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Adapting to Change Business Law Insights from Today's International Legal Landscape

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Adapting to Change Business Law Insights from Today's International Legal Landscape

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Cristina Elena POPA TACHE

Activity

Prof. Cristina Elena POPA TACHE is associate professor of public international law and communications and new technlogies law, Co-Chair in European Society of International Law - IG International Business and Human Rights, expert member in COST Actions-European Cooperation in Science and Technology and project member recommended by Institut national supérieur du professorat et de l'éducation de l'académie de Paris and Sorbonne Université. She continues to be a promoter of multi and transdisciplinarity in law, researcher promoter for international investment law in Romania and also scientific researcher at the International Center for Transdisciplinary Research (CIRET) Paris.

Publications

At the same time, she carries out an intense scientific research activity in the field of international law, as well as a publishing and editing activity, being the author of more than 100 legal publications, editor-in-chief of several specialized publications high indexed, including the International Investment Law Journal. Cristina Elena Popa Tache is co-editor of several co-authored volumes with international scientific personalities such as Professor Jin Banggui, Professor Thierry Bonneau, Federica Cristani, Professor Cătălin-Silviu Săraru and Professor Dalvinder Singh. She is associate editor at Taylor & Francis and Routledge, arbitrator and mediator at the Vienna International Arbitral Centre and member of the Board of Directors in AEDBF Europe. Her scientific activity is extended to participation as a member in the scientific committees and speaker of prestigious international conferences. Recent monographs and works: Le dynamisme du droit international public contemporain et la transdisciplinarité, L`Harmattan Paris, Collection „Le droit aujourd'hui", 2023; Introduction to International Investment Law, ed. Adjuris International Academic Publisher, 2020, translated edition of the monograph Introduction to International Investment Law, Ed. Universul Juridic, 2018; Legal treatment standards for international investments. Heuristic aspects, Ed. Adjuris International Academic Publisher, 2021; Vers un droit de l'âme et des bioénergies du vivant, Ed. L Harmattan, Collection: Logiques Juridiques, 2022, preface by Jean-Luc MartinLagardette; Report Chapter, Specific Threats to Human Rights Protection from the Digital Reality. International Responses and

Recommendations to Core Threats from the Digitalized World, Tina Pajuste ed., Tallinn University, 2022 or contribution to Report about the comparative content analysis of instruments adopted by international and European organizations/countries regarding human rights protection online (Deliverable No. 11), published by The Global Digital Human Rights Network (GDHRNet), 2023.

Renata Treneska DESKOSKA

Activity

Prof. Renata Treneska Deskoska, Ph.D. is a full professor of Constitutional Law and Political System at the Law Faculty "Iustininaus Primus"– Skopje, University "Ss Cyril and Methodius", North Macedonia. She obtained Ph.D. degree in legal studies at the Law faculty - Ljubljana, Slovenia in 2002, defending the doctoral dissertation on "Constitutionalism, constitutions and human rights, with case study of the Republic of Slovenia and the Republic of Macedonia." Prof. Renata Treneska Deskoska, Ph.D. is a member of the Venice Commission (Commission for democracy through law), expert body of the Council of Europe. She was a Member of the Parliament, holding also the position of Vice President of the Parliament, Member of the Parliamentary Assembly of the Council of Europe and Chief of the Delegation in the Parliamentary Assembly of OSCE from 2014-2017 and Minister of Education and Science and Minister of Justice in the Government of the Republic of North Macedonia (2017-2020). She was also elected as a member of the ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in 2012.

Publications

Renata Treneska Deskoska published more than 160 publications, from which 42 books or chapters in books among which are: "Political System", Fridrich Ebert Shtiftung, (2023); "Constitutional Law", Prosvetno delo, (2021); "Human Dignity in North Macedonia" in Paolo Becchi and Klaus Mathis (Eds) "Handbook of Human Dignity in Europe", Springer (2019); "Dilemmas and challenges of legal protection against administrative actions in the Republic of Macedonia" (co-author) in Zoltán Szente and Konrad Lachmayer (eds.), "The Principles of Effective Legal Protection in Administrative Law", Routledge, London and New York, (2017), "Constitutionalism", Law faculty, (2015), "Legal frame for free and fair elections", National Democratic Institute (2015); "Open Parliaments: The Case of Macedonia" in "Open Parliaments 2012 – Transparency and Accountability of Parliaments in South-East Europe" (Regine Schubert, ed.), Friedrich Ebert

Stiftung, Sofia (2012); “Party Funding and Campaign Finance in Macedonia” in Daniel Smilov and Jurij Toplak (eds.), “Political Finance and Corruption in Eastern Europe – The transition Period”, Asgate, (2007) etc. She was rapporteur on several reports of Venice Commission on judiciary, public prosecution and political parties. She has also worked on over 40 international scientific projects in the field of judiciary, human rights, constitutional justice, anti-corruption and integrity etc.

Nathaniel BOYD

Activity

Dr. Nathaniel Boyd is currently Senior Researcher at University of York, Department of Politics and International Relations. He is Associate Editor of the Cambridge Reader in the History of Western Political Thought and also a Research Fellow: “Rethinking Civil Society: History, Theory, Critique” RL-2016-044, Leverhulme Trust Research Leadership Award, http://rethinkingcivilsociety.org/. In 2023 he was also an institute grant recepient and visiting Scholar at the Max Planck Institute for Comparative Public Law and International Law.

Publications

Dr. Nathaniel Boyd is the author of numerous prestigious works on topical issues in classical international law, constitutionalism and international relations. Involved in the most important research projects, we list: N. Boyd (2024) ‘Pufendorf on Confessional Strife and Interstate Relations’, in P. Schröder (ed.), *Pufendorf’s International Political and Legal Thought* (Oxford University Press), pp. 21–43; N. Boyd (2023) ‘Erich Kaufmann et la théorie hégélienne du droit international’, in E. Djordjevic (ed.), Hegel et le droit (Editions Pathéon-Assas), pp. 147–70; N. Boyd (2021) 'Tradition and Revolution: Eighteenth-Century German and French Contexts and Vattel's Law of Nations', in P. Schröder (ed.) Concepts and Contexts of Vattel's Political and Legal Thought (Cambridge University Press), pp. 220–38; N. Boyd (2019) 'Hegel's Hobbes: From the Historical Context of the Constitution to Conscience and Consciousness', History of Political Thought 40.2: 327–56.

EDITORS

Marijana MLADENOV

Activity

Dr. Marijana Mladenov is Professor at the Faculty of Law for Commerce and Judiciary, University Business Academy in Novi Sad. She completed her basic studies at the Faculty of Law, University of Novi Sad, in 2009. At the same faculty, she defended the master thesis titled "The right to privacy in the practice of the European Court of Human Rights" in 2010, and completed doctoral studies in 2017, thesis "Right to an adequate environment as a fundamental human right". In 2009 she was elected for the teaching assistant at the Faculty of Law for Commerce and Judiciary and promoted to the position of assistant professor in 2017. In October 2018, she was elected for Vice-Dean for International Cooperation at the Faculty of Law for Commerce followed by the election for the Director of International Relations Office at the University Business Academy in Novi Sad. She has been professionally involved in several national and international scientific projects. She is a professor at Jean Monnet Module "Application of EU values in the policies of the candidate states", teaching two courses: "Human Rights Protection in the European Union" and "Human rights and climate change within the EU legal framework" supported by the European Commission (Education, Audiovisual and Culture Executive Agency).

Research projects and publications

She is engaged as a researcher on the international project "Global Digital Human Rights Network", organized by the academic network COST, supported by the EU Framework for Research and Technological Development, as well as on numerous national projects related to Environmental Law: "Legal and institutional response of the Republic of Serbia to the need for creating a sustainable system of prevention and control of environmental media pollution in the context of joining the European Union" supported by the Ministry of Education and Science of the Republic of Serbia (2011-2014), "Aarhus Convention within the legal framework of the Republic of Serbia" supported by OEBS and Administration for Environmental Protection of the City of Novi Sad (2011), "Transposition of the requirements of the Aarhus Convention into the legal system of the Republic of Serbia with special reference to the competence of local self-government units on the territory of AP Vojvodina" supported by the Provincial Secretariat for Higher Education and Scientific Research (2017- 2018), "Obligations of the City of Novi

Sad determined by the Law on Environmental Protection and other special laws in this area" supported by Administration for Environmental Protection of the City of Novi Sad (2018-2019), "Review of the potential Deposit-Refund System for Liquids Packaging applicable in the Republic of Serbia" supported by the Ministry of Environmental Protection of the Republic of Serbia (2019). Professor Mladenov teaches and writes in the areas of public international law, environmental law and human rights law. She is the author or co-author of over 40 academic books or articles. She is a reviewer of the journal "Law-Theory and Practice".

Isabelle OPREA

Activity

Isabelle Oprea is a PhD Student at School of Advanced Studies of the Romanian Academy (SCOSAAR) – Doctoral School of Economic Sciences (SDSE), Economics field, Romanian Academy. Her work focuses on economics, law, communication, digitalization, artificial intelligence and financial inclusion. She has a degree in law, a master's degree in Penal Law, a master's degree in finance, banks and stock exchanges and currently she is a master student at Communication and public relations. She has more than 15 years of experience in banking on the international side. Isabelle Oprea working as editor in Editorial Team of Banking and Financial Law Review (AEDBF Romania) and she participated at international conferences with topics related to digitalization and artificial intelligence: 31st of March 2023, „International Conference on Fintech, Cyberspace and Artificial Intelligence Law", Digital Euro Currency, Economic and Legal Implications; 23rd of June 2023, The 3rd „Conference on Comparative and International Law", Digital Wallet: Economic and Legal Implications in the Digital Era; 17th of November 2023, The 3rd International Conference "Challenges of Business Law in the Third Millenium", The role of artificial intelligence in the digital banking system; 24th of November 2023, The 10th International Conference – ESPERA 2023, Knowledge, innovation, smart development and human capital, Unlocking Financial innovation: The Synergy of Open Banking and Artificial Intelligence.

Publications

She is the author of several articles in the financial-banking field, among which we mentioned: *Digital Euro Currency, Economic and Legal Implications* published in „Recent Debates in Cyberspace and Artificial Intelligence Law", ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2023,

p.137-152; *Digital Wallet: Economic and Legal Implications in the Digital Era* published in „Tempore Mutationis in International and Comparative Law", AD-JURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2023, p. 124-141.

Daniela DUȚĂ

Activity

Daniela Duță is a PhD Candidate in European Union law at the Institute of Legal Research "Andrei Radulescu", Romanian Academy, Department of Economic, Social and Legal Sciences and the research paper is about the protection of the fundamental rights, privacy and personal data in the European Union. Her work focuses on law, data protection, privacy, artificial intelligence regulation and new technologies. Her previous work includes more than 15 years of legal experience and data protection in European financial institution. She has a degree in law and a master in European Law, has completed several AI, data protection, European Union and English Law at the University of Cambridge, Faculty of Law and company law courses at the International Summer School on European Business and Corporate Law at the Heinrich-Heine Universität Düsseldorf, Center for Business & Corporate Law. She participated in national and international conferences with topics related to data protection, privacy and artificial intelligence.

Publications

She is the author of several articles in the field of European Union law, among which we mentioned: *Hotărârea CJUE din data de 2.03.2021 în cauza C-746/18, Prokuratuur*, Pandectele Romane 2 din 2021 – Jurisprudenta; *Cauza C-645/19 - Facebook Ireland şi alţii Hotărârea Curţii din 15 iunie 2021 - Competenţa Autorităţii de Supraveghere*, Pandectele Romane 5 din 2021 – Jurisprudenta; Duță Daniela, Georgescu Alexandru, Mitrea Marius Cătălin, Pintilie Alexandra, Ploeşteanu Nicolae-Dragoş, *Prelucrarea datelor cu caracter personal în materia stării civile*, Pandectele Romane 1 din 2022 – Doctrina; Duța Daniela, *Identificarea la distanţă utilizând recunoaşterea facială. Preocupări în ceea ce priveşte protecţia datelor şi viaţa private*, Revista Romana de Drept European (Comunitar) 3 din 2022 - Doctrina; Şandru Daniel-Mihail, Alexe Irina, Georgescu Alexandru, Mitrea Marius Cătălin, Duță Daniela, *Nerespectarea protecţiei datelor de către operatorii din domeniul educaţiei: sancţiuni din Europa, practici din România*, Pandectele Romane 3 din 2021 – Doctrina; Duţă, Daniela, Isabelle

Oprea, *Euro digital, implicatii economice si juridice*, „Recent Debates in Cyberspace and Artificial Intelligence Law", ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2023, p.137-152; Duţă, Daniela , Isabelle Oprea, *Portofelul digital: implicații economice și juridice în era digitală*, „Tempore Mutationis in International and Comparative Law", ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2023, p. 124-141; *Artificial intelligence. Recommendations, guidelines and the legal framework in Romania*, Annual call for scientific communications: Law and Society in Transition, April 20-21, 2023, Legal Research Institute "Acad. Andrei Rădulescu", School of Advanced Studies of the Romanian Academy (SCOSSAR).

Konstantinos KOUROUPIS

Activity

Dr. Konstantinos Kouroupis is an Assistant Professor of European and Data Rights Law at the Department of Law of Frederick University, in Cyprus. His area of expertise are online protection of privacy, security and data rights, artificial intelligence, digital law, human rights and European Law. He graduated in Law from Aristotle University of Thessaloniki and he was awarded an LLM Diploma in European Law. He holds a PhD title from the University of Macedonia in Greece, in the area of EU Data Rights Law. He has participated as a speaker and keynote lecturer on data rights, privacy and EU issues in numerous international conferences. Some of his studies have been uploaded to the digital library of EUROJUST, in Hague and are accessible from a large number of prosecutors, judicial officers and administrative staff of the European agency. In 2018 he delivered a speech on "National and European legal framework on Cybersecurity and data protection" as an expert and on behalf of the Republic of Cyprus, during an international exercice under the supervision of European Defence Agency, held at Zenon Coordination Centre, in Larnaka, in Cyprus. He has participated in European projects and actions funded by the EU concerning the consolidation of a European area of justice and human rights. At present, he is a member of the European Cost action entitled "Global Digital Human Rights Network", under the auspices of the European Cooperation in Science and Technology (COST), serving as Management Committee Delegate, representing Cyprus. He is a member of the editorial board of esteemed legal journals. In addition, he is the author of several legal books and has published numerous articles, both in greek and English as well as in French to esteemed international peer-reviewed journals. He is also member of the pool of experts of the European Commission in the field of

Data Protection and New Technologies, upon evaluation. Since August 2023 he has been appointed as a member of the Cyprus National Bioethics Committee upon a decision of the Council of Ministers of the Republic of Cyprus for a period of 4 years.

Publications
He is the author of several articles and books in the field of European Union law, among which we mentioned: *Privacy and security in light of the EU Digital Agenda*, 2022, Nomiki Bibliothiki; *Data Protection Law in the EU, Training manual*, Sakkoulas Publications, Athens-Thessaloniki, 2019; *Data Protection Law in the EU: Questions and Answers*. Volume 1: *Defining the term "personal data*, Volume 2: *Data rights issues-study cases*, Sakkoulas Publications, Athens-Thessaloniki, 2019; *Practical compliance guide for General Data Protection Regulation*, Publications "En Typois", 2018 (in Greek) as well as "Digital transformation–digitalization in the COVID-19 era", chapter to the collective book *The Impact of the Covid-19 Pandemic on Human Rights*, Logos Verlag Berlin, 2023 and *Video surveillance and the right to privacy in AI era: new rules proposed*, K. Kouroupis, Journal of Data Protection and Privacy, Volume 6.2, 2023, Henry Stewart Publications.

Leonidas D. SOTIROPOULOS

Activity
Leonidas Sotiropoulos is a PhD candidate of the European University Cyprus (EUC) researching artificial intelligence and its effects on maritime law and marine insurance law issues. He holds a master degree (LL.M in Shipping Law) from Cardiff University, UK, specialising in Marine Insurance Law, and a bachelor degree (LL.B) in Law from Aristotle University of Thessaloniki, Greece. He has been a partner at a law firm in Thessaloniki, having acquired significant consulting and judicial experience and practiced in cases of civil, commercial, criminal and administrative law. He is a trainer in adult education certified by the Human Resource Development Authority of Cyprus (HRDA) teaching maritime law and environmental law.

Publications
He is the author of several articles and books, among which we mentioned: *The Legal Treatment of Smart Contacts in English Law*, published in the Proceedings of 20th International Scientific "Legal Days – Prof. Slavko Caric", University

Business Academy, Faculty of Commerce and Judiciary, Novi Sad, Serbia, 6-7 October 2023, ISBN 978-86-86121-58-5; *The legal treatment and regulation of "smart contracts" in English common Law, Assignment within the framework of the Epistemology of law*, Course director: Stamatina Yanakourou, European University of Cyprus, Nicosia, 2023; *The legal treatment of smart contract errors under traditional contract law*, Assignment within the framework of the Methodology of Legal Research, Course Director: Christianna Markou, European University of Cyprus, Nicosia, 2023; *Tackling smart contracts in the insurance sector*, Assignment within the framework of the Research-Analysis of the Scientific Field, Course Director: Phillippe Jougleux, European University of Cyprus, Nicosia, 2023; *Does the Pay to Be Paid Clause protect Third Parties in Marine Insurance claims? A comparative analysis with Australia*, Dissertation within the framework of Marine Insurance, Cardiff University, Cardiff, UK, 2018; *The effectiveness of equidistance method as a methodology in the process and progress of maritime delimitation*, Assignment within the framework of The Law of the Sea, Cardiff University, Course Director: Dr Richard Caddell, Cardiff, UK 2018; *The differentiation between the condition and innominate terms and a critique of the case law of Court of Appeal in Spar Shipping v Grand China Logistics Holding (Group) Co Ltd [2016] 2 Lloyd's Rep 447 ("Spar Shipping")*, Assignment within the framework of Carriage of Goods by Sea, Cardiff University, Course Directors: Dr Katie Richards, Lect. David Glass, Dr Richard Caddell, Prof. Gavin Hoccom Cardiff, UK 2018; *Dealing with Smart Contracts in the Insurance Sector: Institutional framework and practical aspects,* published in Entha, Topical Legal Issues and Analyses, Legal magazine with studies and overview of the current issues in European, International, Greek, and Cypriot law, Issue Fall 2023; and *European Maritime Policy and the Dynamic of Autonomous Vessels*, paper at International Conference "Challenges of Business Law in the Third Millenium" XIIIth edition 17th November 2023, Romania, organized by the Society of Juridical and Administrative Sciences in partnership with the Romanian Academy of Scientists, paper that will appear in volume 4, issue 1, February 2024 from *International Investment Law Journal.*

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Contributions to the 13th International Conference
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Preface

Coordinating Editors
Associate professor ***Cristina Elena Popa Tache***
Co-Chair for ESIL IG International Business & Human Rights
Professor ***Renata Treneska Deskoska***
member of the Venice Commission
Senior researcher ***Nathaniel Boyd***
University of York, United Kingdom

This volume contains the scientific papers presented at the Thirteenth International Conference „Challenges of Business Law in the Third Millennium" that was held on 17 November 2023 in online format on Zoom. The conference is organized each year by the *Society of Juridical and Administrative Sciences* in partnership with the *Romanian Academy of Scientists*.

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 five chapters:

- *Emerging Corporate, Contractual Compliance and Ethical Issues in a Global Context*. The papers in this chapter refer to: consequences for the breach of company directors duties: the USA perspective; the limited liability company from the perspective of the latest legislative changes in Romania; economic justifiability of work on sunday, dilemmas and suggestions; consequences of confirming the restructuring agreement in the rescue procedure; implementation of the deposit-return system, an absolute first for Romania; precautionary measures to protect the debtor`s estate from insolvency proceedings; modern business with ancient tools: warranty against eviction in Roman law and its inheritance in the French, German and Italian civil codes; the rental contract in the HoReCa field, theoretical and practical aspects, respectively alternative dispute resolution methods (ADR) in the field.
- *Navigating Cross-Border Legalities.* This chapter includes papers on: trafficking in human beings: particulars of criminal legal characteristics; the right to defence: an indispensable right for the rule of law; restorative justice between the need to bring to justice those guilty of committing international crimes and conventional crimes and the implementation of the national reconciliation process; certain legal aspects of family businesses in Hungary; coercive administrative measures applied in

financial legal relations according to Bulgarian legislation; the „criminal" nature of the measure of suspension of the operating authorization of a legal person as a tax warehouse; tax evasion - between legality and crime; cumulation of disciplinary liability with other forms of legal liability.

- *Legal Perspectives on Technological Disruption in the International Sphere*. The papers in this chapter refer to: changing circumstances and the crisis of international law: the *rebus sic stantibus* and its use in legal, political and contemporary history; the role of artificial intelligence in the digital banking system; possibilities for the use of artificial intelligence in the activities of the judiciary; MiCA: direct applicability coupled with challenges for the national legislation; peculiarities and controversies regarding the credit (financing) agreement; perspectives regarding the reconfiguration of rest time in current romanian law – the right to disconnect.
- *International and European law Dynamics in a Changing Business Environment*. This chapter includes papers on: international law: the lost metaphor? - reflections on the current wars; the operator in the environmental liability - the European Union and Portuguese regime; the protection of Ukrainian migrants in Portugal: from the international and European regime to Portuguese law; Romania's accession process to the Organisation for Economic Cooperation and Development, prospects, advantages and compatibility; invalidity of treaties, as a legal sanction specific to public international law; constitutional aspect through the prism of international principles;
- *Practical and Administrative Considerations. Legal Implications*. The papers in this chapter refer to: decentralization in public administration: redefining power for more effective governance; exercising the right of preemption in the field of national cultural heritage; the controversies of Israel judiciary reform; legal responsability in the operating room in the particular case of retained surgical foreign bodies; effectiveness of the social protection system – with reference to the minimum inclusion income; quality and interest to address the Romanian National Council for the Settlement of Complaints in the field of public procurement in judicial practice; the double-edged sword of the lapse of the arbitral award as a ground for setting aside the arbitral award.

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.

Table of Contents

EMERGING CORPORATE, CONTRACTUAL COMPLIANCE AND ETHICAL ISSUES IN A GLOBAL CONTEXT

Consequences for the Breach of Company Directors Duties. Perspective of the United States of America

Lecturer **Erjola ALIAJ**[1]
Lecturer **Edvana TIRI**[2]

Abstract

The company good management by its directors provides a high operational stability during the course of its activity, which consequently will find reflection in its profits. In this managing process, directors often have to face with situations, where the consequences of their actions cannot be clearly and unambiguously predicted, and decisions taken are risky. These decisions, in the best scenario, may generate profits but can also lead to unfavorable consequences for the commercial company itself and third parties involved in relations with this commercial company. To minimize these risks, the legislator have to clearly define the duties and responsibilities of the company directors. The latter is one of the legal instruments that serves to coordinate the interests of the directors with the interests of the corporation, its shareholders and third parties. In the present paper, through a legal assessment, special attention has been paid to the consequences for the breach of company directors' duties in the US perspective, which are divided into three categories: responsibilities towards the corporation, shareholders and third parties. Due to the fact the jurispudence and specifically the courts of Delaware in the USA has played an important role in the resolution and interpretation of issues related to directors duties and responsabilities, which were not dealt with in detail in the legislation or corporate acts, this paper will be focused also in one of the most important institutes of American law- "business judgement rule", which was created by the courts in defense of directors rights. The main aim of this paper is to analyze the US doctrine, legal provisions, which regulate the company directors' responsibilities, as well as the court practice in this regard. Also, an important objective of this paper is that it may serve as an important basis for further comparative studies in this field with other jurisdictions. Such analysis is based on the qualitative method, which contains also the research, analytical, descriptive, interpretive methods. The result of this paper will stimulate debate in the academic level and contribute to further improvements of our company legislation, as well to the legal doctrine in Albania that lacks such.

Keywords: *director, duties, breach, consequences, USA.*

JEL Classification: F19, K22

1. Introduction

Administration is the main task of directors, which has a general content. The administration process enables a commercial company to collect a significant

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amount of capital from a large number of investors, without losing the ability to develop a successful commercial activity.[3] In this way, the directors enable investors to spread the risks related to each investment made.[4] The administration of the company puts the directors in a difficult situation, as they often have to make decisions that may charge them with responsibility in the future. Therefore, the company administration not only brings benefits, but also contains certain risks for shareholders of companies. To minimize these risks, the legislator must clearly define directors' duties and responsibilities, as well as the consequences for their breach.[5]

Directors' duties in the US have their origins in company law, where the director was obligated to act faithfully and in the interest of the corporation's beneficiaries. Later, the courts differentiated the positioning of the duties of administration, with the argument that the corporate director must not only take care of the interests of the beneficiaries, but also take risks during the development of the economic activity of the corporation.[6]

Jurisprudence and specifically the courts of Delaware in the USA play an important role in the resolution and interpretation of issues related to the duties of administration, which are not dealt with in detail in the legislation or corporate acts. The responsibility of directors' duties is one of the legal instruments that serves to coordinate the interests of the administration with the interests of the corporation and its shareholders.

In the present paper, through a legal assessment, will be analyzed the consequences for the breach of directors' duties in the US perspective. This paper does not purport to serve as an exhaustive analysis of the doctrine, legislation, as well as judicial practice, but rather, aims to provide a general overview of the regulatory approach in relation to consequences for breach of directors' duties in USA.

The primary goal in the present paper is the analysis of three categories of consequences for breach of directors' duties: responsibilities towards the corporation, shareholders and third parties. Also, this paper is focused on the conceptual assessment of business judgment rule, as one of the most important institutes created by the judicial practice. Such analysis is based on the qualitative method, which contains also the research, analytical, descriptive, interpretive methods.

We conclude that this paper is an attempt to make an important contribution to this specific topic, which may serve as an important basis for further comparative studies in this field with other jurisdictions, as well as an example that

[3] Malltezi A., *E drejta shqiptare e shoqërive tregtare.* Shtepia botuese Mediaprint, Tiranë, 2011, p. 55.
[4] Bachner Th., et al.,. *Ligji i ri shqiptar për shoqëritë tregtare, interpretuar sipas burimeve të tij në të drejtën europiane.* Botimet Dudaj, Tiranë, 2009, p.104.
[5] Ibid, p.105.
[6] See Stegemeier kundër Magness, 728 A. 2d, 557 (Del. 1999).

will stimulate improvement to our company legislation.

2. Business judgement rule

The business judgment rule is one of the most important institutes of American law, which was created by the courts in defense of the rights of directors when faced with the unwanted sale of corporate shares.[7] Some authors state that the first case where the Supreme Court in the state of Delaware has faced the business judgment rule is "*Zapata Corp. against Maldonado*".[8] The business judgment rule represents a judicial syllogism that derives from five principles: a decision (i) in which the directors have no direct or indirect personal interest (ii) that is made (a) with reasonable care (b) information available (c) after a prudent consideration of the alternatives, (iii) as well as in good faith and (iv) in furtherance of a rational purpose, will not run afoul of the courts, notwithstanding the fact that this decision may have caused (v) loss to the corporation or shareholders.[9]

In the American doctrine there is an opinion that the courts should not start their analysis with business judgment rule, but with the evaluation of good governance practices, depending on the situations.[10] In this way, the business judgment rule is considered an indispensable tool in the hands of judges to ensure good corporate governance. The main function of the business judgment rule is to prevent unwarranted interference by courts in the business decisions of directors.[11] The purposes of business judgment rule are applicable by accepting the presumption that in making decisions the directors have acted in good faith, after analyzing the information provided, and in the best interest of the company.

Contrary to the duty of care, which requires reasonable care from directors, the standards of business judgment rule are not very high.[12] Accordingly, the reasonable and prudent person standard does not apply.[13] The principle of business judgment reflects an internal tension between two competing values: the need to preserve discretion in decision-making by the board of directors and the need to hold the board accountable for its decisions.[14] In the "*Aronson v. Lewis"*

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[7] Barton N. et al., *Business judgement rule: fiduciary duties of corporate directors*. Aspen Publishers, New York, 1998, p. 125.
[8] Zapata Corp vs. Maldonado, 430 A.2d 779 (Del. 1981).
[9] Ibid.
[10] Cox J. D., *How Delaware Law Can Support Better Corporate Governance*, in Kieff S., *Perspectives on Corporate Governance*. New York, 2010, p. 349.
[11] Drexler D. A. et al., *Delaware corporation law and practice*. New York, 2010, p. 15-19.
[12] Bainbridge Stephen M., *The New Corporate Governance in Theory and Practice*. New York, 2008, p. 107. Available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=299727, last access on November 3, 2023.
[13] Allen W. et al., *Commentary and Cases on the Law of Business Organization. New York*, 2007. American Law Institute and *The Principles of Corporate Governance: Analysis and Recommendations*. St. Paul, MN, 1994, p. 252.
[14] Bainbridge Stephen M., *op. cit*., p. 107.

case, the court states that: *"according to business judgment rule, there is a presumption that in making a decision the directors of the corporation have acted in good faith and with the honest belief that the action was taken in the best interest of the company".*[15]

The burden of proof is on the party who has claims against the decision and not on theboard of directors defending the decisions made. The decision of the council remains in force if the court determines that the business judgment rule will be applied.[16] In the "Brehm v. Eisner"[17] case, the Delaware court states that: *"the decisions of the directors will be respected by the courts unless the directors have an interest or lack of independence in making the decision, and have not acted in good faith, but with gross negligence, not taking into consideration all the available information."*

Its important to emphasize that Delaware courts do not override the standard of deference to board decisions.[18] This high standard of respect appears in trust in the decision-making of the administrative body.[19] The traditional rule of business judgment did not apply in cases of transactions, for which the approval of independent and disinterested directors was not given[20], as well as in cases of transactions involving the sale or change of the controlling stake of the corporation.[21]

In such cases, the court established other standards of assessment, replacing business judgment rule, which held directors accountable if they failed to prove that they had acted fairly[22] in accordance with the interests of the corporation and shareholders.[23]

In 2013, the Delaware Civil Court in the MFW Shareholder Litigation case[24] set out six conditions that must be met in order to benefit from the protection of the business judgment rule in cases of change-of-control transactions. Specifically, the business judgment rule will be applied in an absorption merger with a controlling shareholder if: (i) the special committee and the majority of minority shareholders have given approval to the transaction; (ii) the special committee is independent; (iii) the special committee has freely chosen its advisors; (iv) the

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[15] See *Ivanhoe Partners vs. Newmont Mining Corp*., 535 A.2d 1334, 1341 (Del. 1987).
[16] Forrester Ch., & Ferber C. *Fiduciary duties and other responsibilities of corporate directors and officers.* Rr Donnelley, 2008. p.15.
[17] 906 A.2d 27 (Del.2006).
[18] Gevurtz F., *Disney in a Comparative Light*, 2007 p. 16. Available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=965596, last access on November 3, 2023.
[19] Cheffins B. & Black B., *Outside director liability across countries,* 84 Texas Law Review, 2006, p. 1385, 1431.
[20] Marciano vs. Nakash, 535 A.2d 400, 405 n3 (del.1987). See also In re Southern Peru Copper Corporation Shareholder Derivative Litigation, 30 A.3d 60 (Del. Ch. 2011).
[21] Mac Andrews & Forbes Holdings, Inc. vs. Revlon, Inc., 506 A.2d 173 (Del. 1986).
[22] Weinberger vs. UOP, 457 A.2d 701, 711 (Del. 1983).
[23] See UNOCAL Corp vs. Mesa Petroleum Co., A.2d 946.
[24] MFW Shareholder Litigation Nr.6566-CS, 2013 WL 2326879 (Del.Ch. 29 May, 2013). On March 14th, 2014, Delaware Supreme Court upheld the decision of Delaware Civil Court.

special committee acted with care; (v) the minority shareholders are informed and (vi) no pressure has been exerted for the benefit of the approval of the minority shareholders.[25]

A few months later, the Delaware Civil Court in the case "SEPTA v. Vogenau",[26] clarified the conditions for the benefit of the protection of business judgment rule in case of sale of the corporation with a controlling shareholder. In this case, unlike the MFW corporate transaction, where the controlling shareholder was also the buyer, a third party was involved in the capacity of the buyer and the controlling shareholder consented to the transfer of a portion of the shares to the absorbed entity. In this case, the protection of business judgment rule will be applied, if the transaction: (i) has been recommended by an independent and disinterested special committee and (ii) has been approved by the irrevocable vote of the majority of the minority shareholders.[27]

In subsequent years, the limitation of the business judgment rule served as an incentive instrument for states to enact laws protecting directors who felt vulnerable, and for shareholders to include in corporate charters provisions that would exclude or limit liability of directors towards the corporation and shareholders in case of breach of duty of care.

3. Liabilities towards the corporation

When corporate directors fail to fulfill their duties, they face personal liability towards the corporation.[28] Shareholders, regardless of the percentage of the corporation's capital they own, can bring derivative actions on behalf of the corporation, against the directors for illegal actions or negligence, as well as for failure to fulfill the duties of administration.[29]

Usually, to protect themselves from corporate liability, corporate directors rely on business judgment rule. Specifically, in cases of breach of fiduciary duty, lack of due care or negligence, this rule is not applied. Indeed, the directors are charged with responsibility towards the corporation, in case of renunciation of performing administrative functions,[30] approval of transactions without proper

[25] Talarides A. et. al., *Delaware Supreme Court tells controlling shareholders "if you look out for your minority, we'll look out for you"*. 2014, p. 1-3. Available online at: http://blogs.orrick.com/securities-litigation/category/business-judgment-rule/, last access on November 3, 2023.
[26] SEPTA vs. Vogenau, C.A. Nr.6354-VCN (Del. Ch. 5.8.2013), Available online at http://blogs.orrick.com/securities-litigation/category/business-judgment-rule/, last access on November 3, 2023.
[27] Talarides A. et. al., *op. cit.*, p. 1-3.
[28] Cox J. D., etc. *Corporations*. Aspen Law & Business, New York, 1997, p. 308-309.
[29] Kamen vs. Kemper Financial Services, Inc., 908 F.2d 1338, 1349-50 (1991).
[30] Aronson vs. Lewis 473 A.2d 805 (Del. 1984).

analysis and consideration of information and facts,[31] failure to implement reporting systems,[32] deliberate failure or refusal to a directorate to inform the council of the violations found.[33]

In case the shareholder's derivative lawsuit is accepted by the respective court, the compensation earned goes to the account of the corporation.[34] In October 2011, the Delaware Court awarded $2 billion in damages to the shareholders of the corporation Miniera Mexico SA, who challenged the administrative actions of the directors that led to the sale of 91.5% of Grupo Mexico SAB's shares in the corporation "Miniera Mexico SA" and approved the legal expenses of the plaintiff in the amount of 300 million dollars.[35]

4. Liabilities towards company shareholders

The directors of publicly offered corporations are obliged to inform the shareholders about the progress of the corporation's activity. The directors are also obliged to, based on the request of the shareholders, make available the annual accounts, reports on the state of the corporation, as well as any other internal documents of the corporation.[36]

Based on Section 11 of the Securities Act,[37] a shareholder can file a lawsuit against the directors, in case the directors have signed financial statements, which have been filed with the federal authorities, with false content. In this case, the directors can defend themselves by arguing that, after a reasonable investigation, they had reason to believe that the statements made were based on accurate information.

Also, in section 12 (2) of the Securities Act, it is provided that the directors have responsibility towards the shareholders in case of presentation of false information in prospectuses or public offers. This responsibility applies primarily to the sale of titles through verbal communications and sales brochures. Unlike section 11 of the Securities Act, in this case, the directors find protection in the principle of good faith in the presentation of information in the brochures. In this case, the persons who supervise these directors will also be charged with responsibility to the shareholders of the corporation.

Section 22 of the Securities Act provides that such suits brought by the stockholders of the corporation shall not be heard by the federal courts, but by

[31] Smith vs. Van Gorkom 488 A.2d 858 (Del. 1985).
[32] In re Caremark International inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).
[33] Kamin vs. American Express 383 N.Y.S.2d 807 (N.Y.Sup. Ct. 1976).
[34] Colley J. L., *Corporate governance.* The McGraw Hill Companies, New York, 2003, p. 49.
[35] Chon G. & Palazzolo J., *"An early Christmas for these Lawyers".* The Wall Street Journal. 2017, p. 4. Availble oline at: http://www.wallstreetjournal.com/.
[36] Granof P. S., *Potential liabilities of corporate directos and officers in the United States*, 2012. p. 219. Available online at: https://www.williamskastner.com/, last access on November 3, 2023.
[37] 33 Act, Title I of Pub. L. 73-22, 48 stat. 74, dated 27.5.1933.

the courts of the states where such corporations are registered. Also, this provision has been reflected in the statutory provisions or the legislation of the state where the corporation is registered.

5. Liabilities towards third parties

The general rule is that when a corporation is financially "healthy", members of the administrative body owe their duties primarily to the corporate and shareholders and rarely to third parties. In this way, these members feel protected by the corporate veil against potential third-party claims.[38]

Until a few years ago, American jurisprudence divided the responsibility towards third parties, mainly creditors, into two separate moments: the insolvency of the corporation on the verge of bankruptcy (also called the bankruptcy zone) and the period of corporate bankruptcy.

Some jurisprudence held that, when a corporation is in bankruptcy, the directors of the corporation are liable not only to shareholders but also to creditors.[39]

While the Supreme Court of Delaware held that, when the corporation is in the bankruptcy zone, the directors are not responsible to the creditors, but only to the shareholders.

Consequently, the directors should not consider the interests of the creditors in decision-making.[40] In this way, even the creditors themselves cannot have claims for violation of administration obligations in order to individually benefit from compensation for the damage caused. Creditors may only bring derivative actions on behalf of the corporation for these alleged violations.[41]

Specifically, in *Trenwick American Litigation Trust v. Ernst & Young L.L.P.*,[42] the Delaware Supreme Court expressly rejected the theory of deep insolvency as a cause of action against directors of an insolvent corporation. According to this court, creditors cannot hold directors who tried to prolong the life of the corporation in the bankruptcy zone liable.[43]

Also, the court determined that only the directors of a bankrupt corporation can be liable to creditors, while their decision-making will continue to be protected by the principle of business judgment. In this way, the responsibility

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[38] Ibid, p. 222.

[39] Mintz L., "Fiduciary Duties and Insolvency: Limiting Personal Liability in tough economic times", 2009, p. 2-4. Available online at: www.mintz.com/newsletter/2009/, last access on November 3, 2023.

[40] Lin L., "*Shift of Fiduciary Duty upon Corporate Insolvency: proper scope of director's duty to creditors"*. 46 VAND.L.REV., 1993. p. 1510.

[41] Ibid.

[42] 906 A. 2d 168, 99 (Del. 2006).

[43] Reinthaker R. et al. *An End to deepening insolvency as a theory of director liability. Insights: The corporate & securities law advisor*, No. 9, 2006, p. 36.

towards the shareholders is shifted to the creditors, who can bring derivative lawsuits on behalf of the corporation, against the directors for breach of the duties of administration.

Further, the court states that bankruptcy does not transform the derivative lawsuit into a direct lawsuit but provides creditors with legal standing to file these claims on behalf of the corporation.[44]

In other words, as long as the directors fulfill their obligations, there is no risk or fear of liability to creditors based on a standard of review other than the business judgment principle.

6. Legal mechanisms for the execution of directors' liability

If legal rules are not effectively executed, their purpose is diluted, and these rules remain mere moral standards.[45] One of the requirements for the effective enforcement of these rules is undoubtedly the fact that the plaintiff must have knowledge of the alleged violation. The Sarbanes-Oxley Act (SOX) [46]contains provisions, which aim to report and resolve violations within the corporate, without requiring the resolution of cases in court.[47]

In the execution of the responsibilities of the corporate administrative body, shareholders face a number of obstacles (both practical and legal) to protect their interests.[48] The legal obstacles start with the fact that, based on the legislation, shareholders cannot sue directly for violations of management obligations and compensation for the damage caused, but only through derivative lawsuits.[49] In other words, the shareholder must approach the corporation in order to file a lawsuit against its directors. Since the corporation's activity is directed by the board of directors, the shareholders must direct a request to this board to file a lawsuit against its directors. This council appoints a special committee composed of independent and disinterested members who, after investigating the circumstances of the case, will decide whether it is in the interest of the corporation to bring such a lawsuit.[50] The council's decision is subject to judicial review under

[44] Shu–Acquaye F., *American Corporate Law: Directors' Fiduciary Duties and liability during solvency, insolvency and bankruptcy in public corporations*. U.P.R. Business Law Journal, Vol. 2, 2011, p. 12-14. Available online at: www.uprblj.com/wp, last access on November 3, 2023.
[45] Baums Th., & Keneth S., *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*. Working paper series no.16, Institute for Law and Finance, Frankfurt, 2005, p. 8. Available online at: http://www.ilf-frankfurt.de/uploads/media/ILFWP_016.pdf, last access on November 3, 2023.
[46] Pub. L. 107-204, 116 Stat. 745, dated 30.7.2002.
[47] Scott K., *Corporation Law and the American Law Institute*. „Corporate Governance Project. Standford Law Review", Vol. 35. 1983, p. 29.
[48] Baums Th., & Keneth S., *op. cit.*, p. 9.
[49] Ibid.
[50] Granof P. S., *op. cit*., p. 14.

different standards in different jurisdictions.[51] If the council refuses to file a lawsuit, the shareholder is unable to protect his interests, unless it turns out that the refusal was wrong. If the court is convinced that this special committee has been independent, during the assessment of the derivative lawsuit it fully relies on the decision of this committee, thereby dismissing the lawsuit filed by the corporate shareholders.[52]

In addition to legal obstacles to the effective execution of shareholder rights, there are also practical obstacles. Specifically, the minority shareholders bear the risk and the initial costs of the lawsuit, while the benefits, in case of acceptance, will belong to all the shareholders of the corporation.[53] To alleviate litigation costs for these shareholders, courts have begun to approve attorney fees for plaintiffs' representatives in both derivative suits (which are collective in nature, since the damages awarded go to the corporation) and in direct lawsuits under Securities law, which are binding on all shareholders of the corporation. This approved value ranges from 20 to 30% of the value of the damage caused by the directors of the corporation.

Despite the increase in the level of protection of the shareholders, the opposition with a derivative lawsuit against the actions of the members of the administrative body seems endangered, as long as the shareholders no longer seek to protect the interests of the corporation, but only their own interests. This could consequently lead to a reduction in derivative lawsuits filed by these shareholders.

7. Conclusions

Through the analysis of the consequences for the breach of the directors' duties in the US perspective, results that the US legislation provides clarity in defining the duties and cases of the director's responsibility towards the corporation, shareholders and third parties.

Regarding issues related to duty of loyalty, US jurisprudence has established a high standard of culpability, using good faith as an instrument for distinguishing this standard of conduct, as well as excluding the possibility of limiting the liability of the corporate director in case of violation. Despite the ambiguity about the positioning of the duty of good faith in the framework of the director's administrative duties in a corporation, US jurisprudence has considered good faith as an integral element of the duty of loyalty rather than an independent obligation.

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[51] Delaware courts, in reviewing the committee's decision, consider certain circumstances of the case. *See* Zapata Corp vs. Maldonado, 430 A.2d 779 (Del. 1981). While the New York courts, in reviewing the committee's decision, do not take certain circumstances of the case into consideration. See Auerbach vs. Bennett, 393 NE.2d 994 (N.Y.1979).

[52] This is a rule in Delaware State. See Aronson vs. Lewis, 473 A.2d 805 (Del. 1984).

[53] Baums Th., & Keneth S., *op. cit.,* p. 10.

Regarding issues related to duty of care, American jurisprudence mainly focuses on the manner of action of the directors rather than on the correctness of the decision taken by them, charging them with responsibility in case of evidence of gross negligence or recklessness in fulfilling the obligation. Unlike the duty of loyalty, the principle of business judgment serves as a safe place for the decisions of boards of directors in the event of a breach of the duty of care.

The dominant feature of the American approach is the observance of the business judgment rule, which serves as an incentive instrument for the evaluation of the decisions of the administrative body and the prediction of statutory provisions for the exclusion or limitation of the directors' responsibilities vis-à-vis the corporation and shareholders in case of violation of duty of care.

From the analysis of the directors' responsibilities towards the above-mentioned entities, it is observed that shareholders and third parties have legal and practical obstacles to the execution of their claims against the corporate directors, since they can only file derivative lawsuits upon approval of the committee appointed by the corporation's board of directors. Despite the increased level of shareholder protection, derivative suit opposition to the actions of directors appears to be at risk as long as shareholders have no interest in protecting the interests of the corporation, but only their own.

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The Limited Liability Company from the Perspective of the Latest Legislative Changes in Romania

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Abstract

The repeated and substantial modification of the Companies Law no. 31/1990 led us to analyze this normative act in more depth, the most important in the field of commercial law, we could say. It is obvious that the evolution of society, of the business environment, of the way of operating a company, imposed the latest changes in the company law. The present study aims to analyze only one of the associative forms regulated by this law, namely, the limited liability company, the most common type of company in Romanian and international practice. The paper will address these changes and will offer pertinent opinions regarding the practical and theoretical usefulness of the changes, will try to present a critical opinion regarding the latest changes made to the legal regime of the limited liability company. In carrying out the scientific approach, we will consider the legal provisions, as well as the new doctrine created up to this point in Romanian law. We will use appropriate methods of interpreting the provisions of Law no. 31/1990, respectively the grammatical, historical method, as well as the logical method, with the corresponding interpretation arguments.

Keywords*: limited liability company, Law 31/1990, share capital, social shares, liability, the National Office of the Trade Register, associates.*

JEL Classification: K23

1. Introduction

The limited liability company is regulated in our legislation in Chapter VII of the Romanian Civil Code[2] regarding the company contract which mentions among the corporate forms in art. 1888 para. 1 letter e) the "limited liability company". Also, starting from the general regulation of the Civil Code, the main seat of the matter is provided by Law no. 31/1990[3] of the companies that regulates, in detail, the legal characters, the conditions for concluding the constitutive act, for the establishment, operation and termination of the limited liability company, as well as by Law no. 265/2022[4] regarding the Trade Register detailing the registration procedure of this corporate form.

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[2] The Romanian Civil Code, Law no. 287/2009, published in the Official Gazette of Romania, part I, no. 505 of 2011.07.15.

[3] Law no. 31/1990 of companies, modified and republished, published in the Official Gazette of Romania, part I, no. 1066 of 2004.11.17.

[4] Law no. 265/2022 of the Trade Register, published in the Official Gazette of Romania, part I, no.

Being perhaps the most important normative act in the field of professional traders, legal entities, the Companies Law no. 31/1990 has been repeatedly amended so that its regulations are consistent with the evolution of the business environment and the requirements for the exploitation of profitable economic activities.

With express reference to the topic addressed in this scientific approach, the company law was recently amended by Law no. 223/2020[5] for the simplification and de-bureaucracy of the transfer of social shares and the payment of share capital and by Law no. 265/2022 of the Trade Register. Also, although it will not be the subject of our study, we must mention the fact that the last amendment to Law no. 31/1990 came about through Law no. 296/2023[6] which entered into force on 11.11.2023.

This paper will try to identify and analyze these legislative changes, highlighting their relevance, practical utility and formulating possible criticisms, if necessary.

Before starting the analysis of the changes brought to the limited liability company, a brief exposition of the history of this form of company is necessary to try to understand why the limited liability company represents the company most often encountered in the practice of the business environment.

The limited liability company is a creation of the German legal system from the 19th century, being introduced through *Gesellschaft mit beschankter Haftung* in 1892 and published in the *Reichgesetz blatt* (Legal sheet of the empire)[7]. This law remained in force even after the entry into force of the German Commercial Code in 1896.

Gesellschaft mit beschankter Haftung represented the source of inspiration for the legal systems of other neighboring states, Austria, especially, through a law from 1906 regulating the new associative form. Also, Czechoslovakia and Poland, in 1920, regulated the limited liability company[8].

In France, the limited liability company was regulated by the Law of 07.03. 1925, in Italy, it was introduced by the Code of 1942 and in Spain, by the Law of 17.04.1953.

750 from 2022.07.26.

[5] Law no. 223/2020 for the simplification and debureaucratization of the transfer of social shares and the payment of the social capital by amending the Companies Law no. 31/1990, published in the Official Gazette of Romania, part I, no. 1018 of 2020.11.02.

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[7] Sorana Popa, *Commercial Law, Judicial Theory and Practice*, Universul Juridic Publishing House, Bucharest, 2023, p. 176.

[8] Laurenţiu Novac-Diaconu, *Noţiunea şi trăsăturile societăţii cu răspundere limitată*, „Acta Universitatis George Bacovia. Juridica", Volume 4. Issue 2/2015, p. 3, https://www.ugb.ro/Juridi ca/Issue8RO/13._Notiunea_si_trasaturile_societatii_cu_raspundere_limitata.Novac_Laurentiu.RO.pdf.

In interwar Romania, the limited liability company was regulated in Bucovina through the application of Austrian legislation and after the Union of 1918, being the type of company preferred by merchants.

In the German legal system, the legislator continued to innovate, regulating the limited liability company with a single partner through the Law of 13.05.1980 and the Law of 04.07.1980. Inspired by these regulations, France introduced through Law number 85-697 of 11.07.1985 and through Decree number 66-909 of 30.07.1986, this new type of company, called sole proprietorship with limited liability.

2. Limited liability company currently in Romania

The limited liability company, a creation of the law of the modern era, is *sui generis*, intermediate company, which borrowed the most advantageous legal characteristics both from capital companies (limited and individual liability) and from personal companies (the number limited by members and the intuitu personae character, as well as a low social capital, at this moment, without a minimum threshold). In specialized literature, the limited liability company is considered a mixed company, *intuitu personae – intuitu pecuniae*.[9]

The limited liability company is defined as the company established on the basis of full trust, by two or more people, who share certain assets, to carry out a commercial activity (production activities, trade or provision of services), in order to share the profit and, who are responsible for social obligations within the limit of their contribution[10].

The limited liability company is the company whose social obligations are guaranteed with the social patrimony and the associates are only obligated within the limit of the subscribed social capital[11].

The definitions given to the limited liability company by the legal doctrine reveal the two, in my opinion, fundamental features of this type of company: the limited liability, within the limit of the contribution to the share capital[12] and the reduced share capital. Obviously, there are other legal characteristics that attract those who want to establish a company, but these are the two decisive arguments for the establishment of this type of professional.

Regarding the first essential feature of the limited liability company, namely the liability of the members for the company's debts, art. 3 paragraph 3 of Law no. 31/1990 stipulates that the partners in the limited liability company

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[9] Sebastian Bodu, *Law 31/1990 commented*, Rosetti Publishing House, Bucharest, 2023, p. 1033.
[10] Vasile Nemeş, Commercial Law, 5th edition, Hamangiu Publishing House, Bucharest, 2023, p. 286.
[11] Stanciu D. Cărpenaru, *Treaty of Romanian Commercial Law*, Universul Juridic Publishing House, Bucharest, 2016, p. 373.
[12] Smaranda Angheni, *Commercial Law*, 2nd edition, Universul Juridic Publishing House, Bucharest, p. 180.

are only responsible up to the concurrence of their contribution to the formation of the social capital. This is the only corporate form in our legislation that has in its name expressly specified the form of liability that rests with the associated members for the debts of that company. Regarding this feature of the limited liability company, Law no. 223/2020 did not make any changes.

Regarding the second essential feature of the limited liability company, and which was the subject of Law no. 223/2020, respectively the minimum share capital, the amendments to Law no. 31/1990 removed the minimum limit of 200 lei on which art. 11 paragraph 1 regulated it for the establishment of this type of company. At this moment, regarding the share capital of the limited liability company, art. 11 stipulates the following: *"The share capital of a limited liability company is divided into equal social shares. The social shares cannot be represented by negotiable securities"*.

The intention of the legislator to eliminate the minimum share capital of 200 lei in the case of the limited liability company took into account the fact that that minimum limit was, anyway, insignificant compared to Romania's economic evolution. Moreover, the share capital, although it represents the general pledge of unsecured creditors, is not held as a reserve at the disposal of eventual creditors. It represents nothing more than another element in the company's balance sheet (respectively, a debt of the company towards the partners, which in case of liquidation, would go back to the partners, after the satisfaction of all other debts).

Also, by eliminating the minimum threshold, the legislator intended to bring the national legislation to the standard of other legislative systems in which there is no requirement of a minimum share capital, such as Belgium, the Czech Republic, Denmark, Finland, France, Greece, Ireland, Italy, the Netherlands, Sweden, as well as other states that are not part of the European Union.

The studies carried out regarding the minimum social capital thresholds have shown that where they are small or insignificant, as in the case of Romania, they do not represent either a relevant indicator for professionals, or a genuine guarantee for creditors. This is all even more evident where the funds subscribed as share capital can then be immediately withdrawn and used to cover the company's expenses, as is the case in Romania.[13]

Therefore, the legislator, out of the desire to facilitate access to this corporate form, also removed the minimum threshold of 200 lei, an initiative that I can criticize considering that, anyway, it was a relatively small amount. Also, even if the minimum threshold was removed, this does not mean that the limited liability company can be established without share capital, considering the provisions of art. 16 para. 1 of Law no. 31/1990 which specifies that cash contributions are mandatory for the establishment of any form of company, including the establishment of a limited liability company.

[13] PL-x no. 599/2020, Draft Law for the simplification and debureaucratization of the transfer of shares and the payment of share capital by amending Law no. 31/1990 on companies, https://www.cdep.ro/proiecte/2020/500/90/9 /em774.pdf.

The current regulation of art. 11 of Law no. 31/1990 only establishes that this social capital is divided into social shares of equal value, and which are not represented by negotiable securities. The second sentence of art. 11 is not new, it is just a reiteration of the old regulations. And previously, the divisions of the social capital in the case of the limited liability company were called equal social shares, not represented by securities. The old regulation even established the minimum value of social shares at 10 lei. After the amendment of these provisions of Law no. 31/1990 by Law no. 223/2020, there are opinions in the doctrine according to which, in the future, the value of the social shares would be, in the future, at least 10 lei[14].

Personally, I do not share this opinion, considering that, as long as the legislator did not regulate a minimum value, as he did in the case of the minimum value of shares in joint-stock companies, we cannot impose such a minimum value either. The only condition is that the value of the social shares is a whole value, that is, at least 1 leu. From this perspective, we could say that, for the establishment of a limited liability company, the minimum share capital would be at least 2 lei, if it had 2 associates. But, from my point of view, the imperative provision in art. 16 paragraph 1 regarding the obligation of the cash contribution, is justified by the need for any company to have an amount of money to use at the start of the activity. Or 2 lei is an absolutely insufficient amount, even derisory, to allow the start of the activity.

However, we understand the legislator's intention to remove the minimum threshold of 200 lei from the desire to see that, for the establishment of a limited liability company, the social capital represents the smallest problem.

Also, the legislator appreciated that the contributions in cash and in kind (assets), possibly, to the establishment of the share capital of a limited liability company must not be paid in full, at the time of the establishment of the company, but, according to art. 91 paragraph 2 of Law no. 31/1990, must be paid in the proportion of at least 30% of the value of the subscribed share capital, no later than 3 months from the date of registration, but before starting operations on behalf of the company[15]. The difference in subscribed capital of a maximum of 70% will be paid within 12 months from the date of registration, for the contribution in cash and within no more than 24 months from the date of registration, for the contribution in kind.

The regulation comes to "copy" the similar provision established by law in the case of joint-stock companies, specifying that, in this situation, when the minimum capital established by law is 90,000 lei, the percentage of at least 30% of the subscribed capital must be paid immediately, at establishment of the joint stock company. We cannot but criticize the legal provision which adds a new

[14] Vasile Nemeş, *Commercial Law*, 5th Edition, Hamangiu Publishing House, Bucharest, 2023, p. 288.

[15] Cristina Cojocaru, *Romanian Business Law, Fundamental concepts*, Universul Juridic Publishing House, Bucharest, 2022, p. 52.

"facility" for the limited liability company. That is, after the ridiculous minimum limit of 200 lei was removed, through the new regulation, the legislator also offers the payment in stages of that insignificant share capital. I believe that such a regulation, lacking in legal coherence, makes a mockery of the idea of social capital.

Regarding another amendment brought to the limited liability company by Law no. 223/2020, this concerns the simplification and de-bureaucracy of the transfer of social shares.

The social shares represent fractions of the social capital, with equal value and are not negotiable securities. The shares are determined by the certificate of shares issued by the company's administrator, at the request of the interested partner, with the mention that it cannot serve as a title for the transmission of the assessed rights[16].

In the form prior to the entry into force of Law no. 223/2020, the provisions of art. 202 of Law no. 31/1990 regarding the transfer of the social shares also established an administrative procedure for communicating to ANAF (the National Fiscal Administration Agency) the decision of the general assembly adopted in this regard and the possibility of formulating an opposition request by the social creditors who were prejudiced by the transfer of the social shares.

According to art. 202 para. 1 of Law no. 31/1990 "*The shares can be transferred between associates. (2) Transmission to persons outside the company is allowed only if it was approved by associates representing at least three quarters of the share capital. (2^1) The decision of the assembly of associates, adopted under the conditions of para. (2), shall be submitted within 15 days to the trade register office, to be mentioned in the register and published in the Official Gazette of Romania, Part IV. (2^2) The trade registry office will immediately transmit, electronically, the decision provided for in paragraph (2^1) of the National Fiscal Administration Agency and the general directorates of the county public finances and of the Bucharest municipality. (2^3) The social creditors and any other persons prejudiced by the decision of the associates regarding the transmission of the social shares can formulate an opposition request by which they request the court to oblige, as the case may be, the society or the associations to repair the damage caused, as well as, if if this is the case, the civil liability of the associate who intends to transfer his shares. The provisions of art. 62 applies accordingly. (2^4) The transfer of the social shares will operate, in the absence of an opposition, on the date of expiry of the term of opposition provided for in art. 62, and if an opposition was filed, on the date of communication of the decision rejecting it. (3) In the case of acquiring a social share through succession, the provisions of para. (2) are not applicable if the constitutive act does not provide otherwise; in the latter case, the company is obliged to pay the social share to the successors, according to the last approved accounting balance sheet. (4) In the event that the legal maximum of associates would be exceeded due to the*

[16] Camelia Stoica, *Corporate Law, Course Notes*, Bucharest, ASE Publishing House, 2015, p. 78.

number of successors, they will be obliged to appoint a number of holders that will not exceed the legal maximum".

Law no. 223/2020 amended the provisions of art. 202 in the meaning repealing the provisions of para. 2^1 - 2^4 which regulated the communication of the decision regarding the transfer of social shares to ANAF (the National Fiscal Administration Agency) and the possibility of formulating opposition by social creditors. The reason for the repeal was the elimination of the bureaucratic procedure and excessive delays in the effective implementation of the cessions of the social parts.

Until the amendment of art. 202, Romania was the only country in the European Union providing such a restrictive and bureaucratic regime regarding the transfer of social shares, not allowing associates to establish their own rules governing the transfer of social shares, and establishing, instead, a bureaucratic process in two different stages, with an incomparably longer duration than in the rest of the EU countries. While in other jurisdictions the transfer of social shares can take place even on the same day, in the most optimistic case in Romania, the transfer took at least 30 days, but in practice even longer depending on the incidents that could occur as a result of the suspension of the transfer, reaching even several years.

The possibility to freely transfer the participation to third parties or for associates to establish their own rules governing this aspect through the constitutive act, is provided in most countries of the European Union, including Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Sweden.

In Romania, in the unmodified version of art 202 of Law no. 31/1990, the transfer of social shares was carried out in two different stages. The first stage is the approval with the majority of ¾ of the share capital. This regulation remained in force even after the amendment of art. 202. I have to make a brief comment regarding the majority of ¾ of the share capital established by Law no. 31/1990. On the one hand, bearing in mind that, through the transfer of shares, the structure of associates can be changed, especially when the transferee is a non-associate, we can say that the majority of ¾ is justified. At the same time, this majority can also represent an obstacle in the way of the free transfer of the divisions of the share capital. I believe that, through this regulation, the limited liability company comes closer to general partnerships.

The second stage was represented by the publication of the decision in the Official Gazette and waiting for a period of 30 days. In practice, however, the publication in the Official Gazette was not carried out directly by the company, but the decision was submitted to the Trade Registry, which forwarded it for publication in the Official Gazette, the procedure lasting even several weeks, so in practice the delay could be as long as 60 of days. This in the conditions in which the company had no debts and no opposition was formulated to the decision of the general assembly.

Moreover, it was foreseen the possibility of formulating an opposition request by any interested person, which could have the effect of suspending the assignment of the social shares until a final court decision is issued. Even if in practice the oppositions formulated were generally rejected by the court as uninteresting, the judicial procedure risked postponing the transfer of the social shares for months beyond the initial deadline. Even when the opposition was admitted, the transfer was not cancelled, but the company was obliged to pay the damage claimed by the plaintiff.

Following the verification in jurisprudence of the cases having as object the opposition in relation to the assignment of the social parts by reference to art. 202 of Law no. 31/1990, approximately 4,600 such solutions were indexed, on average 460 oppositions per year resolved by Romanian courts. Of these, only 96 received a solution on the merits or admission in part, which is about 2%. A simple analysis shows that, in an overwhelming majority, these oppositions were rejected by the court[17].

In most of the opposition requests, the plaintiff was the National Fiscal Administration Agency, and with an overwhelming majority, they were rejected as lacking interest, the court considering that, based on the rules of fiscal procedure, the collection of fiscal receivables is carried out on the basis of an enforceable title issued even by the tax authorities. As a result, ANAF did not need a court decision for the realization of tax claims, because it could proceed to their execution by issuing the writ of execution, when the claims were due. As a consequence, the role of the courts was unjustifiably burdened and ANAF failed to collect more financial resources. Even more serious is the fact that the plaintiff ANAF was forced to pay court costs caused by the settlement of rejected opposition requests, reducing its financial resources, instead of increasing them.

The possibility of formulating the opposition to the assignment of the social parts with suspensive effect was introduced in art. 202 by Emergency Ordinance of the Government (GEO) no. 54/2010[18], although there is already a regulated general opposition procedure that protects the interests of creditors. Personally, I consider the regulation of the opposition to the transfer of social shares through GEO no. 54/2010 an absolutely erroneous and disadvantageous solution, the changes made being unnecessary and confusing from a technical point of view.

The reason for the regulation of this opposition to the transfer of social shares was, officially, the one that results from the name of the normative act that introduced it, namely, combating tax evasion. I consider this regulation lacking in legal vision, considering the fact that there were already legal provisions that

[17] PL-x no. 599/2020, Draft Law for the simplification and debureaucratization of the transfer of shares and the payment of share capital by amending Law no. 31/1990 on companies, https://www.cdep.ro/proiecte/2020/500/90/9/em774.pdf.

[18] Emergency Ordinance 54/2010 regarding some measures to combat tax evasion, published in the Official Gazette of Romania, part I, no. 421 of 2010.06.23.

allowed it (increasing the share capital, with the inclusion of a new associate in the company, then an assignment to this new associate, without being subject to opposition for the assignment to third parties. It was also possible to transform the company into a joint-stock company and then the assignment of the shares, not subject to this opposition).

In conclusion, combating fraud or tax evasion by introducing opposition to the assignment of shares has not been achieved, but has only made it more difficult for business professionals who, for a variety of reasons, did not want or were unable to implement these alternative circumvention operations of the opposition. I believe that the real reason was to allow ANAF to attract funds to the budget and to put pressure on limited liability companies to pay their budget debts, even uncollectible ones, before any transfer of social parts. But there were already legal remedies and other legal procedures for this purpose (joint and several liability for fiscal claims provided for by the fiscal procedure code, liability of management bodies and responsible persons in the insolvency procedure, the opposition generally provided for in art. 61-62, the execution enforced, or even the criminal action for the crime of fictitious transmission of social shares provided for by art. 280^{1}).

Therefore, the repeal of the provisions of art. 202 para. 2^{1} -2^{4} of Law no. 31/1900 is a fair solution of the legislator, to correct an abusive regulation, lacking in legal vision and which did nothing but procrastinate the procedures for the assignment of social shares, unjustifiably burden the role of the courts and transform ANAF from a creditor into a debtor for lawsuits filed against companies and lost. Regarding the situations in which, without abusing their right, the interested persons would like to challenge the assignment of the social shares, Law no. 31/1990 established the general opposition procedure regulated by art. 61 and 62 of the law.

3. Conclusions

This paper analyzed the changes brought by Law no. 223/2020 of the legal regime of the limited liability company, more precisely, the provisions of art. 11 and art. 202 of Law no. 31/1990. These changes essentially provide for the elimination of the threshold of 200 lei of the share capital, the possibility for the associates of limited liability companies to establish their own rules regarding the conditions for the transfer of shares to third parties through the articles of incorporation, as well as the alignment of the regulation of the transfer of shares with the European standard , by repealing the provisions introduced by GEO no. 54/2010 which gave rise to a super-bureaucracy regarding the opposition provided by art. 202 para. 2^{1} -2^{4}.

We hope that the scientific approach has outlined the legal characteristics of the limited liability company, the professional trader, a legal person constituted by the registration at the National Office of the Trade Register of the constitutive

act consisting of a company contract and a statute that confirms the agreement of will of two or more natural persons and/or legal entities that have contributed money or other tangible or intangible movable assets and/or immovable assets, in order to operate an enterprise, i.e. in order to carry out a systematic activity of production, administration or disposal or goods or provision of services in order to achieve a purpose patrimonial, being responsible for any debts within the limit of their contribution to the establishment of the social capital.

We cannot dispute the need for legislation, especially in the commercial field, to keep pace with the realities and demands of the business environment, but, at the same time, we must criticize the repeated amendments to Law no. 31/1990. Even if these changes are not always essential, they are likely to create confusion both among legal practitioners and theoreticians and, more seriously, among commercial professionals or future commercial professionals who are put in difficulty by the changing legislation.

We believe that it would be necessary to amend the Companies Law no. 31/1990 to be implemented with the aim of facilitating the access of future companies to the business environment, especially limited liability companies, the most flexible and friendliest form of association.

The elimination of the minimum threshold of 200 lei for the establishment of a limited liability company is a positive element that we must highlight, able to make this type of professional more accessible to those who wish to establish a company. Regarding the problem addressed in this scientific approach, I consider it appropriate to repeal the provisions of art. 202 par. 2^1 - 2^4 of Law no. 31/1990 which did not have any positive effect, but only made the transfer of social shares more difficult.

Also, the regulation of the subscribed share capital and the term by which it must, effectively, be paid, as well as the removal of a minimum value of the social shares represent other "facilities" offered to future commercial professionals. However, I believe that so many facilities are not useful in a competitive business environment. I share the opinion expressed in the doctrine according to which "*if previously share capital was derisive, now, the idea of share capital has fallen into derision*".

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Economic Justifiability of Work on Sunday. Dilemmas and Suggestions[1]

Associate professor **Anton PETRIČEVIĆ**[2]

Abstract

This topic has been discussed intensively among scientists, workers, consumers, in church circles in the last 20 years. Mostly from the available research it can be seen that the Republic of Croatia is the country where most people want to have a non-working Sunday. At the same time, the question is whether all workers can protect themselves from work on Sundays. So, one part of workers has to work on Sundays. While in the Republic of Croatia we are only at the very beginning of solving this problem, many countries have already addressed this issue. The paper will show how the EU countries have resolved this issue. The EU trend is greater liberalization of work on Sundays. There are several hypotheses in this paper: Hypothesis 1 – work on Sunday is negatively related to the quality of health, Hypothesis 2 – work on Sunday is positively related with conflicts in family relationships. The research carried out in Eastern Slavonia on a representative sample and results obtained by on-line survey method, method of systematization, method of analysis and synthesis, historical method and comparative method should not only remain a dead letter on paper, but the competent institutions and professional public should create a legislative framework and apply the results in practice as a basis for the protection of workers.

Keywords*: work on sunday, socioeconomic relations, psychological relations, family relationships, economic development.*

JEL Classification*:* K31

1. Introduction

This topic has become relevant in the last decade because it directly affects family relationships, the health of workers, and at the same time there is a dehumanization of work and a stratification of society into the rich who use the work of these workers and create profits, and the poor who are exploited by working overtime and often that work is not paid. This resulted in the emigration of workers to other countries, the breakup of families, illnesses, neglect and the impossibility of properly raising children.

The paper has 6 chapters, through a deeper analysis it can be concluded whether this is a superficial impression or whether the direction in which this way

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of working is going should really be changed.

The following methods are used in this paper: on-line survey method, method of systematization, method of analysis and synthesis, historical method and comparative method.

2. Historical overview of working on Sunday

We will consider this part through two units, namely the concept of work before the entry of the Republic of Croatia into the EU and the concept of work after the entry of the Republic of Croatia into the EU

2.1. Work on Sunday until the entry of the Republic of Croatia into the EU

Since ancient times, Sunday has been a symbol of rest, and it received its legal recognition in the 4th century thanks to the Roman Emperor Constantine I. Since ancient times, there has been a need among people for a day of rest and a day that will be dedicated to God. For the Jews it was the Sabbath, Jesus respected the Sabbath and went to the Temple, but he also knew how to behave in a liberating way towards the laws that enslave man. For him, showing honor to God can never be in conflict with saving a man.

It was precisely this attitude of Jesus towards the Sabbath that led his historical witnesses and other preachers of the gospel to feel free to celebrate Sunday instead of Saturday.

In our region, Sunday is accepted with special respect and spiritual significance. Historical sources testify that Sunday, with its Christian content, was also a spiritual center for the people of our region, and so week after week, year after year, century after century this kind of attitude was built.[3]

2.2. Work on Sunday after the entry of the Republic of Croatia into the EU

Working on Sunday has become a relevant social issue during the last decade, which follows the current transitional movements of the country. In addition to political debates, it also encouraged the re-examination of social values related to the norm of work[4].

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[3] Brstilo, Ivana, *Rad nedjeljom: put u potrošačko društvo?* Franjevački institut za kulturu mira, Hrvatsko katoličko sveučilište, Zagreb: Centar za promicanje socijalnog nauka crkve, 2014. p. 79; Sever, Irena, *Nedjelja radi čovjeka,* Hrvatsko katoličko sveučilište, Zagreb, 2021, p. 67; Brstilo Lovrić, Ivana; Mravunac, Damir, *Nedjeljni kapitalizam kao ideološki model rada nedjeljom u Hrvatskoj*, istraživački osvrti iz projekta „Cro Laudato Si" Hrvatsko katoličko sveučilište Zagreb, Zagreb, 2022, p. 73.

[4] Jurić, Daniel & Momčilović, Aco, *Neki socioekonomski i vjerski aspekti stava o radu nedjeljom u Hrvatskoj XVI.* Dani psihologije u Zadru,Zadar, 2008, p. 57; Vulić-Prtorić, A.; Ćubela Adorić,

Even earlier in the legal history of Croatian independence, the ban on working on Sunday was the subject of a constitutional court assessment, with negative outcomes in the end.

The adoption of the acquis of the EU gradually creates a legal framework on the prohibition of working on Sunday. Europe strives for deregulation and liberalization of work. "In a scientific paper at the University of Pennsylvania on the deregulation of work on Sundays in EU countries, the conclusion that the liberalization of the laws brings a number of benefits for both the worker and the employer, primarily because it gives them the freedom to better organize their time, is highlighted."[5]

In the European Social Charter, whose task is to ensure the fundamental social and economic rights of the member states of the European Union, it is stated that "weekly rest time should be provided on Sunday". The government and public opinion that it is necessary to make a serious and comprehensive analysis of the possible consequences of canceling work on Sunday, especially in the trade sector, because it is reflected in other work units, not only in the sales sector. From the analyzes that resulted from surveys conducted in 2018 by the Croatian Chamber of Commerce, the opinions of traders were divided.

So that a part of the traders took the position that the Republic of Croatia is part of the single EU market and there are no borders between the Republic of Croatia and EU member states in the environment where Sunday is a working day (Slovenia, Hungary...), which could result in an outflow of consumers and capital to these countries, especially along the border areas of Slovenia, Hungary and Bosnia and Herzegovina. Traders felt that it was necessary to take into account the labor regulations, of course, and at the same time to take into account the consumers who chose their product chain and remained loyal to it.

Another part of the traders claims that a non-working Sunday would not threaten their business and that it is necessary to take care of protecting the dignity of workers and reducing unfair market competition.

Without a deeper analysis, such opinions, which easily turn into decisions, can have a far-reaching impact to the detriment of certain sales formats.
At the end of 2018, the first meetings in the ministries on this topic began, and tasks were divided and certain responsible persons were assigned to work on sectoral analyzes and proposals. The project was started comprehensively in order to try to see all the problems related to the largest number of employees.

There are many economic studies on the impact of Sunday work on the economy, workers and employers and the results vary from area to area and from country to country.

Thus, a recent study by Eurofound, an organization for labor rights in the

V.; Proroković, A.; Sorić, I.; Valerjev, P. (ur.)., Zadar, Hrvatska: *Odjel za psihologiju*, Sveučilište u Zadru, 2008. p. 60-61 (predavanje, domaća recenzija, znanstveni).

[5] Nakić, Mario, *Hrvati rade nedjeljom upola manje od Šveđana*, kolumna, Liberal, Zagreb, 2018, p. 48.

European Union, came to the conclusion that "unusual working hours can have a negative impact on the health of workers and greater absenteeism, which also negatively affects the companies themselves"[6].

3. Organization of working hours in the Republic of Croatia

The European Working Hours Directive[7] namely, sets minimum requirements for the organization of working hours in order to protect the health and safety of workers from the adverse effects of excessively long working hours, inadequate breaks, inadequate daily, weekly and annual rest, and from the adverse effects of night or shift work. Therefore, the Government of the Republic of Croatia constantly intends to try to protect workers in all these aspects, taking into account the business and market aspects of each individual branch of the economy, even though they are aware after the outflow of the workforce that the Republic of Croatia needs every minute of the worker's working time. The entire spectrum of activities is covered by the reorganization due to the non-working Sunday. The question arises, who benefits, and who loses in this reorganization? The government of the Republic of Croatia started with non-working Sunday, which was preceded already in 2018 by the adoption of regulations and reorganizations in all spectrums of activities, analyzes in their departments carried out by three ministries, in order to find, as part of the European directive on working hours, a model that would be in accordance with the Croatian Constitution and European regulations. They became aware that the term "free Sunday" has seriously become a term in extinction.

3.1. The impact of working on Sunday on the economy, workers and employers

There are many economic studies on the impact of Sunday work on the economy, workers and employers and the results vary from area to area and from country to country.

Working all day on Saturday and Sunday did not have any effects on the economic and commercial side, but it had negative effects on the sociological, human side and the impact on the family. Working on Sunday's results in alienation and disintegration of the family, which has far-reaching consequences.

The participants support working on Sunday primarily because of the financial compensation, and the main reason for opposing work is the opportunity to socialize and rest with the family. Considering these data and the transitional nature of the country, it is possible to assume that the motivation to work on Sunday primarily stems from economic needs. It is therefore reasonable to expect that the

[6] www.eurofound.europa.eu.

[7] European working hours Directiva 2003/88.

