern representative democracies, agreements between the Tax Authorities and the taxpayer translate, in some way, the resumption of citizens' consent to taxation no more generally, but in relation to each concrete situation”²³. In this sense, the agreement may be considered, along with the principle of tax law, as a way of providing consent for taxation. The agreement thus emerges as an ally of the principle of tax legality because it reinforces it as a guarantee of the people's consent to taxation.

Therefore, with mediation and the possibility of entering into an agreement in this context, there is no risk, in our understanding, of a collision with the principle of tax legality, as there is no risk of collision with the principle of legality of the Administration's performance, because if the mediation is provided for by a law of the Assembly of the Republic or an authorized government decree-law, in accepting to submit a dispute to a mediator, the Tax Administration is exactly in compliance with the regulations to which it is expressly bound.

2.2.2. The principle of the unavailability of the tax credit

The principle of the unavailability of the tax credit, which is a manifestation of the principle of tax legality, prohibits any margin forming the object of the tax legal relationship, meaning that the tax obligation is an *ex lege* obligation, the object of which is unavailable, and is subject to the will of the law and not of the parts that intervene in it. A rigid understanding of this principle also removes the admissibility of mediation from the scope of Tax Law. Nevertheless, this principle can not be²⁴.

First of all, because in our legal system, legal regulation itself has shown some flexibility in this principle. In fact, it is the law itself that, given the need to adapt legal-tax legislation to the practical-factual reality, has established legal solutions that give some elasticity to the principle under analysis. It is enough that we think of article 36, paragraph 5, as well as of article 37, both of LGT, which

²³ Onofre Alves Batista Junior, *Transações Administrativas - Um Contributo Ao Estudo Do Contrato Administrativo Como Mecanismo de Prevenção E Terminação de Litígios E Como Alternativa À Atuação Administrativa Autoritária, No Contexto de Uma Administração Pública Mais Democrática* (Editora Quartier Latin do Brasil: São Paulo, 2007), p. 412.

²⁴ In this sense, see Joaquim Freitas da Rocha, *Lições de Procedimento E Processo Tributário*, 5.^a edn (Coimbra Editora: Coimbra, 2014), p. 433.

design the contract institute, in particular the tax contracts, for our legal-tax system. Accordingly, the abovementioned provisions, in particular Article 37 (2) of the LGT, open the possibility for the Administration to conclude agreements, provided that the principles of legality, equality, good faith and credit unavailability are safeguarded tributary.

It should be noted, moreover, that it is the law itself that has admitted in our legal system spaces for achieve consensus. It is enough to think about the contractualisation of the concession of fiscal benefits in the scope of investment projects; agreements on transfer pricing; and, more recently, in the approval by Decree-Law no. 151-A / 2013, of October 31, of a set of exceptional measures of recovery of debts to the Tax Administration, allowing the waiver or reduction of payment of interest on arrears, compensatory interest and costs of the enforcement proceedings in cases of total or partial payment of capital debt, as well as mitigation of the payment of fines associated with non-compliance with the duty to pay taxes.

However, even if it is understood that the principle of unavailability of the tax credit constitutes an insurmountable impediment to the consensus in the Tax Law, it can always be said that when entering into agreements, through mediation, with the taxable person, the Tax Administration does not have to dispose of the tax credit. In fact, the conclusion of the agreement may focus on several other aspects that form the legal tax relationship. We are thinking, for example, of the more open moments of the Tax Administration, that is, when it acts under a greater power of conformation, as well as in the area of ancillary obligations, both fertile fields, in our understanding, in terms of consensualisation.

2.2.3. The principle of equality

The principle of tax equality, which has as its result the principle of taxable capacity, in the field of taxes, has an underlying idea of generality and universality, according to which all citizens are bound to the Fundamental Duty to pay taxes, but based on their ability to pay. In addition, the principle of equality of taxation has as a result, in the scope of fees and other contributions, the principle of equivalence, according to which the value of taxes should be adjusted to the costs that the taxable person generates in the Administration, or benefits provided by the Administration.

The principle of equal treatment by the Administration requires that the Administration treat taxpayers in a similar situation and in an unequal situation as those who are in a different situation. It has been thought that admitting to consensus in the Tax Law is a risk to ensure compliance with the principle of tax equality and equality of action of the Tax Administration.

In fact, there will be no risk to the principle of equality if transparency in the whole process of mediation is ensured, in particular through publicity. In fact,

any process of mediation in tax matters should be shaped by the principle of publicity, in particular the agreement between the Tax Administration and the taxable person. In addition, the consensualisation allows a greater exchange of information between the taxable person and the Tax Administration, thus favoring a taxation more in accordance with their economic situation, or with the benefit obtained from the action of the Administration ²⁵.

2.3. The constitutional requirement of the mediation of legal-tax disputes

In short, for the reasons set out above, the three principles analyzed above do not represent an impediment at all to the mediatability of legal-tax disputes. It seems to me, moreover, that a very careful reading of the Constitution of the Portuguese Republic, which does not deny consensualisation in tax matters, seems to even admit it. It is enough that we pay attention, in a coordinated way, to the Right to Participate, on the one hand, and the objectives of our tax system, on the other hand, as well as the Fundamental Right of Access to Law and Courts, provided for in Article 20., of our Constitution.

In effect, Article 267 (1) of the CRP states that the Public Administration, the Tax Administration, has the duty to "ensure the participation of the interested parties in their effective management". A careful reading of the legal incisive refers us to the admissibility of consensual instruments, such as mediation, not only in Administrative Law, but also in Tax Law. The participation of those interested in the exercise of the administrative function is a fundamental legal requirement, which obliges administrative bodies not only to prevent or limit the right to participate, but also to promote their fulfillment in the legal system. Applied to jus-tax relations, the Right of Participation should have as a consequence the participation of citizens in the realization of the public interest in tax matters.

In turn, Article 103 (1) of the CRP enshrines the fundamental objectives of the tax system, which are essentially geared to meeting the financial needs of the State and other public entities and a fair distribution of income and wealth. From a joint reading of Article 103 (1) with the abovementioned Article 267 (1) of the CRP, it seems that citizens' participation is a fundamental precondition for financial needs of the State and other public entities, as well as to make a fair distribution of the income and wealth that exist in our legal system. The achievement of the fundamental objectives of the tax system implies the right of citizens to participate in this same achievement. First of all, because they are directly interested parties and because the Constitution assures them of this participation. It

²⁵ Luís María Romero Flor, *Las Actas Con Acuerdo En La Ley General Tributaria Y En El Derecho Comparado* (Universidad de Castilla-la Mancha, 2010), p. 84, disponível em <https://ruidera.uclm.es/xmlui/bitstream/handle/10578/1444/LAS_ACTAS_CON_ACUERDO_EN_LA_LEY_GENERAL_TRIBUTARIA_Y_EN_EL_DERECHO_COMPARADO.pdf?sequence=1>, last access in 18/10/2017.

is therefore assumed as a fundamental task of the State to guarantee this participation, creating the necessary conditions for a good relationship between the Tax Administration and taxable persons. In this way, it is the State, in the exercise of the legislative function, to enable the effective participation of citizens in the pursuit of the public interest in tax matters. Participation is also a fundamental condition for a taxation that is more in line with the taxpayer's ability to pay, or with the benefit that the taxpayer derives from the Administration's actions, which seems to promote a greater tax justice²⁶.

But not only the Right of Participation is a constitutional requirement of consecration of mediation in the legal-tax system. It is enough to think of the Fundamental Right of access to the Law and to the Courts, provided for in article 20, of the CRP, and it should be interpreted as a current one. It has been stated that the Fundamental Right of access to the Law and the Courts has two fundamental dimensions, namely the Right of access to the Right and the Right of access to the Courts.

The first dimension of this Fundamental Right, that is to say, access to the Law, includes all means of access, or practice of law, that are not jurisdictional. We consider, in fact, that Article 20 of the CRP can not be interpreted as consecrating a totally judicial State, that is, as a State in which the Law is realized only through access to the Courts. In fact, access to law goes much further than this. The guarantee of access to the law can and should be done in several ways. It is our understanding, given the plurality of means that today allow access to the law, that a current interpretation of this dimension of the Fundamental Right of access to the Law and to the Courts must be made. On the basis of this current interpretation, of course, in the material content of access to the law, all the instruments for settling disputes do not necessarily imply a judicial decision in a Court, such as mediation. In fact, mediation ensures the realization of justice and law, but without the need for recourse to judicial decision within a Court, thus incorporating and ensuring the realization of this fundamental dimension of the Fundamental Right of access to the Law and the Courts. Thus, in our opinion, it may be stated that from a current interpretation of the dimension of access to the Law of this Fundamental Right, the constitutional requirement of the establishment of means of dispute resolution, such as mediation, namely in tax matters, is guaranteed. its realization.

It should be noted that there are several advantages which, from the point of view of access to the law, derive from the use of mediation. First of all, mediation is a means of resolving disputes, as a rule, faster than recourse to contracting

²⁶ As is referred by João Taborda Da Gama, "the procedural participation of those managed in the tax procedure, constitutionally foreseen and legally regulated, leads to clarifying doubts between the two, approaching positions and reducing friction" (João Taborda da Gama, *Contrato de Transacção Do Direito Administrativo E Fiscal*, in "Estudos Em Homenagem Ao Professor Doutor Inocêncio Galvão Telles - Volume V" -, ed. by António Menezes Cordeiro, Luís Menezes Leitão, and Januário da Costa Gomes (Almedina: Coimbra, 2003), pp. 607 a 694 (p. 670)).

authorities, such as State Courts and arbitral tribunals. In addition, mediation may even prevent the future existence of litigation, in that it contributes to a closer approximation of the parties, in this case, the Tax Administration and the taxable person. In fact, mediation allows a dialogue between the active subject and the liability of the tax legal relationship that the contracting authorities do not allow.

To this extent, mediation, as an instrument of consensus between the parties, can contribute to the creation of a greater ethical-tax consciousness. In fact, the lack of ethical-tax awareness has generated, in the Portuguese legal system, several problems, including problems of a normative nature and problems of a procedural and judicial nature. These problems, in turn, have generated high levels of litigation, which must be tackled.

The tax court will be formed by the Fundamental Right of access to the Law and the Courts if it allows, within the scope of consensualisation is admissible, a quick consensual of the disputes, through means of dispute resolution such as mediation, which can, including contributing to greater prevention of disputes.

It should be noted, however, that in spite of the constitutional requirement that alternative means of settling tax litigation for consensualisation, such as mediation, be established, this does not mean that these instruments can be replaced by the Courts, in particular the State Courts. In fact, not all disputes can be subtracted from public jurisdiction²⁷, nor can the State fail to ensure the realization of justice, through its Courts and the *ius puniendi* of the judges who integrate them.

2.4. The mediation process: a proposal *iure condendo*

The process of mediation in tax matters should be shaped by a set of principles, including the principles of voluntarism, equality, impartiality, independence, flexibility, enforceability and publicity of agreements. Among this set of principles, the principle of the publicity of the agreements deserves special attention, since this derogates from the rule of confidentiality that is usually associated with mediation.

Taxation mediation can only be thought of in the transparency framework. The publication of all agreements concluded between the tax authorities and the taxable person must be guaranteed. The approval of the agreement by the

²⁷ This is if mediation is private. There are, however, systems of mediation that are public. For example, our system of family mediation, created by order no. 18 778/2007, of July 13, published in the *Diário da República*, Series II, dated August 22, and started operating on July 16, 2007; our system of labor mediation was created through a Protocol signed on May 5, 2006 between the Ministry of Justice and the Confederation of Portuguese Industry (CIP), Confederation of Commerce and Services of Portugal (CCP), Confederation of Portuguese Tourism (CTP), Confederation of Portuguese Farmers (CAP), General Confederation of Portuguese Workers - Intersindical Nacional (CGTP - IN) and General Union of Workers (UGT); and finally, our system of criminal mediation, instituted in our legal system by law no. 21/2007, of June 12. Thus, one can also think of the creation of a public system of tax mediation.

State Courts, which is required, will ensure that it becomes as public as any other judicial decision. The agreement should be published on a possible electronic platform so that anyone wishing to do so can consult it. In this context, it seems to us that the proposal for a FERNANDO MARTÍN DIZ²⁸ which involves the implementation of a Public Registry of Mediation, within which it will be mandatory to deposit the agreements obtained through mediation, making them accessible to the public, in particular via electronic media.

The process of mediation, although endowed with some flexibility, should not mean informality. The mediator must not conduct the mediation process in a completely arbitrary or discretionary manner. In spite of the flexibility that should be recognized in mediation, the mediator's actions must correspond to a certain sequence of acts and formalities that, at least minimally, must be regulated by the legislator. This requirement of regulation is all the greater when we are in the domain of matters that have a special interest in the public interest, as in the case of Tax Law.

Thus, there are a set of phases that, in our understanding, should be part of any process of mediation on tax matters. In a first stage, which we call the preliminary stage, the parties must express their willingness to submit the dispute to a mediation process and the taxable person has the initiative. In a second phase, which we call the preparatory phase, the mediator must meet with the parties and their lawyers, informing them about what mediation is, what their advantages and disadvantages are, and what rules the mediation process. Once the interested party has been duly clarified and the purpose of continuing the mediation is maintained, the parties, the lawyers who represent them and the mediator must sign a mediation protocol. In a third phase, we find the conciliatory phase in which the mediator performs the various mediation sessions, seeking to help the parties reach an agreement. If they reach an agreement, it should be reduced to writing and signed by the parties. Finally, in a fourth phase, which we call the homologation and publicity phase, the agreement obtained must be approved by a State Court and subsequently published.

3. Tax mediation in a comparative law perspective: the North American and Italian case - brief reference

In the U.S., mediation in tax matters was introduced in the *Internal Revenue Code* pelo *Internal Revenue Service Restructuring and Reform Act of 1998*. Currently, the *Internal Revenue Service*, through the *Office of Appeals*, offers taxpayers essentially three mediation programs. These three mediation programs

²⁸ Fernando Martín diz, *Retos de La Mediación Como Complemento Al Proceso Judicial En Una Sociedad*, in "Los Retos Del Poder Judicial Ante La Sociedad Globalizada. Actas Del IV Congreso Gallego de Derecho Procesal (I Internacional)" (Universiade da Coruña: Coruña, 2012), p. 131 a 146.

are intended for different types of taxable persons and for different stages of the tax procedure, and include, in particular, the *Fast Track Settlement*, o *Fast Track Mediation* and the *Post Appeals Mediation*.

The *Fast Track Settlement* offers taxable persons (*large Business and International, Small Business/Self-Employed e Government Entities*) the possibility of resolving their disputes, as soon as possible, still in the phase of *examination process*. The purpose is to resolve the dispute within 60 or 120 days, depending on the type of taxable person and from the moment the request is made. For this purpose, a mediator is chosen that integrates the *Office of Appeals do Internal Revenue Service*, which is to assist the taxable person and the *Internal Revenue Service* to reach an agreement. In this context, the *Office of Appeals* can define the rules and terms of the mediation process; may meet together or separately with the parties; and finally, it can make proposals for agreements, which may or may not be accepted by the parties²⁹.

The *Fast Track Mediation*, contrary to the *Fast Track Settlement* is intended only for *Small Business/Self-Employed*, whose litigation arises during the collection process. From the moment the request is made, the mediation process must be completed within 40 days. In procedural terms, the *Fast Track Mediation* is very similar to *Fast Track Settlement*.