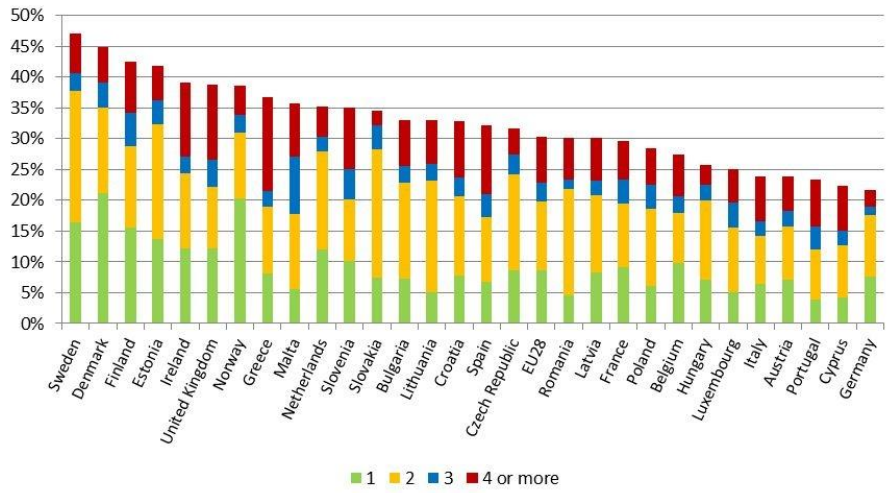
socioeconomic status of citizens will to a certain extent determine the attitude towards working on Sunday. As one of the main social actors who publicly expresses their views is precisely the influence of the church, that is, religious beliefs on the attitude towards working on Sundays, it should be taken seriously into consideration.[8] Citizens of higher socioeconomic status are more inclined to work and shop on Sunday.

It is claimed that working all day on Saturday and Sunday has no effects on the economic and commercial side, but has negative effects on the sociological, human side.

4. Europe and working on Sunday in the last decade

According to research by Eurofound, during the last years Europe has seen mostly deregulation of work, which also includes the reduction of restrictions on weekend work. In 2015, more than half of the workers in the European Union worked on Sunday at least sometimes, and 23% of them worked at least three Sundays a month. The share of workers who work at least one Sunday a month increased from 27% in 2005 to 30% in 2015. Most people work on Sunday in Sweden (every second employed person works at least one Sunday a month), followed by Denmark, Finland, Estonia, Ireland and the UK. Croatia is in the golden middle with 33%. There are the fewest people who work on Sunday in Germany (21%).[9]

Chart 1. Share of workers who work at least one Sunday a month



Source: *Eurofound, 2015, https://www.liberal.hr/images/v1957.jpg*

[8] Jurić, Daniel; Momčilović, Aco, *op. cit.*, p. 58.
[9] Nakić, Mario, *op. cit.*, p. 49.

Trends show that laws across the EU over the last 10 years are moving towards greater deregulation and liberalization of work on Sunday, which means that countries are loosening restrictions, although there are some exceptions that go or have tried to go in the opposite direction.

Poles and Czechs stood up for the traditional family gathering and announced that they would only allow the smallest merchants to have a non-working Sunday.

In France, there is a consensus among traders, Polls show that the vast majority of French citizens are in favor of working on Sunday if they will be paid twice. Macron's 2015 law (then Macron was a minister in the socialist government) allowed local authorities to choose 12 Sundays of the year when everyone can work and allowed work every Sunday in certain tourist spots. Every working hour above 35 hours in a week is counted as overtime. Each overtime hour is paid 25% more than regular hours, and if the number of overtime hours exceeds 8, then each additional hour is paid 50% more.

In 2014, the Polish government expanded the conditions under which companies can work on Sunday, which increased work flexibility and better organization of time for workers and employers. In the summer of 2015, after an expert analysis, large shopping centers in England and Wales were also allowed to be open on Sunday and afternoons. Their research established that the previous law discriminated against large companies and traders on the market. However, the conservative Polish government has limited the centers' work on Sunday.

Hungary banned working on Sunday, but this ban only lasted for one year (from 2014 to 2015). This law exempts family stores with an area of less than 200 square meters, so large foreign-owned retail chains were hit the hardest. Eurofound's economic analyzes showed that this decision did not have a negative impact on the country's economy. It turned out that four out of five Hungarians did not like the ban, and even employees in shopping centers were against it. Realizing the mistake, the Hungarian government lifted the ban.[10]

Prof. Jurčić pointed out that in our neighborhood (Austria and Italy) shops are closed on Saturday and Sunday and that in touristic places tourists go to restaurants to eat because they cannot buy groceries and prepare food themselves.

Under the pressure to return to work on Sunday, liberalization is actually destroying the Italian family, said di Maio, leader of the 5 Star Movement. "We have to limit the working hours of shopping centers again," he told reporters.

Since 1956, working on Sunday has been prohibited in Germany. Only supermarkets located at main train stations are allowed to operate. In 2013, local authorities were allowed to determine a certain number of working Sundays.

In Belgium, working on Sunday is allowed, but it is legally stipulated that work on Sunday is paid 100% more than on other days. Overtime is paid 50%

[10] Ibid, note 9.

more.

In Malta, which is close to us due to the great impact of tourism on the economy, work on Sunday is also paid twice as much as on other days.

Similar to Hungary, the Czech Republic introduced a ban on the opening of shops on public holidays in 2014, with the exception of shops with an area of less than 200 square meters. Shops must be closed at 12 PM on Christmas Eve.

That it is possible to regulate work on Sundays in a high-quality way is shown by the case of Slovenia, which banned work on Sundays and holidays in 2020, and this year their Constitutional Court confirmed the constitutionality of that law after employers filed a constitutional complaint. A similar law was adopted in Montenegro.

In Croatia, according to Article 94 of the Labor Act[11], it is prescribed that for difficult working conditions, overtime and night work, and for work on Sunday, holidays or any other day that is not allowed to work, the worker has the right to an increased salary. The Labor Act did not previously define how much this increase amounts to, and the determination of the increase is determined by the basic collective agreement, labor regulations, employment contract or other regulation. The interests of workers in the public sector are protected by trade unions, which negotiate the amount of compensation for, for example, working on Sunday. Employees in the private sector, on the other hand, are left to the good will of employers.

According to the new Labor Act from 2023, Article 94 states: "For difficult working conditions, overtime and night work, and for work on Sundays, holidays and non-working days determined by a special law, the worker has the right to increased salary, in the amount and in the manner determined by the collective agreement, the work regulations or the employment contract, whereby the increase for each hour of work on Sunday cannot be less than 50%."[12]

5. Research results

The question of working on Sunday will be answered differently by employers and differently by workers. Likewise, the Church has its own position on working on Sunday. Members of the older population will answer this question differently than younger ones, as well as those who are overworked, and those who have time to spare and use shopping centers as a promenade in the winter. In this regard, a short survey was conducted on a representative sample of 257 respondents using an online survey. The respondents were asked the following questions with optional answers:

1. Age (circle)
   - from 18 to 30 years old

[11] Labour Act of the Republic of Croatia, Official Gazzette 93/14, 127/17, 98/19, 151/22, 64/23.
[12] Ibid.

- from 31 to 60 years old
- from 60 to 85 years old

2. Work status - circle
- unemployed
- office worker
- a worker in a shopping center
- construction worker
- a pensioner

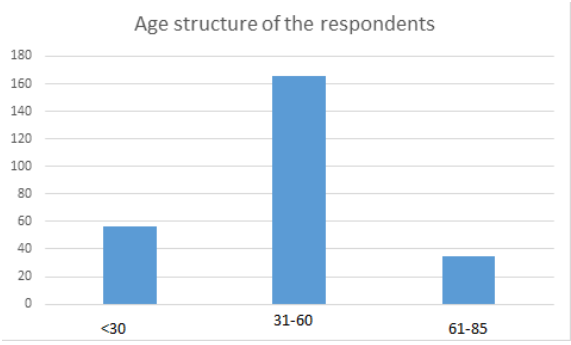
3. Do you support non-working Sunday? YES NO (circle your answer)

4. Is a non-working Sunday economically justified? YES NO (circle your answer)

5. If you work on Sundays, are you paid for your work in an increased amount? YES NO (circle your answer)

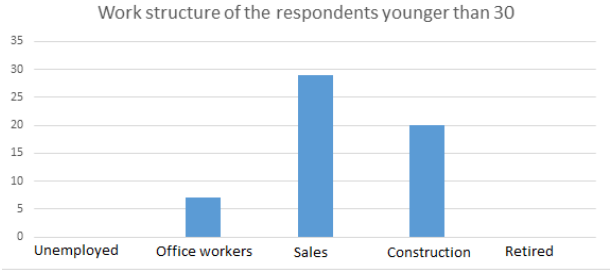
The survey was completed by 257 respondents. The results are as follows:

Chart 2. Age structure of respondents (Author's edit, 12.11.2023)



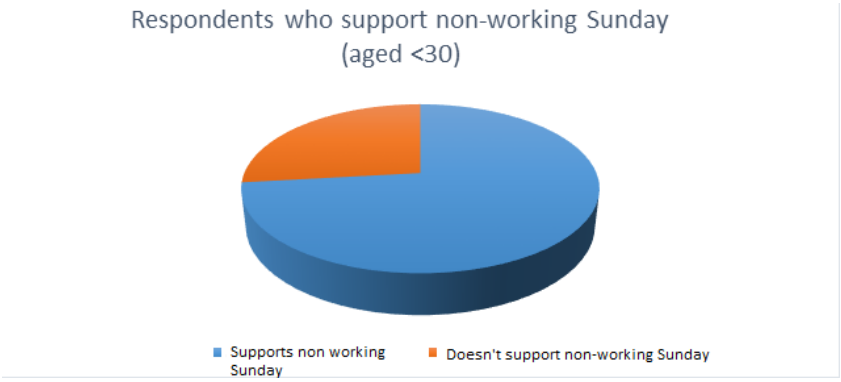
- 56 respondents were under the age of 30. Out of that, 0 unemployed people, 7 office workers,
- workers in shopping centers 29, construction workers 20, pensioners 0.

Chart 3. Work structure of surveyed respondents in the age group <30 years (Author's edit, 12.11.2023)



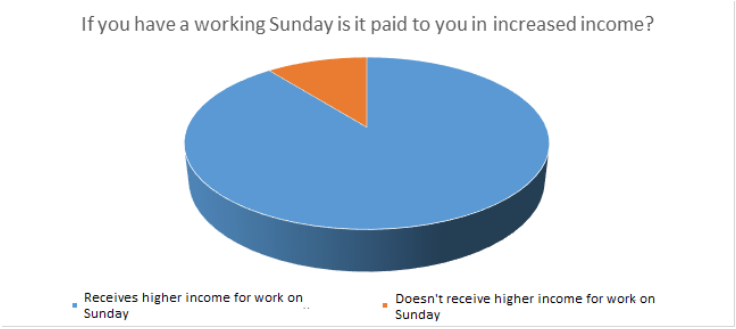
To the question "Do you support a non-working Sunday" out of 56 respondents under the age of 30, 41 answered "YES" and 15 answered "NO".

Chart 4. Support for a non-working Sunday in the age group of respondents <30 years old (Author's edit, 12.11.2023)



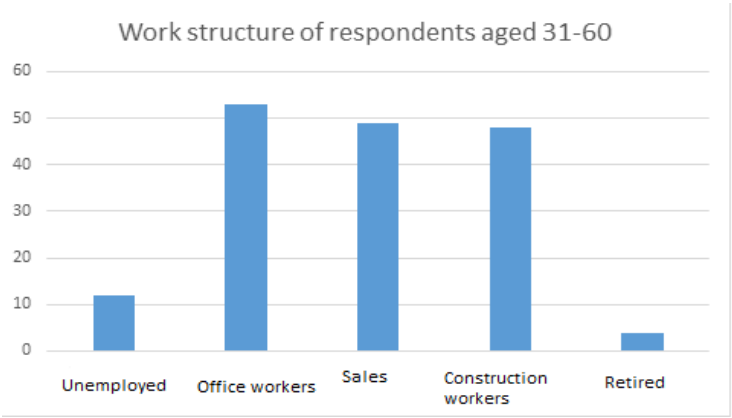
To the question "If you are active at work on Sunday, are you paid for your work in an increased amount of 56 respondents under the age of 30 for the answer YES, there were 50 respondents, and for the answer "NO" 6 respondents.

Chart 5. If you work on Sundays, are you paid for your work in an increased amount (age group <30 years) (Author's edit, 12.11.2023)



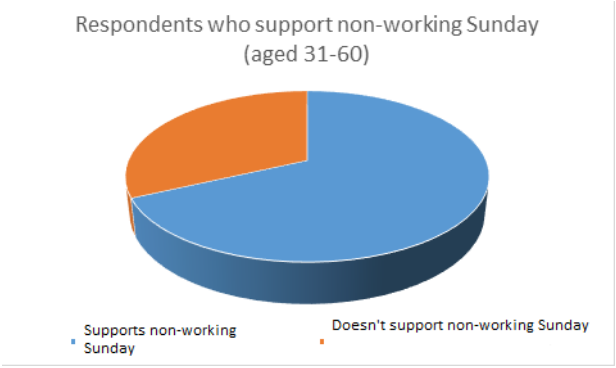
- 166 respondents were between the ages of 31 and 60 - Of these, 12 were unemployed, 53 worked in offices, 49 worked in shopping centers, 48 were construction workers, and 4 were retired.

Chart 6. Work structure of surveyed respondents in the age group 31/60 year (Author's edit, 12.11.2023)



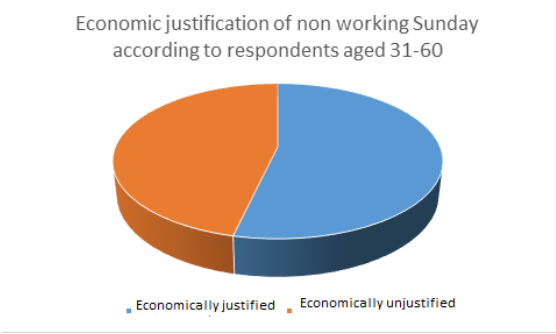
To the question "Do you support a non-working Sunday" out of 166 respondents aged 31 to 60, 113 answered "YES" and 53 answered "NO".

Chart 7. Non-working Sunday support in the 31-60 age group (Author's edit, 12.11.2023)



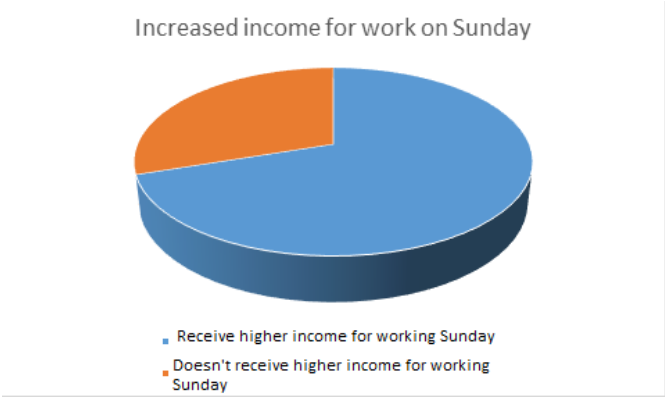
To the question "Is a non-working Sunday economically justified" out of 166 respondents aged 31 to 60, 89 answered "YES" and 77 answered "NO".

Chart 8. Is a non-working Sunday economically justified? Surveyed respondents in the age group 31-60 years (Author's edit, 12.11.2023)



To the question "If you are active at work on Sunday, are you paid for your work in an increased amount from 166 respondents aged 31 to 60 for the answer "NO" there were 50 respondents and 116 for the answer YES.

Chart 9. Increased compensation for work on Sundays in the 31-60 age group (Author's edit, 12.11.2023)



6. What does the ban on working on Sunday bring - public opinion?

Trade Act[13] introduces a partial ban on working on Sunday. The regulation entered into force on July 1, 2023. It is expressly forbidden to operate sales facilities in the business of trade on Sunday. The basic for introducing the ban is that it regulates the fundamental right to Sunday as a day of weekly rest and the issue of the balance of private and business life, which has been shown to be important for Croatian citizens through public opinion polls. The ban on working on Sunday plays a much wider role than it seems at first glance. Many think that

[13] Trade Act of the Republic of Croatia, Official Gazzette 33/23.12.

traffic will drop by 15-20 percent, that thousands of people will be laid off. Some say that this favors the "big" and not the "small". Many people want to escape from society's primordial habits of walking in nature and instruct them to walk in shopping centers in order to save on electricity consumption, to reduce time, and not to spend on heating the apartment. Here, the majority do not spend anything or do not spend a lot, and large costs are created for foreign or local owners, and this is not good for Croatian society and the Croatian economy.

What is specific to labor law is the intensity of the state's character in protecting the rights of workers, because the state, through its interventions in labor law legislation, protects the rights of workers as the weaker contractual party in the labor relation with numerous legal norms. This is also manifested through the application of a more favorable law that favors workers.

Previously mentioned, the ban on working on Sunday was introduced for the last time by the Civil Protection Headquarters of the Republic of Croatia, on April 24, 2020, by passing the Decision on working hours and working methods in trade activities for the duration of the declared epidemic of the disease covid-19. The thus established ban on working on Sundays lasted barely a month, considering that it was abolished by the Decision on amending the decision on working hours and working methods in trade activities for the duration of the declared epidemic of the disease Covid-19. Ivana Brstilo Lovrić pointed out that all surveys show that the majority of Croatian citizens support a non-working Sunday.[14]

7. Conclusion

According to Eurofound data from 2014, about 74% of workers employed in the countries of the European Union never work on Sundays, while 80% of them are satisfied with the schedule of working hours, which on a weekly basis is 39.5 for the average employee. As for Croatia, according to data from 2015, Croatia is at the top of the countries where employees work at least one weekend day, 63% of them, followed by Romania and Greece. Belgium, Austria and Luxembourg are the countries where the smallest number of employees work on weekends, 43% - 45% of them. Workers in Croatia are below the average level of the European Union in terms of satisfaction with the number of working hours, and as the main reason they cite too many working hours.

So, what is unclear are the questions: why did the Croatian worker have to move to other countries looking primarily for a job, and then for better working conditions when the Republic of Croatia had to import labor from other countries, so there is work. Have the legal regulations towards foreign workers started to be applied more consistently? And that's why they don't complain. What does this

[14] Dr. sc. Ivana Brstilo Lovrić pointed out that all surveys show that the majority of Croatian citizens support a non-working Sunday in the commercial sector. Working on Sundays cannot be reduced only to economics, but includes a much wider dimension of the general quality of life; Brstilo Lovrić, Ivana; Mravunac, Damir, *op. cit.*, p. 47.

do to the demographic picture of the Republic of Croatia? That is for a deeper analysis.

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Consequences of Confirming the Restructuring Agreement in the Rescue Procedure

Lecturer **Luiza Cristina GAVRILESCU**[1]

Abstract

The restructuring agreement procedure is one of the latest mechanisms available to viable debtors to prevent insolvency. The agreement between the debtor and the creditors holding the claims affected by the plan is made through the restructuring administrator and is confirmed by the confirmation of the syndic judge. The modified receivables will be paid according to the agreement, the rest of the debts will be paid under previous contracts, but only after priority payment of subsequent financing. Outstanding contracts will continue to be executed during the implementation of the recovery plan. The debtor retains the right to manage his business but will have to restructure his activity according to the plan. The restructuring manager shall ensure that the measures set out in the plan are implemented. Amendments to the restructuring agreement may be ordered if the creditors' challenge is upheld. If the provisions of the plan are fulfilled, the procedure will be closed by decision of the syndic judge, the debtor's debts will be written off according to the agreement. In case of non-fulfillment of the provisions of the plan, the procedure ceases, but the claims terminated by the agreement will be reborn.

Keywords: *confirmation of restructuring agreement, insolvency prevention, debtor rescue, subsequent financing, debt write-off.*

JEL Classification: K22

1. Prerequisites for confirmation of the restructuring agreement

Insolvency law has been relatively recently reformed to create effective frameworks for restructuring viable companies, but which face difficulties that cause such a temporary impairment of their activity that pose a real and serious threat to their future ability to pay their debts as they fall due, unless appropriate measures are taken. The internal regulatory framework has been adapted to ensure the transposition of EU Directive 2019/1.023 on preventive restructuring frameworks.[2]

The main aim of the Directive was to create easily accessible and low-cost procedures in Member States' law, allowing entrepreneurs to restructure at

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[2] The New Chance Directive, published in OJ L 172 of 26 June 2019, available online at: https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1571073221410&uri=CELEX:32019L1023, accessed 2023-10-11.

an early stage of difficulties (financial or otherwise), in order to prevent insolvency and restore the viability of their business in a short time[3].

Although the laws of the Member States existed even before the adoption of the Directive some regulations on the basis of which insolvency prevention procedures could be opened, they were only sporadically accessed, given that those out-of-court frameworks were not flexible enough and did not provide sufficient safeguards to give participants in the economic circuit confidence to resort to such mechanisms to rescue their company.

The amendments brought to Law no. 85/2014 on insolvency prevention and insolvency procedures through Law no. 216/2022[4] updated insolvency prevention procedures, introducing a new procedure, the restructuring agreement procedure, alongside the preventive arrangement procedure.

The restructuring agreement, which replaces the adhoc mandate procedure, is a partially extrajudicial institution with a high degree of confidentiality[5]. The restructuring agreement procedure can only be initiated at the request of the debtor who detects, on the basis of early warning means[6], that he is in difficulty, which cannot be considered naturally reversible, and requires vigorous recovery measures to avoid insolvency. The restructuring agreement therefore gives the debtor the possibility to restructure, within an organised framework but outside insolvency proceedings, obligations that threaten the financial stability of a debtor company with a realistic chance of recovery.

The debtor will prove that he is in difficulty through the report prepared by the restructuring administrator, to be analyzed by the syndic judge, who will be able to use the debtor's viability test[7] (possibly by granting a provisional suspension), in order to prevent abusive recourse to the procedure. The restructuring agreement will be drafted by the restructuring specialist and subject to negotiation with creditors, and to the extent that it is approved by the absolute majority of the value of the affected claims, it will be sent for confirmation to the syndic judge[8]. The acceptance of the request for confirmation of the agreement is conditional on ensuring a fair and equitable treatment of creditors who did not vote for the restructuring agreement or did not participate in the vote. The syndic judge will also check whether the agreement presents reasonable prospects of preventing the

[3] Geanina Oancea, *Acord de restructurare sau concordat preventiv?,* „Revista de insolvență Phoenix", no. 75-76, pp. 3-34.
[4] Published in the Official Gazette, Part I, no. 709 of 14 July 2022.
[5] Paul Popovici, *Inefficiency or uselessness? The practical avatar of regulating the preventive concordat and the ad hoc mandate*, „Curentul Juridic", 2013, vol. 53, pp. 141-144.
[6] Alert mechanisms to indicate when the debtor has not made certain types of payments – an example: when he has not paid taxes or social security contributions.
[7] Recital 26 of Directive (EU) 2019/1023.
[8] Luiza Cristina Gavrilescu, *Condițiile în care debitorul în dificultate își poate restructura datoriile prin intermediul unui acord cu creditorii pentru a evita insolvența,* presentation held at the National Conference "Mechanisms of plurality in law", on 28.10.2022, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

debtor's insolvency and ensuring the viability of the company.

2. Implementation of the restructuring agreement

Until the date of implementation of the restructuring agreement procedure, the main way of reorganisation was insolvency proceedings, which are a procedure for rescuing debtors of last resort, which are eminently judicial, and which are generally value destroying, with a significantly lower degree of debt recovery and higher administration costs[9].

As regards the effects of the confirmation of the restructuring agreement by the court, while the restructuring agreement is in progress, we distinguish:

2.1. The situation of the debtor

Regarding the situation of the debtor:

- *non-affecting legal rights and obligations resulting from other regulations*. The debtor's rights or obligations provided for by other normative acts shall not suffer any prejudice as a result of the debtor's entry into an insolvency prevention procedure.

- *inapplicability of legal or conventional disqualifications or prohibitions on entry into difficulty*. Getting the debtor into difficulty will not entail any legal or conventional sanction. Disqualifications, limitations or prohibitions established by legal norms for the debtor's entry into difficulty will be unenforceable and contractual terms with the same meaning will be considered unwritten[10].

- *maintaining prudential regulatory frameworks.* The proposal of a restructuring agreement, the submission of a confirmatory application or confirmation of a restructuring agreement or the submission of a request for the opening of composition proceedings, the opening of such proceedings or the confirmation of a restructuring plan shall not automatically change the classification of the debtor's exposures and the calculation of the provision, the prudential regulatory frameworks remaining applicable.

- *preservation of the debtor's lucrative regime.* Debtors subject to insolvency prevention procedures will continue to be subject to the legal provisions governing their organisation and operation. The debtor's right of administration under ordinary law is retained throughout the proceedings. The individual and collective rights of employees, including the rights to information and consultation, provided by law or collective agreements are not affected by the opening of

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[9] Andreea Bocioacă, Andreea Manea, *Acordul de Restructurare, noul instrument de prevenire a insolvenței, în curs de a fi introdus prin ultimele modificări ale Legii 85/2014 the document is available online at:* https://blog.pwc.ro/2022/07/12/acordul-de-restructurare-noul-instrument-de-prevenire-a-insolventei-in-curs-de-a-fi-introdus-prin-ultimele-modificari-ale-legii-85-2014/, accessed on 12.10.2023

[10] Art. 6^3 of Law no. 216/2022 – to which we will refer further by the mention "Law".

insolvency prevention proceedings[11]. The debtor's business will have to be restructured in accordance with the provisions of the agreement[12].

- *running of the period of suspicion.* The implementation period foreseen by the confirmed restructuring agreement will be added to the suspicious period[13].

- *non-interruption of execution of ongoing contracts[14]*. The execution of executory contracts will be carried out according to the contractual provisions, and the contractual clauses providing for termination or the creditor's possibility to suspend or refuse performance on the grounds that the debtor is in difficulty are considered unwritten.

The latter rule does not apply to qualified financial contracts and bilateral netting operations under a qualified financial contract or a bilateral netting arrangement, with the exception of contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless the latter contracts take the form of a position traded on an exchange or other markets in such a way that it can be substituted at any time current market value[15].

Budget receivables for which a payment facility is in progress according to the provisions of tax legislation, including those that represent a condition for maintaining the validity of payment facilities, will be paid in accordance with the documents from which they result, being considered unaffected receivables[16].

- *maintaining reasonable and immediately necessary acts and operations for the debtor's continued business.* Acts and transactions carried out in accordance with the confirmed restructuring agreement, as well as those which are reasonable and immediately necessary for their implementation, concluded during the restructuring period in the normal course of the debtor's business, may not be terminated in the event of subsequent insolvency of the debtor, unless fraudulent character is proved.

The acts and operations that are reasonable and immediately necessary for the debtor's continued business may include:

a) payment of costs for the negotiation, adoption or confirmation of a restructuring agreement/plan;

b) payment of costs for professional advice requested in close connection with restructuring;

c) payment of workers' wages for work already performed, without prejudice to other forms of protection provided for by Union or national law;

d) any payments and transfers made in the normal course of business, other than those referred to in subparagraphs (a) to (c).

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[11] Art. 64 of the Law

[12] Luiza Cristina Gavrilescu, *Efectele acordului de restructurare asupra activității debitorilor viabili*, presentation held at the National Conference "Law in European and pan-European context" on 06.05.2023 at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

[13] Art. 93 of the Law.

[14] Art. 94 of the Law.

[15] Art. 95 of the Law.

[16] Art. 96 of the Law.

- *the term for convening the general meeting of shareholders / associates.* After confirmation of the restructuring agreement, for the adoption of decisions on increasing or reducing the share capital, lifting the shareholders' right of preference, acquiring own shares in order to reduce the share capital, in order to fulfill the measures provided for in the restructuring agreement/ restructuring plan, the deadline for convening the general meeting of shareholders/associates is 20 days from the publication of the convocation in the Official Gazette of Romania.

- *postponement of the right to request the opening of insolvency proceedings of the debtor.* Insolvency proceedings may not be opened at the request of an affected creditor. The debtor will not be able to access another insolvency prevention procedure.

2.2. With regard to creditors' rights

The Restructuring Agreement allows differentiation between affected receivables (subject to the agreement) and unaffected receivables (not covered by the agreement), whereas in the case of insolvency, all claims against the debtor are taken into account, without there being a differentiated treatment option at his discretion, but only the subsequent structuring by categories of claims[17].

a) *the regime of previous claims* differs according to whether they are affected or unaffected:

- *affected receivables* are those receivables that may suffer either reductions or maturity deferrals within the restructuring plan.

The affected claims are to be amended in accordance with the provisions of the agreement on the date of the confirmatory decision, regardless of whether or not their holders voted in favour of the agreement, since the provisions of the agreement become enforceable against all creditors, including those creditors who voted against or did not vote on it; budgetary creditors shall be opposable subject to compliance with the legal provisions on state aid, according to the provisions of Article 5, item 71; the taxes due by the debtor for the receivables reduced by the agreement become due on the date of a decision by the syndic judge establishing the fulfillment of the agreement.

Unaffected receivables are those receivables that are not directly modified by the restructuring agreement.

- *unaffected receivables* its provisions shall not suffer any effect of the agreement. Any claim not included in the list of affected claims is an unaffected claim. This differentiation is fundamental for a correct structuring with a real chance of creditors approving a viable restructuring agreement[18].

- the disputed claims shall have the treatment provided for by the confirmed agreement, according to the common law, until the final settlement of the

[17] Andreea Bocioacă, Andreea Manea, *op. cit.*, p. 7.
[18] Ibid, p. 7.

dispute; for the established additional claim, it will be considered an unaffected claim if the creditor does not accept the treatment proposed by the debtor; the *disputed* claims will have voting rights with the amount included in the restructuring plan. The restructuring agreement procedure therefore does not entail the suspension of disputes concerning the recovery of claims held against the debtor or enforcement actions against his assets[19].

- individual rights, and *collectives of employees*, including the rights to information and consultation provided for by law or collective agreements shall not be affected by the opening of the preventive procedure[20].

- the implementation period provided for by the confirmed restructuring agreement will be added to the calculation of the suspect period;

- budget receivables for which a payment facility is in progress according to the provisions of tax legislation, including those that represent a condition for maintaining the validity of payment facilities, will be paid in accordance with the documents from which they result, being considered unaffected receivables[21].

b) ***the treatment of claims after the opening of proceedings differs depending on whether they are new or interim financing:***

New and interim financing provided for in the restructuring agreement may not be terminated in the event of subsequent insolvency of the debtor, unless it is proven fraudulent[22].

Even if new financing would affect the satisfaction of creditors in insolvency, civil, administrative or criminal liability cannot be incurred for persons providing new or interim financing solely on the ground that it was granted to a debtor in difficulty.

In order *to guarantee priority payment* of new and/or interim financing, the law provides for the establishment of a privilege on all movable and immovable property of the debtor and its registration with priority to any subsequent privileges or mortgages.

The concepts of new financing and interim financing have been redefined by law as follows[23]:

New funding means any financing, including the provision of guarantees, supplier credit with a payment term exceeding 90 days, granted by an existing or a new lender, in *to implement an agreement/plan* restructuring/ reorganization plan and included therein.

Interim financing means any financing, including the provision of guarantees, supplier credit with a payment term exceeding 90 days, granted by an

[19] Vlad Dumitru, *Ce înseamnă și în ce constă procedura de prevenire a insolvenței. Condiții de accesare și caracteristici generale,* the document is available online at*:* https://www.normedia.ro/2023/05/18/insolvente-procedura-r30rki45rg/, accessed on 20.10.2023.
[20] Art. 64 of the Law.
[21] Art. 96 of the Law.
[22] Art. 91 of the Law.
[23] Art. 281 of the Law.

existing or a new lender, *for the period of stay of executions* individual forced forces, in the preventive concordat procedure and on *duration of observation period*, in insolvency proceedings. This must be *reasonable and immediately necessary for the debtor's activity* be able to continue or for the value of the debtor's business to be preserved or increased.

3. Monitoring the implementation of the restructuring agreement

The deadline for implementing the restructuring agreement is not set by law but is subject to negotiation Parties. The implementation of the restructuring agreement will be monitored by the restructuring manager and reported quarterly[24].

The monitoring will be carried out throughout the duration of the agreement, but not more than 3 years from the date of its confirmation. The costs of implementing the restructuring agreement may thus be lower than in the case of an arrangement with creditors, as the law limits the monitoring of the implementation of the agreement by the restructuring manager to a period of 3 years, even if the restructuring agreement runs for a longer period of time. The restructuring manager will assist the debtor, if necessary, with any actions provided for therein or necessary for its implementation, such as: operational measures, realisation of assets, realisation of the business or part of it as an independent whole[25].

In order to perform the monitoring task:

- the restructuring administrator will communicate to the affected creditors a quarterly analysis report presenting how the restructuring agreement will be fulfilled, as well as the fact that, by carrying it out, the viability of the business is maintained.

- the debtor has the obligation to send to the restructuring administrator all the information necessary to prepare the analysis report, within 15 days from the date of closing the financial statements for the monitored quarter. Failure by the debtor to provide information shall be presumed to constitute failure of the agreement.

[24] Cristina Dinu, *Acordul de restructurare – noul instrument de prevenire a insolvenței* the document is available online at https://www.linkedin.com/pulse/acordul-de-restructurare-noul-instrument-prevenire-insolventei, accessed on 17.10.2023.

[25] Luiza Cristina Gavrilescu, *Mandatul administratorului restructurării în procedura de prevenire a insolvenței debitorului,* held at the National Conference "Representation, representatives, representatives – approaches in public and private law" on 27.10.2023, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

4. Amendment or revocation of the restructuring agreement

4.1. Contesting the inclusion of a claim in the list of claims

At any time during the implementation of the confirmed plan, similar to the situation covered by art. 111 of Law no. 85/2014, Any of the creditors may challenge before the syndic judge the inclusion in the list of receivables of a claim, in case of discovery of the existence of a forgery, fraud or an essential error or of decisive and hitherto unknown titles. In order to discover one of these reasons, after confirmation of the agreement by a final decision and until the closure of the procedure, the inclusion in the list of a claim may be denounced:

a) non-existent or fictitious;

b) in an amount different from its extent;

c) in a class of claims other than that corresponding to his legal situation.

Regarding the moment when the appeal, for the reasons stated above, can be filed, these appeals may be brought before the courts *only at a time after the confirmation of the restructuring agreement/plan*. Although some stakeholders argued that it would be useful for the procedure of contesting receivables to take place similarly to insolvency proceedings, respectively before the confirmation of the agreement, when all issues related to the existence, extent and classification of claims should be resolved, and subsequently, when all these elements would be established, the syndic judge would be able to confirm/deny the agreement. By virtue of the freedom of choice granted to the member states in this regard, the Romanian legislature opted for a minimum intervention of the courts in the procedure of the restructuring agreement, on the date of its confirmation[26].

The solution adopted reflects most of the requests and proposals made by the participants in the public consultations, who expressed their desire to have a procedure as *non-public, and confidential as possible, with minimal intervention from the courts,* given that at this stage the difficulties faced by the debtor can be overcome through agreements made with some creditors[27].

Moreover, in order to ensure the success of these preventive restructuring measures, it is necessary to intervene expeditiously, different from the specific stages of the insolvency procedure itself[28]. For this reason, restructuring procedures do not involve stages of lodging and admitting claims that would greatly

[26] Luiza Cristina Gavrilescu, *Cerințele confirmării acordului de restructurare în vederea prevenirii insolvenței,*, presentation held at the International Conference "Law and its challenges in socio-economic and administrative filed", on 29.06. 2023, CIPPA 2023.

[27] Mihaela Saracut, *Contestațiile în acordul de restructurare – parte a procesului de implementare a directivei (UE) 2019/1023*, The document is available online at https://revistaphoenix.ro/numarul-75-76/contestatiile-in-acordul-de-restructurare-parte-a-procesului-de-implementare-a-directivei-ue-2019-1023/ accessed on 25.09.2023.

[28] Luiza Cristina Gavrilescu*, Redresarea activității întreprinderilor in dificultate prin intermediul procedurii acordului de restructurare*, presentation presented at the Conference "Legislative changes in the field of commercial law. Challenges for Theorists and Practitioners" on 17.12. 2022,

prolong such procedures.

At the same time, it is necessary to avoid prioritizing the settlement of appeals because there would be a risk of losing the chances of the debtor in difficulty to-recover his activity, especially in the context in which creditors themselves could prolong disputes of this type.

The filing of the appeal will be made within 7 days from the date on which its holder knew or should have known the situation that determines the promotion of the appeal. Also, within the filing deadline, the appeal will be sent by the complainant to all parties with conflicting interests. Proof of appeal may be submitted by the first hearing at the latest. If the court determines that it is necessary to communicate to parties other than those to whom the contestant has communicated the objection, it will order communication to them also in charge of the opposing party, setting a deadline for fulfilling this obligation[29].

The lodging of an appeal shall not suspend the performance of the restructuring agreement until a final court decision has been issued.

4.2. Resolution of the appeal

The appeal shall be settled by the syndic judge within maximum 15 days of submission, and the debtor, the restructuring administrator, the contesting creditor and the creditor whose claim is contested shall be summoned.

If the syndic judge finds that the appeal is well founded, he may order:

a) if the contested claim was not decisive for the outcome of the vote, to *maintain the confirmatory decision*, to amend the list of claims *according to the legal situation thus established, and, with the debtor's consent*, to amend the agreement. The modification of the agreement will be made by the debtor within the term established by the syndic judge, will be submitted to the case file and will be communicated to creditors;

b) where the contested claim was decisive for the outcome of the vote on the agreement, leading to the adoption of a decision confirming it, *revocation of the confirmatory decision, invalidation of the restructuring agreement* and, where appropriate, *reimbursement of payments already made* to settle a non-existent or fictitious claim or in excess of the amount due.

4.3. Hearing of the appeal against the decision confirming the approval agreement

The decisions of the syndic judge may be appealed by the parties only by

at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

[29] Failure to comply with the obligations mentioned in this article entails the application of a judicial fine according to the provisions of Law no. 134/2010, as subsequently amended and supplemented. The limits of judicial fines provided for in art. 187 of Law No. 134/2010, as subsequently amended and supplemented, is doubled.

appeal to the Court of Appeal, within 7 days, which is calculated from the notification[30]. The decisions of the court of appeal are final. In the current form of the law, not only creditors but also any other interested person can appeal[31].

The following grounds of appeal may be invoked against decisions confirming the agreement:

a) the fact that a claim on the list is non-existent or fictitious, has been entered in an amount different from its extent or has been entered in a category of claims other than that corresponding to its legal situation;

b) violation of fair and equitable treatment, including by reference to the values determined in the evaluation report;

c) classification of claims as unaffected

The solutions which the court of appeal may decide when deciding this appeal and which derogate from the ordinary rules of law governing the hearing of appeal[32]. The court hearing the appeal may, as appropriate, order:

1. dismissal of the appeal;

2. allow the appeal *and revoke the restructuring* agreement and, where appropriate, repay payments already made to settle non-existent or fictitious claims or in excess of the amount due, where the contested claim was decisive for the outcome of the vote on the agreement/plan;

3. allowing the appeal and making *amendments to the restructuring agreement with regard to the treatment of the appellant's claim, in relation to the appellant's criticism if the rights of the other creditors in the restructuring agreement/plan are not affected, and, where appropriate, the award of compensation if he has suffered monetary damage.*

The amendment of the restructuring agreement will be made by the debtor within the deadline set by the court of appeal.

The court may *suspend the execution of the* confirmed restructuring agreement pending the outcome of the appeal alleging the non-existence, fictivity, amount or category of the claim, if the continuation of enforcement of the agreement could prejudice the interests of the appellant.

Regarding the question whether this option of the Romanian legislature

[30] The party lodging the appeal must prove that the appeal has been sent to all parties with conflicting interests within the appeal period. Proof of appeal may be submitted by the first hearing at the latest. If the court of appeal determines that communication is necessary to parties other than those with conflicting interests, it will order communication to them also in charge of the appellant, setting a deadline for fulfilling this obligation. Failure to comply with the communication obligations provided by this paragraph entails the application of a judicial fine according to Law no. 134/2010 on the Code of Civil Procedure, as subsequently amended and supplemented. The limits of judicial fines provided for in art. 187 of Law no. 134/2010, with subsequent amendments and completions, is doubled - art. 8.

[31] Claudia Antoanela Susanu, *Perspective teoretice şi jurisprudenţiale asupra verificărilor de legalitate care intră în sfera de competenţă a judecătorului sindic*, "Phoenix Insolvency Review" no. 77-78/2021 (July-December 2021), pp.16-28.

[32] Mihaela Saracut, *op. cit*., p. 15.

to admit a single degree of jurisdiction relative to appeals would represent a violation of Article 6 of the European Convention on Human Rights or of the [33] Romanian Constitution, which ensures the access of parties to justice in all its degrees, it can be argued that the European Court of Human Rights allows the sole degree of jurisdiction, provided that, on appeal, the court is functionally able to examine the evidence and, where appropriate, give its own decision based on its assessment. Moreover, the Constitutional Court of Romania has consistently established that the regulation of the number of appeals, as well as of the parties who may use them, falls within the exclusive competence of the legislature, which may establish, taking into account special situations, special procedural rules[34].

It is therefore noted that, by way of derogation from certain provisions of the Code of Civil Procedure, the amendments to Law no. 85/2014 allow the court of appeal to intervene in a concrete and practical way, through the solution to be pronounced on the content of the restructuring agreement/plan, depending on the criticisms made, changes that will be implemented by the debtor within the deadline indicated by the court.[35]

5. Termination of the restructuring agreement procedure and related effects

The termination of the restructuring agreement is achieved by the syndic judge issuing a decision to close the procedure, in an associated case, in one of the following situations:

5.1. Termination due to fulfilment of the provisions of the restructuring agreement

In this case, the request may be made by:

- any of the parties,
- the restructuring manager.

If the agreement provides for reductions in claims, the reductions shall become final from the date of delivery of the decision terminating the proceedings[36].

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[33] Guide on Article 6 of the European Convention on Human Rights, the document is available online at: https://www.echr.coe.int/Documents/Guide, accessed on 07.09.2023.

[34] Constitutional Court of Romania, Decision no. 362 of 28 May 2019, par. 47, published in the Official Monitor of Romania no. 568 of 10 July 2019.

[35] Alice Ene, *Noi instrumente pentru restructurarea afacerii în dificultate*, the document is available online at https://www.vf.ro/noi-instrumente-pentru-restructurarea-afacerii-in-dificultate, consulted on 02.09.2023.

[36] Cristian Ianca, *Ce este acordul de restructurare?* the document is available online at https://cristianianca.ro/ce-este-acordul-de-restructurare/, consulted on 23.09.2023.

Compliance with commitments under the restructuring agreement or recovery plan may result in definitive discharge of residual obligations. In this case, however, the debtor will not be able to access another insolvency prevention procedure within 12 months from the date of closure of that procedure[37].

It should be noted that only in this hypothesis *the hair-cut* and the measure to stop the accessories of receivables remain final. Also, the tax arising from *hair-cuts* is due when the decision to fulfill the agreement is pronounced[38].

5.2. Termination due to failure to comply with the provisions of the restructuring agreement

In this case, the request for closure may be made by:

- a creditor to whom *his claim has not been paid* in accordance with the provisions of the agreement within a maximum of 60 days from the date specified in the agreement for payment, if the parties have not concluded an agreement to this effect, respecting the rights of the other creditors;
- any creditor, if the debtor's activity during the course of the agreement brings losses to his wealth and *does not present reasonable prospects of maintaining the viability of the business;*
- debtor, if he *is unable to fulfil his obligations under the agreement.*

The effects of terminating the proceedings in this case are:

- *the revival of claims reduced* by agreement to their original amount, reduced as a result of payments made during the restructuring agreement procedure;
- *the resumption of the flow of accessories* which have been suspended by the agreement, the titular creditors being able to request the retroactive calculation of interest, increases or penalties of any kind or expense during the term of the agreement.

5.3. Termination due to failure to comply with the obligation to amend the agreement

It is envisaged to disregard the decision ordered by the syndic judge or by the court of appeal, within the time limit established by the decision ordering the modification, ex officio or at the request of any interested party.

6. Conclusions

Currently, the regulatory framework of insolvency prevention procedures is harmonized and streamlined in order to provide the necessary support to rescue

[37] Art. 61 of the Law.

[38] Continuum SPRL, *Ce înseamnă prevenirea insolventei*?, the document is available online at: https://continuumsprl.ro/ce-inseamna-prevenirea-insolventei/?, accessed on 17.09.2023.

viable companies facing difficulties generated by multiple crises affecting economic activity.

The main advantages that the restructuring agreement confers and which can determine the debtor to access the procedure from the early stage of the onset of the state of difficulty are that it allows him to keep control of his entrepreneurial activity, but also benefits from the support of the specialized administrator for the elaboration and implementation of the measures proposed by the restructuring plan. The involvement of insolvency practitioners increases the chances of success of the procedure by monitoring the degree of completion and assisting in taking measures which may include asset realisation, operational restructuring, introduction of new shareholders, debt-to-equity swap and others.

In case of fulfillment of the assumed payment commitments and maintaining the viability of its business, the debtor will benefit from discharge of residual debts. The fulfillment of the provisions of the restructuring agreement confers advantages on all parties involved, as it ensures both the satisfaction of the debts to the greatest possible degree, as well as the recovery of the debtor and the continuation of its activity and, implicitly, the preservation of the jobs of its employees.

In terms of its purpose, the restructuring agreement is not limited to financial restructuring, including operational or corporate restructuring measures to facilitate the rehabilitation of the debtor undertaking. The agreement provides a much broader, unitary and orderly framework to address the volume of accumulated debts (financial, tax, commercial, etc.) Last but not least, the restructuring agreement becomes a preferable alternative to individual agreements that the debtor could conclude with each creditor, offering high opportunities for implementation.

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Implementation of the Deposit-Return System, an Absolute First for Romania

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Abstract

Identifying legal instruments to involve citizens in voluntary environmental protection has always been on the agenda of public authorities. The world already has a packaging deposit-return system, which aims to reduce pollution. The pretext of our analysis is the fact that in the media a piece of news was published saying that, in our country, the deposit-return system will operate starting from the 30th of November 2023. This made us curious to analyse the applicable legal framework, using scientific research methods specific to law, so as to know as much as possible about the subject. Considering the novelty of this legal mechanism for our country, we believe that the proposed topic is extremely up-to-date and of general importance, as it will involve the whole of society, citizens, authorities and the business environment. The proposed objective of the study is to investigate the extent to which the deposit-return system for primary non-refillable packaging is effective in practice and can lead to a reduction in pollution through active community involvement. Following our analysis, we will emphasize the conclusion of our paper, namely that the subject matter of environmental protection must concern both the public and the private sectors, because life on this beautiful blue planet depends on our actions.

Keywords: *government decision, deposit-return system, packaging, responsibility, public authority.*

JEL Classification: K23, K32

1. Introduction

The public authorities have always been concerned with providing the legal framework for improving the quality of life of citizens. We are currently witnessing a period full of change, which gives us the opportunity to take a leap of conscience and make a voluntary contribution to the social good.

At international level, the scientific community, the private sector and the country leaders are increasingly analysing the issue of pollution in order to identify potential solutions to limit its effects. The concerns of the countries are converging on the idea that the care we need to take for the planet is not only for the present, i.e. for the people who live right now, but also for the future generations. It seems appropriate to us what our doctrine has stated: "it is of the essence of any community to establish behavioural criteria through norms, the requirements of

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which the community sees fit to express in terms of conduct of the people, in such a way that the community preserves itself, that its very existence is not called into question by arbitrary behaviour[2]". At the same time, "the international factors cannot be neglected in the contemporary context, in which the life of each human community is closely linked to the fate of humanity as a whole[3]".

Abandoned packaging is one of the biggest problems for public authorities in both urban and rural areas. As far as the environment is concerned, one of the most fascinating challenges for the public authorities in general, but especially during the recent years, has undoubtedly been the finding of legal mechanisms to make the whole community responsible.

There was a piece of news in the media saying that the deposit-guarantee system in our country for non-refillable primary packaging – DRS will be mandatory as of the 30th of November 2023[4]. This has given us the opportunity to investigate the applicable legal framework, especially as this is a legal first for our country, in a context where, at international level, the issue of reducing pollution is increasingly being raised in mandatory terms, through the involvement of the states. In practice, this system provides a public service. In fact, "in our country, the notion of public service appeared in the inter-war period, starting from the social needs that the state had to satisfy, public service being the means by which the administration carried out its activity[5]". According to the doctrine, "the state is the main political institution of society[6]", in whose responsibility falls the adoption of public policies, through the public administration. At the same time, "the purpose of administration is to satisfy the interests of people"[7].

The purpose of this paper is to find out as much as possible about the proposed topic and to answer questions such as: "*What is the packaging deposit-return system? Who is the DRS administrator? What are the minimum objectives to be met by manufacturers? What is the amount of the deposit collected*? *Does the packaging that is part of the DRS have a specific marking*?" In order to achieve this objective, the research methodology proposes a two-tier structure: the section dedicated to the European legislation and the national plan.

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2. European regulatory framework - brief considerations

The assumption from which we start our analysis is that Romania is obliged to harmonize its legislation with the European acquis. After documenting the subject under analysis, we are able describe, from the administrative practice, such situations that we interpret legally[8].

At the European level, legislation with a direct impact on Member States is being adopted, such as the European Climate Act[9]. According to this law, "climate action by the Union and the Member States aims to protect the people and the planet, the well-being, prosperity, the economy, health, food systems (...) from the threat posed by climate change, in the context of the United Nations 2030 Agenda for Sustainable Development and with a view to meeting the objectives of the Paris Agreement, as well as to maximise prosperity within the planet's resources and to increase resilience and reduce society's vulnerability to climate change" (Preamble, para.9). The European Climate Act establishes a legal obligation to meet the EU's climate target of reducing EU emissions by at least 55% by 2030[10]. Article 2 para. (1) states: "*by year 2050, a balance shall be achieved at Union level between emissions and removals of greenhouse gases, which are regulated in the Union law, so as to reach zero net emissions by that date* (...)"[11].

Considering the above, at the national level, the efforts of central public authorities to implement the European legislation are identified, and liability can be triggered *per a contrario*. In fact, "the Court of Justice enshrined, for the first time, the principle of liability of Member States for infringements of European Union law in the *Francovich judgment* of 1991[12]". We would like to point out that, in this paper, we do not wish to elaborate further on the European Union's policies[13] on this subject.

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[12] Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene (Introduction to European Union Law)*, Universul Juridic Publishing House, Bucharest, 2011, p. 214.

[13] Augustin Fuerea, *Manualul Uniunii Europene (European Union Handbook)*, 6th edition, revised and supplemented, Universul Juridic, Bucharest, 2016, pp. 228-252; Alina Mihaela Conea, *Politicile Uniunii Europene. Curs universitar (European Union Policies. University course)*, Universul Juridic Publishing House, Bucharest, 2020, pp.10-20.

According to the public information available on the website of the Ministry of the Environment, Water and Forests, starting with the 27th of September 2023, the draft of the Government Decision on the approval of *Romania's long-term strategy for reducing greenhouse gas emissions*[14], with a perspective of at least 30 years, is available for consultation. The document proposes three scenarios aimed at achieving climate neutrality in our country, which could be implemented by 2050[15]. Also, among other documents, we mention that the *National Strategy on Environmental Education and Climate Change 2023-2030*[16] and the *Strategy for Sustainable Development of Romania 2030*[17] have been adopted.

3. The deposit-return system (DRS) in Romania - brief considerations

The public administration authorities carry out their activity in several categories of legal acts[18]. One such legal act is Government Decision no. 1074/2021 on the establishment of the deposit-return system for primary non-refillable packaging[19]. As the doctrine points out, "Government Decisions are administrative acts, being *secundum legem* acts that are issued for the organisation of the execution of primary regulations contained in laws and ordinances[20]". To that effect, the Romanian State has committed itself by Law no. 249/2015 on the way of managing packaging and packaging waste[21] to adopt the deposit-return system by 21 January 2021 to be applied for primary non-reusable packaging

[14] Public information, online: http://www.mmediu.ro/articol/proiect-de-hotarare-pentru-aprobare a-strategiei-pe-termen-lung-a-romaniei-pentru-reducerea-emisiilor-de-gaze-cu-efect-de-sera/6493 and http://www.mmediu.ro/app/webroot/uploads/files/Strategia%20%20pe%20Termen%20Lung%20a%20RO%20pentru%20Reducerea%20Emisiilor%20de%20GES.pdf, accessed on 1.11. 2023.
[15] Long-term strategy (...), p. 39 ff.
[16] Government Decision no. 59/2023 on the approval of the National Strategy on Environmental Education and Climate Change 2023-2030, published in the Official Gazette no. 71 of 27 January 2023.
[17] Government Decision no. 877/2018 on the approval of the Strategy for the Sustainable Development of Romania 2030, published in the Official Gazette no. 985 of 21 November 2018.
[18] Dana Apostol Tofan, *Drept administrativ (Administrative Law)*, vol. II, 5th edition, C.H. Beck Publishing House, Bucharest, 2020, p. 3.
[19] Government Decision no. 1074/2021 on the establishment of the deposit-guarantee system for primary non-refillable packaging, published in the Official Gazette no. 1120 of 21 November 2021, as last amended by Government Decision no. 1075/2023, published in the Official Gazette no. 1016 of 07 November 2023.
[20] Cătălin-Silviu Săraru, *Drept administrativ, Probleme fundamentale ale dreptului public (Administrative Law, Fundamental Issues of Public Law)*, C.H. Beck Publishing House, Bucharest, 2016, p. 625; Cătălin-Silviu Săraru, *Drept administrativ*, vol. I, Universul Juridic Publishing House, Bucharest, 2023, p. 103.
[21] Law no. 249/2015 on the management of packaging and packaging waste, published in the Official Gazette no. 809 of 30 October 2015, as last amended by Government Emergency Ordinance no. 96/2023 on some measures to streamline waste management and to amend and supplement some regulatory acts, published in the Official Gazette no. 1003 of 3 November 2023.

made of glass, plastic or metal (...) [art. 10 para. (5)].

By Article 10 para. (6) of Law no. 249/2015 (...) the 8 provisions to be contained in the future Government Decision were outlined:

a) the way in which packaging subject to the deposit-guarantee system is circulated;

b) definition of the components of the collection system;

c) defining the operation of the deposit-return system;

d) the deposit repayment mechanism;

e) the deposit value;

f) the system administrator;

g) the marking on the packaging indicating its participation in the deposit-return system;

h) monitoring and control of the deposit-return system.

Originally, the Government Decision no. 1074/2021 was supposed to be applied as of the 1st of October 2022, but was postponed until the 30th of November 2023. The deposit-guarantee system was analysed at the time by the doctrine, on which occasion it was stated that: not further back than 2004, the date of the adoption at European level of the *polluter pays directive*[22], steps were being taken in our country to harmonise the legislation – which was in public debate a few months ago, in December 2020 – with the Government Decision establishing the deposit-guarantee system for primary non-refillable packaging[23].

Following the public agenda of the relevant ministry, we particularly appreciate the fact that since the adoption of this normative act, consultations have been held with civil society, authorities, economic operators, precisely from the perspective of getting to know the new system. More than two years after the adoption of the Government Decision, the deposit-return system is going to be enforced throughout our country with regard to primary non-refillable packaging.

Government Decision no. 1074/2021 aims to establish the legal framework for the implementation throughout Romania of the deposit-return system, called (...) DRS, applicable to primary non-refillable packaging referred to in Article 10 para. (5) of Law no. 249/2015 on the management of packaging and packaging waste (...).

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[22] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Public information, online: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02004L0035-20130718&from=EN, last accessed on 04 May *2021 apud* Elena Emilia Ștefan, *New tendencies of liability in administrative law*, in Jeton Shasivari, Balázs Hohmann (eds.) *Expanding Edges of Today's Administrative Law,* Adjuris - International Academic Publisher, Bucharest, Paris, Calgary, 2021, pp. 15-16.

[23] Public information, online: http://www.mmediu.ro/articol/mmap-supune-dezbaterii-publice-proiectul-de-hg-pentru-stabilirea-sistemului-de-garantie-returnare-pentru-ambalaje-primare-nereutilizabile/3799, last accessed on 04 May 2021 *apud* Elena Emilia Ștefan, "*New tendencies of liability in administrative law*", *op. cit.*, p. 16.

The following are covered by the deposit-guarantee scheme: *non-refillable primary packaging made of glass, plastic or metal, with volumes between 0.1L and 3L inclusively, used to make available on the national market products such as: beer, beer mixes, mixes of alcoholic beverages, cider, other fermented beverages, juices, nectars, soft drinks, mineral waters and drinking waters of all kinds, wines, and spirits*.

The deposit-return system is, according to Article 1 para. (2) of the normative act: "a means whereby the economic operators referred to in Article 16 para. (1) of Law no. 249/2015(...) referred to as manufacturers, fulfil the responsibility for the take-back, transportation and recycling of DRS packaging, under the terms of this Decision"[24].

From the date of entry into operation of the DRS, the obligations of manufacturers in terms of their responsibility for the take-back, transportation and recycling of DRS packaging will be fulfilled exclusively through the DRS administrator. According to Article 18 paragraph (1) of Government Decision no. 1074/2021, the DRS administrator is the Romanian legal entity, unique at national level, established as a joint-stock company, according to the provisions of the Companies Act no. 31/1991, established exclusively with a view to implement, manage, operate and finance the DRS. According to the public information, it appears that *the administrator of the deposit-guarantee scheme* is RetuRO *Sistem Garanție Returnare* S.A., which was incorporated by the representative associations of beverage manufacturers and traders with a view to manage the DRS[25].

For the general public, it is important to note that, according to the regulatory act, the consumer or the end-user will pay, in addition to the price of the product, a *deposit in the amount of Lei 0.5 for all types of DRS packaging* (Article 12). At the same time, the regulatory act requires that, from the date of entry into operation of the DRS, traders are obliged to charge the deposit from the consumers or end-users who purchase products packaged in DRS packaging.

It is interesting that the legislator did not differentiate between the types of packaging within the DRS, the deposit being the same for all of them, i.e. Lei

[24] Article 16 para. (1) of Law no. 249/2015: "Economic operators are responsible for taking back and recovering packaging/packaging waste from consumers/end users as follows: a) economic operators placing packaged products on the national market, economic operators importing/purchasing intra-Community packaged products for their own consumption shall be responsible for the waste generated by the primary, secondary and tertiary packaging used to package their products (...); b) economic operators who overpackage individually packaged products for resale/distribution are responsible for the waste generated by the secondary and tertiary packaging they place on the national market; c) economic operators who place on the national market retail packaging, including plastic carrier bags, are responsible for the waste generated by such packaging; d) economic operators who hire out packaging in any form on a professional basis are responsible for the waste generated by that packaging".

[25] Public information, online: https://returosgr.ro/, accessed on 1.11.2023. The shareholding structure is: Romanian Brewers Association for the Environment, Association of Soft Drink Producers for Sustainability, Retailers Association for the Environment, Ministry of Environment, Waters and Forests.

0.5. This deposit will be fully refunded to the consumer or end-user when the DRS packaging is returned to a return point. The legislation also refers to the operation of the return points (Article 13). With regard to the *registration in the system*, the legislator requires that producers who place on the national market any of the packaged products referred to in Article 1 para. (1) must register in the database managed by the DRS administrator by the 28th of February 2023.

Also, the packaging that is part of the DRS will have a *specific marking* (Article 24), consisting of a nationally unique representative symbol, a mark of the central public authority for environmental protection and a national barcode (EAN). Finally, the legislation imposes certain return targets on producers for DRS packaging. According to Article 4 paragraph (2), they are obliged, through the DRS manager, to meet certain *minimum return targets*:

a) 65% glass, 65% plastic, 64% metal for 2024;
b) 75% glass, 75% plastic, 80% metal for 2025:
c) 85% glass, 90% plastic, 90% metal for 2026.

4. Conclusions

The present study has outlined some milestones regarding the implementation of the deposit-return system in our country, as stated in the Government Decision no. 1074/2021. The example set by Romania, which is implementing the deposit-return system and which will become operational at the end of 2023, makes our country part of the long-term international effort to reduce pollution. At the same time, in the context of climate change, we can say that we are entering a new phase of evolution, one in which the emphasis will be increasingly placed on environmental responsibility.

While we appreciate the deposit-guarantee system for primary non-refillable packaging, considering the minimum targets to be met by producers for the return of DRS packaging and the rather late date for the system to come into operation, perhaps the legislator should review these percentages set for the period 2024-2026. We argue that these percentages were taken into account at the initial date of the legislation, when the system was supposed to come into force in 2021.

Another conclusion that emerges from our analysis is that "(...) empowering citizens by involving them in the life of the community in which they live can be seen as a factor of democracy, of the evolution of society[26]". From this point of view, if the packaging abandoned on the streets will end up being collected through the DRS, this could lead to an increase in the general interest and, in time, perhaps more people will get involved and participate in the disposal of abandoned packaging.

[26] Elena Emilia Stefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ (Legal liability. A special look at liability in the administrative law)*, Pro Universitaria Publishing House, Bucharest, 2023, p.18.

The test of time will also tell us how effective this system will be, conceived as a kind of public-private partnership that could lead to a cleaner environment by involving a wide range of actors: the state, economic operators, authorities, citizens.

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15. Verginia Vedinaș, *Drept administrativ (Administrative Law)*, 14th edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023.
16. Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing a framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EC) No. 2018/1999, published in the Official Journal of the European Union L343/1 of 9.07.2021, pp.1-17.
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21. Government Decision no. 59/2023 on the approval of the National Strategy on Environmental Education and Climate Change 2023-2030, published in the Official Gazette no. 71 of 27 January 2023.

Precautionary Measures to Protect the Debtor's Estate from Insolvency Proceedings

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"The debtor's table is like a fruit tree for creditors of the insolvent legal entity".

Abstract

The concept of debt mass formation in the literature is not clearly defined. The content of this concept is usually revealed by analysing the algorithm of actions and measures of the insolvency court, the administrator/liquidator in order to form the debtor's estate. As the first basic stage, the formation of the debtor's estate is of great importance and of maximum interest to creditors. It is in fact the preparation for the subsequent implementation of bankruptcy proceedings, liquidation of the insolvent debtor or the establishment of the debtor's solvency. The aim of this paper is to carry out a complex theoretical and practical study of the peculiarities of measures to secure and protect the assets of the insolvent debtor. In order to achieve the proposed aim, the following objectives are envisaged: identification of the general considerations of the debtor's estate, the concept of protective measures, identification of the procedural phases of application of protective measures, the importance of preliminary protective measures. The following research methods have been used in the study comparative method will be used to observe and highlight the commonalities and differences (where they exist) between the international regulations of the institution of personal bankruptcy to show how the various particularities are reflected in practice on the beneficiary respectively the legal person. In the course of the research, we will use both the deductive and the inductive method in order to ensure, on the one hand, the achievement of the general objective of formulating new concepts and theories concerning the chosen legal institution and, on the other hand, the identification of problems of application of the normative provisions and of the gaps in the legislation. By means of the logical method used in the research I aimed to demonstrate that only by starting from existing principles can deductive reasoning be leveraged from the general to the particular or singular. The main research tools used to carry out the scientific approach were the scientific publications in the field of bankruptcy, the normative acts in force, the relevant judicial practice. The expected results automatically represent the fulfilment of the objectives and the answers to the research questions. Provisional measures taken by the insolvency court, administrator/liquidator are intended to prevent the insolvent debtor, during the course of the insolvency process, from destroying, disposing of assets or ineffective administration of assets. Their importance lies in the fact that by applying these measures the rights of the participants in the insolvency proceedings are protected.

Keywords*: debtor estate, administrator, insolvency court, sealing, inventory, preservation, suspension, estate, dispose, assets, liabilities.*

JEL Classification: K22

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1. Introduction

One of the basic problems of the insolvency process lies in respecting the rights and freedoms of the persons involved in the process on the one hand, and on the other hand ensuring the purpose of the process, which, according to the provisions of Article 1 of the Insolvency Law no.149/2012, is to satisfy the claims of creditors on behalf of the debtor's assets by applying the restructuring or bankruptcy procedure and distributing the finished product. Beyond the analysis of the way in which the legislator has chosen the purpose of the insolvency process, what is important in the context of the present scientific study is the fact that risks arise from possible abuses that may be committed by the management bodies of the insolvent debtor in connection with the disappearance of assets. Taking into consideration the above, in order to achieve the purpose of the insolvency process, the legislator considered it necessary to grant legislative levers for securing the assets of the insolvent debtor applied by the court and the administrator/trustee of the provisional bankruptcy proceedings. The purpose of the protective measures is to ensure that the value of the debtor's assets is not diminished, while at the same time guaranteeing the integrity and preservation of the insolvent debtor's assets. They are also intended to prevent the debtor's assets from being altered during the period prior to the opening of insolvency proceedings[2].

Thus, in the insolvency proceedings, compared to the Civil Procedure Code[3] of the Republic of Moldova, the following measures are found: placing the debtor under observation, appointing a provisional administrator, ordering the debtor that during the observation period decisions on the management of the assets be taken only with the prior consent of the provisional administrator; removing the debtor from the management of the assets; placing the debtor's assets and business correspondence under seizure; suspending the individual pursuit of creditors and enforcement of claims against the debtor's assets and the limitation period for the right to enforce their claims against the debtor; prohibiting the debtor from disposing of his assets or deciding that they may be disposed of only with the express consent of the provisional administrator. In some cases, the insolvency court may order the debtor to be brought in for a hearing. All of the above mentioned safeguards operate until the date of rejection of the petition, as well as upon conclusion of a settlement in the manner established by Law no.

[2] For a comparative analize see John Kong Shan Ho & Rohan Price, *Moral Hazard, Insolvency and Employees as Creditors: What Governance Lessons can be Learned from the Hong Kong Model?*, „Journal of Corporate Law Studies", 11:2, 525-550, 2011, DOI: 10.5235/14735971179811058 3; and Marialuisa Gallozzi, *Insolvencies among the "London Companies" in the London Market*, „Environmental Claims Journal", 7:2, 5-23, 1994, DOI: 10.1080/10406029409383811.

[3] Code of Civil Procedure of the Republic of Moldova republished 03.08.2018 in the Official Gazette of the Republic of Moldova no. 285-294, art. 436, Ed. Cartier, Chișinău, 2018, ISBN 978-9975-79-951-5.

149/2012[4]. Speaking in this scientific approach about the preliminary measures to protect the debtor mass of the insolvent legal person, we are obviously interested in what is the debtor mass of the insolvent legal person, how it can be formed, who are the actors who contribute to its formation and by what actions, methods it can be formed. In order to give a detailed account of the preliminary measures for the protection of the debtor's estate described above the author has used the following research methods comparative method will be used to observe and highlight the common points and differences (where they exist) between the international regulations of the institution of personal bankruptcy in order to show how the various particularities are reflected in practice on the beneficiary or legal person. In the course of the research, we will use both the deductive and the inductive method in order to ensure, on the one hand, the achievement of the general objective of formulating new concepts and theories concerning the chosen legal institution and, on the other hand, the identification of the problems of application of the normative provisions and the gaps in the legislation. By means of the logical method used in the research I aimed to demonstrate that only by starting from existing principles can deductive reasoning be leveraged from the general to the particular or singular.

2. General considerations of debtor's mass security measures in insolvency proceedings

Insolvency proceedings shall be opened only on the basis of a request for the opening of insolvency proceedings, hereinafter referred to as the application initiating insolvency proceedings[5]. The application may be filed by the debtor, creditors, other persons specified in the Insolvency Act No.149/ 2012[6]. The filing of an application for insolvency proceedings against the debtor in the court requires taking the necessary steps to settle the application. The insolvency court shall apply the necessary measures to prevent the change in the condition of the debtor's assets in the period before the insolvency proceedings were filed.

When examining the application for the opening of insolvency proceedings in respect of the debtor, the court shall, within 3 days from the date of filing, make a decision on the admissibility of the application for the opening of insolvency proceedings. The insolvency court shall order the debtor to be placed under supervision by appointing a provisional administrator and shall apply measures to secure the creditors' claims. The preliminary steps of the insolvency court, which comprise what the legislator has called the protective measures.

[4] Insolvency Law no.149/2012 published on 14.09.2012 in the Official Gazette of the Republic of Moldova no.193-197, art. 663.

[5] Garrido, J. M., DeLong, C. M., Rasekh, A., & Rosha, A., *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive*, IMF Working Papers, 2021(152), A001. 2021. Retrieved Jan 25, 2023, from https://doi.org/10.5089/9781513573595.001.A001.

[6] Insolvency Law no.149/2012, art. 663.

At the debtor observation phase, we have two actors of the procedure that contribute to the formation, preservation of the debtor mass of the insolvent legal person. From the context of the rule, art. 24 paragraph (1) of the Insolvency Law of the Republic of Moldova[7], after receiving the application for examination, the insolvency court shall apply the necessary measures to prevent the change in the state of the debtor's assets in the period before the insolvency proceedings are opened.

As insurance measures, in order to prevent changes in the status of the debtor's assets during the course of the insolvency proceedings, the following are: 1) the appointment of a provisional administrator, 2) decisions on the management of the assets to be taken only with the prior consent of the provisional administrator, 3) the debtor shall be prohibited from disposing of his assets, 4) the seizure of all the debtor's assets and business correspondence shall be prohibited, 5) the individual pursuit of creditors and the execution of the debtor's assets shall be suspended, as well as the limitation period for the right to request the execution of their claims against the debtor. At the same time, the insolvency court shall oblige the debtor and its management bodies, the founders, the administrator, the accountant of the company, to cooperate with the provisional administrator and to submit to the provisional administrator the documents of the debtor's economic activity and accounting records.

The insolvency court's decision to admit the application for examination of the petition requires the provisional administrator to notify all public registers of the application of the insurance measures, i.e. the Public Services Agency, the State Tax Service, the courts, the bailiffs, the National Bureau of Statistics, the Customs Service, the Pledge Registry, the commercial banks and to ask them to hand over the debtor's correspondence and any other communications received at his address.

All these actions taken by the court at the provisional stage are aimed at forming the debtor's estate in the course of the insolvency proceedings. In the context of the Insolvency Law of the Republic of Moldova no. 149/2012, the debtor's estate consists of assets, including cash and non-cash assets, in national and foreign currency, owned by the debtor at the date of commencement of the insolvency proceedings, acquired or recovered during the course of the proceedings, with the exception of assets which, according to the law, are not subject to compulsory execution. It serves for the enforcement of claims on assets.

Thus, in order to ensure the security and integrity of the assets included

[7] Insolvency Law no.149/2012, art. 663. See for general comparative conditions Franken, Sefa M. *Cross-Border Insolvency Law: A Comparative Institutional Analysis*. „Oxford Journal of Legal Studies", vol. 34, no. 1, 2014, pp. 97–131, http://www.jstor.org/stable/24562810. Accessed 25 Jan. 2023. See also for general reflections Cristina-Elena Popa Tache, Ebook*: Introduction to International Investment Law,* ADJURIS International Academic Publisher, Bucharest, 2020, ISBN 978-606-94978-2-1 (E-Book), http://www.adjuris.ro/reviste/iiil/E-book%20Cristina%20Po pa%20-Tache.pdf.

in the debtor's estate, the decision to open insolvency proceedings transfers the debtor's right to administer and dispose of the assets included in the debtor's estate to the insolvency administrator/liquidator. From the analysis of the Insolvency Law no. 149/2012, as well as the literature, the debtor's removal from the administration of the estate is the measure to secure the estate. The effect of the withdrawal of the right of administration is that the debtor is no longer able to administer and collect income, to continue his activity, by prohibiting him from representing the interests of the estate in court, and by preventing him from contacting, alienating or encumbering the assets.

In the opinion of the Romanian author, Gheorghe Gheorghiu, compared to the legislation of the Republic of Moldova, the lifting of the debtor's right to administer and dispose of his assets constitutes a sanction applied to the debtor in default and subject to bankruptcy proceedings, aiming at blocking the debtor's possibility to use his assets in order to preserve his wealth.[8] This sanction restricts the debtor's ability to oppose acts and operations relating to his assets vis-à-vis third parties.

At the same time, in Romanian doctrine, the lifting of the debtor's right to administer his assets and to dispose of his wealth is called "the bankrupt's divestment of his patrimony".[9] The essence of disinheritance is the loss of the right to administer and dispose of the assets that the debtor possesses at the date of the judgment as well as those that he acquires during the course of the bankruptcy proceedings.[10] In this sense, the debtor is replaced by the liquidator who will execute the measures ordered by the insolvency court as well as those provided by the insolvency law. In other words, the debtor loses the right of legal disposition of the assets of his estate, but also the right of material disposition, not having the possibility to consume, modify or destroy any of the assets of his estate. At the same time, the debtor is prohibited from carrying out any act of administration in respect of his assets. All measures falling within the scope of acts of administration, such as, for example, the collection of income, the leasing of assets and measures for the use, development and exploitation of assets are the responsibility of the liquidator/administrator of the insolvency proceedings.

It should be noted that, according to the provisions of Article 74(2) of the Insolvency Law, any act of disposal by the debtor of an asset from the debtor's estate carried out after the opening of insolvency proceedings is null and void. The sanction of nullity may be applied in compliance with the procedural conditions (filing of an action, issuing of a judgment of nullity and annulment of the legal act concluded by the debtor) and produces specific effects, retroactivity,

[8] Gh. Gheorghiu, *Judicial reorganization and bankruptcy procedure*, Ed. Lumina Lex, Bucharest, 2000, p.170, ISBN 973-5888-250-7.
[9] Mircea N. Costin, Angela Miff, *Bankruptcy, evolution and actuality*, Ed. Lumina Lex, Bucharest, 2000, p. 229, ISBN 973-588-263-9.
[10] Idem.

reinstatement of the parties in the previous situation and annulment of the subsequent act. The sanction of unenforceability of the debtor's acts is more appropriate to the bankruptcy procedure, given its features. Indeed, the debtor whose right of administration and disposal has been withdrawn should not be considered to be incapacitated, since the purpose of the measure is to guarantee creditors that the debtor's assets will not be diminished by acts contrary to their interests, which can be achieved by entrusting the assets to another person, i.e. the liquidator. Therefore, if the debtor commits acts which are prohibited, the sanction of unenforceability protects creditors from the effects of those acts to the extent that the judge or liquidator considers them to be unfavorable. If the debtor has assumed new obligations, the third party creditor will not be allowed to register his claim if he has acted in bad faith, his liability being presumed until proven otherwise.

3. Other preliminary measures for the protection of the debtor estate applied by the administrator/liquidator

In order to take over the administration of the debtor's assets, the Insolvency Law of the Republic of Moldova no. 149/2012 provides the administrator/liquidator with a series of measures aimed at facilitating his actions to ensure the integrity of the debtor's assets.

Article 74(4) of the Insolvency Act provides that the insolvency court shall, by a decision on the opening of insolvency proceedings, order financial institutions with which the debtor has available accounts not to dispose of them without an order of the insolvency administrator/liquidator. Also in this regard, Article 66(1)(b) provides for the right of the insolvency administrator/liquidator to open, examine, seal, seize production premises, warehouses, commercial and administrative premises, remove goods and persons from unlawfully occupied premises, take an inventory of the debtor's assets, divide them up and take measures to preserve the debtor's assets.

As mentioned above, the insolvency administrator/liquidator ensures the debtor's assets and their integrity, the size and composition of the debtor's assets, the suitability and possibility of continuing the economic activity of the company, which, through a report, can propose to the insolvency court either the initiation of insolvency proceedings or the initiation of simplified bankruptcy proceedings, or by which the insolvency administrator/liquidator can establish the solvency of the debtor and terminate the proceedings[11].

An essential objective for an efficient insolvency procedure is the establishment of a protection mechanism, which ensures that the value of the debtor's

[11] Nicolò Nisi, *The recast of the Insolvency Regulation: a third country perspective,* „Journal of Private International Law", 13:2, 324-355, 2017, DOI: 10.1080/17441048.2017.1345901; Björn Laukemann, *Regulatory copy and paste: the allocation of assets in cross-border insolvencies – methodological perspectives from the Nortel decision*, „Journal of Private International Law", 12:2, 379-410, 2016, DOI: 10.1080/17441048.2016.1206710.

assets is not diminished, which implies the performance of a set of operations, legal and financial-accounting acts, with the purpose - specified *in terminis*, namely, the establishment, the preservation and registration of the debtor's assets, the establishment of the debtor's liabilities and creditors, the finding of an amicable solution to satisfy the interests of the creditors, and if such a solution is not possible, the liquidation of the assets and the payment of the creditors within the limit of the debtor's ranking in the final table.[12]

The central figure of this phase remains the administrator/liquidator, whose tasks reveal his role and involvement in the administration of the bankruptcy procedure until its completion.