In *Post Appeals Mediation*, the taxable persons can only access it after the traditional appeal procedure has been exhausted. Currently, the use of *Post Appeals Mediation* is not restricted to certain taxable persons and can be used, *Fast Track Settlement*, by *large Business and International, Small Business/Self-Employed* and *Government Entities*, is not limited to matters of value over 1 million or to purely factual matters, but may also concern questions of law. The resolution of the dispute must be concluded within 60 to 90 days. In the same way as the other mediation programs mentioned above, the mediator will also be an employee of the *Office Appeals do Internal Revenue Service*. However, it is possible for the taxable person to indicate a co-mediator who is not part of the *Office Appeals*, in which case the costs will be entirely at his expense³⁰.

In Italy, the *mediazione tributaria* is a recent instrument and has been established therein by Article 39 (9) of the *decreto-legge di 6 de luglio*, de 2011, que adicionou ao *decreto legislativo n.º 546/92, di 31 di dicembre* o artigo 17.º Bis, entitled “*Il reclamo e la mediazione*” (emphasis added).

According to the above-mentioned diploma, a taxable person who intends to take legal action against an act of *Agenzia*, should, in matters of less than €

²⁹ The rules that should be obeyed by the *Fast Track Settlement* are listed in *Revenue Procedure 2003-40*, available in <http://www.irs.gov/> last access in 10/09/2017. In doctrine, for more information on this program see, among others, David Parsly, *The Internal Revenue Service and Alternative Dispute Resolution: Moving From Infancy to Legitimacy*, "Cardozo Journal of Conflict Resolution", Vol. 8 (2007), 677 a 715 (p. 691 a 695).

³⁰ The rules to be followed by the *Post Appeals Mediation* are currently included in the *Revenue Procedure 2014-63*, available in <http://www.irs.gov/> last access in 10/09/2017.

20,000, file a claim in advance. It is within the scope of that complaint, which is mandatory, that the taxable person may or may not submit a *mediazione tributaria*. This proposed *mediazione tributária* must be duly reasoned and well founded, and the taxable person should not confine himself to requesting the total or partial annulment of the act. The complaint, with the proposal for mediation, is presented at the *Direzione provinciale* or the *Direzione regionale* on which the agency that has practiced the act depends, and this should proceed to its re-routing to an independent legal department located there. These departments review the proposal submitted and may accept it, even if partially, reject it, or submit a counter-proposal of *mediazione*, taking into account the principle of economical administrative action. The agreement is concluded through the assent of *l'Ufficio* and of the taxable person who is required to sign it and takes the form of payment by the taxable person of the agreed amount. Furthermore, the taxable person has the benefit of a 60% reduction in the administrative penalty.

This procedure of tributary *mediazione*, in fact, takes on some peculiarities that make us reject its classification as a true mediation. First of all, because we are not, in this procedure, before a real mediator, insofar as he is confused with one of the parties (*l'Ufficio*).

4. Conclusions

From all of the above, it turns out that the concept of mediation, as an alternative means of settling disputes, and when conceived for Tax Law, is exactly the same concept of mediation that exists for the resolution of disputes in private law matters (for example, Labor Law³¹ and Family Law³²) and other branches of Public Law (such as Criminal Law³³ and Administrative Law³⁴). That is, the concept of mediation and mediator, provided for in the Portuguese Mediation Law, can be applied to tax mediation. This does not mean that this law should apply to tax mediation. In fact, to think about tax mediation is to create a

³¹ The Portuguese labor mediation system was created through a Protocol signed on May 5, 2006 between several entities, namely the Ministry of Justice and the Confederation of Portuguese Industry (CIP), the Confederation of Commerce and Services of Portugal (CCP), the Portuguese Confederation of Portuguese Tourism (CTP), the Confederation of Portuguese Farmers (CAP), the General Confederation of Portuguese Workers - Intersindical Nacional (CGTP - IN) and the General Union of Workers (UGT))

³² The Portuguese family mediation system was created through Order no. 18 778/2007, of July 13.

³³ Criminal mediation was introduced into the Portuguese legal system by law no. 21/2007, of June 12.

³⁴ In fact, according to Article 87c (1) of the Code of Procedure in Administrative Courts (CPTA) - this article was added by Decree-Law no. 214-G / 2015, of October 2 - when the case falls within the power of the parties' disposition, may at any stage of the proceedings take place at an attempt to mediate, provided that the parties so request, jointly, or the court deems it appropriate. Administrative mediation is carried out under the terms of the law, which, in the absence of another, is the Mediation Law.

Tax Mediation Law, similar to what happens in the arbitration with the Legal Regime of Tax Arbitration.

In fact, taxation mediation, as we have considered it, should contain some specificities, namely in terms of the confidentiality of the agreements. In fact, the confidentiality of mediation, foreseen as a general principle of mediation, in Article 5 of our Mediation Law, goes wrong with the required and necessary transparency in the resolution of disputes, in the context of matters of interest public and that, therefore, to all (public purse) concern.

To think mediation for the Portuguese tax-legal system seems to us to make all the sense today. First of all, because, as we have seen above, the main obstacles to tax mediation are not absolute. That is, it is not impossible to envisage a future relationship between mediation and Tax Law.

In fact, the use of alternative means of dispute resolution in Portugal is becoming more and more significant. Effectively, in the various jurisdictions, we find rules that elect ADRs as preferential means of settling disputes, to the detriment of the traditional recourse to State Courts. We take a positive look at the progress in the search for other forms of dispute resolution, insofar as they allow, as mentioned above, a further strengthening of the Fundamental Law of access to the Law and the Courts.

Contrary to what, for a long time, would be expected, the Tax Law has not been an exception to the rule. In fact, the acceptance of alternative solutions to the decision of the State Court, for the resolution of disputes arising from legal-tax relations, is no longer a new reality in Portugal. In fact, as mentioned above, in 2011, Decree-Law No. 10/2011, of January 20, was approved, which established, in a clearly innovative way, a Legal Regime of Tax Arbitration. Despite some dissonant voices, the Portuguese legislator decided to proceed with the consecration of tax arbitration and, in fact, many have been those, mostly companies, who have preferred the resolution of their disputes with the Tax Administration, by the Arbitral Tribunal, to the detriment of the State Court. The main reason for this preference is essentially the speed of disputes which the Arbitral Tribunal, as compared with the State Court, offers.

Faced with this, and despite the discordant voices that may arise, it seems to us that the natural way will be the one that allows the use of mediation also in matters of Tax Law. Although this should be a trend of acceptance, the truth is that the reception of this instrument of dispute resolution, in tax matters, should always be guided by the existence of some limits.

In our opinion, mediation can never be substituted, or compete, in an absolute way, with the Courts, be they the arbitral ones, or the state ones. In fact, there is a core of issues that can not, by their very nature, be mediated. In addition, it is incumbent, constitutionally appreciating, to the Courts the administration of justice in the name of the people³⁵, so it would not make sense to accept that

³⁵ Cf. Article 202 (1) of the CRP.

instruments such as mediation, notwithstanding the recognizable advantages, could be replaced, in an absolute way, by the Courts in the administration of justice.

The latter are the organs of sovereignty that are responsible for the exercise of the judicial function, that is, who is ultimately responsible for dictating the law. Thus, even if it is admitted that the means of self-composition, such as mediation, can be offered by public systems integrated in the State itself, similar to what happens with our systems of family, labor and criminal mediation, this does not mean that mediation may wish to reduce very little the exercise of the judicial function by the Courts, first of all because there are matters in which the possibilities of agreement are, from the outset, forbidden. The path one desires is one that promotes and prefers consensualisation when it is possible. Where this is not the case, in particular where there are no negotiating areas, recourse to the Court and the decision of the court should be unavoidable.

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LABOR LAW

Emigration of Croatian Workforce after Country Joined the European Union

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Abstract

The biggest problem Croatia is facing at the moment is mass emigration of its workforce. This situation has several factors in its background, such as: terrible economic situation, inability of employment, lack of perspective for young people, slow, large and inefficient public administration, financial instability, poor standard of living, tax repression, job insecurity, and insufficient engagement of the State to improve conditions through education reform and better use of available resources of the state. Most common reasons of emigration of our workforce are better job opportunities and better salary, better working and life conditions in the country of immigration, better possibilities for education and specialization, better possibilities of fulfilling ones values, acknowledged status according to effort and devotion, better and safer existence. It is both urgent and necessary to keep the workforce and stop its emigration because without young and perspective people and their creative ideas, there will be lack of development and prosperity in Croatia. Methods used in this paper were: method of analysis, method of synthesis, method of case study and method of observation

Keywords: education reform, lack of employment opportunities, demographic reform, creative ideas of young people, mass emigration.

JEL Classification: K31, K37

1. Introduction

The demographic question in the Republic of Croatia should be perceived as a burning issue and needs to be adequately solved. The task is not easy, on the contrary, it is very serious and difficult, requires full engagement of profession in solving this question. Demographic structure is being changed on a daily basis. The rates of departure of the working-active population don't stop, on the contrary, are being increased and get even more devastating proportions. At the moment, situation in Croatia is very serious because with these devastating proportions of emigration comes the change of demographic structure of the population and the disappearance of the critical mass of the population that would be ready to lead Croatia towards better economic growth and welfare and creating a destination where it would be easy and safe to live.

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To stop this trend of mass emigration from Croatia and start a process of revitalization of the demographic structure, it is necessary to create a platform for demographic recovery, social security, equal chances in education and creating a European standard of living. Vision of the future understands stopping the emigration because these trends could take away our tradition and cultural heritage which we inherited for generations.

Especially problematic situation is currently in Eastern Croatia where the consequences of emigration are alarming. Young people are leaving for other EU countries, one can't find an electrician or a plumber, experts of any kind because everyone are leaving. Those that stay are old and poor people, while qualified workforce is leaving. New and urgent demographic measures are needed. Those should be focused on demographic recovery of Croatian population.

2. Emigration of workforce in Eastern Croatia after the country joined the EU

Migration of the population is a historical phenomenon of various causes. Very often migrations are conditioned by wars, then by natural disasters and in recent times mostly by economic and social necessities.²

From very little data obtained at the Croatian Employment Service, it is evident that mostly young qualified and highly educated people are leaving the eastern part of Croatia. What is the reason for it? From the conversation with them we find out several reasons: inability to obtain a job, job insecurity, small wages, little or none job offers, rigidity of the system, financial instability, better standard of living, specialization of knowledge obtained throughout college, the wish to work in world research centers. The loss of young and highly educated workforce is extremely dangerous since the country invested a lot in them and they need to emigrate to find better and or any job opportunities. This part of the population is leaving because of knowledge specialization and they can't be easily affected, they are being led by their knowledge to the countries where there are no limits to research, education and specialization in long term. Mass emigration is unfortunately a part of our everyday life. If this trend doesn't change, we will be forced to import less qualified workforce and workforce of less quality. Mass emigration shouldn't be allowed because without its population there is no development of one country. Investing in infrastructure, equipment and real estate makes no sense unless we have the people who would know to use all of it for the purpose of innovation, new technologies and communication to the realization of ideas and development.

² Wertheimer - Baletić 1999; Wertheimer – Baletić, 2002; Wertheimer - Baletić i Živić, 2003; Čizmić i Živić, 2005. "Područja u koja pučanstvo odlazi, u početku bliža, postaju sve udaljenija zbog razvitku prometa i dostupnosti informacija, Zagreb.

Based on the Decision of the European parliament and Council back in 2011, 2012. was pronounced as the European year of active ageing amongst generations. (Directive 940/2011/EU).

“It is probably not necessary to explain the subject of active aging. Demographic changes, which can be seen only as part of the broader social processes of redefinition / reconstruction of work, the family and the overwhelming personal experience of itself and its environment, place many challenges ahead of European societies. Usually, we see them as a problem, primarily as hard pressures on public finances, in the area of pensions, health, social and long-term care. The costs seem to create an inexhaustible burden on the scarcely younger generation.”³

Generally, young, working-age population is emigrating from the Republic of Croatia, and the old population remains.

"Projections of the total population of the Republic of Croatia from 2010 to 2061 as a base have an estimate of population by age and sex as of January 1st 2010 calculated on the basis of Population Census 2001, vital and migration statistics.

These projections will be revised after later censuses, and special attention will be given to the analysis of the coverage of external migration statistics and interim methodological changes.

Accordingly, retrospective corrections will be made to population estimates and demographic indicators for the interim period. Regional projections relate to the period from 2010 to 2041.

For the region level, setting up a hypothesis is much more complex than for the state level and, as a rule, projections are made for a shorter period. The smaller the area of migration is, migrations have much bigger impact on the movement of the general population than at a national level where internal migration is neutralized.”⁴

With the rate of natural decline and aging of the population, Croatia is also faced with the large emigration of the population abroad. In 2014, 20,858 residents emigrated abroad. At the same time, the population from abroad is immigrating to a lesser extent than the domestic population emigrating from Croatia. The 2010 foreign migration balance was -10,220. A positive migration balance or more migration than emigration in 2014 was recorded only by the Istria and Dubrovnik-Neretva counties⁵

³ Zrinščak, Siniša: Aktivno starenje, rodna ravnopravnost i socijalna uključenost, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2012.

⁴ Projekcije stanovništva Republike Hrvatske od 2010. do 2061. Population projections of the Republic of Croatia, 2010 2061.

⁵ MINISTARSTVO REGIONALNOGA RAZVOJA I FONDOVA EUROPSKE UNIJE STRATEGIJA REGIONALNOG RAZVOJA REPUBLIKE HRVATSKE ZA RAZDOBLJE DO KRAJA 2020. GODINE.

One in three highly educated people in Croatia placed their knowledge to disposal of another EU member state immediately after Croatia joined the EU back in 2013. This is because other countries provide opportunities to prove oneself, don't marginalize science and acquired qualifications and provide better perspective. Croatia was second in EU (40%) behind Greece (42,4%) by youth unemployment rates. Spain was the third at 25,8%.

Table no.1 Total migration numbers in Osijek-Baranja County.
Source: Croatian Bureau of Statistics., Public announcement number 7.1.2., July, 2017.

Year	Immigrated to Osijek-Baranja county			Emirated from Osijek Baranja county			Total migrational saldo	Inter-County migrational saldo	Migrational saldo with foreign countries	
	Total	From other counties	From foreign countries	Total	To another county	In a foreign country			Osijek-Baranja county	Croatia
2005.	1.790	1.202	588	2.413	1.806	607	-623	-604	-19	8.218
2006	1.860	1.164	696	2.711	1.848	863	-851	-684	-167	7.286
2007	2.027	1.306	721	3.080	2.038	42	-1.053	-732	-321	5.620
2008	2.060	1.285	765	2.357	1.714	643	-307	-429	122	7.053
2009	1.640	1.199	441	2.205	1.587	618	-565	-388	-177	-1.472
2010	1.352	1.120	232	1.976	1.437	539	-624	-317	-307	-4.875
2011.	1.594	1.193	401	2.148	1.537	611	-554	-344	-210	-4.165
2012.	1.527	1.100	427	2.293	1.547	746	-766	-447	-319	-3.918
2013.	1.547	1.152	395	2.754	1.771	983	-1.207	-619	-588	-4.884
2014	1.895	1.517	378	3.665	2.160	1.505	-1.770	-643	-1.127	-10.220
2015.	1.824	1.354	470	4.458	2.248	2.212	-2.634	-892	-1.742	-17.945
2016.	1.792	1.270	522	5.744	2.110	3.634	-3.952	-840	-3.112	-22.451

From table one it is visible that in Osijek-Baranja County as a part of Eastern Croatia, the situation is no less alarming. The number of emigrants in a period 2005-2016 was increased by five times while migration conto was somewhat smaller (around three times).

Table no. 2 – Country of employment (migrants from Osijek-Baranja County) – Data related only to unemployed people from public records of Croatian Bureau of Employment that called in their new status Osijek-Baranja County

Country of Imi-gration	2013	2014	2015	2016	2017	Total number
Austria	5	30	58	67	46	206
Belgium		1	4	2	8	15
Bosnia and Herze-govina		2		1		3
Bulgaria		1				1
Cyprus				1	1	2
Czech Republic		2		4	1	7
Chile				1		1
Denmark		1	3	1		5
Egypt			1			1
Finland		1	1	1		3
France	1	1	1	2	2	7
Greece			1			1
Republic of Ire-land		11	37	14	10	72
Iceland				2	2	4
Italy	1	12	6	10	6	35
Republic of South Africa		1				1
Canada		2	1			3
China	1	1			1	3
Lybia	1	1			1	3
Luxemburg				1		1
Hungary	3	6	3	1	1	14
Malta	1	1			2	4
Holland		1	2	7	1	11
Norway		3		2	7	12
Germany	270	336	461	456	295	1818
Poland		3				3
Portugal			1			1
Romania		1		1		2
USA		1	3			4
Slovakia		17	4	8	10	39
Slovenia		2	5	4	3	14
Serbia	1		1	1		3
Spain	1			2		3
Sweden		3	9	1	4	17

Switzerland		1	3	3	4	11
Great Britain and Northern Ireland		2	1	1	2	6
Employment abroad	284	444	606	594	406	2334
Emigrated abroad	14	73	153	196	146	582
Total number	298	517	759	790	552	2916

Table no.2 shows that after Croatia joined the EU, the population of Eastern Croatia commonly emigrates to Germany and Ireland as promised countries. According to data obtained by Institute for migrations and nationalities in Zagreb, there are currently around 2,5 million Croats living abroad (USA, Australia, Germany, Argentina, Canada and other countries).

Data in tables 1 and 2 are only related to persons that were in the public records of Croatian Bureau of Employment so therefore, this number could be significantly bigger because many people that had jobs emigrated and there are no data for them in public records of Croatian Bureau of Employment. Also, table no.2 shows people who were in the records of Croatian Bureau of Employment and after emigration called in the country of immigration so there are records about it.

Immediately after Croatia joined the EU (2014.) the number of people who got their jobs in abroad was around 3484⁶ while 879 of them permanently moved abroad. Emigration didn't stop since then. Highly educated people are those that commonly emigrate Croatia because they have some pre-emigrational experience acquired through foreign exchange and mobility throughout college, living abroad and acquiring specialized knowledge, working on mutual international projects and in contacts with foreign colleagues.

From very little statistical data it is visible that two thirds of workers that left the country don't want to return, especially if they obtained foreign citizenship, those who live outside of their native land for a long time and those whose expectations were fulfilled after coming in to a country of their immigration. Some people returned because they failed to adapt. The return of other depends on their chances to find any job in their homeland. If they decide to return, the only thing that matters is that they find any job with which they would be able to support themselves and their families.

One of the most prominent Croatian scientists, Ivan Đikić said that we need to ensure a place for young people in Croatia to develop as professionals because once they leave the state, they would hardly ever come back. According to him, Croatia shouldn't quietly watch as young people leave and do nothing about it.

⁶ <http://www.poslovnihrvatska/odljev-mozgova-postao-je-nasa-stvarnost-287055.09-studeni> (last consulted 15.11.2017).

3. Measures of fixing the mass emigration problem and workforce problems in general

After Croatia joined the EU, the job market was opened for young people in almost all the member states, while some of them kept a temporary period of necessary work permits. The possibilities in other countries were huge because a person could work on oneself in a developed society, its specialization, continuous education because of getting more options for a better job and obtaining a higher living standard.

Several questions are being continuously asked. How to stop the emigration of our young workforce? How to return those that left? What can be done to stop this trend?

Croatia is a country rich with natural resources, has the nicest coast line, large amounts of fresh water, uncultivated farm land and good and honest people. Especially because of its resources, the country needs to introduce measures, because Croatia could face serious problems in ten years if this terrible trend continues. Problems such as mass emigration, unemployment and bad economic situation need to be stopped and fix. But how to do that?

1. Croatia needs to fix its economy and therefore make new job vacancies
2. Croatia needs to lower its tax policy repression
3. Croatia needs to offer the unemployed to produce healthy domestic food products on acres of uncultivated land
4. Croatia needs to make better usage of projects and programs of EU structural and cohesive funds, which should bring to economy and small entrepreneurship development.
5. Croatia needs to reform its real estate policy
6. Small business and small entrepreneurs who are full of knowledge and creative ideas after their colleges should be allowed to develop their ideas with the help of structural EU funds and not to destroy them in the very beginning by slow and inefficient bureaucracy and repressive tax policy.
7. Bigger significance should be placed on education, both formal and various continuous lifelong educations because knowledge is the power of development. Conditions for research work need to be ensured within our universities and institutes
8. Priority goal should be to fix the unemployment problems, increase employment through safer forms of jobs and better respect of worker rights as well as humanization of working relations.
9. Croatia needs to change the demographic situation of its population by encouraging parents to make large families through better conditions of nurture and education. Whole studies could be written about it.

In case all of these measures were introduced, the motivation of people to stay would increase which would represent the foundation for development of our country.

The example of Denmark is often suggested. Denmark was mostly an agricultural society. They invested a lot in their education and today they have one of the better education systems. Such educational systems created a basis for faster prequalification in some other profession according to needs of the job market.

The Republic of Croatia must turn to the Croatian village as a source of healthy food, as a place where young people will find their place of work, because the depopulation of the Croatian village would be devastating.

"Strengthening the economy and raising living standards in rural areas is a prerequisite for stopping negative demographic changes (aging populations, natural decline in certain areas) and solutions to unemployment problems (Gelo, 1997, Akrap, 2002). However, strategic thinking about the development of rural population is unthinkable without the significant role of agriculture and activities related to it. Many believe that decentralization of economic activities will increase economic efficiency and improve the social well-being of rural populations. rises in big cities to overcome their own social difficulties also had a major impact on the re-interest in rural development. (Cramer and Jensen, 1997) In the last thirty years in the Republic of Croatia there has been a decrease of population dependent on agricultural resources and production. Agriculture as the main economic segment of the rural area of the Republic of Croatia is based on average small agricultural holdings with low technical and technological equipment and insufficient economic efficiency. There is an unfavorable age and educational structure of farmers, as well as poorly developed market infrastructure, an unresolved land market issue, undeveloped forms of business organization, including cooperatives, and generally lacking a recognizable image of a particular area. "⁷

4. Demographic recovery of Croatia

Unfortunately, demographic situation in Croatia is well known to everybody. Croatian prime-minister Andrej Plenković pointed that the demographic situation is a question of strategic importance for the future of Croatia and a foundation for the development of the country. He also announced the forming of a Council for demographic revitalization of Croatia.

Great areas of our country remain without people. The birth rate is low, and young people are emigrating. The average age of the population has risen almost 10 years since the 1961 census. Then the average age was 32.5 years and in 2011 was 41.7 - which makes Croatia one of the oldest nations in Europe. The 2011 census shows that the number of people over the age of 65 exceeded the number of young people over the age of 14 for the first time. Almost every fifth

⁷ Grgić, I. i sur.: Čimbenici iseljavanja seoskog pučanstva u Republici Hrvatskoj, Agronomski glasnik 2-3, Zagreb, 2010.

Croat is older than 65 years of age. Such negative demographic trends are reflected in all aspects of society, especially the economy, health and pension system, equal development of Croatia and social welfare. Along with the negative natural movement of the population, the trend of emigration, especially among young and educated workforce, has been evident in recent years.

Among the current projects is care for old and infirm, children without parental care, encouragement of pronatality policy⁸

Šterc emphasized that demographic policy must be the foundation of the country's development and suggested the establishment of a strategic office with the government as based on the Israeli model. Referring to a positive example of Ireland, he also referred to the Croatian emigration as a potential that was misused. "Ireland has not cut off its population but has been making progress on its wings," he pointed out. Čipin said that gerontology is ruling in Croatia where young people are not winners. "We are in a vicious circle for an inflexible labor market with young people who are leaving. In his exposition of pronatality policy, he concluded that low fertility should be treated as a syndrome of other social problems rather than as a separate problem. Davorko Vidović, the representative of the Croatian Chamber of Economy and former Minister of Labor and Social Welfare, sees the solution in introducing the so-called dual education. "There is a huge discrepancy between the system of education and labor market, whereby some institutions mediate only. Young people need dual education, inclusion in the labor market as early as 15 years old where the labor market becomes their school, and college" Vidović said. He believes that boosting the economy is a priority in addressing demographic problems.⁹

"Croatia, like most European countries, is faced with low fertility and demographic aging. Thus, there is a gradual increase in the share of older people (those aged 65 and over) in the total population, while reducing the working-age population (age 15-64). Such movements, with the retention of the existing low activity rates, can result in a relative lack of workforce over a longer period of time. In addition to the existing projections of demographic trends and the retention of existing activity rates within age groups, the overall activity rate of population will be decreased by 2010. This would make Croatia even further away from the goals set by Lisbon agenda. If trends continue and do not take more active measures of economic policy, then restrictions can be expected, not only on demand side, but also on labor supply."¹⁰

⁸ <http://www.035portal.hr/vijest/politika/plenkovic-predstavio-sve-pronatalitetne-mjere-i-najavio-osnutak-vijeca-za-demografsku-revitalizaciju-hrvatske-10205> (last consulted 15.11.2017).

⁹ Vidović, Davorko: *Okrugli stol: Demografska obnova - temelj napretka Hrvatske*, Zagreb, 2017

¹⁰ PRISTUPANJE EUROPSKOJ UNIJI, Ekonomski institut, Zagreb, 2007.

5. Conclusion

Demographic problems in Croatia are big and it is necessary to form a ministry for demography, family, young people and social welfare. "Croatia is facing serious demographic problems. Only last year 19 thousand more people died than it was born.", pointed demographic expert Anđelko Akrap in an interview on national TV.

If we add mass emigration to this, then we need to admit that Croatia is faced with a serious problem. To fix this issue it is necessary to introduce the following measures.

1. Croatia needs to fix its economy and therefore make new job vacancies
2. Croatia needs to lower its tax policy repression
3. Croatia needs to offer the unemployed to produce healthy domestic food products on acres of uncultivated land
4. Croatia needs to make better usage of projects and programs of EU structural and cohesive funds, which should bring to economy and small entrepreneurship development.
5. Croatia needs to reform its real estate policy
6. Small business and small entrepreneurs who are full of knowledge and creative ideas after their colleges should be allowed to develop their ideas with the help of structural EU funds and not to destroy them in the very beginning by slow and inefficient bureaucracy and repressive tax policy.
7. Bigger significance should be placed on education, both formal and various continuous lifelong educations because knowledge is the power of development. Conditions for research work need to be ensured within our universities and institutes
8. Priority goal should be to fix the unemployment problems, increase employment through safer forms of jobs and better respect of worker rights as well as humanization of working relations.
9. Croatia needs to change the demographic situation of its population by encouraging parents to make large families through better conditions of nurture and education. Whole studies could be written about it.

"Although it may be incompatible, it would be good if demographic policy is a part of regional development, because Croatia in part of its land is really empty," said Angelo Akrap. He also said that laws should be harmonized within this matter while pointing Labor Law as an example that doesn't favor pronatality policy.

Society should provide and make possible to raise children and increase employment. It is necessary to provide kindergarten and nursery work on Saturdays and Sundays, as well as possible nightshifts in them because these days are working also, as well as some parents work nightshifts (doctors, nurses, other). Also, entrepreneurs must be socially sensitive. Less and less children mean less

grades in schools and fewer residents, which is certainly not good and that needs to be stopped.

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Collective Dismissal in Turkish Labor Law

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Abstract

The system for the protection of workers against termination is called as job reassurance in practice and teaching in general. Indeed, in the legal systems of countries that adopt this assurance, it has become necessary to establish a balance between freedom of contract, employer's freedom of enterprise, and the protection of the authority of the employer and the removal of workers from the job. Job reassurance should not mean that the worker can not be removed of workers from the work. In business law, the protection of the work is as important as the protection of the worker. It may be necessary for the operator to start to apply economic and financial difficulties, to apply modern technology requirements in the workplace, to go a more efficient and rational working organization, or to inefficiency and behavior of employees. If the conditions of employment security are met, the employer must terminate the indefinite-term employment contract of the employer and must rely on a valid cause arising from the employee's inadequacy or behavior or from the necessity of the employer, the workplace or the job. The employer's dismissal because of economic, technological, structural, and so forth business, workplace or as a result of the job requirements in the workplace is collective dismissal. It is important that workers be protected against termination. However, the emergence of an economic reason for the business community, resulting in the layoff of employees will create, in this case, the workers should be provided job security. The arrangement of business that are related to collective labor law and the ILO Convention No. 158 of 13 and 14. provides that articles shall be determined in accordance with the principles of. In our study, the concept of mass dismissal in terms of Turkish Law, in relation to a method of laid-off require to be able to work their back, and these Regulations non-compliance with the Civil and criminal consequences were investigated.

Keywords: job reassurance, dismissal, labor law, technology requirements

JEL Classification: K31

1. Introduction

The system for the protection of the worker against termination is usually referred to as job security in theory and practice. Indeed, law systems of countries which adopt this security require a balance between freedom of contract, the employer's freedom of enterprise and managerial authority, and the protection of the worker against dismissal. Job security should not mean inability to dismiss a worker. In labor law, the protection of the employer is just as important as the

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protection of the worker. It may be necessary to dismiss a worker due to economic and financial difficulties, implementation of modern technologies in the workplace, implementation of a more efficient and rational work organization, or inadequacies or negative behaviors of the worker. In cases where conditions related to job security are met, the employer must base his decision to terminate a permanent employment contract on a valid reason arising from the worker's incompetence or negative behaviors or requirements of the establishment, the workplace, or the job.

Dismissal of more than a certain number of workers by the employer due to economic, technological, structural, or similar necessities of the establishment, the workplace, or the job is collective dismissal. The protection of workers against termination is important. However, if an economic reason requires the establishment to dismiss a certain number of workers collectively, job security of workers must be ensured in this case as well.

In this study, we examine the concept of collective dismissal in Turkish Law, the relevant method, the obligation to re-recruit those who were dismissed, and legal and penal consequences in case of failure to follow regulations.

2. The concept of collective dismissal

With regard to job security, the valid reason for collective dismissal is specified in Article 18/1 of the Labor Law (LL.18/1) as "economic, technological, structural, or similar necessities of the establishment, the workplace, or the job". If such a situation emerges and necessitates collective dismissal, the provision under LL.29 must not be used to prevent implementation of provisions related to job security. However, if an economic reason requires the establishment to dismiss a certain number of workers collectively, job security of workers must be ensured in this case in an efficient manner as well, which is just as important as protecting workers individually against termination of their employment contract. The arrangement related to collective dismissal in the Labor Law has been resolved in accordance with principles set forth in Article 13 and 14 of ILO Convention No. 158.