The administration of the insolvency/bankruptcy procedure starts with the sealing of the debtor's assets, the inventory of the debtor's assets, the preservation, conservation of the assets, the verification of claims and the establishment of the liabilities, the valuation/liquidation of the assets in order to obtain the sums necessary to make payments to creditors, the distribution of the sums realised following the liquidation.

The sealing of the debtor's assets, regardless of where they are located, is an urgent conservation measure ordered by the administrator/liquidator as soon as possible after the opening of the bankruptcy proceedings[13].The purpose of the measure is to avoid the disappearance of the debtor's assets. Sealing is a measure taken both in favour of the creditors and the debtor, as it ensures that the inventory is carried out honestly and prevents the debtor's assets from being misappropriated. The liquidator applies seals to warehouses, offices, goods, shops, etc. belonging to the debtor.

Perishable goods that must be sold urgently to avoid their material deterioration or loss of value, accounting books, bills of exchange and other securities that are due or will become due, cash that the liquidator will deposit at the bank in the account of the debtor's estate, are not subject to sealing. Also, assets in the possession of third parties, other than those held for the debtor, may not be sealed.

The next operation is the inventory of the assets, which is carried out according to art.108 of the Insolvency Law no.149 of 29.06.2012.[14] This measure, like the entire procedure, is governed by the principle of speed.[15]

The inventory of the debtor's assets is a necessary and obligatory operation to determine the assets that are part of the debtor's estate, both visible and non-visible.[16]

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[12] C. Catan, *The Authorised Administrator's Handbook*. Central Printing House Chisinau: 2015, p. 88. ISBN 978-9975-53-583-0.
[13] R. P. Vonică, *Commercial Law. Judicial reorganization and bankruptcy*. Victor, Bucharest 2001, p. 178. ISBN 973-8128-10-2.
[14] Insolvency Law no.149/2012 published 14.09.2012 in the Official Gazette no. 193-197, art. 663.
[15] M. N. Costin, A. Miff, *op. cit.*, p. 229.
[16] R. P. Vonică, *op. cit.*, p. 178.

Subsequently, according to Article 3 of the Law on Accounting and Financial Reporting no. 287/15.12.2017, the inventory is a process of control and documentary authentication of the existence of assets, equity and liabilities belonging to and/or under the temporary management of the entity.[17]

The inventory of the debtor's assets is made by the liquidator, an emergency. If the debtor's assets can be fully inventoried in one day, the liquidator shall apply the seals immediately after the inventory operation has been carried out, in other cases the inventory shall be carried out as soon as possible.

The debtor must attend the inventory. If the debtor does not attend, he will not be able to contest the inventory data. In the context of Article 108 (5) of the Insolvency Act[4] the inventory must describe all the identified assets of the debtor and indicate, if accessible, the book value of each asset at the time of the inventory. To determine the market value of the assets the insolvency administrator/liquidator shall engage a valuation firm at the debtor's expense. The inventory deed shall be signed by the insolvency administrator/liquidator, by the members of the inventory committee, where applicable, by the debtor through his representative appointed in the insolvency proceedings.

From the moment the inventory is signed, the liquidator appears as a custodian of the assets contained in the inventory, with all the consequences that derive from this capacity, including safekeeping and preservation.[18] The inventory is also an opportunity for the liquidator to get to know the debtor's business, to visit warehouses, offices, buildings, shops, to talk to staff, etc. The inventory is supplemented by the information that the debtor communicates to the liquidator, the list of staff, the amount of wages to be paid, and especially the list of creditors. In this way, the liquidator will know the debtor's assets.

Since the debtor's assets are intended for liquidation, they must be kept in good condition until the date of their recovery, in accordance with the law. The liquidator shall therefore take the necessary measures to preserve the debtor's assets. However, the preservation measures may also include appropriate measures to avoid the disappearance of the assets of the debtor's managers, who contributed to the company's insolvency, as they may be obliged to pay the claims with their personal assets (Article 247 of the Insolvency Act).

Preservation measures must be taken quickly, even during the action of sealing the goods and last until their recovery. The measures concern the preservation of the substance of the goods and the preservation of the rights in the debtor's assets[19].

Preservation of the substance of goods concerns the operations necessary to avoid deterioration of goods and prevent damage. To this end, the liquidator may take the necessary steps to reserve the means of production, a broad formula

[17] Accounting Law no. 287/2017: https://www.legis.md/cautare/getResults?doc_id=13635&lang=ro#.
[18] Gh. Gheorghiu, *op. cit.*, p. 178.
[19] R. P. Vonică, *op. cit*.., 2001, p.180.

which applies both to the maintenance and renewal of current maintenance or supply contracts and to the sale of stocks subject to perishability or depreciation.[20]

According to the national legislation, the procedure for the safekeeping of the debtor's assets is provided for in Article 109 of the Insolvency Act[21], which stipulates that, as the inventory is carried out, the insolvency administrator/ liquidator shall take possession of the assets, becoming their judicial depositary, and shall take the necessary measures for their preservation, conservation and safekeeping, and only with the consent of the creditors' committee, or, as the case may be, of the creditors' meeting, the assets included in the debtor's assets shall be handed over, against signature, to the debtor for safekeeping. If the creditors' committee or the creditors' meeting does not agree to the transfer of the assets of the debtor's estate to the debtor for safekeeping or if the debtor refuses to take over the assets, the insolvency administrator/liquidator shall hand over the assets, on the basis of a storage or safekeeping contract, to a third party, who shall be entitled to remuneration and compensation for the costs of handing over the assets. If the property included in the debtor's estate is exposed to deterioration or if it has undergone changes that imply the danger of its depreciation and there is no time to remove this danger, the person to whom the property has been given for safekeeping shall inform in time the insolvency administrator/liquidator, who is obliged in the context of Article 109 paragraph (8) of the Insolvency Act to sell at any time the perishable property or property subject to depreciation under the terms of this Act. At the same time, the insolvency administrator/liquidator is also entitled to sell the property included in the debtor's estate if keeping it involves disproportionate expenses.

At the same time, the Insolvency Law also provides for other measures taken by the insolvency administrator/liquidator in order to preserve the debtor's assets of the insolvent legal entity, which are reflected in Article 75 of the above-mentioned Law, namely; the activity of the debtor's management bodies shall be suspended; the opening of the accumulation account managed by the insolvency administrator/liquidator and payments with the debtor shall be made only to this account; any guarantee for the execution of obligations shall be granted only by the insolvency administrator/liquidator, with the authorisation of the creditors' meeting or committee; the seizure of the debtor's assets, other measures to secure or limit the debtor's right of the insolvency administrator/liquidator to administer and exploit the debtor's assets applied by the court or the bodies empowered to do so shall be automatically annulled and applied exclusively by the court which opened the insolvency proceedings. The debtor's associates (shareholders, members) are not entitled to have their share of the debtor's estate separated in connection with the debtor's removal or exclusion from the list of associates (shareholders, members) or the division of his assets. The repurchase or purchase of the

[20] Idem.
[21] Insolvency Law no.149/2012, art.663.

shares placed by the debtor or the payment of the countervalue of the participation share is prohibited; the payment of dividends, other payments related to the valuation of securities, the payment of income on the participation shares, the distribution of profits among the debtor's associates (members) are prohibited.

Further to the description of the measures preceding the initiation of insolvency proceedings described in Article 75 of the Law, the calculation of penalties, interest and other payments related to the debtor's creditors' debts, as well as other payments such as the commitment fee, the risk fund of the loans granted to the debtor by the Ministry of Finance, as well as the payments related to the sums forfeited from the state budget in order to honour the state guarantees are also suspended.

Another measure provided for in Article 79 (4) is the suspension of cases concerning the assets of the debtor's estate in which the debtor is a defendant and the plaintiff is an unsecured creditor and which are pending at the time of the opening of insolvency proceedings, until resumption by the unsecured creditor or until the end of the insolvency proceedings. Unsecured creditors shall be entitled to lodge an application for the submission of claims in the insolvency court. The suspension procedure may be resumed by the unsecured creditor if the claims are not validated in the insolvency proceedings. The purpose of the suspension measure is to protect creditors and to make the insolvency proceedings more effective in terms of insolvency proceedings, which are collective and egalitarian in nature, thus avoiding the need for individual pursuit or enforcement actions against the debtor's assets.

4. Conclusion

The preliminary measures described in this paper make a real contribution to achieving the aim of insolvency law by establishing a collective procedure for the satisfaction of creditors' claims against the debtor's estate. At the same time, it is an effective means of protecting the subjective rights of creditors and a legal instrument guaranteeing the enforcement of the final schedule of claims of the insolvent debtor. With this I expect that the results of the research can be used both by those who will carry out further studies in the given field, so that they will be to the benefit of the people, as well as researchers in legal sciences in the Republic of Moldova.

Last but not least, I expect to bring to the forefront the usefulness of legal science researchers for such problems addressed, so that the general public becomes aware of the need to apply them in such circumstances encountered.

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Modern Business with Ancient Tools or Warranty against Eviction in Roman Law and Its Inheritance in the French, German and Italian Civil Codes

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Abstract

Modern Civil codes are mostly based on Private Roman Law, and this relation can be seen especially in the regulation of contracts and torts. The aim of this paper is to highlight the essential elements of the vendor's warranty against eviction by reference to the main sources of Roman Law, in order to search for its influence on contemporary civil law, in France, Germany and Italy. The analyze undertaken will use the comparative method, with direct reference to the Roman institutions that influenced contemporary legislation. This study is part of the author's recurring interest regarding the warranty against eviction, and its main focus is on the definition of eviction alongside the object of the warranty. As a conclusion, the author identifies a slightly different approach concerning the concept of eviction, that explains the similar treatment both for the warranty against eviction and defects, found in current legislations.

Keywords: *eviction, warranty, Roman law, comparative law, actio auctoritatis, actio empti.*

JEL Classification*:* K12, K15

1. Introduction

Commercial relations arose and developed initially through the exchange of goods, and later through repeated buying and selling. Today, sale has become the main way of acquiring property, and incidents arising from commercial activity, an important source of litigation.

The warranty against eviction appeared in Roman law with the aim of ensuring the security of civil and commercial legal relations, a function maintained until contemporary law. Despite keeping the same role, the legal mechanisms by which the warranty against eviction was regulated varied from ancient times to the post-classical era of Roman law, decisively influencing current regulations.

In this paper we will analyze the warranty against eviction as it was regulated in Roman law, by reference to the three known forms of sale, in chronological order: sale by mancipation, by double stipulation and by consensual contract. First of all, we specify that the first form of sale was made by simple mancipation, as a way of transferring property. This function was fulfilled exclusively

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by *mancipatio*, until the appearance of the contract concluded by double stipulation[2]. This sense of the term will be the subject of section 1.1. Later, we will consider mancipation as a form of property transfer subsequent to concluding a sale either by double stipulation or by consensual contract.

As for the classical Roman texts used, we will primarily refer to the Digests of the Emperor Justinian (*Iustiniani Digesta*)[3], The Sentences of Paul (*Julii Pauli – Sententiarum Receptarum ad Filium*)[4], Varro's work, entitled *De re rustica*[5]. The Latin texts in their content will be reproduced in the original language, and the related explanations will be reproduced in the body of the paper. As for the current Civil Codes of France, Germany and Italy, we will consider the form in force on November 1, 2023, and the legal texts will be translated in English. We have chosen to limit ourselves to the mentioned legislations as we consider them representative for the continental legal system.

The purpose of this article is to determine to what extent the unity of treatment between the warranty for eviction and the warranty for defects in current law was foreseeable in Roman law.

To answer this question, the paper will be structured in two parts: the first concerns the warranty against eviction in Roman law, with an emphasis on its evolution along with the forms of sale earlier mentioned. In this part, I have reproduced the essential elements of the warranty for defects in Roman law, as they will be relevant in the second section of the paper.

In the second part, I briefly analyzed three characteristic elements of the warranty for eviction in modern legislation, namely the definition of the concept, the object of the warranty and, implicitly, the legal mechanism.

The conclusion reached proposes a different approach to the notion of eviction, inspired by current German law, that of „defect of title". Reanalyzing the texts of Roman law with this perspective, we can objectively justify the reason why in continental civil law the legal treatment of the warranty against eviction and the warranty against defects follow the same institutional pattern.

2. Warranty against eviction in Roman Law

2.1. Eviction in the early sale contracts done solely through *mancipatio*

When the sale was performed through the ritual of *mancipatio*, property

[2] E. Molcuț, *Drept privat roman*, Universul Juridic Publishing House, 2011, Bucharest, p. 289.
[3] Available online at: https://droitromain.univ-grenoble-alpes.fr/, last accessed on the 2nd of November 2023.
[4] Available online at: https://www.ancientrome.ru/ius/library/paul/, last accessed on the 2nd of November 2023.
[5] Available online at: https://penelope.uchicago.edu/Thayer/L/Roman/Texts/Varro/de_Re_Rustica/2*.html, last accessed on the 2nd of November 2023.

was transferred to the *accipiens* and, as a consequence, he had the right to receive the object mancipated, as *corpus,* and be granted its peaceful ownership. If the buyer was threatened with eviction by a third person, he was entitled to ask the seller to defend its title[6] (*praestare auctoritatem*).

From a procedural perspective, *accipiens* was entitled to use *actio auctoritatis,* which is a specific guarantee for sales made through *mancipatio*[7]. Its origin seems to be of delictual nature, mainly because the seller has agreed to accept the price even though he was not the owner of the object sold and also accepted that the buyer was in danger of being evicted in front of the real owner's vindication[8].

To be in the presence of an eviction, one had to lose the legal right that was transferred to him in favor of a third person, that invoked a better title. Another case of eviction implies that the buyer has to accept a *ius in re* that limits its ownership over the object acquired, which was sold with "*uti optimus maximusque*"[9] for example a personal servitute, a hypoteque or an emphiteosis. In this regard we shall quote a text from the Digests attributed to Neratius[10].

As an effect of *actio auctoritatis*, the seller was liable for double the price paid to him, and that is seen as a penalty for the vendor, and a compensation for the prejudice suffered by the purchaser[11]. Zimmermann, considering the delictual nature of the warranty, points out that the quantum of the sanction followed the same reasoning as *furtum nec manifestum*, where, equally, the obligation to compensate regarded double the price[12].

For *actio auctoritatis*, there are two texts that confirm the most usual quantum of the compensation as double the price. The first comes from *The Opinions of Julius Paulus*[13]: *Res empta mancipatione et traditione perfecta si evincatur, auctoritatis venditor duplo tenus obligator.* In this regard, Paulus opposes the obligation to warrant derived from *mancipatio* to that derived from *traditio*

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[6] The seller was called to the buyer's assistance due to the fact that he was the one that sold the object of the contract, pretending to be the real owner, therefore, the seller had to vouch for its title as the owner.

[7] According to Zimmermann, traces of its form can be found even in the XII Tables, tab.6, par.3, *usus auctoritas fundi biennium est*, but its meaning is not that of warranty.

[8] R. Zimmermann, *The Law of Obligations – Roman Foundations of Civilian Tradition*, Juta & Co. Ltd, Cape Town, Wetton and Johannesburg, 1990, p.295

[9] Latin term meaning „free of any servitute".

[10] D.21.2.48 (Neratius, lib. VI Membranarum): „*Cum fundus, uti optimus maximusque est, emptus est et alicuius servitutis evictae nominae aliquid emptor a venditore consecutus est, deinde totus fundus evincitur, ob eam evictionem id praestari debet, quod ex duplo reliquum est: nam si aliud observabimus, servitutibus aliquibus et mox proprietate evicta amplius duplo emptor, quam quanti emit consequeretur".*

[11] P. F. Girard, *Manuel Elementaire de Droit Romain*, 4th edition, Arthur Rousseau Publishing House, 1906, Paris, p. 554.

[12] R. Zimmermann, *op.cit.*, p. 295.

[13] Julii Pauli, *Sententiarum Receptarum ad Filium* – usually translated as *The Opinions of Julius Paulus*, book II, title XVII, paragraph 3, further on "Paul.Sent.2.17.3".

(where the warranty derives from an express stipulation).

The second text, with mostly the same meaning, is attributed to Varro[14]: *Aut si mancipio non datur, dupla promitti, aut, si ita pacta simpla.* Therefore, if there was no valid mancipation, regardless of the cause, the parties could stipulate for simple or for double the price, but if there was a valid mancipation, that would be enough to justify an action for double the price paid.

The judicial mechanism used to this purpose was the *actio auctoritatis* and consisted of the introduction of the seller as *auctor*[15] in the judicial procedure launched by the third person (the evictor) against the buyer. If the seller refused to defend the buyer's title, or failed to do so, despite its efforts, he would be sentenced to pay the buyer double the price received from him[16].

For these reasons, it is commonly accepted in nowadays Roman law literature that the obligation to warrant against eviction deriving from *mancipatio* had a delictual nature[17], considering the fact that the seller had to pay back the price to cover the prejudice and also pay the same sum again, as a penalty for its action to sale an object that did not belong to him.

2.2. Eviction in the sale contract done by two stipulations

The mechanism based on *actio auctoritatis* was only available for valid *mancipatio*[18], therefore all the conditions of the mancipation had to be satisfied: for example, the parties had to be Roman, the object had to be Roman and had to belong to the category of *res mancipi*. If the property of an object was transferred without *mancipatio* (by *in iure cessio* or *traditio*), to obtain a warranty against eviction, the Romans have chosen to imitate the effects of *auctoritas* by a stipulation[19]. Usually it was a verbal stipulation, but later it could have also been convened in writing. Given its abstract character, stipulation was a general manner to conclude any type of agreement[20].

This practice became more and more appealing to the Romans, given its simplicity, and it was often used when the sale contract was concluded by double stipulation, regardless of the type of object sold. The effect of the sale contract was to generate obligations between the parties. Taking into consideration that the obligations were conventionally assumed, by default, one could not have been

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[14] Varro, *De re rustica,* 2.10.5.

[15] The terms *auctor* and *auctoritas* are used in this context in the same sense as in tutorship, therefore the seller has to warrant the buyer in the same way the tutor warrants the pupil – G. May, *Éléments du droit romain,* Recueil Sirey, Paris, 1913, p. 346.

[16] E. Molcut, *op.cit.*, p. 296; G. May, *op. cit.*, p. 346.

[17] E. Molcut, *op.cit.*, p.296, R. Zimmermann, *op. cit.*, p. 295.

[18] J. Goicovici, *Perspective asupra evoluției garanției pentru evicțiune în dreptul roman*, in „Studia Universitatis Babeș-Bolyai - Iurisprudentia", no.4/2020, p. 342.

[19] P. F. Girard, *op.cit.*, p.555, R. Zimmermann, *op. cit.*, p. 295.

[20] A. J. Andrei, *Particularitățile sistemului juridic roman,* Universul Juridic Publishing House, Bucharest, 2015, p. 86.

liable for more than he consented. Usually, the agreement was followed by a transfer of property through *mancipatio* or a transfer of undisturbed possession by *traditio* (*vacuam possessionem tradere*).

To warrant against eviction, a separate stipulation was required according to which the vendor, would guarantee to protect the buyer against a third person that would claim a right over the object traded. If he would not be able to defend the buyer against such a legal threat, he would be forced to compensate him for the eviction suffered.

If the object of the sale was a *res mancipi*, or a valuable *res nec mancipi*, the vendor was obligated *to pay double the price* received. This provision was called a *stipulatio duplae*. The quantum of the compensation can be deduced from a text we have already mentioned in the former section regarding *actio auctoritatis*, respectively Varro[21], where we can observe that if there was no valid *mancipatio* the parties could stipulate for simple or double the price, but for valid *mancipatio*, the stipulation was for only double the price.

The obligations derived from *stipulatio duplae* could be judicially claimed[22] by *actio certae creditae pecuniae*, therefore, by an action based on the stipulation (*actio ex stipulatu*).

In case of a sale made by double stipulation, in which the transfer of property would have been made by valid mancipation, what action would the buyer prefer to use in case of an eviction: either *actio auctoritatis* or *actio ex stipulatu*?

It is not hard to accept that the buyer would be able to use *actio certae creditae pecuniae*, considering the fact that it had the nature of a consented establishment of the damage caused by eviction. Of course, this does not diminish the buyer's faculty to choose from the two actions, but, if he would choose one, by virtue of *electa una via non datur recursus ad alteram*, he would not be able to choose the other afterwards.

If the object of the sale was a *res nec mancipi*, the situation was different, therefore, if a sale was made by double stipulation, but the transfer of property was not possible by *mancipatio*, for example it was done by *traditio,* the only way to obtain warranty against eviction was to use the *actio ex stipulatu*[23]. If the stipulation for warranty was not made, then the buyer had no valid obligation to warrant.

The stipulation for warranty in case of a *res nec mancipi*, was done by the *rem habere licere* provision. The vendor, by express stipulation, acknowledges that the buyer has the right to own the object sold (*rem habere*). In case of an eviction, the vendor was obligated to compensate the buyer. It is not precisely

[21] Varro, *De re rustica,* 2.10.5.
[22] E. Molcut, *op. cit.*, p. 297.
[23] Personal action derived from the stipulation.

clear what was the quantum of the compensation, meaning that it cannot be certain if the compensation would cover the purchase price or the damage resulted[24]. For this matter, it was established that the promise of *rem habere licere* was a *stipulatio incerta*, therefore, the quantum of the compensation, when an agreement lacked, was to be left to the arbitrary appreciation of the judge[25].

2.3. Eviction in the consensual sale contract

In what concerns the consensual sale contract, it has been historically accepted that, at first, a stipulation to warrant against eviction was not implied by the buy-sale provisions, but, as an effect of good faith, the buyer was entitled to ask the seller for a promise *de evictione cavere*[26], that he would defend the buyer's title or compensate its loss in case of eviction. Therefore, because the contract was of good faith[27], (*ex bona fides*), the vendor had to offer all the usual benefits[28], including the promise mentioned.

The mechanism was the following: After the consensual sale contract was concluded, the buyer was entitled to ask the vendor to warrant against eviction by a separate stipulation. The warranty could have been enacted by *actio empti* given to the buyer for this purpose. Usually, for *res mancipi* and *res nec mancipi* of significant value, the vendor would have assumed a *stipulatio duplae.*

In Roman law, it was impossible to force the vendor to assume the obligation to warrant, but it was possible to force him to pay a specific sum of money in case he would fail to assume the obligation. This thesis is supported by a text from the Digests, attributed to Paul[29]: *Si dupla non promitteretur et eo nomine agetur, dupli condemnandus est reus.* Therefore, to avoid paying even without the occurrence of an eviction, the vendor would willingly offer the warranty hoping that eviction would not occur.

Another text attributed to Paul[30], indicates an evolution in what concerns the nature of the warranty. According to the latter text, „*si res simpliciter traditae evincantur, tanto venditor emptori condemnandus est, quanto si stipulatione pro evictione cavisset".* In this case, the warranty against eviction is no longer of conventional nature, but of legal nature. It is implicit and inherent to the nature of the consensual sale contract.

Here, we can already observe that this mechanism has evolved by giving the buyer the opportunity to directly ask the seller for warranty, and not only to ask him to assume the obligation to warrant.

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[24] R. Zimmermann, *op.cit.*, p. 296.
[25] G. May, *op.cit.*, p. 347.
[26] Ibid, p. 347.
[27] R. Zimmermann, *op. cit.*, p. 297.
[28] In this case, by usual benefits we refer to the simple trading of the *res* alongside the guarantees for its continuously enjoyment.
[29] D.21.2.2 (Paulus 5 ad sab.).
[30] Paul.Sent.2.17.2.

This position was specific to late classical Roman law. From the reign of Emperor Julian[31], compensation was established by reference to another quantum than the price itself. For this thesis we shall quote one text from the Digests[32], attributed to Julian: *Venditor hominis emptori praestare debet, quanti eius interest hominem venditoris fuisse.*

In the time of Emperor Justinian, a maximum limit on the calculation of damages to double the price paid by the purchaser[33]. This limit is supported by a text from the Digests[34], attributed to Africanus: *cum et forte idem mediocrium facultatium sit: et non ultra duplum periculum subire eum oportet.* This implies that the limit of damages is enacted only if the vendor has offered a title of at least mediocre quality.

The extend of the liability of the vendor has not yet been settled between Romanists[35], and that can be mostly explained by the fact that Roman law has outlived the society that created it and most of the sources nowadays come to represent the practice of a certain period and not the synthesis of an institution.

2.4. Warranty for defects in the consensual sale contract

Alongside the warranty against eviction, the vendor was liable for warranty against defects.

To point out the development of this institution, we need to establish three different systems[36], mostly in accordance with the evolution of the warranty against eviction[37] as previously approached. In this regard, we must analyze the warranty against defects in under the Roman civil law system and under the Curulian Ediles.

Under the civil law system, in the time when sales were made mostly by *mancipatio* there was only one action given to *accipiens* alongside *actio auctoritatis*: *actio de modo agri*. This latter only covered the sale of a land of smaller surface than that declared by the vendor.

Girard[38] also illustrates the opinion according to which we are in the presence of defects if a tract of land is sold „*uti optimus maximusque*" and it is later discovered that servitutes were imposed on it.

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[31] *Flavius Claudius Julianus Augustus*, also known as *Julian the Apostate*, as well as *Julian the Philosopher*, was Roman Emperor from 361 to 363, after Christ.

[32] D.21.2.8 (Iulianus 15 Dig.), first sentence.

[33] P. Ourliac, J.de Malafosse, *Histoire du droit prive, vol. I, Les obligations*, Presses Universitaires du France, Paris, 1969, p. 278.

[34] D.19.1.44 (Africanus 8 quaest).

[35] R. Zimmermann, *op. cit.*, p. 302, and footnotes 54, 55 and 56 at the same page.

[36] This timeline was proposed by Girard, (P. F. Girard, *op. cit.*, p. 561) and we find it most appropriate for the purpose of this paper.

[37] P. Ourliac, J.de Malafosse, *op. cit.*, p. 278.

[38] P. F. Girard, *op. cit.*, p. 561.

As a different opinion, Romanian Roman law literature[39] points out that in this case we are in the presence of eviction and not of latent defects, because the defect is in the title and not in the objected sold.

We are more inclined to see this latter opinion as justified. One cannot expect that every misunderstanding regarding the object traded can be seen as a latent defect. It is highly essential that the misunderstanding itself comes from an issue of the object sold, and not from the quality of the title through which the sale was performed.

Under the edicts of the Curulian Ediles[40], a specific system applicable only to the sale of slaves and the sale of animals has been created. It was understood that vendors were aware of the defects of the objects they were selling, reason for which they had to inform the buyers about those defects. This duty to inform was based mainly on the proverbial dishonesty of the slave traders and not on their quality as merchants, or on the quality of buyers, as Romans.

At the end of the Republic, this regulation was also adapted for the sale of animals, and it was enough for the vendor to make an oral declaration to inform about the defects.

As a difference from eviction, the sanctioning system in case of warranty against defects was better developed, meaning that the buyer had the opportunity to choose between the resolution of the contract or compensation of the damages with a sum equivalent to the part of the object sold that was rendered unusable.

The first was called *actio redhibitoria* that would lead to the resolution of the contract if the buyer would appreciate that the defects of the object make it improper for its use. The mechanism was the following: If the vendor was called into justice by this action, and he would refuse to resolute the contract, he would be condemned to pay double the price received. To this end we shall indicate a text from the Digests[41].

The second action, called *actio quanti minores* or *actio estimatoria*, was intended to cover the damage resented by one part by the partial deterioration of the object bought, according to Ulpianus[42], quoted in the Digests.

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[39] E. Molcut, *op. cit.*, p. 296.

[40] Magistrates empowered to manage the police of market places and also to organize trials regarding objects sold in markets.

[41] D.21.1.45 (Gaius 1 ad ed. aedil. curul.) „*Redhibitoria actio duplicem habet condemnationem: modo enim in duplum, modo in simplum condemnatur venditor. nam si neque pretium neque accessionem solvat neque eum qui eo nomine obligatus erit liberet, dupli pretii et accessionis condemnari iubetur: si vero reddat pretium et accessionem vel eum qui eo nomine obligatus est liberet, simpli videtur condemnari".*

[42] D.21.1.31.16 (Ulpianus 1 ad ed. aedil. curul.) „*Si quis egerit quanto minoris propter servi fugam, deinde agat propter morbum, quanti fieri condemnatio debeat? et quidem saepius agi posse quanto minoris dubium non est, sed ait iulianus id agendum esse, ne lucrum emptor faciat et bis eiusdem rei aestimationem consequatur".*

3. Essential elements of warranty in the French, German and Italian Civil codes

3.1. Definition of the concept of eviction

Neither of the three regulations define exactly the term "eviction", but by reference to art.1625 of The French Civil Code[43] (C.civ.Fr.), we shall observe that the warranty which the seller owes to the purchaser consists of two objects: the first is *the peaceful possession of the object sold*, and the second, concerns *the latent defects of the same thing, or its redhibitory vices*. This provision cannot be accepted as a precise definition, mainly because it expresses the obligation of the vendor to ensure the peaceful possession, meaning the normal use, of the object sold. Any limitation to the *peaceful possession* must not have been previously known by the buyer, otherwise he would have bought on his own risk, according to art.1629 C.civ.Fr.

Section 433, paragraph 1, thesis 2 of the German Civil Code[44] (BGB) provides that *the seller must procure the thing for the buyer free from material and legal defects*[45]. Therefore, it is the duty of the seller to provide an object free of legal defects and if he would fail to do so, he would have to compensate for those defects[46], according to section 437 BGB.

In order to define legal defects, which can be understood as defects of the title, we shall quote section 435, sentence 1 BGB, according to which these represent the possibility of a third party, *in relation to the thing, to assert rights, or only the rights taken over in the purchase agreement, against the buyer*.

In the Italian Civil Code[47], art.1483, paragraph 1, states that *if the buyer suffers total eviction of the object bought by effect of the rights of a third party, the seller is obliged to compensate him for the damage caused by the eviction pursuant to article 1479*. Therefore, in this case eviction is not defined as an institution, but it results implicitly from the way the seller's obligation to warrant has been regulated.

By the three texts we can observe three different approaches in the matter of eviction. The French regulation refers to *the peaceful possession of the object sold,* as a reminder of *vacuam possessione*, just like in the Roman double stipulation sale contract, that being the object of protection for the warranty against

[43] From now on, referred to as "C.civ.Fr". The text was translated by the author.
[44] From now on referred to as "BGB". For this paper we have been using the English version, available online at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html, last accessed on the 10th of November 2023.
[45] In the German Regulation, every rule applicable to warranty against eviction is also applicable to warranty against defects, reason for which the mechanism that ensures protection for both types of warranty is the same.
[46] Legal defects have the meaning of flows of title that are able to lead to eviction. Material defects represent flows of the object itself that render it unusable for the purpose intended.
[47] From now on referred to as "C.civ.It.". The text was translated by the author.

eviction. The German text stipulates that the object sold must be free of legal defects, and this way, the seller would have to grant that the title transferred had no defects. The Italian provision is very close to the conceptual notion of warranty against eviction, as developed by the Romans, even from early times[48].

3.2. Particular provisions concerning the object of the sale

We observe that by contrast to Roman law, modern private law does not make a difference based on the category of the object sold. This solution is most natural, given the fact that the difference between *res mancipi* and *res nec mancipi* is not viable any more, and has not been since post-classical Roman law.

Nevertheless, we shall find specific provisions for certain type of objects.

Section 452 BGB establishes that the same provisions that apply for the sale of land should be used for the sale of registered ships or ships under construction, given their high value.

The more we look into the provisions mentioned we can see that they are regulated by special norms due to the specific issues that could be raised in practice for these types of goods.

Both German (section 445 BGB) and French regulations (art.1649 C.civ.Fr.) have special provisions regarding auction sales. In the German regulation, if the object represents a pledge and it is sold by auction, the seller is liable only if he would have fraudulently concealed the defect (both legal or material), or made a guarantee of its quality.

On the other hand, the French provision is only applicable to sales made by court order in what concerns only material defects. The reasoning behind these exclusions is that the sale itself did not represent a contract based on trust and mutual agreement, but a manner in which the creditor executed its pledge, and the vendor may not be subjected to liability for defects because it was not a consented sale contract in the proper meaning of the concept.

One common provision, seen as a limit of warranty, found in all three regulations, valid both for eviction and defects, regards the knowledge of the buyer that the respective flaw constitutes the cause for eviction or for defects.

This issue, regarding eviction, is found in art.1629 C.civ.Fr., according to which, essentially, the seller *is bound to return the price, unless the purchaser knew, at the time of the sale, of the danger of dispossession, or unless he bought at his own risk.*

The Italian regulation is very similar to the French one, article 1488, paragraph 2 C.Civ.It. providing that the vendor is not bound to return the price of the sale when the contract was concluded on the buyer's risk.

[48] It is much similar to the provision from Paul.Sent.2.17.3, mentioned at the beginning of this study.

It is also important to mention that in accordance with section 442, paragraph 1 BGB, *the rights of the buyer due to a defect are excluded if he has knowledge of the defect at the time when the contract is entered into.* Taking this into consideration, we admit that if the object was bought knowing about the defect, the buyer assumed that risk.

This same solution is based on Roman law, for example D.21.1.14.10 (Ulpianus 1 ad ed. aedil. curul.), as earlier quoted.

As we can easily observe, the area of protection granted by the warranty against eviction is mostly developed on Roman principles, each limit having its own correspondent in the texts analyzed in the first part.

3.3. The mechanism of warranty against eviction

In French law, either for eviction or defects, there are mainly two actions, both resembling to *actio redhibitoria*[49] and *actio aestimatoria*[50]. These two remedies are of general application, while a very interesting provision can be found in art.1638 C.civ.Fr., according to which, *when a property is sold, without any declaration having been made, encumbered with non-apparent servitudes which are of such importance that it is to be presumed that the purchaser would not have bought if he had known of them, he may apply for termination of the contract, unless he prefers to content himself with an indemnity.* Here, the buyer has a choice between an action that would terminate the contract and an action that would confer him a compensation only for the part lost.

By the provisions of the German Civil Code, we shall observe that for both types of defects there is a single set of actions under section 437. Here, the buyer has three options, according to paragraph 1, he is entitled to demand cure, pursuant of section 439 BGB[51], therefore he can ask for the replacement or repair of the object. Equally, the buyer can also choose an action to revoke the agreement under section 440 BGB, or an action to reduce the purchase price. Moreover, the buyer is also entitled to claim damages under paragraph 3, but only alongside an action to revoke the sale. This way we can observe a resemblance to *actio redhibitoria* cumulated with the payment of the damage occurred. Claiming the

[49] Art.1636 C.civ.Fr.: *Where a purchaser is dispossessed from only part of the thing, which is of such importance, in proportion to the whole, that the purchaser would not have bought without the part of which he is dispossessed, he may have the sale terminated.*

[50] Art.1637 C.civ.Fr.: *Where, in case of dispossession of part of a tenement sold, the sale is not terminated, the value of the part of which the purchaser is dispossessed shall be reimbursed to him according to an appraisal at the time of the dispossession, and not in proportion to the total price of the sale, whether the thing sold has increased or decreased in value.*

[51] This provision mainly comes from the correspondent text, art.3, point 5 of the Directive 1999/44/EC on the sale of consumer goods. This is atypical for our analyze so far, but it comes as an expression of consumer protection, its greatest area of application being that of sale contracts concluded between professionals and consumers that exceeds the usual premises for warranty at European level.

damages implies more than just revoking the act, followed by a *restitutio in integrum*. It is mostly a manner to compensate for the price paid alongside other expenses regarding the object bought. In addition, the buyer would be entitled to the entire sum that represents its interest (*quod interest*).

In the Italian Civil Code (C.civ.It.), in case of eviction, the mechanism is slightly different. According to article 1485, the buyer must first ask the vendor to defend its title, by a form of *actio empti*. If he does not comply to this provision, he might lose the protection granted by law if the seller invokes *exceptio mali processus*. This mechanism is similar to that used in *actio auctoritatis*, where the seller was called, as *auctor*, to defend de buyer's title (*praestare auctoritatem*).

In case of total eviction, article 1483 C.civ.It., refers to art.1479 of the same law, offering the buyer the effects of *actio redhibitoria*, alongside the necessary and useful expenses made by the buyer regarding the object acquired.

For partial eviction, article 1484 C.civ.It. establishes the regime of art.1480, that offers the buyer the choice between *actio redhibitoria* and *actio aestimatoria*.

A very interesting provision can be found in article 1489, that refers to article 1481 C.civ.It., according to which, if the object sold is encumbered with real rights in the benefit of a third person, and if there is a danger of dispossession, the buyer is entitled to suspend the payment of the price. The only exception to this rule is given by the situation in which the buyer was aware of the risk when he concluded the contract.

As we sum up the mechanisms offered by nowadays legislations, we can observe that both *actio redhibitoria* and *actio aestimatoria* have been generalized not only for material defects, but also for legal defects. Equally, considering the mechanisms, there is no substantial difference between the protection offered for the warranty against eviction and for defects. They have both combined in a way that led to a traditional mechanism multiplied and adapted to serve the interest of the buyer each time he acquires an object with flaws, either legal, either material.

4. Conclusion

In Roman law, the concept of warranty against eviction was the subject of constant development, starting from the era of the Republic until the fall of the Eastern Roman Empire. Despite this fact, the Romans seem to have constantly referred to a complete eviction, respectively to the total loss of the acquired right over the sold property.

In these conditions, the partial eviction was considered to be a defect in the object of sale, and in this sense, in the old law, the *actio de modo agri* was recognized, as an action by which the seller was liable for defects, respectively for the inconsistency between the extent of the surrendered land and the description of the land in the contract. The premise of the Roman jurisconsults was that the defect consists in the lower extent of the land, therefore being related to the

object sold.

This perspective contradicts the defining features of the concept of eviction as known in current legislation. Obviously, we do not intend to apply current concepts to legal situations born approximately two millennia ago, but we plan to check, retrospectively, the effects produced by a reinterpretation of the notion of eviction.

Considering the classification made in the German Civil Code, between defects of the title and defects of the object, we consider that we can use a similar distinction in the analysis of eviction in Roman law.

Thus, the *actio de modo agri* could be perceived in a different way, namely as an action that protects the buyer against partial eviction, since the sale contract, which constitutes the title, is effective only for part of the property sold, the buyer's right being removed with respect to another part of the good. Accordingly, we find that the Romans recognized the *actio de modo agri* in the case of a defect of the title, therefore, in the case of an eviction, and the action thus acquires a special and derogatory nature from the *actio auctoritas*.

Equally, the view of eviction as a defect of the title and not just a legal deprivation of right, constitutes an additional justification for the fact that the reception of Roman law in modern legislation was done by unifying the warranty system for eviction with the warranty system for defects. In this sense, we consider that current law recognizes some effects derived from *actio redhibitoria* and from *actio aestimatoria* including in the case of the warranty for eviction.

In conclusion, we appreciate that a new perspective on eviction, viewed as a defect of the title, by which the buyer's right was restricted or removed, instead of the action of a third party which produced the same effects, leads to restore the distinction between the warranty for eviction and warranty for defects in Roman law. The approach we propose is not immune to criticism and does not aim to contradict the traditional Roman law literature, but to complement the modern perception of the warranty born from *actio auctoritas* and even from *actio empti*.

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The Rental Contract in the HoReCa Field. Theoretical and Practical Aspects, Respectively Alternative Dispute Resolution Methods

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Abstract

In a constantly evolving world, marked both by the recent impact of the pandemic and by technological progress, the increasingly diverse and growing demands of customers - tourists, consumers of services and products in the hospitality industry, especially in the HoReCa field, have generated new challenges. Professional marketers in the hospitality industry have responded to meet all these challenges by identifying innovative and viable solutions. In this context, in addition to the provision of accommodation services, they diversified the objective of using the available spaces within the hotels to offer consumer tourists, additional relaxation and leisure services, including casino gambling facilities. Also, in order to secure their business and to develop solid and continuous relationships with customers, they have introduced contractual clauses that facilitate the amicable resolution of any disputes between the parties, thus also benefiting from alternative dispute resolution methods (ADR). All these initiatives have been foreseen and developed with the aim of maintaining a professional and human balance in the relationship with clients and their collaborators, as well as to ensure a harmonious continuation of the efficiency, sustainability and professional ethics of all these relationships.

Keywords: *consumer tourists, tourist services and products, space rental, HoReCa, gambling facilities, ADR methods, European Union.*

JEL Classification: K22, K41

1. Introduction. Advance specifications

1.1. Definition of the HoReCa field

The HoReCa field represents an important component of the hospitality industry, of tourism[3] and the term used for it is an abbreviation for the following

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[3] From the date of entry into force of the Treaty on the Functioning of the European Union (TFEU) 2012/C 326/01 on December 1, 2009, published in the Official Journal C 326, 26/10/2012, in accordance with the provisions of art. 6 (letter d) as well as with those of art. 195 title XXII, tourism policy is regulated at the EU level, a field that thus benefits from its own legal basis. In this context, by default HoReCa has an official recognition, given that it also enjoys non-reimbursable financing programs (including post Covid 19). In this sense, art. 6 letter d of the TFEU provides the following: "The Union is competent to carry out actions to support, coordinate or supplement the actions of

words: hotels, restaurants and cafes[4].

So, the HoReCa domain includes, for example, the following: tourist reception units with hotel accommodation function[5] where food and drink services are also offered (public alimentation)[6], catering service providers[7] as well as other related services[8].

1.2. Protection of consumer tourists in HoReCa

The hotel company, as a hotel unit (the hotel), has as its main object of activity: the provision of services and the offering of hotel, tourist products, in favor of its customers, tourists, consumers - as third-party beneficiaries.

The authorization system through tourist licenses and patents as well as the legislative control system, related to the provision of services and the sale of accommodation and catering products as well as other related services (hereafter jointly referred to as "hotel services/activities"), within HoReCa field, include special protection mechanisms for consumer tourists.

Thus, they are established both at the national level[9] and at the level of

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the member states. Through their European purpose, these actions have the following areas: (a) the protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport."

[4] See in this regard, https://www.gastroprofis.ro/ce-inseamna-horeca/ accessed on 17.03.2022 at 13.40.

[5] For example, hotels, hostels, motels, guesthouses, cabins, campsites, apartments authorized for accommodation services, as well as other accommodation structures, etc.

[6] For example, restaurants, pubs, bars, cafes, confectionery, patisseries, etc.

[7] In accordance with the provisions of Order no. 337/20.04.2007 issued by the President of the National Institute of Statistics (NIS) regarding the updating of the Classification of activities in the national economy, published in the Official Gazette of Romania no. 293 of May 3, 2007 ("Caen Code"), the provision of predominant activities within the hotel industry, for example, can be found in the following Caen codes: Hotels and other similar accommodation facilities - 5510; Restaurants- 5610; Food activities (catering) for events - 5621; Other food activities - 5629; Bars and other activities serving drinks - 5630.

[8] For example, leisure services, relaxation in bar areas, casinos, saunas, swimming pools, massage or fitness rooms, within the hotel.

[9] In Romania, the Methodological Norms of 2013 regarding the issuance of classification certificates of tourist reception structures with accommodation and public catering functions, tourism licenses and patents, published in the Official Gazette of Romania no. 353 bis of 14.06.2013, with the amendments and subsequent additions, regulate the issuance of classification certificates, licenses and tourism patents. In accordance with their provisions, for the purpose of protecting tourists, accommodation and public catering services are provided only in tourist reception structures (which include any constructions and arrangements intended, through design and execution, for lodging or serving meals for tourists, together with the specific services related) which are classified. Tourist reception structures include: a) tourist reception structures with tourist accommodation functions: hotels, apartment hotels, motels, youth hotels, hostels, tourist villas, cottages, bungalows, holiday villages, campsites, apartments or rooms for rent in family homes or in buildings with another destination, river and maritime ships, tourist guesthouses and agro-tourism guesthouses and other units with tourist accommodation functions; b) tourist reception structures with public catering functions: catering units within the premises of reception structures

the European Union and involve appropriate quality standards and procedures, technological evolution and innovation.

Over time, all these measures led to the evolution of the quality level of hotel activities, thus opening a growing number of 4- and 5-star category hotels[10].

2. Lease contract in the HoReCa field

2.1. The headquarters of the matter. The parts

In Romanian law, the general regulation of the rental contract applicable to this field, can be found in the provisions of art. 1777-1834 Romanian Civil Code.

In this sense, we will further analyze the situation of the lease or rental contract, respectively the lease of a space intended for the exercise of the hotel professional's activity, which is subject to the provisions of the common law in matters of lease as well as those of art. 1824 and art. 1828-1831 Civil Code.

Therefore, based on this contract, the hotel, in its capacity as lessor (professional, legal entity)[11], rents spaces (parts) of the total area of the hotel real estate[12] to a company (professional, legal entity) - as lessee or tenant, in order for the latter to carry out various commercial activities in accordance with its object of activity, for example, gambling and betting activities (casino-type activities)[13].

2.2. Contract definition and types of clauses

By means of the lease contract in the HoReCa field, the lessee undertakes to pay a price (a sum of money) called "rent" to the hotel lessor and the latter

with accommodation functions, public catering units located in municipalities and tourist resorts.

[10] According to NIS information, on July 31, 2021, Romania had, for example, a number of 36 5-star hotels and "of the total number of places in hotels, 44.3% were in 3-star hotels, 31.5 % were in 4-star hotels, 18.9% in 2-star hotels, 3.9% in 5-star hotels, 1.3% in 1-star hotels and 0.1% in non-star hotels". See in this regard, https://insse.ro/cms/sites/default/files/ field/publicatii/capacitatea_ de_cazare_turistica_existenta_la_31_iul_2021.xlsx.pdf accessed on 21.10.2022 at 14.21.

[11] According to art. 2 and art. 3 of the Romanian Civil Code "all those who operate an enterprise are considered professionals. The exploitation of an enterprise constitutes the systematic exercise, by one or more persons of an organized activity consisting in the production, administration or disposal of goods or in the provision of services, regardless of whether or not it has a profit-making purpose". Also, according to the provisions of art. 8 of Law 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania no. 409 of 10.06.2011, the notion of "professional" includes the following categories: merchant, economic operator, entrepreneur, any other persons authorized to carry out economic or professional activities, as provided by law.

[12] See, Vasile Nemeș, Gabriela Fierbințeanu, *The law of civil and commercial contracts. Theory, jurisprudence, models*, Hamangiu Publishing House, Bucharest, 2022, p. 189.

[13] In accordance with the provisions of code Caen 9200 - gambling and betting activities.

undertakes to insure and make available to the lessee, for use, for a period determined by the good/thing (rented space), within the hotel. Therefore, the conclusion of this contract has the following characteristics: a) only a right of use or a right of claim is transferred and not a real right[14], regarding the rented space. Therefore, the lessor remains the owner of the leased space throughout the duration of the lease, the lessee acquiring only a right of temporary use; b) has as its object both the rented space and the price set by the parties, namely the rent[15].

Being a synalagmatic, commutative contract, with onerous title, translational for temporary use, with successive execution in time[16], where the written form is required not for its validity but for its probation[17], the contract can include, for example, clauses relating to:

a. the object of the contract, in which the rented space is described;

b. the duration of the contract, in which the date of its entry and exit from force is mentioned, as well as the possible conditions for its extension, including details regarding the delivery-receipt of the rented space. In this sense, the use of the rented space is a matter of fact, which consists in its delivery-reception, its maintenance and use in good condition according to its destination, for the entire contractual period[18];

c. the amount as well as the method of paying the rent (which includes details regarding: the currency in which the payment will be made and possibly the exchange rate, the method of paying the rent which can be monthly, quarterly, methods of indexing the rent according to certain European/national economic indices, etc.);

d. the date of the rent payment, which includes details regarding the payment method (for example, by payment order, the bank account in which the payment will be made, guarantees and deposits set up by the tenant in this regard, etc.);

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[14] See Francis Deak, *Treatise on Civil Law. Special Contracts*, Vol II, *Location. Renting the house. Lease. The enterprise. Mandate*, 5th edition updated by Lucian Mihai and Romeo Popescu, Universul Juridic Publishing House, Bucharest, 2020, pp. 34-36.

[15] See F. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *New Civil Code. Commentary on articles*, Publishing House C.H. Beck, Bucharest, 2012, p. 1827. In the same sense, see Florin Moțiu, *Special Contracts.* University course revised and added, IX edition, Universul Juridic Publishing House, Bucharest, 2023, pp. 167-168.

[16] See Constantin Stătescu, Corneliu Bîrsan, *Civil Law. The general theory of obligations*, 8th edition, Allbeck Publishing House, Bucharest, 2002, p. 40. In the same sense, see Ion P. Filipescu, Andrei I. Filipescu, *Civil Law, General Theory of Obligations*, revised and added edition, Universul juridic Publishing House, Bucharest, 2004, p. 37.

[17] In accordance with art. 1798 Civil Code, the legislator recognized the enforceable character of the rental contract regarding the payment of the rent, at the terms and under the conditions provided in the contract, in order to fulfill the formalities of its execution. In this sense, in order to have the value of an enforceable title, the contract must be concluded in authentic form or by means of a document under a private signature that will be registered with the competent tax authorities, in order to tax the income obtained from the rent.

[18] As a rule, this type of contract is concluded for a longer period of time, with the possibility of extension before its expiration.

e. the obligations of the lessor which may consist of the following: to hand over the leased space to the lessee[19], to secure it and thus maintain it in a suitable condition so that it can be used usefully and quietly for the entire duration of the lease; to administer the building of which the leased space is a part, under conditions corresponding to its usual use for providing hotel activities. In this sense, the lessor will guarantee the lessee against disturbances caused by the act of third parties or his own act; to guarantee against defects that reduce or prevent the use of the work, occurred during the rental period; to carry out the capital repairs of the rented space according to the original destination, as well as those concerning the degradations resulting from normal use, including those concerning the hidden defects of its arrangements, etc.;

f. the lessee's obligations regarding the rented work/space[20], which may consist of the following: to receive it[21] and pay the related rent, in accordance with the contractual conditions; to use it with caution and diligence[22]; to return it in the condition in which it was received, according to its destination; to obtain, at his exclusive expense, all the necessary authorizations for the best possible functioning of his activity within the leased space; to ensure compliance with all fire prevention and extinguishing and work protection measures for its own staff as well as for the equipment within the rented space; to comply with the lessor's regulations and procedures regarding the hotel activities carried out within the building of which the rented space is a part so as not to affect the normal operation of a hotel as well as its customers; take out general liability insurance for a certain annual amount as well as for each insured event. Within the insurance, the lessor will be named as an additional beneficiary of the insurance policy with a direct, own right to collect the insured amount[23], etc.;

g. conditions for termination of the contract, which may include the following situations: failure to pay the rent on time, which may lead to the termination[24] of the contract; abandonment by the lessee of the rented space before the expiration of the contractual term; non-compliance by the lessee with his contractual obligations; termination of the contract by any of the contracting parties before the end of its duration, etc.;

h. situations of disputes/litigation between the contracting parties such as

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[19] See F. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.*, p. 1835.

[20] See Gabriel Boroi, Liviu Stanciulescu, *Institutions of civil law in the regulation of the New Civil Code. Timely application of the Civil Code. The right of ownership. The civil legal act. Tortious civil liability. Extinctive prescription and decay. Special contracts. The right of inheritance,* Hamangiu Publishing House, Bucharest, 2012, pp. 441-444.

[21] See Liviu Stănciulescu, *The Law of Civil Contracts. Doctrine and jurisprudence,* 3rd edition revised and added, Hamangiu Publishing House, Bucharest, 2017, p. 349.

[22] See Vasile Nemeș, Gabriela Fierbințeanu, *op. cit.*, p. 209. In the same sense, see Francisc Deak, Lucian Mihai, Romeo Popescu, *op.cit*., pp. 74-76 as well as the provisions of art. 1799 Civil Code.

[23] See, Ioan Macovei, Codrin Macovei, *The Law of Insurance Contracts*, Universul Juridic Publishing House, Bucharest, 2020, pp. 122-123.

[24] See Francis Deak, *op. cit*., p. 29.

alternative ways of solving them, the arbitration clause, etc.

As such, although the activity of renting parts of spaces within a hotel, which is the subject of the lease contract in the HoReCa field, represents a particularity, an accessory of the main activities specific to it (namely the provision of hotel tourist services), complete with the latter.

The varieties of the lease agreement in the HoReCa field are: the lease agreement between the lessor-hotelier and the lessee-provider of casino-type services, from the perspective of the activities carried out by the lessee within the leased space.

The continuous growth and the introduction of new services and activities related to the operation of a hotel, in the conditions of a fierce competition on the hotel market, have led to the favoring of a multitude of options among consumer-tourist customers.

In this sense, merchants - as professionals of commercial activity[25], namely hoteliers, together with casino service providers, continuously identify innovative solutions and methods to keep, attract, stimulate and retain their customers, which consist of including offering special rewards and benefits.

So, hoteliers have introduced into their businesses, in addition to specific hotel activities, the operation of casinos in other spaces of the managed building. This type of business shows rapid growth in the last period of time, because hotel-consumer tourists want access to quality services, as varied and complex as possible, for relaxation and spending free time, also based on a technology that is continuously developing and innovating.

Following the Covid 19 pandemic, due to the fact that there are significant decreases in tax revenues around the world, including hoteliers, they are identifying various alternative ways to increase revenues. Regarding these, the legalization of casino-type gambling activities, including sports betting, represents a continuously expanding market. Thus, offering personalized experiences in favor of consumer-tourist customers[26], implied by casino-type games, presents countless opportunities for hoteliers to attract not only their loyalty but also to continuously improve their services and additional facilities offered.

Therefore, through the conclusion of the lease agreement between a lessor-hotelier and a lessee-casino, the lessor offers within the hotel, both hotel services and activities as well as casino gambling facilities, in favor of its customers.

Consequently, the conclusion of the lease agreement between the hotelier-lessor and the lessee-provider of casino-type services, within a hotel, presents additional advantages compared to those specific to the lease agreement in the

[25] See Stanciu D. Cărpenaru, *Treatise on Romanian commercial law*, 6th edition updated, Universul Juridic Publishing House, 2019, p. 12.

[26] See in this regard, Elise Nicoleta Valcu, *Sustainable development and sustainable tourism in the European Union*, „The Annals of the Stefan cel Mare University of Suceava. Fascicle of the Faculty of Economics and Public Administration", vol. 9/2009, Issue Special, (ISSN 2066-575X), pp. 66-70.

HoReCa field, for the contracting parties, for example:

- increases the hotelier's income by collecting from the lessee the sums of money related to the contracted rent;
- increases the business of both the hotelier and the lessee (for example, the casino[27]), by attracting new domestic or international customers-tourists, consumers of the products and services offered by both parties;
- promotes the tourist activities of the hotelier as well as of the lessee, carried out on the territory of Romania; consolidates the collaborative relationship between them, in the long term, etc.

3. Considerations and statistics regarding the HoReCa rental contract concluded between the hotel and the casino

The emergence and maintenance of the Covid 19 pandemic situation for a long period, had an important impact on the global tourism market, in the present case regarding the market of hoteliers and casinos, imposing significant travel restrictions that led to the suspension/closure of their activity. All this has determined a reduction in the degree of occupancy of these traders, their related incomes as well as the trust of consumer-tourist customers in the services offered by these traders. The statistics carried out internationally for this segment of business trade have tried to make the collected information more transparent, with the aim of providing hoteliers and casinos with useful information to re-optimize their business.

Thus, worldwide, the Horizontal Digital institution has published a number of data[28] regarding the provision of tourist and casino-type activities within a hotel, for the period 2022-2023, regarding the perception of entrepreneurs in this trade segment affected by the evolution of their businesses in the context of the Covid 19 pandemic. Thus, the statistics carried out noted the fact that, for the analyzed period, it is estimated that hotel rates increased by 54%, while the collaboration between the hospitality industry and that of casino games, is in percentage development with a rate of 5.14%. At the same time, 88% of clients state that they are looking for vacations that include personalized local experiences during their vacations and trips.

Also, for the geographical areas: Europe, North America, Latin America, Asia Pacific, Africa and the Middle East, the Mordor Intelligence organization has published data[29] on the performance of these activities for the period 2023-

[27] Following the Covid 19 pandemic, due to the fact that there are significant decreases in tax revenues around the world, various alternative ways of increasing them are being sought. In this regard, the legalization of casino-type gambling activities, which also includes sports betting, is constantly growing. See in this regard, https://www.bdo.com/insights/industries/gaming-leisure/5-trends-driving-the-gaming-and-hospitality-industry-for-2021 accessed on 17.09. 2023.

[28] See in this regard, https://www.horizontaldigital.com/insights/gaming-and-hospitality-industry-is-evolving-the-way-they-connect accessed on 17.09.2023.

[29] See in this regard, https://www.mordorintelligence.com/industry-reports/europe-operation-intel

2028. Thus, the statistics carried out noted the following:

- the Covid 19 pandemic had a significant impact on the global business segment in the hospitality and tourism industry, especially in the HoReCa field, which includes hotels where casino-type gambling activities are also carried out, which thus led to a significant decrease in revenue receipts as well as hotel room occupancy rates. Because of this, this segment presented a decrease in revenues in 2020, respectively by a percentage of 31% in 2020 compared to 2019;

- in the period of 2020-2023, however, these businesses have grown a lot, especially in developing economies such as those in the Asia-Pacific area. Despite all these challenges, globally it is estimated that this business segment will gradually recover in the coming years, thanks to factors such as: the reduction of travel restrictions, the launch of vaccines, the widespread adoption of innovative technologies such as virtual reality such as and artificial intelligence.

Therefore, for the studied and forecasted period 2023-2028, it is estimated that this business segment will register an annual growth rate of 4%.

4. Alternative dispute resolution methods (ADR) regarding the rental contract in the HoReCa field

In the event of a dispute regarding a lease contract in the HoReCa field, the collaborative relationship between lessors and tenants in the HoReCa field is affected. This determines that the use of an alternative voluntary extrajudicial dispute resolution method (called "ADR"), becomes applicable, feasible.

Disputes, litigations regarding the rental contracts of the premises - parts of a hotel, in this field, can often be expensive and take a long time. In this sense, those arising between the contracting parties and resulting from non-compliance with contractual obligations fall under the typology of B2B (business to business) disputes, namely those in which the dispute takes place between the owner of the HoReCa unit, respectively the hotelier - in his capacity as lessor and the merchant - lessee with whom he has commercial relations. Therefore, in the case of these types of situations, for resolving disputes amicably, out of court, it may represent the right solution for the contracting parties.

In general, the analysis of the advantages of alternative out-of-court dispute resolution methods differs according to the category above. The disputes that could result from the rental contract concluded between the lessor hotelier and the lessor merchant, are part of the category of B2B disputes and can contain both a national and an international component. The international component can intervene between commercial parties, who have their headquarters in the same jurisdiction of disputes that include elements of internationality[30], and can be determined, for example, by the following types of membership:

ligence-market-industry accessed on 20.10.2023.

[30] See Ioan Macovei, *Private International Law Treaty*, Universul Juridic Publishing House, Bucharest, 2017, pp. 12-13; Laura Magdalena Trocan, *Correlations between international trade*

- of the hotel lessor - to an international hotel chain in the situation of the existence of an international brand franchise contract[31] based on which the hotel operates on the territory of Romania, in which case the provisions of the respective contract are applicable,

- of the merchant lessee - at an international chain of casinos, in which case the provisions and procedures specific to it are applicable, on the territory of Romania.

In a general sense, in the category of ADR methods, the following are included: arbitration, mediation, conciliation[32], anticipated neutral evaluation, mini-trial[33], extrajudicial expertise carried out jointly by the parties, online dispute resolution (e-ADR or ODR), international inter-institutional body - European Ombudsman, litigation commissions, etc. Among the general advantages of using ADR methods are the following: they represent flexible, informal procedures, applicable to both individuals and legal entities; limit and remove the state of hostility between the parties; involve the participation of a third party that supports the parties involved in the dispute, in identifying a solution mutually acceptable to the latter; involves low costs of time and money; the proceedings are completed with the rapid pronouncement of a resolution/judgment; involve confidential procedures, essential in the conduct of commercial business relations between the parties; easy implementation of the pronounced solution; also trains the use of specialists (for example, arbitrators, mediators, etc.) with expertise in the field of activity that is the subject of the respective dispute, etc.

Regarding the ADR methods related to the rental contract in the HoReCa field, they include, for example, arbitration, mediation[34], negotiation, etc. In this sense, it is necessary to continue in a future work, the analysis in particular of the advantages presented by the use of arbitration as well as mediation in the case of B2B type disputes resulting from the conclusion of the rental contract between professionals-merchant legal entities.

law and other branches of law, „Annales of the "Constantin Brâncuşi" University of Târgu Jiu, Series of Legal Sciences" no. 3/2013, pp. 85-88.

[31] See Charlotte Ene, *Contractul international de franchising*, University Press, Bucharest, 2009, p. 219 et seq. as well as Stanciu D. Cărpenaru, *op. cit*., pp. 586-596.

[32] See, Julian M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration*, Ed. Kluwer Law International, Hague, Netherlands, 2011, pp.12-13.

[33] See, Gary B. Born, *International Arbitration: Law and Practice*, Ed. Kluwer Law International BV, Netherlands, 2012, p. 14.

[34] See in this regard, https://www.imia.com/wp-content/uploads/2013/05/GP04-2004-Alternative-Dispute-Resolution.pdf accessed on 19.10.2022, as well as https://www.consorsegurosdigital.com/en/numero-01/content/contributions/out-of-court-dispute-resolution-mechanisms-in-the-insurance-sector, accessed on 19.10.2022, at 19.06.

5. Conclusions

The context of the Covid-19 pandemic imposed a series of both theoretical measures, expressed through legislative and practical regulations, aimed at implementing these regulations for the benefit of the HoReCa sector. These actions have been designed to support both professional traders and hoteliers, taking into account the perspective of the latter, but also of tourists who are consumers of the services and products offered by the hospitality industry within this field. Particularly relevant in this perspective are the efforts made to revitalize the tourism sector in Europe, which is by far the most sought-after tourist destination globally. Tourism occupies an essential position in the economy of the European Union, contributing 10% to the gross domestic product. In the light of the aforementioned health crisis, the European Union shows an obvious concern to breathe new life into this strategic sector of activity.

In the first four months of 2020, Europe recorded a significant reduction of 44% in the number of international tourists compared to the same period of the previous year, thus reflecting the global evolution of tourism performance. The impact of the crisis was dramatically felt in the field of tourism manifesting itself in substantial job losses during 2020, where rental contracts in the sector decreased by less than a third compared to the previous period.

In this complex context, the European Commission has intervened with multiple legislative instruments, initiatives and proposals aimed at addressing various aspects, including the situation of airlines[35], passenger rights[36], border controls[37] and assistance for the repatriation of travelers from the EU[38], during the travel restrictions applied between March and May 2020. These actions were complemented by a series of recovery measures, communications and subsequent proposals, where the European Parliament expressed its position on three exceptional legislative proposals on 26 March 2020. These proposals it aims at the investment initiative in response to the new context generated by the coronavirus pandemic, the expansion of the European Union's solidarity fund to cover public health emergencies and the temporary suspension of airport slot rules. As an immediate reaction, the European Parliament adopted a resolution on tourism and transport in the same year.

In March 2021, the European Parliament adopted, on its own initiative, the report entitled "Establishment of a European Union strategy for sustainable

[35] See in this regard, https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vl6xj8kkklzp, accessed on 13.11.2023 at 20.04.

[36] See in this regard, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020XC0318%2804%29 accessed on 13.11.2023 at 20.07.

[37] See in this regard, https://data.consilium.europa.eu/doc/document/ST-6842-2020-INIT/en/pdf, accessed on 13.11.2023 at 20.09.

[38] See in this regard, https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/699 613/IPOL_ATA(2022)699613_EN.pdf as well as https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA(2022)699613 accessed on 13.11.2023.

tourism", by which it requested the member states to implement common criteria and coordinates for tourist trips, in safe conditions. Also, in 2022, the European Commission launched its own plan called "Transition Path for Tourism". The update of the EU industrial strategy emphasized the imperative of strengthening the resilience of the tourism sector, accelerating the digital transition as well as the green transition, in the context of the Covid-19 pandemic. This transition has identified 27 areas of action aimed at increasing the resilience of the EU tourism industry.

In response to this plan, in December 2022, the European Council adopted the "EU Agenda for Tourism 2030". The agenda focuses on five major priorities: green transition, digital transition, resilience and inclusion, skills development and assistance, and the governance and policy facilitation framework. Each of these priorities includes a series of specific actions. In this context, the deep involvement of the EU institutions in the tourism sector is highlighted, with direct repercussions on the HoReCa field, an essential segment without which tourism would be without foundation and from a wider perspective, we can even argue that these two segments they merge working together in a common body. At the same time, in order to facilitate the development and maintenance of contractual relations in the field of business and to respond to the changes occurring at the global and European level in a broad social context, marked by the pandemic and social and geopolitical realities, the parties involved in the contractual relations identify innovative solutions. Especially with regard to the lease contracts in the HoReCa field, they include provisions aimed at preventing possible disputes, favoring the amicable resolution of disputes, with special attention paid to B2B relationships. By adopting clauses to this effect, potential disagreements are anticipated and managed, using alternative dispute resolution (ADR) methods. They provide both the necessary confidentiality and efficiency as well as appropriate expertise compared to the options offered by state judicial courts.

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NAVIGATING CROSS-BORDER LEGALITIES

Trafficking in Human Beings.
Peculiarities of Criminal Legal Characteristics

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Abstract

This article is dedicated to human trafficking as one of the most dangerous and highly profitable forms of international organized crime. The study examines the process of the international community's fight against such an international crime, analyzes the international legal acts aimed at suppressing this crime. The legislation in force in Romania is researched, concepts such as "human trafficking", "human exploitation", "recruitment", "transportation", as well as certain features of the criminal law and the forensic characteristics of the analyzed crime, are revealed, which features of this crime must be taken into account, the importance of human trafficking investigations.

Keywords: *crime, human trafficking, organized crime, human exploitation, recruitment.*

JEL Classification: K14, K33

1. Introduction

In our time we can only imagine the human person as free, unrestrained in his movement and actions. In order to have this right recognized, centuries of social upheaval had to pass, the entire history of mankind illustrating the struggle of the masses against oppression, for freedom[2].

From a social point of view, human trafficking is considered to be one of the modern forms of slavery (so-called "white slavery"), and from a criminological point of view - one of the most dangerous and profitable forms of international organized crime.

The use of slave labour and human trafficking is quite widespread in the world, it is the fastest growing type of criminal activity and ranks third in terms of profitability after the drugs and arms trade. Organised criminal groups make tens of millions of euros from human trafficking. According to estimates by experts at UNESCO and the International Labour Organisation (ILO), the slave trade exists in 127 countries and the exploitation of slaves takes place in 137 countries. There are 5.7 million children and 1 million girls forced into prostitution each year as victims of forced labour. In addition, the proceeds from the sale of people contribute to the financial support of international terrorist activities.

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[2] G. Antoniu, M. Popa, St. Danes, *Criminal Code for Everyone*, 3rd edition, revised and added, Political Publishing House, Bucharest, 1976, p. 202.

According to the United Nations Office on Drugs and Crime, a pressing problem that is attracting the attention of the entire global community is human trafficking. Globally it is estimated at 32 billion dollars; the number of victims is around 2.4 million, of which 2/3 are women and children[3].

The proceeds received by criminal organisations from the commission of offences related to trafficking in human beings (THB) and the use of slave labour are extremely lucrative and are comparable to and sometimes even exceed the arms trade and drug trafficking, therefore such clearly underestimated statistical reporting indicates a high latency of such acts.

A recent study, the Global Initiative against Transnational Organized Crime, found that human exploitation has become the world's most widespread criminal economy[4].

The United Nations Children's Fund (UNICEF) also estimates that approximately 28% of identified victims of trafficking globally are children. In regions such as sub-Saharan Africa, Central America and the Caribbean, children account for an even higher proportion of identified victims of trafficking, 64% and 62% respectively[5]. However, there is a lack of systematic data on trafficking worldwide. In terms of profitability, the trade in '*life goods*' is estimated to be third after drugs and arms smuggling.

In modern conditions of globalisation, simplification of border crossing procedures and increasing migration flows, trafficking in human beings is becoming increasingly transnational in character and is closely linked to document forgery, illegal migration and corruption, carried out for the purposes of labour and sexual exploitation, illegal adoption, trafficking in human organs and tissues, which in some cases significantly complicates the framing of this crime and increases its latency.

The complex and transnational nature of trafficking in human beings, its link to organised crime, which is less vulnerable to direct anti-criminal influence, has made it necessary to combine international and domestic legal mechanisms to combat this phenomenon.

One of the key conditions for the effectiveness and efficiency of joint efforts by states to combat trafficking in human beings is the use of a unified approach in formulating legally significant categories in this area. Firstly, this relates to the very concept of trafficking in human beings, the definition of which has not been developed in international law for a long time.

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[3] United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, New York, 2022, https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_chapter_1_Global_Overview_230123.pdf.

[4] Global Initiative against Transnational Organized Crime, *Global Organized Crime Index 2021* (Geneva, 2021). Available at: https://globalinitiative.net/wpcontent/uploads/2021/09/GITOC-Global-Organized-Crime-Index-2021.pdf

[5] UNICEF, Children account for nearly one-third of identified trafficking victims globally, https://www.unicef.org/press-releases/children-account-nearly-one-third-identified-trafficking-victims-globally.

International cooperation between states in the fight against human trafficking began with the Declaration on the End of the Slave Trade, adopted at the Congress of Vienna in 1814-1815, and continued until the end of the 19th century. At the beginning of the 20th century such cooperation was achieved as part of the fight against the slave trade. There was an awareness of the need to ban both the slave trade and slavery itself. At the same time, the attention of the international community is being drawn to the problem of stopping the sale of women and children into slavery, and especially into prostitution.

However, the 1904 International Agreement for the Suppression of the White Slave Traffic, the 1910 International Convention for the Suppression of the Traffic in Women, the 1921 Geneva Convention for the Prohibition of the Traffic in Women and Children, the 1933 International Convention for the Suppression of the Traffic in Women and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others do not contain a definition of the concept of trafficking in persons. Moreover, the first formal mention in an international legal act of the term "trafficking in persons", regardless of gender and age, occurred in the 1949 Convention, which, as the preamble to the Convention shows, combines the above acts[6].

Included in Article 3 of the Palermo Protocol, the definition of trafficking in human beings, first agreed at international level, has subsequently spread to various acts of international law and national legislation of States. Elements of trafficking in human beings have been included in the criminal codes of Australia, Armenia, Belarus, Hungary, Spain, Kazakhstan, Kyrgyzstan, China, Colombia, Costa Rica, Cuba, Lithuania, Moldova, the Netherlands, Paraguay, Poland, Russia, Romania, El Salvador, Slovakia, Tajikistan, Uzbekistan, Ukraine, Montenegro, Sweden. This definition is fully adopted by the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. As regards other regional acts, for example, the 2005 Agreement on Cooperation of CIS Member States in Combating Trafficking in Human Beings, Organs and Tissues contains three main elements of the definition of trafficking in human beings taken into account, without taking into account the consent of the trafficked person to the planned exploitation if any of the specified means of coercion have been used, and the provision that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered trafficking in human beings, even if not associated with the use of any of the specified means of coercion. This approach is not supported, as international law is based on the need to establish enhanced safeguards for the safety of children, including against the practice of child trafficking.

[6] This refers to the 1904 Agreement and the Conventions of 1904, 1921 and 1933. amended by the 1947 and 1948 Protocols.

2. National legislative framework

The Romanian Constitution recognises and guarantees the fundamental rights and freedoms of man and of the citizen in accordance with the generally recognised principles and norms of international law. Paragraph 1 of Article 23 of the Romanian Constitution proclaims the right to individual freedom and security of person; paragraphs 1 and 2 of Article 25 enshrine the right to move freely, to choose a place of residence and residence; Article 41 of the Constitution guarantees freedom of work and the right to freely dispose of the capacity to work, to choose the type of activity and profession, and Article 42 prohibits forced labour.

These legal freedoms have been the result of the historical development of society and international legal regulations, yet despite being outlawed by the global community and national legislation, human trafficking has existed to this day for centuries.

In national legislation, trafficking in human beings is defined in Articles 12 and 13 of Law No. 678/2001 on preventing and combating trafficking in human beings, as subsequently amended and supplemented, using a definition consistent with that of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The enforcement of criminal liability by law enforcement bodies has shown that it is necessary to create modern criminal legal means to combat crimes that infringe on the personal freedom of the person, and with the adoption of the new Criminal Code in 2009 (Law 187/2012 for the implementation of Law 286/2009), which entered into force on 1 February 2014, Romania has fulfilled its international obligations imposed by signing the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime.

In the new Criminal Code of Romania, the responsibility for trafficking in persons is achieved in a unitary way, by including new provisions in Title I - "Offences against the person", Chapter VII - "Trafficking and exploitation of vulnerable persons", known as: "Trafficking in persons" (art. 210).

The establishment of criminal liability for these acts can be explained by the following reasons. Firstly, these offences have become relatively common and therefore socially dangerous. Secondly, trafficking in human beings has serious consequences for the trafficked person. For example, the victim loses his or her personal freedom, is subjected to exploitation, his or her health deteriorates and sometimes even death is caused, and human trafficking is facilitated by the fact that this crime generates quite high revenues, as it is associated with the exploitation of the people the criminal's traffic.

The prevalence of trafficking in human beings is explained by the fact that the principle of inevitability of liability in the commission of this crime is not

respected. Most perpetrators commit this crime, confident that they will go unpunished. That is, the level of latency of this crime is high.

It is well known that criminal law plays an important role in the fight against all types of crime, including trafficking in human beings. In turn, the effectiveness of its enforcement depends on the quality of the criminal law, and the wording of Article 210 of the Criminal Code is unclear and, in my opinion, has a number of shortcomings.

From the legislative definition contained in the provision of Part 1 of Article 210 of the Criminal Code, it is concluded that the offence is committed only as human exploitation by recruiting, transporting, transferring, harbouring a person or receiving a person for the purpose of exploitation.

All the criminal methods mentioned in the law must be complemented by the buying and selling actions, which constitute trafficking in human beings. Buying and selling are paid transactions in which one party (the seller) undertakes to transfer ownership (the product) to the other party (the buyer) and the buyer undertakes to accept this product and pay a certain amount of money (the price) for it.

These actions involve an illegal compensation transaction in which one party (the seller) transfers one or more persons for a fee to the other party (the buyer), and the buyer receives them and transfers to the seller a reward in the form of money, property or ownership. In this case, the buyer may be either a person who intends to use a "*live product"* directly or a person who purchases it for the purpose of resale and profit from the action. Most of the actions listed in the provisions of Part 1 of Article 210 of the Criminal Code are not trade in the exact sense of the word. Among them, the action of exploitation of persons is particularly noteworthy, which is highly dangerous and directly related to trafficking in persons, as the trafficked person is usually exploited.

It is worth noting that the legislator has included in the provision of Article 210 of the Criminal Code the words "*other benefits*", because it excludes the possibility of a person being held criminally liable if he or she has not offered, given, accepted or received money in exchange for human trafficking. The legislator has also provided in the article that the consent of the trafficked person does not constitute justifiable cause.

Let us briefly consider the individual features of criminal law as well as the forensic characteristics of the crime under analysis.

The object of the offence provided for in Article 210 of the Criminal Code of Romania consists of public relations aimed at securing the individual's freedom, rights and legitimate interests, so that any person can be recognized as a victim of this crime, and the concept of "*personal freedom*" is a right of a person, within which an action or inaction is carried out in accordance with his will and desired choice. Personal freedom implies physical freedom, freedom of movement, choice of permanent or temporary place of residence, protected interests such as honour and dignity, inviolability of private life, i.e. with every act of

trafficking in persons, the specified components of freedom as a whole are harmed.