Convention No. 158 regulates the method for collective dismissal. According to the convention, when the employer contemplates terminations for economic reasons, the employer must provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. In accordance with national law and practice, the employer must give the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment (Article 13). Again in accordance with national law and

practice, the employer must notify the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out (Article 14). According to Directive 98/59 of the EC, collective dismissal means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is either, over a period of 30 days- at least 10 in establishments normally employing more than 20 and less than 100 workers, at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers, at least 30 in establishments normally employing 300 workers or more (Article 1/1,a). The Directive regulates the employer's obligation to begin consultations with the workers' representatives in good time with a view to reaching an agreement (Article 2), the employer's obligation to notify the competent public authority in writing of any projected collective dismissal (Article 3), and specifies that projected collective dismissal notified to the competent public authority shall take effect not earlier than 30 days after the notification (Article 4).

Collective dismissal is regulated in Article 29 of the Labor Law. Collective dismissal occurs when the employer dismisses more than a certain number of workers due to economic, technological, structural, or similar necessities of the establishment, the workplace, or the job². The condition for collective dismissal is an economic, technological, structural, or similar necessity of the establishment, the workplace, or the job. In terminations due to necessities of the establishment, the workplace, or the job, the valid reason is not in the worker's area of responsibility, but in the employer's area of responsibility. Also, it does not matter whether the economic reason that requires a collective dismissal is the result of the employer's decisions, choices, or approaches. Other than necessities of the establishment, the workplace, or the job, if the number of notified terminations due to workers' incompetence or behaviors is over the number specified in LL.29, it cannot be possibly deemed collective dismissal³.

² Eyrenci, Öner, *Toplu İşçi Çıkarma ve Ortaya Çıkan Sorunlar*, "Dedicated to Prof. Dr. A. Can Tuncay", Istanbul 2005, 549 ff.; Ulucan, Devrim, *Toplu İşten Çıkarmalar Karşısında İşçinin Korunması*, "İş Hukukuna İlişkin Sorunlar ve Çözüm Önerileri, Symposium of GS. University-Istanbul Bar Association", Istanbul 1999, 57 ff.; Aydın, Ufuk, *Avrupa Birliği, ILO ve Türk Hukukunda Toplu İşçi Çıkarma*, "Dedicated to Prof. Dr. A. Can Tuncay", Istanbul 2005, 653 ff.; Cengiz Urhanoğlu, İstar, *Türk Hukukunda Toplu İşçi Çıkarma*, Ankara 2009; Kaya, Pir Ali, *Karşılaştırmalı Çalışma Hukukunda Toplu İşten Çıkarma*, "Dedicated to Prof. Dr. Toker Dereli", Istanbul 2006, 525 ff.; Çılga, Erten, *Toplu İşçi Çıkarma*, Sicil Labor Law Journal, 2009/13, 75 ff.; Sümer, Haluk Hadi, *İşçinin Toplu İşten Çıkarmalar Karşısında Korunması*, Konya 2002, 15 ff.; Yiğit, Yusuf, *İşverenin Toplu İşten Çıkarma Sürecini Çalışanlarla Görüşme Yükümlülüğü*, "TİSK Akademi", 2010/II, 38.

³ "In cases where collective dismissal is imperative, it is stipulated that the union shall be informed and parties shall meet and decide on provisions of dismissal, number of workers to be dismissed,

Pursuant to LL.17, it is considered collective dismissal if at least 10 workers are dismissed in establishments employing 20 to 100 workers, at least ten percent of workers are dismissed in establishments employing 101 to 300 workers, and at least 30 workers are dismissed in establishments employing more than 301 workers, provided that the dismissal occurs on the same day or different days within a month (LL.29/2). The number of workers is determined considering fixed term and permanent employment contracts, full-time and part-time employment contracts. However, the calculation does not include white collar employees, interns, apprentices, borrowed workers, or workers of the sub-employer.

LL.29 does not include any provision regarding how to determine workers to be dismissed due to reasons specified in LL.29/1⁴. While there is no regulation regarding this issue, the employer is obligated to treat workers equally within the framework of the principle of social selection and select objectively in accordance with the ban on discrimination. According to LL.5, "The employer cannot treat a worker differently in concluding the labor contract, establishing the conditions thereof, implementation and termination thereof due to sex or pregnancy, unless biological reasons or those pertaining to the work qualifications oblige." It is stated in the Law on Trade Unions and Collective Labor Agreements, 25/2 that the employer may not discriminate between workers based on union membership. According to the Law, "The employer shall not discriminate between workers who are members of a trade union and those who are not, or those who are members of another trade union, with respect to working conditions or termination of employment. The provisions of the collective labor agreement with respect to wages, bonuses, premiums and money-related social benefits shall be exceptions." These regulations constitute the boundaries of the employer's freedom to select workers to dismiss in cases where there is a valid reason for termination of employment contract. If certain criteria for social selection are specified in the collective labor agreement, the employer may select workers based on these criteria⁵.

and date of dismissal. The employment contract of the claimant was terminated in accordance with the public mandate on the ground that he was over the age of 50 and qualified for pension. It is stated in CLA 86/a that the article in question shall not apply to those who qualify for pension. The court's rule to a job security compensation due to failure to follow the CLA's procedure was found to be false and required a reversal.", The 9th Civil Chamber of the Supreme Court (9CCSC), 11.05.2005, 12345/16290. Manav, Eda, *Türk Hukuku'nda Toplu İşçi Çıkarımında Eleştiri Konusu Olmuş Düzenlemeler ve Çözüm Önerileri*, "Legal İHSGHD.", 2009/24, 1453; Engin, Murat, *Toplu İşçi Çıkarma*, "Seminar of Istanbul Bar Association and Galatasaray University on Basic Concepts and Recommended Practices Related to Job Security", Istanbul 2003, 65 ff.; Eyrenci, 553; Sümer, Haluk Hadi, *İş Hukuku Uygulamaları*, 6.P., Ankara 2016, 263 ff.

⁴ Kar, Bektaş, *İşletme, İşyeri ve İşin Gereklerinden Kaynaklanan Fesihlerde Yargısal Denetim*, 2008/2, 128 ff.

⁵ According to the Supreme Court, if a worker employed in a hospital operated by the Municipality is dismissed due to the hospital's being shut down without searching the possibility of employing the said worker in another department of the Municipality, the termination of the employment contract must be deemed invalid. 9CCSC, 12.10.2005, 23601/33170.

3. The method for collective dismissal

In cases where collective dismissal is necessary, the employer must notify the trade union representatives in the workplace, the respective regional directorate and the Turkish Employment Agency in writing at least thirty days in advance (LL.29/1). This notification must include the reason for the contemplated dismissal, the number and groups to be affected by the dismissal as well as the time period in which the procedure of terminations is likely to take place (LL.29/3).

Consultations with trade union representatives to take place after the said notification deal with measures to be taken to avert or to reduce the terminations as well as measures to mitigate or minimize their adverse effects on the workers concerned. A document showing that the said consultations have been held is drawn up at the end of the meeting (LL.29/4). This meeting is an information and consultation meeting by nature and it is not mandatory to reach a decision. Parties may hold as many meetings as they wish until the decision to dismiss is effective⁶. If there is no authorized trade union and therefore a trade union representative in the workplace, this provision cannot be applied.

In case the establishment is completely shut down and its operation is indefinitely ceased, the employer is only obliged to notify the respective regional directorate and the Turkish Employment Agency at least thirty days in advance and to announce it at the workplace (LL.29/6).

It is specified in the Law that a notification of termination shall become effective thirty days after the notification of regional directorate by the employer of his intention of collective dismissal (LL.29/VI). Thus, the expression of “a notification of termination shall become effective” should be deemed as that once the 30-day period ends, the notification of termination period will start or the contract may be terminated by paying the salary for the notification period in advance⁷. Also, it should be accepted that this provision in the 6th paragraph is the same with provisions of notifying the regional directorate thirty days prior

⁵ According to the Supreme Court, “A document showing that the said consultations have been held is drawn up at the end of the meeting. It is not mandatory to reach a conclusion or a decision in meetings with trade union representatives of the workplace.”, 9CCSC, 06.02.2010, 6058/36339.

⁶ According to the Supreme Court, “A document showing that the said consultations have been held is drawn up at the end of the meeting. It is not mandatory to reach a conclusion or a decision in meetings with trade union representatives of the workplace.”, 9CCSC, 06.02.2010, 6058/36339.

⁷ Cengiz Urhanoğlu, 68; Aydın, 670; Engin, 57. For the opinion that the provision of notification’s becoming effective 30 days after notifying the regional directorate should be interpreted as that the expiration date of the contract of workers whose notification period is less than 30 days is extended for an additional 30 days, see. Tuncay, A. Can, *İş Güvençesi Yasası Neler Getiriyor*, “The Journal of Cement Industry Employers”, January 2003, 30 ff.

and meeting with trade union representatives specified in the first paragraph⁸. Indeed, there is only a single 30-day period; the time of notification's becoming effective mentioned in the 6th paragraph is tied to the period necessary to pass as mentioned in the first paragraph. Therefore, the notification of termination becomes effective 30 days after the employer's notifying the regional directorate about his intention of collective dismissal (LL.29/5); the notification period begins 30 days after the employer's notifying the regional directorate or the employer may pay the salary for this period in advance.

There is no regulation regarding the punishment to be imposed if the employer fails to act according to the method stipulated by the Law and fails to fulfill his obligation to notify. If the employer fails to act in accordance with the obligation to notify, workers may ask the court to deem the termination invalid. Indeed, if the provision given in LL.29/9 is considered, it may be possible to request the invalidity of the termination due to violation of the method for collective dismissal, as in application of the provision in LL.20 and failure to base the application on a valid reason⁹.

Collective dismissal is a procedural concept. The violation of this procedure requires a pecuniary fine only; the employer's acting in conflict with the collective dismissal procedure does not turn collective dismissal into individual dismissal for workers affected by the collective dismissal. Therefore, it is not possible to say that terminations will not become effective if the employer fails to notify the regional directorate or fails to consult with trade union representatives in the workplace. If the employer dismisses workers in accordance with the method specified in the law, workers may bring a re-employment lawsuit with the claim that collective dismissal is not based on a reason arising from economic, technological, structural, or similar necessities of the establishment, the workplace, or the job; therefore, it should be possible for workers to request the invalidity of the termination if the employer fails to follow the relevant method¹⁰.

Workers whose employment contract has not been terminated based on a valid reason requiring collective dismissal may bring an action in accordance with provisions of LL.18, 19, 20, and 21 and achieve re-employment (İşK.29/9)¹¹.

⁸ The employer must meet with trade union representatives and conclude the matter within the 30-day period which starts with the notification to the regional directorate and is necessary for the notification to become effective.

⁹ Eyrenci, 559-561; Aydın, 679-680; Engin, 71; Akı, 98; Yürekli, 132; Engin, 121-123. "The procedure of collective dismissal is not relevant with valid reasons or validity of termination. Therefore, violating the procedure requires an administrative fine (Article 100)." 22CCSC, 09.09.2015, 18989/24389.

¹⁰ Cengiz Urhanoğlu, İftar, *Toplu İşçi Çıkarma Prosedürüne Aykırılığın Sonucu*, "Tühis", V.21, N.2-3, November 2007-February 2008, 133 ff.; Sümer, Haluk Hadi, *İş Hukuku*, 21.P., Ankara 2016, 108,109.

¹¹ "Since the type of termination in case of collective dismissal is a termination of definite duration within the scope of Article 17 of the Labor Law, it leads to the same consequences as a termination based on a valid reason arising from necessities of the establishment or the workplace. Even in case

Although it is stated in LL.29/2.a that the number of workers employed in the establishment must be at least 20, LL.18/1, which determines the scope of job security, requires that the establishment employs 30 or more workers. Since LL.18, too, is mentioned in LL.29/9, it should be accepted that only workers within the scope of job security may bring an action requesting the invalidity of termination in case of collective dismissal. The employer must notify termination in accordance with LL.19 in case of collective dismissal and the reason behind termination must be specified expressly and implicitly¹².

In case of seasonal and campaign works, if the dismissal is due to the nature of the job, provisions regarding collective dismissal do not apply (LL.29/7).

4. The obligation to re-recruit those who were dismissed

Pursuant to provisions regarding collective dismissal, if the employer intends to employ workers for a job with the same qualifications within six months from the finalization of collective dismissal, the employer shall preferably recruit qualified workers among those dismissed collectively (LL.29/VI)¹³. The article does not clarify how the employer should invite the workers. It should be appropriate to send a written invitation for ease of proof. If the worker who was dismissed as a result of collective dismissal applies to the employer upon such invitation, the employer is obligated to recruit the worker according to the conditions of the day. The employer must wait for the worker's application for a reasonable time. The need for new workers must arise within six months following the finalization of collective dismissal and the worker who was dismissed as a result of collective dismissal must have qualifications needed for the vacancy.

There are no legal and penal sanction regarding the employer's failure to comply with the obligation to draw up a contract. According to the Supreme Court, it is not possible to bring an action for fulfillment against the employer in

of collective dismissal, the employer must follow conditions under Article 19 of the Labor Law No. 4857. In short, the employer must specify the reason behind termination expressly and implicitly." 9CCSC, 06.02.2010, 6058/36339. According to the Supreme Court, there is a valid reason if the employer decides to transfer subsidiary works to a subcontractor due to a reconstruction in the establishment, pays compensations of workers and terminates their employment contracts. It cannot be concluded that the employer uses collective dismissal provisions under Article 28 to prevent the application of job security provisions. 9CCSC., 14.10.2004, 22472/23187, Legal İHSGHD., 2005/6, 771-774; similarly, 9CCSC, 30.04.2007, 6394/13549; 9CCSC, 24.09.2007, 13940/ 27942.

¹² According to the Supreme Court, the employer must act in accordance with provisions of LL.19 in cases of collective dismissal and the reason for dismissal must be expressly and implicitly specified in the notification of termination. 9CCSC, 06.02.2010, 6058/36339, Tühis, 2011/5, 1 ff.

¹³ It is accepted that this regulation is a rule which must be applied in all cases of collective dismissal and not just in case of the establishment's being shut down. Cengiz Urhanoğlu, İhtar, *İşverenin Yeniden İşçi Alma Gereği Halinde Toplu İşten Çıkarılanları Tercihen İşe Alma Yükümlülüğü ve Bu Yükümlülüğe Aykırı Davranışının Yaptırımı*, "Sicil Labor Law Journal", 2010/18, 48 ff.

cases where the employer fails to comply with the obligation to draw up an employment contract: “In Article 29 of the Law on Trade Unions, it is stated that the worker who quits working as a professional trade unionist within 1 month following the request shall be re-employed at his previous position or equivalent by giving priority over others. However, the obligation here is limited only to penal and legal sanction. Other than these, there is no provision or regulation in the law aimed at fulfillment. For this reason, if the worker whose trade union related duties end and who applies to the employer for re-employment is not re-employed, it shall not require the court to rule for the performance of the re-employment.”¹⁴.

5. Conclusion

If the employer intends to dismiss workers collectively due to economic, technological, structural, or similar necessities of the enterprise, the workplace, or the job, the employer must notify trade union representatives of the workplace, the respective regional directorate and the Turkish Employment Agency in writing at least thirty days in advance. This notification must include the reason for the contemplated dismissal, the number and groups to be affected by the dismissal as well as the time period in which the procedure of terminations is likely to take place. The regulation related to collective dismissal in the Labor Law is in accordance with principles set forth in ILO Convention No. 158.

In case the establishment is completely shut down and its operation is indefinitely ceased, the employer is only obliged to notify the respective regional directorate and the Turkish Employment Agency at least thirty days in advance and to announce it at the workplace.

Workers whose employment contract has not been terminated based on a valid reason requiring collective dismissal may bring an action in accordance with provisions of LL.18, 19, 20, and 21 and achieve re-employment.

Pursuant to provisions regarding collective dismissal, if the employer intends to employ workers for a job with the same qualifications within six months from the finalization of collective dismissal, the employer shall preferably recruit qualified workers among those dismissed collectively.

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¹⁴ 9CCSC, 14.6.2010, 22962/18561. Similarly, 9CCSC, 01.05.2006, 8138/12228, 9CCSC, 20.03.2006, 2990/6997, 9CCSC, 26.01.2004, 1303/1157.

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Considerations Regarding the Inclusion of Persons with Disabilities on the Romanian Labor Market

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Abstract

Objectives of the study: the study aims to analyze the issue of the inclusion of people with disabilities in the labor market in Romania and to provide legislative solutions. The research methods used are the qualitative research method and the observation method. Results and implications of the study: 1. The conclusion of partnerships between educational institutions and employers, in order to provide the conditions for a real practice for young people with disabilities in different sectors of activity; 2. In order to include people with disabilities on the labor market, for effective communication with them, I propose introducing the obligation to create unique posts in each institution and public authority for interpreters of the mimic-gesture language; 3. Creating the legal framework for the introduction of the obligation to set up unique posts in each public institution for interpreters of the mimic-gestural language; 4. Creation of a database of people with disabilities to be managed by the National Authority for People with Disabilities, in collaboration with the National Agency for Employment.

Keywords: inclusion, people with disabilities, the labor market, unique jobs.

JEL Classification: K31

1. Identification of the researched problem

The lack of funds and organizational culture has led to poor employers' awareness of the employment of people with disabilities.

Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, republished, stipulates in Art. 78, para. (2), the obligation of both legal entities and public institutions, as follows: "Public authorities and institutions, legal entities, public or private, having at least 50 employees, have the obligation to employ persons with disability in at least 4% of the total number of employees. "

If, on the other hand, this obligation is not met, public authorities and institutions, public or private, may opt to fulfill one of the following two obligations (under Article 78 (3)):

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a) to pay monthly to the state budget an amount representing 50% of the gross minimum basic salary in the country multiplied by the number of jobs in which they have not employed persons with disabilities;

b) to purchase products or services made through their own activity of the disabled persons employed in the authorized protected units, on a partnership basis, in an amount equivalent to the amount due to the state budget, under the conditions stipulated in a).

This provision is not effective at present, not being able to motivate legal, public or private persons to employ people with disabilities.

Lack of employers' interest in providing conditions for real practice in different sectors of activity, to the benefit of young people with disabilities;

Many retired invalids are not currently looking for a job, because if retired, pensioners receiving a first and a second degree disability pension should retire altogether.

2. A new point of view in relation to existing doctrinal approaches

The novelty of the existing doctrinal approaches is that we relate to a 5-year horizon.

3. Structure of research

The change begins with each of us, there is power in us to make the difference, of course if we care and give us the profession professionally. I consider that people with disabilities should not be treated as inferior, pitiful, but as equal partners.

In accordance with Law no. 221/2010 on the ratification of the Convention on the Rights of Persons with Disabilities adopted at New York by the United Nations General Assembly on 13 December 2006, opened for signature on 30 March 2007 and signed by Romania on 26 September 2007, "Disability is a concept in evolution and this results from the interaction between people with disabilities and attitudinal and environmental barriers that prevent their full and effective participation in society on an equal footing with others. "

4. Details of the research methods used

The qualitative research method and the observation method were the research methods used. The thematic analysis was used in the category of qualitative analyzes.

5. The proposed solutions

The proposed solutions are as follows:

1. The conclusion of partnerships between educational institutions and employers, in order to provide the conditions for a real practice for young people with disabilities in different sectors of activity.

2. In order to include people with disabilities on the labor market, for effective communication with them, I propose introducing the obligation to create unique posts in each institution and public authority for interpreters of the mimic-gesture language.

3. Creating the legal framework for the introduction of the obligation to set up unique posts in each public institution for interpreters of the mimic-gestural language

4. Creation of a database of people with disabilities to be managed by the National Authority for People with Disabilities, in collaboration with the National Agency for Employment.

6. Conclusions

6.1. Research results

The research results are as follows:

- a. in the short term, the decrease in the number of people with disabilities
- b. in the short term, the financing of health, unemployment and pensions insurance as a result of wage contributions
- c. in the short term, ensuring a decent standard of living for people with disabilities
- d. Having the possibility of decent living, people with disabilities will also be concerned about the education of the children they have, thus resulting in a medium and long-term population with an adequate level of training and more chances of finding a place work and become productive for society and to support health, unemployment and pensions

6.2. The method that we used

The communication of the results is the way to capitalize them and will be done in one of the following forms: communication within the university cache, completion of a detailed research report; publishing would

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**BUSINESS LAW AND INFORMATION
SOCIETY**

The Right to Information and the Information Society

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Abstract

The study starts from the idea that the citizen's fundamental right to information has new valences through the rapid development of information technology. As more and more activities are currently being deployed in the virtual space, and technology occupies an increasingly important place in social life, it is important that users' right to information be respected, that they are protected against abusive practices, concurrently with the achievement of an honest competitive environment. Correlated with the expansion of new technologies and the use of information in the most diverse areas, without space barriers, it is necessary to guarantee an effective protection of personal data and the right to privacy. Individuals' confidence in the information society is crucial to its development and its evolution in line with European and global trends. The virtual space users need to be properly informed so that they can make informed choices and avoid legal conflicts between service providers and end-users. At the same time, the intense development of business in the virtual environment can be noticed, the economic actors seeing the potential that this space represents for their evolution on the economic and financial markets.

Keywords: right to information, information society, users, personal data protection, privacy protection.

JEL Classification: K10, K24

1. General considerations

We cannot analyse the citizen's right to information without directing our attention to the information society we live in and which plays a major part in the dissemination of information. Over time, the evolution in the information technology field has consisted in the development of infrastructure, devices and operating systems, all of which facilitate the free circulation of information, the social impact being felt in multiple fields, not only technologically or scientifically, but also in other economic and social areas.

It is necessary to make a distinction between the concept of information society and the information and communication technology sector.

"According to the definition agreed upon at the Eurostat level, the ICT sector includes the manufacture of electronic components, computers and peripheral equipment, communications equipment, consumer electronic products and magnetic and optical media for recording purposes; editing of software

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products; telecommunication; information technology services; web portal activities, data processing, web site administration and related activities; repair of computers and communication equipment"².

"The definition of information society services ... includes any service regularly and remotely provided in exchange for remuneration by means of electronic, data processing (including numerical compression) and storage equipment, upon the individual request of the service recipient."³

Information society is a social system in which the various fields of economy, science, technology, etc. intertwine and form a unitary one, without which the individual cannot develop to optimal parameters. Some authors⁴ make mention of the "link between the information society and the knowledge society", a concept that thereby supports the individual's need to have access to information in all areas as there is no information society independent of social needs.

Maintaining a development level of the information society at the level of the states, but also within the state, at the level of the regions, allows to reduce the disparities between societies and between individuals. It also contributes to the achievement of an essential desideratum of the European Union, namely the one concerning the creation of a borderless area in which the free movement of goods and services is ensured, where citizens can receive and transmit information without barriers.

The citizen's access to information has become a necessity; it can come to informed, accurate and consistent decisions only when it has access to up-to-date information in a society evolving in an alert rhythm.

In the literature it is stated that "It is not clear which advantage of the information era is addressed to the individual"⁵. I share the author's opinion, meaning that although information and communications technology provides various individual advantages and opportunities, but also social ones on a whole, there are also some vulnerabilities that users (natural or legal entities) are exposed to. As far as individual users are concerned, "threats to the individual's privacy" may occur, endangering their personal data or private life.

Information technology represents a resource for the other economic-social areas and its role is becoming more and more important in social life as a result

² http://www.insse.ro/cms/files/ISI/publicatia_SI_13.pdf. (last consulted 23.10.2017). The publication is based on data available within the National Institute of Statistics. Page 5.

³ "Directive 2000/31 / EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)" - Official Journal L 178, 17/07/2000 P. 0001 - 0016

⁴ Drăgănescu M. - "Information and Knowledge Society. The vectors of the knowledge society " p. 52, https://www.google.ro/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0ahUKEwj5isuPxoTXAhWMh7QKHSDoDe8QFghQMAU&url=http%3A%2F%2Fwww.academiaromana.ro%2Fpro_pri%2Fdoc%2Fst_a01a.doc&usg=AOvVaw3uX2VQTDD26uurlVPoROnj. (last consulted 23.10.2017).

⁵ Stoica Marian - "Prerequisites for the transition to the information society ", p. 43 <http://revistaie.ase.ro/content/16/stoica.pdf> (last consulted 23.10.2017).

of the measures taken for its development in the period to come (e.g. "a digital agenda for Europe"⁶). The evolution of technology creates "high expectations in various areas - education, health, agriculture, transport, utilities and production"⁷ - encourages several interested parties to enter the market, thus contributing to its expansion. The new processes in the ICT field allow interconnection (not only virtual but also physical), which facilitates communication and circulation of information.

The evolution of the access to the information transmitted over the Internet is conditioned by the coverage area of the Internet services and by the possibility for users to connect to such resources. The development of information technology is placed on an upward trend from year to year, but differs from one country to another as it is subject to financing, geographical configuration, infrastructure, etc.

In Romania, according to the statistics published by the International Telecommunication Union (ITU), the evolution of individual's access to the internet has risen spectacularly from 3.61 (in 2000) to 59.50 (in 2016)⁸.

"An important challenge that remains for Romania in terms of fixed broadband connectivity refers to rural areas"⁹

From the point of view of internet connectivity, Romania must be concerned about bringing the Internet closer to users in rural areas, because fixed networks are currently focused on the urban environment. The reason for this differentiation of connectivity is mainly of an economic nature. In order to remedy these disparities, Romania has started a project funded by the ERDF (European Regional Development Fund), by means of which nearly one third of the rural areas are to benefit from fixed broadband connectivity. Such a project is likely to favour the circulation of information, to guarantee the citizens' right to information regardless of the environment they live in.

When it comes to the information society, one cannot help but notice its role in the phenomenon of globalization, through its essential characteristics, "flexibility and mobility". Information technology facilitates access to information, much easier and less costly management, especially in a society that needs as much information as possible to achieve sustainable development. Technology provides better connectivity, access to information from a wide variety of fields, but this technology needs to be properly used, by observing

⁶ [http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52010DC_0245R\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52010DC_0245R(01)&from=EN) (last consulted 23.10.2017).

⁷ International Telecommunication Union - "*Measuring the Information Society Report*", Geneva, Switzerland, 2015, p. 169 <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf>, (last consulted 23.10.2017).

⁸ <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (last consulted 23.10.2017).

⁹ International Telecommunication Union - „*Measuring the Information Society Report*”, Geneva, Switzerland, 2015, page 110 <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf>, (last consulted 23.10.2017).

individual rights and freedoms, while facilitating access to this technology for as many users as possible.

The information society makes available a wide range of opportunities to increase the quality of everyday life, such as infrastructure and traffic control, electricity networks, water and sewage management, etc. A challenge for the variety of opportunities is to provide proper infrastructure and prevent cyber-attacks which are capable of harming components of the information society.

The most important concern of the information society actors must remain to keep this space in the margin of lawfulness to provide guarantees to all users. In order to achieve this aim an important and necessary pre-requisite is the cooperation of all the factors involved: individual users, product and service suppliers, the State.

In terms of the State's involvement in protecting the interests of the citizens and in guaranteeing their right to information a key role is the national regulatory authority in the telecommunication field, namely the National Authority for Management and Regulation in Communication of Romania (ANCOM). The role of this authority is also important for initiating regulations meant to protect the confidentiality of the data managed within electronic communications, as well as for maintaining open markets with fair competition.

At an European level, several legislative instruments have been adopted the objective of which is to ensure the interoperability of networks and transmission services so that information technology and communications should facilitate the circulation of information, a fair competitive environment and access to a range of services at prices as moderate as possible. At the same time, there is a concern to protect the rights and interests of users, in particular the right to plurality opinion and the diversity of the information provided, freedom of expression, personal data protection, the right to privacy, etc.

Community legislative instruments aim at developing the information society services, removing the legal obstacles that might arise in national legislation, as well as ensuring the free movement of the services corresponding to this society.

2. The role of the national authority for management and regulation in communication in guaranteeing the citizen's right to information

As shown in the previous section, there is a concern at a European level for a coherent regulation of the manner in which the information society operates while protecting the rights of users, and in order to guarantee the impartiality of the decisions adopted, the national authority for regulation in the communication field must be an independent body.

Information society services are made available online, which has raised specific legal regulations to facilitate decision-making by users and thus help to develop the market for this type of service.

Directive 2000/31/CE of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the internal market (directive on electronic commerce)¹⁰ establishes in art. 5, "General Information to Provide" the information that the service provider is bound to make available to users as well as to competent authorities, information to which "easy, direct and permanent access" is to be achieved. In addition to the information on the name of the service provider, address, contact details, registration number, details of the relevant supervisory authority and the professional organization (where applicable), the Directive sets out the obligation to clearly and unequivocally mention the applicable delivery taxes and charges. The directive also regulates the information to be provided to users on commercial communications and their basic principle is that the information they contain must be "easily accessible and clearly and unambiguously brought forward".

Directive 2002/21/ EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communication networks and services (Framework Directive)¹¹ established as a principle the right to information of the authorities, but also of the users. Thus, it is established that in order to carry out its tasks, the national regulatory authority has the right to request information from the service providers and this information must also be accessible to the public. This right to information is limited to the public if the information is confidential (protected by national law on free access to information or by the law on the confidentiality of the business environment). Also, the authority's right to information should not be burdensome for service providers, requests for information should not be excessive and the exchange of the information received with other authorities should be governed by the principles of relevance and proportionality.

Directive 2002/21/ EC also expressly governs, in Art. 5, "Information provision", the market participants being bound to make available to the regulatory authority all required information, including that of financial accounting nature. It also establishes the providers' obligation to quickly send the requested information to the authority within the required and detailed timeframe. On the other hand, it is also the authority's duty to observe the confidentiality of the information received and to justify the legitimacy of the request for information.

The Authority may publish the information it holds in order to ensure a competitive, transparent and open market. However, the limitation of the right to information subsists in this case as well when it comes to guaranteeing commercial confidentiality or when data are protected or exempted from free access.

¹⁰ OJ L 178, 17.07.2000, p. 0001-0016.

¹¹ OJ L 108, 24.4.2002, p. 33.

Concerning the users' right to information, Directive 2002/21/ EC sets in the national authority's charge the obligation to bind service providers to supply clear information and to ensure "transparency of the fees and conditions corresponding to the use of services", allowing users to "access and share any information or use applications and services as they may choose".

The national authority may also request security political-related information from suppliers to make ensure that they are technically and organizationally prepared to cope with the growing security risks.

One can observe the Community legislator's concern to guarantee the users' right to information along with the obligation to protect data confidentiality and commercial secret.

At a national level, the transposition of Directive 2002/21/ EC was made by Government Emergency Ordinance no. 22/2009 on the establishment of the National Authority for Management and Regulation in Communications, approved by Law no. 113/2010¹². In the preamble of the legislative instrument it is mentioned that Romania had already been notified by the European Commission about its failure to comply with the obligation of transposition, the Romanian state being put in default. The legislative instrument establishes that ANCOM has the role of protecting the interests of users in the electronic communications market. Thus, art. 6 of the Ordinance, par. 2, transposes into the national law the provisions of Directive 2002/21/EC on "promoting the provision of clear information, especially regarding the transparency of fees and conditions for the use of publicly available electronic communications services" (letter c); and "Promoting the ability of end-users to access and distribute information or to use applications or services according to their own decisions" (letter g).