In fact, human trafficking involves the criminal movement of people against their will, usually using deception or violence. In such cases, a person's health and dignity will act as an additional object, and in cases of illegal migration, a violation of public order.

The offence shall be regarded as completed when one of the actions referred to in the provision of the article, such as recruitment, transportation, transfer, harbouring or receipt for the purpose of exploitation of the victim is committed, irrespective of the consequences of the occurrence of the exploitative situation. The list of these actions is exhaustive and the commission of one of them forms the objective side of the offence.

On the basis of this, we can say that a crime is committed only by an action, and the person must be aware of the purpose of the actions he/she performs; all of them must be committed for the purpose of exploitation, otherwise such actions do not form the objective side of these elements of a crime or form other elements of crimes (e.g. kidnapping or unlawful deprivation of liberty).

Exploitation is the appropriation of the results of the work of another; in connection with this article, the legislator has specified the concept of exploitation in Art. 207 of the Criminal Code of Romania: "exploitation of a person means: a) the forced performance of work or services in violation of the legal rules on working conditions, wages, health and safety; b) keeping in a state of slavery or other similar procedures of deprivation of freedom or servitude; c) forcing to practice prostitution, pornographic manifestations for the production and dissemination of pornographic material or other forms of sexual exploitation; d) forcing to practice begging; e) organ removal.

Recruiting means hiring, recruiting for any job, engaging in any activity, including illegal activities, engaging in any organization, including whose activities are prohibited by law. Methods of recruitment may include persuasion, deception, etc.

Transport - actions related to any movement of the victim from one place to another, whether in the same town, city, country or abroad.

Transfer involves the action of an intermediary in carrying out the actions required by the law on trafficking in human beings, as well as the subsequent transfer to other persons of the victim after the purchase or sale, or other transaction, by the buyer himself, e.g. for temporary accommodation and residence, use, etc.

Receiving a person is the opposite of transmitting. Harboring - is an action aimed at hiding the victim from any interested parties (law enforcement agents, relatives).

The active subject of this offence is a healthy person, who has reached the age of criminal liability provided for by the Romanian Criminal Code - 16

years. The passive subject of the offence provided for in Article 210 of the Criminal Code of Romania is a person regardless of sex, race, age, nationality, state of health, social status and degree of relationship with the offender.

The subjective side is expressed by guilt in the form of direct intent. The active subject of the offence realises that he is committing an act or transaction against a person, or other actions aimed at further exploitation, and wishes to do so.

Paragraphs a), b) and c) of Article 210 of the Criminal Code of Romania list qualified elements of an offence, such as: by coercion, abduction, misleading or abuse of authority; by taking advantage of the impossibility to defend oneself or to express one's will or of the state of manifest vulnerability of that person; by offering, giving, accepting or receiving money or other benefits in exchange for the consent of the person having authority over that person, most of which are traditional for criminal law and do not require detailed explanations.

3. Human trafficking investigations and their importance

Trafficking in human beings usually takes place according to the following pattern: recruitment and export - transport - reception and exploitation. The components of this crime remain unchanged, regardless of whether the victim is moved by the offender to one country or another. The difference here is that, in the second case, the offender must ensure that the victim crosses the state border (usually illegally). Exploitation, slave labour and other servitude are ensured by direct physical or mental coercion, debt dependency, etc.

Practice shows that, at the recruitment and transportation stages, even if the elements of a particular crime (e.g. preparation or attempt) are present, law enforcement agencies usually face serious difficulties in obtaining evidence.

Prospective victims of human trafficking have no idea what kind of "*job*" they are promised upon arrival in the destination country. Traffickers become truly vulnerable in terms of exposure when they start exploiting the victim. Thus, the methodology for investigating trafficking in human beings must necessarily include provisions for the use of the results of operational investigative activities. Taking victim testimony alone as the basis for investigation and evidence is highly ineffective - victims of human trafficking rarely contact law enforcement agencies, most often they are afraid of revenge against themselves and their loved ones from the perpetrators, as well as publicity.

A study of the practice shows that typical sources of information about human trafficking can be:

- advertisements (magazines, newspapers, websites, etc.) offering work abroad without indicating the nature of the work;
- advertisements about the provision of dubious leisure services in saunas, massage parlours, entertainment clubs, etc;
- databases of visa departments at embassies or consulates, as well as

companies involved in tourism and employment abroad;

- contacts with representatives of these companies, embassies and consulates;

- contacts with employees of saunas, massage parlours, hotels, bars, clubs, advertising agencies, rental agencies, port and airline employees.

The development of a forensic methodology for investigating this type of crime should take into account these and many other characteristics of criminal law and forensics. It is also necessary to take into account the experience of combating these offences in other countries. Trafficking in human beings, as we know, is a transnational crime, which means that international cooperation and interaction between law enforcement agencies in different states plays a fundamental role in the fight against trafficking in human beings.

In comparison, if in 2001 the ILO considered Romania as an area of origin or transit, identifying a number of factors that favoured the emergence and development of trafficking[7], in 2021 according to statistics published by the National Agency against Trafficking in Persons, the trend is decreasing, thus 505 victims of trafficking in persons were identified and notified to the Romanian anti-trafficking system, this value measuring both the size of domestic and international trafficking whose victims were Romanian citizens. In 2021, the trend of decreasing the number of victims observed since previous years is maintained, with 15% fewer victims being notified than in 2020[8].

According to the TIP Report prepared in 2022, by U.S. Mission Romania, for the year 2021, Romania has been promoted to Level 2, because compared to the previous period, the Government has made significant efforts to eliminate human trafficking, even if the minimum standards have not been fully met.

Thus, Romanian authorities opened 628 new cases of human trafficking (571 cases for sexual exploitation, 35 for forced labour and 22 unspecified), 552 more than in 2020. Authorities prosecuted 522 suspected traffickers (506 cases for sexual exploitation, 6 for forced labour and 10 unspecified), a significant increase compared to 2020, when only 234 new cases were reported. Courts convicted 162 traffickers (127 for sexual exploitation, 35 for forced labour), up from 142 in 2020. The majority of convictions for trafficking ranged from prison sentences of 3 years to 12 years. However, 39 convicted traffickers (24%) received prison sentences of less than three years, which do not comply with the minimum sentence provided for in Articles 210 (Trafficking in human beings) and 211 (Trafficking in minors), and 30 convicted traffickers (19%) received suspended sentences. Such lax sentences given to convicted traffickers weakened deterrence, did not adequately reflect the nature of the offence and thwarted overall efforts to combat trafficking[9] .

[7] ILO, *Vulnerability of Young Women in Romania to Human Trafficking*, 2001

[8] ANITP Romania, *Annual report on the evolution of human trafficking in 2021*, Bucharest, 2022, p. 9, https://anitp.mai.gov.ro/ro/docs/studii/Raport%20anual%202021.pdf

[9] *Trafficking in Persons Report* (2022), U.S. Department of State, U.S. Mission Romania, https://ro.

As financial gain is the main factor motivating criminals to engage in human trafficking, it becomes obvious that "*money tracking*" is a major action to detect criminals profiting from human trafficking. A 2017 report by the ILO and Walk Free warned that there are an estimated 40 million people trafficked globally and that each year these crimes generate $150 billion in profits through the exploitation of people[10] .

The 2019 OSCE report "Tracking Money - Resource Compendium and Step-by-Step Guide for Financial Investigations of Trafficking in Human Beings"[11], highlights that investigations into the financial aspects of THB can support each pillar of the OSCE framework against THB.

First and foremost, the cornerstone of any effective anti-trafficking response is the investigation and prosecution of traffickers. Prosecutions uphold the rule of law, ensure community safety, protect victims and help prevent future crimes by convicted criminals. However, there can be many challenges to investigating and prosecuting THB, including insufficient evidence to hold perpetrators accountable, heavy reliance on victim testimony and cooperation, lack of coordination among law enforcement organizations, inadequate legislation to hold offenders accountable, and the absence of a robust system. Thus, to counter these challenges and to build successful and effective investigations and prosecutions, law enforcement and prosecutors should incorporate evidence from the financial sector into their cases. Financial evidence can, for example, help identify victims and alert authorities to THB even before a victim's report is received; can corroborate a victim's testimony and provide additional context about the scope of criminal activity; and can help identify associates and institutions that may be complicit in the crime.

Secondly, money confiscated from criminals can be redirected to their victims, helping to protect them and repair the damage they have suffered.

Third, the use of financial investigations as a method of investigating human trafficking offences can frustrate the prosecution of offenders, decrease profits as a result of committing the crime, and also cause offenders to perceive the risks they are taking.

Last but not least, addressing the financial implications of human trafficking can build better partnerships between sectors, including in particular public and private institutions.

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usembassy.gov/ro/raportul-privind-traficul-de-persoane-2022/

[10] ILO and Walk Free, *Global estimates on modern slavery: Forced labour and forced marriage* (Geneva, International Labour Office, Geneva, 2017). https://www.ilo.org/wcmsp5/groups/public/---dgreports/-dcomm/documents/publication/wcms_575479.pdf.

[11] Organization for Security and Cooperation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Following the Money - Compendium of Resources and Step-by-Step Guide to Financial Investigations Related to Trafficking in Human Beings, October 2019, p. 19, antitrafficking.gov.md/public/files/Following_the_Money_Compendium_of_Resources_and_Step-by-step_Guide_to_Financial_Investigations_Into_Trafficking_in_Human_Beings.pdf.

Because many of the points of contact between THB and the financial services industry are located in the private sector, public anti-THB response systems must build partnerships with private companies to meet the objectives outlined above. The private sector also has a strong incentive to identify and eliminate the misuse of their businesses for THB and can thus benefit from partnerships with the public sector, including law enforcement[12] .

In this regard, the Finance Against Slavery & Trafficking (FAST) Blueprint Project is an innovative and ambitious strategy to accelerate action against modern slavery and human trafficking, but the financial sector alone cannot eradicate the crime of human trafficking. Financial institutions can be connected to modern slavery and human trafficking through their own operations or business relationships. Because the financial sector is so intertwined with the rest of the economy, action by the financial sector can help change the way the entire global economy works. The financial sector has a unique opportunity at this critical time to lead the transformation of our global economy to tackle modern slavery and human trafficking[13].

4. Conclusions

Following the above summarized, we consider that the legislation in the field of criminal regulation of trafficking in human beings is not always without imperfections. The amendments, additions and clarifications made to the content of the rules laid down in Article 210 of the Romanian Criminal Code often prove to be insufficient. As a result, it is necessary to continue the research activities of specialists in the field of modernisation of the current criminal legislation. Consistent presentation of regulatory materials becomes the basis for effective law enforcement activities.

Modernising criminal law rules means using the necessary empirical material. In this respect, domestic and foreign experience in combating the development of human trafficking deserves attention. Guided by this provision, it is logical to pay attention to the interaction of states in the fight against this social and legal phenomenon, but also of other institutions or international bodies. The development of regional programmes to combat trafficking in human beings and the use of slave labour, based on an appropriate legal framework at federal level, deserves some attention.

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The Right to Defence, an Indispensable Right for the Rule of Law

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Abstract

The right to defense is a principle enshrined since Roman law, being considered a minimum requirement and a necessary guarantee to realize the defense of the fundamental rights and freedoms of any party in a process. According to Roman law[2]*, the advocatus (lawyer) "was not a representative in court, because he did not participate in the process in place of the party, but alongside the party supporting it through the legal knowledge he had. The lawyers' services were free. Women could not practice law." At the same time, referring to the application of the right to defense in Romanian law, "the trial took place in a building, in the presence of the magistrate, the parties, the lawyers and some court officials."*[3] *We thus observe the importance of this principle since ancient times, no person could be tried without the presence of a defender, not even the slave. The study aims to carry out a detailed analysis, both from a theoretical and a practical point of view, of the right to defence, based on the implications of domestic law, but also the provisions of international treaties on human rights and the jurisprudence of the ECHR.*

Keywords: *right to defense, fair trial, right to information, presumption of innocence, procedural guarantees.*

JEL Classification: K10, K41

1. Introduction. Regulation of the right to defence

Nowadays, the implications of the right of defense have a wider scope of application[4]. Thus, we find it both at the national level (Criminal Procedure Code, the Constitution of Romania, etc.) and at the international level (European Convention on Human Rights).

In accordance with the provisions of art. 10 Criminal Procedure Code," the parties and main procedural subjects have the right to defend themselves or to be assisted by a lawyer. The parties, the main procedural subjects and the lawyer have the right to benefit from the time and facilities necessary to prepare the

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[2] E. Molcuț, *Drept privat roman*, Ed. Universul Juridic, Bucharest, 2011, p. 383.

[3] Idem, p. 83.

[4] For a comparative view see Schachter, Oscar, *Self-Defense and the Rule of Law*, „The American Journal of International Law", vol. 83, no. 2, 1989, pp. 259–77; https://doi.org/10.2307/2202738. Accessed 25 Jan. 2023; Harry Amankwaah, *The rule of law and armed conflict reconstruction implementation practices: A human right-based analysis of the Rwandan experience*, „Cogent Social Sciences", 9:1, 2023, DOI: 10.1080/23311886.2023.2171573.

defense. The suspect has the right to be informed, before being heard about the deed for which he is being investigated and its legal framework. The defendant has the right to be informed immediately about the deed for which the criminal action against him was initiated and its legal framework. Before being heard, the suspect and the defendant must be reminded that they have the right not to make any statement. The judicial bodies have the obligation to ensure the full and effective exercise of the right to defense by the parties and main procedural subjects throughout the criminal process. The right to defense must be exercised in good faith, according to the purpose for which it was recognized by law."

Considering the provisions of art. 24 of the Constitution, "the right to defense is guaranteed. Throughout the process, the parties have the right to be assisted by a lawyer, chosen or appointed ex officio."

The Universal Declaration of Human Rights provides in art. 11, point 1 provides that: "any person accused of committing a criminal act has the right to be presumed innocent until his guilt has been legally established during a public trial in which all guarantees have been ensured necessary for its defense".

Likewise, the International Covenant on Civil and Political Rights shows in art. 14, point 3 the following: "Any person accused of committing a criminal offense has the right, under conditions of full equality, to at least the following guarantees:

a) to be informed as soon as possible, in a language she understands and in detail, about the nature and reasons of the accusation brought against her;

b) to have the time and facilities necessary to prepare his defense and to communicate with the defender he chooses;

c) be judged without excessive delay; d) to be present at the trial and defend herself or have the assistance of a defense attorney chosen by her; if she does not have a defense attorney, to be informed of the right to have one and, whenever the interest of justice requires it, to be assigned a defense attorney ex officio, without payment if she does not have the means to pay him;

d) to interrogate or cause to be interrogated the witnesses of the prosecution and to obtain the appearance and interrogation of the witnesses of the defense under the same conditions as those of the witnesses of the prosecution;

e) to benefit from the free assistance of an interpreter, if he does not understand or speak the language used at the court session;

f) not to be forced to testify against herself or to plead guilty".

We therefore note that the right to defense is not limited to the assistance or representation of a party by a lawyer, being much broader and following an obvious progress over time, encouraging respect for human rights, without discrimination and being recognized by all procedural systems[5].

At the same time, we note that the regulation of the right to defense is not

[5] Little, David, „The Right of Self-Defense and the Organic Unity of Human Rights", *Journal of Law and Religion* 36, no. 3 (2021): 459–94. https://doi.org/10.1017/jlr.2021.59.

limited to the mentioned articles, as it is also guaranteed in other legal provisions, such as in the case of art. 374 paragraph (2) Code of Criminal Procedure, according to which: "the President explains to the defendant what the accusation against him consists of, informs the defendant of the right not to make any statement, drawing his attention that what he declares may be used against him as well, as well as regarding the right to ask questions of the co-accused, the injured person, the other parties, witnesses, experts and to give explanations throughout the judicial investigation, when he deems it necessary."

From this legal provision, a series of applications of the right to defense result, such as: the right to information, the right to remain silent, etc.

Another guarantee of the right to defense can be found in the provisions of art. 344 of the Code of Criminal Procedure, which gives the defendant, in the preliminary chamber phase, after being sent to court, the right to learn about the subject of the proceedings in this procedural phase, being notified of a copy of the indictment and being brought to him aware of the right to hire a defense attorney and the term in which, from the date of communication, he can make written requests and exceptions regarding the legality of the administration of evidence and the execution of documents by the criminal investigation bodies.

2. The guarantees of the right to defense

An important guarantee of the right to defense is information, which we find both in domestic law and in European law.

Thus, according to art. 83 Code of Criminal Procedure: "during the criminal trial, the defendant has the following rights: g) the right to be informed about his rights."

In accordance with art. 108 Code of Criminal Procedure: "the judicial body communicates to the suspect or defendant the capacity in which he is being heard, the act provided by the criminal law for which he is suspected or for which the criminal action was initiated and its legal framework (..) During the criminal prosecution, before the first hearing of the suspect or defendant, shall be informed of the rights and obligations provided for in paragraph (2). These rights and obligations are also communicated to him in writing, under his signature, and in case he cannot or refuses to sign, a minutes will be drawn up."[6]

Regarding the guarantee of the right to defense from the perspective of European law, art. 14, point 3 of the International Covenant on Civil and Political Rights: "Any person accused of committing a criminal offense has the right, under conditions of full equality, to at least the following guarantees: a) to be informed as soon as possible, in a language he understands and in detail, about the nature and reasons of the accusation brought against him."

[6] Art. 83 of the Code of Criminal Procedure.

The European Convention for the Protection of Human Rights and Fundamental Freedoms amended by Protocol no. 11 shows in art. 6, point 3 the fact that: "any accused has, in particular, the right: a) to be informed, in the shortest possible time, in a language he understands and in detail, about the nature and cause of the accusation brought against to."

In conclusion, we will note the fact that information is an important guarantee of the right to defense and exists for the entire duration of the criminal process, until a final judgment is issued.

Thus, the information, as a guarantee of the right to defense, includes the entire activity of the criminal investigation bodies and takes place, from a procedural point of view, both written and verbal.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 regarding the right to information in criminal proceedings[7] provides that: "Member States ensure that suspected or accused persons are promptly informed of at least the following procedural rights, as applicable in domestic law, to ensure the possibility of effective exercise of those rights:

a) the right to be assisted by a lawyer;

b) any right to free legal advice and the conditions for obtaining such advice;

c) the right to be informed about the charge, in accordance with Article 6;

d) the right to interpretation and translation;

e) the right to remain silent."

The said Directive also provides that "the right to information in writing about the rights at the time of arrest, provided for in this directive, should also apply, mutatis mutandis, to persons arrested for the purpose of executing a European arrest warrant, based on Council Framework Decision 2002/584/JAI of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States. To help Member States draw up the Bill of Rights for these persons, a model is provided in Annex II. That model is indicative and may be subject to revision in the context of the Commission's report on the implementation of this directive and also with the entry into force of all the measures in the Roadmap."

We therefore observe the fact that there are obligations for the member states regarding the written information of the person's rights at the time of arrest, precisely to guarantee the accused person the right to detailed information regarding the act of which he is accused.

Another guarantee of the right to defense is the right to an interpreter. In accordance with art. 12 Code of Criminal Procedure, "the parties and procedural subjects who do not speak or understand the Romanian language or cannot express themselves are assured, free of charge, the opportunity to get acquainted

[7] Published in Romanian in OJ L 142/1 of 1.6.2012, with subsequent modifications.

with the parts of the file, to speak, as well as to put conclusions in court, through an interpreter. In cases where legal assistance is mandatory, the suspect or defendant is provided free of charge with the opportunity to communicate, through an interpreter, with the lawyer in order to prepare the hearing, to introduce an appeal or any other request related to the resolution of the case."[8]

This right is granted to persons suspected or accused of committing a crime and who do not speak or understand the language in which the respective criminal procedure is carried out, being also provided for by Directive 2010/64/EU of the European Parliament and of the Council of October 20, 2010 regarding the right to interpretation and translation in criminal proceedings.

3. Exercising the right to defense. Defense tools

From the perspective of exercising the right to defense, we will analyze the most important "tool" of defense, the right not to make any statement or the "right to remain silent".

In domestic law, according to art. 10 paragraph (4) of the Code of Criminal Procedure, we find an obligation imposed on judicial bodies which, before hearing the suspect or defendant, must be made aware of the fact that he has the right not to make any statement.[9]

In accordance with art. 83 lit. a) from the new Code "it is brought to his attention that if he refuses to give statements, he will not suffer any unfavorable consequences, and if he gives statements they can be used as evidence against him."[10]

It should also be mentioned that the witness also benefits from certain procedural guarantees in the matter of the right not to self-incriminate. In accordance with art. 118 Code of Criminal Procedure: "The witness statement given by a person who, in the same case, before the statement had or, subsequently, acquired the capacity of suspect or defendant cannot be used against him. The judicial bodies have the obligation to mention, on the occasion of recording the statement, the previous procedural quality."

As a scope, the right against self-incrimination means that, in a criminal case, the prosecution should try to build its case without resorting to evidence obtained by coercion or pressure, against the will of the accused [Saunders v. The Kingdom United (MC), point 68; see also Bykov v. Russia (GC), § 92]. However, the right not to incriminate oneself does not, in itself, extend to the use, in a criminal procedure, of data that can be obtained from the accused by recourse to coercive powers, but that exists independently of the will of the suspect, such as, for example: documents obtained by virtue of a warrant, the taking of respiratory and blood samples and 24 Council of Europe/European Court of Human Rights

[8] Art. 12 of the Criminal Procedure Code.
[9] Art. 10 of the Criminal Procedure Code.
[10] Art. 83 of the Criminal Procedure Code.

2014 Guide on art. 6 of the Convention – Right to a fair trial (criminal aspect) urine and body tissue samples for DNA analysis [Saunders v. the United Kingdom (MC), § 69; see also O'Halloran and Francis v. the United Kingdom (GC), § 47].[11]

Another way of exercising the right to defense is the defendant's last word. According to art. 389 Code of Criminal Procedure: "Before ending the debates, the president gives the last word to the personal defendant. During the time when the defendant has the last word, no questions can be asked. If the defendant reveals new facts or circumstances, essential for solving the case, the court orders the resumption of the judicial investigation."

We thus observe the fact that, before completing the procedure, the defendant is granted the right to freely express his position regarding the act of which he is accused, without being able to be represented, having the opportunity to admit the act or to complete or rectify it own statements or the statements of other participants.

In the doctrine it was shown that[12]: "the last word is not to be confused with the defendant's conclusions from the debates held in the order established in art. 388 CPP, which can be presented in person, or his lawyer can take the floor. The right to the last word is exercised personally only by the defendant and is not subject to the rigors of adversarial proceedings, as he cannot be asked questions and cannot be interrupted. On this occasion, the defendant declares regarding the entire process, all aspects related to the accusation, the facts attributed to him and the way in which the judicial investigation was carried out, he can make requests for new evidence, regarding unknown facts or circumstances of court. In the case of special procedures (acknowledgment of guilt, agreement to admit guilt), in his reports, the defendant will refer to the facts and circumstances regarding which the application of the procedure intervened."

We therefore note the fact that listening to the suspect, or the defendant is a way to exercise the right to defense, being a right of the suspect or the defendant, which he can dispose of, as well as an obligation towards the judicial bodies.

4. Sanctions arising in the event of non-compliance with the right to defence

The main sanction that we find in practice when the right to defense is not respected is nullity.

In accordance with the provisions of art. 280 Code of Criminal Procedure, "violation of the legal provisions that regulate the conduct of the criminal

[11] European Court of Human Rights. Guide regarding art. 6 of the Convention. The right to a fair trial, 2014, https://www.echr.coe.int/documents/d/echr/Guide_Art_6_criminal_RON.

[12] A. Crișu, *Drept procesual penal. Partea specială*, 3rd edition, revised and updated, Ed. Hamangiu, Bucharest, 2022, p. 227.

process attracts the nullity of the act under the conditions expressly provided by this code. Acts performed subsequent to the act that was declared void are in turn struck by nullity, when there is a direct link between them and the act declared void. When it finds the nullity of an act, the judicial body orders, when necessary and if possible, the restoration of that act in compliance with the legal provisions."[13]

In practice, nullity can be invoked both during the criminal process and afterwards, by formulating extraordinary appeals.

As an example, the High Court of Cassation and Justice decided that "the right to a fair trial was violated in the situation where the plaintiff's defense attorney requested the postponement of the case for medical reasons, submitting a copy of a medical certificate, and the court on the merits rejected the postponement request because the medical certificate was not certified for compliance. In this regard, the High Court specified that, if the trial court considered that the request to postpone the case was not justified because it was not thoroughly motivated (the submitted medical certificate was not taken into account), then the procedure provided for by art. 156 para. (2) C. proc. Civ., according to which when the court refuses to postpone the judgment for this reason, it will postpone, at the request of the party, the pronouncement in order to submit written conclusions. In this case, the court of first instance did not respect this legal text and discussed the exception of the non-stamping of the request and even proceeded to cancel the request as not stamped, thus violating the right of defense of the plaintiff (Decision no. 408 of January 27, 2012 issued in appeal by the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice, having as its object the annulment of an administrative act)"[14].

Another example found in which the right to defense was violated is the violation of the obligation to inform the lawyer of the suspect or the defendant, at his request, about the performance of any procedural act, except in the cases provided by law.

Thus, "compared to the previously shown, passed through the filter of the requirements provided by art. 92 et seq., Criminal Procedure Code as well as those provided by art. 282, Criminal Procedure Code, the judge finds that the legal provisions regarding the suspect's right to defense were violated, given that his lawyer was not informed of the performance of some procedural acts, in which he had the right to participate (the hearing of some witnesses, the hearing of some injured persons, carrying out searches) and as a consequence an injury occurred to the suspect in the conditions where the statements taken in violation of the law were used by the prosecutor in arguing the referral to court and can only be removed by abolishing the act, the suspect's right to defense being obviously and

[13] Art. 280 of the Code of Criminal Procedure.

[14] Corina Cioroabă, *ICCJ. Încălcarea dreptului la apărare*, Juridice.ro, https://www.juridice.ro/260315/iccj-incalcarea-dreptului-la-aparare.html.

seriously affected."[15]

In the cases of Kurochenko and Zolotukhin v. Ukraine (20936/16 and 53257/16, judgment of February 11, 2021) "a series of ongoing criminal proceedings regarding the crimes committed by the two in the Luhansk region, a region over which, in the existing political context, the Ukrainian government no longer had control. The criminal proceedings could not be completed because the Ukrainian authorities could no longer have access to a number of documents and evidence. The applicants contested that the authorities were not taking sufficient steps to advance the examination of their cases under these conditions or to regulate their status in this regard in a clear way. They invoked Article 6 para. 1 and article 13 of the European Convention on Human Rights and article 2 of Protocol no. 7 to the Convention. The first applicant also appealed under Article 5 para. 1 and 4 of the Convention, that his deprivation of liberty in this situation was illegal and that he did not enjoy the observance of effective procedures for reviewing the legality of the measure. The second applicant also complained under Article 2 of Protocol no. 4, that a restriction on freedom of movement was imposed on him in the context of the criminal proceedings in question. The European Court of Human Rights noted that if a person is deprived of liberty based on a conviction by a competent court, but the reasons that justified the person's deprivation of liberty have changed over time, the possibility of formulating a means of appeal is necessary and is imposed according to the provisions of the Convention. At the same time, the claimants' request was accepted because they did not contest the lack of speed in the matter, regarding the judgment of appeals on the ordered measures, but precisely the fact that the national court did not take into account the real reason why they had been deprived of certain rights namely the lack of information caused by the authorities' lack of access to certain documents that would have changed their situation"[16].

According to the judgment of August 28, 2018, ECtHR, the case of Vizgirda v. Slovenia, "judicial bodies have a positive procedural obligation to ensure that the interpretation is of an appropriate quality to guarantee the fairness of the proceedings, in particular by guaranteeing that the suspect or defendant knows the cause and may exercise his right of defence."

The Bucharest Court ruled that: "the right of any of the parties to be assisted by a defense counsel corresponds to the correlative obligation of the judicial bodies to ensure the full exercise of procedural rights by the parties, under the conditions provided by law"[17].

According to art. 101 Criminal Procedure Code: "(1) It is forbidden to use violence, threats or other means of coercion, as well as promises or exhortations in order to obtain evidence. (2) Listening methods or techniques may not be

[15] File no. 114/2019, Decision of 21.07.2020, Prahova Court, https://www.rejust.ro/juris/345645gg.

[16] See Kafkaris v. Cyprus 9644/09, 21 June 2011.

[17] The Bucharest Court, first criminal section, decision no. 1673/2004.

used that affect the person's ability to consciously and voluntarily remember and relate the facts that are the subject of the evidence, the prohibition applies even if the person listened to gives his consent to the use of such listening methods or techniques. (3) It is forbidden for criminal judicial bodies or other persons acting on their behalf, to provoke a person to commit or continue to commit a criminal act, in order to obtain evidence".

At the same time, in relation to the provisions of art. 102 Criminal Procedure Code: "(1) The evidence obtained through torture, as well as the evidence derived from it, cannot be used in the criminal process. (2) Illegally obtained evidence cannot be used in the criminal process. (3) The nullity of the act by which the administration of evidence was ordered or authorized or by which it was administered determines the exclusion of the evidence. (4) Derived evidence is excluded if it was obtained directly from illegally obtained evidence and could not be obtained in any other way".

It follows, therefore, that the new Code of Criminal Procedure provided for three components of the principle of loyalty, namely: "the prohibition of the use of violence, threats, means of coercion, promises or exhortations in order to obtain evidence; the prohibition of the use of listening methods or techniques that affect the person's ability to remember and consciously and voluntarily reproduce the facts that are the subject of the evidence and the prohibition of causing a person to commit or continue to commit a criminal act, in order to obtain a trial."

In conclusion, we appreciate that the right to defense includes a set of procedural guarantees provided by law, which any suspect or defendant accused of committing a crime can benefit from, in order to defend their rights and interests in a criminal trial[18].

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[18] Thomas W. Merrill, *The Essential Meaning of the Rule of Law*, 17 Journal of Law, Economics & Policy, 17, 2022, 673 Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3897, accessed on 23.05.2023. See also Hessbruegge, Jan Arno, *A Human Right to Self-Defense?*, „Human Rights and Personal Self-Defense in International Law" (New York, 2017; online edn, Oxford Academic, 22 Dec. 2016), https://doi.org/10.1093/acprof:oso/9780190655020. 0030003, accessed 25 Jan. 2023; and details about the evolutions of the concept in Cristina Elena Popa Tache**,** *Le dynamisme du droit international public contemporain et la transdisciplinarité,* Préface de Florent Pasquier, Ed. L`Harmattan Paris, la collection « Le droit aujourd'hui », 2023, pp. 125-152.

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Restorative Justice between the Need to Bring to Justice Those Guilty of Committing International Crimes and Conventional Crimes and the Implementation of the National Reconciliation Process

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Abstract

When a deed is committed, the civil society of which the perpetrator is a part, considers it reprehensible, considering the relation of the deed to that society's own value system. Since by the effect of committing such an act in society, another person has been injured in his physical being or in his property, who will have to bear the consequences of this injury? This is the essential issue of liability. The reprehensible social judgment of value will manifest itself in the form of a statement of public opinion in which the objectionable object is precisely the reprehensible. The conduct of the public - the subject of the respective opinion - which expresses itself reprehensibly will be one of rejection of the reprehensible, rejection manifested in various forms, with the times and places[2] The progress made in the last century by public international law, in terms of the field of criminalization of criminal acts, unfortunately did not lead to great corresponding achievements, along the lines of the creation and promotion of international legal institutions that value the norms of law in force. In the absence of such criminal jurisdiction, the sanctioning of international crimes continues to be achievable, with some limited and conjunctural exceptions in a national framework, by the criminal courts of each state[3]. By acceding to international treaties of international humanitarian law, states undertake to respect them in good faith. Moreover, international conventions only specify serious crimes, indicating them expressly (see: the Geneva Conventions of 1949 - art. 49 of Convention 1; art. 50 of Convention II; art. 105-108 and 129 of the III Convention and art. 146 of the IV Convention; Additional Protocol I of this convention, concluded in 1977 - art. 85 paragraph 1, as well as the Geneva Convention of 1954 for the protection of property cultural in case of armed conflict - art. 28; genocide - art. V of the 1948 Convention; terrorism - art. 1 of the 1937 Convention; drug trafficking - art. 36 of the Single Convention on Narcotic Drugs of 1961) and recommends that states establish the only punishments for these serious crimes, the courts competent to judge them, as well as the qualification of other acts contrary to international humanitarian law as actions or crimes and the manner of their criminal and disciplinary sanctions[4]. So, are the victims of armed conflicts entitled to benefit from the reparation of the damage suffered, from the states? If so, under what conditions and through what mechanisms can victims benefit from these

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[2] Gheorghe C. Mihai, Radu I. Motica, *Fundamentals of Law. Optima Justitia,* Ed. All Beck, 1999, p. 121, ISBN 873-9435-45-9.

[3] Vasile Crețu, *International Criminal Law,* Bucharest, Tempus Society Ed., Romania, 1996, p. 295, ISBN: 937-9205-04-6.

[4] Sereda Maria Toma, *International Criminal Liability in Humanitarian Law,* Ed. of the "Andrei Șaguna" Foundation, Constanta, 2003, p. 1, ISBN-973-8146-94-1.

rights? Recent developments in international law have made answering this question increasingly difficult as different approaches have developed to determine the nature of the obligation to provide reparations to war victims. The emergence of international human rights law led to placing the individual in a bivalent position, namely as a rights holder, without being fully recognized as subjects. States have often proved to be neither the only nor the best guarantors of the rights of their citizens. However, international law recognizes the rights of individuals and has established mechanisms for their direct exercise, without mediation by the individual's state. However, these rights and mechanisms are governed by different legal frameworks of a universal and regional nature, the application of which also depends on how national law recognizes these rights, which makes it difficult to determine the secondary obligations arising from the breach of the obligations arising from human rights.

***Keywords**: victim, crime, international criminal responsibility, international justice, international criminal procedures, restorative justice, human rights.*

***JEL Classification*:** K33

1. Introduction. The emergence of victims' rights in international law

Against the backdrop of recent developments in international human rights law and international humanitarian law and taking note of important gaps in previous international criminal tribunals, the Rome State negotiations of the International Criminal Court (ICC) recognized, for the first time in history, the right of victims to participate and obtain reparations in international criminal proceedings.

The UN General Assembly adopted in 1985 the Declaration of Fundamental Principles of Justice Concerning Victims of Crime and Victims of Abuses of Power,[5] which defines the rights of victims in the criminal justice process, in particular the right of access to justice, the right to be treated with respect and dignity, the right to protection and assistance and the right to reparation. This Declaration constituted the "cornerstone" for the foundation of victims' rights in international law.[6]

A range of mechanisms have been put in place to give victims access to justice where they are unable to obtain justice and redress through national courts.

At the national level, universal jurisdiction has become an important tool in the fight against impunity, ensuring that those responsible for crimes are

[5] UN General Assembly Resolution 40/34 of 29.11.1985, *Declaration des principes fundamentals de justice relatifs aux victimes de la criminalité et aux victimes d'abus de pouvoir*, (cited on 22.10.2023), available online: https://undocs.org/fr/A/RES/40/34.

[6] Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary General, (cited on 22.10.2023), available online: https://undocs.org/pdf?symbol=en/S/2000/1063.

brought to justice. At the international and regional level, victims have an increasing aspect in the protection of human rights, with jurisdiction over violations committed by States, in particular the United Nations treaty monitoring bodies and the African, European and Inter-American Courts and Commissions on Human Rights. Finally, international criminal justice has developed to put an end to the impunity of individuals responsible for the most serious crimes under international law, particularly war crimes, crimes against humanity and genocide.

Before the Nuremberg and Tokyo Tribunals, established after the Second World War, as well as before the International Criminal Tribunals for the former Yugoslavia and Rwanda, created in the 90s of the 20th century, the interests of the victims were largely neglected, the role them being limited to that of witnesses.

Meanwhile, an increasingly broad movement, started by non-governmental organizations, but also by some states, allowed to recognize the fact that international justice does not only have a "retributive" role, aimed at punishing the guilty, but in equally a "restorative" role, allowing victims to participate in the proceedings and seek reparations for the harm caused. Thus, one of the major successes of the Rome Statute is the recognition of an independent status for victims.

However, the establishment of the ICC did not diminish the importance of other mechanisms, including at the national, regional and international level, aimed at guaranteeing effective access to justice for victims.

Applying the Rome Statute, states retain the primary responsibility to prosecute those guilty of committing crimes under international law. The ICC is complementary to the national judicial systems, being therefore competent to react only in case of lack of will or capacity of the respective systems. If the ICC has jurisdiction, it will only be able to prosecute a limited number of people presumed to be responsible for the crimes committed. Thus, it is necessary to continue to develop all available mechanisms for victims.

We will examine the evolution of victims' rights in international law and present the various mechanisms available to victims to obtain justice.

It is certain that the process of recognizing victims' rights in addition to the ICC was strongly influenced by the very evolution of victims' rights in international law. In this sense, we will make a brief analysis of the main documents in the matter of ensuring the rights of the victims.

2. Essential documents relevant to victims' rights

2.1. With international application

The three basic international documents on victims' rights are:

- United Nations Declaration on Fundamental Principles of Justice for Victims of Crime and Victims of Abuse of Power;

- the fundamental principles and directives of the United Nations reflecting the right to an appeal and reparation for victims following flagrant violations of international human rights law and international humanitarian law - "Van Boven/ Bassiouni Principles";[7]

- United Nations Principles on the Protection and Promotion of Human Rights in the Fight against Impunity - "Joinet/Orentlicher Principles".[8]

A. United Nations Declaration on Fundamental Principles of Justice for Victims of Crime and Victims of Abuse of Power. The adoption by the UN General Assembly on 29.11.1985 of the Declaration on Justice for Victims constituted an unprecedented advance in the recognition of victims' rights. The declaration in question was the first international instrument to focus specifically on the interests and rights of victims in the context of the administration of justice. This instrument primarily reflects the position of the victims in the context of the administration of justice. This instrument particularly reflects the position of victims within the national criminal justice system, except that the general principles are equally applicable to the international system. Guidelines for the use and application of this Statement are provided in the Victims' Justice Handbook.[9]

"Victims have the right (…) to access to the courts and to a quick reparation of the damage caused".[10]

The objective of this Declaration is "to ensure that any victim has access to the judicial system, as well as to support during the entire judicial process". The directives specify the organization of the judicial system, indicating the importance of minimizing the obstacles faced by victims in the context of reaching justice.

B. The fundamental principles and directives of the United Nations reflecting the right to an appeal and reparation for victims following flagrant violations of international human rights law and international humanitarian law - "Van Boven/Bassiouni Principles".

"Considering that by honoring victims' right to recourse and reparation, the international community upholds its commitments to the suffering of victims, survivors and future generations and reaffirms the international legal principles

[7] Audiovisual Library of International Law. *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Seriously Violations of International Humanitarian Law*, New York, 16 December 2005, (cited on 22.10.2023), available online: https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.

[8] Jonathan Sisson, *A Conceptual Framework for Dealing with the Pastry*. In: *Part I: A Holistic Approach to Dealing with the Past*, p. 11-15, (cited on 22.10.2023), available online: https://www.kairoscanada.org/wp-content/uploads/2015/06/UN-Joinet-Orentlicher-Principles.pdf.

[9] Handbook on Justice for Victims: *On the uses and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. A. Center for International Crime Prevention, New York, 1999, (cited on 22.10.2023, available online: https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf.

[10] 1985 UN Declaration on Justice for Victims. Principle 4.

of accountability, justice and the rule of law."[11]

Boven/Bassiouni Principles were adopted by the Commission on Human Rights and the UN General Assembly in 2005. They define the right of victims of serious violations of human rights and international humanitarian law to an effective judicial remedy, including reparation, as well as the obligation of states to prevent violations, to investigate, prosecute and punish those responsible, to provide victims with effective access to justice and to grant them full reparation.[12]

C. The United Nations Principles on the Protection and Promotion of Human Rights in the Fight against Impunity - "Joinet/Orentlicher Principles".

The Joinet/Orentlicher Principles define the obligation of states to investigate violations of human rights and international humanitarian law and bring the perpetrators to justice. At its 61st session in 2005, the UN Commission on Human Rights took note of the Joinet/Orentlicher Principles,[13] recalling that these principles "have already been applied regionally and nationally, encouraging States, intergovernmental and non-governmental organizations to use to use them in the development and application of effective measures in the context of the fight against impunity".[14]

Principle 1 defines the general obligation of states to take effective measures to fight impunity: "impunity constitutes a lack of the obligations of states to investigate violations, to take appropriate measures in relation to their authors, especially in the field of justice, so that they are prosecuted, tried and sentenced to appropriate punishments, to ensure the victims effective means of recourse and reparation of the damage caused, as well as to take the necessary measures to avoid the repetition of such violations".

Joinet/Orentlicher principles equally define the right to know,[15] the right to justice and the right to guarantee non-recurrence of violations.[16]

2.2. Documents with regional application

A. The European Union's framework decision on the status of victims in criminal proceedings. In 2001, the Council of the European Union adopted a Framework Decision on the status of victims in criminal proceedings, calling on

[11] Preamble to the 2005 van Boven/Bassiouni Principles.

[12] Human Rights Commission, Resolution 2005/35 of 19.04.2005; General Assembly, Resolution 60/147, of 16.12.2005, *Principes fundamentals et directives concernant le droit à un recourse et à réparation des victimes de violations de flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitariane*, (cited on 22.10.2023), available online: https://undocs.org/fr/A/RES/60/147.

[13] Human Rights Commission Resolution 2005/81, *Impunité*, 21.04.2005, para. 20, (cited on 22.10.2023), available online: https://ap.ohchr.org/documents/alldocs.aspx?doc_id=11120.

[14] Ditto, par. 21.

[15] Principles 2-18.

[16] Principles 31-38.

member states to ensure that the rights and legitimate interests of victims are recognized (art. 2).[17] Later this document was replaced by Directive 2012/29/EU of the European Parliament and of the Council of 25.10.2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220/JAI of Council.[18] These acts also contain provisions that reflect the provision of legal assistance to victims, before and after the criminal procedure. So, for example, member states have the obligation to ensure that the national legislation in the field of criminal procedure guarantees the following rights for victims: to be heard during the procedure and to present evidence; to have access from the start to any pertinent information related to the protection of their interests; to have access to appropriate translation and communication resources; to have the opportunity to participate in the procedure as a victim and the opportunity to benefit from legal advice and, if justified, free help; to have the right to reimbursement of lawyer's expenses; to benefit from an adequate level of protection for victims and their families, especially in terms of security and privacy; to be entitled to reparation. In accordance with art. 18 of the 2001 Framework Decision (replaced by Directive 2012/29/EU), the European Commission had to draw up a report on the measures taken by the Member States to comply with the provisions of this Framework Decision. The first report was publicly presented on 16.02.2004, an incomplete and insufficient report, taking into account that only 10 states at that time submitted that the text of the provisions had been incorporated into national law.

B. Recommendation of the Council of Europe on the position of the victim in criminal law and criminal procedure. In 1985 the Council of Ministers of the Council of Europe issued a Recommendation on the position of the victim in criminal law and criminal procedure, calling on states to ensure that the needs of victims are taken into account in the criminal justice process at national level (Recommendation R (85)).[19] The recommendation states that victims should be informed at all stages of the procedure, that they have the right to challenge a decision not to prosecute or the right to initiate criminal prosecutions, and that they can obtain compensation in the criminal justice process. Some of these recommendations were reaffirmed in 2000, in Recommendation R (2000) 19 of the Committee of Ministers to member states on the role of the public ministry in the

[17] The Council's framework decision of 15.03.2001 regarding the status of victims in criminal proceedings, (quoted on 22.10.2023), available online: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML /?uri=CELEX:32001F0220&from=RO.

[18] Directive 2012/29/EU of the European Parliament and of the Council of 25.10.2012, (cited on 22.10.2023), available online: https://eur-lex.europa.eu/eli/dir/2012/29/oj.

[19] Recommendation no. R (85) 11 of the Committee of Ministers to the member states regarding the position of the victim in criminal law and criminal procedure, from 28.06.1985, (quoted on 22.10.2023), available online: https://rm.coe.int/16805e3be1.

criminal justice system.[20] See also Recommendation R (87) 21 on victim assistance and victimization prevention adopted in 1987 and updated in 2006.[21] The Committee of Ministers adopted several recommendations regarding victims of different categories of crimes: R (85) 4 on violence in family framework; R (97) 13 on witness intimidation and defense rights; R (99) 19 regarding mediation in criminal matters; R (2000) 11 regarding action against human trafficking for sexual exploitation; R (2001) 16 on the protection of children from sexual exploitation; R (2005) 09 on the protection of witnesses and justice collaborators.

3. Restorative justice and victims' rights

3.1. Restorative justice

As I explained above, none of the listed regulations, on which the theories of justice established today are based, provide the definite and indubitable conclusion that the punishment, regardless of the method of application, would represent a source of satisfaction of the victim's interest.

Thus, the progressive wing of human rights-oriented justice claims that society's reaction to crimes is absolutely necessary to be in the spirit of respect for human rights, in a restorative manner, without being limited to the punitive modality[22].

Restorative approach (referring to the restoration of rights and advantages) is more rewarding for the victim, as it promotes effective ways of reparation and security of the victim's liberties or assets, in the form of compensation or mediation. Thus, for the victim whose property has been stolen or destroyed, compensation gives him the chance to regain his property or its equivalent, either through the contribution of the offender or through the contribution of the state, when the offender is without means. In regard to the victim on whom a violent crime was committed, the mediation between the criminal and the victim is likely to restore the violated right to the victim. If the offender will be helped to realize the impact of his act on the victim and will demonstrate through active reparative methods, his regret for what he has done, then the level of the victim's fears will

[20] Recommendation R (2000) 19 of the Committee of Ministers of the member states regarding the role of criminal justice in the criminal justice system, from 06.10.2000, (cited on 22.10.2023), available online: https://cj.md/recomandarea- 2000-19-of-the-committee-of-ministers-of-the-mem berstates-regarding-the-role-of-criminal-prosecution-in-the-criminal-justice-system/.

[21] Recommendation Rec(2006)8 of the Committee of Ministers addressed to the Member States regarding the assistance granted to victims of crimes , from 14.06.2006, (cited on 22.10.2023), available online: https://rm.coe.int/16805d8025.

[22] See: Anne Seymour, *Restorative Justice*, in Anne Seymour, Morna Murray, Jane Sigmon, Melissa Hook, Christine Edmunds, Mario Gaboury, and Grace Coleman, *National Victim Assistance Academy Textbook*, 6th edition, Washington, 2002, pp. 171-194 and De Haan Willem, *The Politics of Redress: Crime Punishment an Penal Abolition* , Ed. Unwin Hyman , London, 1990.

decrease and his degree of satisfaction will certainly increase[23].

The main objectives of restorative justice are:

- to meet the needs of the victims - material, financial, emotional and social (including the needs of those close to the victim, who may also be affected);
- enable offenders to actively take responsibility for their actions;
- prevention of recidivism by reintegrating criminals into the community;
- to recreate a community that supports the rehabilitation of offenders and victims and that is active in crime prevention;
- providing means to avoid burdening the criminal justice system and costs and delays[24]
- restorative version of justice, receiving before the punitive one, will bring long-term benefits to the victim, the criminal and society as a whole.

Thus, if the act of justice were to be limited to punishing the offender, it will in most cases bring frustration and resentment on the part of the offender, directed towards the victim and society. The criminal will not have understood the concrete consequences and emotional implications of his act and will assimilate and develop the belief that he has become a "pariah" of society. The offender will not be given the opportunity to act actively to remedy the damage caused to the victim by his act, which would implicitly lead to a much deeper awareness of the immoral character of the act committed, without being limited to the illegal and reprehensible character of the fact.

The severity of a possible punishment applied to the criminal would most likely lead to the tendency of the criminal, after serving the sentence, to commit new, more serious crimes, directed against the same victim or others, thus increasing the number of people with this quality, within a society. Exponentially, the criminal will receive a more severe punishment and the process of social rehabilitation would be much more difficult or even impossible to achieve under these conditions.

Directly proportionally, approaching justice in this way would have a long-term, devastating impact on the state, which will have to bear the economic and social costs of the punishment. On the other hand, the victim will experience feelings of fear, due to the possibility that the offender, after serving his sentence, will turn his resentment on himself, and potential other victims will suffer an equally great psychological impact by establishing insecurity and danger permanent.

All these sources of dissatisfaction can be relativized, through the restor-

[23] Dalina Groza, *Victim's Rights. Recovery from oblivion,* Ed. Lumen, Bucharest, 2006, p. 27, ISBN 10 973-7766-67-9.

[24] Practical Guide for Justice Professionals. *Rights of Crime Victims to Rehabilitation and Compensation*, Organization for Security and Cooperation in Europe, Chisinau 2022, p. 7, available online: https://www.osce.org/files/f/documents/4/c/525762.pdf.

ative approach, which through compensation and mediation, contributes to shaping the following profiles: a victim restored to his rights, freedoms and advantages, a criminal who exercises his self-determination by being aware of the impact of his act on to the victim, remorse, active contribution to reparation and a community that feels more protected from new imbalances created by the commission of new crimes[25].

3.2. Victims' rights

3.2.1. The right to information

Recommendation no. R (85) 11 of the Committee of Ministers to the member states regarding the position of the victim in criminal law and criminal procedure, from 28.06.1985, stipulates that "The police will inform the victim about the possibilities of obtaining assistance and practical and legal advice as well as to obtain compensation from the offender or the state" (A.2); "The victim will be able to obtain information about the results of police investigations" (A.3); "The victim will be informed about the final decision on the accusation, unless he indicates that he does not want this information" (B.6), "The victim will be informed about the date and place of the hearing, his opportunities to obtain restitution or compensation in criminal proceedings, legal assistance and advice; the ways to find out the finality of the process, in any of its phases" (D.9)[26].

At the same time, UN General Assembly Resolution 40/34 of 29.11.1985, *Déclaration des principes fundamentals of justice relative aux victimes de la criminalité et aux victims d'abus de pouvoir provides*: "The judicial and administrative mechanism will be established and strengthened where necessary, in order to enable the victim to obtain remedies through the most expeditious, fair, inexpensive and accessible formal and informal procedures. The victim will be informed about his right to request remedies, through such mechanisms" (A.5); The victim will be informed about medical, social and other relevant sources of assistance and will be provided with prompt access to these services" (A.15)[27].

[25] Dalina Groza, *op. cit*., p. 28.
[26] Recommendation no. R (85) 11 of the Committee of Ministers to the member states regarding the position of the victim in criminal law and criminal procedure, dated 28.06.1985, art. A2, A3, B6 and D9, (quoted on 22.10.2023), available online: https://rm.coe.int/16805e3be1.
[27] UN General Assembly Resolution 40/34 of 29.11.1985, *Declaration of fundamental principles of justice relative to victims of criminality and abuse of power*, art. A5 and A15, (cited on 22. 10.2023), available online: https://undocs.org/fr/A/RES/40/34.

3.2.2. The right to be treated with respect and dignity

The United Nations Declaration on Justice for Victims states that "victims must be treated with compassion and respect for their dignity."[28] Equally, the Van Boven/Bassiouni Principles state that "voting victims must be treated with humanity, including by respecting their dignity and their human rights".[29]

Treating victims with respect involves informing them at all stages of the procedure, of evaluating the case, asking for it to be reflected.[30]

3.2.3. The right to fair judicial treatment

Recommendation no. R (85) 11 of the Committee of Ministers to the member states regarding the position of the victim in criminal law and criminal procedure, dated 28.06.1985 establishes that "The police will benefit from training programs, in order to be able to work with victims in a constructive, empathetic and comfort-generating manner". (A.1); "The victim will be able to obtain information about the results of police investigations". (A.3); "The victim will be informed about the final decision on the accusation, unless he indicates that he does not want this information". (B.6); "The victim will have the right to ask for a review carried out by the competent authorities, of the non-prosecution solutions or the right to initiate private proceedings". (B.7);"At all stages of the criminal procedure, the victim will be questioned in a manner that takes into account his personal situation, his rights and his dignity. Whenever possible and appropriate, children and mentally ill or disabled persons will be questioned in the presence of their parents or specialized staff to assist them". (C.8); "The victim will be informed about the date and place of the hearings, his opportunities to obtain restitution or compensation in the criminal process, counseling and legal assistance, the ways to find out the result with which the process ends, in any of its phases". (D.9); "The information and public relations policies associated with the investigation or trial of a crime shall take into account the victim's need to be protected from any publicity that may adversely affect his private life or dignity. If the nature of the crime, the personal situation of the victim or his safety demand such special attention, either the trial will be heard in private, or the disclosure or publication of personal information will be restricted, to the extent necessary." (F.15); "Whenever it appears necessary and especially when it comes to organized crime, the victim and his family will be provided with protection against intimidation and the risk of re-victimization by the criminal" (G.16)[31].

[28] Principle 4.
[29] Principle 10, Treatment of Victims.
[30] UN Declaration on Justice for Victims, Principle 6.a.
[31] Recommendation no. R (85) 11 of the Committee of Ministers to the member states regarding the position of the victim in criminal law and criminal procedure, dated 28.06.1985, art. A1, A3, B6, B7, C8, D9, F15, G16, (quoted on 22.10.2023), available online: https://rm.coe.int/16805e

In the same sense, UN General Assembly Resolution 40/34 of 29.11.1985, *Déclaration des principes fundamentals of justice relative aux victimes de la criminalité et aux victims d'abus de pouvoir* provides: "The judicial and administrative mechanism will be established and strengthened where necessary, in order to enable the victim to obtain remedies through the most expeditious, fair, inexpensive and accessible formal and informal procedures. The victim will be informed of his rights to obtain remedies through such mechanisms.

Adapting the response of judicial and administrative procedures to the needs of the victim will be facilitated by:

a) informing the victim about the role and purpose of the procedures, their progress and the solutions provided in all cases and especially when it comes to very serious crimes or where such information is requested;

b) Allowing the victim to present and have their views and concerns taken into account at stages of the proceedings that concern the victim's personal interests, without prejudice to the accused and in accordance with the relevant national criminal justice system;

c) providing appropriate assistance throughout the legal proceedings;

d) taking measures to minimize inconvenience for the victim, to protect privacy, when necessary, and safety, both for the victim and for his family or witnesses, against intimidation or re-victimization;

e) avoiding unnecessary delays in the settlement of the lawsuit or in the execution of provisions to compensate the victim for the damage suffered.

Informal conflict resolution mechanisms, including mediation, arbitration or indigenous practices will be used, where appropriate, to facilitate reconciliation and victim recovery" (A.4-A.7).

"Police, justice, medical and social services, as well as other categories of personnel who come into contact with the victim will benefit from training programs, which will sensitize them to the needs of the victim, as well as good practice guides, to ensure that they provide the right and prompt help. In providing services and assistance to the victim, special attention will be paid to victims who have special needs, either due to the nature of the damage suffered or due to factors that could generate discrimination (race, color, sex, age, language, religion, nationality, opinions political or other, cultural beliefs or practices, economic, social or family condition, ethnic or social origin, disabilities)" (A.16-A.17)[32].

3.2.4. The right to an effective appeal

"*Any person has the right to effective satisfaction from the competent national legal courts against acts that violate the fundamental rights recognized by*

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[32] UN General Assembly Resolution 40/34 of 29.11.1985, *Declaration of fundamental principles of justice relative to victims of criminality and abuse of power*, art. A4, A5, A6, A7, A16, A17, (cited on 22.10.2023), available online: https://undocs.org/fr/A/RES/40/34.

the constitution or law" (art. 8).[33]

All general international human rights instruments contain provisions establishing the right of victims of human rights violations to an "effective remedy".[34] The right to an effective remedy is equally recognized among human rights instruments that reflect specific rights.[35] This right includes the right to investigate, prosecute and sanction those responsible for human rights violations, including the right to reparations. Article 13 of the European Convention on Human Rights has been interpreted by the European Court of Human Rights as obliging states to initiate investigations and prosecutions in cases of violations of the right to private life and inhumane treatment.[36]

Articles 8 and 25 of the American Convention on Human Rights have been interpreted by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights as requiring states to initiate investigations and prosecutions against those responsible for human rights violations, as well as guarantee reparation to victims. The Inter-American Court equally found that Article 25 imposes on states the obligation to guarantee victims access to a criminal trial, and Article 8 states that the trial must be conducted in such a way as to guarantee the fairness of the proceedings for victims (see cases: Velasquez Rodriguez; Castillo paez Blake).

Article 7.1 of the African Charter on Human and Peoples' Rights has been interpreted by the African Commission on Human and Peoples' Rights as including the right to appeal to the competent national courts (see the case of the National Commission on Human Rights and Freedoms v. Chad, 1992).

3.2.5. The right to protection, assistance and individualized extrajudicial treatment

The United Nations Declaration on Justice for Victims obliges states to take measures to ensure the safety of victims, including their families, witnesses and to protect them against any act of intimidation and reprisals.[37]

The declaration also contains precise provisions on the assistance and

[33] The Universal Declaration of Human Rights, adopted on 10.12.1948, (cited on 22.10.2023), available online: https://www.legis.md/cautare/getResults?doc_id=115540&lang=ro.

[34] See: International Covenant on Civil and Political Rights, 1966 (art. 2.3); European Convention on Human Rights, 1950 (art. 13); American Convention on Human Rights, 1969 (arts. 8 and 25); African Charter on Human and Peoples' Rights, 1981 (art. 7.1).

[35] See: Convention on the Prevention and Suppression of the Crime of Genocide, 1948 (art. 1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (arts. 4 and 12-14); Convention on the Elimination of All Forms of Racial Discrimination, 1965 (art. 6); Convention for the Protection of All Persons from Enforced Disappearance, 2006 (arts. 8 and 12).

[36] Affaire Gulec, Turkey (1998), (cited on 22.10.2023), available online: https://www.doctrine.fr/d/CEDH/HFJUD/CHAMBER/1998/CEDH001-62768

[37] Principle 6.

support to be given to victims before, during and after legal proceedings. Assistance measures include in particular material, medical and social assistance.[38]

In the same way, the van Boven/Bassiouni Principles provide that "adequate measures must be taken to ensure the victims' security, physical and mental well-being, as well as the protection of private life, including that of their family members".[39]

States must "take measures to limit as much as possible the difficulties faced by victims and their representatives, to protect their private life from any unlawful interference and to ensure their security, including his families, but also his witnesses, offering- the opportunity to avoid intimidation and reprisals before, during and after judicial, administrative or other proceedings, putting the interests of the victims at stake".[40]

3.2.6. The right to financial assistance: redress through restitution and compensation

Recommendation no. R (85) 11 of the Committee of Ministers to the member states regarding the position of the victim in criminal law and criminal procedure, dated 28.06.1985, establishes that: "In any report to the judicial authorities that carry out the function of prosecution, the police will include an exposition as as complex and accurate as possible, of the damages and losses suffered by the victim" (A4); "A discretionary decision regarding the appropriateness of prosecution will not be taken without considering the issue of victim compensation, including any serious efforts made in this regard by the offender" (B5); "The victim will be informed about his ... opportunities to obtain restitution and compensation in the criminal process ....

Ways will be found to make it possible for a criminal court to order restitution to the victim by the offender. To this end, the existing limitations, restrictions and technical obstacles that prevent the generalization of such a possibility must be removed.

National laws must provide for compensation either as a criminal sanction, or as a substitute for a criminal sanction, or in addition to a criminal sanction.

All relevant information regarding the damage or loss suffered by the victim must be made known to the court, so that when it decides on the nature and amount of the punishment, it will be able to take into account both the victim's needs to be compensated and of any effort made in good faith by the offender to provide compensation or restitution to the victim.

In situations where it is open to the court to attach the condition of conditional suspension of the sentence, to a probation order or any other measure ordered by the court, great importance will be given to including among these

[38] Principles 14-17.
[39] Principle 10. Treatment of victims.
[40] Principle 12.c, Access to justice.

conditions the obligation of the offender to provide compensation to the victim.

In the situation where the compensation represents a criminal sanction that will be collected in the same way as the fine and will benefit from priority over any other financial sanction imposed on the offender. In all other cases, the victim will be assisted as much as possible in collecting the amount representing the compensation" (D9-D14)[41].

Also, UN General Assembly Resolution 40/34 of 29.11.1985, *Déclaration des principes fundamentals of justice relative aux victimes de la criminalité et aux victims abuse de pouvoir* provides: "The criminal or the civilly responsible party shall provide compensation to the victim, his family or the persons dependent on the victim. Such restitution may include the return of property, the payment of the equivalent of the harm or loss suffered, the return of the expenses occasioned by the victimization, the services from which the victim needed or the process of restoring his rights.

Governments will review their practices, rules and laws to consider restitution as an option in the criminal justice system, possibly ordered by the court in addition to a criminal sanction.

In cases where there has been substantial harm to the environment, restitution, if ordered, will include, as far as possible, restoration of the environment, reconstruction of the infrastructure, relocation of community facilities or covering the costs of relocation, whenever such harm consists of a displacement of a community.

When a public official or other agent acting in an official or quasi-official capacity violates national criminal law, the victim may seek restitution from the state whose official or agent is responsible for the resulting harm. When the government under whose authority the victimizing act or omission occurred no longer exists, the successor state or government shall provide restitution to the victim.

When compensation cannot be fully covered by the offender or other sources, the state will provide financial compensation for:

a) victims who have suffered serious harm to their bodily integrity or harm to their physical or mental health as a result of a serious crime.

b) to the family or dependents of persons deceased or physically or mentally incapacitated as a result of such victimization.

The establishment, strengthening or expansion of national funds for victim compensation will be encouraged. When necessary, other funds will be established for this purpose, including those cases where the state to which the victim belongs is not in a position to compensate the victim for the damage suffered" (A.8-A.13)[42].

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[41] Recommendation no. R (85) 11 of the Committee of Ministers to the member states regarding the position of the victim in criminal law and criminal procedure, dated 28.06.1985, art. A4, B5, D9, D10, D11, D12, D13, (quoted on 22.10.2023), available online: https://rm.coe.int/16805e3be1.

[42] UN General Assembly Resolution 40/34 of 29.11.1985, *Declaration of fundamental principles*

4. Conclusions

Traditionally, reparation for victims was not considered a priority in the context of crime suppression. Meanwhile, the evolution of national judicial regimes was accompanied by a parallel evolution of international criminal law, strongly influenced by the international human rights jurisprudence of the European and Inter-American Courts of Human Rights.[43]

The UN Declaration on Justice for Victims introduced the notion of an individual right to reparation into international law.[44] The right to reparation for victims of serious violations of international human rights law and international humanitarian law is the main object of the Van Boven/Bassiouni Principles, according to which victims have the right to "adequate, effective and prompt reparation for the harm caused", which will have to be "depending on the seriousness of the violation and the damage caused",[45] as well as the right of the victims to an appeal.[46]

Joinet/Orentlicher principles equally provide that "any violation of a human right leads to the birth of a right to reparation in the interest of the victim or those entitled to reparation, which obliges the state to reparate, but also the possibility of recourse against the author illegal acts".[47]

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[43] Cherif Bassiouni, *Reconnaissance internationale des droits des victims. Terrorisme, victims et responsabilité pénale internationale*. SOS Assault. Paris: Calmann-Lévy, 2003, p. 166 ff the following.

[44] Principles 4 and 8-13.

[45] Principle 11, b.

[46] Principles 14-23.

[47] Principle 31, Rights and obligations arising from the duty to repair.

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Certain Legal Aspects of Family Businesses in Hungary[1]

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Abstract

The aim of the paper is to examine some of the issues related to family businesses in Hungary. Family businesses are a popular topic in both international and domestic economic literature, but the legal aspects have been less studied, and there has been no legislation or legal definition in Hungary. The study was primarily based on the relevant literature, together with the relevant legal sources. My main insight is that the various factors identified in the economics literature, which have been used in research, also serve as a valuable basis for the law, but it is important to place these factors in the appropriate civil law context. This is what this paper attempt to do, by providing a comprehensive concept that could also serve as a starting point for legislation.

Keywords: *family business, family firm, family enterprise, civil law, business law.*

JEL Classification*:* K15, K22, K36

1. Introduction

"The weight and importance of family businesses is undisputed, and they are seen as the backbone of the economy in many countries around the world."[3] The importance of family businesses should be mentioned in connection with the fact that several European Union bodies have dealt with them on several occasions, always emphasising their important role in national economies.[4]

The economic approach to family businesses focuses on two major issues: one is the definition of family businesses themselves, along which characteristics they can be distinguished from other legal entities (most notably "traditional" business corporations), and the other analysis focuses on the succession issues associated with family businesses. In addition, the role of family businesses in the economy, their specific internal mechanisms[5] and the use of a case

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[4] European Parliament resolution of 8 September 2015 on family businesses in Europe (2014/ 2210(INI)) (2017/C 316/05); Opinion of the European Economic and Social Committee on 'Family businesses in Europe as a source of renewed growth and better jobs' (own-initiative opinion) (2016/ C 013/03).

[5] See among others: Tobak, Júlia – Nábrádi, András – Nagy, Adrián Szilárd: *Sikeres nemzetközi és*

study are also considered as a good practice.[6]

In many respects, the legal analysis of family businesses is an intersection of these.[7] In this paper, I will review the possible conceptual features of family businesses in addition to a general overview. Research has shown that there are around 90 definitions of family businesses in the European Union, one consequence of which is that they cannot be precisely defined: some research suggests that two thirds of the world's businesses are family businesses.[8] My aim is not to create a completely new concept, but to formulate possible conceptual features that are relevant from a legal point of view.

The concept must be designed for a specific purpose: if no further legal consequence is attached to calling a legal entity or other formation as a family business, there is no point in attempting to define it in any way. (However, the absence of a legal concept would not render economic analyses meaningless.) The legal consequence could be, among others, some special form of support or tax relief, or labour law relief to promote employment. Together with this, it is also possible to identify the interest of their support from a family policy or economic policy perspective. If the cohesion and cooperation of the family is to be promoted by various means, family-run businesses deserve attention in the same way as other measures.

In order to define the conceptual elements, a brief analysis of the (mostly Hungarian) literature and existing academic approaches to family business is necessary. The reason why I am looking at the Hungarian approach first is that every country's economic and legal environment is different. It is necessary to be aware of the Hungarian aspects first, although foreign approaches should also be used as a model. In my future research, I intend to target an even broader range of states with essentially similar conditions and histories.

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[7] Some articles also deal with the legal environment in a „first-swallows" way, see for example: Arató, Balázs – Csákné Filep, Judit – Radácsi, László: *Családi vállalkozások jogi környezete*. „JURA" (2020) 4. 5-28.

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2. Basic features and challenges of family businesses

The strength of family businesses is the informal, trust-based network of relationships that stems from the family: two or more family members relate to each other in a different way than non-family members; it is desirable that the love and appreciation between family members becomes an element of trust that can be used in business life. They may also have a reputation which is the result of the intertwining of the family name, the company name and the brand name, i.e. because it is important for the family that one of the family's connecting names has a 'ring', they also seek to position themselves in the economy in such a way that their company can prosper, goodwill can be built up and consumers will seek out their products to a significant extent because of the brand name's ring. In doing so, of course, they are also working for their own livelihood. A further strength is the organisational culture based on social responsibility, which is characterised by the crucial importance of personal relationships, and some elements of which point towards corporate social responsibility (CSR).[9]

Regarding the disadvantages, in addition to the "everyday" problems (e. g. work-life balance, hierarchy within the business), there is another serious issue, which is also a subject of considerable research in economics, but its legal representation can be approached from several angles, namely succession (generational change).[10] It is no coincidence that economic historians, based on Thomas Mann's novel (*Buddenbrooks*), have referred to the frequent phenomenon of family businesses failing to survive the succession of the third generation as the Buddenbrook syndrome.[11]

One of the challenges of family businesses is that there is no single term used for them in either the foreign or Hungarian literature. The terms 'family business', 'family firm', 'family enterprise' are used equally, with each of its Hungarian equivalents also being translated in both the everyday life and in the literature. In law, it is extremely important to use one term for a certain legal phenomenon, and the question must be raised whether these terms mean the same phenomenon. The other question to be answered is, if so, which term would be the most appropriate. More importantly, if they do not mean the same, what the difference is between them. I have not yet found any literature on this point, and this is important if only because, at least from the point of view of Hungarian law,

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[9] Konczosné Szombathelyi, Márta – Kézai, Petra: *Családi vállalkozások – generációk és dilemmák*. „Prosperitas" (2018) 3. 48-76. 53; Csákné Filep, Judit: *Családi vállalkozás, avagy a profitkergetés nélküli nyereségtermelés receptje*. „Valóság" (2012) 7. 36-44. 37.

[10] Filep, Judit – Szirmai, Péter: *A generációváltás kihívása a magyar kkv-szektorban*. „Vezetéstudomány" (2006) 6. 16-24. See also: Magrelli, Vittoria et al.: *Generations in Family Business: A Multifield Review and Future Research Agenda*. „Family Business Review" (2022) 1. 15-44.

[11] Lorandini, Cinzia: *Looking beyond the Buddenbrooks syndrome: the Salvadori Firm of Trento, 1660s-1880s*. „Business History" (2015) 7. 1005-1019. 1005. http://dx.doi.org/10.1080/00076791.2014.993616.

the terms ‘business/company’, ‘firm’ and ‘enterprise/undertaking’ do not mean the same, even if there is an overlap between them. I will use the most widespread ‘family business’ in this paper as a synomym.

Family businesses do not have a precise definition: in the everyday life, they can be understood as a family’s ability to exercise control over a legal entity, usually a business company; they typically span several generations and can have a significant impact on local society.[12] Of these legal entities, the development of companies and firms dates back to the last five hundred years, although there are some predecessors in ancient laws.[13] Nevertheless, the literature also lists family businesses that have been in existence for more than 500 years, it is not necessary that they always operate under the same legal form.

Zwack Unicum (alcoholic beverage) is the oldest family-owned company in Hungary and has been managed by members of the 6th generation since 2008.[14] Other well-known Hungarian family businesses include among others Béres (Béres drops),[15] Cserpes (dairy products)[16] and Oázis (garden center group).[17]

One of the biggest risks in the life of family businesses is the issue of continuity, and concerns about this are not unjustified: the difficulty of ’passing on’ a family business is illustrated by the fact that in the early 2010s in the United States, approximately one third of family businesses are passed on to the second generation of the family, and only 13% are passed on to the third generation,[18] meaning that at least two thirds of family businesses do not survive the generational transition. There are several reasons for this, including factors unrelated to the family business, such as a significant change in the market environment in which the business operates, and a general trend towards business closure. Examples include[19] the inability or unwillingness of these businesses to adapt to

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[12] Polster, Csilla – Konczosné Szomathelyi, Márta: *Családi vállalkozások hatása a helyi társadalomra*. „Civil Szemle” (2021) 2. 21-34.

[13] See in detail: Sándor, István: *A társasági jog előzményei az ókori jogokban*. „Jogtudományi Közlöny” (2000) 9. 335-352.; Sándor, István: *A társasági jog története Nyugat-Európában*. KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., Budapest, 2005.; Fegyveresi, Zsolt: *Társasági jog fejlődése Magyarországon*. In: Dúl, János – Lehoczki, Zóra Zsófia – Papp, Tekla – Veress, Emőd (ed.): *Társasági jogi lexikon*. Dialóg Campus Kiadó, Budapest, 2019. 256-258.

[14] https://zwackunicum.hu/hu/cegunk/zwack-tortenet/. Last accessed 10. 11. 2023; see also: Konczosné Szombathelyi, Márta – Kézai, Petra: *Családi vállalkozások – generációk és dilemmák*. „Prosperitas” (2018) 3. 48-76. 52.

[15] https://beres-international.com/. Last accessed 10. 11. 2023.

[16] https://cserpessajtmuhely.hu/a-sajtmuhelyrol.php. Last accessed 10. 11. 2023.

[17] https://oazis.hu/about-us. Last accessed 10. 11. 2023. Vágány, Judit – Fenyvesi, Éva – Kárpátiné Daróczi, Judit: *Sikeres családi vállalkozás, és ami mögötte van*. „Gradus” (2016) 1. 506-511. 507. See also: Arató, Balázs: *Családi vállalkozások; családi alkotmány és generációváltás.* Patrocinium Kiadó, Budapest, 2023. 37-44.

[18] Csákné Filep, Judit: *Családi vállalkozások – fókuszban az utódlás*. Doctoral thesis. Budapest, 2012. 65-66. The document is availaible online at http://phd.lib.uni-corvinus.hu/660/1/Csakne_Filep_Judit_dhu.pdf, last accessed 11. 10. 2023.

[19] Vágány, Judit – Fenyvesi, Éva – Kárpátiné Daróczi, Judit: *Sikeres családi vállalkozás, és ami mögötte van*. „Gradus” (2016) 1. 506-511. 509.

changing market and technological conditions; differences in generational perceptions of management and long-term goals;[20] and the reluctance or inability of the next generation to take over the business. Not all of these factors necessarily affect generational change, but in many cases they can have an impact.

In this context, the interest in family business and succession to family businesses is justified. This interest is reflected, inter alia, in the number of doctoral theses written on the subject[21] and in the Q1-Q3 international journals focusing on family business (e.g. Family Business Review, Journal of Family Business Management). There is considerable academic research both at national level (Budapest LAB Business Development Office) and internationally [International Family Enterprise Research Association (IFERA)].[22] IFERA is a non-profit association that brings together an international network of academics, researchers and other key players in the family business field who are committed to advancing family business research. The Budapest LAB, a partnership of the Budapest University of Economics and Business, helps to spread entrepreneurial culture by sharing knowledge and strengthening small and medium-sized enterprises in Hungary.[23] These think-tanks focus to a large extent on the role of family businesses in the economy, with less emphasis on the legal side of the research. However, in order to ensure that their role in society is adequately represented, it is necessary to be able to interpret the known perspectives in a legal sense, where relevant.

Other important international research is being carried out at the University of St. Gallen, where they are building the 'Family Business Index', updated every two years since 2015, in partnership with Ernst & Young, and their measurements suggest that family businesses in 2021 had revenues of US$7.28 trillion and 24.1 million employees. These firms also excelled in succession, with three quarters of the 500 firms measured having been in business for 50 years or more,

[20] In the context of family business objectives, see: Vajdovich, Nóra – Heidrich, Balázs: *Quo vadis? – A családi vállalkozások összetett célrendszereinek elemzése*. „Vezetéstudomány" (2021) 11. 13-27.

[21] Among others Csákné Filep, Judit: *Családi vállalkozások – fókuszban az utódlás*. Doctoral thesis. Budapest, 2012. 65-66. The document is availaible online at http://phd.lib.uni-corvinus.hu/660/1/Csakne_Filep_Judit_dhu.pdf last accessed 11. 10. 2023; Bogdány, Eszter: *Átadni tudni kell! Vezetői szerep átadás a hazai kis- és középvállalkozásokban*. Doctoral thesis. Veszprém, 2014. The document is availaible online at https://core.ac.uk/download/pdf/132284262.pdf last accessed 11. 10. 2023; Németh, Krisztina: *Családi vállalkozások teljesítményének endogén tényezői*. Doctoral thesis. Győr, 2017. The document is availaible online at https://rgdi.sze.hu/images/RGDI/honlapelemei/fokozatszerzesi_anyagok/Doktori_%C3%A9rtekez%C3%A9s_N%C3%A9meth_Krisztina_nyilv%C3%A1nos_vita-RGDI.pdf last accessed 11. 10. 2023; Tobak, Júlia: *A sikerténye zők és az utódlás vizsgálata családi tulajdonú vállalkozások esetében*. Doctoral thesis. Debrecen, 2018. The document is availaible online at https://dea.lib.unideb.hu/server/api/core/bitstreams/fb1374cc-a5e6-4eaf-82ad-867ba74b1efd/content last accessed 11. 10. 2023.