In order to fulfil its role as a guarantor of end-user rights, ANCOM regulates, by means of the president's decisions, the obligations of service providers, such as those relating to the information they have to make available to the public. ANCOM also provides users with useful information on its own website, the Info Centre section detailing how to obtain information on telephone, internet and television services; phone numbers and services available at these numbers (European Single Numbers, toll-free line, Special rate numbers etc.) and roaming service, as well as user guides (for information purposes).

By Decision No. 158 of 23 February 2015 of the President of the National Authority for Management and Regulation Communications¹³, the obligations to inform the end-users of publicly available electronic communications services were established.

The decision guarantees the users' right to information and distinctly sets out their ways of information through service providers' own instrumentality and the information by means of ANCOM. The decision also sets out criteria on the

¹² Published in the Official Gazette, Part I, no. 174 of 19 March 2009.

¹³ Published in the Official Gazette of Romania, Part I, no. 146 from 27.02.2015.

manner in which the information is brought forward so that it is user-friendly, readable, "accessible, detailed, accurate, comprehensible, relevant and presented in a way that allows users to easily cover it".

Another feature of the information made available to users is that the information must be up to date, the suppliers being required to change the information released to users whenever (technical or fee-related) alternations occur.

Information through ANCOM is particularly relevant in that the decision determines not only the provision of certain pieces of information to users but comparative information on the services and fees provided by suppliers is achieved so that the user can make informed decisions without being affected by potentially misleading offers.

Comparative information is given to the user distinctly per service category, "and shall return a ranking of the most advantageous cost plans in terms of price meant to correspond to user-expressed options." This means of information enables the user to choose correctly and provides suppliers with the premises of a fair competitive market where each of them has the same opportunities without favouring either party.

3. The users' right to information in the context of Regulation no. 531/2012 on roaming in public mobile communications networks

Within the information society, roaming services have an important role to play as they are a significant way of communicating information and developing the communications markets. At an international level, it has been acknowledged that the economic impact of the development of roaming services at user-friendly prices can lead to the achievement of the European Union's objectives on the free movement of goods and services. Bringing this service at rates as close as possible to national rates is an advantage for both users and service providers.

Since at an European level it has been noticed that roaming price rates are sometimes very high and may constitute a barrier in the way of the free movement of information, there have been different concerns for the regulation of this market. Concerns also focused on accurately informing users so that they can use the service correctly and not suffer the so-called "invoice shock" (i.e. an invoice the amount of which is deemed to be excessive by the user).

According to the Measuring the Information Society Report¹⁴, "European roaming prices dropped significantly over the period 2007-2013, with over 80% for calls and text messages and with over 90% for roaming data services." A survey conducted in 2014 "showed that 47% of Europeans traveling to other EU

¹⁴ International Telecommunication Union - "Measuring the Information Society Report", Geneva, Switzerland, 2015, p. 133-135, <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf>, (last consulted 23.10.2017).

countries avoid using the mobile Internet, more than 25% by simply turning their mobile phones off," the reason invoked by the users being the excessive price they must pay on their return to the country.

The regulation of rates within the EU/ EEA may definitely lead to economic responses from suppliers in the sense that they lower rates on regulated markets but may increase the same in non-regulated markets so that the user has the guarantee of free movement of information only in a certain geographical area.

Market accessibility studies depending on the market price have approached not only the Internet (fixed or mobile) sector but also the telephone communications sector (landline telephone service, mobile telephone service, clustered packages: voice, text message, data). These prices corresponding to roaming services have a great influence upon the economic and social activity when they are at a prohibitive level meant to limit the access of users to information, technology, etc.

Regulation (EU) No. 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming in public mobile communications networks within the Union¹⁵ deems that an important objective to be pursued by national regulatory authorities should be "the ability of end-users to access and share information or to use applications and services of their choice".

In the context of the development of the relevant market it is important to "increase the level of information" of the users, which leads to their ability to make an informed choice, the services that best serve their main interest, respectively provide them with the right to information. This information must be clear, easily accessible and user-friendly.

The Regulation acknowledges the need to inform customers of applicable rates, to ensure price transparency and to provide detailed information per types of roaming services (call, SMS, MMS, data communications) so that the user can decide the manner in which it exercises the rights conferred by the law. Such information should be provided by the supplier whenever changes (concerning subscriptions, rate plans) occur so that the information is up-to-date for the user.

Regarding the way in which information is transmitted, the Regulation lists several possibilities: invoices, internet, TV commercials or direct mail marketing. The condition to be met by these means of communication is to ensure the transmission of clear, comprehensible, transparent information. Also, the transmission of this information to users must also observe other rights conferred by other legal instruments (consumer rights, the right to privacy, the right with regard to personal data processing, etc.).

Given that the use of information society services requires some technical knowledge, which not all users have, the Regulation establishes that providers should support customers, ease their understanding of certain terms used in

¹⁵ Text with relevance for the EEA countries, OJ L 172, 30.06.2012.

contracts, for example, to provide them with information that includes examples of the amount of data used (approximate) when using the e-mail, certain popular applications, when browsing the Internet, etc. Regarding the costs of roaming services, the legislative instrument sets out that the information must be provided to the customer in real time in order to avoid burdening it with unwanted or excessive costs.

Guaranteeing the right to information for roaming users aims to ensure transparency, protect consumers and facilitate the decision-making process of service users while achieving a real competitive market.

The Regulation assigns information obligations for the national regulatory authorities as well, which must provide to whomever may be concerned current data on the application of the provisions of the Regulation at a national level. The publication of information should be monitored every six months, detailed per suppliers and types of services (customers with pre-paid or post-paid service).

The rules laid down in Regulation no. 531/2012 aim at "increasing price transparency and improve the provision of information concerning the rates to roaming users." Thus, the legislative instrument guarantees the users' right to information and binds suppliers and the national regulatory authorities to take the necessary measures in this regard.

As far as Romania is concerned, ANCOM shares on its website a section dedicated to information on the roaming services named "Roam like at home (UE / SEE)"¹⁶, which, through its subsections, explains what this concept is, when it is applied, how it actually works, whom it applies to, what the policy of reasonable use in roaming (PUR) is and the consequences of its overrun. It also provides users with information on roaming charges in the EU/ EEA, their rights, including the right to information from suppliers and how they can defend their rights ("what, how and where can you claim?").

My conclusion is that the adoption of this Regulation and its implementation in the Member States has led to an increased level of information regarding the users, increased transparency, reduced user costs (avoiding "shock invoices") while facilitating the flow of information across borders, by reducing costs.

At the same time, it has raised the citizens' awareness concerning the need to acquire specific knowledge and information in order to benefit from these services at optimal parameters.

4. Conclusions

In the context of the evolution of society and the fast development of technology, the citizen's right to information has gained new valences.

¹⁶ http://www.ancom.org.ro/roaming_3767 (last consulted 23.10.2017).

More and more legislative instruments are added to the constitutional text which approves this right, thus guaranteeing the right to information, but also limiting this right in order to protect the other fundamental rights and the economic interests of the participants in the field.

As shown, with regard to roaming services on unregulated markets, one can conclude that providers prejudice the rights and interests of users as the latter have to bear higher costs in order to have free access to information. Costs are significant both by using the service and by choosing alternatives such as the purchase of local services. The use of WI-FI networks is not a viable solution either because it limits the citizen's space of use and its free access to information.

The International Telecommunication Union¹⁷ by means of Recommendation ITU-T D.98 (09/2012) on the responsibilities of the mobile roaming international service¹⁸, urges Member States (such compliance with the provisions of the Recommendation is voluntary) to adopt measures enabling users to take advantage of a well-regulated, transparent, competitive market that provides them with the appropriate information. Member States should identify ways to improve the functioning of the roaming market, including by reducing rates.

Studies have revealed that "the three most important reasons for which households do not have access to the Internet are that: such services are unnecessary (49%), they do not have the necessary skills (37%), the costs are too high – for the equipment (30%) and for access (26%) ".¹⁹

Information society services must be accessible to as many people as possible and this can be achieved by reducing costs but also by informing users. In addition to their rights and obligations, the information should also address the benefits of technological advancement and the need for users to acquire the skills necessary to use these services.

I believe that international efforts would be required to regulate these services following the model adopted at the EU/ EEA level, and only through an international and regional collaboration can the objectives of rate reduction and increased accessibility of information society services be reached, all of which having an impact not only on citizens' right to information, but also upon society

¹⁷ The International Telecommunication Union (ITU) is a specialized agency of the United Nations in the field of telecommunications, information and communications technologies (ICT). Telecommunication Standardization sector of ITU (ITU-T) is a permanent body of the ITU. ITU-T is responsible for studying technical, operating problems and pricing and issuing recommendations in their respect with a view to standardizing telecommunications on a worldwide basis.

¹⁸ ITU-T Recommendation D. 98 (09/2012), <https://www.itu.int/rec/T-REC-D.98-201209-I/en> (last consulted 23.10.2017).

¹⁹ International Telecommunication Union – „Measuring the Information Society Report”, Geneva, Switzerland, 2015, page 93, <http://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2015/MISR2015-w5.pdf>, (last consulted 23.10.2017).

as a whole because technological progress and fair competition generate economic and social development.

The educational component is important in the sense that users need to become more aware of the need to receive and access certain information which guarantees their rights and facilitates their understanding of their corresponding obligations.

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Legal Reform of European Union Data Protection

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Abstract

Achievement the Digital Single Market, one of the objectives of European Union, needs a specific legal framework. In this regard, it was adopted the General Data Protection Regulation 679/2016/EU (the GDPR) which will come into force on 25 May 2018 and will replace the existing Data Protection Directive 95/46/EC. The main goal of the GDPR is to harmonise data protection across the EU and to enable individuals to regain control of their personal data, according to Mr. J.-Ph. Albrecht, member of European Parliament. The application of the GDPR will bring significant changes to European data protection law; therefore those rules include data breach notification, coordinated enforcement, strengthened consent, clarify the “right to be forgotten” together with serious financial penalties for non-compliance. The GDPR also expands the territorial and material scope of EU data protection law thus non-EU companies will have to apply the same rules as EU companies when offering services in the EU. In conclusion, the Regulation strengthens fundamental rights in the digital age and facilitates business by simplifying rules for companies in the Digital Single Market.

Keywords: *General Data Protection Regulation 679/2016/EU, EU data protection law, data breach notification, damages claims for data protection breaches, right to be forgotten, Digital Single Market.*

JEL Classification: K13, K23

1. Introduction

Since the adoption of the Data Protection Directive 95/46/EC in 1995 we have experienced rapid technological developments like explosion of the Internet, big data and cloud computing, online social networks, online advertising, virtual currency, etc. as well as globalization flows of personal data².

All these new technological challenges have significantly transformed the way in which personal data are processed and used, thus it is necessary a “strong and more coherent data protection framework in the Union (...) that will allow the digital economy to develop across the internal market.”³

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² Concerning the application of Directive 95/46/EC, see Camelia Florentina Stoica, Marieta Safta, *Theoretical and practical issues relating to the right to the protection of personal data*, „Juridical Tribune”, vol. 5, issue 2, 2015, p. 101, 102.

³ Recitals (6) and (7) of the Regulation EU 2016/679.

The aim of this paper is to examine the main changes brought by the legal reform of the EU data protection in light of the challenges of contemporary data processing, based on Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (so-called General Data Protection Regulation).⁴

The General Data Protection Regulation (hereinafter GDPR) was initially published by the European Commission in January 2012, and finally adopted on 27 April 2016. Following a two-year grace period, the GDPR will come into force on 25 May 2018 and it will replace national legislation which implements the existing Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (Data Protection Directive).

The core goal of the data protection provisions refers to processing with respect to personal data belonging to the individuals in their capacity as data subjects,⁵ meaning “an identifiable natural person (...) by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”⁶ Firstly, the processing of personal data consist in “collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination, restriction, erasure or destruction,”⁷ etc. Secondly, the concept of personal data is defined as “any information relating to a” data subject.

2. The principal changes enshrined in GDPR

In order to fulfil its main objectives, meaning to create a balance between protections of the fundamental rights of data subject and freedom of flow of such personal data across European Union, GDPR provides several innovations in processing personal data, considered below.

⁴ GDPR was published in 2016 OJ (L 119) from 4.05.2016, pp.1-88. Gutwirth, S., Leenes R., de Hert P., (eds.) *Reforming European Data Protection Law*, Springer, Dordrecht [Netherlands], 2015, p. 12; Voss, W.G., *European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting*, The Business Lawyer, vol.72, winter 2016-2017, p. 132.

⁵ Art.2 (1) of GDPR.

⁶ Art.4 (1) of GDPR.

⁷ Art.4 (2), art.33 of GDPR.

2.1. GDPR extends its territorial application

According to Article 3(1), the provisions of GDPR shall apply to any processing of personal data “in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing itself takes place within the Union or not.” Moreover, Article 3(2) refers to all non-EU data controllers and data processors but which offer goods or services to EU data subjects or which monitor their behavior. This connecting factor, further specified by Recital 23 is more specific than the former “equipment/means” criteria set out by the Data Protection Directive 05/46.⁸

2.2. Principles of transparency and accountability

GDPR specifies that data have to be processed “in a transparent manner”⁹ and any inaccurate data must be erased or rectified “without delay.”¹⁰ In addition, GDPR develops the accountability principle according to that the data controller have to comply with the obligations provided by the Regulation and to demonstrate such compliance. In this regard, they have the obligation to keep detailed records of their processing activities, and to “implement appropriate technical and organizational measure” to ensure data protection by design and by default demonstrated with certification¹¹ issued based on approved certification mechanism pursuant to Article 42.

2.3. Lawfulness of data processing

The Regulation emphasizes the necessity of the legitimacy for personal data processing provided by law or data subject’s consent.¹² According the GDPR, data subjects must freely give “specific, informed and unambiguous consent” for each processing of their data, and they can withdraw their consent at any stage and it must be easy for them to do so.¹³ In all cases, the controller has to be able to prove that the data subject has given his/her consent.

The processing of the personal data of children younger than the age of 16 years is lawful only if and to the extent that consent is given or authorised by

⁸ Opinion 8/2010 of the Working Party on the Protection of Individuals with regard to the processing of personal data, on applicable law.

⁹ Art.5(1)(a) of GDPR

¹⁰ Art.5(1)(d) of GDPR

¹¹ Art.25 of GDPR

¹² Art.6 (1) of GDPR.

¹³ Art.7 of GDPR.

the holder of parental responsibility over each child.¹⁴ The controller shall make reasonable efforts to verify that any holder has given or authorized consent.¹⁵

2.4. Specific rights of data subjects

In light of GDPR, data subject have more control over the processing of their personal data and so they enjoy some new rights, including the right to restrict processing, the right to data portability, rights in relation to automated decision making and profiling, right to erasure (right to be forgotten).