[22] Konczosné Szombathelyi, Márta – Kézai, Petra: *Családi vállalkozások – generációk és dilemmák*. „Prosperitas" (2018) 3. 48-76. 49.

[23] https://budapestlab.hu/index.php/rolunk/ last accessed 11. 10. 2023.

and one third for more than 100 years.[24] (It should be added that to be included on this list, the firm in question must be a second-generation firm.) More recent data for Hungary is available from the study, which found that 64-86% of the firms surveyed were family businesses; the smaller the firm, the higher the proportion of family businesses.[25] It is only in the last three decades that the legal literature and economic analysis of family businesses has come to the fore, when the composition of the membership of companies has begun to be examined.[26]

3. The elements of a definition of family businesses in Hungary

Looking at the different definitions, the legal definition should be centred around three elements: ownership (i.e. the extent of the shareholding), participation in the management of the business and intergenerational transfer, or at least the intention to transfer.[27]

The definition of family business has not been defined in legislation.[28] A possible legislative framework could be provided by Act XXXIV of 2004 on small and medium-sized enterprises and on support for their development, given that family businesses are commonly identified with SMEs.[29] They may indeed be similar in size in most respects, but they are characterised by specific economic and social values and operational features, as outlined above, which make them worthy of special attention.

The European Commission's expert group has defined a concept of a family business,[30] regardless of its size, in the following cases:

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[24] https://familybusinessindex.com/ last accessed 11. 10. 2023.

[25] Drótos, György – Wieszt, Attila – Meretei, Barbara – Vajda, Éva: *Családi vállalkozások Magyarországon. Kutatási jelentés a 2017-18-as magyar családi vállalkozási felmérésről. BCE Családi Vállalatok Központ Kutatási jelentése.* 9. The document is availaible online at https://magyarvallalatok2030.hu/2019conf/wp-content/uploads/2019/04/kutata%CC%81s_2018_CFB__PRESS.pdf last accessed 11. 10. 2023.

[26] Del Giudice, Manlio: *Understanding Family-Owned Business Groups. Towards a Pluralistic Approach.* Palgrave Macmillan, Cham, 2017. 19.

[27] Csákné Filep, Judit – Kása, Richárd – Radácsi, László: *Családivállalat-kormányzás. A nemzetközi szakirodalom kategorizálása a három kör modell tükrében*. „Vezetéstudomány" (2018) 9. 46-56. 46-47. See also: Wieszt, Attila – Drótos, György: *Családi vállalkozások Magyarországon*. In: Kolosi, Tamás – Tóth, István György (ed.): *Társadalmi Riport 2018*. Társadalomkutatási Intézet Zrt., Budapest, 2018. 233-247.

[28] This has been done in an expert report at EU level. Balázs Arató highlights the benefits and risks of creating a single definition. Arató, Balázs: *Családi vállalkozások nemzetközi kitekintésben*. „Glossa Iuridica" (2020b) 3-4. 263-285. 266-268.

[29] Arató, Balázs – Csákné Filep, Judit – Radácsi, László: *Családi vállalkozások jogi környezete*. „JURA" (2020) 4. 5-28. 7.

[30] Final report of the Expert Group. Overview of family-business-relevant issues: Research, networks, policy measures and existing studies. 10. The document is availaible online at https://ec.europa.eu/docsroom/documents/10388/attachments/1/translations/en/renditions/native, last accessed 11. 10. 2023.

(1) The majority of decision-making rights is in the possession of the natural person(s) who established the firm, or in the possession of the natural person(s) who has/have acquired the share capital of the firm, or in the possession of their spouses, parents, child or children's direct heirs.

(2) The majority of decision-making rights are indirect or direct.

(3) At least one representative of the family or kin is formally involved in the governance of the firm.

(4) Listed companies meet the definition of family enterprise if the person who established or acquired the firm (share capital) or their families or descendants possess 25 per cent of the decision-making rights mandated by their share capital.

In the expert group's view, this concept also covers enterprises that have not yet undergone the first generation change, as well as sole members and the self-employed (of course, if there is a transferable legal entity).[31]

The statute of the National Association of Family Enterprises (*Családi Vállalkozások Országos Egyesülete* – abbreviated: CSVOE, CSAVE, the latter is used here)[32] also serve as a starting point: enterprises may be members of the association if *"[i]n which one or more natural persons closely related to each other, directly or indirectly, have a majority influence in the economic operator, participate in its management, and in addition have tasks in the organisation and performance of the work of the enterprise, and in the performance of these tasks at least one other person. The aims of the enterprise include the transfer or the intention to transfer the assets, the accumulated experience and the acquired wealth between generations."*[33] The definition in the statute reflects the elements required by the literature, but also includes elements that can be legally evaluated. It clearly states the required level of member participation,[34] indicates the possible family relationship,[35] designates the possible family business circle with the economic operators.[36] Guidelines defining the objectives of the enterprise are less legally assessable elements.

Given their legal nature, family businesses can, in my view, be conceived not only as legal entities, but also as contractual formations that can be used to

[31] Ibid.

[32] https://csave.hu/, last accessed 10. 11. 2023.

[33] Cited by Kása, Richárd – Radácsi, László – Csákné Filep, Judit: *Családi vállalkozások definíciós operacionalizálása és hazai arányuk becslése a kkv-szektoron belül.* „Statisztikai Szemle" (2019) 2. 146-174. 149.

[34] See Act V of 2013 on Civil Code (HCC) Section 8:2. https://njt.hu/jogszabaly/en/2013-5-00-00, last accessed 11. 10. 2023.

[35] HCC Section 8:1(1) point 1.

[36] Act CXXX of 2016 on the Code of Civil Procedure (CCP) (as in force on 1 April 2020) Section 7(1) point 6. https://njt.hu/jogszabaly/en/2016-130-00-00, last accessed 11. 10. 2023.

fulfil such a function, such as contract for civil law partnership[37] and even fiduciary asset management contract.[38] The contract for civil law partnership[39] will constitute the legal basis for the cooperation between the parties to the contract,[40] a contractual framework that can be modified at will at the discretion of the parties, and no further official or judicial act is needed to 'finalise' this modification, as the contract will not create a new legal entity separate from its members. Within the framework of the cooperation, they are free to carry out activities which do not require a public authorisation and which are not prohibited by law. One of the justifications for the creation of a fiduciary asset management contract is precisely to keep and preserve family assets together.[41] Some of the parties to the contract (the trustee, the settlor and the beneficiary) may be members of the same family, so that 'strangers' have no influence on the disposition of the property. However, the success of such an arrangement requires that the trustee, knowing the specificities of the asset management, acts in an appropriate manner and has the necessary expertise.

But here I will focus on family businesses with legal personality. In this respect, they are not different from other legal persons; they are distinguished by the subject-matter of the members and, if there is a successful generational change, they can be considered as family businesses in this respect.

The use of the term is also widespread in Hungarian judicial practice, although it usually has no further legal consequence, this fact is mentioned at the beginning of the statement of facts. At the same time, it is not clear why the courts use this term, and it is not clear from the grounds of the judgments what makes a family business a family business.

The criteria for inclusion in the Family Business Index for this topic are: the business itself is at least second generation or has at least one family member among its senior managers. For a first generation business, there are at least two family members in this role. In addition to management, there must also be a significant shareholding of the members, i.e. a direct holding of at least 50 per cent in the case of a private company, or a minimum of 32 per cent in the case of a publicly traded company.[42]

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[37] HCC Section 6:498.

[38] HCC Section 6:310.

[39] Certain terms are used as in the translation of Hungarian Civil Code. https://njt.hu/jogszabaly/en/2013-5-00-00.

[40] Fabó, Tibor: *A polgári jogi társasági szerződés*. In: Benke, József – Nochta, Tibor (ed.): *Magyar polgári jog. Kötelmi jog II.* Dialóg Campus Kiadó, Budapest – Pécs, 2018. 355-368.

[41] Magyar-Csatlós, Judit – Magyar, Csaba – Sándor, István: *Vagyontervezési labirintus. Útmutató a bizalmi vagyonkezelés, a vagyonkezelő alapítványok és a magántőkealapok világához.* HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2021. 50. In the context of fiduciary asset management contract, see also: B. Szabó, Gábor – Illés, István – Kolozs, Borbála – Menyhei, Ákos – Sándor, István: *A bizalmi vagyonkezelés*. 2nd edition. HVG-ORAC Lap - és Könyvkiadó Kft., Budapest, 2018.

[42] https://familybusinessindex.com/, last accessed 10. 11. 2023.

In a Hungarian economic research conducted in 2017-2018, the definition of a family business was based on three factors: whether the respondent considers itself a family business, whether there is dominant family control in the firm, and whether the family ownership share is at least 50%. If the respondent firm met at least the first two conditions or at least the third condition, it was considered a family firm. While these are important threshold conditions, other increasingly stringent additional conditions were also included, such as the requirement to have at least two family members working in the firm. As a further tightening of this condition, it was also examined whether at least two generations of the family were involved in the operational activities. Finally, the last of these additional criteria related to the aspiration to maintain family shareholdings in the long term, i.e. the criterion was set to consider succession within the family.[43]

In this context, the legal situation of family businesses is specific in the sense that there is no legal definition, but the term is often used in judicial practice and in everyday life. At the same time, there is no specific legal consequence, an additional consequence, in the existing case law, of the classification of a legal entity as a family business. There may be practical reasons for the definition, but the concept must not be too casuistic or too narrow, it must leave enough room for personal assessment, and it must not be exclusionary. Family businesses themselves are extremely diverse.

Defining the term 'family', the list of (close) relatives as defined in paragraph Section 8:1 para. (1) points 1-2. of the Civil Code[44] is appropriate as a starting point, as it is also included in the subject scope of the CSAVE. It is, however, justified to extend it by the concept of kinship in Book Four (Family Law),[45] as I consider a composition of members where e.g. cousins also hold shares in the same company to be perfectly acceptable. Similarly, the more general concept of a partnership or a legal person whose members include spouses is also acceptable.[46] However, this may lead to a too broad definition of the circle

[43] Drótos, György – Wieszt, Attila – Meretei, Barbara – Vajda, Éva: *Családi vállalkozások Magyarországon. Kutatási jelentés a 2017-18-as magyar családi vállalkozási felmérésről. BCE Családi Vállalatok Központ Kutatási jelentése.* 3-4. The document is availaible online at https://magyarvallalatok2030.hu/2019conf/wp-content/uploads/2019/04/kutata%CC%81s_2018_CFB__PRESS.pdf last accessed 11. 10. 2023.

[44] HCC Section 8:1 [Interpretative provisions]. (1) For the purposes of this Act, 1. close relative means the spouse, the lineal relative, the adopted child, the stepchild and the foster child, the adoptive parent, the step-parent and the foster parent and the sibling; 2. relative means the close relative, the cohabitant, the spouse of a lineal relative, the lineal relative and the sibling of the spouse, and the spouse of the sibling.

[45] HCC Section 4:96 [Kin relationship]. (1) Lineal kin relationship exists between those of whom one originates from the other. (2) Blood relatives with no lineal bond are collateral relatives if they have at least one common lineal ascendant.

[46] According to the decision published in BDT No. 3839 of 2018, the applicant company is „largely a family business", in which one of the spouses has become a member in addition to the parents and children, and therefore this classification is, in my view, entirely correct. The document is availaible online at https://uj.jogtar.hu/#doc/db/25/id/A18H3839.BDT/ last accessed 10.11.2023.

of persons in itself (blood relatives who are indeed 'more distant' are less and less familiar with each other, and the sense of belonging to a common ancestor is less and less). It is therefore advisable to adopt the concept of great-grandparentage from inheritance law[47] for a legal definition, and to use the definition of relative in conjunction with it. In my point of view, based on everyday experience, that in this circle of relatives, family members still know each other or can get to know each other more easily and keep/maintain better contact with each other. This does not mean, however, that distant relatives cannot associate with each other and that it cannot be a family business.

The scope of family members can be defined in this way, but in order to establish the family nature, it is advisable to add further conceptual elements based on the literature: for example, a family business is considered to be a business in which at least half of the voting rights attached to the members' shares are held by members of the same family. An optional element could be added to the concept of management: if the manager is a member of the family, he or she is better able to embrace the family values and the idea of 'passing on' family assets, which are among the conceptual elements of the family business. It is therefore an optional element that the management should also be chosen from among the family members, since this type of provision, duly included in the articles of association, must be respected by the managing director, who may be subject to sanctions if it is not respected. Optionality can also be seen in the fact that a supervisory board can be set up as an internal control body, in which, for example, only family members are members, so that control over any 'external' manager is even better ensured, and they can send an appropriate signal to the other family members in the event of a threat whose occurrence would be incompatible with the objectives of the family business in terms of results. This, how-

See also: Barta, Judit: *A közkereseti és betéti társasági részesedés a házastársi közös vagyonban*. „Gazdaság és Jog" (2023) 3-4. 9-21; Kispál, Beáta: *Egy családi vállalkozás sikere és bukása egy hirtelen haláleset és egy változó kamatozású devizahitel (devizaalapú) hatása következtében*. „Gazdaság és Jog" (2023) 4. 45-51.

[47] HCC Section 7:65 [Succession of great-grandparents and their descendants]. (1) In the absence of grandparents and descendants of the grandparents, the great-grandparents of the estate leaver shall all be intestate heirs in equal shares. (2) When replacing a great-grandparent disqualified from succession, his descendants shall inherit in the same way as the descendants of a disqualified grandparent when replacing the latter. (3) In the absence of descendants of the disqualified great-grandparent or if they may not inherit, the other great-grandparent of that pair of great-grandparents or, if he is also disqualified, his descendant shall inherit. (4) If any pair of great-grandparents is disqualified and they have no descendants to be replaced by or the descendants may not inherit, the other pairs of great-grandparents shall inherit the whole estate in equal shares. (5) If a great-grandparent inheriting under paragraph (4) is disqualified, the rules laid down in paragraphs (2) and (3) shall apply. See also: Vékás, Lajos: *Öröklési jog*. Eötvös József Könyvkiadó, Budapest, 2014. 97-98; Orosz, Árpád – Weiss, Emilia: *Öröklési jog – Anyagi jog.* HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2014. 128-130; Barzó, Tímea – Juhász, Ágnes – Pusztahelyi, Réka – Sápi, Edit: *Öröklési jog. Ideiglenes jegyzet*. Novotni Alapítvány, Miskolc, 2016. 122-124.

ever, requires family members to have the necessary expertise to identify problems. However, these objectives must be clearly defined and cannot be formulated in a general, non-transparent way, as this would prevent the manager from assessing whether the conduct in question is in line with the objectives and would also require the court to conduct a serious evidentiary hearing in the event of a dispute.

Within undertakings,[48] firms are the legal forms in which such associations have the right to exist; in these, to a certain extent, and taking full account of the specific characteristics of the firm, personal participation and influence may also be possible in addition to the accumulation of assets. The concept of firm must, of course, be used with caution: firms include, for example, companies, groupings and cooperatives, which, in my view, can also function as family businesses without any further restriction. Act V of 2006 on company registration, court proceedings and winding-up, for example, includes individual firms, water management companies and notary offices, the characteristics of which, in my view, make them less suitable for becoming family businesses. In any case, the family should be considered as the defining characteristic of family businesses, with the enterprise itself serving the subsistence of the family (the extended family, depending on the degree of kinship/relationship of the family members). An alternative condition is the personal contribution of family members to the enterprise and the possibility for family members who are not members of the enterprise to be employees.

As I have mentioned, the wording of CSAVE may indeed be a suitable starting point, but there are elements in the relevant list of the economic operator[49] that cannot be assessed as a family business per se, such as the State, the local government, and a budgetary organ or another legal person required by law to apply the rules pertaining to the economic activities of budgetary organs. In the context of the relevant concept, it is therefore worthwhile to list the entities that may become family businesses. Legal entities are also defined in a taxative way, even if not in a single law; such a definition may also be listed in an itemised way.

[48] HCC Section 8:1(1) 4. undertaking means a person acting within its profession, independent occupation or business activity.

[49] CCP Section 7 [Interpretative provisions]. (1) For the purposes of this Act: 6. economic operator means a company, European company, grouping, European economic interest grouping, European grouping for territorial cooperation, cooperative, housing cooperative, European cooperative society, water management company, forest management company, Hungarian branch of an enterprise having its seat abroad, state-owned enterprise, other state-owned economic organ, enterprise of certain legal persons, jointly owned enterprise, court bailiff firm, notary office, law office, patent firm, voluntary mutual insurance fund, private pension fund, individual firm, private entrepreneur and, in the context of its civil relationships related to its economic activities, the State, the local government, a budgetary organ or another legal person required by law to apply the rules pertaining to the economic activities of budgetary organs, an association, a statutory professional body or a foundation.

The concept proposed by the Commission's expert group is an example to be followed in all respects, as it leaves sufficient scope for defining family businesses and represents a specific synthesis of the literature. This flexibility would not be applicable to a Hungarian legal definition, but it is worth considering as a model.

4. Legal aspects of succession issues in family businesses. The family constitution and the succession plan

A major issue in the economic literature is the survival of family businesses,[50] and more specifically, their intergenerational transition, given the indicators that show that the vast majority of family businesses do not survive the second, or even the first, generation. In order to avoid this, various techniques are proposed to improve the chances of starting the process of generational change and to be able to adequately protect themselves against unexpected events that could affect the family business. The study of this issue has been less widespread in the legal literature.[51]

"The family constitution, according to the approach accepted in the literature, is a document that unifies the family's shared values and vision, the common goals to be achieved and the principles to be followed, a basis for identity, a unifying bond."[52] An important feature is that it should reflect family values, it sets out the principles that guide the family's life and guide the family's decisions to ensure that the family's goal in the business is sustainable without compromising the family's understanding (in terms of family relationships or property) and it can provide solutions and guidance for dealing with specific problems. Its content is open-ended and sets out the principles that the family considers essential.[53]

A family constitution cannot consist of just one document; its content can

[50] For example: Csákné Filep, Judit – Karmazin, György: *A családi vállalkozások pénzügyi jellemzői és az utódlással kapcsolatos pénzügyi kérdések*. „Prosperitas" (2017) 3. 5-31. Among family businesses, Peter Leach's multi-published work, also published in Hungarian, is a significant benchmark: Leach, Peter: *Családi vállalkozások*. HVG Könyvek, Budapest, 2018. On succession in particular see: Leach, Peter: *Családi vállalkozások*. HVG Könyvek, Budapest, 2018. 133-288.

[51] See: Arató, Balázs: *A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspektusai*. „Glossa Iuridica" (2020a) 1-2. 141-177. For an international perspective, see for example: Marjanski, Vladimir – Dudás, Attila: *Intergenerational Transfer of Family-run Enterprises by Means of Civil Law in Serbia*. „Central European Journal of Comparative Law" (2021) 2. 119-137.

[52] Arató, Balázs: *A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspektusai*. „Glossa Iuridica" (2020a) 1-2. 141-177. 145. On the identity of family businesses, see: Wieszt, Attila: *„Fontos, hogy mi családi cég vagyunk?" – Családi vállalkozási identitás és teljesítmény*. „Vezetéstudomány" (2020) 2. 60-73.

[53] *KPMG: „Családi vállalkozások" – a magántulajdonú társaságok sikeréért*. 6. The document is availaible online at https://docplayer.hu/2092898-Csaladi-vallalkozasok-a-magantulajdonu-tarsasagok-sikereert-kpmg-hu.html last accessed 10. 11. 2023; Vágány, Judit – Fenyvesi, Éva – Kárpátiné Daróczi, Judit: *Sikeres családi vállalkozás, és ami mögötte van*. „Gradus" (2016) 1. 506-511. 510.

be very diverse. Both in form and content, it can consist of, among other things, the articles of association of the company (in the case of a family business with legal personality), a contract for the transfer of shares (both for pecuniary and non-pecuniary purposes), or a syndicate contract.[54] The content and form of each of these documents is different, but they can all contribute to the formulation of a succession plan and the basis for running the family business.[55]

The family constitution and the succession plan may form a single unit, but they may also be separate, but I believe that a properly prepared succession plan forms part of the family constitution, since the plan will be geared to the future operation of the business and the family constitution itself will encompass the whole of the operation of the family business. It should be added that the succession plan must also properly reflect respect for the past and include the traditions of the family business to be preserved, on which the present of the family business is based and on which the future can be built.[56]

5. Conclusions

The aim of this paper was not to explore all the legal aspects of family businesses, but to outline possible research directions. Some of these are already beginning to appear in the legal literature, but more can be found in economic literature. Several aspects are analysed, some of which are also legally relevant, such as the concept of family business.

A single definition of family business cannot be drawn from the literature because, although a definition may include a significant number of family businesses, there is a risk of excluding an equal number of family businesses. In the event that a legal definition is established, additional legal consequences should be attached to it. However, such a definition should preferably be based on as broad a consensus as possible in the literature, as current research uses a different definition from one author to another, which may become subjective as a result

[54] Papp, Tekla: *A szindikátusi szerződés*. In Papp, Tekla (ed.): *Atipikus szerződések*. Opten Informatikai Kft., Budapest, 2015. 224-235; Papp, Tekla: *Atipikus szerződések*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2019. 113-124; Veress, Emőd: *Szindikátusi szerződés*. In Dúl, János – Lehoczki, Zóra Zsófia – Papp, Tekla – Veress, Emőd (ed.): *Társasági jogi lexikon*. Dialóg Campus Kiadó, Budapest, 2019. 231-234; Fazakas Zoltán József: *A családi gazdasági társaságok és a szindikátusi szerződések lehetséges kapcsolódásai*. „Debreceni Jogi Műhely" (2023) 1-2. 99-124; Arató, Balázs: *Családi vállalkozások; családi alkotmány és generációváltás.* Patrocinium Kiadó, Budapest, 2023. 123-179.

[55] See also: Braut Filipović, Mihaela: *Corporate Governance of Family Businesses in Croatia – Legal Framework and Open Challanges*. „Central European Journal of Comparative Law" (2021) 1. 9-27.

[56] Leach, Peter: *Családi vállalkozások.* HVG Könyvek, Budapest, 2018. 101-131. See also in detail: Arató, Balázs: *Családi vállalkozások; családi alkotmány és generációváltás.* Patrocinium Kiadó, Budapest, 2023. 79-121.

of the beliefs of the researchers and research opportunities.[57] In my view, provided factors for a comprehensive concept could serve as a starting point for legislation.

Succession in family businesses is also an important issue, which can occur both between living persons and in the event of death, and triggers different legal mechanisms. The picture is also nuanced by the type of family business under scrutiny, the situation is different for partnerships per se where one of the members has died, and further analysis is needed for other legal entities and even contracts.

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3. Arató, Balázs: *A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspektusai*. „Glossa Iuridica" (2020a) 1-2. 141-177.
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[57] Kása, Richárd – Radácsi László – Csákné Filep Judit: *Családi vállalkozások definíciós operacionalizálása és hazai arányuk becslése a kkv-szektoron belül.* „Statisztikai Szemle" (2019) 2. 146-174. 150.

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Coercive Administrative Measures Applied in Financial Legal Relations According to Bulgarian Legislation

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Abstract

The report examines the enforced administrative measures applied in financial legal relations according to Bulgarian legislation. The enforced administrative measures are considered as a form of state coercion for the fulfillment of obligations arising from financial legal norms and the principles they should be based on. A definition of enforced administrative measures according to Bulgarian legislation is provided. The principles of legality, proportionality, restrictive interpretation of the substantive legal provisions in their application, and actions of the administrative body in conditions of bound competence are examined. The main role of these measures in preventing, stopping, or removing the harmful consequences of administrative violations is analyzed, as well as their specific goal of eliminating the administrative violation and its consequences, rather than sanctioning the violator, and their effect over time. The specific enforced administrative measures that are legislatively regulated in Bulgarian financial laws, such as the sealing of a commercial establishment and others, the supervisory measures imposed by the Bulgarian National Bank, the deadlines for their judicial contestation, and the competent court before which the complaint is filed, are studied. The enforced administrative measures in money laundering, such as measures for the prevention of the financial system, are considered. Current judicial practice of Bulgarian courts in contesting enforced administrative measures through judicial proceedings is cited.

Keywords*: coercive administrative measures, legality, money laundering, financial legislation.*

JEL Classification*:* K23, K34

1. Introduction

An enforced administrative measure is a form of state coercion for fulfilling obligations arising from financial legal norms[2] and represents a tool of the state to ensure the lawful execution of certain legal relations through the use of state coercion. Administrative measures are not administrative sanctions. An enforced administrative measure, as a type of state coercion, causes adverse consequences for the addressee with the goal of achieving a legally defined result. It impacts the subject to make them undergo unfavorable personal and property consequences, which the legislator has deemed will prevent the commission of a specific offense. Given this characteristic, the enforced administrative measure is

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[2] Lazarov, Kino. *Coercive administrative measures*, ed. Science and Art, Sofia, 1981, p. 75.

identical to the other type of administrative coercion - the administrative sanction, which aims for an adverse impact, but for a committed offense. Administrative coercion, in the narrow sense of the word, is a system of measures and actions of competent administrative authorities, intended to ensure the enforcement of the protected and applied legal norms through it[3]. The enforced administrative measures are actions of the administration in applying the disposition of the respective legal norm, while administrative sanctions — the application of its sanction. The structure of the study includes a concept of enforced administrative measures, their characteristics, judicial practice in judicial control over issued enforced administrative measures, and conclusion, using comparative and analytical research methods.

2. Concept of an enforced administrative measure

According to Article 22 of the Law on Administrative Offenses and Penalties, to prevent and stop administrative offenses, as well as to prevent and eliminate the harmful consequences of them, enforced administrative measures may be applied. This legal definition of the purpose of the enforced measures clearly indicates that they are conditioned by an offense, particularly an administrative violation. If there is no established administrative violation, the enforced administrative measure would not have its lawful purpose[4].

The specific measures are established in the financial laws—according to Article 23 of the Law on Administrative Offenses and Penalties, the cases when enforced administrative measures can be applied, their type, the bodies that apply them, and the manner of their application, as well as the procedure for their appeal, are regulated in the respective law or decree. The enforced administrative measure is foreseen in the law as administrative coercion to prevent and stop administrative offenses, as well as to prevent and eliminate the harmful consequences of them. It protects a certain legal norm by bringing the behavior of a specific legal subject into compliance with its disposition, for which there is an immediate danger to deviate, is deviating, or has deviated from what is prescribed[5].

3. Characteristics

When issuing enforced administrative measures, the principle of legality must be strictly followed, applying a restrictive interpretation of substantive legal provisions.

Enforced administrative measures are acts of state governance classified

[3] Dermendzhiev, Ivan, Kostov, Dimitar, Khrusanov, Doncho, *Administrative law of the Republic of Bulgaria. General Part*, ed. Sibi, Sofia 2011 pp. 361-367.
[4] Chifchieva, Miroslava, *Coercive administrative measures*, ed. Sibi, 2022, pp. 20-33.
[5] Decision No. 10/18 on constitutional case No. 4/2017 of the Constitutional Court.

as individual administrative acts and should adhere to the principle of legality, both regarding their issuance and implementation[6]. Compliance with legality requirements in issuing the act guarantees the lawfulness of the measure itself. Enforced administrative measures are applied to prevent, stop, or remove the harmful consequences of administrative violations, aiming to eliminate the administrative violation and its consequences, not to sanction the violator. Applying an enforced administrative measure based on grounds not explicitly regulated in the law, or in the absence of all normatively established conditions, is inadmissible.

The substantive legal prerequisites for such measures are subject to strict and restrictive interpretation because their application directly affects the legal sphere of the addressee. Due to their restrictive nature, it is inadmissible to expand their scope and field of application.

Protection of the rights and interests of the addressee of the enforced administrative measure is ensured by adhering to the principle that the administrative act and its implementation cannot affect rights and lawful interests more than necessary for the purpose for which the act is issued. The administrative body must refrain from acts and actions that could cause damages clearly disproportionate to the pursued goal[7].

The issuance of the order for the enforced administrative measure by the competent administrative body is carried out under conditions of bound competence. This means that in the case of an established administrative violation, which the parties to the case do not dispute, the administrative body could not decide whether to impose an enforced administrative measure or not, but was obliged to do so. An exception to bound competence is the exercise of discretionary power in determining the duration of the enforced administrative measures. In determining the duration, the administrative body acts with operational independence, so only compliance with the limits of operational independence and the conformity of the act with the purpose of the law are subject to judicial review. The duration is determined in accordance with the established factual situation, the severity of the violation, and the goals of the law, which are to protect public interests and motivate the violator to comply with the established legal order.

Measures must be applied only in explicitly and precisely listed cases in the law or decree, only by the bodies specified in the legal norm or bodies equivalent to them. Only the enforced administrative measure specifically defined in type in the legal norm should be applied.

Enforced administrative measures must be applied in the manner and order provided in the legal norm and must be taken in accordance with the substantive legal requirements of the general and special norms regulating them (substantial legality), should be applied in accordance with the purpose of the law

[6] Dermendzhiev, Ivan, Kostov, Dimitar, Khrusanov, Doncho, *op. cit.*, pp. 369-371.
[7] Cheshmedzhieva, Margarita, *Administrative law in schemes and definitions*, ed. Fenea, 2015, pp. 88-89.

(targeted nature of the act). Strict compliance with the requirements for the legality of administrative acts when applying an enforced administrative measure guarantees their lawfulness.

Enforced administrative measures can be applied in legal relations where one of the subjects is an individual, a legal entity, or non-personified companies and insurance funds equated based on Article 9, paragraph 2 of the Tax and Social Insurance Procedure Code (TSIPC)[8]. A civil society is non-personified, but according to Article 9, paragraph 2 of the TSIPC, in proceedings under this code, non-personified companies are equated with legal entities, i.e., for the purposes of taxation, the law regulates a legal fiction. Specifically, in connection with the independent economic activity carried out by this company, it is a tax-liable entity under Article 3 of the Value Added Tax Law[9].

Enforced administrative measures are applied for a specific offense, as they are an expression of state coercion, and the exercise of state coercion in the absence of an offense is inadmissible. They can be applied independently or cumulatively with seeking another type of responsibility (administrative, criminal, civil). They may have a one-time legal effect or act for a specified period[10].

The Currency Law includes regulation of enforced administrative measures. According to Article 17 of the Currency Law, upon the establishment of violations of this law and the normative acts for its implementation, the Minister of Finance or an authorized person may: issue written instructions for the removal of the violations within a specified period; apply an enforced administrative measure of sealing the commercial establishment of persons under Article 3, paragraph 1 of the Currency Law, who are not banks; revoke the issued certificate of registration of a person operating as a currency exchange office.

The Bulgarian National Bank may conduct inspections and enforce the collection of statistical information according to Article 6 of Regulation (EC) No. 951/2009 of the Council of October 9, 2009, amending Regulation (EC) No. 2533/98 on the collection of statistical information by the European Central Bank (Official Journal, L 269/1 of October 14, 2009); issue written instructions for the removal of deficiencies in the declaration under Article 7, paragraph 5 of the law, in the information under Article 8, or in the statistical forms under Article 10, paragraphs 1 and 2, when the requirements of Articles 7, 8, and 10 of the law, as well as the normative acts for their implementation, are not met.

The National Revenue Agency or an authorized person may: issue written instructions for the removal of violations within a specified period; apply an

[8] According to Art. 357 of the Law on Obligations and Contracts, with the partnership agreement two or more persons agree to combine their activities to achieve a common economic goal.

[9] According to Art. 2, item 4 of the Accounting Act, companies under the Obligations and Contracts Act are enterprises and accordingly have an obligation to keep accounting records /in contrast to enforcement, in which it is carried out against the persons participating in the unincorporated companies, according to their participation.

[10] Penov, Sasho, *Financial law. General part*, Univ. ed. "St. Kliment Ohridski", Sofia, 2021, pp. 225-230.

enforced administrative measure of sealing the commercial establishment of persons under Article 13, paragraph 1 of the law, who are not banks. The execution of the administrative sanction and the enforced administrative measure is terminated by the body that imposed them, upon request of the administratively penalized person, and after it is proven by them that the imposed property sanction or fine has been paid in full. The deprivation of the right to exercise the respective activity, as well as the enforced administrative measure, are subject to preliminary execution, unless the court orders otherwise.

Article 186 of the Value Added Tax Law stipulates that the enforced administrative measure of sealing an establishment for a period of up to 30 days, regardless of the provided fines or property sanctions, is applied to a person who does not issue a corresponding document for sale under Article 118 of the Value Added Tax Act; does not commission or register a fiscal device or an integrated automated system for managing commercial activity with the National Revenue Agency; does not submit data from the electronic system with fiscal memory under Article 118 to the National Revenue Agency; uses a fiscal device or integrated automated system for managing commercial activity that does not meet the requirements for approved type and is not approved by the Bulgarian Institute of Metrology; uses electronic systems with fiscal memory that are not of an approved type, have been modified by adding or removing individual components without prior notification to the National Revenue Agency, have broken or missing seals, allow a mode of operation during interruption of connection/connections and/or communication/ communications between the individual modules not as established by the regulation under Article 118, paragraph 4 of the law; has chosen to manage sales in a commercial establishment through software included in the list under Article 118, paragraph 16 of the law, but for managing sales in this commercial establishment uses software/software module not included in the list under Article 118, paragraph 16 of the law.

The enforced administrative measure is applied with a reasoned order by the revenue body or an authorized official. The appeal of the order for the application of the enforced administrative measure is carried out according to the Administrative Procedure Code.

An exception is provided in Article 186a of the Value Added Tax Act - Regardless of the stipulated fine or property sanction, the enforced administrative measure under Article 186 of the Value Added Tax Act is not applied to a person under Article 118, paragraph 18 of the law, which for the first time does not issue a corresponding document for sale under Article 118, provided that for managing sales it has chosen and uses only software included in the list under Article 118, paragraph 16 of the law.

When applying the enforced administrative measure under Article 186, paragraph 1 of the Value Added Tax Act, access to the establishment or establishments of the person is prohibited, and the available goods in these establishments and the adjoining warehouses are removed by the person or an authorized

person. The measure is applied to the establishment or establishments where the violations have been established, including when at the time of sealing the establishment or establishments are managed by a third party, if this third party knows that the establishment will be sealed. The National Revenue Agency publishes on its internet page lists of the commercial establishments subject to sealing and their location. It is considered that the person knows when a permanently affixed notice of sealing and/or information about the commercial establishment subject to sealing and its location is published on the internet page of the revenue administration.

When the removal is associated with significant difficulties for the revenue bodies and/or significant expenses for the person, the body that ordered the sealing may arrange for the goods in the establishment or establishments to be left under the responsible care of the person. The arrangement does not apply to the goods, which are subject of the violation under Article 186, paragraph 1, item 2 of the law.

The enforced administrative measure is terminated by the body that applied it, upon request of the administratively penalized person, and after it is proven by them that the fine or property sanction has been paid in full. The unsealing is carried out with the obligation of cooperation on the part of the person. In case of a repeat offense, unsealing of the establishment is not allowed before the expiration of one month from its sealing.

The enforced administrative measure under Article 186, paragraph 1 of the Value Added Tax Law is subject to preliminary execution under the conditions of Article 60, paragraphs 1-7 of the Administrative Procedure Code, and the court's determination is not subject to appeal.

Enforced administrative measures are also applied by the Bulgarian National Bank as supervisory measures. They are part of the supervisory measures that the Bulgarian National Bank may take in case of violations or omissions, which consist of breaching or circumventing the provisions of this law, the directly applicable acts of the European Union for which the Bulgarian National Bank has been granted authority, including Regulation (EU) No. 575/2013 or acts of the Bulgarian National Bank, breaches of confidentiality requirements, concluding banking transactions that affect the financial stability of the bank, or banking transactions that, through the use of impersonators, thwart or circumvent the application of the provisions of this law, the normative and other acts and instructions of the Bulgarian National Bank, failure to fulfill written commitments made by the bank to the Bulgarian National Bank, conducting transactions or other actions in violation of the issued banking license or another permission or approval from the Bulgarian National Bank, obstructing the exercise of banking supervision, non-payment of premium contributions to the Bank Deposit Insurance Fund or other actions endangering the interests of depositors, violations of the Law on Measures Against Money Laundering or the Law on Measures

Against the Financing of Terrorism and the acts for their implementation, identified in the control under Art. 108, para. 6 and the inspections under Art. 108, para. 4 of the Law on Measures Against Money Laundering, as well as in cases under Art. 79b, para. 8 of the law, endangering the stability of payment systems, violating the conditions based on which the bank's license or other permission or approval was issued, and others.

The acts for the application of the measures are subject to immediate execution. The Bulgarian National Bank has the right to request the announcement of the acts for the application of the measures, respectively the registration of the circumstances subject to registration resulting from the application of these measures, in the commercial register. In cases where the Bulgarian National Bank has applied a measure, the general meeting of shareholders is convened by the Bulgarian National Bank through an invitation, which is announced in the commercial register.

Individual administrative acts applying an enforced administrative measure can be contested before a three-member panel of the Supreme Administrative Court regarding their legality. The court rules on the complaint within a 40-day period from the formation of the respective first-instance or cassation proceedings.

According to the Excise Duties and Tax Warehouses Act, when imposing an administrative punishment, an enforced administrative measure may also be applied.

When imposing an administrative punishment, an enforced administrative measure of sealing the establishment or establishments where the violation was established is also applied for a period of one month, and in case of a repeat violation - for a period of 2 to 6 months (Art. 124b of the law).

The enforced administrative measure is applied with a reasoned order by the director of the competent territorial directorate or by an authorized official at the location of the establishment. The order is subject to preliminary execution unless otherwise ordered by the court. The order is subject to appeal according to the Administrative Procedure Code. The enforced administrative measure is terminated by the body that imposed it, upon request of the administratively penalized person, and after it is proven by them that the fine or property sanction has been paid in full. The unsealing is carried out with the obligation of cooperation on the part of the person.

When applying the enforced administrative measure under Art. 124b, para. 1 of the Excise Duties and Tax Warehouses Law, access to the establishment or establishments of the violator is also prohibited, and the available goods, except those that are the subject of the violation, are removed by the person or by an authorized person within a period determined by the body that imposed the enforced administrative measure. When the removal is associated with significant difficulties and/or significant expenses, the body that imposed the measure under Art. 124b, para. 1 of the law, may order that the goods in the establishment or

establishments be left under the responsibility of the violator. The order does not apply to the goods that are the subject of the violation. In cases where the removal of the goods is not carried out within the specified period, the customs authority removes them, placing them in front of the establishment, without obligation to keep them, at the expense of the liable person and bears no responsibility for their damage, wear, or loss.

When issuing an enforced administrative measure, the administrative body acts under conditions of bound competence. It does not have the right to independently assess whether to apply an enforced administrative measure for an administrative violation that falls within the subject scope of Art. 124a, para. 1 of the Excise Duties and Tax Warehouses Law. There is no need to state specific motives regarding the goals pursued with the application of the measure. The extent of the measure is specifically determined in the legal norm of Art. 124b of the law, so the administrative body again has no opportunity for independent assessment. The only thing that needs to be verified in connection with the duration of the applied enforced measure is whether the violation has been committed repeatedly or not, in view of imposing a longer punishment.

The measures provided in the Law on Measures Against Money Laundering do not constitute actual enforced administrative measures given the definition of enforced administrative measure in Art. 22 of the Law on Administrative Offenses and Penalties. They are formulated as measures for the prevention of the use of the financial system for the purposes of money laundering and include a comprehensive check of clients, collection, and preparation of documents and other information under the conditions and according to the order of this law, storage of the collected and prepared documents, data, and information for the purposes of this law, assessment of the risk of money laundering and financing of terrorism, disclosure of information about suspicious operations, transactions, and clients, disclosure of other information for the purposes of this law, control over the activities of obliged entities, exchange of information and interaction at the national level, as well as exchange of information and interaction between the Financial Intelligence Directorate of the State Agency for National Security, financial intelligence units of other countries and jurisdictions, and with the competent authorities and organizations in the respective field of other countries. In cases of money laundering and/or suspicion of funds of criminal origin, the director of the Financial Intelligence Directorate of the State Agency for National Security may stop a certain operation or transaction with a written order for a period of up to 5 working days, counted from the day following the day of the issuance of the order, for the purpose of performing an analysis, confirming the suspicion, and disclosing the results of the conducted analysis to the competent authorities. If no seizure or prohibition is imposed by the expiration of this period, the person may perform the operation or transaction[11]. When a person does not

[11] Art. 73 of the Law on Measures Against Money Laundering.

fulfill their obligations under Art. 102 or Art. 104, para. 2 of the law, as well as in established violations under Art. 116 of the law, the director of the Financial Intelligence Directorate of the State Agency for National Security may order the person to stop the violation and to take specific measures necessary for its removal, determining a deadline for their implementation[12].

The Bulgarian law lacks systematization of the stipulated measures and does not ensure full transposition of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on preventing the use of the financial system for the purposes of money laundering and financing of terrorism and amending Directives 2009/138/EC and 2013/36/EU in the part of the provided legal measures.

4. Judicial practice in judicial control over issued enforced administrative measures

The court accepts that the application of the enforced administrative measure "Sealing of an establishment: currency exchange office" is conditioned by the imposition of the administrative punishment "Deprivation of the right to operate as a currency exchange office," which directly follows from the provision of Art. 18, para. 7 in connection with para. 6 of the Currency Law. With the penal decree, the enforced administrative measure of sealing the establishment is also applied. The administrative punishment "Deprivation of the right to engage in the corresponding activity" for committing the violations specified in the norm is imposed along with a fine or property sanction, and the enforced administrative measure "sealing of the establishment" can only be imposed if the violator has been administratively punished with "deprivation of the right to engage in the corresponding activity." The administrative body acts under bound competence, where it mandatorily applies the enforced administrative measure, but only in the presence of a penal decree imposing the specified punishment of "deprivation of the right to engage in the corresponding activity." Issuing an order to apply such a measure without a penal decree constitutes a violation of the substantive law, which is grounds for its annulment[13].

As the sealing off of the commercial premises is accompanied by a ban on access/Art. 187, para. 1 in conjunction with Art. 186, para. 1 of the Value Added Tax Act, it is clear that the application of these measures does not aim to stop the violation expressed through inaction in providing data to the National Revenue Agency via a remote connection. This violation presupposes active behavior in the commercial premises by the addressee of the measures —aligning the activities of the obligated entity with the requirements of Art. 18, para. 8 of the law and Art. 3, para. 3 and para. 12 of the Ordinance for the application of the

[12] Art. 126 of the Law on Measures Against Money Laundering.
[13] Decision No. 118 of 26.01.2016 by Adm. D. No. 3387/2015 of the Varna Administrative Court.

law. Therefore, from the objectives of the measures under Art. 22 of the Law on Administrative Offenses and Penalties for the measures under Art. 186, para. 1 and Art. 187, para. 1 of the Value Added Tax Act, only the goal of prevention is relevant - to prevent administrative violations. In this case, this goal had already been achieved at the time the mandatory measure was issued. When the coercive administrative measure is imposed after the cessation of the violation, it takes the character of a sanction, and coercive administrative measures do not serve such a function. For such an administrative violation, the law stipulates a property sanction, which is imposed with other objectives — to warn and re-educate the violator. The incongruity of the imposed coercive administrative measure with the purpose of the law constitutes a material illegality of the same, leading to its annulment[14].

The purpose of the coercive administrative measure is the prevention of the violation. After the cessation of the violation in accordance with Art. 6, para. 5 of the Administrative Procedure Code, the issuer of the act should have refrained from issuing it. The lack of purpose of the act is an independent ground for its annulment[15].

Accordingly, the understanding of dividing coercive administrative measures into preventive, suspensive, and restorative, as contained in Art. 22 of the Law on Administrative Offenses and Penalties, is based on positive legal regulation. In the hypothesis of Art. 124b, para. 1 of the Excise Duties and Tax Warehouses Law, the legal fact that gives the power to the head of the customs office or a person authorized by them to impose a measure to seal off the premises is the imposition of a penalty under Art. 124a of the law. The provision, which is the address of the referral, provides for the imposition of a cumulative penalty of deprivation of rights for exhaustively listed violations, including those under Art. 126 of the law. By imposing penalties for the violation committed under Art. 126 of the Excise Duties and Tax Warehouses Act, as the source of their authority under Art. 124b, para. 1 of the Excise Duties and Tax Warehouses Act, the respondent in cassation under the conditions of bound competence issued the aggravating administrative act, the content of which is the sealing of the commercial premises where the illegal activity was carried out[16].

The conditions specified in the legal norm necessitate the application of a compulsory administrative measure, and the administrative body acts under the conditions of bound competence. The application of the measure under Art. 124b of the law is conditioned by the established violation and the imposed punishment of 'deprivation of the right to practice a certain activity in the facility where the violation is established.' The purpose of the measure under Art. 124b, para. 1 of the law is to ensure and secure the implementation of the imposed administrative

[14] Decision No. 6912 of 26.06.2023 by Adm. No. 483/2023 of the Supreme Administrative Court.
[15] Decision No. 715 of 23.01.2023 under Adm. d. No. 3611/2022 of the Supreme Administrative Court.
[16] Decision No. 2158 of 28.02.2023 by Adm. No. 5082/2022 of the Supreme Administrative Court.

penalty of 'deprivation of the right to conduct a certain activity or activities,' as according to Art. 124a, para. 1 of the Excise Duties and Tax Warehouses Act, it is implemented in the facility where the violation is established[17].

In the decision of the Court of Justice of the EU on case C 97/21 with the subject of a preliminary question referred under Article 267 TFEU by the Administrative Court - Blagoevgrad (Bulgaria) with an act from February 12, 2021, it is stated that according to the constant judicial practice, the administrative sanctions imposed by the national tax authorities in the field of value-added tax represent the application of Articles 2 and 273 of the VAT Directive and therefore the law of the Union within the meaning of Article 51, paragraph 1 of the Charter[18]. Therefore, they must be in accordance with the fundamental right guaranteed in Article 50 of the same (see in this sense decision of May 5, 2022, BV, C 570/20, EU:C:2022:348, item 26 and the cited judicial practice)[19]. Article 273 of the VAT Directive and Article 50 of the Charter must be interpreted in a way that does not allow a national legal regulation, according to which for the same non-fulfillment of a tax obligation and after conducting separate and independent proceedings, a tax-liable person may be imposed a measure of a property sanction and a measure of sealing a commercial facility, which are subject to appeal in different courts, as long as the mentioned legal regulation does not provide coordination of the proceedings, allowing the additional burden from the cumulation of the mentioned measures to be reduced to the strictly necessary, and does not allow to guarantee that the severity of all imposed sanctions corresponds to the severity of the violation under consideration[20].

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[17] Decision No. 167 of 13.02.2023 under Adm. d. No. 1457/2022 of the VIII Chamber of the Administrative Court - Varna.

[18] The national regulation is in art. 118, para. 1 of VAT, Art. 185, Art. 186 and Art. 187 of the VAT on sealing a commercial establishment and its location is published on the website of the revenue administration.

[19] Article 50 of the Charter states that "[n]o person shall be prosecuted or punished for an offense for which he has already been acquitted or convicted in the territory of the Union by a final judgment in accordance with law." Thus, the ne bis in idem principle prohibits the cumulation of both accountability procedures and sanctions, which have a criminal nature within the meaning of this article, for the same act and against the same person (decision of 22 March 2022, C 117/20, EU:C:2022:202, item 24 and the cited case law).

[20] Sealing for a period, the duration of which can reach 30 days, could, however, be qualified as severe especially for a sole trader who has only one commercial site, since in particular it prevents him from carrying out his business and therefore deprives him of income his. As for the pecuniary penalty, the fact that it is heavy is evidenced both by the impossibility of its amount for a first offense being below BGN 500 (about 250 euros) and the possibility of it reaching BGN 2,000 (about 1,000 euros), as well as by the ratio between the unpaid VAT for the sale of a pack of cigarettes considered in the main proceedings, namely an amount of less than BGN 1 (about EUR 0.50), and the sanction imposed, which according to the data of the Bulgarian government is in the amount of BGN 500 (about EUR 250). In this context, if, as follows from the information of the referring jurisdiction, the measures considered in the main proceedings are to be qualified as sanctions of a criminal nature, it should be considered that the cumulation of these sanctions leads to a limitation of the fundamental right guaranteed in Article 50 of the Charter.

5. Conclusion

The compulsory administrative measures applied in financial legal relations have a purely sanctioning character, as they are always applied cumulatively with a penal decree or after the issuance of a penal decree. The composition of the administrative offense is complete, i.e. the applied compulsory administrative measures do not correspond to the main objective set out in the Law on Administrative Offenses and Penalties — to prevent or stop the commission of an offense. The applied compulsory administrative measures lead to a double sanction for the affected addressees – a property sanction/fine imposed with the penal decree and property damage as a result of the imposed compulsory administrative measure. If the penal decree is annulled as unlawful, the damages suffered from the compulsory administrative measure are compensated following a claim filed according to the Law on State and Municipal Liability for Damages.

In view of ensuring the compliance of the legal regulation of the compulsory administrative measure in financial laws, which is special compared to the regulation of the compulsory administrative measure with a general clause in the Law on Administrative Offenses and Penalties—with the compulsory administrative measures to prevent or stop the commission of an offense, it is justified that in part of the financial laws, the possibility of applying compulsory administrative measures should be entirely eliminated.

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The "Criminal" Nature of the Measure of Suspension of the Operating Authorization of a Legal Person as a Tax Warehouse

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Abstract

The issue of liability of the legal person, in the context of discussing the "challenges of business law in the third millennium", gives us the opportunity to address some aspects regarding the qualification as "criminal sanctions" of some administrative measures taken in fiscal terms. Using, as research methods, documentation, interpretation and comparative scientific analysis, the present study brings to attention the need to continue the process of harmonizing national legislation with European Union law, with a view to the uniform application of a general regime of excise duties. Starting from a recent decision of the Court of Justice of the European Union (Judgement of 23 March 2023) regarding two preliminary questions formulated by a Romanian court, and considering the fact that the phrase "in criminal matters" has a wider meaning in Union law compared to the one in the Romanian legislation, this paper also concludes with a concrete legislative amendment proposal to avoid the risk of violating, in certain situations, the principle of the presumption of innocence against the legal person that functions as a tax warehouse.

Keywords*: criminal liability of the legal person, the general excise duty regime, tax warehouse, the primacy of European Union law, presumption of innocence.*

JEL Classification*:* K14, K19

1. Introduction

Within the theme of criminal liability of the legal person, this paper deals with some aspects regarding the "criminal" nature, respectively the qualification as a "criminal sanction", of the administrative measure of suspending the authorization to operate as a fiscal warehouse of a legal person.

Emphasizing the importance of the principle of primacy of European Union law, the study discusses the meaning of the phrase "in criminal matters" in Romanian legislation, compared to its broader meaning in Community legislation.

The research methods used in the work are: documentation, interpretation and comparative scientific analysis (both at the level of legislation and at the level of jurisprudence - with references to the jurisprudence of the Court of Justice of the European Union, to the jurisprudence of the European Court of Human Rights and to the national jurisprudence).

As a structure, the study includes three sections (except the introduction

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and conclusions). In the first section, a comparison is presented between administrative fiscal measures, punishments (as criminal law sanctions) and preventive procedural measures that can be taken against a legal person under Romanian legislation, so in the sense of domestic law.

In the 2nd section, the application of Directive 2008/118/EC on the general regime of excise duties at the level of the European Union is addressed.

Section 3 analyzes a recent decision of the Court of Justice of the European Union (Judgment of 23 March 2023) regarding two preliminary questions formulated by a Romanian court, highlighting the fact that the answers given by the Luxembourg court to these questions are in a close connection with the qualification, as a "criminal sanction", of the measure of suspending the authorization to operate as a tax warehouse of a legal person.

The conclusions section also contains a proposal for a *ferenda law* to amend the Romanian Fiscal Code, in order to avoid situations in which, by taking an administrative fiscal measure that could be considered as having a "criminal" nature according to Union law, the principle of the presumption of innocence could be affected.

2. Comparison between fiscal administrative measures, punishments and preventive procedural measures that can be taken against the legal person, based on Romanian legislation

Currently recognized in the legislation of most European states, the institution of criminal liability of the legal person is also regulated in the Romanian Criminal Code[2], in which it is stipulated[3] that the legal person, with the exception of the state and public authorities, is criminally liable for crimes committed in carrying out the object of activity or in the interest or on her behalf.

The punishments that can be applied to the legal person are, according to Romanian legislation[4], of two types: main and complementary. While the main punishment is the fine, the complementary punishments (the application of which is mandatory when the law provides for them or which are applied when the court finds their necessity) are:

- dissolution of the legal person;
- suspension of the activity or one of the activities of the legal person for a period of 3 months to 3 years;

[2] Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009, with subsequent amendments and additions. Thus, as a result of the acceptance of the doctrinal opinions that recognized the existence of a liability of the legal person under the criminal aspect, provisions regarding this form of liability were also introduced in the Romanian Criminal Code, otherwise respecting the recommendations contained in the international documents in the field (Gina Negruț, Adriana Stancu, *Legal person – active topic of corruption infractions*, in "Agora International Journal of Juridical Sciences" no. 4/2013, p. 113).

[3] Art. 135 para. (1) Criminal Code.

[4] Art. 136 Criminal Code.

- closing some work points of the legal person for a period of 3 months to 3 years;

- prohibition to participate in public procurement procedures for a period of one to 3 years;

- placement under judicial surveillance;

- display or publication of the conviction.

Unlike punishments, which are applied in the event of criminal liability under the criminal law, some *measures of a fiscal administrative nature* can be taken against the legal person under the Fiscal Code[5]. Thus, in the case of a legal person operating as a tax warehouse[6], the authorization may be suspended[7]:

a) for a period of 1-6 months, if one of the contraventions provided for in the Fiscal Code, which lead to the taking of this measure, was found to have been committed;

b) for a period of 1-12 months, if one of the acts criminalized as crimes in the Fiscal Code and which attract this measure was found to have been committed;

c) until the final resolution of the criminal case, if the criminal action has been initiated for certain crimes provided for in the Fiscal Code.

In terms of the procedure, the measure of suspending the operating authorization of a legal person as a tax warehouse is ordered, upon the proposal of the control bodies, by the competent authority, which can be represented by[8]:

- the regional general directorates of public finance, the general Directorate for the administration of large taxpayers, as a territorial fiscal authority;

- the structure with powers of monitoring, control and/or resolution of appeals within the Ministry of Public Finance - central apparatus, as the central fiscal authority;

- the structure with attributions in the elaboration of the legislation on the excise regime within the Ministry of Public Finance - central apparatus, as the central fiscal authority;

- the specialized structures within the Romanian Customs Authority, as central or territorial customs authority, as the case may be;

- regional customs directorates or inland customs offices and/or border customs offices, as territorial customs authority.

So, while the punishments, as criminal law sanctions applicable to the

[5] Law no. 227/2015 regarding the Fiscal Code, published in the Official Gazette of Romania no. 688 of September 10, 2015, with subsequent amendments and additions.

[6] The tax warehouse represents, according to art. 336 point 3 of Law no. 227/2015, that "place where excisable products are produced, transformed, held, stored, received or shipped under excise duty suspension regime by an authorized warehousekeeper as part of his activity, subject to certain conditions established by the competent authorities of the member state where the tax warehouse is located", respectively under the conditions provided by the Fiscal Code, if the tax warehouse is located in Romania.

[7] Art. 369 para. (3) Fiscal Code.

[8] Art. 336 point 4 Fiscal Code.

legal person operating as a tax warehouse, can only be ordered by the courts (as judicial bodies), following the completion of a criminal process, by engaging in criminal liability, suspending the authorization it can be ordered by the competent authority according to the Fiscal Code, an authority that does not have the capacity of a judicial body.

At the same time, the distinction must be made between punishments[9], fiscal administrative measures[10] and *procedural preventive measures* that can be taken against a legal person, in the context of the initiation of the procedure to engage it criminal liability.

The specificity of punishments applicable to a legal person and of the crimes that can be committed by a legal person justify the establishment of a special procedure regarding the criminal liability of the legal persons[11]. Such a special procedure, in the sense of a way of carrying out the criminal process different from the usual procedure, and which involves complementary and derogatory rules compared to the common rules, is regulated in the Romanian Code of Criminal Procedure[12].

Thus, according to this special procedure, the following preventive measures can be taken against the legal person[13]:

- prohibition of initiation or, as the case may be, suspension of the procedure for dissolution or liquidation of the legal person;

- the prohibition of the initiation or, as the case may be, the suspension of the merger, division or reduction of the social capital of the legal person, started previously or during the criminal investigation;

- the prohibition of some patrimonial operations, likely to lead to the decrease of the patrimonial asset or the insolvency of the legal person;

- prohibiting the conclusion of legal acts, established by the judicial body;

- prohibiting the carrying out of activities of the nature of those on the occasion of which the crime was committed.

In order for one or more of these procedural measures to be ordered, the

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[9] See also other considerations regarding the sanctioning of legal entities, including for tax evasion or other crimes in the economic field, in Robert Dover, *Fixing Financial Plumbing: Tax, Leaks and Base Erosion and Profit Shifting in Europe*, "The International Spectator" 51, Issue 4 (2016): 40-50, DOI: 10.1080/03932729.2016.1224545; Lindsay M. Tedds, *Keeping it off the books: an empirical investigation of firms that engage in tax evasion*, "Applied Economics" 42, Issue 19 (2010): 2459-2473, DOI: 10.1080/00036840701858141; Daniela Novackova, Tomas Peracek, L'ubomira Strazovska, Boris Mucha, *Financial crime in economic affairs: case study of the Slovak Republic*, "Juridical Tribune" 10, Special Issue (October 2020): 142-163.

[10] For an approach to the legal nature of financial penalties, see also Lukas Jancat, *Special regime for the recognition of decisions on financial penalties: complex analysis*, "Juridical Tribune - Tribuna Juridica" 13, Issue 1 (2023): 93-119, DOI: 10.24818/TBJ/2023/13/1.07.

[11] Anca-Lelia Lorincz, *Special procedure regarding the criminal liability of a juridical person*, in "Perspectives of Business Law Journal", vol. 3, Issue 1, 2014, p. 263.

[12] Law no. 135/2010 regarding the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 of July 15, 2010, with subsequent amendments and additions.

[13] Art. 493 Criminal Procedure Code.

following conditions must be fulfilled, cumulatively:

- there are solid reasons justifying the reasonable assumption that the legal person has committed an act provided for by the criminal law;
- only to ensure the proper conduct of the criminal process.

The competence to take preventive measures belongs to the following categories of judicial bodies: the judge of rights and liberties (during the criminal investigation, at the proposal of the prosecutor), the judge of the preliminary chamber (in the procedure of the preliminary chamber) and the court (during the trial).

In terms of duration, preventive measures can be taken for a maximum of 60 days, with the possibility of extension during the criminal investigation and maintenance during the preliminary chamber procedure and the trial, if the grounds that determined the taking of these measures are maintained, each extension not exceeding 60 days.

During the procedural phase of the criminal investigation, the preventive measures are ordered by the judge of rights and liberties through a reasoned conclusion given in the council chamber, with the summons of the legal person, the participation of the prosecutor being mandatory. Against the conclusion, a contestation can be made to the judge of rights and liberties or, as the case may be, to the judge of the preliminary chamber or the hierarchically superior court, by the legal person and the prosecutor, within 24 hours from the pronouncement, for those present, and from the communication, for the legal person that was absent.

Therefore, these preventive measures can be taken against the legal person only during a criminal trial, so they have a procedural nature, and their purpose is to ensure the smooth running of the trial, to prevent the evasion of the criminal prosecution or judgment of the legal person, or to prevent the commission of another crime.

3. Application of Directive 2008/118/EC on the general regime of excise duties

Between January 2009 and February 2023, at the level of the European Union, in order to guarantee the good functioning of the internal market[14] and to harmonize the conditions regarding the collection of excise duties for certain products, a general regime of these excise duties was established by Directive 2008/118/EC[15]; this directive was amended (reformed) and, from February 13,

[14] As part of the European integration process - see, in this sense, Janusz Ruszkowski, *From finalité politique to multifinalité. Theoretical basis explaining the turn in the process of defining the future of the European Union*, "Romanian Journal of European Affairs" 20, no. 2 (2020): 131-146.

[15] Council Directive 2008/118/EC of 16 December 2008 on the general regime of excise duties and repealing Directive 92/12/EEC, published in the Official Journal of the EU no. L 9 of January 14, 2009; this directive was amended (reformed) and, from February 13, 2023, repealed by Council Directive (EU) 2020/262 of December 19, 2019 establishing the general regime of excise duties, published in the Official Journal of the EU no. L 58 of February 27, 2020.

2023, repealed by Council Directive (EU) 2020/262[16], the new regulation maintaining the same provisions regarding the general regime of excise duties. Therefore, all considerations related to Directive 2008/118/EC, contained in this study, are also valid in relation to the new regulation.

In the recitals of Directive 2008/118/EC it was mentioned that "since checks need to be carried out in production and storage facilities in order to ensure that the tax debt is collected, it is necessary to retain a system of warehouses, subject to authorization by the competent authorities, for the purpose of facilitating such checks" and that it is also necessary "to lay down requirements to be complied with by authorized warehousekeepers and traders without authorized warehousekeeper status".

Among the excisable products on which a general regime has been established[17] there is alcohol and alcoholic beverages regulated by Directives 92/83/CEE[18] and 92/84/CEE[19].

For the implementation of Directive 2008/118/EC at the level of the Member States of the European Union, the Council defined[20] the terms and expressions used, including:

- *authorized warehousekeeper* – "a natural or legal person authorized by the competent authorities of a Member State, in the course of his business, to produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse";

- *duty suspension arrangement* – "a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended";

- *tax warehouse* – "a place where excise goods are produced, processed, held, received or dispatched under duty suspension arrangements by an authorized warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located".

The directive provides[21] that, subject to compliance with the established general framework, each Member State regulates, by developing its own rules, the production, transformation and possession of excisable products. Also, this directive establishes the rule according to which the production, transformation

[16] Council Directive (EU) 2020/262 of December 19, 2019 establishing the general regime of excise duties, published in the Official Journal of the EU no. L 58 of February 27, 2020.
[17] Art. 1 para. (1) lit. b) from Directive 2008/118/EC.
[18] Council Directive 92/83/EC of 19 October 1992 on the harmonization of excise duty structures on alcohol and alcoholic beverages, published in the Official Journal of the EU no. L 316 of October 31, 1992.
[19] Council Directive 92/84/EC of 19 October 1992 on the approximation of excise duty rates on alcohol and alcoholic beverages, published in the Official Journal of the EU no. L 316 of October 31, 1992.
[20] Art. 4 points 1, 4 and 11 of Directive 2008/118/CE.
[21] Art. 15 of Directive 2008/118/EC.

and holding of excisable products, when the excise duties have not been paid, must be carried out in a tax warehouse.

Regarding the tax warehouse, Directive 2008/118/EC states[22] that "the opening and operation of a tax warehouse by an authorized warehousekeeper shall be subject to authorization by the competent authorities of the Member State where the tax warehouse is situated", the authorization being subject to the conditions that these authorities have the right to establish in order to prevent any fraud or abuse.

Among the obligations that the directive establishes for the authorized warehousekeeper are:[23]:

- compliance with the requirements established by the member state on whose territory the tax warehouse is located;

- placing in its tax warehouse and entering in its accounting register, after the end of the movement, all excisable products moving under excise duty suspension regime, unless[24] the Member State allows the movement of excise goods under excise duty suspension regime to a place of delivery directly located on its territory;

- acceptance of all monitoring actions and controls concerning stocks.

The transposition into Romanian legislation of Directive 2008/118/EC was carried out through the provisions of the Fiscal Code, according to which[25] the necessary conditions for issuing the tax warehouse authorization are as follows:

- the place is to be used for the production, transformation, holding, receiving and/or shipping of excisable products under excise duty suspension regime;

- the place is located, constructed and equipped in such a way as not to allow the removal of excise goods without payment of excise duties;

- the place will not be used for the retail sale of excisable products, with the exceptions provided by law;

- in the case of a legal person that is going to carry out its activity as an authorized warehouse, neither the person itself nor the administrators of this legal person are incapacitated, have not been definitively convicted or have not been pronounced a postponement of the application of the sentence for the crimes referred to the law (including the offenses provided for in the Fiscal Code).

[22] Art. 16 para. (1) of Directive 2008/118/EC.
[23] Art. 16 para. (2) letter b), d) and e) of Directive 2008/118/EC.
[24] In application of art. 17 of Directive 2008/118/EC.
[25] Art. 364 Fiscal Code.

4. Analysis of the Judgment of the Court of Justice of the European Union of 23 March 2023

Relevant to the measures that can be taken against a legal person operating as a tax warehouse, is the Judgment of the Court of Justice of the European Union (C.J.E.U.) of 23 March 2023[26], a decision that raises the issue of the legal nature (of the qualification) of these measures, as well as the duration for which they may be available.

Thus, in a case before the C.J.E.U., a Romanian Court (Tribunalul Satu Mare - Regional Court Satu Mare) made a request for a preliminary decision regarding the interpretation of art. 16 para. (1) of Directive 2008/2018/EC, as well as of art. 48 para. (1) and art. 50 of the Charter of Fundamental Rights of the European Union[27].

The internal litigation in which the request for a preliminary decision was made had as subjects: the company Dual Prod SRL (a Romanian company that operates in the field of alcohol and alcoholic beverages subject to excise duties) and the Cluj-Napoca Regional General Directorate of Public Finances (Regional commission for the authorization of operators of products subject to harmonized excise duties), and the object of this litigation was, among other things, the annulment of the decision to suspend the authorization to operate as a tax warehouse.

In fact, C.J.E.U. found that, as a result of a search to which the company Dual Prod was subjected on August 1, 2018, it was ordered to start the criminal prosecution *in rem* for the commission of crimes provided for in the Fiscal Code[28], which consist in the evacuation and possession, outside the tax warehouse, of a quantity greater than 40 liters of ethyl alcohol with an alcoholic strength of at least 96% by volume, respectively in the installation of a hose at the production facility.

In this context, under the Fiscal Code[29], the competent administrative authority (Regional General Directorate of Public Finances Cluj-Napoca) suspended the authorization of the legal entity Dual Prod to operate as a tax warehouse for a period of 12 months, a period that was reduced to 8 months by the Oradea Court of Appeal (by decision handed down on December 13, 2019, as a result of the notification made by Dual Prod company). The measure of suspension of the authorization for the period of 8 months was executed in full.

Later, after the Dual Prod legal person became a defendant (on October

[26] Judgment of 23 March 2023, Dual Prod (C-412/21, EU:C:2013:234), document available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=271743&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3647324#Footnote, accessed on 16.10. 2023.

[27] The Charter of Fundamental Rights of the European Union, published in the Official Journal of the EU no. C 202 of June 7, 2016; Art. 48 para. (1) enshrines the principle of presumption of innocence, and art. 50 regulates the right not to be tried or convicted twice for the same crime.

[28] Art. 452 para. (1) letter h) and i) Fiscal Code.

[29] Art. 369 para. (3) letter b) Fiscal Code.

21, 2020) in the criminal trial launched in 2018, the competent administrative authority suspended again, under the Fiscal Code[30] the authorization to operate as a tax warehouse, until the final resolution of the criminal case; the Dual Prod company notified the court with an action in administrative litigation to annul this decision to suspend the operating authorization.

The Romanian court referred to (Tribunalul Satu Mare - Regional Court Satu Mare) addressed *two preliminary questions* to the European court in Luxembourg:

"1) Is Article 48 (1) of the Charter, which concerns the principle of presumption of innocence, read in conjunction with Article 16 (1) of Directive 2008/118, to be interpreted as precluding a legal situation, such as that at issue in the present case, in which an administrative measure suspending an authorization to operate as a producer of alcohol may be adopted on the basis of mere presumptions which are the subject of an ongoing criminal investigation, without any final conviction in criminal proceedings having been handed down?

2) Is Article 50 of the Charter, which concerns the principle *ne bis in idem*, read in conjunction with Article 16 (1) of Directive 2008/118, to be interpreted as precluding a legal situation, such as that at issue in the present case, in which two penalties of the same nature (suspension of authorization to operate as a producer of alcohol), differing only in the duration of their effect, are imposed on the same person in respect of the same facts?"

To rule on these questions, C.J.E.U. first made some introductory remarks, of which we retain, in the main:

- when a Member State suspends the authorization to operate as a tax warehouse, within the meaning of Directive 2008/118/EC, as a result of indications regarding the commission of crimes related to the excise goods regime, it applies Union law, becoming applicable and The Charter of Fundamental Rights of the European Union, the provisions of which the Member State is thus obliged to respect[31];

- the task of assessing whether the two authorization suspension measures discussed in the internal litigation can be qualified as "penal sanctions" that would attract the application of art. 48 para. (1) and art. 50 of the Charter, rests with the referring Romanian court, but there are three criteria that must be taken into account: the legal qualification of the sanctioning of the illegal act[32] in domestic

[30] Art. 369 para. (3) letter c) Fiscal Code.
[31] Point 26 of the Judgment of the C.J.E.U. from 23 March 2023, previously quoted.
[32] Although the formula used by C.J.E.U. to indicate this criterion is "the legal qualification of the illegal act in domestic law", we believe that, in reality, the Court is referring to the "legal qualification of sanctioning the illegal act in domestic law".

law, the very nature of the sanctioning of the illegal act[33] and "the degree of severity of the penalty that the person concerned is liable to incur"[34].

In other words, although the C.J.E.U. does not rule on the "criminal" nature of the measure to suspend the authorization to operate as a tax warehouse, establishing that such an assessment remains at the discretion of the Romanian court, however it indicates certain criteria and makes some recommendations regarding the interpretation of these criteria.

Thus, regarding the first criterion, C.J.E.U. appreciates that, although in Romanian law, the measures to suspend the authorization to operate as a tax warehouse are not qualified as "criminal", the application of the provisions of the Charter extends, independently of such express qualification, to all procedures and sanctions that must be considered as having a criminal nature based on the other two stated criteria.

Regarding the second criterion, the European court considers that it involves checking whether the measure of suspension of the authorization has, in addition to the preventive character, also a repressive finality. If the purpose of the measure were only preventive or insurance (for example, if it were limited to repairing the damage caused by the illegal act), this measure would not have a criminal nature. Moreover, C.J.E.U. appreciates that, if the temporary deprivation of the benefits deriving from the tax warehouse authorization, as an effect of the suspension of this authorization, would be based only on the fact that the competent administrative authority found that the granting conditions are no longer or risk not being fulfilled of the authorization, would mean that the measure of suspension does not have a repressive purpose.

Regarding the third criterion, in the opinion of the C.J.E.U., although the suspension measures in question are likely to have negative economic consequences for the company in question, in principle they do not reach the "necessary degree of severity" to be qualified as having a criminal nature, as it does not prevent the legal person from continuing to carry out economic activities that do not require an authorization to operate as a tax warehouse.

Next, in relation to the first preliminary question, C.J.E.U. notes that, by means of this question, the referring Romanian court requests to establish whether art. 48 para. (1) of the Charter must be interpreted in the sense that it opposes the possibility that an authorization to operate as a tax warehouse of products subject to excise duties be administratively suspended until the completion of the criminal trial for the simple reason that the holder of this authorization has acquired the status of defendant in this trial.

The Luxembourg court notes that the provisions of art. 48 para. (1) of the

[33] Although the formula used by C.J.E.U. to indicate this criterion is "the very nature of the illegal act in domestic law", we consider that, in reality, the Court is referring to "the very nature of the sanctioning of the illegal act in domestic law".

[34] Point 27 of the Judgment of the C.J.E.U. from 23 March 2023, previously quoted.

Charter (which enshrines the principle of the presumption of innocence) are violated when an administrative authority applies a sanction of a criminal nature without having previously ascertained the violation of a pre-established rule of law and without having offered the person in question the opportunity to prove her innocence, any doubt being in favor of this person. Moreover, C.J.E.U. appreciates that in this case is also applicable art. 47 of the Charter[35], which requires that "every addressee of an administrative penalty of a criminal nature to have access to a legal remedy enabling him or her to have that penalty reviewed by a court that has unlimited jurisdiction".

Accordingly, the response of the C.J.E.U. to the first preliminary question is as follows: "*Article 48 (1) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding an authorization to operate as a tax warehouse for products subject to excise duty from being suspended for administrative purposes, until the conclusion of criminal proceedings, on the sole ground that the holder of that authorization has been formally charged in those criminal proceedings,* ***if that suspension constitutes a criminal penalty***".

In relation to the second preliminary question, C.J.E.U. notes that, by means of this question, the referring Romanian court requests to establish whether art. 50 of the Charter must be interpreted in the sense that it opposes the application of a sanction against a legal person in respect of which, for the same facts, a sanction of the same nature, but with a different duration, has been applied.

In this sense, C.J.E.U. notes, first of all, that the answer to this question is also conditioned by the qualification given to the measures in question, because the *ne bis in idem* principle enunciated in art. 50 of the Charter prohibits the accumulation of both procedures and ***sanctions that are of a criminal nature*** regarding the same acts and against the same person.

Then, the European court assesses that in this case the existence of the double condition that the *ne bis in idem* principle implies must be verified, namely:

- the identity of the material facts for which the sanctions were applied and

- the definitive character of the first sanction.

Regarding the condition of identity of facts, C.J.E.U. finds that, as the referring court itself has shown, the two measures to suspend the authorization applied to the legal person in question are related to identical material facts found during the search.

Regarding the condition of the finality of the first measure, C.J.E.U. establishes that the Romanian court must verify whether, in this case, the court decision by which the Oradea Court of Appeal reduced to 8 months the duration of the first suspension measure had acquired *res judicata* authority on the date of

[35] Art. 47 of the Charter of Fundamental Rights of the European Union regulates the right to an effective remedy and a fair trial.

taking the 2nd suspension measure of the authorization of functioning as a tax warehouse.

Moreover, C.J.E.U. considers that, if the referring court, examining the previously mentioned conditions, would consider that the fundamental right guaranteed by art. 50 of the Charter (the right not to be convicted twice for the same offence), this court should also check whether such a restriction could be justified in the case under art. 52 para. (1) of the Charter[36]. Therefore, according to the provisions of art. 52 para. (1) of the Charter, C.J.E.U. considers that an accumulation of sanctions of a criminal nature could be justified, given the importance of the general interest objective pursued by the national regulation (in this case, guaranteeing the correct collection of excise duties and combating fraud and abuse), provided that these sanctions target, for the achievement of this objective, complementary purposes that have as their object "different aspects of the same criminal behavior".

On the other hand, C.J.E.U. also establishes that, even under the conditions in which the referring court would consider that the suspension measures in question do not constitute sanctions of a criminal nature, so as to become applicable art. 50 of the Charter, taking the 2nd suspension measure should respect *the principle of proportionality*, as a general principle of Union law. According to this principle, it is required that the member states resort to means which, ensuring the possibility of effectively achieving the objective pursued in domestic law, do not go beyond what is necessary and affect as little as possible the objectives and principles enshrined in the legislation of the Union.

Moreover, the principle of proportionality, as a fundamental principle, was addressed in the doctrine[37] by highlighting various manifestations of proportionality in the legal order of the European Union.

Thus, C.J.E.U. appreciates that the fact that a measure of suspension of the authorization to operate as a tax warehouse of excisable products, applied to a legal person accused of violating the rules that ensure the correct collection of excises, continues to produce its effects throughout the criminal process carried out against it, "may indicate a disproportionate infringement of the legitimate right of that legal person to pursue its entrepreneurial activity".

Accordingly, the response of the C.J.E.U. to the second preliminary question is the following: "*Article 50 of the Charter of Fundamental Rights must be*

[36] According to art. 52 para. (1) of the Charter of Fundamental Rights of the European Union, "Any restriction of the exercise of the rights and freedoms recognized by this Charter must be provided by law and respect the substance of these rights and freedoms. By respecting the principle of proportionality, restrictions can be imposed only if they are necessary and only if they effectively meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others."

[37] Koen Lenaerts, *Proporționalitatea, principiu director care promovează efectivitatea dreptului Uniunii Europene și legitimitatea acțiunii Uniunii Europene (Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action)*, "Revista Română de Drept European" no. 1/2022: 13.

interpreted as not precluding a criminal penalty, for infringement of the rules on products subject to excise duty, from being imposed on a legal person who has already been subject, in respect of the same facts, to a criminal penalty that has become final, provided:

- that the possibility of duplicating those two penalties is provided for by law;

- that national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides for only the possibility of a duplication of proceedings and penalties under different legislation;

- that those proceedings and penalties pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue;

- that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities; that the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate time frame; and that any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed."

5. Conclusions

In conclusion, we note that the C.J.E.U. does not pronounce strongly regarding the nature (qualification as a criminal sanction) of the measure of suspending the authorization of the operation of a legal person as a tax warehouse. The answers that the European court gave to the preliminary questions formulated by the referring court are, however, closely related to this qualification of the respective measure, a qualification that remains at the discretion of the Romanian referring court.

The principle of primacy of European Union law requires that all Member States recognize the community law system, as a result of their agreement to be part of this community and to accept the special jurisdiction created in accordance with the constitutive treaties[38].

It is known that, in Union law, the phrase "in criminal matters" has a wider meaning compared to the one given in our domestic legislation. In this

[38] Nicoleta Diaconu, Dumitru Adrian Crăciunescu, *Procesul civil internațional în contextul exigențelor juridice contemporane*, (Bucharest: Universul Juridic Publishing House, 2021), 45.

sense, both the jurisprudence of the C.J.E.U. and the jurisprudence of the European Court of Human Rights (E.Ct.H.R.)[39] are unitary[40] "in the matter of retaining or not" the criminal nature of an administrative decision or a judicial decision as an element that attracts the application of the *ne bis in idem* principle or the principle of the presumption of innocence.

Therefore, in order to avoid situations in which, by taking an administrative measure in fiscal terms, which could be qualified as having a "criminal" nature in the sense of Union law, the principle of the presumption of innocence could be affected[41], a legislative amendment to the Romanian Fiscal Code would be justified to ensure the possibility of contesting that measure before a "court that has substantive jurisdiction" through a remedy with a suspensive effect of execution. We note, in this sense, that the current provisions of the Romanian Fiscal Code[42] guarantee the warehousekeeper's right to contest the decision to suspend the authorization to operate as a fiscal warehouse "in accordance with the legislation on administrative litigation". It is true that the court of administrative litigation does not have "substantive jurisdiction" to rule on the criminal liability of the warehousekeeper, so that it can verify whether the administrative authority has not violated the principle of the presumption of innocence[43]; what the administrative litigation court can verify is whether the administrative authority applied the administrative sanction following the finding of one of the facts provided for by law[44] or following the initiation of the criminal action by the competent judicial authority (prosecutor), still allowing the person in question (the warehouskeeper) to obtain a "control of this sanction"[45].

Therefore, we propose by *law ferenda* to modify the content of art. 369 para. (7) from the Romanian Fiscal Code, as follows: "*Contesting the decision to*

[39] Moreover, the so-called "Engel criteria" from the E.Ct.H.R. Case Engel and others v. the Netherlands (Judgment of 8 June 1976, document available online at https://hudoc.echr.coe.int/eng#{%22appno%22:[%225370/72%22],%22itemid%22:[%22001-57479%22]} accessed on October 19, 2023) were also taken over and adapted by the C.J.E.U. (for example, Bonda Case C-489/10, EU:C:2012:319, Judgment of 5 June 2012, document available online at https://curia.europa.eu/, accessed on October 19, 2023 or Dual Prod Case C-412/21, EU:C:2013:234, Judgment of 23 March 2023, previously quoted) in order to provide the courts of the member states with the elements of interpretation specific to Union law, which would allow them to assess the criminal nature of a measure or a court decision. For an analysis of the "Engel criteria", see also Baris Bahceci, *Redefining the Concept of Penalty in the Case-law of the European Court of Human Rights*, "European Public Law" 26, Issue 4 (2020): 867 – 888, DOI: 10.54648/euro2020069.

[40] Decision of the High Court of Cassation and Justice no. 8/2016, the Panel for resolving some legal issues in criminal matters, published in the Official Gazette of Romania no. 430 of June 8, 2016.

[41] See also point 42 of the Judgment of the C.J.E.U. from 23 March 2023, previously quoted.

[42] Art. 369 para. (5) Fiscal Code.

[43] See point 42 of the Judgment of the C.J.E.U. from 23 March 2023, previously quoted.

[44] Acts that could be crimes, if the competent judicial authority, i.e. the criminal court, qualified them as such.

[45] In the sense of what was retained by the C.J.E.U. in point 42 of the Judgment of the C.J.E.U. from 23 March 2023, previously quoted.

suspend, revoke or cancel the tax warehouse authorization suspends the legal effects of this decision for the period of the resolution of the contestation in the administrative procedure".

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Tax Evasion - Between Legality and Crime

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Abstract

Tax evasion is an economic-social phenomenon of great scope and interest, located at the crossroads between the economic and legal fields, which many states face and which has become a topic debated more and more often in practice, considering the extension of this phenomenon to all types of companies. Historically, tax evasion has existed since the first tax regulations. To understand this phenomenon, it is necessary to know its causes. Thus, among the most controversial causes of tax evasion are: the way tax legislation is designed and applied, the low level of tax education, the lack of effective controls, the lack of staff training, etc.

Keywords: *tax evasion, taxation, crime, economic crimes.*

JEL Classification: K34

1. Introduction. General notions about tax evasion

In doctrine[2] it was shown that the notion of tax evasion is associated with three meanings and a double clarification in terms of legality: "the first meaning attributed to evasion - between the two world wars - was the extensive one, tax evasion is included in the of fraud. The second meaning - and the most well-known - defines tax evasion as the art of avoiding falling into the field of attraction of the tax law. The third meaning defines tax evasion as the totality of the manifestations of running away from taxes."

Tax evasion is[3] "the evasion by any means, in whole or in part, from the payment of taxes, fees and other amounts owed to the state budget, local budgets, the state social insurance budget and special extra-budgetary funds by Romanian individuals and legal entities or foreigners, hereinafter referred to as taxpayers."

By Law no. 251/2005 on the prevention and combating of tax evasion, the facts constituting the crime of tax evasion were regulated, respectively:

Article 3: "the act of the taxpayer who does not restore, with intention or through fault, the destroyed accounting records documents, within the term indicated in the control documents."

The active subject of the crime is the taxpayer (natural person or legal person).

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[2] N.C. Aniței, R.E.Lazăr, *Evaziunea fiscală între legalitate și infracțiune*. Ed. Universul Juridic, Bucharest, 2016, p.38.

[3] Art. 1 of Law 87/1994 (repealed).

In doctrine[4] it was shown that the active subject of the crime is qualified in the case of the legal person. Thus, according to art. 10 of law no. 82/1991: "responsibility for the organization and management of accounting for the persons provided for in art. 1 paragraph (1)-(4) belongs to the administrator, the credit orderer or another person who has the obligation to manage the respective entity", and if we are discussing the situation in which the administration is separated into management and management supervision (eg: the dualist system), the qualified active subject is the member of the management body, if this attribution was not retained by the supervisory body.

At the same time, according to art. 10 paragraph (2) of the accounting law: "accounting is organized and conducted, as a rule, in distinct compartments, led by the economic director, the chief accountant or another person authorized to perform this function. These people must have higher economic education. By a person authorized to perform the function of economic director or chief accountant is meant a person employed according to the law, who has higher economic studies and who has duties regarding the management of the accounting of the entity", the qualified active subject in this case being the head of the department (economic director, accountant), and not the members of the governing bodies.[5]

The passive subject of the crime is the State through the Ministry of Public Finance.

Regarding the material object of the crime[6], in the doctrine it is appreciated that "the crime of tax evasion has no material object, the destroyed accounting records are not the material object of the crime because the criminal law does not sanction their destruction, but the omission of their restoration."

Regarding the material element of the crime of tax evasion, in accordance with art. 9 of Law no. 241/2005, the crime of tax evasion is:

a. "hiding the asset or the taxable or chargeable source;

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[4] S. Bodu, C. Bodu, *Economic crimes. Offenses in the company regime. Bankruptcy offences. Tax evasion offences. Comments and explanations. Annotations with jurisprudence*. 2016 edition, Ed. Rosetti, Bucharest, p. 209-210: "As the management duties of a company managed in a dualistic system belong by right to the directorate, the supervisory board will never have accounting duties, which means that a possible retention of accounting duties it could only exist in the case of administrators, in relation to directors, but this hypothesis is purely theoretical, the exercise of management duties being practically impossible without accounting duties. In all cases, the internal act of the company must be checked (constituent act, decision of the general meeting, internal regulation or decision of the administrative body), including limited liability companies that appoint directors. If the internal act, regardless of the corporate form, does not provide anything, the rule will be that the accounting duties follow the managerial, executive management duties and not the supervision of the executive management by the administrators. When the administrative body is collective, that member who, according to the internal act, had duties regarding accounting is criminally liable".

[5] Art. 10 paragraph (2) of the Accounting Law.

[6] Idem.

b. omission, in whole or in part, of highlighting, in the accounting documents or other legal documents, the commercial operations performed or the incomes achieved;

c. the highlighting, in accounting documents or other legal documents, of expenses that are not based on real operations or the highlighting of other fictitious operations;

d. the alteration, destruction or concealment of accounting documents, memories of toll machines or electronic fiscal markers or other means of data storage;

e. execution of double accounting records, using documents or other data storage means;

f. evading the performance of financial, fiscal or customs checks, by non-declaration, fictitious declaration or inaccurate declaration regarding the main or secondary headquarters of the verified persons;

g. the substitution, degradation or alienation by the debtor or by third parties of the assets seized in accordance with the provisions of the Fiscal Procedure Code and the Criminal Procedure Code."

Regarding the evidence that can be administered, with the entry into force of the new criminal code, the special procedure of obtaining data on a person's financial situation was introduced.

Thus, in accordance with art. 153 paragraph 1 of the Code of Criminal Procedure (C.p.p.), "the prosecutor may request a credit institution or any other institution that holds data on a person's financial situation to communicate data on the existence and content of a person's accounts, if there are solid indications regarding the commission of a crime and there are grounds to believe that the requested data constitute evidence."[7]

According to an opinion[8], "prior consent will be obtained only in the case where the criminal investigation body seeks to obtain data regarding the existence of the accounts and their content. Regarding the content phrase of the accounts, we appreciate that it refers to the balance of the account. Another assessment, in the sense that it would concern the account statement, the operations carried out through them, would contradict the essence of the notion of technical supervision mandate provided by art. 138 paragraph 9 C.p.p., which refers to obtaining data on a person's financial transactions with reference, explicitly, to financial transactions and other operations carried out or to be carried out through a credit institution or other financial institutions."

In practice[9], as an example, the judge of the preliminary chamber of the Harghita Court holds that "recourse to a certain evidentiary procedure or means

[7] Art. 153 of the Code of Criminal Procedure.

[8] C. Voicu, G. C. Militaru, I. Ardeleanu, *Investigarea infracţiunilor de evaziune fiscală,* Consiliul Superior al Magistraturii, Bucharest, 2015, p. 67.

[9] https://www.rejust.ro/juris/ee887d7g5, consulted on 1.10.2023. Harghita Court - measures and exceptions ordered by the preliminary chamber judge.

of evidence to prove an element of fact is a matter of opportunity and not of legality and in the criminal investigation phase, when it is the prosecutor's own, he is the only authority entitled to appeal to a certain evidentiary procedure or means of evidence or to another. However, compliance by the criminal investigation body with the conditions prescribed by law when opting for an evidentiary procedure or a means of evidence is a matter related to the legality of criminal investigation documents and this is reserved for the purpose of the preliminary chamber. In other words, the judge of the preliminary chamber does not have the legal ability to investigate the appropriateness of the disposition of an evidentiary procedure or the administration of a means of evidence during the criminal investigation phase, but, certainly, he has the legal competence to investigate whether the criminal investigation body complied with the law when decided to use that evidentiary procedure or means of evidence."

According to the provision Art. 172 para. 9 C.p.p., "the making of a finding can be ordered only if there is a danger of the disappearance of some means of proof or of a change in some factual situations, or if it is necessary to urgently clarify some facts or circumstances of the case. Or, in the present case, none of the assumptions provided by art. 172 para. 9 C.p.p. which would have authorized the ordering of the technical-scientific assessment was not incidental to the dates of the 5 technical-scientific assessment reports. In the case, the criminal investigation was started in rem since 09.10.2013, so that, on the dates of the technical-scientific findings, namely, 21.11.2016, 23.05.2018, 10.10. 2019, 01.11.2019 and 06.02.2020, there is no longer any emergency involved. At the same time, the documents submitted to the analysis of the anti-fraud specialist from the National Agency for Fiscal Administration - General Directorate for Anti-Fiscal Fraud - Directorate for Combating Fraud, assigned to the criminal investigation body, respectively the specialist from the Prosecutor's Office attached to the Court ##########, were in the hands of the criminal investigation bodies, there being no danger of their disappearance. In addition, there is no evidence that in the mentioned data there would have been any risk of changing some factual situations."

Therefore, it is found that" the ordinances by which the criminal investigation body ordered the performance of technical-scientific findings are contrary to the provisions of art. 172 para. 9 C.p.p. By disposing of the technical-scientific findings under conditions other than those provided by law, followed by the use of the conclusions of the specialist from the criminal investigation body to argue the provision of referral to court, the defendants' right to defense was significantly affected, although they were justified (while the technical-scientific findings were illegally disposed of), they did not have the opportunity to benefit from the guarantees provided by art. 177 C.p.p. aiming at carrying out a specialized expertise.

In this context, it should also be noted that the infringement of the defendants' rights consists precisely in the existence in the evidentiary material of

the 5 reports of technical-scientific findings made on the basis of ordinances ordered against the relevant legal provisions in the matter, which leads to the aggravation in the process criminal of their situation as they will have to build defenses in relation to these evidences, which otherwise they would not have had to formulate.

In these circumstances, the remedy for restoring legality can only be the abolition of the ordinances by which the technical-scientific findings were ordered and the exclusion of the findings reports based on them.

Consequently, the preliminary chamber judge, based on disp. Art. available 282 para. 1 C.p.p., is to sanction with relative nullity the ordinances from the dates of 02.11.2016, 10.05.2018, 16.09.2019, 14.10.2019 and 28.01.2020, issued by the prosecutor from the Prosecutor's Office attached to the Court ########## in the file no. 246/###/P/2013, which ordered the performance of some technical-scientific fiscal findings by the anti-fraud inspectors from the National Agency for Fiscal Administration - General Directorate for Anti-Fiscal Fraud - Directorate for Combating Fraud, seconded within the respective criminal investigation body by the specialist within the criminal investigation body and, consequently, pursuant to the provisions of art. 345 para. 3 C.p.p. related to art. 102 para. 3 C.p.p., will exclude from the evidentiary material administered during the criminal investigation phase the finding report no. ###/P/2013 drawn up on 21.11.2016 by the anti-fraud specialist assigned to the criminal investigation body (f. no. 30 – 47 vol. X d.u.p.), finding report no. 293/###/ P/2017 drawn up on 23.05.2018 by the anti-fraud specialist assigned to the criminal investigation body (f. no. 281 – 294 vol. X d.u.p.), finding report no. 146/###/P/2015 drawn up on 10.10.2019 by the anti-fraud specialist assigned to the criminal investigation body (f. no. 132 – 152 vol. X d.u.p.), finding report no. 246/###/P/2013 drawn up on 01.11 .2019 by the anti-fraud specialist assigned to the criminal investigation body (f. no. 231 – 280 vol. X d.u.p.) and 5. Finding report no. 246/###/P/2013 drawn up on 06.02.2020 by the specialist from the criminal investigation body (f.nr. 357 – 421 vol. X d.u.p.)."

2. The causes of non-punishment and reduction of punishments

According to art. 10 of Law 241/2005, "in the case of committing a crime of tax evasion provided for by the present law, if during the criminal investigation or trial, until the first court term, the accused or the defendant fully covers the damage caused, the limits of the punishment provided by law for the committed deed they are reduced by half. If the damage caused and recovered under the same conditions is up to 100,000 euros, in the equivalent of the national currency, a fine can be applied. If the damage caused and recovered under the same conditions is up to 50,000 euros, in the equivalent of the national currency, an administrative sanction is applied, which is registered in the criminal record. The pro-

visions provided for in para. (1) does not apply if the perpetrator has already committed a crime provided by the present law within a period of 5 years from the commission of the act for which he benefited from the provisions of para. (1)."[10]

Until the completion of the criminal investigation means the time interval between the start of the criminal investigation in rem and the filing of the indictment with the court, according to art. 327 Code of Criminal Procedure.[11]

Thus, after the end of the criminal investigation and the notification to the court, until the first term to which he is legally summoned, the defendant can benefit from the causes of non-punishment and reduction of punishments, if he has not committed a crime provided by the present law within an interval of 5 years from the commission of the act, as provided by the previously mentioned legal text.

Until this amendment, there was no ceiling on the damage caused as a result of the crime of tax evasion, so that, regardless of the amount of the damage, in the situation where the debt increased by 20% of the damage plus interest and penalties on the debt is paid, the defendant benefits from the cause of impunity.

However, this benefit does not apply if the perpetrator has committed a crime under the present law within a period of 5 years from the commission of the act.

As a result of this legislative amendment, a maximum damage ceiling of 100,000 euros is established to be able to benefit from the cause of non-punishment.

If the damage is greater than 100,000 euros, the defendant can no longer benefit from the non-punishment case, even if the debt increased by 20% plus interest and penalties is paid, however, we must take into account the provisions of art. 5 of the Criminal Code regarding the application of the more favorable criminal law, this case of non-punishment will be able to operate for all acts of tax evasion committed until December 18, 2021 (the date of entry into force of GEO no. 130/2021).

3. Tax havens

In the doctrine[12], it was shown that two types of definitions are attributed

[10] Art. 10 din Legea 241/2005.

[11] Art. 327 Code of Criminal Procedure: "When he finds that the legal provisions guaranteeing the discovery of the truth have been respected, that the criminal investigation is complete and there is the necessary and legally administered evidence, the prosecutor: a) issues an indictment ordering the referral to court, if the criminal investigation material shows that the act exists, that it was committed by the defendant and that he is criminally liable. b) issues an ordinance classifying or abandoning the prosecution, according to the legal provisions." Art. 330 Code of Criminal Procedure: When the prosecutor orders the prosecution of the defendant, the indictment may also include the proposal to take, maintain, revoke or replace a preventive measure or a preventive measure.

[12] G. Haita, O. Héguin de Guerle, *Structura controlată offshore. Frauda fiscală şi optimizarea*

to the tax haven, in other words, the tax haven would be "the state that makes available a favorable legislation, and the offshore financial center is made up of the economic agents that take advantage of this legislation. The second approach starts from roughly the same hypothesis as the first, namely the favorable legislation, but assigning it a distinct motivation, namely that the burdensome tax legislation has led to the tendency of international companies to look for states with favorable taxation in nature lead to the elimination or reduction of obstacles to economic operations."

In other words, the financial system has discovered a method of evading income from taxation through a form of legal tax evasion, namely tax havens.

In another opinion[13], the tax haven means "a state or a geographical area, with an almost non-existent taxation regime and a high degree of fiscal discretion. In these areas tax obligations can be suppressed within the law and are almost impossible to control. Fiscal policy is fundamentally a matter of conscious choice and by governments, depending on the current economic situation, available resources, the global and regional political context, and other considerations."

Among the factors that contributed to the emergence and development of tax havens are[14]:

1. decrease in trust in local financial institutions;
2. mistrust of government agencies;
3. the need for privacy.

We therefore observe that, as a result of these methods, the main advantage of tax havens is reduced taxes.

A specialized analysis carried out in order to identify the states that would allow their development as tax havens, shows that "the legislative system most favorable to the evolution of a tax haven is the American one, and the least favorable is the European one, considering the stability political and economic states."[15]

Regarding OFFSHORE companies in tax havens, they are established in order to benefit from financing in countries where tax reduction is possible.

As an example[16], in Bahrain "no taxes are levied except in the case of revenues obtained in the oil industry (in the amount of 45%). Therefore, taxes on buildings, land, dividends, etc., are not known. At the same time, there are no currency controls, and banks are legally prohibited from charging interest."

In another opinion[17], an offshore company is "a company registered in a

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fiscală într-un context internaţional, https://mfinante.gov.ro/.

[13] F. I. Lică, *Prin paradisurile fiscale*, https://ibn.idsi.md/sites/default/files/imag_file/198-203.pdf, consulted on 1.10.2023.

[14] N. C. Aniței, R. E. Lazăr, *op cit*, p. 53.

[15] Stefan (Radu) Daniela Iuliana, *Paradisurile fiscale*. Doctoral thesis, https://drept.unibuc.ro/ documente/dyn_doc/oferta-educationala/scoala-doctorala/rezumat-teza/stefan-radu-daniela-mai-2015-ro.pdf.

[16] N.C. Aniței, R.E. Lazăr, *op cit.*, p.59.

[17] C. Bișa, I. Costea, M. Capotă, B. Dăncău, *Utilizarea paradisurilor fiscale- între evaziunea fiscală*

country or a dependent territory of a country with autonomous legislation, but which does not carry out activities in that territory".

Thus, offshore companies are financial instruments used to avoid paying taxes and increasing profits, having the freedom of financial transactions.

Among the main advantages of offshore companies are: confidentiality, low taxes and lack of financial controls.

By way of example[18], "in jurisdictions that do not levy taxes (income tax, VAT, payroll tax, dividend tax, council tax, road tax, property tax, etc.), such as: Bahamas, Gibraltar, a registered company don't pay any kind of tax."

In conclusion, we will note the fact that the advantages of offshore companies are actually the causes of tax evasion, and the maintenance of some tax regulations, but also the lack of financial education is likely to create a behavior inclined towards tax evasion of the Romanian taxpayer, the only way to avoid these consequences being combating tax evasion.

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legală și frauda fiscală. B-T Publishing House, Bucharest, 2005, p. 35.

[18] N.C. Anitei, R. E. Lazăr, *op cit*, p. 64.

Cumulation of Disciplinary Liability with Other Forms of Legal Liability

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Abstract

In order to provide a better legal understanding of how other forms of legal liability collide with disciplinary liability - a form of liability specific to labour law - this article will examine, on the one hand, the specifics of domestic regulations on the possibility of combining the employee's disciplinary liability with other legal forms of liability, and on the other hand, the evolution of case law in the field of disciplinary liability which, as we shall show, profoundly influences the way in which legal texts are interpreted and applied.

Keywords: *disciplinary liability, work discipline, disciplinary misconduct, disciplinary sanction.*

JEL Classification: K31

1. Conceptual aspects of labour discipline

Under Romanian law, the principles that define disciplinary liability and, implicitly, the legal regime for sanctioning disciplinary offences committed by the employee, are strongly influenced by the Labour Code which, in Chapter II, Articles 247-252, regulates disciplinary liability as a form of legal liability specific to labour law[2]. Due to the nature of the work carried out, many employers are in the habit of developing rules on disciplinary procedure in their internal regulations. Drawing up these rules in the internal rules is indeed a component of the disciplinary prerogative conferred by law on the employer and, at the same time, an expression of his managerial authority arising from the need for good coordination of the work process. However, the scope left to the employer's individual discretion in organising the disciplinary procedure is still significantly limited by a series of minimum rules laid down in the Labour Code, and the employer's disciplinary prerogative does not entail a restriction of the rules of public policy in relation to the disciplinary procedure.

It should be noted that the employer's disciplinary prerogative is related not only to the employer's possibility to establish internal rules of work discipline, but also to the employee's obligation to comply with these rules, once the indi-

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[2] For details on the notion of disciplinary liability, see Dan Țop, *Treatise on Labour Law. Doctrine and Jurisprudence*, 2022, Ed. Universul Juridic, Bucharest, p. 572.

vidual employment contract has been concluded, otherwise the employee's liability for disciplinary misconduct is in question[3]. In addition, it is acknowledged[4] that the employee's liability may go beyond the disciplinary screen, by the possibility of combining disciplinary liability with other forms of liability (pecuniary, contraventional or criminal). This possibility is natural, since the act committed by the employee may be a disciplinary offence and at the same time may constitute a criminal offence or a misdemeanour, or it may also be an act causing damage. In order to provide a better legal understanding of how other forms of legal liability collide with disciplinary liability, this article will examine, on the one hand, the specifics of the national rules on the possibility of combining an employee's disciplinary liability with other forms of legal liability and, on the other hand, the development of case law in the field of disciplinary liability which, as we shall show, has an impact on the interpretation and application of the legal texts. But some details below.

2. Disciplinary liability - an area specific to labour law

In view of what has been mentioned above in relation to the specifics of disciplinary liability, it is indeed legitimate to assert that the employer's authority in disciplinary matters is contractual[5]. Express or implied, this authority gives the employer the legal power to apply disciplinary sanctions under the law to employees who breach the obligations assumed in the individual employment contract. Thus, only the conclusion of the individual employment contract binds the employee to comply with disciplinary rules and policies. And because our legal system distinguishes a number of atypical employment contracts from the standard form (fixed-term employment contract, part-time employment contract, temporary employment contract, home-working contract or teleworking contract)[6], disciplinary liability applies equally to all employees regardless of the type of contract. On the other hand, disciplinary liability is inextricably linked to the status of employee, also because of the *intuitu personae* nature of the individual employment contract, which excludes disciplinary liability for the actions of another person or the transfer of such liability to the employee's heirs. This means

[3] Defined by the legislator in Art. 247 para. 2 of the Labour Code as follows: "Disciplinary misconduct is an act in connection with work and consisting of an action or inaction committed with guilt by the employee, by which he/she has violated the legal rules, internal regulations, the individual employment contract or the applicable collective employment contract, orders and legal provisions of hierarchical managers".

[4] Ș. Beligrădeanu, *Admissibility of the cumulation of employees' disciplinary liability with their criminal and misdemeanour liability*, in "Dreptul", no. 4/2006, pp. 171-173

[5] For developments on the contractual nature of disciplinary liability, see Ion Traian Ștefănescu, *Theoretical and Practical Treatise on Labour Law*, 2017, Ed. Universul Juridic, Bucharest, p. 828.

[6] For an analysis of the characteristics of atypical employment contracts regulated by the current Labour Code, see M. E Marica, *Contracte de muncă atipice*, Ed. Universul Juridic, Bucharest, 2019, pp. 38-42.

that the employment contract was concluded in consideration of the personal qualities of the employee[7].

3. Cumulation of disciplinary liability with other forms of liability

a) *Cumulation of disciplinary liability and financial liability.* Although both forms of liability, disciplinary and patrimonial, are specific forms of labour law, disciplinary liability should not be confused with patrimonial liability. While disciplinary liability arises when an employee's wrongful act violates disciplinary rules, financial liability is linked to the employee's act causing material damage[8].

While disciplinary liability may bear a resemblance to criminal or misdemeanour liability by reference to the elements of the misconduct, the features of the wrongful act, the hypotheses which exclude the employee's liability or the degrees of culpability, financial liability bears a resemblance to civil liability[9]. Although both cases of liability can be triggered by the commission of one and the same wrongful act, i.e. the employee's act qualified as misconduct is at the same time an act generating damage to the employer's assets, the effects of establishing these forms of liability are produced in different levels because the conditions of the two forms of liability are also regulated by the legislator separately in the Labour Code (art. 247 et seq. and respectively 253 et seq.).

The rule according to which the employee will be liable both disciplinary and patrimonial, if the act of the employee causing damage is also disciplinary misconduct, is nothing but a special form of legal liability, but expressly regulated by the specific rules of labour law. In practice, however, it is possible that the two forms of liability may not necessarily be assumed. As the breach of different social relationships is involved[10], it is possible that financial liability does not imply disciplinary liability, i.e. the act of the employee causing damage does not also constitute a breach of disciplinary rules such that it can be qualified as disciplinary misconduct. Even in such a case, the employee's liability will only be of a pecuniary nature with all the legal consequences required by the text, and the disciplinary liability procedure will no longer be triggered. The combination of disciplinary liability with financial liability in the special field of labour law also requires fundamental clarification from a case-law perspective. Thus, in a decision of the Timisoara Court of Appeal[11], it was decided that only in the hypothesis where the disciplinary sanction previously applied was challenged in court and

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[7] See Ion Traian Ștefănescu, *op. cit*., p. 829.

[8] See Art. 253 para. (1) of the Labour Code which states that "The employer is obliged, under the rules and principles of contractual civil liability, to compensate the employee in the event that he has suffered material or non-material damage through the fault of the employer in the performance of his duties or in connection with his employment".

[9] Alexandru Țiclea, Laura Georgescu, *Labour law. University Course,* Ed. Universul Juridic, 2020, p. 473.

[10] See Ion Traian Ștefănescu, *op. cit.,* p. 829.

[11] Decision No. 961/2016 (http://portal.just.ro).

the court had already ruled on the existence of the act and its unlawful nature, such a decision would also have the force of res judicata in terms of patrimonial liability. If the disciplinary penalty has not been challenged by the employee, the decision imposing the penalty is not res judicata, and the fact that the employee is aware of that decision does not deprive him of the possibility of a judicial review of the existence of the act and its unlawful nature in a separate procedure relating to financial liability. In view of the court's view expressed by this solution, the hypothesis that the employee was disciplined and did not contest the decision will not constitute res judicata in relation to any financial liability, since the court is always required to verify the existence of the act and the conditions for incurring financial liability.

A similar regime can also be found in comparative law as regards the cumulation of disciplinary liability with patrimonial liability. Thus, according to Article 321 of the Swiss Labour Code[12], the employee is liable to make good any damage which he has intentionally or negligently caused to his employer in the sense that the employee has not shown the diligence required in the performance of his duties, the employee's fault in such a case being presumed.

b) Cumulation of disciplinary and criminal liability. With regard to the cumulation of disciplinary and criminal liability, the two forms of legal liability, while containing many specific elements, also have many common elements[13] , some of which are sometimes expressed in language which only gives the appearance of a difference. However, from the point of view of legislative technique, the two forms of liability have different sources: criminal liability is based on breaches of criminal law, whereas disciplinary liability is based on breaches of workplace rules contained either in the law, the individual employment contract, the collective agreement or the internal rules. In other words, under the aegis of this cumulation, it may happen that the same act committed by the employee constitutes both a disciplinary offence within the meaning of labour law and a criminal offence within the meaning of criminal law, and thus the employee's criminal and disciplinary liability may arise simultaneously.

In our law, from the point of view of the legal regime enshrined in law, the accumulation of disciplinary liability with criminal liability requires fundamental clarification in the context of the evolution of jurisprudence, which has led to significant changes in doctrinal views. If until 2015, when the normative texts enshrined in the Labour Code in Art. 52 para. (1) letters a) and b) allowed the suspension of the individual employment contract in the event that the employer lodges a criminal complaint against the employee and in the event that the

[12] See in this respect Alexandre Berenstein†, Pascal Mahon & Jean-Philippe Dunand (2017), *Switzerland*, in R. Blanpain (ed.), "International Encyclopaedia for Labour Law and Industrial Relations", Kluwer, 1982, p. 105.

[13] For an analysis of the similarities and differences between the two forms of liability, see Alexandru Țiclea, *Disciplinary liability in employment relationships - Legislation. Doctrine. Jurisprudence*, Ed. C.H. Beck, Bucharest, 2017, p. 25-28.

disciplinary investigation procedure is initiated, the issues relating to the principle that *the criminal holds in place the disciplinary*, was a fundamental doctrinal principle, accepted both in practice and in case law[14], the idea that criminal liability for the act committed by the employee replaces disciplinary action in the workplace is currently more of a doctrinal speculation not adapted to the current legislative context[15]. As a result of the succession of decisions of the Constitutional Court, Decision 279/2015 and Decision 261/2016, the employer filing a criminal complaint no longer has the possibility of suspending the employment contract of that employee even for acts incompatible with the position held until the court decision becomes final, and as a result of Decision No. 261 of 5 May 2016, he will not be able to suspend the contract on the grounds of carrying out the prior disciplinary investigation because this measure represents "a restriction on the exercise of the right to work"[16]. And in the context that the decisions of the Constitutional Court are binding without any distinction, no matter how serious and obvious the misconduct committed by the employee and regardless of the negative consequences produced by the employee's act in the employer's assets, in all cases the disciplinary investigation will be triggered without suspending the employee's employment contract. These jurisprudential circumstances do not render the existing practice on disciplinary relations ineffective. Thus, applying the doctrinal principle of *criminal law instead of disciplinary law*, in practice it happens that, in the event of serious misconduct with evidence of the criminal nature of the act, the employer is unable to apply any disciplinary sanction until the criminal court's decision and, moreover, is forced to continue to accept the employee at work without the legal possibility of suspending the employment contract. In such situations, the boundary of the principle *that the criminal law holds in place the disciplinary law* is obviously transgressed, and today we consider that this doctrinal rule is no longer reflected in the current legislative reality, and this is supported by the fact that it has never had a legislative basis[17], but a

[14] In Decision No. 203/18 April 2006, the Pitesti Court of Appeal held "*that the criminal law holds in place the disciplinary law in the same way as it holds in place the civil law. Once criminal liability has been triggered, it is not possible to accumulate liability simultaneously, but only subsequently, conditionally, the employer having the possibility, during the criminal proceedings, only to suspend the employee from his post".*

[15] For developments in this regard, see R. Dimitriu, *Some proposals for a new law on the regulation of the suspension of the individual employment contract*, in M. Țichindelean, M. Gheorghe (coord.), *Proposals for a new law on the improvement of labour legislation in Romania*, Ed. Universul Juridic, 2015, p. 109.

[16] In the reasoning of Decision 261/2016, the Court held that "*following the application of the proportionality test aimed at restricting the exercise of the right to work, because during the period of suspension the employee neither works nor is paid, the suspension of the individual employment contract in the event of the commencement of the preliminary disciplinary investigation does not meet the conditions of proportionality, the measure being excessive in relation to the objective to be achieved so that the provisions of Article 52 para. (1) letter a) are unconstitutional*" (published in the Official Gazette no. 511 of 7 July 2016).

[17] It should be noted that opinions to this effect are also expressed in case law. Thus, the Bucharest

doctrinal rule taken by analogy from civil law "*the criminal law holds in place the civil law*".

c) Cumulation of disciplinary liability with misdemeanour liability. Another category of cumulation encountered in practice in the disciplinary field is that relating to the cumulation of disciplinary and misdemeanour liability[18] . From this perspective, the context is similar in that the act committed by the employee is a disciplinary offence and at the same time also qualifies as a misdemeanour within the meaning of the legal regulations penalising misdemeanours. As a legal concept, disciplinary liability and misdemeanour liability may be incurred concurrently, since the harmful result of the act committed by the employee occurs at different levels, namely disciplinary liability through breach of the rules defining work discipline at the level of the establishment and misdemeanour liability through the disruption of social relations of more general interest protected by legal rules. With regard to the principle of "the disciplinary principle is replaced by the misdemeanour principle", the text of the legislation does not expressly specify the nature of the legal liability, nor is there a doctrinal principle that applies in this respect. It is difficult to determine in practice, by analogy with the principle of 'criminal law in lieu of disciplinary law', to what extent 'misdemeanour law in lieu of disciplinary law' applies, since there is no written rule to this effect. Consequently, according to an opinion expressed in the literature[19], the 30-day and 6-month limitation periods (provided by art. 252 para. (1) Labor Code) for the entire period of time between the date of the finding of the offence and the application of the sanction and the date of the final judgment on the offender's complaint against the report of the offence and the application of the sanction.

As far as we are concerned, we believe that this is an entirely justified point of view. As a matter of principle, a legal prohibition (let alone a doctrinal principle in this case taking the form of a limitation) could not be extended by analogy or for identity of reason to other similar situations.

4. Some conclusions

In the context of the above, although the old and general rule is that *the criminal law holds in place the disciplinary law*, certain consequences of the application of the latter exercised in the field of disciplinary relations in the context

Court of Appeal, by Decision 107/2009, held that "*although the employee's disciplinary liability has not been established, the dismissal decision was duly issued by the employer for the culpable commission of serious disciplinary offences. The two forms of liability have different sources, the criminal liability being based on a breach of the criminal law and the disciplinary liability on a breach of the workplace regulations*."

[18] See in this regard, Alexandru Țiclea, Laura Georgescu, *Labour Law. University Course*, Ed. Universul Juridic, 2020, p. 475-476; Ion Traian Ștefănescu, *op. cit.*, p. 832. For further references on contravention liability see M.A Hotca, *Regimul juridic al contravențiilor,* Ed. C.H Beck, 2007; M. Ursuța *Procedura contravențională*, Ed. Universul Juridic, 2010.

[19] Ș. Beligrădeanu, *op. cit.*, p. 182.

of the repeal of the normative texts of Article 52 para. (1) (a) and (b) as unconstitutional may justify excluding the application of this principle because of the direct or indirect negative consequences for employers. The case-law developments highlighted above only accentuate a level of precariousness in relation to the exercise by employers of the disciplinary prerogative expressly recognised by the legislator as a fundamental right of employers, implicitly referring also to the component of the right to apply disciplinary sanctions to employees who have committed misconduct. Therefore, since there is no uniformity of opinion as to whether or not the principle of *criminal law* applies *instead of disciplinary law*, interference in the employer's disciplinary prerogative in the management of the employment relationship is not necessarily achieved through express legal rules. Exercising the employer's disciplinary prerogative, especially today, will require a rethinking of the approach to the disciplinary process, while respecting the current regulations which have become inimical to it. The new vision brought by the case law through the succession of decisions of the Constitutional Court, Decision 279/2015 and Decision 261/2016 censures the employer in the exercise of disciplinary powers. For these reasons, it would be useful to adopt a procedure for disciplinary investigations that provides for shorter deadlines, given that the current disciplinary investigation of the employee is no longer carried out with the suspension of the employment contract, and the employer is obliged to allow the employee access to the workplace throughout this period.

Consequently, we believe that it would be useful to draw up *proposals for a law to* improve the contractual framework for disciplinary matters, as follows:

1. *A proposal for a law* would aim to expressly enshrine in the text that in disciplinary matters, *the criminal law does not replace the disciplinary law.* This is in the context of the fact that there is no uniformity in doctrinal opinions on the importance of applying this principle and there is no written rule in this regard, and the two decisions of the Constitutional Court, Decision 279/2015 and Decision 261/2016, respectively, eliminated the possibility for the employer to suspend the employment contract during the disciplinary investigation or in the event that the employer has filed a criminal complaint against the employee for an act related to work. This development in case law places the employer in an extremely onerous situation in relation to the disciplinary prerogative, which is not to be overlooked in order to respect the balance in the employment relationship between employer and employee.

2. *De lege ferenda, it would* be useful to reassess the provisions of the Labour Code regarding the time limit within which a disciplinary investigation can be carried out. In this context, where during the disciplinary investigation the suspension of the employment contract is no longer a legal solution, as the employer is obliged to allow the employee to work throughout the investigation, we consider it appropriate for the disciplinary investigation to be carried out within a shorter period of 6 months after the offence was committed, as is currently the

case.

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LEGAL PERSPECTIVES ON TECHNOLOGICAL DISRUPTION IN THE INTERNATIONAL SPHERE

Changing Circumstances and the Crisis of International Law. The *Rebus Sic Stantibus* and Its Use in Legal, Political and Contemporary History

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Abstract

In the current era of overlapping crises, we are discovering new vulnerabilities in international law. 'Rebus sic stantibus' is the principle that treaties and agreements can be revised or annulled when significant changes in circumstances occur, thereby undermining the stability and predictability of international relations. By analysing legal, political and contemporary history, the article explores how this principle has been used and interpreted in different contexts. It examines relevant case studies that highlight the application or rejection of this principle in the face of political crises and significant changes in the international landscape. Discussions on the authority and effectiveness of international law in the face of current challenges are also relevant, and possible directions for future development of this concept are suggested.

Keywords*: rebus sic stantibus, international law, politics, crises, treaties.*

JEL Classification: F50, K33

1. Introduction

In his *Second Report on the Law of Treaties* (1956), Special Rapporteur Sir Gerald Fitzmaurice made the following comment about the *rebus sic stantibus*: 'it is all too easy to find grounds for alleging a change of circumstances, since in fact, in international life, circumstances *are* constantly changing'.[2] As he added in a caveat to this notorious principle that permits a state to break treaty given a significant alteration in the original conditions under which they were signed, 'changes are not, generally speaking, of a kind that can or should affect the continued operation of treaties'.[3]

What Fitzmaurice sought to delimit was the potential threat the *rebus sic stantibus* doctrine posed to *pacta sunt servanda*, the ultimate principle of legal intercourse that went on to form the basis of the Vienna Convention on the Law of Treaties.[4] Beyond this specific context, however, he also isolated something

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[2] G. Fitzmaurice, 'Law of Treaties: Second Report', in *Yearbook of the International Law Commission 1957, Volume II, Documents of the Ninth Session Including the Report of the Commission to the General Assembly* (New York: 1958), 56, paragraph 142 (original emphasis).

[3] Ibid., 57.

[4] VCLT (signed 23 May 1969, entered into force 27 January 1980).

worth examining in greater depth in our own time: the idea that circumstances *are* constantly changing is certainly nowhere more acute than in periods of geopolitical crisis. The global constitutional order is evidently fraying before our eyes, multipolarism and fragmentation are on the rise. As was recently stated at a meeting of the UN General Assembly, we may be headed towards an 'international law abyss'.[5] In such a situation, the *rebus sic stantibus* could prove to be theoretically useful as a trope for framing contemporary shifts in international politics and relations. Furthermore — and, indeed, given its particular history — , this metaphor might be uniquely situated to examine the conflictual interpretive regimes of contemporary international law. This article seeks to take a provisional step in this direction.

The article is divided into three parts: 1) I introduce the *clausula rebus sic stantibus* by tracing its legal, philosophical and political history and incorporation into international law, a field which initially was in large part extrapolated from civil law. 2) I discuss the heyday of the *clausula* in the nineteenth century in the context of the 1871 London Declaration, the Russian appeal to changed circumstances in order to alter the unfavourable provisions of the Treaty of Paris (1856). This is a moment when it became either an accepted norm or a political-rhetorical strategy to breach treaty. 3) I conclude by analysing the codification of *rebus sic stantibus* — *not* as clause but as principle — in Article 62 of the VCLT and then examine the survival of the *clausula* in the context of the Crimean crisis and the Russian-Ukrainian conflict. This shows how the political dimension of the doctrine has not disappeared. This opens up future research into the field of contemporary geopolitics and international relations, to the interpretation of international law as a weapon in the struggle for legal and political change.

2. History of a concept

As the legal-historical scholarship has long recognised, the origin of the *clausula* does not belong to law or to legal discourse.[6] The first sources are philosophical-moral. They are to be found in ancient Greek philosophy, in Plato's *Republic* (I.332a), where we find Socrates in discussion with Cephalus on the meaning of justice (of speaking truth and paying debts, the example of the borrow sword) — and Polybius's *Histories* (IX.37). Both recognise exceptions to the rule of keeping promises or treaty.

Whereas the first appearance of the doctrine in a legal context emerged

[5] Meetings Coverage General Assembly (07.11.2023), Amid Conflict in Gaza, General Assembly's Discussion of World Court, Human Rights Council Never More Important, Speakers Say, Noting Requests for Advisory Opinion https://press.un.org/en/2023/ga12557.doc.htm (Accessed 21.11. 2023).

[6] R. Feenstra, 'Impossibilitas and Clausula Rebus Sic Stantibus: Some Aspects of Frustration of Contract in Continental Legal History up to Grotius', in idem, *Fata iuris Romani: études d'histoire du droit* (Leiden: 1974) 364–91.

with canon law in the medieval period — with reference to Cicero, Seneca and Augustine, each of whom took over the borrowed sword example from Plato, the second example from Polybius — although clearly speaking more directly to a legal context of alliance — was a mere isolated instance that was not transmitted as a general rule or proposition to the tradition.[7]

The *clausula* first took root in the theological context of canon law in which the *pacta sunt servanda* had evolved into a generally applicable maxim by means of equity and good faith (*bona fides*).[8] Non-fulfilment was a sin — but there were also exceptions to the rule.[9] The canon law authors read the *clausula* back into the *Digest* 12.4.8 on the recoverability of a dowry after marriage, if infidelity had occurred. Once this discussion was taken over by the civilians — the commentators, glossators and post-glossators on the *Corpus iuris civilis* — its origin could be confused with Roman law.

The importance of this discussion demonstrates that the *clausula* initially emerged in a context in which civil law had become inflexible. The *pacta sunt servanda* threatened itself to become a rigid formal principle — the original ideals of equity and good faith attached to it could erode if it, likewise, became a fixed doctrine. The function of the *clausula* in this respect has perhaps been best portrayed in the critical scholarship with reference to the notion *summum ius*, *summa iniuria* [‘the highest law is the highest injustice’] whereby dogmatic adherence to a single rule, such as *pacta sunt servanda* in this case, could result in the greatest injury.[10] In this way, *a silent clause* — hence the name *clausula rebus sic stantibus* — was added as an implied condition to every contract, pact or treaty. There had to be an exception to the rule in order for justice to be maintained.

If looked at from the perspective of a thoroughly unalterable legal principle, the *pacta sunt servanda* could solidify obligations without any possibility of termination. With no reference to duration or the impossibility of performance, it

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[7] A. Vamvoukos, *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude* (Oxford: 1985), 5–6.

[8] C. Rabl Blaser, *Die clausula rebus sic stantibus im Völkerrecht* (Bern: 2012), 13–14.

[9] Earlier historical scholarship argued that the *clausula* was present in a gloss by the Italian jurist Accursius to *Digest* 12.4.8 on the recoverability of a dowry after marriage (see L. Pfaff, ‘Die Clausel: rebus sic stantibus in der Doctrin und der Österreichischen Gesetzgebung’, in *Festschrift zum 70. Geburtstag für Joseph Unger* (Stuttgart: 1898), 221–354, at 223, 226. Shortly thereafter, this was criticised as incorrect (see O. Fritz, ‘Clausula Rebus Sic Stantibus’, *Archiv für Bürgerliches Recht* 17 (1900), 20–49, at 29–30). For the intermediary position, see Feenstra, ‘Impossibilitas and Clausula Rebus Sic Stantibus’, 370 who shows how the expression *rebus sic se habentibus* emerged with Accursius’s gloss, but not in connection with the *clausula* concept.

[10] *De officiis* 1.10 — cited in R. Köbler, *Die ‘clausula rebus sic stantibus’ als allgemeiner Rechtsgrundsatz* (Tübingen: 1991), 1 n. 3. This starting point to approach the problem was first begun, however, by K. Larenz, *Geschäftsgrundlage und Vertragserfüllung. Die Bedeutung ‘veränderter Umstände’ im Zivilrecht* (Munich and Berlin: 1957), 3 who Köbler does not cite in this context. For its use in an international law context, see Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law: Second Edition* (Oxford University Press, 2021), https://www-oxfordreferen ce-com.libproxy.york.ac.uk/display/10.1093/acref/9780197583104.001.0001/acref-97801975831 04-e-2029?rskey=adQNvv&result=2031 (Accessed 05.11.2023).

might thus itself become unjust. In this respect, the *clausula* proved to be a remedy. It balanced contractual fidelity with equity and impartiality. Even if legal intercourse is based on *pacta sunt servanda*, an unchangeably juridical formalism — no matter what the consequences — had by the late Middle Ages been recognised as problematic. This was nowhere more evident than in periods of crisis that so thoroughly marked the formation of the clause.[11]

The concept of crisis forms a link between otherwise entirely distinct epochs and legal spheres in which the *clausula* was the subject of intensive inquiry, an object of legal consciousness. For example, this is no less true of its rather late acceptance as a principle in the German Civil Code — as 'collapse of the underlying basis of transaction' [*Wegfall der Geschäftsgrundlage*] — where it was reluctantly formulated as a response to economic catastrophe and the impossibility of contractual performance after the First World War.[12]

The internecine European wars of the seventeenth century saw the solidification of the *clausula* in civil law contracts and the doctrine of obligations. This was paralleled in international law. Alberico Gentili took the *clausula* over from civil law and it became a tacit or implied condition of almost every legal act, not only in testaments, but also in contracts and, above all, treaties.[13] The issue the *clausula* raised for international law, however, was unique.

At the level of civil law, the answer to the fundamental question of who will judge (*quis judicabit*) whether circumstances have changed materially is uncontentious: the courts decide. International law lacks the same material and procedural hierarchy, which in civil law is everywhere positive, binding and obligatory and states ubiquitously that 'nobody should be the judge in his (own) case' (*nemo debet esse iudex in (propria) causa*).[14] Hence, the *clausula* has historically demonstrated at the level of international law how its rules-based legal order — the coordination of justice, law and politics — is in a perpetual state of suspension. Here the interpretation of law can become a weapon in the struggle for legal and political change.

Summing up, the *clausula* emerged first in a theological context, taken over from moral-philosophical sources; it grew alongside *pacta sunt servanda*, through faith and equity. Yet the *pacta sunt servanda* in its turn could become inequitable, too stable and rigid, as the canonists realised by reading the *Digest*

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[11] For a critical remark, see Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 3: 'The problem in question arises at any time, and by no means, as one might think, only in times of crisis and upheaval' [*Das Problem, um das es geht, stellt sich zu jeder Zeit, keineswegs, wie man denken könnte, nur in Zeiten krisenhafter Erschütterungen und Umwälzungen*].

[12] R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: 1996), 582.

[13] A. Gentili, *De iure belli libri tres*, ed. T.E. Holland (Oxford: 1877), III.xiv, 352 — citing Baldus, Seneca and the Italian civil lawyer Alciato.

[14] Fellmeth and Horwitz, *Guide to Latin in International Law*, https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1442;jsessionid=DE797D7612D0D11D4194D52A3D817DF6.

12.4.8. Given historical factors of crisis, this became even more evident. A tacit or implied condition was thus attached to every contract, pact or treaty in respectively distinct legal spheres. Hence, the *clausula* traversed the species barrier, from canon law to civil law and international law. Absent a judge to decide when circumstances had truly altered, international law represented the most problematic legal discipline in which the *clausula* appeared.

3. Nineteenth-Century State Practice, Russia and the 1871 London Declaration

At a moment when the *clausula* fell into disrepute in civil law, disappearing from nineteenth-century codifications, it reached its heyday in international law and state practice: 'thrown out by the door, it will always re-enter through the window'.[15] This played out in distinct legal orders. Erich Kaufmann distinguished subordination from coordination: '*private law* is by its very essence *thoroughly subordination law* and not, like international law, individual law'.[16] From this perspective, there was no higher order above the individual state. Kaufmann's highly syncretic perspective conjoined Hegel and the politics of Bismarck — historically theorising the collapse of the Holy Alliance and the emergence of a novel international political order based purely on autonomous nation states. Just as the contract did not explain the higher ethical domain of the state, so too were the private relations between individuals and their obligations inadequate to explain the international relations between states: attempts have often been made to apply private law […] to states, but the position of private persons is that they are subject to the authority of a court which implements what law is as such. The relationship between states is a relationship of independent units which make mutual stipulations but at the same time stand above these stipulations.[17]

Following this logic, a treaty between states was conditional and not absolutely binding. The private law analogy of the contract neither functioned at the level of the state nor international relations. The praetor's promise, so astutely

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[15] Zimmermann, *The Law of Obligations*, 581. The reference is to B. Windscheid, 'Die Voraussetzung', *Archiv für die civilistische Praxis*, 78, 2 (1892), 161–202, at 197. Windscheid's doctrine of the presupposition, despite its theoretical thrust, did not recommend itself to the other drafters of the German Civil Code. This was due to the critique of O. Lenel who found it inadequate. Either it must be an expressed condition, legally known and valid for the contract and thus adopted and consented to by both parties; or it remains a legally inconsiderable motive, a purely psychological theory of the will, something unknown that cannot be the object of consent (see Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 6–7).

[16] E. Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus. Eine Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriff*, (Tübingen: 1911), 171: '*Das* Privatrecht *ist […] seinem Wesen nach […]* durchaus Subordinationsrecht, *und nicht ebenso wie das Völkerrecht Individualrecht*' (original emphasis).

[17] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right or Political Science in Outline*, ed. Allen W. Wood, trans. H.B. Nisbet (Cambridge University Press, 1991), 366 (§330 Addition) (translation modified).

explicated by Ulpian in the *Digest* (2.14.7), and which stood at core of the *pacta sunt servanda* did not apply. This Hegel perceived lucidly when he stated that '[t]here is no praetor to adjudicate between states, but at most arbitrators and mediators, and even the presence of these will be contingent […]'.[18] On the other hand, Bismarck's reflections were the result of his observations that the old order — the stability of the political world after 1815 had been irrevocably shaken — whereby the sacred character of treaties had disappeared. This was not mere theory. Rather it was confirmed in state diplomacy — not in Prussia, but in Russia.

In 1870, a period of shifting balance of power, Russia sought to unilaterally annul obligations stemming from the Treaty of Paris that had limited its freedom of manoeuvre and security interests in the Black Sea and Mediterranean after the Crimean War (1853–6).

The Treaty of Paris had put a seal on the Russian defeat, *demilitarising* the Black Sea. Russian warships were no longer permitted passage. Moreover, the Treaty maintained the prevailing legal regime of the the Straits Convention of 1841, which saw the Ottoman Empire controlling access through the Dardanelles and the Bosporus Straits.[19]

Russia appealed to the material breaches by other states of the Treaty of Paris, but, more importantly for the subject at hand, to changing circumstances. Before 1870, the *clausula* had rarely been invoked — now it became both a legal doctrine and political and diplomatic rationale.[20]

What was most contentious was that Russia's unilateral denunciation called the entire authority of treaties that was at the core of the post-1815 political order into question — the *pacta sunt servanda* had been shaken to the core. The invocation of the *clausula* attested to a growing international disorder. This stretched down to the First World War, the Treaty of Versailles and the Second World War. Reflecting on the crisis, the Earl of Granville, British Secretary of State for Foreign Affairs, perceived the full implications of the problem. This was demonstrated in the capacity, as he stated, of 'the right of Russia to annul the Treaty on the ground of allegations of which she constitutes herself the only judge'.[21] Thus, Granville attempted to draw an analogy from civil law — the legal principle that nobody is permitted to be the judge in their own case — and to apply it to the level of international law, politics and relations in order to maintain the sanctity of treaties.[22]

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[18] Ibid., 368 (§333). This passage is central to the early twentieth-century interpretations of the *clausula* (see N. Boyd, 'Erich Kaufmann et la théorie hégélienne du droit international' in Élodie Djordjevic (ed.), *Hegel et le droit* (Paris: 2023), 147–70).

[19] D. J. Bederman, 'The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations', *The American Journal of International Law*, 82, 1 (1988), 1–40, at 7.

[20] Ibid, 8.

[21] See Lord McNair, 'Part V Termination of Treaties, Chapter XXX, Pacta Sunt Servanda, and the General Presumption Against Unilateral Termination', in *Oxford Scholarly Authorities on International Law* (Oxford: 2011), 496.

[22] Bederman, 'The 1871 London Declaration', 13.

Russia succeeded in renegotiating the Treaty of Paris — the *clausula* had served its reason of state. The London Declaration of 1871, however, that put these changes into law attempted to restate the very treaty order that had just been broken.[23]

4. Article 62 and the Crimean Crisis

An underlying strategic logic is shared between the 1870 example of Russia's appeal to the clause with the 2014 Crimean crisis and the ongoing Russian-Ukrainian War: Russia's relative lack of a strategic warm-water port. The most important major warm-water port the Russian Federation controls is the Port of Sevastopol in occupied Crimea, from which its Black Sea Fleet operates. This gives it essential political and economic access to the Mediterranean and through it to the Suez Canal and the Red Sea. Access in and out of the Black Sea and into the Mediterranean is restricted by the Montreux Convention (1936), through which Turkey still controls the Straits.

Before turning to how the *clausula* was leveraged by the Prime Minister of the RF, Dmitry Medvedev after the annexation of Crimea in 2014 and, in a similar respect, to how Putin cited a change in conditions justifying treaty breach through Soviet historical precedent in order to invalidate all bi-lateral agreements with Ukraine, I take a look at its incorporation into the VCLT.

Whereas the *clausula* could safely function in a municipal legal system in which a higher authority is present, this is in no way obvious at the level of international law.[24] The security of treaties lacks compulsory jurisdiction. To employ Kaufmann's language, this meant subordination in a coordinating order of states ultimately *is not real — but only voluntary*. In this way, the actual outcome, fidelity to treaties and the judgement drawn as to when the conditions have fundamentally altered remains principally a question of politics.[25] In this context, the danger of the *clausula* is that it tends towards a subjective application of the law which follows an equally subjective principle of interpretation in view of the fact that there is no 'general obligation to submit disputes to third-party settlement'.[26]

Part V. of the VCLT — by its very size the most preeminent part of the Convention — sought to comprehensively codify all legal problems that possibly could arise from treaties: invalidity, suspension and termination included as exceptions to the rule of *pacta sunt servanda*.[27] The VCLT had a very broad concept

[23] See The London Declaration, Jan. 17, 1871, 18 Martens Nouveau Receuil 278 (1873).
[24] O.J. Lissitzyn, 'Stability and Change: Unilateral Denunciation of Suspension of Treaties by Reason of Changed Circumstances', *Proceeding of the American Society of International Law at its Annual Meeting (1929–1969)* 61 (1967), 186–93, at 187.
[25] Ibid., 191, 193.
[26] Ibid., 189.
[27] See United Nations, Treaty Series, *Vienna Convention on the Law of Treaties (with Annex)* (New York: 1980), 332: 'Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized'.

of a treaty.[28] This now meant 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[29]

On the one hand, the inclusion of exceptions demonstrates the attempt to be exhaustive; on the other, to stabilise treaty relations *in a closed system*, where authority can be drawn through citing any particular provision or article. The underlying presumption is that any reference to invalidity, termination or suspension takes place within the convention itself.[30] *There is nothing outside of the VCLT*.

This cannot detract from the fact, however, that the VCLT is also a treaty, even if it attempts to be the definitive regime that codifies all such relations — *the* treaty of treaties. According to its own rules, the VCLT rejected the *clausula* as an implied or tacit condition. Hence, *rebus sic stantibus* no longer functioned as a clause attached to every treaty.[31] The solution was provided by theorising it, on the contrary, as an 'objective principle of law' — thus a potential change in circumstances was outside of any given treaty; it was the unforeseen and could not be included tacitly as a condition exercising restraint.[32] This was too 'subjective'.

The International Law Commission considered the *rebus sic stantibus* a necessity to render justice and equity to those circumstances in which a real fundamental change was at issue. It was recognised that if it were excluded this might drive a state to take action outside the law.[33] Thus, the doctrine was integrated as a principle of peaceful change. This contrasts starkly with how the *clausula* has been used politically.

Since its codification, the *rebus sic stantibus* has largely disappeared — playing only a very modest role in international law.[34] Appeal to the doctrine is rarely made and often unsuccessful.[35] It is viewed reluctantly as it introduces more problems than it solves, alienating the state that cites it. The *rebus sic stantibus* is a hangover from an earlier — indeed more 'primitive' — epoch of international law in which treaties were not as systematically negotiated, where little attention

[28] S.E. Nahlik, 'The Grounds of Invalidity and Termination of Treaties', *The American Journal of International Law* 65, 5 (1971), 736–56, at 736–7.
[29] VCLT Article 2, paragraph 1, subparagraph (a).
[30] Nahlik, 'The Grounds of Invalidity and Termination of Treaties', 740.
[31] G.G. Fitzmaurice, 'Law of Treaties, Second Report', in *Yearbook of the International Law Commission 1957, Volume II: Documents of the Ninth Session Including the Report of the Commission to the General Assembly* (New York: 1958), 32.
[32] M. Shaw and C. Fournet, 'Volume II, Part V Invalidity, Termination and Suspension of the Operation of Treaties, s.3 Termination and Suspension of the Operation of Treaties, Art. 62 1969 Vienna Convention', in *Oxford Scholarly Authorities on International Law* (Oxford: 2011), 1414.
[33] Lissitzyn, 'Stability and Change', 190, 191.
[34] E. M. Leonhardsen, 'Pride and Perseverance: Strategic use of *Rebus sic Stantibus* in Russian Foreign Policy 1870–1950', *German Yearbook of International Law*, 63, 1 (2020), 581–620, 584.
[35] See J. Kulaga, 'A Renaissance in the Doctrine of the Rebus Sic Stantibus?', *International & Comparative Law Quarterly*, 69, 2 (2020), 477–97.

had been given to the elaboration of formal exit or renegotiation clauses or flexibility in performance.[36]

The fact remains, however, that there are still many treaties that are primitive in form. In many cases, these still retain eminent geopolitical importance and are even exemplary of the endurance of a rules-based international order. For example, this is particularly true of the Montreux Convention.

Reports in 2019 suggested that the RF might seek renegotiation of the Montreux Convention on the grounds of changed circumstances in Crimea. That moment passed. The strategic importance of the Convention was demonstrated when Turkey recognised Russia's so-called 'special military operation' as a war, closing the Dardanelles and the Bosporus Straits to Russian warships. The Montreux Convention allows Turkey to act as a belligerent when it feels threatened and to decide which warships enter the Black Sea. On this principle, it could allow the passage of NATO allied warships. Should the Alliance invoke Article 5 of the North Atlantic Treaty,[37] given an attack — whether intentional or unintentional — on any member, Turkey, also NATO member, would be in a position to activate Article 20 of the Montreux Convention which would permit it to take any action necessary concerning transit through the Straights.[38]

Russia has been party to the VCLT since April 29, 1986, then as the Soviet Union. The RF appeal to changing circumstances in the context of the Crimean crisis demonstrates, however, most powerfully the extent to which politics — and not *only* law — continues to shape the life of treaties. It also shows how the *clausula* can still function outside of the codification of *rebus sic stantibus* in VCLT.

After the annexation of Crimea in 2014, the Prime Minister of the Russian Federation (RF), Dmitry Medvedev, made reference to the clause.[39] The issue involved the Partition Treaty on the Status and Conditions of the Black Sea Fleet:[40] the fact is that, given the changed circumstances and the fact that Crimea is now part of the territory of the Russian Federation, there are no grounds for the continuation of this treaty. There is such an international legal principle that the contract remains in force as long as the circumstances that gave rise to it are in effect — sorry for the Latin, *clausula rebus sic stantibus*.[41]

This example shows poignantly how an increase in state power can have treaty infringement as an explicit objective. It thus provides an important historical parallel to the 1870 Russian invocation. That being said, the 2014 example demonstrates a bolder usage of the *clausula* as the breach of treaty was premised

[36] Leonhardsen, 'Pride and Perseverance', 586.
[37] Signed 04.04.1949, entered into force 24.08.1949.
[38] A. Aliano and R. Spivak, 'Ukraine Symposium: The Montreux Convention and Turkey's Impact on Black Sea Operations', https://lieber.westpoint.edu/montreux-convention-turkeys-impact-black-sea-operations/ (Accessed 09.11.2023).
[39] It also passed into Russian federal law (http://en.kremlin.ru/acts/news/20673 (Accessed 23 December 2022)).
[40] Signed 28 May 1997, entered into force 12 July 1999.
[41] http://kremlin.ru/events/president/news/20623 (Accessed 22 December 2022).

on pure state aggression and a politics of annexation. It did not seek to renegotiate a treaty order, but to destroy it. According to Article 75 of the VCLT, a state guilty of aggression in this way has no recourse to use the Convention. Thus, this deployment of the clause shows how it continues to be an integral element of the struggle for legal and political change between states: politics and the threat of violence are in a position to decide on the validity of a legal order or its undoing. It demonstrates how appeal to the *clausula* carries with it a residual logic of reason of state that has no reference whatsoever to the acceptance of the *rebus sic stantibus* as a customary norm in the VCLT.

The other example is equally as political and has no foundation in the current doctrine of international law.[42] It does, however, have an historical precedent. After the First World War and the Russian Revolution (1917), the Soviet Union sent a letter to the Director of the Institute of International Law, the Hague that stated its express intent to breach all previous treaty obligations on the basis of its revolution. And it did so 'from the viewpoint of the rebus sic stantibus clause for each state and each treaty individually'.[43] Putin used the same argumentation — but instrumentalised it against Ukraine. The change of government in Kiev — considered a revolutionary ousting of Yanukovych by the Kremlin — made the fulfilment of all bi-lateral agreements between the RF and Ukraine null and void.[44]

5. Conclusion

Changing circumstances can precipitate a domino effect that disrupts the entire global order. Even if restricted to the VCLT, the status of long-standing conventions and agreements can become unsettled. (Could Ukraine challenge Russia's permanent membership of the UN Security Council on the ground that the approval of other former Soviet republics postulated in the Alma Ata Protocol is obviated by changed circumstances?) According to the VCLT, the Protocol would fall under its definition of treaty as any form of international agreement governed by international law. Article 5 of the Protocol structures itself on the basis of the UN Charter and the principle of territorial integrity for each and every member of the Commonwealth of Independent States. The letter sent to the UN by the Commonwealth of Independent States is what granted the RF the possibility of occupying the seat on the Security Council that had been left vacant by the collapse of the Soviet Union.[45]

Who would pass judgement on the question of whether the RF, by

[42] C. Marxsen, 'The Crimea Crisis: An International Law Perspective', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74 (2014), 367–91, at 371.
[43] Letter of the Soviet Government to the Director of the Institute of International Law, the Hague, 2 April 1924 — quoted in Leonhardsen, 'Pride and Perseverance', 586.
[44] Marxsen, 'The Crimea Crisis', 371.
[45] Signed 21.12.1991, entered into force 21.12.1991 — see European Commission for Democracy through Law, *Agreements Establishing the Commonwealth of Independent States* https://www.venice.coe.int/webforms/documents/?pdf=CDL(1994)054-e (Accessed 09.11.2023).

breaching Article 5 of the Protocol with its invasion of Ukraine, still ought to rightfully possess a seat on the Security Council? This would no doubt have to be answered at the highest level. But such ranking authority is nowhere to be found other than in the quasi-judicial capacities of the UN Security Council itself.[46] As the last instance of appeal, its decisions, according to Articles 25 and 103 of the Charter, are given priority above all other rules in international law.[47] But it can hardly be imagined that the RF — or its closely aligned partner in authoritarian global governance,[48] China, another member of the Security Council — would allow such proceedings.

Given the current context of geopolitical change, the normative and political realities that sustain states in periods of untroubled security are beginning to dissolve. In this context, it seems more than likely that long-standing treaty regimes might be increasingly put under strain. The confines of the VCLT can be broken when the interpretation of the norms of international law is turned strictly into a political dimension of the state. This begs the question of whether we are actually dealing with international law as such. This is nowhere more emphatic than in the example of Medvedev as it goes against the grain of Article 62 paragraph 2 subparagraph (b) which forbids that 'the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty'.

Russian federal law justified breaching the Partition Treaty,[49] which was preceded by the politics of an annexation. This purely political use of the *clausula* is confirmed by the fact that the legality of the annexation is not recognised by the international community or the global legal order. On the other hand, as the reference to the Protocol demonstrates above, the VCLT itself could potentially be instrumentalised due to changing circumstances — although in the former case this would result in a constitutional crisis of the UN by removing a sitting member of the Security Council.

Irrespective of the legal field under consideration, the *rebus sic stantibus* generally reflects an exception to the rule, a norm that contradictorily calls a given legal order into question. At the level of international law, it is thus eminently fitting to examine as a uniquely symptomatic concept — denoting broader processes and trends in international politics and relations. The conflict over its political or legal interpretation might yet provide a comprehensive grasp of shifts that can assist in theorising the newly emerging geopolitical order. Finally, it thrusts the problem of judgement in international law to the foreground, an issue

[46] A. Skordas, 'The European Union as Post-National Realist Power', in S. Blockmans and P. Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Cheltenham: 2018), 394–444, at 405.
[47] Ibid.
[48] See A. Skordas, 'Authoritarian Global Governance? The Russian-Chinese Joint Statement of March 2021', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 81 (2021), 293–302.
[49] http://en.kremlin.ru/acts/news/20673 (Accessed 23 December 2022).

related to the classical understanding of crisis and its wide constitutional significance which in this particular context concerns a global rules-based order. Through an examination of some past and present uses of the *rebus sic stantibus* and by drawing out its theoretical circumference through historical-legal analysis, the present article has sought to analytically grasp international law as a highly distinctive shifting geopolitical field of complex struggle. The global rules-based order is undergoing a process of intensive transformation, universality fragmenting or being relativised. In this context, an examination of the *rebus sic stantibus*, as I have conceptualised it here, may serve as an aid for understanding precipitous change. This only requires formalisation in an innovative and comprehensive theory.

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tional Law Commission 1957, Volume II, Documents of the Ninth Session Including the Report of the Commission to the General Assembly (New York: 1958).
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The Role of Artificial Intelligence in the Digital Banking System

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Abstract

This paperwork follows the role and impact of artificial intelligence (AI) in the financial-banking system. By analyzing systems that use AI in business relationship initiation, decision-making processes, analytics, risk management, cyber security and customer experience, AI technology is considered to have revolutionized the way banks operate. It also discusses the advantages, disadvantages and challenges associated with the implementation of AI in the banking industry, as well as the future prospects of this field in the context of the continuous development of technology. The paper emphasizes the importance of effective adaptation to this technological evolution to ensure competitiveness and customer satisfaction in the current financial banking environment.

Keywords: *financial-banking system, artificial intelligence, digital bank, algorithms*

JEL Classification*:* A10, K00, K10, K33

1. Introduction

Digitization is one of the major structural changes transforming the functioning of the euro area and the global economy, along with globalization and demographic trends. Digitization is a long-standing technology shock that has accelerated since the 2003 strategy review, not least in relation to the coronavirus pandemic (COVID-19).[3] Evidence suggests that digital adoption differs across countries and technologies, with heterogeneous impacts. Based on the 2020 edition of the European Commission's Digital Economy and Society Index (DESI), the most digital EU economies are Finland, Sweden, Denmark and the Netherlands, and the least digital are Bulgaria, Greece and Romania[4].

The digital transformation of banks is a form of continuous innovation from conventional banks to digital banks. The evolution of the banking industry

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[3] European Central Bank, report, Digitalization: channels, impacts and implications for monetary policy in the euro area, 2021, p. 5.
[4] Ibid, p. 10.

has started from Banking 1.0, which is based on traditional and historical banking, to Banking 4.0, which includes advanced technology used in various fields, including banks, through the use of artificial intelligence systems[5].

Over time, banks have used new and cutting-edge technologies to develop new products and services and stay ahead of the competition as they face various competitive threats from neo-banks and non-bank competitors. In November 2023, 17 neo-banks are active in Romania, the best known is Revolut[6]. The digital business model is influenced by technological evolution and aims to implement service-oriented digital policies to ensure long-term business continuity.

Banks are at a critical moment right now. The evolution of technology and changing of the consumer's behavior are setting the stage for a new S-curve for banking business models, and the COVID-19 pandemic has accelerated these trends. Building on this momentum, advances in digital technologies and artificial intelligence in financial services offer banks the potential to increase revenue at a lower cost by attracting and serving customers in radically new ways, using a new business model called "the digital bank of the future"[7].

The bank of the future will combine artificial and human intelligence (AI+HI) to be more collaborative, personalized, and inclusive and provide consumers with better products and experiences, all built on trust. AI should be defined not just by what the technology can do on its own, but also by how it can augment and amplify human effort so that humans can do more[8].

The adoption of artificial intelligence (AI) in financial services is maturing as banks deploy it in a number of innovative use cases. A new survey of IT executives shows that 85% have a "clear strategy" for adopting AI in the development of new products and services. Banks use AI the most for fraud detection (58% use AI heavily and another 32% use it at least to some extent) and to optimize IT operations (54% to a great extent and 36% to some extent). Almost all banks are currently using AI to some degree or plan to do so in the next three years, in virtually all areas of business, from operations to customer experience. Key areas for future growth include personalization of investments (17% plan to adopt in the next 1-3 years), credit scoring (15%) and portfolio optimization

[5] By definition, Artificial Intelligence (AI) refers to systems that exhibit intelligent behaviors by analyzing their environment and that take action - with some degree of autonomy - to achieve specific goals. European Union Agency for Fundamental Rights, Understanding the Future Artificial Intelligence and Fundamental Rights, Luxembourg: Publications Office of the European Union, 2021, Doi:10.2811/087099.

[6] Neobanks in Romania in November 2023, https://neobanks.app/neobanks/romania, accessed on 08.11.2023.

[7] Mckinsey & Company, Building the AI bank of the future, Global banking practice, May 2021, pg. 2.

[8] Note of Microsoft President in India, Anant Maheshwari, AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020.

(13%).[9]

Several research methods have been used in documenting the issues under scientific research, analyzed from both an economic and a legal point of view. Among these, the comparative method is used to identify the advantages and disadvantages of using artificial intelligence systems in the banking financial system. Through the legal method, the national and European legislative framework that could be applicable and the perspective of possible resulting risks, the advantages, disadvantages and challenges associated with the implementation of AI in the banking industry were subjected to analysis.

2. Development on artificial intelligence

Developed and developing countries around the globe are releasing white papers[10] and national strategies on artificial intelligence[11]. Many of these strategies involve developing ethical guidelines and principles for the use of artificial intelligence and identifying necessary changes to existing legislation and regulations, in addition to formulating new ones to enable its use.

Prominent examples of these countries are the United Kingdom, China, the United States of America, and Singapore. In addition to formulating guidelines for the effective use of artificial intelligence in various industries, nations around the world are trying to develop comprehensive regulations for artificial intelligence to address the associated ethical, legal, social, and economic issues. In most countries, regulations have struggled to keep up with accelerating changes brought about by new technological developments, including artificial intelligence. Specific AI regulations applicable to financial institutions are limited, and existing laws and regulations govern the use of AI in a lesser extent. To some extent, corporations are self-regulating by adhering to AI ethical guidelines, which are voluntary in nature. An example of this would be the voluntary ethical guidelines for artificial intelligence published by Microsoft[12].

The first intergovernmental standard document for AI[13] policies was published by the Organization for Economic Co-operation and Development

[9] Report - The Economist Intelligence Unit Limited, 2022, p. 1.

[10] The White Paper on Artificial Intelligence - A European approach focused on excellence and trust was published on 19 February 2020 by the European Commission and sets out the basic principles of a future EU regulatory framework for artificial intelligence in Europe. Brussels, 19.2.2020 COM (2020) 65 final, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit -digital-age/excellence-trust-artificial-intelligence_ro.

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[12] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020, p. 10.

[13] OECD, Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449.

(OECD) in May 2019, which was endorsed by 42 countries.[14]

Romania adhered to the OECD principles on artificial intelligence by signing the OECD Declaration on Artificial Intelligence in May 2019 at the Ministerial Council meeting in Paris. By signing the declaration, Romania expressed its commitment to promote and implement ethical[15] principles for the development and use of artificial intelligence in a responsible and sustainable way[16].