The controller has to inform data subject about their rights and the ways of exercising them.¹⁶ In this regard, the controller shall provide any information and communication referred to the data processing “to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means.”¹⁷ Moreover, the controller has to facilitate the exercise of data subject rights and “shall not refuse to act on the request of the data subjects for exercising their rights, unless the controller demonstrates that it is not in a position to identify the data subject”.¹⁸ In every such case, “the controller shall provide information on action taken on a request to the data subject without undue delay and in any event within one month of receipt of the request.”¹⁹ In fulfilment of this obligation, the “controller shall provide a copy of the personal data undergoing processing.”²⁰

EU or Member State may restrict certain rights of data subjects if the restriction “respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society” to safeguard national interests.²¹

2.5. Data breach notification

The GDPR introduces a mandatory data breach notification mechanism whereby the controller is obligated to notify to the relevant data protection supervisory authority of personal data breaches without undue delay and in any event within 72 hours²², unless the breach is unlikely to result in a risk to the rights and

¹⁴ Art.8 (1) of GDPR.

¹⁵ Art.8 (2) of GDPR.

¹⁶ Art.15 (1) of GDPR.

¹⁷ Art.12 (1) of GDPR.

¹⁸ Art.12 (2) of GDPR.

¹⁹ Art.12 (3) of GDPR.

²⁰ Art.15 (3) of GDPR.

²¹ Art.23 of GDPR.

²² Art.33 (1) of GDPR.

freedoms of data subjects. If this risk is high, then data subjects must also be notified of the breach without undue delay.²³

In addition, the GDPR provides that the processor is also obligated to notify data breaches to the controller without undue delay, and the latter must provide any documentation regarding data breach to allow the supervisory authority to verify compliance.²⁴

2.6. Sanctions

The GDPR provides that supervisory authorities are permitted to impose against both controllers and now processors substantial fines, in amount of up to €20m or 4% of their total worldwide annual turnover in the previous year. Supervisory authorities shall determine whether to impose a fine, and the level of that fine. On the other hand, the controllers and processors may take measures in order to decrease the amount of the fine, such as to mitigate the damage suffered by data subjects,²⁵ etc.

3. Conclusion

From the moment of GDPR come into force all the actors involved in processing personal data have to be prepared to apply it. In this regard, they need to adapt all the internal procedure handling personal data in order to cover all request of data subjects, to implement procedures regarding data breaches, and, generally, to protect of natural persons with regard to the processing of their personal data.

It is clear that EU data protection reform will require a common effort to ensure the free movement of personal data within the internal market and to seize the opportunities of the Digital Single Market.

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²³ Art.34 of GDPR.

²⁴ Art.33 (5) of GDPR.

²⁵ Art.83 (2)(c) of GDPR.

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ENVIRONMENTAL LAW AND BUSINESS

The Role of Environmental Protection in the Current International Context

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Abstract

The study seeks to illustrate that in a global world dominated by chaos and conflicts, maintain an applicative framework for applying and guaranteeing environmental protection standards, although there is a great awareness of the population and decision-makers in the need to promote actions to prevent and repair wherever possible, environmental degradation. Within an area of freedom, embodied in rights and privileges of persons, services, capital and commodities to the free movement, owing to current modern technologies, the range of action of the environmental degradation has been extended and intensified, acquiring in a short time a cross-border and international character. In order to prevent the degradation of the cross-border and international space, it is necessary to start new concerted actions at global, regional, national level, which need to be translated into a clear constitutional order of reference so as to stop the acts of deterioration and limit the possibilities that globalization triggers in the environment.

Keywords: *environmental protection, environmental policies, legal norms, environmental degradation, environmental damage, climate change.*

JEL Classification: K32, K33.

1. Introduction

In a global world dominated by complexity, dynamism and antagonism, deeply affected by economic and financial tensions and crises, the protection of the environment in the current context represents a real attempt, with fundamental objectives, difficult to achieve for European construction, Euro-Atlantic cooperation as well as for global developments.

As mankind is in permanent change and transformation, with public and private entities from different countries in continuous interaction and cooperation, the development of the Internet, transport and new technologies worldwide has led, on the one hand to economic sustainability; on the other hand, the premises of new environmental challenges have been created, generating major risks to the safety of the climate we live in.

Within an area of freedom, embodied in rights and privileges of persons, services, capital and commodities to the free movement, owing to current modern technologies, the range of action of the environmental degradation has been extended and intensified, acquiring in a short time a cross-border and international character.

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In order to prevent the degradation of the cross-border and international space, it is necessary to start new concerted actions at global, regional, national level, which need to be translated into a clear constitutional order of reference so as to stop the acts of deterioration and limit the possibilities that globalization triggers in the environment

Although humanity in general is currently part of a structure of freedom, security, and justice based on values, interests, common goals, democratic principles and norms of the rule of law, has failed, although they have taken place a series of transformations, mutations, degradation and catastrophes, to attach great importance to the environment as a general national societal interest, is based on essential and vital regulation for mankind.

With the emergence of the first forms of environmental degradation, the first legislative measures quickly came up under the shape of identifying, determining and repairing environmental damage appeared in an uninterrupted manner².

"The identification of ecological problems as well as the intensification of the phenomenon of globalization illustrate, for environmental law, an evolution towards the universalization and homogenization of the regulations in order to ensure an efficient protection of the quality of the environment. This evolution has led to the development and adoption of rules meant to embody the entire order of environmental law so as to ensure the protection of its quality.

The interests manifested in this respect have mainly developed in the formulation of certain rules specific to the environment law with applicability in the international and national systems.

Depending on its international, regional, or national character, over time these rules have seen a number of assertions and formulations in different legal systems, aimed at enhancing the size of the area of prevention and combating the degradation and deterioration of the environment."³.

These principles have had a political feature and organizational inclusion, being outlined and legally established on the basis of a forecast of the interaction between economic development, the contribution of newly established European and European institutions and the protection of the environment through the design of a single common market.

The actual form of their assertion and recognition in the system of environmental law was based on the research of international regulations in the field, which illustrated the establishment of certain laws as principles, at different

² In 1273, the British Parliament adopted the first legislative measures on the prevention and the fight against environmental pollution, which imposed an obligation on residents of London not to use coal-fired processes for heating homes. Afterwards, in 1383, the French King Carol adopted regulations prohibiting the use of emissions that produced a smell to affect french citizens.

³ Lidia Lenuta Balan, *Environmental Protection in the Prevention and Control of Pollution*, Volume 1, University Publishing House, 2014, p.78.

stages of recognition, affirmation and guarantee, as legal norms for the member countries in order to prevent confusion and to correctly formulate in the cases appeared in the analyzed field.

2. International legal instruments for environmental protection

To address the problems posed above, "the first concerns for the reorganization of the legal order in the form of establishing certain rules and principles for the prevention of degradation and deterioration of the environment occurred at the meetings held at the *United Nations Conference on the Environment in Stockholm in 1972*. The most significant document adopted by the Conference was the *Declaration on the Environment*, which includes 26 principles stating the rights and obligations of states, citizens as well as the specific ways of developing the collaboration for the protection of the environment. Principle 1 of the Environmental Statement decrees that the individual has the fundamental right to adequate living conditions in a healthy environment. Subsequently, on the basis of this principle, the United Nations Environment and Development Conference in Rio 1992 decreed that the human being must benefit from a healthy life"⁴.

The international community alarmed by the tragedies and ecological catastrophes, on the basis of expert reports and economic reflections made on this occasion, aimed to implement action plans with measures meant to prevent and suppressing the effects of the environmental degradation and deterioration so as to remedy the environmental damage, wherever it was still possible.

Fully aware of the situation, the European Community, in turn, increasingly wanted to implement and develop these measures at the regional level. Thus, during the period of 1977-1983, they managed to develop a program to promote certain principles to regulate the sphere of action of the prevention of environment degradation and to rehabilitate the whole ecosystem at the regional level was developed.

At a meeting in Paris on 19 and 20 October 1972, the Heads of State and Government as well as the Delegations of the Member States of the European Communities agreed that the economic sustainability should be based on the following pillars: reducing life requirement gaps, improving the quality of life and paying particular attention to the protection of the environment so that the progress can serve all of ⁵.

Constantly concerned about the promotion of environmental protection actions, of filling the existing gaps in international legal instruments and the enhancement of measures to prevent and combat environmental degradation and

⁴ Balan, Lidia- Lenuta, *Environmental Protection in the Prevention and Control of Pollution*, Volume 1, University Publishing House, Bucharest, 2014, p. 80.

⁵ Jans, John, *European environmental law*, 2nd ed. edition, Europa law publishing, Groningen, 2000, p.3.

deterioration, the European Community has legislated a number of environmental action programs⁶.

These rules, which have been set up as principles in terms of their legislation in the six environmental action programs, have become obligatory for all Member States and have subsequently become legal illustrations of the provisions of Article 174 of the Treaty of Rome, of the provisions of the Single European Act of 1986⁷.

Starting from the regional plan regulations and returning to the international plan, among the various forms of deterioration and degradation of the environment that humanity faces over time, for this study I will confine myself to briefly analyzing only a part of the instruments legal entities with universal vocation, namely those concerning climate change.

In the light of the already established international legal instruments, the international community, in order to halt the degradation of the environment and to rebalance the whole ecosystem, especially climate changes, met on 11 December 1997 and signed the Kyoto Protocol to the Convention- the United Nations Framework Convention on Climate Change⁸, which required the mandatory fulfilment of the quantitative limitation and reduction of gas emissions in relation to 1989, for the years 2008-2012.

The provisions of this Protocol sought to reduce greenhouse gas emissions by at least 5% compared to 1990 levels; on this occasion the States Parties had an express obligation to regulate greenhouse gas emission reduction policies

⁶ For a comprehensive study on environmental action programs, see, for example, Profiroiu, Marius; Popescu, Irina, *European Policies*, Economic Publishing House, Bucharest, 2003, p.161 et seq.; Petrescu-Mag, Ruxandra Mălina, *Environmental Protection in the context of sustainable development. Legislation and Institutions*, Bioflux Publishing House, Cluj-Napoca, 2011, p.63-75.

⁷ The first set of Community programs and regulations relating to environmental protection was adopted in 1973, after which these regulations were included in the Community treaties, by the provisions of the Single European Act of 1986 and Art. 130R, 130S, 130T, subsequently 174, 175 and 176 (current Articles 191, 192 and 193 of the Treaty of Lisbon). Article 174 (2), above, states that policies pursued at European Community level are pursued on the basis of the exercise of the precautionary principle, the polluter pays principle and the principle of priority source correction. The three principles did not have the legal force of being recognized and guaranteed as the main and generally binding legal rules in building actions for a common policy in Europe, but only guidelines to encourage a united Europe with a market and environmental protection jointly developed and further developed by the Treaty on the Functioning of the European Union, as well as through a series of directives and regulations.

⁸ The European Union ratified the Protocol on 31 May 2002, stating that ratification was to be at the expense of the commitments of at least 55 states, which has happened. Romania ratified the Kyoto Protocol on 11 December 1997, by the provisions of Law No 3 of 02 February 2001, published in the Official Gazette of Romania no.81 of 16.02.2001. It is worth mentioning that Australia and the US have not ratified the protocol, although if we relate to the share of countries contributing to air pollution, they are a priority. Which required the mandatory fulfillment of the quantitative limitation and reduction of gas emissions in relation to 1989, for the years 2008-2012.

and to encourage as far as possible public-private partnerships as well as the international cooperation in this area.

Also, for the period 2008-2012, the Protocol Member States were expressly required to adopt national regulations that would improve the quality of internal emissions factors, improve climate change and allow, where appropriate, the adaptation to these changes.

Based on the studies carried out in the scientific reports presented on this occasion, it was concluded and established that, in order to achieve the desired outcome of the United Nations Framework Convention on Climate Change, action must be taken in a dynamic manner by all States, including developing countries in order to achieve the world-wide minimization of greenhouse gas emissions⁹ under 50% for the level of 2050 in relation to the estimated emissions in the year 1990.

"As these mechanisms failed to reach the proposed levels of greenhouse gas reduction, the international community met at the United Nations Climate Change Conference held in Doha from 26 November to 8 December 2012 to order the continuation of the application of the Kyoto Protocol until 2020. At the request of the European Union, the Conference has decided to adopt a work plan based on the two-party Durban Conference on Climate Change, which aims to develop a new global climate change agreement for all countries of the world in 2015 and to find ways to limit global emissions by 2020 in order to eliminate the existing gap between emissions commitments and global warming reduction plans to less than 2°C"¹⁰.

The Protocol's provisions aimed to initiate programs to monitor and implement the obligations assumed by signatory States to reduce their greenhouse gas emissions¹¹.

Among other instruments that address climate change concerns, we mention the first meeting of the Parties to the Framework Convention, held in Buenos Aires in 1998, as well as the Seventh Marrakech Conference of the Parties in the year 2001¹².

There followed the UN Climate Change Conference in Copenhagen in 2003 and several UN Bali Climate Change Conferences in 2007¹³, Poznan, 2008,

⁹ According to the provisions of Article 3, letter d of the Government Decision no.780 of 14 June 2006, as subsequently amended and supplemented, on establishing the greenhouse gas emission allowance trading scheme, greenhouse gases are those set out in Annex 2 to this normative act.

¹⁰ Balan, Lidia- Lenuta, *Atmospheric, water and soil protection at international, European and national level*" Volume 2, University Publishing House, Bucharest, 2014, p.31.

¹¹ Canada considered it desirable to withdraw it in 2011, from fulfilling its obligations under this country, other countries such as New Zealand, Russia and Japan, did not consider it appropriate to undertake obligations related to the reduction of greenhouse gases.

¹² 2001 Marrakech Agreement aimed at developing low-cost programs for units resulting from the content of R & D projects to increase greenhouse gas emission savings.

¹³ Bali Conference in 2007 adopted a document called the Bali Road Map which includes the Bali Action Plan based on the following measures: a common approach to cooperation measures to limit

Copenhagen, 2009, Cancun, 2010, which called into question the adoption of a global legislative system to combat climate change.

The UN Climate Change Conference held in Cancun from 29 November to 10 December 2010 reiterated the idea that climate change is the expression of a whole chain of environmental challenges and that, in order to meet the overall objective of combating climate change, all mankind needs to participate and actively cooperate "¹⁴.

Although a series of action plans with measures have been taken on this occasion, the Conference has failed to produce remarkable results as the necessary and mandatory measures to limit greenhouse gas emissions have not been legislated, the procedures for financing the fund set up and the legal means of reducing the necessary gas emission reductions have not been outlined.

Subsequently, the 21st session of the Conference of the Parties, also called (COP 21) to the United Nations Framework Convention on Climate Change, also had a special and balanced significance for the area of prevention and combating climate change, as well as the 12th Session of the Meeting of the Parties to the Kyoto Protocol in Paris in 2015, which called for the necessity of concluding a new global agreement that would continue and contain action plans with measures for the reduction of the global warming below a percentage of 2°C, establishing clear and precise obligations for the States Parties to inform of the actions taken to prevent and combat climate change every 5 years and a more active involvement of the EU and of the developed countries so as to continue to provide financial support to developing countries for the prevention and fight against climate changes.

The Paris agreement was signed by most states except Syria, Nicaragua and the Vatican, though they also faced a series of global warming problems and struggled to combat it. The USA, in turn, despite having signed the agreement, consider under Trump administration that it is more appropriate to withdraw from the discussion table and to deal with its national policies to combat this phenomenon, without any embarrassment under the negotiated rules.

This decision has generated a series of chain reactions for both international and national environments, which grants China many economic and diplomatic advantages and opportunities, and at the same time offers it a world leader position in the fight against climate change climatic nature.

emissions; national and international cooperation on mitigation of climate change; adopting programs to enable technological development and transfer to stimulate measures to reduce and adapt to climate change; initiating research programs to reduce emissions by allocating funds and resources to that end.