The European Commission welcomes the agreement by G7 leaders on International Guiding Principles on Artificial Intelligence (AI) and a voluntary Code of Conduct for AI developers under the Hiroshima AI process. These principles and the voluntary Code of Conduct will complement, at international level, the legally binding rules that the EU co-legislators are currently finalizing under the EU AI Act.[17]

The eleven Guiding Principles adopted by the leaders of the seven countries and the EU, which make up the G7, provide guidance for organizations developing, deploying and using advanced AI systems, such as foundation models and generative AI, to promote safety and trustworthiness of the technology. They include commitments to mitigate risks and misuse and identify vulnerabilities, to encourage responsible information sharing, reporting of incidents, and investment in cybersecurity as well as a labelling system to enable users to identify AI-generated content.[18]

The Guiding Principles have in turn served as the basis to compile a Code of Conduct, which will provide detailed and practical guidance for organizations developing AI. The voluntary Code of Conduct will also promote responsible governance of AI globally. Both documents will be reviewed and updated as necessary, including through inclusive multistakeholder consultations, to ensure they remain fit for purpose and responsive to this rapidly evolving technology. The

[14] OECD The Organization for Economic Co-operation and Development (OECD) was created in 1961 and is a unique forum where governments work together to address the economic, social and environmental challenges of globalization. The European Union participates in the work of the OECD and Romania participates as a candidate state for joining the Organization, following the decision of the OECD Council of 25.01.2022, granting this status to our country (the OECD is to officially approve the Roadmap for Romania's Accession to the organization (mediafax.ro). The recommendations are adopted by the Council and are not legally binding. They represent a political commitment to the principles they contain and imply an expectation that adherents will do their best to implement them.

[15] The OECD principles on artificial intelligence concern: transparency, accountability, respect for human rights, security and protection of privacy, as well as ensuring sustainability and positive impact on society and the environment.

[16] Daniela Duță, *Artificial Intelligence. Recommendations, guidelines and legal framework in Romania*, Annual session of scientific communications: Law and Society in Transition, April 20-21, 2023, Legal Research Institute "Acad. Andrei Rădulescu", School of Advanced Studies of the Romanian Academy (SCOSSAR).

[17] European Commission, Commission welcomes G7 leaders' agreement on Guiding Principles and a Code of Conduct on Artificial Intelligence, 30.10.2023, Bruxelles, https://ec.europa.eu /commission/presscorner/detail/en/ip_23_5379, last accessed on 13.11.2023.

[18] Ibid.

G7 leaders have called on organizations developing advanced AI systems to commit to the application of the International Code of Conduct. The first signatories will be announced in the near future.[19]

According to the latest McKinsey report, as of 2022, 50% of organizations surveyed reported having adopted AI in at least one business unit or function. This total is down slightly from 56% in 2021, although it is up significantly from 20% in 2017. The use of artificial intelligence has grown rapidly over the past half decade, but has leveled off as of 2020. Over the past half decade, the average number of AI capabilities that organizations have incorporated doubled from 1.9 in 2018 to 3.8 in 2022. Some of the AI capabilities that McKinsey characterizes in the survey include recommender systems and facial recognition. In terms of the type of AI capabilities incorporated into at least one function or business unit, robotic process automation had the highest rate of incorporation in the high-tech/telecommunications, financial and business services, and legal and professional services industries — respectively, the incorporation rates were 48%, 47%, and 46%. Across all industries, the most incorporated AI technologies were robotic process automation (39%), computer vision (34%) and virtualization (33%)[20].

3. Artificial intelligence in the banking system

Global financial bodies and committees see emerging technologies such as artificial intelligence as enablers for the growth and personalization of financial services. In 2017, the Financial Stability Board (FSB), an international body that monitors and makes recommendations on the global financial system, established various applications of AI in the financial sector, such as on portfolio management, customer due diligence, scoring and compliance with the regulations. The FSB also highlighted possible benefits for individual customers and small and medium-sized enterprises (SMEs), as well as efficiency gains in back-office procedures carried out by banks. In a 2018 report, the Basel Committee on Banking Supervision (BCBS) — a committee of banking supervisors and the main global standard setter for prudential regulation of banks — encouraged banks to use emerging technologies such as AI, to increase its effectiveness in responding to fintech risks. The committee then began discussions with regulators and industry on risk management and AI systems, including through a workshop hosted by its Oversight and Implementation Group (SIG) in Tokyo in October 2019. The

[19] International Guiding Principles on Artificial Intelligence (AI) can be accessed here: https:// digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-guiding-principles-advanced-ai-system. The voluntary Code of Conduct for AI developers can be accessed here: https:// digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-code-conduct-advanced-ai-systems, last accessed on 13.11.2023.

[20] Artificial Intelligence Index Report 2023, Stanford University Human Centered Artificial Intelligence, 2023, p. 198.

financial and digital banking system witnessed a huge growth in the last two decades. This transformation has been primarily driven by an increase in digital payments across various sectors and industries[21].

The potential cost savings for banks from applying AI in the front, middle and back office is estimated at USD 447 billion by 2023. Of this, middle office operations will account for nearly 50% of the cost saving opportunity and middle and back office will be represented 45%, respectively 7%[22]. The use of artificial intelligence within the banking partitions are:

3.1. Customer Interface – virtual/digital assistants or chatbot's

The use of virtual customer assistants as an alternative to customer service assistants is one of the most common use-cases of AI in banking. These chatbots or transactional bots, simulate conversations with human customer service agents to process customer queries; they answer user questions, connect users to appropriate services in a bank, and suggest relevant information via text and speech. Commercial banks have made chatbots available on different platforms including mobile applications and websites, and on their social media handles. These virtual assistants use ML[23] and Natural Language Processing (NLP) - a type of ML that understands human language and processes data accordingly - to offer customers personalized experiences[24]. According to Juniper Research, financial organizations will be able to save more than $820 million by 2023 thanks to banking chatbots. Also, another report by Juniper reveals that chatbots will help reduce banks' customer service budget by more than $7.3 billion worldwide in 2023. This shows that it is a type of tool designed for to reduce the operating costs of financial institutions and that digitization has gone from being a plus to being a requirement after the pandemic[25].

3.2. Payment fraud detection and risk management

Online payment fraud losses are expected to jump to USD 48 billion per

[21] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020, p. 13.
[22] Ibid, p. 14.
[23] Machine Learning (ML) is a part of AI that studies how computer agents can improve their perception, knowledge, thinking, or learn and act on experience and data, and has its origins in computer science, statistics, psychology, neuroscience, economics and control theory. Subject also presented in the paper: Daniela Duță, *Artificial Intelligence and the right to private life*, held during the Annual Session of Scientific Communications: Law and Global Crises. Legal implications of the health crisis - September 22-23, 2022, Bucharest.
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[25] Conversational Banking: Advantages and Applications of Chatbots for Banking, https://www.sydle.com/blog/conversational-banking-64cbe5e6f90a0a42e903568d, accessed on 08.11.2023.

annum by 2023, compared with an estimated USD 22 billion per annum in 2018. In such a scenario, it is expected that the use of AI to proactively monitor and identify various instances of fraud, money laundering, malpractices, and prevent them in real time will increase greatly. An example of this is identifying irregular transactions by examining patterns based on an individual's spending data and behaviour. The ability of technology to decode patterns and continuously adapt to recognize new fraud tactics will help banks bolster fraud detection and prevention efficiency and significantly cut costs.[26]

3.3. Business and Strategy Insights

AI technology has the potential to analyse large amounts of data collected and maintained by banks and offer insights to transform business processes and drive informed decision-making. Deeper and real-time insights into customer data can facilitate marketing and portfolio strategies. Identification of gaps and suggested actionable business insights based on assessment of data trends using AI can help banks implement measures to boost their growth. Another area where AI analytics can help assist with business decisions is digital payments, where transaction data, including users' transactions, searches, and needs can be mined to derive actionable insights[27].

3.4. Credit evaluation services and decisions to grant credit facilities

A priority for the banking sector is the reduction of financial and social inequality. Thus, financial and social inequality can be reduced by creating digital banking services that are more accessible and that can attract new users. With a focus on Romania, out of the 30 commercial banks in our country, only one is not digitized[28], the rest using digital products to a lesser or greater extent, namely: all digitalized banks have the internet banking platform where the user can make online payments, but not all digitalized banks have the possibility to offer their customers the possibility of opening a current account or granting an online credit facility, and the application of artificial intelligence is still in its infancy (opening a current account through remote video identification using facial recognition[29], granting credit facilities or using chat bots).

According to a press release from Horvath Romania, the banks present in the FinnoScore analysis were evaluated from the point of view of the level of

[26] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020, p. 24.
[27] Ibid, p. 24.
[28] Banca Centrală Cooperatistă CREDITCOOP, https://noul.creditcoop.ro/ro/node/41.
[29] The Authority for the Digitization of Romania, the 2021 Norm regarding the regulation, recognition, approval or acceptance of the remote person identification procedure using video means. https//gov.ro, accessed on 11.09.2023.

digitization, according to over 300 criteria, divided into 12 categories, including: website, online sales, multichannel communication, the functionality of the mobile application and internet banking, online marketing, presence in social media, innovation and sustainability, price transparency, loyalty programs, methods of attracting new customers or the degree of implementation of a complete process (end-to-end) of online onboarding, through which customers can create and use a bank account exclusively online, etc. In the top Romanian banks, BCR is in first place, with a score of 6.81, a position mainly due to the George mobile application, the increased attractiveness for new customers, but also the good score for online banking and onboarding. This is followed by Banca Transilvania (6.15), which obtained a maximum score for attractiveness for new customers, far above any other bank in Romania[30].

Digital banking services create new opportunities for financial inclusion. By using these services, financially vulnerable people can have access to banking services at a low cost; digitized banking services are much faster (out of the 29 digitized banks in Romania, 10 banks offer customers the instant payment service for local transfers in RON; it should be mentioned that in our country this service does not exist for payments in foreign currency, but it will be implemented in the near future).

On 28.10.2022, the European Commission adopted a legislative proposal aimed at ensuring that all citizens and companies holding a bank account in the EU and EEA countries can make instant payments in euros. The proposal fulfills an essential commitment from the Commission's 2020 Strategy on retail payments, which aimed at the generalization of instant payments in the EU. The proposal comes in the form of an amendment to the 2012 Regulation on the single euro payment area, which contains general provisions for all SEPA transfers in euros, adding specific provisions for SEPA instant payments in euros[31].

From opening a simple current or payment account to granting an online credit facility, the digitization of banking services can have significant effects on financial and social inequality. Digitization can give access to these products to people who previously had difficulties in obtaining them. In this way, financial inclusion can be improved for the population with low incomes, from rural areas or from marginalized groups.

The digitization of banking services can lead to a decrease in financial illiteracy through financial education, which can be presented through digital applications and information helping customers to responsibly manage their financial resources. With the introduction of digital services in banks in Romania, with reference to interbank transfers (the cost of intrabank transfers is 0 RON), their

[30] Romania is represented on the 3rd place in the FinnoScore international top regarding the digitization of banks (consulting company) www.agerpres.ro/economic/2023/06/22, published on 22.06.2023, accessed on 11.09.2023.

[31] European Commission, 2023, https://commission.europa.eu/, accessed on 11.09.2023.

related costs have decreased compared to traditional transfers (by physical payment order), thus helping to reduce financial inequality.

Artificial intelligence allows banks to use alternative sources of information, including data from spending and earning habits, family history and the use of mobile data to build a credit score for such underprivileged people. Banks, in turn, depend on these scores to identify and onboard more customers. For existing customers, AI algorithms extract information from various data inputs such as a person's banking transactions, their past financial decisions, social media usage, web browser history and psychometric tests to enable banks to determine accurate creditworthiness and to make quick loan decisions.

3.5. Regulatory compliance

Financial reporting for purposes of compliance is a burdensome and complex activity that banks must regularly undertake. It requires banks to invest in extensive human resources, as errors in compliance can have significant repercussions on a banking entity. AI technology can be harnessed to automate compliance procedures, processing vast amounts of data into dashboards. Dashboards assist companies in better understanding and decision making and enable regulators to maintain closer oversight at lesser cost.[32] AI technology also makes it easier to identify suspicious transactions, which further helps with better compliance. Automation of compliance procedures also reduce the time and costs involved in interpreting and implementing new reporting requirements[33].

3.6. Personalized insights and digitized customer service

AI algorithms have the potential to deliver personalized insights to customers, using chatbots that assess customer queries, wealth management applications that oversee customer portfolio, and mobile banking applications that offer personal finance management. Use of AI over time will enable banks to anticipate customer needs and demands more effectively by gathering and analysing digital profiles and transactional history. This in turn will help them provide personalized product offers and recommendations to clients. Further, better knowledge management of customer data will allow bank employees to deliver insights to their customers more swiftly. The time they save in the process can be utilized on other activities, such as building relationships with existing customers and expanding their pool of users.[34]

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[32] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020, p. 25.

[33] FinTech Futures, How technology and AI are set to transform compliance - Global fintech news & intelligence, https://www.fintechfutures.com/2018/12/how-technology-and-ai-are-set-to-transform-compliance/, accessed on 09.11.2023.

[34] AI in banking, Institute for development and research in banking technology – established by

More than 50% of bank customers believe that personalized service is one of the key factors for them to trust their banks, while only 35% of traditional banks offer personalization that meets customer needs at the right time and place.

Therefore, banks will have to invest (or are investing) more than ever to personalize the services offered to customers and, in turn, to retain their trust and loyalty. Banks need to use data-driven AI capabilities to micro-segment existing customers and prospects. This level of granularity can help banks more accurately predict customer and prospect needs and behaviors[35].

3.7. Know Your Customer (KYC) and Anti Money Laundering (AML)

Non-compliance with sanctions, Know Your Customer (KYC), and Anti Money Laundering (AML) has resulted in global financial regulators issuing fines worth USD 26 billion to financial institutions, including banks in the past decade. To reduce manpower and resource spent on compliance, banks are investing in AI to streamline their KYC processes and detect AML activities. Banks are using AI to oversee transactions in real time and adopt regulatory changes swiftly to ensure compliance in a time-bound manner.[36]

3.8. Remote identification using facial recognition

The use of AI will enable banks to improve speed and efficiency in customer authentication and identification. It has been estimated that by the end of 2020, AI will be used by 1.9 billion consumers globally for mobile app authentication, ATM cash withdrawals and digital integration. Customer authentication is done using physical and behavioral biometrics.[37] AI systems analyze physical biometrics, including a person's fingertip, iris or voice, and behavioral biometrics, such as a person's posture or typing speed to recognize them and authenticate further[38].

At the national level, the Financial Supervisory Authority (ASF) issued Instruction no. 4/2023 for the application of the Guide on the use of remote customer registration solutions pursuant to article 13 paragraph (1) of Directive (EU)

reserve bank of India, 2020, p. 25.

[35] Artificial intelligence: Transforming the future of banking, Deloitte report, 2021, p. 2.

[36] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020, p. 25.

[37] Subject studied by Daniela Duță in the work *Remote identification using facial recognition. Data protection and privacy concerns*, prepared for the International Conference "Challenges of Doing Business in the Global Economy" CBGE 2022, IXth Edition, Bucharest, May 13-14, 2022, organized by the "Dimitrie Cantemir" Christian University.

[38] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020.

2015/849.[39]

The instruction establishes the measures that the regulated entities referred to in article 2 paragraph 2 letter (d) of ASF Regulation no. 13/2019 must adopt to ensure secure and efficient remote customer identification and registration practices in accordance with the applicable legislation on preventing and combating money laundering and terrorist financing and the EU data protection framework. According to the Instruction, ASF applies the Guidelines on the use of remote customer onboarding solutions under article 13 paragraph (1) of Directive (EU) 2015/849 set out in the Annex[40].

The guidelines set out the following:

• the data logging steps and requirements for the pre-implementation assessment of the remote customer registration solution,

• the internal policies and rules, internal control mechanisms and procedures relating to remote client registration that regulated entities must establish and maintain,

• data, documents and information necessary for remote identification of customers,

• conditions to be met by the remote customer registration solution,

• outsourcing of remote customer registration,

• managing the risks associated with the use of information and communication technology (ICT) and the risks associated with cyber security.

According to the Instruction:

- in application of the provisions of article 11 para. (1) letters a) - c) of Law no. 129/2019[41], in order to establish a business relationship or an occasional transaction concluded remotely, regulated entities shall analyze and assess the need to adopt a technical solution for remote registration of customers in compliance with the provisions of this instruction.

- regulated entities shall establish internal policies and rules, internal control mechanisms and procedures to manage the SB/FT risks of remote customer registration, appropriate to the nature and volume of the business conducted and to the SB/FT risks to which they are exposed in accordance with article 3 paragraph (3), (5) of ASF Regulation no. 13/2019. Internal policies and rules, internal control mechanisms and risk management procedures for SB/FT remote customer registration shall be developed, implemented, reviewed, and approved in accordance with the provisions of art. 4 para. (1) and art. 9 para. (1) letter a) of ASF Regulation no. 13/2019.

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[39] Instruction no. 4/2023 for the application of the Guidelines on the use of remote customer onboarding solutions under article 13(1) of Directive (EU) 2015/849.

[40] Guidelines on the use of Remote Customer Onboarding Solutions under Article 13(1) of Directive (EU) 2015/849, EBA/GL/2022/15, 22/11/2022, https://www.eba.europa.eu/sites/default/documents/files/.

[41] Law no. 129/2019 of July 11, 2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the modification and completion of some normative acts, Published in the Official Gazette no. 589 of July 18, 2019.

- the adoption of a remote customer registration/enrolment solution and the conduct of business under this solution by regulated entities shall be carried out in accordance with the provisions of the relevant applicable regulations

- regulated entities shall make available to the ASF, at its request:

a. an assessment of the need to adopt a technical solution for remote customer registration/enrolment and the outcome of the assessment;

b. the appropriateness of the use of the technical solution for remote customer registration/enrolment, taking into account identified SB/FT risks, taking into account geographical exposure, customer base, distribution channels and products and services offered;

c. the analyses carried out and remedial action taken to correct identified deficiencies in the technical solution for remote customer registration/enrolment.

- violation of the provisions of the instruction shall be sanctioned in accordance with the provisions of Chap. X of Law no. 129/2019 and/or specific legislation applicable to the regulated entity Regulated entities must comply with their obligations under this Instruction by 30 June 2024.

3.9. Wealth management

Banks advise their customers on wealth management based on their portfolio and other attributes. AI helps in understanding customers' needs and risk-taking appetite, helping in the delivery of customized products. AI makes identification of market trends easier and credible, and gives insights on price fluctuations in the future, helping potential investors choose the right product for their portfolio. In addition to providing algorithm-based portfolio management advice, AI systems can analyse salary, savings, and spending data of customers and draw patterns to formulate customized financial plans catering to a specific individual's needs. Some banks are now using chabot's to tell customers how to manage their investment portfolio using AI, ML and predictive analytics. Bots analyze the client's previous investments, salaries and spending patterns to suggest the best possible investment strategies. [42]

3.10. Simplify backend processes

Increasingly, a large proportion of innovation is taking place in the digital economy. Innovation in business models based on Big Data, deep-learning algorithms and Internet of Things (IoT) is expected to dramatically alter many paradigms such as employment, communication, health and productivity that are fundamental to our lives. Acting responsibly in this area is therefore of primary importance in shaping society and the values of tomorrow.[43]

[42] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020, p. 26.

[43] Marc Dreyer, Luc Chefneux, Anne Goldberg, Joachim Von Heimburg, Norberto Patrignani,

AI can be used to automate back-end office operations such as customer onboarding, compliance monitoring automating the writing of investment/earning reports, or extracting functional information from relevant financial documents. Since these tasks usually involve high volumes of data, AI helps streamline and expedite the process without manual interventions. As workplaces have become remote during the COVID pandemic, AI is being used in many, different office functions. Many workplaces, including banks, have incorporated AI into their human resource function. AI is being used for onboarding employees, offering them a personalized experience, and facilitating their learning and training.[44].

4. Conclusions

Banks and financial institutions stand to gain from adopting AI. It can lead to better risk management in these institutions, thereby improving their growth potential. Moreover, AI can help banks adapt to the modern business environment and meet different customer needs by differentiating products and generating new insights from data. AI is also seen as an equalizer that will help create a fairer and more inclusive financial system. With the help of artificial intelligence, banks can offer customers – especially those in rural areas, who currently cannot access the desired levels of banking benefits – greater and faster access to banking facilities, credit options and wealth management products.

In addition, banks are likely to feel increased regulatory pressure when it comes to "explainability," or how an AI system makes decisions. They will need to establish a set of processes that allow users to understand the output created by machine learning algorithms. As part of a responsible deployment approach, explainable AI provides greater visibility to detect and correct potential model flaws and vulnerabilities. It helps to improve the performance and accuracy of a model while ensuring that fairness and transparency are taken into account. Banks that play an active role in developing AI algorithms with stronger explanatory capabilities will be in a better place to earn the trust of both consumers and regulators[45].

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[44] AI in banking, Institute for development and research in banking technology – established by reserve bank of India, 2020.

[45] François Candelon, Rodolphe Charme di Carlo, Midas De Bondt, and Theodoros Evgeniou, *AI Regulation Is Coming*, Harward Business Review, September–October 2021 issue, https://hbr.org/2021/09/ai-regulation-is-coming.

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11. François Candelon, Rodolphe Charme di Carlo, Midas De Bondt, and Theodoros Evgeniou, *AI Regulation Is Coming*, Harward Business Review, September–October 2021 issue, https://hbr. org/2021/09/ai-regulation-is-co ming.
12. Guidelines on the use of Remote Customer Onboarding Solutions under Article 13(1) of Directive (EU) 2015/849, EBA/GL/2022/15, 22/11/2022. https://www.eba.europa.eu/sites/default/documents/files/document_library.
13. Instruction no. 4/2023 for the application of the Guidelines on the use of remote customer onboarding solutions under article 13(1) of Directive (EU) 2015/849.
14. International Guiding Principles on Artificial Intelligence (AI) can be accessed here: https://digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-guiding-principles-advanced-ai-system.
15. Law no. 129/2019 of July 11, 2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the modification and completion of some normative acts, Published in the Official Gazette no. 589 of July 18, 2019.
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25. The White Paper on Artificial Intelligence was published on 19 February 2020 by the European Commission, Brussels, 19.2.2020 COM (2020) 65 final, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/excellence-trust-artificial-intelligence_ro.

Possibilities for the Use of Artificial Intelligence in the Activities of the Judiciary

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Abstract

The implementation of artificial intelligence (AI) in various parts of the workforce is already a fact, but the impact of technology is in all areas of public life. Digitalization not only affects economic processes, it also leads to a transformation in the sphere of judicial proceedings. In Bulgaria, as part of the European Union, the digitalization of the judicial system is based on acts of the European Parliament transposed into national legislation. The aim of this paper is to examinate current issues related to various possibilities of using AI in the activities of the judiciary and to discuss the results. In order to realize the set goal, the authors use the traditional methods of legal research - induction, deduction, normative and comparative analysis. On the basis of the study conclusions are drawn about the need for improvement of the legal framework, need of professional knowledge in the field of information technology of the employees in the judiciary. The present study was developed in the framework of the national scientific project NPI № 57 of 2022 on the topic "Legal Relations and Status of Persons in the Judiciary in the Conditions of Digitalization".

Keywords: *judiciary, court proceedings, digitalization, artificial intelligence.*

JEL Classification: K23, K24

1. Introduction

As artificial intelligence (AI) enters more and more spheres of personal and public life, the topic becomes the subject of much discussion. AI is a phenomenon of the Fourth Industrial Revolution. Unlike the previous ones, the current one is distinguished by its scale and complexity, as well as by the speed with which new technologies are developing. This raises many questions about how technology and humans will coexist in a future society[3].

The implementation of AI in different parts of the labour activity is already a fact[4], but the impact of technology is in all areas of public life. In view of

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[3] Slavova, V. & Dimitrova, D. (2023). *Ethical and Legal Problems Related to Subjectivity and Artificial Intelligence.* Filosofiya-Philosophy, 32, 2023, 2, 186-202.
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the topic at hand, digitalization and the Fourth Industrial Revolution are not only affecting economic processes, they are also leading to a transformation in the sphere of judicial administration. In order for the judiciary to carry out its judicial administration function, it is crucial that it is in tune with the ongoing social processes and serves to protect the rights of citizens and organizations. Digitalization is rapidly changing all spheres of society and transforming the interrelationships between the subjects of different social relations. It is therefore imperative that the digitalization of the judicial system is implemented in a way that guarantees the quality of e-justice, but also preserves the traditions built on the basis of established principles in this activity.

In Bulgaria, as part of the European Union, the digitalization of the judiciary is based on acts of the European Parliament transposed into national legislation. A Unified Information System of the Courts has been launched at national level, which aims at digitalization in all courts. It covers all stages and elements of court cases, all statements and acts submitted to and by the judiciary, the random allocation of cases, the reporting of court caseloads and the collection and processing of information on their efficiency.

In practice and doctrine, the question of the impact of AI on law is increasingly raised [5]. All this determines the topicality of the research subject, which is related to the need for a comprehensive and complete legal framework of digital processes in judicial proceedings.

The aim of this paper is to explore current issues related to various possibilities of using AI in the activities of the judiciary, as well as to discuss their results.

In fulfillment of the set aim the authors have set the following research tasks:

- to analyse the legal framework concerning the use of AI in the activities of the judicial authorities;

- to consider and evaluate some current capabilities of "judicial" AI.

Challenges Facing the Labour Market. CompSysTech '19: 20th International Conference on Computer Systems and Technologies, 21-22 June 2019, University of Ruse, Bulgaria: Proceeding, New York: ACM [Association for Computing Machinery] Digital Library, 74-77. https://doi.org/10.1145/3345252.3345261; Andreeva, A., Yolova, G. & Dimitrova, D. (2022). *On the Boundary Between Rest Time and Working Hours in a Digital Environment.* Digital Economy, Business Analytics, and Big Data Analytics Applications: Conference proceedings, Cham: Springer Publ., 2022, 733-739 (Book Ser. Studies in Computational Intelligence; 1010), DOI 10.1007/978-3-031-05258-3.

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Given the limited length of the paper, only some basic accents are presented.

The authors do not claim the exhaustiveness of the study, given the limited length of the presentation. The doctrinal and practical questions concerning the entry of AI in the activities of the judiciary are only addressed in a basic way and aim at setting the framework related to the process of digitalization of the judiciary in Bulgaria. They will be the subject of further scientific publications. The present study was developed in the framework of the national scientific project NPI № 57 of 2022 on the topic "Legal Relations and Status of Persons in the Judiciary in the Conditions of Digitalization".

In order to realize the set aim and research tasks the authors use the traditional methods of legal research - induction, deduction, normative and comparative analysis. On the basis of the study conclusions are drawn about the need for improvement of the legal framework, deepening of the professional knowledge in the field of information technology of the employees in the judiciary.

The article has been developed in view of the current legislation as of 25 October 2023.

2. Legal framework and legislative trends on the use of artificial intelligence in the judiciary

The bodies of judiciary occupy a special place in the state organization of Bulgaria and perform special tasks. The court, the prosecution and the investigation are specialised bodies whose main purpose is to perform a law protection function[6]. Of the three state authorities, the judiciary is the one that protects the rights and legitimate interests of citizens, legal persons and the state (Art. 117, par. 1 Constitution of the Republic of Bulgaria; Art. 1a, par. 1 Judiciary System Act).

The digitalization of many processes in the judiciary raises the question of the impact of AI on law in general and on judicial proceedings in particular. In the modern stage, one of the challenges facing the judiciary is related to the requirements for increasing the digital literacy of those working in it. The reform in the field of digitalization of the judiciary in Bulgaria started with the establishment of a Single Portal for e-Justice (SPEJ), an essential part of which is the requirement for a Unified Information System of the Courts (UISC) in Bulgaria. The processes of digitalization are changing the working environment of both magistrates and court officials.

At present, the position of the European institutions and bodies is that AI systems are machines, i.e. objects of law, and it is not envisaged to grant them

[6] Dimitrova, D. *About some specifics of the functions of the administration of the judicial power*. Law and business in modern society: Collection of reports from the 4th national scientific conference, October 22, 2021, Varna: Science and Economics, 2021, 199-211, 2603-5073, DOI 10.36997/LBCS2021.199.

legal personality at this stage. However, digitisation and AI are important priorities for the European Union, so measures are already being taken to regulate them. The main document in this respect is „White Paper On Artificial Intelligence - A European approach to excellence and trust, COM/2020/65 final“[7]. Two resolutions are adopted:

- „European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL))“[8];

- „European Parliament resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL))“[9].

On the one hand, it should be borne in mind that these are not binding legal acts, but are strategic documents that only outline the framework of a future legislation for AI. As the main sources of EU derivative law, regulations and directives have the nature of legislative acts. On the other hand, White Papers, such as the White Paper on Artificial Intelligence, are of great importance in the European Union. They are published by the Commission and contain specific proposals for Union measures in a particular policy area. If the relevant White Paper is welcomed by the Council, it could form the basis of a programme of action for the European Union[10].

As for resolutions (such as the ones cited), they are also a kind of legal acts - other forms of action to build the Union's legal order. They express general views and intentions regarding the overall integration process and specific tasks within and outside the European Union. As an expression of common political will, resolutions facilitate significantly the achievement of consensus in the work of the European bodies and institutions, ensuring at least a minimum degree of consistency in the hierarchy of decision-making at Community and Member State level[11].

In Bulgaria, as a Member State of the European Union, a Concept for the Development of Artificial Intelligence was adopted by Protocol No. 72.4 of the Council of Ministers of 16 December 2020. The concept is in line with the European Commission documents, considering AI as one of the main drivers of digital transformation and a significant factor for ensuring the competitiveness of the European economy and a high quality of life. By their legal nature, the Concepts, like the Strategies, are not binding legal acts, but are programmatic in nature and are guiding documents that provide guidelines, perspectives or specific tasks to

[7] https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en (last accessed 24.10.2023).

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0276 (last accessed 24.10.2023).

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0275 (last accessed 24.10.2023).

[10] Borhart, K. D. (2017). *ABC of EU law*. Brussels: European Commission, p. 120.

[11] Ibid, p. 119.

be implemented. In view of this, at the present stage of the development of European and Bulgarian national law, it should be underlined that not only does AI still lack legal personality, but it also has no special legal regime. Despite the fact that the above-mentioned European documents and the Bulgarian Concept are not binding legal acts, their adoption should be assessed as a positive first step towards future legal regulation of the status of AI. In this sense, they are not without legal significance.

Along with the documents already mentioned, a special place in the matter under consideration is occupied by the „European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment", European Commission for the Efficiency of Justice (CEPEJ), adopted at the 31st plenary meeting of the CEPEJ, Strasbourg, 3-4 December 2018[12]. The Charter is intended for all those responsible for the creation and deployment of AI-enabled tools and services that involve the processing of judgments and data. In addition, it concerns the competent authorities that have the power to adopt legislation or regulations, to develop, verify or use these tools and services.

The use of these tools and services in judicial systems is expected to improve the efficiency and quality of justice. However, this must be done responsibly, taking into account the fundamental rights of individuals as set out in the European Convention on Human Rights and the Convention on the Protection of Personal Data, and in line with other fundamental principles (set out in the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment) that should guide the shaping of public policies in the justice sector. AI processing of court decisions is expected to find application in civil, commercial and administrative cases in order to improve the predictability of law enforcement and the consistency of court decisions. There are major reservations about the use of AI in criminal cases, given the risk of discrimination based on sensitive data, in line with fair trial guarantees.

The European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment does not contain legal norms binding on its addressees. This document only outlines a framework of principles to guide legislators and justice professionals in view of the rapid development of AI and its penetration into a number of judicial processes and into the national judicial systems of the Member States in general.

Given its content, like the White Paper on Artificial Intelligence, the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment is not a binding legal instrument. Rather, this Charter is a code of ethics on the principles and modalities of the use of AI in European judicial systems. However, the importance of acts containing ethical norms should not be underestimated as they can serve as a basis for the adoption of legislation.

[12] European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c (last accessed 24.10.2023).

In legal doctrine, codes of ethics are seen as "soft law" or "flexible law"[13]. On the one hand, these are non-binding legal acts that do not have the force of legal requirements. On the other hand, however, they are published on the official websites of the institutions that issue or implement them. For example, the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment is published on the official website of the Council of Europe and on the official website of the Supreme Judicial Council of the Republic of Bulgaria[14]. For this reason, codes of ethics should be considered to be known to persons by virtue of the very fact of practising the profession. Those codes play a role in interpreting the acts and actions of the officials to whom they are addressed.

There is a pressing need to adopt legislation on the legal regime of AI and its use. In Europe, steps have already been taken in this direction. On 25 November 2022, the official website of the European Union published „Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM/2021/206 final)“[15].

The adoption of standards on a global scale certainly cannot be achieved through the actions of individual Member States. Success depends on Europe-wide but timely legislative solutions with strong democratic oversight, accountability and effective implementation. The EU has the potential to set standards at a global level on AI ethics. The EU can take advantage of the absence of a competing global governance model and gain the full benefits of a “first engine”. [16]

The trend that is emerging regarding the use of artificial intelligence in the activities of the judiciary is towards the creation of legal regulation at the level of the European Union. On the one hand, legal regulations cannot keep pace with technological developments. On the other hand, however, there are problems that need to be anticipated even before AI systems have reached the intellectual level of man, i.e. while they are still under his control.

Social relations are reflected in law in order to be institutionalized as legal relations. At the same time, the institutionality of law is shaped by specific evaluative social phenomena representing ethical values. The legal regulation of AI is one of the most serious challenges for the law of the European Union and for the national legal systems of the Member States, as it draws a complex picture in which questions are being asked about the need for an imminent rethinking of basic concepts and institutes of positive law. However, the law is a conservative

[13] Pehlivanov K. (2015). *Codes of ethics in Bulgarian law*. Studia Iuris. 2015;(2),1–18.

[14] https://vss.justice.bg/root/f/upload/29/Ethical-charter-EN-for-publication-4-December-2018-BG-tra.pdf (last accessed 24.10.2023).

[15] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206 (last accessed 24.10.2023).

[16] Radev, E. (2021). *The ethical challenges facing the European Union in the use of artificial intelligence. Notices.* Journal of the University of Economics - Varna, 65 (3), 310 – 331.

system and it is an undeniable fact that the legal framework (not only in Bulgarian law but also in a pan-European perspective) lags behind technical progress.

3. Current possibilities of the "judicial" AI

In spite of the lack of regulations on the application of AI, its rapid development increases the actual possibilities for its use in the judiciary, and depending on the service offered, the range can be very wide. According to the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment issued by the European Commission for the Efficiency of Justice (CEPEJ) the main categories, in which the AI can be used are following: 1) Advanced case-law search engines; 2) Online dispute resolution; 3) Assistance in drafting deeds; 4) Analysis (predictive, scales); 5) Categorisation of contracts according to different criteria and detection of divergent or incompatible contractual clauses; 6) "Chatbots" to inform litigants or support them in their legal proceedings [17].

The survey conducted in 2018 received a relatively low response rate, which prevents clear identification of trends. In fact, mainly publicly available literature was used, making the list of main categories incomplete. A categorisation of how AI is used into the following categories was made:

- uses to be encouraged: case law enhancement (search options, linking of sources), access to law (chatbots, facilitating access to information sources, document templates), Creation of new strategic tools (quantitative and qualitative evaluations and to make projections);

- possible uses, requiring considerable methodological precautions: Help in the drawing up of scales in certain civil disputes, Support for alternative dispute settlement measures in civil matters ("predictive justice" tools, chatbots), online dispute resolution. The use of algorithms in criminal investigation in order to identify where criminal offences are being committed;

- uses to be considered following additional scientific studies: judge profiling, anticipating court decisions;

- uses to be considered with the most extreme reservations: use of algorithms in criminal matters in order to profile individuals, quantity-based norm.

A number of problems have been identified with regard to case law search engines. Firstly, the amount of data that is available is fundamental to improving predictability. In most EU member states, a policy of open data on judicial decisions has been implemented in relation to ensuring publicity and transparency of court activities. This would allow their use both for the needs of court proceedings and for making forecasts. Currently, the main users are professional clients such as lawyers or legal departments, which hinders the assessment of its

[17] European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment, p. 17, the document is available online at https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c, last accessed 22.10.2023, p. 19.

impact on the efficiency and quality of justice. In France, legislation was adopted in 2016 on the dissemination of court decisions as open data, except in some specific cases. Advantages of such dissemination are pointed out, such as awareness of judicial activity and case law, creation of a database. On the other hand, important and legitimate questions are raised as to whether the derivation of trends in case law from AI would not lead to judges deciding disputes in accordance with these trends and not only in accordance with legal norms[18]. There is also a risk of uniformity of decisions and disregard for the hierarchy of courts, and the interpretative decisions of the supreme courts in most Member States ensure uniform interpretation of legal rules. Judges should be critical and encouraged to resolve disputes in accordance with legal rules rather than conforming to trends and standardised decisions. Questions are raised regarding the protection of the personal data of parties, lawyers and judges. Last but not least, it is not to be overlooked that AI could generate false information, as happened recently in a case before the Federal District Court in USA. In this case the court disclosed that the lawyer had created a legal brief for a case in Federal District Court that was filled with fake judicial opinions and legal citations, all generated by ChatGPT. In his defense, the lawyer has said that he did not comprehend that ChatGPT could fabricate cases[19]. This reaffirms the belief that, especially in the judiciary, any information obtained and aggregated from AI should be carefully checked before being used.

Another possible application of case law search engines is "predictive" analysis of existing case law, mainly used by lawyers, legal departments and insurers. Here too, there are a number of risks, mainly in terms of the principle of due process. If only processing of vocabulary groups is carried out, there is no way to ascertain the reasons for decisions, still less to carry out legal analysis. Where hybrid systems are used, there are limitations given the sample of data they use and the change in legislation or overruling of case law.

There are also many problems with online dispute resolution. For low-value disputes, the idea is to facilitate the procedure using AI. In some countries, automated solutions are applied - e.g. UK, Netherlands, Latvia. For consumer disputes there is also a general framework created by Regulation № 524/2013.[20]

[18] Art. 117, par. 2 In the performance of their functions, all judges, court assessors, prosecutors and investigating magistrates shall be subservient only to the law Constitution of the Republic of Bulgaria, the document is available online at https://www.parliament.bg/en/const, last accessed 22.10.2023.

[19] Article in the New York Times, "The ChatGPT Lawyer explains himself", the document is available online at https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html, last accessed 22.10.2023.

[20] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), Official Journal of the EU L165/1 18.06.2013, the document is available online at: https://eur-lex.europa.eu/legal-content/BG/TXT /?uri=celex%3A32013R0524, last accessed 22.10.2023.

The questions are what methods are used to calculate compensation, how fair is the processing of the information from the algorithms, is there provision for the existence of an adversarial basis and the involvement of a trained and certified third party, is there always access to a judge. Provision should be made for the user to refuse to be the subject of a decision based entirely on automated processing, and for measures to protect their rights and freedoms, including the right to express their views and to challenge the decision. At the very least, users should be given clear information, in plain language, as to whether the dispute will be processed entirely by automated means or whether a mediator or arbitrator will be involved. This could also affect the equality of the parties in the process if one party uses digital means and the other is less familiar with digital technology. The same applies to the alternative online dispute resolution services offered. The possibility to resolve disputes online should not lead to a violation of Art. 6 *Right to a fair trial* and art. 13 *Right to an effective remedy from the European convention on the human rights*[21].

Undoubtedly AI could assist in the drafting of acts. Again, a number of problems arise here, in addition to those mentioned above. For example, in the reasoning of judgments. Given the nature of reasoning - assessing and interpreting the proven, relevant facts of the case as well as the applicable legal rules. It is the judge who makes the assessment of the relevant facts, how far they have been proven, which are the applicable norms, and when there are more than one source, which one should be applied in the case, and on this basis he reasons his decision. This makes it difficult for the AI, who would not be able to distinguish lawful from unlawful arguments of the court and makes it almost impossible to give reasons for judicial decisions.

The use of AI for analytical work is relatively widespread, a conclusion that can be drawn from the attached list of legal services using AI as early as 2016[22]. However, criminal cases should be approached with caution given the potential risk of discrimination. As revealed by the NGO ProPublica the algorithm used in COMPAS leads to discriminatory effects. This can lead to certain problematic policies being legitimized rather than corrected.

When categorising contracts according to different criteria and detecting divergent or incompatible contractual clauses, the risks are not so great. AI could be very useful not only for categorisation but also for drafting contracts and other document templates. It is no coincidence that this type of use is in the "encouraged uses" category. Of course, here again it is advisable to have the document checked by a legal professional.

"Chatbots" to inform litigants or support them in their legal proceedings

[21] European Convention on Human Rights, the document is available online at: https://www.echr.coe.int/documents/d/echr/convention_bul, last accessed 22.10.2023.

[22] European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, p. 18, the document is available online at https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c, last accessed 22.10.2023.

are also finding increasing application. When using them, there is a risk for the parties as to whether they submit the correct information and ask the right questions. Again, it is advisable to use a legal professional who would minimise this risk.

AI is commonly used for e-filing, speech-to-text, translation, keyword searches, document automation, e-administration, video conferencing. The Resource Centre Cyber Justice and AI, officially operational from March 2023 on the CEPEJ website[23], currently provides information on 92 systems implemented in 29 countries, incl. United States of America and Brazil. It is designed to further research, discuss risks, respective benefits and provide information to practitioners and users on systems that comply with the standards of the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment.

Bulgaria is not present in this database, but it has made achievements in digitalization with the construction of the Unified Information System of the Courts and the Single Portal for e-Justice, the introduction of software for accelerated creation and reproduction of acts and other documents through dictation and automatic voice-to-text conversion, developed under a project with the participation of the Supreme Judicial Council of the Republic of Bulgaria. Bulgaria is also among the initiators of the e-EDES E - Evidence Digital Exchange System, based on e-CODEX, through which EU Member States' authorities can securely exchange information, requests for cooperation in criminal cases and evidence.

In contrast, some countries have internet courts - e.g. China. Already in 2017 launched the „intelligent court" project, which is key to judicial reform in China. In 2018 was established an online platform that connects every courtroom in China — a total of 3,520 courts and 9,238 courtrooms[24], giving to the judges the possibility to handle cases, work and communicate on it in real time. Internet courts have been established to resolve civil disputes, the first back in 2017 in Hangzhou City. „According to official statistics published by the court, as of August 17, 2018, one year after its establishment, the Hangzhou Internet Court had taken 12,074 internet-related cases (mostly civil cases and a few administrative disputes), of which 10,391 cases — including 80 transnational disputes — had already been adjudicated."[25] In 2018, two more internet courts were established in Beijing and Guangzhou. They hear civil cases e.g.: contractual disputes over sales of goods/services/financial loans; copyright disputes; different internet re-

[23] Resource Center Cyberjustice and AI, the document is available online at: https://public.tableau.com/app/profile/cepej/viz/ResourceCentreCyberjusticeandAI/AITOOLSINITIATIVESREPORT?publish=yes, last accessed 22.10.2023.

[24] Wang, Zhuao, "*China's E-Justice Revolution*", Judicature. [Online] 2021, the document is available online at: https://judicature.duke.edu/articles/chinas-e-justice-revolution/, last accessed 22.10.2023.

[25] Ibid.

lated disputes over: domain names, internet using in order to infringe others' personal/property rights, product liability (in case of online shopping), as well as public interest lawsuits arising out of internet management by the government; and administrative litigations. Courts in China feature intelligent assisted document drafting, automatic notices about legal norms, intelligent research and suggestion of similar cases, automatic voice recognition during court hearings. Automatic convergence, real-time updating and dynamic analysis of case information of all courts in the country, fully automatic generation of court statistics, intelligent analysis of court proceedings have been implemented. On the one hand, this greatly reduces the workload of the courts, eases administration (filing everything online) and saves time. On the other hand, one can't help but point out some of the problems such as internet outages, environmental noises, people may be inclined to less truthfulness in the online environment, not as good an opportunity for the judge to control the process as he would in a hearing in person, it also hinders the judge's ability to observe facial expressions and other nonverbal cues. Another problem that Zhuao Wang notes is that all three courts are in major cities, respectively supported by powerful tech companies whose disputes are resolved in the respective courts. Some others go even further e.g. Estonia by introducing "AI judge" for small claims under 7000 Euro or "robot mediator" in British Columbia[26].

The introduction of e-justice and the use of electronic technology to achieve efficiency, transparency and access to justice is essential for any justice system[27]. There is no doubt that AI applications could assist legal professionals

[26] Vasdani, Tara, *From Estonian AI judges to robot mediators in Canada, U.K*, Law 360 Canada, 13 June 2019, the document is available online at: https://www.law360.ca/articles/12997/from-estonian-ai-judges-to-robot-mediators-in-canada-u-k-?article_related_content=1, last accessed 22. 10.2023, Vasdani, Tara, *Estonia set to introduce 'AI judge' in small claims court to clear court backlog*, Law 360 Canada, 10 April 2019, the document is available online at: https://www.law 360.ca/articles/11582/estonia-set-to-introduce-ai-judge-in-small-claims-court-to-clear-court-back log-?article_related_content=1, last accessed 22.10.2023, Smartsetlle One - https://www.smarts ettle.com/smartsettle-one.

[27] Wang, Zhuao, *op. cit*., p. 17, Lupo, Giampiero & Bailey, Jane. "*Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples"*, Laws 2014, Vol. 3, pp. 353- 387. [Online], 2014, doi:10.3390/laws3020353, ISSN 2075-471X. the document is available online at: www.mdpi.com/journal/laws, last accessed 22.10.2023; Van den Hoogen, Ronald, *Will E-Justice still be Justice? Principles of a fair electronic trial*, International Journal for Court Administration, volume 1, issue 1, 15 January 2008, pp. 65-73. [Online], 2008. DOI: 10.18352/i jca.128, the document is available online at: https://www.iacajournal.org/articles/abstract/10.18 352/ijca.128, last accessed 22.10.2023; Numa, Anett. "*Artificial intelligence as the new reality of e-Justice"*, e-Estonia. [Online] 27.04.2020, the document is available online at: https://e-estonia.com/artificial-intelligence-as-the-new-reality-of-e-justice/, last accessed 22.10. 2023; Fabri, Marco, Lupo, Giampiero, *Some European and Australian e-justice services*, Project Rethinking Processual Law: Towards Cyberjustice, Working Paper No. 1, Cyberjustice Laboratory, University of Montréal, Montréal, QC, Canada, 2012. [Online] ISBN 978-88-97439-04-2, the document is available online at: https://dns2.irsig.cnr.it/repo/Fabri_Some%20European %20and%20 Australian%20e-Justice%20services_IRSIG-CNR_2012.pdf, last accessed 22.10. 2023.

in their work. Many of the applications that are designed to improve legal research can lead to faster and more efficient activity of the courts, to quality justice and to strengthening guarantees of the rule of law, as well as reducing the workload of judges. Some of the problems mentioned above can be overcome by introducing certification and classifications of AI systems. The main guarantor remains the human factor - assessing all the risks for the judicial system. Another important factor is the training of stakeholders - judges, lawyers, court officials, etc. In any case, the application of AI should respect the principle of human review of significant decisions taken by an automated decision-making programme. However, there remains the problem of the risk of uniformity, standardisation and loss of the human face of justice.

4. Conclusion

After the analysis the following can be summarized:

Legislation should be adopted at EU level on the use of AI in the judiciary, applicable in all Member States. Such legislation should be fully consistent with the fundamental principles, namely: Principle of respect for fundamental rights; principle of non-discrimination; principle of quality and security; principle of transparency, impartiality and fairness; principle "under user controll". Steps have been taken towards the adoption of a legal framework with the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial intelligence act) and amending certain union legislative[28].

The use of AI in the judiciary is necessary and inevitable, given the technical progress and the penetration of digitalization in all areas of public life. It can assist legal professionals in their work and contribute to faster and more efficient administration of justice. But these processes must be controlled by man. Particularly in the judicial system, decisions should be made by a human being after thorough examination of all relevant facts and circumstances to avoid errors. There is a need "to balance legal certainty, which makes decisions more predictable, against vitality in judicial interpretation"[29].

[28] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial intelligence act) and amending certain union legislative acts, COM/2021/206 final, the document is available online at: https://eur-lex.europa. eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206, last accessed 22.10.2023.

[29] European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment, *loc. cit.*, p. 23; European Court of Human Rights in cases of differences in domestic case-law: Greek Catholic parish Lupeni and Others v. Romania [GC]. No. 76943/11, 29/11/2016, Judgment 19.5.2015 [Section III], the document is available online at: https://hudoc.echr.coe.int, last accessed 22.10.2023.

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MiCA: Direct Applicability Coupled with Challenges for the National Legislation

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Abstract

On June 9, 2023, the Markets in Crypto Assets Regulation (MiCA) was published in the Official Journal of the European Union as a comprehensive regulatory framework for the crypto industry in the EU. This paper aims to critically assess the selected issues of national law in conflict with directly applicable rule MiCA. Authors deal with problematic issues, such as the question of an unambiguous choice of law in relation to the Rome I Regulation which provides protection to the consumers by means of their domestic law. Secondly, authors discuss the complaint handling procedure under MiCA, especially the conflict between specific MiCA rules and national rules for enforcement. The paper brings questions of whether it is lex specialis vis-à-vis national rules on the enforcement of rights arising from defective performance or not. It is therefore necessary to assess whether the complaints regime constitutes only an expression of dissatisfaction with the provider's conduct or whether it also constitutes an expression of dissatisfaction with the quality or quantity of the contractual performance. The paper is accompanied by an insight into the implementation regime of Czech law as well as the current regulation of crypto-service providers from the perspective of the Estonian AML Act.

Keywords*: MiCA, crypto-assets, choice of law, complaint handling, financial regulation.*

JEL Classification: K22

1. Introduction

On June 9, 2023, the Markets in Crypto Assets Regulation (MiCA) was published in the Official Journal of the European Union (OJEU). The regulation represents a unique piece of legislation being the first comprehensive framework adopted in a major jurisdiction in the world. As a comprehensive regulatory framework for the cryptocurrency industry in the EU, MiCA includes provisions on investor protection that shall be directly applicable in EU Member States.

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The regulation came into force on June 20, 2023, but the entry into application is sequenced. The first part concerning the regime for stablecoins[3] in Title III and Title IV shall enter into force and application on 30 June 2024. The second part with the rest of provisions shall enter into force and application on 30 December 2024.[4] MiCA aims to promote innovation and the use of crypto-assets by enhancing the protection of consumers and investors as well as financial stability.[5]

MiCA does not apply to crypto-assets qualifying as financial instruments under Markets in Financial Instruments Directive (MiFID II). Institutions with a MiFID authorisation will be able to continue to run business under MiCA without a necessity to obtain a special authorisation under MiCA provided that they only offer one or several crypto-asset services equivalent to the investment services and activities for which they are authorised under MiFID II. MiCA includes a list of those equivalent services.[6]

MiCA does not regulate the issuance of crypto-assets, but their public offering[7], which constitutes a communication in any form and by any means providing sufficient information about the terms of the offering so that it can be purchased. MiCA as a new EU crypto regulation closely follow the MiFID II principles. Although the proximity of the regulated matter is higher than in the case of insurance, where "*mifidization*" proves not to be an appropriate step, the idea to "*copy and paste*" existing regulation might also lead to problems in the future because the inconsistencies between crypto-asset regulation and financial markets regulation will probably become more significant.[8] At the same time, several deviation from the MiFID framework appeared in the final MiCA text, which triggers uncertain expectations about the interpretations. For instance, although MiCA does not require any license for an issuer of a token, in practice an issuer may fulfil the definition of crypto-asset service provider (CASP) when sending a newly issued token to another wallet. Such action may be regarded as "placing" of crypto-assets.[9]

[3] MiCA does not use the term „stablecoins", but rather introduces a new terminology of asset-references tokens (ART) and electronic money tokes (EMT), while both would fall under the definition of stablecoin.

[4] Art. 149 of MiCA.

[5] European Parliament. Think Tank. Markets in crypto-assets (MiCA). Briefing: online]. 2023-09-29 [viewed 2023-10-29]. Available from: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)739221.

[6] Article 3 (16) of MiCA.

[7] However, there may be an interpretation that an issuer of crypto-assets who does not offer them to the public, but perhaps only to a closed group of persons, will be subject to CASP regulation in the meaning of "placing of crypto-assets".

[8] Maume, Philipp. The Regulation on Markets in Crypto-Assets (MiCAR): Landmark Codification, or First Step of Many, or Both?. *European Company and Financial Law Review.* [online] 2023-09-05, Volume 20 (2), pp. 243-275 [viewed 2023-10-29]. Available from: https://doi.org/10.1515/ecfr-2023-0014.

[9] Placing is defined as crypto-asset service in Article 3 (16) of MiCA.

The alignment with the legal regime for traditional investment services goes so far as to offer a simplified authorisation regime to existing investment service providers, in particular securities dealers. As a result, investment service providers with the appropriate licence will be entitled to provide corresponding services in the field of crypto-assets without needing a specific authorisation under the MiCA. They only should make a notification to the competent authority of the home Member State least 40 working days before the start of the provision of services.[10] Based on the type of financial service and exiting license MiCA offers a simplified procedure to obtain CASP licence. This regulatory framework can be considered an appropriate method to protect customers as it allows already regulated securities traders to enter the newly regulated sector with a bit of a head start over other crypto service providers, providing certain assurance of the quality of the services. The acquisition of existing authorised entities for a newly established crypto business could be effectively an easier path than obtaining a working on the authorisation under MiCA from scratch. As a result, large crypto players are forced to go through the process of obtaining a standard financial license (e.g. E-money institution or investment firm) to be able to compete on EU market. The challenge in this respect will be in particular the different implementation of MiFID in individual Member States. The so-called "*goldplating*" of national legislators will thus be an impactful factor in a situation where licensed securities dealers will want to provide services under the directly applicable MiCA regulation. Member States could broaden requirements on service providers. In addition, some Member States already introduced a regime for crypto business, which may hinder the level-playing field in all EU Member States

The regulation identifies and covers three types of crypto-assets:

a) asset-referenced tokens (ART) - digital assets keeping a fixed value by being tied to certain assets or rights that can be traded. They may be backed by cryptocurrencies, commodities and also official national currencies (incl. stablecoins that are supported by multiple fiat currencies). When it comes to ART, only limited number of possible issuer and business models can be identified at this moment.

b) electronic money tokens (EMT) - so-called stablecoins, digital representations of one fiat currency backed by a central bank or other financial institution. Unlike ART, the EMT seems to be viable solutions for different crypto business models.

c) other crypto assets - a catch-all category not covered by existing EU law - it contains utility tokens using the DLT technology and cryptocurrencies (currency tokens). The legislation regulates issuance and trading of crypto-assets as well as the management of the underlying assets, where applicable, with additional regulatory rules aimed at 'significant' ART and EMT. This category includes tokens that are not qualified as EMTs or ARTs, but are used to access a

[10] MiCA, Article 60.

specific product or service, such as software or a platform, and do not have any value.

The paper builds on the impact of the new directly applicable legal framework on the existing legal systems of certain Member States, namely Czechia and Estonia. The scientific methods used were critical and comparative analysis. Authors decided to focus on two countries to examine different approached and demonstrate possible challenges.

2. Complaints

Provisions governing the complaint-handling procedure in MiCA are only general, while the Regulatory Technical Standards (RTS) should bring more clarity. The recent draft RTS are, however, also very vague in this regard. It should be noted that although the directly applicable regulation takes precedence over national legislation, in the author's view it cannot be deemed as a *lex specialis*. It derogates from the legislation of the Member States in the area of the exercise of rights arising from defective performance which may be linked to the right of withdrawal from the contract.

Pursuant to Article 18(2)(q), the application for authorisation under Article 16 to offer to the public or seek the admission to trading of asset-referenced tokens shall include, inter alia, a detailed description of the complaint handling procedure under Article 31. This leaves applicants for authorisation with a considerable degree of discretion, the adequacy of which will be assessed by the competent authority of their home Member State. Pursuant to Annex II, part D, 12, the white paper on asset-referenced tokens, that shall serve as a specific information material for clients, should also contain the description of the complaints-handling procedures.

Based on Article 25(1)(i), a material change in the business model, including the complaint handling process, must also be notified to the home country regulator.

Article 31 provides that asset-referenced token issuers shall establish and maintain effective and transparent procedures for the prompt, fair and consistent handling of complaints. However, this provision does not provide any binding deadline for the resolution of a complaint or the legal consequences associated with the failure to resolve a complaint in a proper and timely manner. The provision also refers to regulatory technical standards to be issued for this purpose.

It should be noted that the provision of Article 31 is very general and therefore, even on the basis that the directly applicable regulation takes precedence over national legislation, it cannot, in our view, be said to derogate as *lex specialis* from the relevant provisions of national legislature relating to the exercise of the rights of defective performance.

Under the Article 31 (5) the European Banking Authority (EBA) in close

cooperation, with European Securities and Markets Authority (ESMA) are mandated to develop RTS. This "joint mandate" of EBA and ESMA would result of the specification on requirements for how an issuer of ART shall handle complaints. Similar mandate can be found in Article 71, while ESMA would be in lead to develop similar RTS for CASP. In practice, both authorities would work closely together to align their legal texts.

The draft RTS under Art. 31 (5) (EBA/CP/2023/13) states: (The issuer) *"...should keep the complainant informed about the progress of the complaints handling procedure and provide a response without any undue delay or at least within the time limits set at national level to address complaints filed by complainants, where applicable; the issuer should also assess all complaints, identifying possible recurring shortcomings*."

Thus, even the draft RTS directly provides for time limits for handling "complaints" without interpreting the term in a way that would clearly determine whether it is merely a procedural means of expressing dissatisfaction with the service provider's conduct or whether it is an exercise of a right of defective performance.

Complaint-handling procedure under MiCA represents a "must do" for issuers of ART and CASP in order to start business in the EU. The requirements of a description of a complaint-handling procedure are of a formal nature. MiCA sets only limited criteria for a national competent authority to justify a refusal of an application due to any flaws in the complaints-handling.

3. Choice of law

Although the Retail Investment Strategy (RIS) proposal[11] has brought information obligations on choice of law into the area of insurance products, it has not done so for investment services regulated by the MiFID II. In contrast, MiCA includes disclosures on choice of law. As regards the regulatory area and the cooperation between home and host Member States competent authorities, unfortunately, the alignment between MiCA and MiFID II is not sufficient enough, even though the same supervisory authorities (i.e. EBA and ESMA) have the comparable competences, especially in the area of supervisory convergence. While the RIS has to some extent harmonised the supervisory process for the much more diverse legal regimes for insurance and investment products, MiCA does not introduce the possibility of a specific communication platform between supervisors or specific time limits for redress in case of breaches of the rules on cross-border distribution of services.

[11] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules and Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1286/2014 as regards the modernisation of the key information document.

MiCA stands aside from the RIS, a legislative proposal amending the framework for the provision of investment and insurance services, which requires to provide information on choice of law for life and non-life insurance but not for investment services under MiFID II. Although the choice of law rules applicable to products falling under the MiCA are of the same nature as those in MiFID II[12], MiCA requires to provide clients with information on choice of law.

Pursuant to MiCA, article 34(5) contractual arrangements with cross-jurisdictional implications shall provide for an unambiguous choice of law. Furthermore, the white paper shall contain the law applicable to the offer to the public of crypto-assets, as well as the competent courts (Annex I, Part E, 19 and Part G, 10, Annex II, Part C, 15 and Part D, 17, Annex II, Part C, 4 and Part 3, 8). List of infringements, being part of Annex V under point 32. and 54., considers the failure to state an unambiguous choice of law in the contractual agreements to be a violation of MiCA rules. However, in case of consumer contracts, according to Art. 6 of Rome I, the choice of law will be always ambiguous, unless the choice of law follows the law of each individual country where the services will be actively offered.

4. Czech law insight

In the Czech Republic, a draft *"Act on the implementation of European Union regulations in the field of digital finance and accompanying proposal amending certain laws"*[13] is now undergoing the legislative procedure. As regards the above-mentioned choice of law and the related violation of the MiCA rules, the draft Czech law does contain sanctions for violation of the requirement to indicate an unambiguous choice of law and for failing to establish a proper complaint handling system.[14] However, it does not deal with either their substance or relationship to the rights arising from defective performance.

In the authors´ opinion, even the more detailed regulation of complaints does not affect the customer's right to assert the rights from defective performance under section 1921 and related provisions of the Civil Code.[15] In the area of legal relations with a consumer element, the term "*reklamace*" (which may be also translated as "*complaint*") has been introduced as a legislative shortcut for this purpose. In this context, it is necessary to draw attention to the provisions of section 1925 of the Civil Code. This provision stipulates that what can be achieved by exercising rights arising from defective performance cannot be claimed in any

[12] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 6.
[13] Czech Republic Draft act on the implementation of European Union rules in the field of digital finance (Digital Finance Act). Available from: https://odok.cz/portal/veklep/material/ KORNCW HFWZ3M/.
[14] Draft (Digital Finance Act, s. 20 (1) b) and s. 21 (1) a).
[15] Czech Republic Civil Code No. 89/2012 Coll.

other way. However, it should be also stated that a submission must be assessed on its contents. In other words, it should be assessed on material basis, not based on formal criteria. That is to say, if it is clear from the customer's submission that it expresses dissatisfaction with the performance provided, the submission must be treated as an assertion of the right of defective performance, even if it is named as a complaint or if it is made in accordance with the service provider's rules which treat it as a complaint. In the case of a consumer, such a submission will need to be dealt with within 30 days or the consumer will have the right to withdraw from the contract. In our view, the complaint and defective performance regimes will thus be applicable in parallel.

As stated in section 1841 of the Civil Code, a financial service contract is any consumer contract relating to banking, credit, payment or insurance services, a contract relating to pension insurance, currency exchange, the issue of electronic money and a contract relating to the provision of an investment service or trading on the market in investment instruments. Given the fact that MiCA creates a separate regulatory framework for assets that are not considered financial instruments, it is therefore clear that contracts relating to crypto-assets are not financial service contracts within the meaning of the Civil Code. Unless the relevant provisions of the Civil Code are amended, contracts relating to crypto-assets will be subject to the general rules governing distance contracts in the Czech law and, consequently, to the possibility of withdrawing from a distance contract or an off-premises contract within 14 days within the meaning of section 1829 of the Civil Code. Thus, if the consumer loses money during the first 14 days of the contract, he/she has the right to withdraw from the contract and claim reimbursement of the unjustified enrichment.

This area is also closely related to the previous two points – a situation may very likely arise when a customer with a habitual residence in the Czech Republic concludes a distance contract according to the terms and conditions, which will specify the choice of law of the country. The choice of law could be determined according to the seat of the service provider. Since the customer will be protected by Czech law, he/she will be able to use the relevant provisions of the Civil Code, i.e. to withdraw from the contract within 14 days, and to exercise the right of defective performance, or to make a claim for service within the meaning of s. 13 of the Act no. 634/1992 Coll., on consumer protection, and in the event of failure to resolve it within 30 days withdraw from the contract.

5. Example from Estonia

Estonia introduced a national regime for crypto assets. Currently, a virtual assets services provider (VASP) may be licensed by the financial markets regulator of Estonia. It may focus on delivering order execution, custody and access to a wide set of investment strategies to a diverse clientele. In Estonia, it is possible to apply for a license for the provision of virtual asset services under section 70

s. 1 art. 4) and/or 5) of the MLTFPA.[16] Estonia is therefore ahead of EU legislation in this regard, but the license is driven by locally specific Anti-money laundering (AML) regulation. If the applicant decides to go for a MiFID license, it would be a license under the Estonian Securities Market Act.[17] The scope of application depends on the services offered, ie whether (and to which extent) they fall in the scope of MiFID II. Where a crypto-asset qualify as a MiFID II financial there is a lack of clarity on how the existing regulatory framework for financial services applies to such assets and services related to them. The current MLTFPA scope of applicability will be reviewed in reflection of MiCA. As MiCA will introduce new requirements for crypto-asset service providers (CASPs), they will need to obtain a new license from the relevant authority. In Estonia, the issuance of licenses of the CASPs and the supervision of the service providers are expected to be transferred to the competence of the Financial Supervision Authority (FSA). For the market participants, it likely means a more prudent supervision than before, as credit institutions, payment and e-money institutions and investment firms are also supervised by the FSA. On the positive side, the application process is hopefully clearer and faster and certain in decision-making. The switch to the MiCA regime is expected to bring a legal clarity for Estonian crypto market. Undoubtedly, the current license amendment process with the Financial Intelligence Unit (FIU) and ensuring compliance with the MLTFPA changes have been a good preparation for the service providers in Estonia. Presumably, this in turn creates a 'smoother transition' from the compliance perspective and readiness to apply for a license from the FSA.[18]

6. Conclusion

MiCA brings several challenges that national legislators will have to tackle despite its direct effect. In particular, the precise treatment of complaints and their status vis-à-vis the exercise of rights of defective performance, as well as the issue of choice of law. The choice of law may be regulated by national law in derogation from the generally applicable regime of the Rome I Regulation that applies to crypto-assets. As we can see from the example of Czech law, the inclusion of services related to crypto-assets in the financial services regime will also be an important step because of the withdrawal rules. It will also be interesting to see the flexibility of national legislation in relation to the licensing of CASPs and the reporting regime underlying the authorisation of certain regulated financial

[16] Estonia Money Laundering and Terrorist Financing Prevention Act. Available from: https://www. riigiteataja.ee/en/eli/517112017003/consolide.

[17] Estonia Securities Market Act. RT I 2001, 89, 532. Available from: https://www.riigite ataja.ee/en /eli/513042022001/consolide.

[18] Nael, Virgi, Meidla, Kristi. Njord Estonia: *What changes will MiCA bring for crypto-asset service providers?* [online] 2023-04-10 [viewed 2023-11-01]. Available from: https://www.njordlaw.com/ njord-estonia-what-changes-will-mica-bring-crypto-asset-service-providers.

institutions to provide crypto-services on an unlicensed basis. There are genuine or unique services on one hand and services, corresponding to MiFID II investment services on the other. Additionally, there are services regulated under MiFID II, which in case of crypto-assets remain out of scope. Meanwhile some of these differences are well justified by the nature of the crypto-assets as a new asset class, others seem potentially unreasoned.[19] In the authors' view, the MiCA is more likely to be interpreted by analogy in the spirit of MiFID II, even where MiCA was not explicitly inspired by MiFID II. This is a manifestation of the deepening MiFIDisation of financial services regulation, which, however, does not include, for example, cryptoasset services under the current draft Czech law. Based on the analysis of crypto failures, Kokorin also identified five possible elements of future regulation: (i) a large exposures regime, (ii) robust disclosure requirements, (iii) structural and organizational separation of custody and trading/investment activities, (iv) deposit-like guarantees and (v) a special recovery and resolution regime for significant crypto firms.[20] Given that the scope of MiCA is universal and targets all crypto-assets that, e.g. due to their inclusion in funds, do not fit directly into the MiFID regime, there should be "no escape" from regulation. It means that unregulated crypto-assets should not exist at all. However, the general language of the terms defining crypto-assets challenges this assumption. The cooperation process between relevant EU and third country authorities should be also explained better and and certain safeguards should be in place to protect customers who invest their money with service providers based outside the EU.[21]

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Peculiarities and Controversies Regarding the Credit (Financing) Agreement

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Abstract

From the perspective of business law, the concept of "credit" has the following three valences, namely: the claim (amount of money/cash benefits), the payment term and the creditor's confidence in the debtor that the latter will honor its payment obligation when due. Thus, the financial-banking products existing on the market have a rather varied and complex content and structure. In order to satisfy the interests and needs of both categories of subjects, the legislator has established a series of rules, as protective measures, for each category. This type of credit/financing is used, both in social, selling, common law relations, as well as in legal business relationships, between professional traders. The present study aims to capture an analysis of the particularities of the credit agreement from the perspective of the two categories, consumers and professionals, as well as of the existing regulatory framework. For these reasons, we will discuss the primary legislation, as well as the secondary legislation, applicable in this field.

Keywords*: contract, credit, money, interest, loan, damages.*

JEL Classification*:* K10, K11, K12, K15, K22

1. General considerations concerning the credit agreement

A credit institution may be defined as "an undertaking whose business involves making deposits or other repayable funds from the public and granting credits for its own account[2]".

The establishment of a *credit institution* can be done in one of the following forms[3]: "banks, cooperative credit organizations, savings and lending banks in the housing field, mortgage credit banks".

Non-banking financial institutions are established as joint stock companies[4], under the terms of Law no. 93/2009 on non-banking financial institutions.

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[2] Art. 4 para. 1 point 1 of Regulation (EU) No. 575/2013 of the European Parliament and of the Council.

[3] Art. 3 of GEO no. 99/2006 on credit institutions and capital adequacy, published in the Official Gazette of Romania Part I, no. 1027 of 27 December 2006, subsequently amended and supplemented, including by Law no. 236/2022 on the prudential supervision of financial investment services companies, as well as for amending and supplementing certain normative acts.

[4] Art. 6 of Law no. 93/2009 regarding non-banking financial institutions, published in the Official Gazette of Romania Part I, no. 259 of April 21, 2009, subsequently amended and supplemented, including by GEO no. 52/2016.

The mortgage loan for real estate investments can only be granted by authorized financial institutions, under the terms of Law no. 190/1999 on mortgage credit for real estate investments[5].

In view of the above, we can affirm that there is a correlation between the notion of bank and credit institution, as from part to whole, since it is only "a species of credit institution[6]".

Therefore, in order to legally qualify an agreement as a credit agreement, it is necessary that the lender/financier be a credit/financial institution that has been authorized, under the law, to carry out lending activities. For the borrower, as a borrower, the law does not establish any special requirement, and can be any natural person (beneficiary of consumer and mortgage loans) or legal person (beneficiary of any type of credit). As regards the formal requirements of a credit agreement, it must undoubtedly be concluded in writing, required *ad validitatem*[7].

According to recent doctrine[8], the credit agreement is a financing technique practiced both between consumers – natural or legal persons, to satisfy social needs, and between professional traders, within commercial (business) relationships.

In social relations between consumers, this type of contract is used to satisfy social needs, such as the purchase of consumer goods, the purchase of housing. In the business relations established between traders, the credit agreement is concluded for carrying out commercial activity, such as the purchase of movable and immovable property for economic purposes, the purchase of machinery, work equipment, technological or production lines, car fleet, etc.

The doctrine[9] has defined a credit agreement as, "the agreement under which a credit institution or a non-banking financial institution, called a creditor or lender, undertakes to make available to a person, called a debtor or borrower, a sum of money or to extend the maturity of a debt or other financial facilities, with the obligation of the debtor to repay, in full of the amount borrowed, interest thereon and other charges relating thereto".

The main similarity between the credit agreement and the loan agreement with interest lies in the object of the benefits, which is common, namely, the sums

[5] Published in the Official Gazette of Romania Part I, no. 611 of 14 December 1999, subsequently amended and supplemented, including by Law no. 304/2015.

[6] See Vasile Nemeș, Gabriela Fierbințeanu, *Civil and commercial contract law. Theory, jurisprudence, models*, 2nd edition revised and added, Hamangiu Publishing House, Bucharest, 2022, p. 583.

[7] *The written form* of the credit agreement is required *ad validitatem*, both by the rules of common law and by those of consumer protection legislation, which makes it impossible to prove the existence of the contract with another means of proof – art. 33 of GEO no 50/2010 on credit agreements for consumers, art. 51-52 of Law no. 93/2009 and Art. 117 para. 1-2 in conjunction with art. 120-121 of GEO no 99/2006. Unlike this type of financing, the consumer loan governed by the rules of ordinary law, from the perspective of the validity of the contract, is a real contract.

[8] See, D. Velicu, *Banking contracts*, Universul Juridic, Bucharest, 2022, pp. 159-160.

[9] See Vasile Nemeș, Gabriela Fierbințeanu, *op. cit.*, p. 573.

of money and their translational nature, repaid, as agreed by the parties. Thus, the lender has the obligation to transfer a property right over the sums of money to the borrower, with the obligation to repay, within a certain period, agreed between the parties.

Both types of contracts have the advantage that they are enforceable titles, even if this fact finds its legal basis in different legal provisions[10].

However, unlike the interest loan regulated by common law, where the parties can be natural or legal persons, in the credit (financing) agreement, the status of party becomes a qualified one, namely, at least one of the parties will have the status of professional trader (lender), established, specialized and authorized in lending activities, under the terms of commercial law.

While the consumer loan under ordinary law (Article 2159(1) to (2) of the Civil Code) may also be free of charge, the essence of the credit agreement is the onerous and synalagmatic nature of the agreement, since the special rules applicable in this area do not provide for exceptions in this respect. Interest also operates differently, so that in the credit agreement it may consist only of sums of money, while in the common law loan, it may consist of money or other goods of the kind (Article 2167 of the Civil Code).

Thus, the object of the *credit agreement* is unique and bears exclusively on a sum of money, while the loan agreement provided for by the Civil Code may usually cover any kind of movable property. In this respect, we can consider that the provisions of the Civil Code contain a rule of reference and, by interpreting *per a contrario* the provisions of Art. 2158 para. 2, the rules of the special legislation on institutionalized bank credit, whether we refer to primary or secondary legislation, become applicable[11].

Therefore, when a person grants a loan on a professional basis, the legal provisions governing credit institutions and non-banking financial institutions will apply as a priority[12]. At the same time, all the rules of the Civil Code refer to special rules and, alternatively, to their own rules[13].

Another difference in essence is that individuals can also participate in legal lending relations, as *consumers* of financial-banking products, and for this category determined by subjects, the legislator has established several rules for the protection of their rights[14].

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[10] The credit agreement is an enforceable title, pursuant to art. 120 of GEO nr. 99/2006, and the loan agreement with interest of certain sums of money, according to art. 2165 Civil Code.

[11] Becoming priority in implementation, including regulations, orders or circulars of the National Bank of Romania, which enjoy legislative prerogatives in the field.

[12] See, as a matter of priority, the incidence of GEO no 99/2006 on credit institutions and capital adequacy, approved with amendments and completions by Law no. 227/2007. That legislative act therefore constitutes the 'common law' of credit agreements and bank deposit agreements.

[13] Art. 1177 Civil Code – "The contract concluded with consumers is subject to special laws and, in addition, to the provisions of this Code."

[14] See, J. Goicovici, *The Law of Relations between Professionals and Consumers. University course*, Hamangiu Publishing House, Bucharest, 2022, p. 389.

In this regard, we reveal the incidence of the provisions of Government Emergency Ordinance (GEO) no. 50/2010 on credit agreements for consumers[15], which establishes, imperatively, the principles of negotiation and enforcement of credit agreements concluded as a consumer and GEO no. 52/2016 on credit agreements offered to consumers for real estate, as well as for amending and supplementing GEO no. 50/2010 on credit agreements for consumers[16]. However, those consumer protection clauses become applicable only to credit agreements concluded with credit institutions providing financial services.

De lege lata, in the matter of credit agreements are applicable in banking matters and the following normative acts: Law no. 190/1999 regarding mortgage credit for real estate investments[17], Law no. 93/2009 on non-banking financial institutions[18], Regulation no. 2/2019 on preventing and combating money laundering and terrorist financing[19].

2. General rules applicable to the credit agreement, regarded as a species of the agreement for lending sums of money, with interest (consumer loan for consideration)

As a legal nature, the credit agreement undoubtedly[20] represents a species of interest-bearing loan agreement, regulated by art. 2167 Civil Code[21]. Of course, the provisions of the Civil Code will find their applicability, whenever there are no special norms in the normative acts in the banking field.

If the loan of money with interest can be qualified as a *named* contract, being regulated in art. 2167 – 2170 Civil Code, the credit agreement is an *unnamed* contract, not regulated by the Civil Code. Thus, in the absence of special rules applicable to the credit agreement, the provisions of the common law on contracts will become applicable – art. 1167-1168 Civil Code, respectively the

[15] Published in the Official Gazette of Romania, Part I, nr. 389 of 11 June 2010, as amended and supplemented by GEO no. 52/2016 on credit agreements for consumers relating to immovable property. Regulating, including credit agreements secured by mortgages, assessing the creditworthiness of customers, prudential and supervisory requirements of credit intermediaries and debt collection entities.

[16] Published in the Official Gazette of Romania, Part I, nr. 727 of 20 September 2016.

[17] Published in the Official Gazette of Romania, Part I, nr. 611 of 14 December 1999

[18] Published in the Official Gazette of Romania, Part I, nr. 259 of 21 April 2009.

[19] Published in the Official Gazette of Romania Part I, nr. 736 of 09 September 2019.