¹⁴ Balan, Lidia-Lenuta, *Atmospheric, Water and Soil Protection at International, European and National Level*, Volume 2, University Publishing House, Bucharest, 2014, p.32.

3. Conclusions

The Paris Agreement and the withdrawal of America from the agreement have done nothing but outline China's leadership position. Its leadership position seems to be a firm and fruitful one, as it has become an essential member, if we refer to the degree of its involvement in the assuming of the obligations regarding gas emissions curtailment to the norms negotiated through the agreement by 2030, and to the fact that it shows solidarity along with Europe, Asia and Africa for the actions taken to the detriment of future generations, taking definite responsibility for the prevention and combating of pollution for the whole planet; however, it remains to be seen what the purpose of this agreement is and how it will succeed in bringing together the world's states in order to fight against climate change, the deterioration and degradation of the environment we live in.

As it has been noticed, the number and quality of legal instruments with a universal and regional vocation has gradually evolved in the course of time, which has largely succeeded in making some forms of regulation in the field of combating environmental degradation, but in no way preventing nor entirely eliminating the phenomenon of deterioration and degradation of the environment.

It is also hard to believe that only by means of regulation it will be possible to completely eliminate the phenomenon of deterioration and degradation of the environment and essentially of the degradation of the human health and life.

Although a series of challenges have turned up over time, we can firmly assert that we are at the beginning of a road, even if there is a legislative framework designed to manage to a certain extent and in an efficient manner the resolution of the ecological issue in a peaceful way, through the reconstruction of the damage, a situation created by man's boundless desire to master and exploit, at any cost, the nature.

All these findings do nothing but reflect once again that the legal system for the estimation and recovery of the environmental damage is really at disadvantage as it is based on a non-functional structure, with the existence of clear sectoral policies to illustrate what has determined the occurrence of the damage and what steps should be taken to recover the environmental damage, a situation arising from the transfer process from a planned economy to a market economy based on the establishment of new rules of adaptation to advanced technology and techniques of acquiring and implementation, although China has switched to a technology based exclusively on greening.

Despite all this technical and economic harmonization, the legislative framework in which these policies have been reflected is currently showing a number of applicative difficulties, with dysfunctions regarding the guarantee for the effective determination and restoration of the environmental damage.

In order to identify the causes of deficiencies and non-functioning of current policies in the field of environmental damage compensation, it is necessary to start extensive research on all existing environmental policies for the determination of the proportionality of policies in the area of rehabilitation in the context of protection, rational exploitation and sustainable development of environmental factors.

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'Green' Obligations Regarding New Constructions and Their Impact Upon the Real-Estate Market

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Abstract

The fight for reducing green gas emissions and energy dependency requires the application of additional obligations for new constructions. From this perspective, starting from the 31st of December 2020 building permits for new constructions in the private sector shall be issued only if their energy consume is close to zero. Additionally, the recovery level of non-dangerous waste resulting from construction and demolition activities must reach until the 31st of December 2020 a percentage of minimum 70%. These additional obligations will have a direct impact upon the construction price and will certainly influence the real-estate market.

Keywords: Green obligations, real-estate market, energy performance of buildings, energy law.

JEL Classification: K25, K32.

1. Buildings whose energy consumption is almost equal to zero

At European Union level, buildings are responsible for about 40% of final energy consumption and 36% of greenhouse gas emissions². From the energy consumption perspective at the national level, the residential and tertiary sector (office buildings, commercial spaces and other non-residential buildings) represent together 45% of the total energy consumption³. Considering that there is a tendency to expand this sector, it is obvious that both energy and raw material consumption will increase, which will also lead to an increase in the level of carbon dioxide emissions.

1.1. Applicable legislative framework

From the perspective of the legislation applicable at the European Union level, the field of energy efficiency is regulated mainly by Directive 2010/31/EU of the European Parliament and of the Council from 19th May 2010 on the energy

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² <https://ec.europa.eu/energy/en/topics/energy-efficiency/buildings> (consulted on 5.10.2017).

³ https://ec.europa.eu/energy/sites/ener/files/documents/2014_article4_ro_romania.pdf (consulted on 5.10.2017).

performance of buildings ('**Directive 2010/31/EU**'). The Directive 2010/31/EU repealed Directive 2009/91/EC and introduced substantial amendments to the energy performance requirements for buildings.

Law no. 372/2005 on the energy performance of buildings⁴ ('**Law 372/2005**') transposes fully into the national legislation the provisions of Directive 2010/31/EU, aiming to promote measures for increasing the energy performance of buildings by:

- designing new buildings with low energy consumption;
- thermal rehabilitation of existing buildings as well as
- correctly informing the owners/administrators of the buildings on the energy performance certificate.

1.2. New obligations on energy consumption

In the context of new legal obligations regarding energy consumption, the following aspects should be taken into consideration:⁵

- the new buildings from the private sector, for which the reception of the construction works is performed on the basis of building permit issued starting with the 31st of December 2020, will be buildings that have the energy consumption almost equal to zero;
- the new buildings owned/administrated by public administration authorities, which the reception of the construction works is performed on the basis of the building permit issued after 31st December 2018, will be buildings that have energy consumption almost zero.

Therefore, according to the above mentioned, starting with 31st December 2020, **building permits for new buildings from the private sector will no longer be issued unless they have nearly zero energy consumption**. For buildings owned/administrated by public administration authorities, after 31st December 2018, building permits for new buildings will not be issued unless they have nearly zero energy consumption. It may be noted that the legislator wished to impose for public authorities a more strict compliance deadline than the one for the private sector.

The building for which energy consumption is almost equal to zero is defined by Law 372/2005 as a building that meets the following cumulative conditions:

- i. has a very high energy performance, with almost zero or very low energy consumption

The notion of 'energy performance' of a building means the amount of energy calculated or measured to ensure the energy demand under the

⁴ Law no. 372/2005 regarding the energetic performance of buildings, published in the Official Gazette, Part I, no. 1144 dated 19th December 2005, as further amended.

⁵ Article 14 of Law 372/2005.

- normal use of the building, which includes, inter alia, the energy used for heating, cooling, ventilation, hot water and lighting.⁶
- ii. energy consumption is at least 10% covered by energy from renewable sources produced either on-site or nearby

Renewable energy is the energy from non-fossil renewable sources, namely: wind, solar, aerothermal, geothermal, hydrothermal, and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogas.⁷ Unfortunately, the legislator did not expressly indicate the proximity, leaving this assessment for the authorities and/or investors. However, we consider that it is necessary to regulate this aspect in a future amendment to the law.

The level of energy required for buildings of which energy consumption is almost equal to zero is set **by technical regulations**. This level is differentiated on areas with renewable energy potential and is periodically updated according to technical progress.

By city planning certificate issued in order to obtain the building permit, it will be necessary for the energy requirements of the buildings to be limited to the specific technical regulations⁸.

The city planning certificate issued without the observation of the provisions for the energy demand of buildings to be limited to the levels provided in the specific technical regulations, shall be considered as an incomplete city planning certificate⁹. In this respect, the building permit issued under an incomplete city planning certificate is not valid.

1.3. The building's energy performance certificate

The building's energy performance certificate is defined under Law 372/2005 as the documents established according to the calculation methodology of the energetic performance of buildings, that indicates the energetic performance of a building or of a building's unit and that comprises data regarding the primal and final consumption of energy, including the energy resulting from renewable energy sources as well as the quantity of CO₂ emissions (**'Performance certificate'**).

The existence of the Performance certificate is mandatory for (i) the establishment, (ii) the sale, (iii) the lease and for (iv) the performance of significant renovations of the following building categories: single family housing; apartment blocks; offices; education buildings; hospitals and restaurants; buildings

⁶ Directive 2010/31/UE.

⁷ Directive 2010/31/UE.

⁸ Article 14 paragraph (4) of Law 372/2005.

⁹ Article 32 paragraph (2) of Law 372/2005.

designated for sport activities; buildings for trade services; other types of buildings that are energy consumer.

The Performance certificate contains:

- calculated values, in accordance with the current technical regulations on energy consumption and CO₂ emissions that allow the investor/owner/administrator of the building/building unit to compare and assess the energy performance of the building/building unit;
- recommendations to reduce the energy consumption of the building by estimating the energy savings through implementing measures to increase the energy performance of the building, including specifications from where to obtain more detailed information, such as: the cost-effectiveness of the recommendations made, the procedure that should be followed for the implementation of recommendations, financial or other incentives and funding opportunities.

For the buildings that are under the construction process, the certificate is established by the investor/owner/administrator, is presented in original to the reception commission at the end of the works, is attached, in copy, to the reception protocol and is part of the technical book of the construction.

1.4. Consequences for non-observing the obligations on new energy performance obligations

For new buildings in the private sector or owned/managed by the public administration authorities, who do not observe the above mentioned obligations, namely do not have almost zero energy consumption, the reception of the construction works will not be performed, according to the provisions of the Regulation for reception of construction works¹⁰.

As a result of failing to perform the reception at the end of construction works or the lack of the reception's protocol, the construction cannot be put into use¹¹.

Also, the ownership right of buildings may be registered in the Land Register on the basis of the protocol regarding the performance of the reception at the end of the construction works, accompanied by the documentation listed in Order no. 700/2014 regarding the approval of the Regulation for the approval, reception and registration in the cadastral records and land register, Official Gazette no. 571 of 31/07/2014, as further amended (**'Order 700/2014'**).

¹⁰ Government Decision no. 343/2017 for the amendment of the Government Decision no. 273/1994 regarding the approval of the Regulation for the reception of construction works and related installations, in force since 29th July 2017, published in the Official Gazette, Part I no. 406 of May 30, 2017 ('Regulations for the reception of construction works').

¹¹ Article 5 of the Regulation on the reception of construction works.

Constructions made without a building permit or without the observance of its provisions, as well as those that **do not have the reception at the end of the works performed**, according the law, **are not considered to be completed and cannot be registered in the land register**¹².

According to the provisions of Order 700/2014, the unfinished constructions registered in the land register that do not have a reception protocol at the end of the construction works, **cannot be subdivided into apartments**.

2. Recycling of construction waste

The construction sector is a significant generator of construction and demolition waste, representing approximately 25% -35% of the total waste generated by the European Union¹³. Reducing energy consumption and raw materials can be achieved by recycling waste resulting from construction and demolition activities.

The recycling of waste, including those resulting from constructions, is a process of waste valuation. This process saves both energy, because it reduces the number of industrial processes required for production, as well as raw material for the production of the finished product. Reuse of construction and demolition waste reduces waste disposal space and allows the use of recycled materials instead of natural resources.

2.1. Applicable legislative framework

Directive 2008/98/EC of the European Parliament and of the Council from 19th November 2008 on waste and repealing certain Directives ('**Directive 2008/98/EC**') sets objectives that need to be achieved by the Member States of the European Union in the field of waste recycling, by 2020.

At national level, Law no. 211/2011 on the waste treatment¹⁴ ('**Law 211/2011**') transposes Directive 2008/98/EC and seeks to establish measures for the environment protection and public health, by preventing or reducing the adverse effects of waste generation and waste management. Law 211/2011 also aims to reduce the overall effects of resource use and increase the efficiency of its use.

¹² Law no. 50/1991 regarding the authorization of the execution of construction works republished Official Gazette no. 874 of November 1st, 2016, as further amended, comment Wolters Kluwer.

¹³ http://ec.europa.eu/environment/waste/construction_demolition.htm (consulted on 5.10.2017).

¹⁴ Law no. 211/2011 on the waste treatment, published in the Official Gazette no. 837 from 25th November, 2011.

2.2. The principle 'polluter pays'

Waste represents any substance or object that the holder discards or intends to discard.¹⁵

The 'polluter pays' principle is a guiding principle at European and international level. According to the 'polluter pays' principle, the cost of waste management is to be borne by the original waste producer or by the current owners or previous holders of that waste¹⁶.

The notion of **waste producer** means any person whose activities generate waste. From this perspective, waste producers are considered both the original waste producer as well as any other person who performs pre-treatment, mixing or other operations that change the nature or composition of such waste. Regarding the **waste holders**, this category includes either waste producers, or physical or legal persons who have waste in their possession.

2.3. Minimum quantity of construction waste that needs to be recycled

Holders of construction and/or demolition permits are required to manage construction and demolition waste. Managing this type of waste involves reaching, by 31st December 2020, a level of preparedness for re-use, recycling and other material recovery operations, including filling operations, landfills that use waste to replace other materials, of at least 70% of the mass quantities of non-hazardous waste resulting from construction and demolition activities.¹⁷

In the Annex of the Commission's Decision of 18th December 2014¹⁸ ('**Commission Decision 2014**'), point 17 lists the categories of construction and demolition wastes that are classified as hazardous and those classified as non-hazardous. Based on these lists, the selection of non-hazardous waste for recycling will be made in order to progressively reach recycling levels of at least 70% of the non-hazardous waste mass by 31st December 2020.

According to Annex no. 6 of Law 211/2011, annual obligations on the level of preparedness for re-use, recycling and other material recovery operations, including filling operations, landfills that use waste to replace other materials of legal entities on whose behalf the permits of construction/demolition are issued, must be:

- a) at least 30% of the amount of construction activity waste from 2017;

¹⁵ Point 9 from Annex no. 1 of Law 211/2011.

¹⁶ Article 14 (1) of Directive 2008/98/EC.

¹⁷ Article 17 paragraph (3) of Law 211/2011.

¹⁸ The Commission's Decision dated 18 December 2014 for the amendment of Decision 2000/532/CE for the establishment of a waste list under the Directive 2008/98/CE of the European Parliament and Council.

- b) at least 45% of the amount of construction activity waste from 2018;
- c) at least 55% of the amount of construction waste from 2019;
- d) at least 70% of the amount of construction activity waste from 2020.

The above mentioned annual obligations are calculated on the basis of the quantities of waste generated in that year.

3. The impact of 'green' obligations on the real estate market

The implementation of technical solutions on (i) the performance of buildings for which energy consumption is almost zero and (ii) the achievement of the required recycling rate of construction and demolition waste, will most likely involve additional costs for investors and real estate developers. These additional costs will be reflected in the final selling price of the buildings, namely the cost of rent (both in the residential and non-residential sectors).

Although long-term needed, these environment protection measures will be a challenge regarding their implementation.

Bibliography

1. Law no. 372/2005 regarding the energetic performance of buildings, published in the Official Gazette, Part I, no. 1144 dated 19.12.2005, as further amended;
2. Law no. 50/1991 regarding the authorization of the execution of construction works republished Official Gazette no. 874 of November 1st, 2016, as further amended;
3. Law no. 211/2011 on the waste treatment, published in the Official Gazette no. 837 from 25th November, 2011;
4. Government Decision no. 343/2017 for the amendment of the Government Decision no. 273/1994 regarding the approval of the Regulation for the reception of construction works and related installations, in force since 29th July 2017, published in the Official Gazette, Part I no. 406 of May 30, 2017;
5. Order no. 700/2014 regarding the approval of the Regulation for the approval, reception and registration in the cadastral records and land register, Official Gazette no. 571 of 31/07/2014, as further amended;
6. Directive 2010/31/EU of the European Parliament and of the Council from 19th May 2010 on the energy performance of buildings;
7. Directive 2008/98/EC of the European Parliament and of the Council from 19th November 2008 on waste and repealing certain Directives;
8. The Commission's Decision dated 18 December 2014 for the amendment of Decision 2000/532/CE for the establishment of a waste list under the Directive 2008/98/CE of the European Parliament and Council;