[20] The same legal qualification was held by the Constitutional Court by Decision nr. 62/2017, published in the Official Gazette of Romania Part I, no. 161 of 3 March 2017. The credit agreement represents in the conception of the constitutional legislature, a prototype, a variety of the consumer loan agreement with interest.

[21] According to art. 2167 of the Civil Code "The provisions relating to the loan with interest are applicable, accordingly, whenever, under a contract, an obligation arises to pay, with term, a sum of money or other goods of this kind, to the extent that there are no particular rules regarding the validity and performance of that obligation".

rules provided by the Civil Code for consumer lending, in particular, those applicable to lending money with interest or, as the case may be, the rules of the Civil Code governing the credit facility.

The essence of the interest-bearing loan, however, is that this type of contract is onerous in nature, since it gives rise to a new obligation for the borrower, namely, to pay the price of using the borrowed good[22]. However, the goods transmitted by the lender, being fungible and consumable, the borrower will have to return goods of the same nature and quality, since through the effect of the consumer loan agreement the ownership of the amounts of money that are the subject of the contract in question is conveyed.

In this question of law, judicial practice[23] has ruled that "borrowed property (sums of money) is subject to a double transfer of ownership, from one estate to another, namely from lender to borrower at the time of conclusion of the contract and, conversely, from borrower to lender at the time of return of goods of the same kind".

Compared to the above, we believe that the loan with interest also acquires a *real character*[24], because the remittance of the amount of money by the lender to the borrower represents an *ad validitatem*[25] condition necessary for the conclusion of the contract and not an obligation of the lender. As a consequence, if the negotiation between the parties has been completed, but the remittance of the amount of money has not been made, the parties will be faced with a promise to contract (a pre-contract), and the loan agreement with interest will not produce legal effects, as it is not validly concluded[26].

With regard to the characters *intuitu personae* and *intuitu pecuniae*, we agree with the view expressed in the doctrine[27], according to which the loan of sums of money implies "both the conclusion of the contract taking into account the quality of the parties and the consideration of the financial situation of the borrower, or the amount of interest charged".

The *unilateral* nature of the loan agreement with interest arises both from

[22] By the provisions of art. 2159 para. 2 Civil Code, the legislature establishes a legal presumption, according to which, "until proven otherwise, the borrowing of sums of money shall be presumed to be for consideration". Also, the provisions of art. 2158 para. 1 final sentence of the Civil Code, establish the main obligation of the borrower, generically called "obligation to repay", namely, to return to the lender goods of the same nature and quality on the due date.

[23] See, Civil Decision No. 969A of 10 June 2015, pronounced by the Bucharest Court of Appeal, Civil Section VI, on idrept.ro.

[24] See, Civil Sentence No. 1247 of 30 January 2015, pronounced by the Bucharest Sect. 4 Court, Civil Section, on idrept.ro.

[25] This has also been decided in recent case law. See, Decision No. 686 of 1 July 2021, pronounced by the Court of Appeal Suceava on www.rolii.ro.

[26] See Decision No. 850A of 17 March 2015, pronounced by the Bucharest Court, Civil Section V, on idrept.ro.

[27] See Vasile Nemeș, Gabriela Fierbințeanu, *op. cit.*, p. 544.

the obligation to repay the amounts borrowed and from the obligation to pay interest, both of which are duties incumbent on the borrower, since the lender has no legal obligation. In this sense is also the judicial practice[28], in which it was stated that "the borrower must apply and want to receive the loan".

In this case, we are witnessing the temporary transfer of the right to use the sums of money by the lender, with the obligation for the borrower to repay the amounts borrowed, together with the related interest.

A particular aspect is also the fact that, although it is a *translative property* contract, the lending of money with interest – regarded as *gender goods*, gives rise to *a claim in favor of the lender*, and not to *real rights*, and the borrower will also bear the risk of losing the borrowed amounts, pursuant to art. 2160 Civil Code – *res perit domino*.

Credit agreements as well as collateral or personal collateral agreements concluded with a credit institution shall be enforceable instruments[29].

3. Peculiarities and controversies regarding the credit agreement

3.1. Credit agreement – contract on a professional basis

The quality of creditor/lender in a credit agreement may be:

- *the credit institution*[30] which may have one of the legal forms governed by the provisions of art. 3 of GEO no. 99/2006 on credit institutions and capital adequacy;

- *authorized financial institutions*, which are regulated by Law No 190/1999 on mortgage credit for investment in real estate;

- *non-banking financial institutions*, established in the form of joint stock companies, operating under the provisions of Law no. 93/2009 on non-banking financial institutions.

The qualification of a loan as a *credit agreement* results precisely from the special quality of the lender, who is a circumstantial subject, namely – *credit institution/authorized financial institution/non-banking financial institution*.

As regards the nature of the consideration in the credit agreement, they relate to sums of money. Thus, the lender, known in socio-economic life as "loan

[28] See Decision No. 1138 of May 21, 2015, pronounced by the Bucharest Court, Civil Section VI, on idrept.ro.

[29] Under the provisions of art. 120 of GEO no. 99/2006 on credit institutions and capital adequacy, as amended by art. 98 of Law no. 236/2022 - any reference to the phrase "credit institution" or "credit institutions", contained in GEO no. 99/2006, shall be deemed to be made under the phrase "credit institution referred to in art. 4 para. (1)(a) of paragraph 1 of Regulation (EU) No. 575/2013, as amended" or "credit institutions referred to in art. 4 para. (1)(a) of paragraph 1 of Regulation (EU) No. 575/2013, as amended", except for the references contained in the title, art. 1, 2, 4, 41, art. 7 para. (1) and (11), Art. 54, 176 and Title II1 of Part I of GEO no. 99/2006.

[30] The notion of bank is not confused with that of credit institution, but represents only a particular species of it.

seller", will not be able to lend the borrower sums of money, through the legal formula of "sale with payment in installments". Because the sale with staggered payment of the price implies a *real obligation* on the part of the seller (transfer of ownership) and on the part of the buyer, the obligation to pay the price, which implies a personal obligation (giving rise to a right of claim).

However, in the *credit agreement* we are in the presence of *real mutual obligations* of the contracting parties, which are well-founded and derive from the translational ownership character of this type of agreement. Therefore, the borrowed amounts pass into the property of the borrower at the time of conclusion of the contract, with the correlative obligation of the borrower to repay the borrowed amounts at maturity, even in the form of installments, which also determines a transfer of ownership. In this way, both obligations, both of the lender (financier/lender) and of the borrower (client/debtor), are on a position of legal equality, respectively they are *real obligations* that involve the transfer of the property right from one patrimony to another.

3.2. Credit agreement – contract with *uno ictu* performance or *with successive performance*?

As regards the successive performance nature of the credit agreement, the case-law[31] is not consistent. The practice of the Supreme Court arguing, in support of the uno ictu character of the credit agreement, the fact that, "the repayment of the sums borrowed in monthly instalments is only a way of fulfilling the borrower's obligation, however, the obligation to repay being unique, the successive instalments, forming by their nature a unitary whole[32]".

In our opinion, the court's solution can be challenged by the following special rules, incidental to the credit agreement, namely:

- art. 10 of Law No. 190/1999 provides that the amount of money relating to the loan granted may be made available to the beneficiary "in instalments or in full";

- art. 55 of GEO nr. 50/2010, corroborated with art. 3 point 14, Art. 29 and Art. 26 of GEO nr. 52/2016, confers the possibility of "drawing down on the basis of a credit agreement";

- art. 300 of GEO nr. 99/2006 in relation to the provisions of art. 39 of GEO nr. 50/2010 and art. 19 of Law nr. Law no. 190/1999 establishes the *sanction of termination*, applicable to the debtor/borrower, in case of contractual fault,

[31] See, Civil Decision No. 860 of 18 March 2015, pronounced by the High Court of Cassation and Justice, Civil Section II, which recognizes an *uno ictu* obligation on the part of the bank, in contradiction with the solution pronounced in Civil Decision no. 1293/2013 by the Supreme Court in another case, on www.scj.ro. In the same vein, see also Civil Decision no. 3521 of 24 October 2013, pronounced by the High Court of Cassation and Justice, Civil Section II, on www.scj.ro.

[32] In the same vein, see also Civil Decision no. 3521 of 24 October 2013, pronounced by the High Court of Cassation and Justice, Civil Section II, on www.scj.ro.

generated by non-compliance with contractual obligations (either as a result of late execution or as a result of non-performance of the obligation to pay at maturity, the installment related to the borrowed loan).

Moreover, the Supreme Court also ruled on the application of *the sanction of termination* in the case of the credit agreement, and not of termination, in other cases[33] by which it established the possibility of the client-borrower to immediately terminate the agreement, in case of abusive clauses in the contract, or, as the case may be, the possibility of terminating the credit agreement, granted to the bank, in case of non-fulfillment of the contractual obligations assumed by the client.

I therefore note the inconsistency and unfoundedness of judicial practice where, while acknowledging the *uno ictu*[34] nature of the credit agreement, it surprisingly applies the legal *effects of termination* in the context of its judicial decisions in the case of culpable non-performance of the contractual obligations assumed by the parties.

As a consequence, we are witnessing in relatively recent judicial practice the application of the sanction of termination, specific to legal acts with *uno ictu* enforcement, which, however, produces the effects specific to the sanction of termination.

I consider that such legal reasoning cannot be accepted, being in total contradiction with the principle *pacta sunt servanda*, which must govern the conclusion of any legal act.

3.3. Credit agreement – negotiated contract or adhesion agreement?

In the practice of bank loans, credit institutions/lenders must pay greater attention to consumers of their products. In this respect, the credit agreement must comply with certain technical-legal procedures and mechanisms, imposed by special regulations in the field, both at national and European level.

As European consumers[35], who enjoy certain "European rights", the European Parliament Resolution of 18.10.2008 establishes the obligation to inform consumers, as a step prior to the conclusion of a credit/financing agreement, an

[33] See, Civil Decision No. 3856 of 04 December 2014, pronounced by the High Court of Cassation and Justice, Civil Section II, Civil Decision nr. 1453 of 10 April 2014, pronounced by the High Court of Cassation and Justice, Civil Section II and Civil Decision nr. 84 of 26 January 2016, pronounced by the High Court of Cassation and Justice, Civil Section II, on www.scj.ro.

[34] According to the provisions of art. 1554 para. 1 Civil Code, "in case of admission of termination, the parties are obliged to return the benefits received". But the borrower not only repays the "benefits received", respectively - the amount borrowed, but also all installments declared early due by the bank, as well as interest and commissions or other bank charges (i.e., bears the legal effects of art. 1554 para. 3 of the Civil Code, which regulates termination). See in this regard, Vasile Nemeș, Gabriela Fierbințeanu, *op. cit.*, p. 583.

[35] CJEU, Berliner Kindl Brauerei AG v. Andreas Siepert, judgment of 23 March 2000, EU:C: 2000:152.

obligation incumbent on credit institutions – regarded as a qualified, specialized and professionalized subject.

The obligation to inform is established, including jurisprudential[36] and implies honest, transparent and equidistant information of the consumer by the professional – financier. The effective realization of this type of correct financial education consists in displaying, in letter format or on the public website of the financing institution, the offer to contract, as well as the different types of loans.

To that end, the national legislature laid down specific, specific rules necessary to fulfil the obligation to inform consumers, which could be assimilated to a genuine procedure for negotiating a credit agreement, as follows:

- art. 9 of GEO no. 50/2010, whereby credit institutions and, where applicable, credit intermediaries shall provide the consumer with adequate explanations enabling him to assess, whether the proposed credit agreement is adapted to his needs and financial situation, the transparency of the bank creditor at the formation stage of the agreement, also representing a factor stimulating interbank competition[37]. The information provided to the consumer must allow him to compare several offers, in order to be able to make an informed decision" (art. 14 of GEO no. 50/2010);

- art. 13 of GEO no. 50/2010 provides for the obligation to inform consumers correctly and transparently, so that they are not misled by legal or technical expressions, specific to the banking field, and, at the consumer's request, a copy of the draft credit agreement is provided.

- art. 7 para. 1 and art. 8 para. 2 of GEO no. 52/2016 provides for honest information to consumers *for the purchase of real estate or for loans secured by immovable property*. In this respect, the creditor is obliged to include in the public offer a concise and proportionate warning of the specific risks associated with the credit agreement in question (such as change in the benchmark, fluctuation of revenue, currency risk, average amount credited, average duration of the contract, average additional costs).

- art. 8 of Law nr. 190/1999 on mortgage credit for real estate investments, obliges the authorized credit institution, when requesting an offer by the customer/consumer, to offer him/her free of charge, in printed or digital format, a repayment schedule and a draft of the credit agreement.

In the realm of Law nr. 190/1999 regarding the mortgage loan for real estate investments, regardless of the quality of the client – consumer/ professional, the *obligation to inform subsists*, regardless of its legal status (art. 1204 and art. 1214 of the Civil Code). *Only the legal effects are different, as follows:* in the case of the consumer, the lack of information determines *the existence of*

[36] See Civil Decision No. 541 of 18 February 2015, pronounced by the High Court of Cassation and Justice, Civil Section II, on www.scj.ro.

[37] Z. Fungacova, L. Weill, *Does bank competition reduce cost of credit? Cross-country evidence from Europ*, „Journal of Banking and Finance", vol. 83, nr. 3/2017, pp. 104-120.

unfair terms – sanctioned with *absolute nullity*, and in the case of other professionals – beneficiaries of the credit, the lack of information may be a cause of ineffectiveness of the credit agreement or cause of cancellation of the agreement for vitiating consent (regarded as a condition of validity of the contract).

In case of breach of the *information obligation* when concluding a credit agreement with a person, as a consumer, the contravention liability of the credit institution shall be incurred, according to art. 86 of GEO nr. 50/2010 or, as the case may be, art. 121 of GEO nr. 52/2016. Also, the injured persons may notify the National Authority for Consumer Protection. If the parties are in the pre-contractual period, breach of obligations established in the field of consumer protection may give rise to tort liability for the damages caused.

In conclusion, however, I consider that the fulfilment of the *information obligation* by the lender should not be confused with the negotiation of the credit agreement, for the following reasons:

- the inequality of forces between client and financier is obvious, both from an economic and legal perspective;

- the negotiation of contract terms is insignificant and is done more from the perspective of compliance with the obligation of consumer protection.

Therefore, the customer/consumer, after fulfilling *the information obligation* by the financier, may accept *the standard terms*, imposed by him, in which case the credit agreement is concluded or does not accept them, and the contract is not concluded. However, from both perspectives, under no circumstances is it in a position of negotiator, which could determine the modification or completion of standard contractual clauses.

Thus, the existence of standard clauses in the financing contract, pre-established by the financier and accepted by the client[38], in relation to the way of expressing the will of the contracting parties and to the banking practice, are arguments that entitle us to consider the loan agreement as an *authentic adhesion agreement*[39].

[38] Or not accepted by the customer, which determines the non-conclusion of the contract. See also, A. Almășan, *Civil Law. Dynamics of obligations*, Hamangiu Publishing House, Bucharest, 2018, p. 83 et seq.

[39] See, in support of this view, and Civil Decision No. 3864 of 04 December 2014, pronounced by the High Court of Cassation and Justice, Civil Section II. Thus, which held that, "... The bank informed the complainants of the content of the contract and that it had given them time to consider and think, but it does not mean that it negotiated these terms with the plaintiffs." Also, Civil Decision No. 310 of 11 February 2016, delivered by the High Court of Cassation and Justice, Civil Section II ('Nor does the existence, at the time of conclusion of the contract, of a variety of credit products mean that it has been negotiated, since the applicant merely adheres to a preformulated type of contract, the terms of which have been grafted onto the applicant's eligibility conditions').

4. Special rules on distance conclusion of credit agreements

The credit agreement may be concluded at a distance, under the conditions established by the provisions of Government Ordinance (GO) no. 85/2004 on consumer protection when concluding and executing distance contracts on financial services[40].

The era of digitalisation has led to the replacement of the classic paper *instrument* by electronic means and the adoption of rules governing the conclusion of contracts by electronic means.

In this respect, and with regard to the credit agreement, the provisions of Law no. 455/2001 on electronic signature[41] and Law no. 365/2002 on electronic commerce[42].

According to these legal provisions, the content and effects of the document in electronic form are equivalent to the document under private signature, if an extended electronic signature, based on an unsuspended or not revoked qualified certificate, generated by means of a secure electronic signature creation device, has been incorporated, attached or logically associated with it. The credit agreement thus concluded will take effect between the parties from the moment when the acceptance of the offer to contract has come to the knowledge of the financier[43] (art. 9 of Law no. 365/2002 on electronic commerce).

However, *certain particularities must be borne in mind which arise and may affect the validity of the credit agreement, as follows:*

- prohibition on concluding a distance credit agreement where the object of the agreement is credit granted for the purpose of acquiring immovable property or where the credit is secured by immovable property[44].

- the credit agreement concluded at a distance, according to art. 8 of GO nr. 85/2004, "constitutes an enforceable title, in the absence of a handwritten signature or an extended electronic signature, unless the parties require the signature as a condition of validity of the contract[45]". This type of contract "represents a *document on computer support* (art. 266 and art. 282 Code of Civil Procedure),

[40] Republished in the Official Gazette of Romania, Part I, nr. 365 of 13 May 2008, with subsequent amendments and completions, including by Law nr. 209/2019 on payment services and amending certain normative acts. 3 lit. a) of O.G. No. 85/2004 defines distance contract – „a contract for financial services concluded between a supplier and a consumer under a distance selling scheme or a service scheme organised by the supplier which uses exclusively, before and at the conclusion of that contract, one or more distance communication techniques".

[41] Republished in the Official Gazette of Romania, Part I, nr. 316 of 30 April 2014.

[42] Republished in the Official Gazette of Romania, Part I, nr. 959 of 29 November 2006.

[43] This rule is known in doctrine as information theory – art. 1186 Civil Code.

[44] Prohibition established by art. 24 of GEO no. 52/2016 on credit agreements offered to consumers for real estate, as well as for amending and supplementing GEO no. 50/2010 on credit agreements for consumers.

[45] Civil Decision No. 23 of 14 October 2019, pronounced by the I.C.C.J., Panel for hearing appeals in the interest of law, on www.scj.ro.

has the evidentiary regime described by art. 283 Code of Civil Procedure and the evidentiary power established by art. 284 Code of Civil Procedure[46]".

- *the right of withdrawal* of the borrower/consumer from the credit agreement concluded at a distance, without invoking a specific reason, may be exercised within 14 calendar days, term running from the date of conclusion of the contract or from the date of fulfillment of the information obligation by the financier, if this was done after the conclusion of the contract. *Retractability*, representing the consumer's option to withdraw from the contract, occurs *ope legis*, even if it is not expressly provided for in the contract[47].

Two different opinions have been expressed in the doctrine regarding the legal value of retractability, namely: in one opinion[48], the borrower-consumer's *right of withdrawal* was qualified as a right of withdrawal, having the nature of a *probative right*, from the perspective of the general theory of the contract[49].

In another opinion[50], to which we agree, *this right of withdrawal*, expressly recognized by the rule of law, represents *unilateral termination of the contract*, which amounts to a authentic *case of termination of the contract.*

5. Credit facility

The credit facility is regulated by the provisions of Article 2193 of the Civil Code, as "the contract by which a credit institution, a non-banking financial institution or any other entity authorized by special law, called the financier, undertakes to keep at the disposal of the client an amount of money for a determined or indefinite period of time". The contract may be concluded for a fixed or indefinite period, and the client may use the loan in several instalments, according to custom, and may, through successive repayments, renew the available amount (Art. 2194-2195 Civil Code).

The credit agreement should not be confused with the credit facility, as the latter is only one species of loan. As a consequence, the rules established for the credit facility will be supplemented by the legal provisions applicable to the consumer loan[51].

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[46] See, M. D. Bereanu, *Written on computer support and document in electronic form. Divergence or Unity?,* „Revista Română de Drept Privat" no. 2/2021, p. 67.

[47] This right is known as retractability and is recognized only to the borrower/consumer, not to the financier – art. 58-60 of GEO nr. 50/2010.

[48] A. Almășan, *op. cit.*, 2018, p. 97 et seq.

[49] Mona-Lisa Belu Magdo, *Good faith in negotiating, concluding and executing the contract*, in "Dreptul" Magazine nr. 7/2020, p. 52.

[50] L. Bercea, *Consumer credit: comparison between consumer withdrawal from contract and early repayment of credit*, „Pandectele romane" no. 10/2009, pp. 59-79.

[51] See, L. Bercea, *Bank credit: what's in a name?*, in "Unnamed contracts in business", Universul Juridic Publishing House, Bucharest, 2017, pp. 161-162; Flavius Baias, E Chelaru, R. Constantinovici, I. Macovei (ed.), *The New Civil Code. Commentary on articles*, C.H. Beeck Publishing House, Bucharest, 2012, p. 2163. Gh. Piperea, *Credit facility agreement and debit card,*

In this respect, the Supreme Court qualified[52] *the credit facility agreement* as a rights constitutive agreement, generating claims rights, because the conclusion of this type of agreement does not determine the transmission of real rights, respectively, the ownership right over the sums of money, which are only made available to the client by the financier. Thus, the financier has the obligation to "*make*", respectively, to ensure the necessary cash availabilities, and the client will decide, whether to make specific drawdowns, to this type of lending.

In banking, this legal operation is known as a "*credit line*", having more of an economic meaning. However, in the legal realm, the credit facility becomes a complex operation, with particular valences, which determines specific legal effects.

6. Conclusions

The particularities captured in the present study entitle us to consider the credit agreement (financing) as an independent agreement, with specific valences, to which the particular rules of primary and secondary legislation apply.

In the credit relations participate qualified subjects of law, respectively, merchant professionals, as lenders and consumers – individuals, as borrowers. The financial products offered have a fairly diversified and appreciably complex structure and content.

Knowledge of the internal mechanism of contract formation, its typologies, as well as the special protection rules established for consumers, reveals the importance of the analysis undertaken and is all the more justified, because the credit agreement is widely used, both in commercial, business relations and in current social life, in which both individuals and legal entities participate.

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Perspectives Regarding the Reconfiguration of Rest Time in Current Romanian Law. The Right to Disconnect

Judge A**ndrei Radu DINCĂ**[1]

Abstract

The digitization of activities became a constant sign of social evolution in recent decades. More and more professions allow the option to work remotely through information technology, resulting in exceptional flexibility in the way work is carried out for professionals in multiple fields. What seems like a flexible work schedule can turn into a permanent work schedule, and the assessment of its impact on employees can be determined by quantifying the high number of people who have complained of professional burnout in the last period. The purpose of this paper is to identify a viable legal mechanism for protecting workers against the possibility of carrying out a long activity, exceeding the maximum working time regulated by law. Finally, the author formulates a de lege ferenda proposal regarding the need to regulate the right to disconnect in Romanian legislation.

Keywords: *right to disconnect, rest time, remote work, telework, work flexibility,*

JEL Classification: K31

1. Introduction

Maintaining a balance between work time and rest time has become an increasing challenge in recent years.

The appearance of new, complex ailments based on mental and physical exhaustion have been alarm signals for today's society. First used in 1980[2], by the authors H. Freudenberger and G. Richelson, the term "Burnout" is defined by the World Health Organization as an "occupational phenomenon", being included in the 11th revision of the International Classification of Diseases (ICD-11), as such. Essentially, it is not considered a medical condition[3].

In the last decade, burnout at work has become a constant problem, especially in the private sector, where the week of professional activity effectively reached over 70-80 hours, given the increased spatial and temporal flexibility of professional activity, with the outbreak of the SarsCov2 pandemic.

The purpose of this article is to analyze the compatibility of the current

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[2] H. Freudenberger, G. Richelson, *Burn-out: The High Cost of High Achievement*, Publisher Anchor Press, Double Day and Company, Garden City, New York, p.1.

[3] Conformable https://www.who.int/news/item/28-05-2019-burn-out-an-occupational-phenomenon-international-classification-of-diseases, accessed on 9.11.2023.

regulation of rest time from the Romanian Labor Code with the new realities determined by the professional activity carried out remotely, through online means. Obviously, such an analysis is important only with regard to professions that can be practiced from home or from another place other than the one provided by the employer.

Leveraging a historical analysis[4], we note that in the first Labor Code adopted in 1950[5], rest time was directly regulated, in application of the "right to rest" recognized by art. 20 of the 1948 Romanian Constitution[6], which stipulated: "Citizens have the right to rest. The right to rest is ensured by regulating working hours, paid holidays, in accordance with the law, by organizing rest homes, sanatoriums, clubs, parks, sports fields and specially designed settlements".

A comparable regulation was found in the Labor Code of 1972[7], which was repeatedly dimensioned until the adoption of the current Labor Code in 2003.

In addition to the annual leave, in each of the three previously mentioned legislations, forms of daily rest, respectively weekly rest, were recognized, a fact perpetuated until now. At the time of drafting the regulations we are referring to, the legislator had in mind, exclusively, the hypothesis of carrying out work in a place provided by the employer or determined by the specifics of the activity, but the possibility of carrying out the activity by means of computer technology was not foreseen.

2. Rest time – current regulation

In the current legislation[8], the rest period is defined by art. 133 of the Labor Code as "any period that is not working time".

Under these conditions, the determination of rest time is directly dependent on the determination of work time, since the first is defined in antithesis to the second[9].

Art. 111, paragraph 1 of the Labor Code regulates working time, as follows: "working time represents any period during which the employee performs work, is at the disposal of the employer and fulfills his tasks and duties, according to the provisions of the individual employment contract, the contract applicable labor collective and/or of the legislation in force".

The definitions of work and rest time in the current Romanian Labor

[4] S. Al. Vernea, *Rest time of the employee in the Romanian Labor Code of 1950*, in Revue européenne du droit social, no.1/2021, p. 32.
[5] Law no. 3/30.05.1950, published in the Official Gazette, no. 50/08.06.1950.
[6] Published in the Official Gazette, no. 87bis of 13.04.1948.
[7] Published in the Official Bulletin, no. 140/01.12.1972.
[8] Law no. 53/2003 on the Labor Code, republished in the Official Gazette, Part I, no. 345/18.05. 2011, with subsequent amendments and additions.
[9] C. Gîlcă, *Labor Code commented and annotated*, Ed. Rosetti International, Bucharest, 2015, p. 444.

Code are the result of the implementation of art. 2, points 1 and 2 of the Directive of the European Parliament and of the Council no. 2003/88/EC on aspects of the organization of working time.

We note that the legislator uses the terminology "rest time" instead of "rest time" or "free time", since the defining feature of this interval consists in the omission of a professional activity, the worker being entitled to use the time for rest or for other personal goals. In the literature, it has been shown that between the term "rest" and the term "break", there is an imperfect synonymy, since the breaks have a shorter duration[10].

A reputed author[11] defined rest time as "the time required to recover the physical and intellectual energy spent in the work process to satisfy social and cultural-educational needs".

Beyond the classical purpose of rest time, that of recovery a workforce, we appreciate that in the current period, rest time is also intended to ensure a balance between professional life and personal life, an indispensable element for the quality of life of every worker.

According to a part of the current literature[12], we believe that working time is not determined by the union of three defining criteria: the spatial criterion, the authority criterion and the professional criterion, the dynamics of professional activity requiring the rethinking of this notion.

Another author[13] shows that in order to qualify the working time, the cumulative fulfillment of the following elements is required: performance of the work, finding the worker at the disposal of the employer and fulfilling the obligations assumed by the worker. We have a doubt about the position of the quoted author, since the third element appears as useless in the conditions of meeting the first two.

In current literature[14] it was argued that a preferable definition of working time, in the context of the evolution of communication technology, is "the period in which the employee, regardless of where he is, performs work or is at the disposal of the employer, performing his tasks or being prepared to perform them in - a short term, under the authority of the employer".

We do not identify any obvious flaw in the definition, especially since the essential elements, namely the performance of work and being at the disposal of the employer, are provided alternatively.

As for the period during which the employee is at the disposal of the

[10] D. Țop, *Treatise on labor law*, ed. IV, Ed. Universul Juridic, Bucharest, 2022, p. 470.
[11] I.T. Ștefănescu, *Theoretical and practical labor law treatise*, ed. 4th, Ed. Universul Juridic, Bucharest, 2017, p. 636.
[12] M. Gheorghe, *The period in which the employee is at the disposal of the employer. Controversial aspects*, in the Romanian Journal of Labor Law, no. 4/2018, p. 53.
[13] C. Gîlcă, *op. cit.*, p. 424.
[14] S. Al. Vernea, *Rest time and digitization. The right to disconnect*, in Revue européenne du droit social, no. 3/2023, p. 75.

employer, in the labor law literature[15]it was shown that the period in which the employee is at the disposal of the unit, but in his home, cannot be included in the working time, since he can organize his time freely, taking into account his interests and priorities. We agree with the statement of the previously quoted author, with the only reservation that regarding the activity carried out remotely, the time during which the employee waits for the task given by the employer, even in his home, will be classified as working time.

Under these conditions, trying our own definition of rest time, we will proceed to exclude work time from the working day. Thus, rest time represents the interval in which the employee either does not perform work, or is not available to the employer, performing his tasks or being prepared to perform them in a short period of time.

3. Consequences of work flexibility on rest time

During the SarsCov2 pandemic, software development activities, the centralization of various results, accounting, the provision of legal or technical advice, education and even the holding of meetings of the governing bodies of various entities took place, for a considerable period, in the virtual space.

According to a report drawn up in 2017 at the level of the European Agency for Safety and Health at Work[16], by work on online platforms is designated "all activity performed through or mediated by online platforms, which presents a wide range of employment regimes/relations, such as (types of) casual work, self-employed work with economic dependence, informal work, contract work, home work and crowd-working, in a wide range of sectors".

The increase in the use of information technology for carrying out activities led to the development of the habit of employees to always be available for the employer's needs, to the extent that they could be satisfied through online means.

In Romania, the conduct of online activity, in a telework regime, is provided for by Law no. 81/2018 on the regulation of telework activity[17].

The term is defined by art. 2, letter a of Law no. 81/2018 as "the form of work organization through which the employee, on a regular and voluntary basis, fulfills the duties specific to the position, occupation or job that he holds in another place than the workplace organized by the employer, using information and communication technology".

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[15] R. Dumitriu, *Considerations in connection with the flexibility of employees' working time*, in Dreptul Journal no. 7/2008, p. 124.

[16] S. Garben, *Protection of workers in the online platform economy. EU Regulatory and Policy Development Overview*, Luxembourg: Publications Office of the European Union, 2017, p. 3, available online at: https://osha.europa.eu/sites/default/files/Summary_Protecting_Workers_in_Online_Platform_Economy_RO.pdf, consulted on 09.11.2023.

[17] Published in the Official Gazette, Part I, no. 296/02.04.2018.

In agreement with part of the doctrine[18], we note that in order to classify the activity performed as a telework regime, it is necessary to perform the duties outside the place organized by the employer along with the use of information and communication technology.

We agree with some of the specialized literature[19] which stated that only employees are allowed to work remotely, in a context in which a civil servant will not be able to work in this mode.

A current issue is configuration an effective legal protection of the rest period, in which the worker is not at the disposal of his employer, in the conditions that he would perform the activity by online means and could connect to the work platform within minutes of the employer's request.

Applying the definition we gave to rest time, we note that the existence of a state of quick availability to a request from the employer, even if this could be fulfilled from the worker's home, characterizes working time, not being able to be quantified as time rest. Thus, in the conditions of carrying out the activity through online platforms, the delimitation between working time and rest time it can no longer be done.

As a remedy for this situation, I believe it is necessary to introduce an element of an objective nature, conferred by an effective right of the employee not to be contacted for professional purposes by the employer, or by a client of the employer, outside the predetermined hours.

The legal way in which such a mechanism could be put into practice has been the subject of bold legislative measures taken in several European states, which have regulated the "right to disconnect", but despite constant interest at the level of the European Union, such measures have not were uniformed.

4. The need to regulate the right to disconnect

At the level of the European Union, the right to disconnect has become current, with the Resolution of the European Parliament of January 21, 2021, containing recommendations addressed to the Commission regarding the right to disconnect[20].

The purpose of the regulation is to establish a common starting point in the regulation of the right in question, under the conditions of the common labor market at the level of the European Union. The latter have a very high degree of permeability, as workers can easily work for employers in multiple Member States.

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[18] S. Panainte, *Individual labor law*, ed. 2nd, Ed. Hamangiu, Bucharest, 2021, p. 249.

[19] S.-Al. Vernea, *Work flexibility as a reaction to pandemic restrictions in Romanian legislation*, in Revue européenne du droit social, no. 3/2022, p. 110.

[20] Available online at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_RO.html#title1, last consulted on 09.11.2023.

The resolution contains an annex that constitutes the guidelines of a future directive intended to regulate the content and limits of the right to disconnect.

Without a trace of doubt, a Directive in this area would constitute an energetic and efficient way of ensuring the protection of workers at the level of the European Union.

Under the aspect of the content of the right, art. 1 of the proposed directive stipulates that the right is accessible to any type of worker, in the public sector and in the private sector who use digital tools, including ICT, for professional purposes, i.e. to all workers, regardless of their status and working methods.

The directive defines the act of disconnecting, in art. 2, paragraph 1, the content of the right arising from this definition. The right to disconnect is defined as the worker's right not to engage in work-related activities or communications through digital tools, directly or indirectly, outside of working hours. In my opinion, the right to disconnection consists of the employee's prerogative to refuse to respond to the employer's request to perform professional activities.

It establishes an obligation for employers to take the necessary measures to provide workers with the necessary means to exercise their right to disconnect and an obligation to establish an objective, reliable and accessible system to allow the measurement of the duration of each worker's daily working time, in accordance with workers' right to privacy and the protection of their personal data. Workers have the possibility to request and obtain the recording of their working time.

I believe that the purpose of the directive would be achieved in the event that the worker would have the possibility to refuse to respond to the requests of another person, such as a client of his employer, who would ask him to perform professional activities in consideration of his relationship with the employer. In this way, I appreciate that all possibilities would be covered in which the worker would be directly or indirectly at the disposal of the employer.

The essential element for the effectiveness of the right to disconnection is the recording and quantification of working time. According to art. 3, paragraph 2, sentence I of the proposed directive, Member States have the obligation to ensure that employers establish an objective, reliable and accessible system that allows the measurement of the duration of the daily working time of each worker. Under these conditions, the right to disconnect will be exercised throughout the day, which cannot be qualified as working time.

The need to keep a record of working hours, with the indication of the start and end time of the work schedule, has been constantly established by the jurisprudence of the Court of Justice of the European Union.

In case C-055/18, *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE*, the Court of Justice of the European Union interpreted Articles 3, 5 and 6 of Directive 2003/88/EC of the European Parliament

and of the Council of 4 November 2003 regarding certain aspects of the organization of working time, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, as well as Article 4(1), Article 11(3) and Article 16 paragraph (3) of Council Directive 89/391/EEC of 12 June 1989 on the implementation of measures to promote the improvement of the safety and health of workers at work, in the sense that it opposes a regulation of a Member State which, according to the interpretation which is given to it by the national jurisprudence, does not impose on employers the obligation to establish a system that allows the measurement of the duration of the daily working time performed by each worker.

The Court recalled that the right of each worker to a limitation of the maximum working time and to daily and weekly rest periods constitutes a fundamental right of the European Union. In order to guarantee the full effectiveness of Directive 2003/88, Member States have the obligation to take the necessary measures to ensure that the beneficial effect of this right is fully ensured, allowing workers to effectively benefit from minimum daily and weekly rest periods and maximum limit of average weekly working time.

Bearing in mind the vulnerable position of the worker, the Court further analyzed whether and to what extent the establishment of a system allowing the measurement of the duration of the daily working time carried out by each worker is necessary to ensure effective compliance with the maximum weekly working time, as well as the minimum daily and weekly rest periods.

The conclusion was that, in the absence of such a system, neither the number of working hours performed, nor their distribution over time, nor the number of hours performed over normal working time, as overtime, can be determined objectively and reliably. Furthermore, it is difficult, if not impossible in practice for a worker to ensure effective compliance with the maximum length of weekly working time.

Consequently, the member states have the obligation to define "the concrete methods of implementing such a system, in particular the form it must take, and this possibly taking into account the particularities of each sector of activity in question or the specificities of certain undertakings, in particular their size, without prejudice to Article 17(1) of Directive 2003/88, which allows Member States, respecting the general principles of protection of the safety and health of workers, to derogate, among other things, from articles 3-6 of this directive, when, based on the specific characteristics of the activity performed, the duration of working time is not measured and/or predetermined or can be determined by the workers themselves".

National law does not regulate the form that the work time record must take, except for the condition of indicating the start time and the end time of the work schedule, however, in order to give effectiveness to the legal provisions that impose the obligation to respect the rest time, the record of working hours must be objective, so as to eliminate the possibility of the employer formally drawing

up a record that does not take into account the actual time at which the work schedule began or ended.

The stipulation of a generic obligation on the state does not necessarily determine the access of the worker to the records of the working time carried out online.

In this regard, the proposed directive establishes a right in favor of the worker in art. 3, paragraph 2, final sentence: "Workers have the possibility to request and obtain the registration of their working time". The wording is imperative, in a context in which I appreciate that its transposition must be carried out in the form of ensuring a right to the worker.

To the extent that the right to disconnection is violated, we consider that the only remedy available to the worker consists in obtaining compensation, in accordance with art. 6, paragraph 1 of the proposed directive[21]. Obtaining damages is circumscribed to the tortious civil liability action to the extent that the parties to the employment contract have not regulated this aspect in the concluded contract.[22] A delicate issue exists in the hypothesis that through the employment contract, the parties establish that the employer does not owe compensation in the situation where it violates the right to disconnect.

In my opinion, such a contractual clause is likely to deprive the worker of the protection conferred by legislation, which cannot be allowed, being clearly contrary to the purpose of the directive. In this sense, I show that the right to disconnect has been qualified as a fundamental right, which constitutes an inseparable component of the new work models of the new digital era, according to letter h of the Resolution of the European Parliament of January 21, 2021.

5. The right to disconnect in the law of other states

The right to disconnect as a legal right appeared in France in 2016, when the so-called El Khomri Law was adopted, which introduced the right to disconnect as a mandatory subject of negotiation in companies with more than 50 employees.[23] This regulation was based on a decision of the French Supreme Court in 2001, which ruled that "the employee does not have the obligation to accept

[21] According to art. 6, paragraph 1 of the proposed directive: "Member States shall ensure that workers whose right to disconnect has been violated have access to fast, effective and impartial dispute resolution mechanisms and have the right to reparation of the damage in the case of violation of their rights arising from this directive".

[22] Civil decision no. 2509 of May 6, 2021, of the Bucharest Court of Appeal – VIIth Section for cases regarding labor disputes and insurance, pronounced in file no. 18105/3/2020, definitive, unpublished.

[23] Law on work, modernization of social dialogue and protection of professional paths, also known as "El Khomri Law", Law 2016-1088 of August 8, 2016, entered into force on January 1, 2017. The document is available online at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032983213&categorieLien=id, last consulted on 10.11.2023.

work at home or to take his work files and tools there"[24], as well as one from 2004 of the Supreme Court, which ruled that an employee cannot be criticized for being inaccessible outside of his working hours[25].

Later, a National Inter-Professional Agreement was signed by the social partners in 2013, entitled "Towards a policy to improve the quality of life at work"[26], agreement that contained the notion of protecting workers' disconnection time.

Also, in 2016, a provision was introduced in the French Labor Code in the chapter "Adaptation of Labor Law to the Digital Age" - par. 7, Art. L2242-17, which established the right to disconnection as a mandatory subject of negotiations between social partners at the company level: "(...) The terms that give employees the opportunity to fully exercise their right to disconnection and the introduction by the company of the programs that regulate the use of digital tools, in order to ensure compliance with the regulations governing rest and vacation periods, privacy and family life".

Inspired by the initiative in French law, and in Spanish law, during 2018, the new Data Protection Law was adopted, which also introduced a set of digital rights for both citizens and employees[27], respectively Article 88 stipulates that workers, both in the public and private sectors, have the right to disconnect in order to ensure respect for their periods of rest, leave and holidays, as well as their personal and family privacy.

In Italian law, the right to disconnection was transposed at the legislative level by the adoption of Law no. 81/2017 on "Smart Work" for updating the country's outdated telework legislation, promoting and providing a framework for new forms of remote work and facilitating the work-life balance of workers[28].

Thus, intelligent work is defined in Italian law as work without precise constraints in terms of schedule or workplace. The work may be carried out partly from home or another place of work, as long as it is suitable for the performance of the task. The employer and the employee must agree in writing on the terms and conditions of intelligent work, an agreement that must contain provisions regarding the employee's rest periods, as well as the organizational measures necessary to ensure his right to disconnect, as provided for in article 19 from the Law.

Last but not least, references to smart work were also made by the Italian

[24] Labor Chamber of the Court of Cassation, October 2, 2001, no. 99-42,727.
[25] Labor Chamber of the Court of Cassation, February 17, 2004, no. 01-45,889.
[26] Accord national interprofessionnel du 19 juin 2013 "Qualité de vie au travail". The document is available online at https://www.journal-officiel.gouv.fr/publications/bocc/pdf/2013/0041/boc_20130041_0000_0011.pdf, last consulted on 10.11.2023.
[27] Ley Orgánica 3/2018, "Protection of Personal Data and guarantee of digital rights", 5.12.2018. The document is available online athttps://www.boe.es/eli/es/lo/2018/12/05/3#:~:text=Ley%20Org%C3%A1nica%203%2F2018%2C%20de,%C2%AB%20BOE%20%C2%BB%20n%C3%BAm, last consulted on 11.11.2023.
[28] Law no. 81 of May 22, 2017. The document is available online at https://www.gazzettaufficiale.it/eli/id/2017/06/13/17G00096/sg, last consulted on 11.11.2023.

government in the context of the decrees issued in relation to the Covid-19 crisis, to enable and promote remote work on a larger scale during the pandemic.

We also encounter the notion of the right to disconnection in Belgian law, introduced in 2018 through the "Law on strengthening economic growth and social cohesion"[29], as part of a series of initiatives to reform Belgian labor law. The law required employers with more than 50 employees to discuss with workplace health and safety committees the issue of disconnection and use of digital tools. The purpose of the legal provisions was to ensure the observance of rest periods, vacations and leave of employees, as well as the balance between their work and private life. Where there is no workplace health and safety committee, this role can be played by the trade union delegation.

6. Conclusions

As we have noted, the right to disconnect is an effective remedy for the disappearance of the classic boundaries between work time and rest time.

Currently, Romanian legislation does not allow the imposition of a protection standard for the worker involved in remote work, through information technology, but in other countries, the right to disconnect benefits from more or less detailed regulations.

In my opinion, the introduction of this right in labor legislation should be carried out quickly, since the negative effects of flexible schedule are likely to affect the worker's life balance.

In view of the analysis previously carried out, I believe that waiting for the adoption of a directive on the right to disconnection would unduly delay the protection workers, and the adoption of national legislation inspired by comparative law and the proposal for a directive would constitute an adequate remedy.

The national regulation should include, in my opinion, three essential provisions: (i) the express stipulation of the worker's right to refuse to perform professional activities outside working hours, at the request of the employer or of another person acting in consideration of the relationship with the employer, (ii) stipulating the right of the worker to obtain from the employer a detailed record of the working time provided and (iii) stipulating a prohibition to limit the damage to which the worker is entitled as a result of the violation of the right to disconnection by the employer.

Under these conditions, I propose the introduction in the Labor Code, in title III - "Working time and rest time", chapter III - "Periodic rests", section I - "Meal break and daily rest", of art. 1351, having following content: "(1) Any type of worker, from the public or private sector, who carries out his activity mainly

[29] Laws of 26 March 2018 relating to strengthening economic growth and social cohesion. The document is available online at https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2018032601, last consulted on 11.11.2023.

through the use of information technology, has the right to refuse to perform professional activities outside working hours, at the request of the employer or another person's acting in consideration of the relationship with the employer. (2) The worker has the right to obtain from the employer a detailed record of the working time provided. (3) Violation of the obligation provided for in paragraph 1 entitles the worker to compensation. The contractual clauses limiting or removing the damage to which the worker is entitled as a result of the violation of the right to disconnection by the employer are considered unwritten".

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INTERNATIONAL AND EUROPEAN LAW DYNAMICS IN A CHANGING BUSINESS ENVIRONMENT

International Law: The Lost Metaphor? Reflections on the Current Wars

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Abstract

The wars currently ravaging our planet lead us to question the normative character of international law with its corresponding imperativeness. Are we facing the decay of international law, as Anthony Carty[2] *wrote in the last century? Has the metaphor been lost? Is there still any hope for tomorrow? We will analyse the current war situation to question the imperative normativity of international law. On this subject, Martti Koskenniemi*[3] *wrote "From Apology to Utopia" and later "The Gentle Civilizer of Nations": has international law lost this character? The answer will remain open, and this essay will be a speculative treatment of the subject.*

Keywords**:** *international law, use of force, collective punishment, self-defence.*

JEL Classification: K33

1. Introduction

The question of the normative character of international law, postulating the corresponding imperativeness and coactivity inherent to the concept of law itself, is renewed with the outbreak of each new conflict, invariably giving rise to heated debates.

This could not fail to happen with the ongoing war between Russia and Ukraine, or with Israel's recent response to the Hamas attacks on October 7.

In an article, published in the November 2, 2023, edition of the New York Times, Amanda Taub pertinently summarizes the questions usually raised in these circumstances: "If a wartime attack kills innocent people, how could it be legal? If the laws of war are so limited, what are they good for? Will anybody ever stand trial? What about the accusations of collective punishment?"[4]

All of these questions substantiate the set of doubts commonly addressed to international law and which call into question its very existence, as an authentic

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[2] Anthony Carty, *The decay of international law?*, Manchester University Press, Manchester, 1986, p. 77.

[3] Martti Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument*, Helsinki, Finnish Lawyers' Publishing Company, 1989, p. 57; Martti Koskenniemi, *The Gentle Civilizer of Nations*, Cambridge, Cambridge University Press, 2002, p. 47.

[4] Amanda Taub, *The Laws of War Have Limits. What Does That Mean for the Hamas-Israel War?*, „The New York Times", (2023-11-02) in https://www.nytimes.com/2023/11/02/world/middleeast/ international-law-israel-hamas.html?searchResultPosition=1.

branch of law. If it can be violated, without this violation (when the violators are superior and stronger powers or entities sponsored by them) being followed by a sanction, how can it be argued that we are facing true legal norms, and not simple ethical or moral precepts?

2. In defence of international law

International law is – everyone recognizes – an especially weak branch of law, where sanctions can be fragile and not always susceptible to coercive execution. This is not, however, an exclusive note of international law. What characterizes any legal norm is, precisely, its contingent nature and the possibility of its violation, which is not always followed by a sanction.

A common felony, even if the perpetrator is known, can go unpunished, as long as it is time-barred (statute of limitation) or the evidence collected to demonstrate it is illegal, according to Criminal Procedure rules. This does not mean that anyone will argue that Criminal Law is not a branch of law, because there are crimes that go without sanction. On the contrary, the absence of a sanction may even result from the application of the rules of Criminal Procedure itself.

Also in Constitutional Law, we frequently witness the subversion of constitutional review rules, promoted by dictators or authoritarian leaders who intend to circumvent any rules on term limits, thereby perpetuating themselves in power. Think, for example, of the case of Hugo Chavez, in Venezuela. The occasional success of these true constitutional *coups d'état* does not allow us to deny the existence of Constitutional Law as effective law or, by proclaiming its occasional failure, to reduce its essence to a set of simple political aspirations with a moral content. As Baptista Machado wrote, „Law does not depend on Force in its validity, in its specific meaning or in its essence; it depends on Force only in its existence. It is, therefore, a purely *de facto* dependence – not a *de iure* dependence, that is, situated at the level of validity or legitimacy."[5]

International law is certainly a young branch of law (when compared to the great systems of Roman or Germanic Law), a law still in formation and not always secure in the lines of its affirmation and consolidation. This does not mean, however, that it does not already contain rules that are definitively consolidated and stabilized as authentic and unquestionable legal rules that no subject of international law will dare violate without triggering sanctions from the legally organized international community. Take, for example, the case of the use of force to collect debt. It is now universally accepted that the declaration of war made by a creditor State against a debtor State that has not honored its commitments it is not only morally unacceptable, but also legally illicit, constituting a true, intolerable and sanctionable violation of international law.

[5] João Baptista Machado, *Introdução ao Direito e ao Discurso Legitimador*, Coimbra: Almedina, 1989, p. 41.

3. The law of war

It is, moreover, within the scope of the Law of War that today the debate on the existence and limits of international law is focused, with no one questioning an international law regulating relations between States and other subjects of international law, through treaties and agreements, relating to the most comprehensive matters, from international trade, to the recognition of foreign judgments in the field of marriage or filiation, through issues of double taxation of income of the same holder, generated or subject to tax in two different States.

It is in war that the crisis of international law reveals and manifests itself.

How can we claim, without contradiction, that the activity whose essence materializes, precisely, in causing unlimited damage and bringing death and annihilation to an enemy, is subject to legal rules whose non-compliance determines the illegality of such acts?

Let us first agree: war, the use of unilateral force to resolve international disputes, can only be an extraordinary means today, a well-justified and unequivocally founded exception.

The rule, as recalled by the former UN Secretary General, Kofi Annan, during the invasion of Iraq in 2003[6], is that one established in article 2, paragraphs 3 and 4, of the United Nations (UN) Charter: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

The exception is in article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

4. The exception of self-defence

Self-defence – limited in time, even so, until the moment the necessary measures are taken to maintain or restore peace, by the Security Council[7] – therefore seemed to constitute the only basis for legitimizing the use of force.

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[6] Michael Wood, *International Law and use of force: What happens in practice*?, „Indian Journal of International Law", vol. 53 (2013), p. 345.

[7] Resolution 377A(V), of November 3, 1950 ('Uniting for Peace', otherwise known as the Dean

The concept of international self-defence was built on the concept of self-defence under domestic law. Its assumption was a current or imminent external aggression, not the mere fear (simulated or real) of a future aggression, not yet materialized.

In the case of international self-defence, and under the terms of the aforementioned article 51 of the UN Charter, the actuality or imminence of aggression presupposed, as we have seen, an urgency for action, incompatible with waiting for a timely adoption by the Security Council of measures necessary to safeguard and maintain peace. And the exercise of the right to self-defence will cease as soon as such measures are taken.

However, after the attack on New York's Twin Towers on September 11, 2001, the Bush Administration claimed *"that modern warfare and recent innovations in military technology, which may also be employed by nonstate actors engaged in terrorist activities, changed the whole calculus of self-defense. Warfare is now much more devastating and can occur with less warning, which gives considerable advantage over an opponent if allowed to strike first. It would thus be unreasonable and unrealistic to employ the orthodox principles governing the right to self-defense, namely to await the occurrence or the threat of an imminent «armed attack» to use defensive force. Nations threatened by such weapons may not have the time to appeal to the United Nations and may be compelled to use pre-emptive force to prevent an opponent from gaining an overwhelming military advantage."*[8]

Recognizing the relevance of the argument, we cannot fail to recognize the disturbance it brought to the established traditional system and the challenges

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Acheson resolution, „Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures") extended to the General Assembly the power to take the necessary measures to maintain or restore peace, appropriate to put an end to the exercise of the right to self-defence. Although controversial – despite it itself declaring that it does not intend to exceed or limit the exclusive powers of the Security Council – the abstract potential of the Resolution has been limited as, in fact, it is not thinkable that the General Assembly would act against the unanimous will of the permanent members of that Council. And, if there is this desire, the Security Council is not paralyzed, and the condition of legitimate action of the General Assembly is not met. It will always be necessary, therefore, for the General Assembly to count on the unequivocal support of one or some (not all) of the permanent members of the Security Council to overcome the paralysis of this body, but the direct confrontation between these members that this support may imply will not favor the use of the Assembly's powers provided for in the aforementioned Resolution 377A(V), of November 3, 1950. On this subject e,g. Christian Tomuschat, *Uniting for Peace General Assembly resolution 377 A(V)*: New York, 3 November 1950 in https://legal.un.org/avl/ha/ufp/ufp.html.

[8] Onder Bakircioglu, *The Right to Self-Defense in National and International Law: The Role of Imminence Requirement,* „Indiana International & Comparative Law Review", vol 19: 1(2009), p. 2.

it raised to international law.

In effect, the problem ceased to be one of establishing a mere fact: knowing whether an aggression existed or was about to occur, but became a problem of assessing a justified fear that legitimized a defensive intervention of a pre-emptive nature.

The invasion of Iraq in 2003 highlighted the risks of such pre-emptive action. The belief that Saddam Hussein's regime possessed chemical and mass destruction weapons and the fear that it could use them aggressively and illicitly, without time for reaction by the intended targets, justified and was used as the basis for the invasion. The truth, however, is that it turned out that such weapons did not exist (or, at least, no traces of their existence were ever found), ultimately revealing the argument of the just fear legitimizing the invasion to be unfounded.

The question thus became, from the point of view of international law, in the judgment of the reasonableness of the error regarding the presuppositions of resorting to a comprehensive self-defence or its intentional and illicit invocation, precisely, to carry out an action prohibited by article 2 of the UN Charter and not covered by article 51.

The invasion of Ukraine by Russia (special military operation, in Russian terminology), which began on February 24, 2022, would also correspond, from its perspective, to a lawful exercise of self-defence, in light of article 51 of the UN Charter, as, on the one hand, the Ukrainian populations of Russian ethnic origin in the separatist regions of Donetsk and Luhansk were supposedly being victims of genocidal actions by Ukrainian nazi forces (current aggression); and, on the other hand, the expansion of NATO into Eastern Europe, with the possibility of Ukraine joining that military alliance and the fear of the installation of missile bases on the Russian border, capable of reaching Moscow in a few minutes, imposed and legitimized a pre-emptive action, designed to ward off this threat[9].

Obviously, having overcome the strict concept of current aggression, as a mere matter of fact – objective observation of an aggression that has already begun or is about to begin, without the possibility of adopting the necessary measures to prevent it and restore peace, by the Council of Security – the issue of an international legitimate defence is no longer a problem that can be resolved by a definitive abstract answer.

As international legitimate defence can now substantiate a pre-emptive act of war, aimed at avoiding and removing a non-current and merely potential threat, only on a case-by-case basis – and *a posteriori*, reconstructing the judgment of prognosis in which it was based the fear invoked by the author of the

[9] Cf. Francisco Pereira Coutinho, *A Agressão Russa à Ucrânia e o Direito Internacional: Uma Tragédia em Quatro Atos*, e-Publica, vol. 10, n.º 1 (Maio 2023) in: https://novaresearch.unl.pt/ files/ 60627975/75330_a_agressao_russa_a_ucrania_e_o_direito_internacional_uma_tragedia_em_quatro_atos.pdf.

supposed act of self-defence – it will be possible to assess the good foundations of such act or the justified error regarding its assumptions and determine its respective legality or illegality, in the light of international law.

The case of a current, manifest and patent aggression is different, in which the right to exercise self-defence will not be questionable.

This is what happened with the military measures taken by Israel on the Gaza Strip, following the attacks on its territory, carried out by Hamas, on October 7, 2023.

Now (at least until the Security Council adopts, in accordance with article 51 of the UN Charter, the necessary measures to re-establish peace) it is no longer a question of verifying the existence of the prerequisites for the exercise of international self-defence. These assumptions are met. Now the aim is to verify and control the limits of this exercise and to ensure that the response action carried out corresponds to an effective act of self-defence, intended to ward off a current aggression, and does not represent an excess of self-defence, illicit by definition, because it is not limited to removing and preventing that aggression, but materializes in a new act of war in violation of article 2 of the UN Charter.

At this point, the guiding principles of international law are well defined.

Firstly, the principle of proportionality. The action taken must include the measures necessary to put an end to the aggression. It is not possible to adopt these measures, guaranteeing their absolutely harmless nature for the population outside the conflict. A self-defence military response may include unwanted collateral damage, without this, in itself, implying an automatic violation of international law. What cannot be done is to transform these unwanted collateral damages into directly targeted acts, with indifference to their possible occurrence, disproportionately assuming them as natural effects of the actions taken, without taking care to avoid them, as they can be avoided, without compromising the legitimate objectives of defence against the aggression suffered.

Collective punishment is also prohibited by international law. And this may be the most delicate point in Israel's legitimately defensive intervention against Hamas.

Israel was the target of aggression by Hamas and this movement has weapons and means in the Gaza Strip that allow it to continue and reiterate this aggression. This fact authorizes acts of self-defence by the State of Israel. However, lawful acts of self-defence do not include the identification of all Palestinians in the Gaza Strip with members of Hamas, in order to consider appropriate, the indiscriminate elimination of any Palestinian – including old people, women and non-combatant children – as if this were the enemy who committed the act of aggression that establishes the right to self-defence. Such a fact, which would translate into indiscriminate collective punishment against a people, regardless of their guilt, would represent a war crime, sanctioned as such by the international legal order.

The use of prisoners as civilian shields, of which members of Hamas have

been accused, will also constitute a war crime.

5. Conclusion

Returning to the beginning, by way of conclusion, the circumstance that such international crimes, if they happen to occur, may go unpunished, may accentuate and highlight the limits of international law which, we repeat, like any branch of law, knows limits.

This does not mean, however, that international law is not true law or that it is – as several authors question – losing its character as such.

The growing affirmation of international law in the scope of legal studies, the creation and activity of the International Criminal Court, the reflection on its principles and the respective proclamation as current law have progressively guaranteed the institutionalization of international law. The perpetrators of war crimes or crimes against humanity know today that their future will not be peaceful[10]. They may, perhaps, escape international sanctions targeting them, but they also know that, to do so, they will have to remain, forever, fugitives from justice. It is no coincidence that, more and more, military forces include in their ranks jurists specialized in international law who advise them to remain within the framework of proportionality, and non-collective punishment in order to ensure that war does not go beyond the boundaries of International Humanitarian Law.

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The Operator in the Environmental Liability. The European Union and Portuguese Regime

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Abstract

The concept of operator and occupational activity are essential for determining the application of the environmental liability regime. The aim of this paper is to critically analyse those concepts as they are used in European Union legislation (Directive 2004/35/EC) and in Portuguese legislation (Decree-Law 147/2008) as well as the subjective scope of application of these diplomas, referring to options made by the legal systems of other Member States and the case law of the CJEU. In the end, we present some considerations that should enable greater and better application of the legal regime of environmental liability.

Keywords: *environmental liability; operator; occupational activity; Directive 2004/35/EC; Decree-Law no. 147/2008.*

JEL Classification: K32, K33

1. Introduction

To determine whether we fall within the scope of environmental liability, there are at least two elements to take into account: firstly, the type and object of the environmental damage, which must be significant and measurable, as provided for in the directive 2004/35/EC of the European Parliament and of the Council of 21 April on environmental liability with regard to the prevention and remedying of environmental damage (ELD), and secondly, the type of activity carried out by the operator that gave rise to it and is therefore liable. In fact, the fundamental principle of the environmental liability regime is that the operator whose activity has caused environmental damage, or the imminent threat thereof, should be held financially liable, as dictated by the polluter- pays principle.

One of the essential requirements for the application of this regime is the identification of an operator who can be qualified as responsible and who, consequently, will have to assume the costs inherent in repairing the damage caused or the preventive measures necessary to avoid it from occurring. As determining who is responsible is an essential requirement, it is also one of the main problems in applying the regime, given the specific characteristics of environmental damage. Environmental damage can originate or result from the combination of several causes or the combination of behaviours, whether concerted or not, which

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lead to its occurrence or worsening. In these situations, as well as obviously making it more difficult to determine who is or are responsible, it will also be more difficult to establish the causal link between them and the damage.

The concepts of operator and "occupational activity" are therefore decisive for the application of the environmental liability regime and are not sufficiently debated in doctrinal approaches to environmental liability.

The aim of this paper is to analyse those concepts and how they are used in European and Portuguese legislation, comparing the two regimes and ending with some considerations that would allow for a better application of the environmental liability regime.

2. The concept of occupational activity

Following on from what had already been done in the Lugano Convention and the White Paper on Environmental Liability[2], the ELD opted to impute liability to the operator, a concept it defined in a broad way so as to include as many subjects as possible.

To this extent, the person who caused the imminent threat or the actual damage through the exercise of their occupational activity will be responsible for preventing and repairing the environmental damage, and for bearing the respective costs.

The concept of occupational activity is also broadly defined in the Decree-Law no. 147/2008 of 29 July establishing the legal framework for liability for environmental damage (ELDL) as "any activity carried out within the scope of an economic activity, regardless of whether it is public or private, profitable or not"[3].

The ELD defines occupational activity as "any activity carried out within the scope of an economic activity, a business or a company, regardless of whether it is private or public, profitable or not"[4]. This concept includes not only private entities, but also the Administration and other public bodies, and the ownership of the activity is irrelevant. And so it is, since liability falls on the operator, which will normally be the company or public entity that owns the installation that caused the damage.[5] This prioritises the notion of control over the occupational activity, or its technical and economic functioning, over the right of property over the installations, an idea that had already been put on record in both the Green Paper[6] and the Commission's White Paper on liability for environmental damage.[7]

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[2] COM(2000) 66 final.
[3] Article 2(1) of the ELDL.
[4] Article 2(7) of the ELD
[5] Moreno Molina, A. M., *Derecho Comunitário del Medio Ambiente. Marco institucional, regulación sectorial y aplicación en España*, Madrid, Marcial Pons, 2006, p. 300.
[6] COM(93) 47 final.
[7] Point 2.1.3 of the Green Paper and point 4.4 of the White Paper.

In United States (US), CERCLA[8], for example, allows environmental liability to be imputed to the purchaser of a contaminated property or to the financial institution that financed the agent who caused the damage. The European Union has moved away from the choices made by the US system, which are considered unfair and to violate the polluter-pays principle, the foundation of all European environmental policy.[9]

All industrial and commercial activities are covered by this concept, including professional hunting and fishing, even though they are not one of the activities included in Annex III of the ELD and are therefore excluded from strict liability. It should be remembered that Annex III of the ELD lists the activities that are considered to have the greatest environmental impact, and which are therefore subject to liability for the environmental damage they cause or the imminent threat thereof, regardless of the operator's fault. For all the others, there will only be faulty environmental liability.

As is also clear from the definition of activity, it can be profit-making, as in the case of commercial companies, or non-profit making, when carried out, for example, by the public administration for the benefit of the community, as in the case of waste management[10]. It is true that non-profit public activities carried out by legal persons governed by public law do not, as a rule, have links with the market or a competitive nature. This has already led the Court of Justice of the European Union (CJEU) to criticise the wording of Article 2(7) of the ELD for using terms such as "business" and "undertaking". The CJEU considered that giving a purely economic meaning to these terms would have the effect of excluding almost all public activities carried out in the interests of the community, and therefore not for profit, from the concept of occupational activity, depriving the ELD of part of its useful effect by removing from its scope a whole series of activities that have a real risk for human health and the environment.[11]

In short, for the purposes of applying environmental liability rules, what matters is that the activity in question is the cause of the environmental damage or the imminent threat of such damage[12]. However, this is a strictly professional concept and was not conceived for personal or domestic behaviour by private individuals, even if it can cause environmental damage, such as the practice of

[8] The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known by Superfund, is a United States federal environmental remediation program designed to investigate and cleanup sites contaminated with hazardous substances.

[9] See Gomis Catalá, L., «La ley de responsabilidad medioambiental en el marco del derecho de la Unión Europea», em Lozano Cutanda, B. (Coord.), *Comentários a la ley de responsabilidad medioambiental. Ley 26/2007, de 23 de Octubre*, Navarra, Thomson Civitas, 2008, p. 122, note 180.

[10] Garcia Amez cites public waste or water treatment services as an example. Cfr. *Responsabilidad por Daños al Medio Ambiente, Navarra*, Thomson Reuters Aranzadi, 2015, p. 172.

[11] Judgment of the CJEU of 9 July 2020 in Case C-297/19, paragraphs 72-75.

[12] Articles 2(1), 12 and 13 of the ELDL, and Article 3(1)(a) and (b) of the ELD. In the same vein, see Garcia Rocasalva, C., La responsabilidade medioambiental, Barcelona, Atelier Libros Jurídicos, 2018, p. 165.

sports.[13]

However, the fact that non-occupational activities were left out was controversial. This is understandable, since thinking that occupational activities are the most dangerous in the first place may not be true. In fact, non-occupational activities can also use dangerous substances or products that can cause environmental damage. It is true that, in terms of prevention, occupational activities will be better equipped, and will be able to react more effectively in the event of a threat of damage or its occurrence. However, it seems to us that here there has been some discrimination (perhaps in exaggerated terms) against the professional sector, probably because it is thought to have a more robust financial capacity.[14]

That said, the concept of activity is closely linked to that of operator. Entities that do not fall within the definition of Article 11(1) of the ELDL, namely those that do not carry out an occupational activity, will therefore not fall within the scope of this legal regime.

3. Operator in environmental responsibility. The notion of operator

As a result, the operator will be, under the terms of the ELDL, "any natural or legal person, public or private, who operates, controls, registers or notifies an activity whose environmental liability is subject to this Decree-Law, when they exercise or can exercise decisive powers over the technical and economic functioning of that activity, including the holder of a permit or authorisation for that purpose."[15]

The concept of operator therefore covers any natural or legal person, whether public or private, who operates or controls the occupational activity causing the environmental damage or threat of damage or has decisive powers over its technical and economic functioning.

The Portuguese legislator slightly altered the text of the ELD's definition of operator, which better emphasised the idea of execution, control or decisive power over the operation of the occupational activity.[16] And it is this idea - of

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[13] Novelli, M., "Consideraciones acerca de la Directiva 2004/35/CE sobre responsabilidade medioambiental", *Revista Jurídica Cognitio Iuris*, Ano II, n.º 4, Abril 2012, p. 42; and Garcia Amez, *op. cit.*, 2015, pp. 171 and 172.

[14] Bergkamp, L. and Bergeijk, A., "Scope of the ELD Regime", in Bergkamp, L. and Goldsmith, B. (Eds.), *The EU Environmental Liability Directive. A Commentary*, Oxford, Oxford University Press, 2013, pp. 51-79.

[15]Article 11(1)(l) of the ELDL. See Casado, L., "Atribuicion de responsabilidades (arts. 9 a 16)", in Lozano Cutanda, B. (Coord.) *Comentarios a la ley de responsabilidad medioambiental. Ley 26/2007, de 23 de Octubre*, Navarra, Thomson Civitas, 2008, p. 236; and Esteve Pardo, J., *La Ley de Responsabilidad Medioambiental Comentário Sistemático*, Madrid, Marcial Pons, 2008, p. 40.

[16] The ELD, in Article 2 (Definitions), paragraph 6, defines "operator" as any natural or legal person, public or private, who operates or controls the occupational activity, or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity, or the person who registering or notifying such an activity.

execution, control or decision-making power over the functioning of an activity - that is decisive, in our view, in the concept of operator.

However, at no point are we given definitions of either "control of an activity" or "decision-making power over its technical and economic functioning". However, the Lugano Convention already considered that control of an activity should cover the legal, financial and economic circumstances that make it possible to determine the person responsible for the activity. Pedraza Laynez argues that, for the purpose of determining the person who controls an activity, rather than consulting the structure of the company itself, the permits and authorisations granted, as well as communications and other administrative records, should be analysed, since the persons identified there will be the ones who actually control the activity. With regard to the technical and economic functioning, the managers and administrators will be involved, as they are responsible for the damage caused, as long as it is possible to establish a causal link between their actions and the liability of the legal person. With this definition, the intention was to include in the concept of operator also those who only contribute in economic terms to the activity, but who are nevertheless fully aware of the destination of their investment.[17]

The wording used by the ELDL is so broad that it has led to it being strongly criticised, as it is felt that the determination of several operators, as a result of its application, could make it difficult to determine the contribution of each of them to the final result.[18] The very notion of activity, which was analysed in the previous point and to which we refer, is worth delimiting here, since it is not the operator of any activity that is liable for environmental liability, but only the operator of occupational or professional activities. Likewise, the definition of operator, given its scope, ends up clashing with other situations covered by the ELDL, such as the liability of parent companies or companies in a group or control relationship, which only occurs, under the legal terms, when there is abusive use of legal personality or fraud against the law.

Firstly, we would like to point out that we don't think it is reasonable to fall under this broad definition of operator for those who registered or notified the activity, if they do not exercise or no longer exercise any kind of control over it. In the same way, we believe that banking and financial entities should be excluded if they do not have operational control over the activity but contribute economically to its realisation, for example by granting credit. This is in line with the

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[17] Pedraza Laynez, *La responsabilidad por daños medioambientales*, Thomson Reuters Aranzadi, 2016, pp. 33-36.

[18] See Casado, L., *op. cit*., 2008, pp. 232-234; Yanguas Montero, G. and Blázquez Alonso, N., "La nueva responsabilidad medioambiental", *Revista de Derecho urbanístico y médio ambiente*, no. 245, 2008, p. 110; Miguel Perales, C. "Aspectos básicos de la nueva regulácion sobre responsabilidad medioambiental", *Revista de Responsabilidad Civil, Circulación y Seguro*, no. 1, 2008, pp. 6 ff. Also, Yanguas Montero, G., "Luces y sombras de la Directiva 2004/35/CE sobre responsabilidad medioambiental", *Icade. Revista cuatrimestral de las Facultades de Derecho y Ciencias Económicas y Empresariales*, no. 67, 2006, p. 41.

provisions of the Commission's White Paper on Environmental Liability. If this were not understood in this way, the consequence would be that those entities could refuse to support the functioning of the business sector, which would be catastrophic for many companies.

As can be seen from the above, the Public Administration will also be considered an operator for the purposes of applying the ELDL, provided that a public service gives rise to an imminent threat of damage or actual environmental damage, through the exercise of an activity (for example, water supply, wastewater treatment or waste collection and management), or through the decisive powers it holds over its technical and economic functioning. The Spanish Environmental Liability Law has excluded from the concept of operator, from the outset, the contracting bodies of public administrations which, in the exercise of the prerogatives granted by public procurement legislation, have concluded administrative or other contracts with any type of contractor, on whom the condition of operator will effectively fall. In any case, these bodies will always have to cooperate with the competent authority. And this will be the case unless the threat or damage to the environment results exclusively from the fulfilment of an order given by the competent public authority regarding the execution of a contract.[19]

As far as legal persons are concerned, while it is true that ultimately there will always have to be human behaviour behind the action or omission that causes the environmental damage, the truth is that whenever it has been adopted on their behalf and in their name, as a result of a decision taken by their legal representatives, even if they were at fault, they will be held liable and will therefore have to bear the resulting costs. This is also clear from the Civil Code, which, in Article 165, states that legal persons are civilly liable for the acts or omissions of their representatives, agents or mandataries, under the same terms as the principal is liable for the harmful act of his commissioner.[20] In the same vein, Article 6 (5) of the Commercial Companies Code (CSC) establishes that the company is civilly liable for the acts or omissions of those who legally represent it, under the same terms as principals are liable for the acts or omissions of commissioners. In addition, in all circumstances, the operator, whether a natural or legal person, will always be objectively liable, as a principal, for the harmful acts carried out by their commissioners, under the terms of the Article 500 of the Civil Code. With regard to legal persons governed by public law or legal persons governed by private law exercising public powers, the Law no. 67/2007, of 31 December (Non-Contractual Civil Liability Regime for the State and Public Legal Persons) stipulates that they will be jointly and severally liable with the employee, agent or holder of the body when there is willful misconduct or serious fault on their part and will be exclusively liable in all other cases.[21]

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[19]Articles 2(10), 7(4) and 14(1)(b). Casado, L., *op. cit.*, 2008, pp. 237-338.

[20] Article 998 of the Portuguese Civil Code.

[21] Articles 7(1) and (3) and (8). Antunes Varela, J. M., *Das Obrigações em Geral*, Vol. I,10.ª Ed., Coimbra, Almedina, 2000, pp. 648-649; Menezes Leitão, L. M., *Direito das Obrigações*, Vol. I,

3.1. Liability of directors, managers or administrators of legal persons

The current trend in the law is for directors and managers to be liable for all adversities that occur in the company, for the acts they carry out or order them to carry out, but also for failing to take the necessary measures to prevent unlawful acts from being carried out, namely by failing to promote adequate training for employees, or to monitor and control the activity that is carried out.

Under this assumption, if the damaging activity is attributable to a legal person, the respective directors, managers or administrators will be jointly and severally liable[22].

This is a logical solution, since it is the directors, managers or administrators who, in principle, exercise decisive power over the technical and economic functioning of the activity that caused the damage. In fact, what the legislator wants to ensure, above all, is compensation for the damage, or rather the adoption of preventive or remedial measures for the environmental damage, and the person(s) with the greatest economic capacity can be sued. For this reason, this should include not only those who exercise these functions in law, *i.e.* those who have been appointed to the position in compliance with all the legal requirements, but also those who only exercise them in *fact*. In other words, all those who, in practice, despite not being legally invested with such functions, adopt decisions and determine behaviours that may harm the good they are intended to protect, in this case the environment. As Marques Da Silva states, the existence of *de facto* directors "should not be used as a pretext for the company to escape its responsibility, which would be easy to do by granting management powers to people who are not members of the respective body or by delegating or being given a special task by the members of the company's bodies", adding that "the *de facto* bodies or *de facto* members of the company's bodies are representatives of the company, receiving a tacit mandate from those in authority. In this situation, the *de facto* leader behaves as if he had the power to represent the company, to act on its behalf, and this representation is known and desired by the company's bodies."[23]

Administrators, directors and managers, in addition to being jointly and severally liable with the legal person in terms of environmental liability, are also liable in the same way in terms of environmental administrative offences. Thus, under the terms of Article 11 of the Law no. 50/2006, of 29 August (Framework Law on Environmental Offences), the heads of the highest body of public legal

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15.ª Ed., Coimbra, Almedina, 2018, pp. 371-373. See also Alenza Garcia, J. F., "La imputación de responsabilidad patrimonial a la administración por daños ambientales", in Pigrau Solé, A. (Coord.), *Nuevas perspectivas de la responsabilidad por daños al medio ambiente*, Ministerio de Medio Ambiente, 2006, pp. 74 and following.

[22]Article 3(1) of the ELDL. The Spanish legislator, instead of establishing joint and several liability for managers and administrators in fact or in law, opted for subsidiary liability.

[23] Cfr. Marques Da Silva, G., *Responsabilidade Penal das Sociedades e dos seus Administradores e Representantes*, Editorial Verbo, 2009, p. 244.

persons, partners, directors or managers are jointly and severally liable with the legal person for payment of the penalty. The Law no. 50/2006 also provides for the subsidiary liability of these and other persons who exercise, even if only *de facto,* management functions in legal persons, even if irregularly constituted, and any other similar entities, for penalties imposed for offences committed during the period in which they held office or before, when the assets of the company or legal person have become insufficient to pay them due to their fault. Likewise, they are subsidiarily liable for penalties due for previous offences when the final decision imposing the penalties was notified during the period in which they held office, and they are responsible for non-payment. They will also be liable, in the alternative, for the procedural costs arising from the proceedings.

In addition to the function of guaranteeing compensation for the damage mentioned above, the preventive function that the liability of directors, managers or administrators fulfils in cases of environmental damage or imminent threat thereof is also evident. In fact, knowing in advance that they may be jointly and severally liable with the legal person in which they hold office, they are likely to see this as an incentive to opt for solutions that respect good environmental practice when making decisions on the technical and economic functioning of the activity.

3.2. The plurality of responsible parties

Directive 2004/35/EC only established minimum levels of protection, allowing Member States to maintain or adopt more stringent provisions in their legislation, *i.e.* more protective of the environment. And this is exactly what happened in the case of "*custos em caso de responsabilidade partilhada*", "*imputación de los costes en caso de vários responsables*", "*affectation des coûts en cas de causalité multiple*", and "cost allocation in cases of multiple party causation", according to the Portuguese, Spanish, French and English versions, respectively, of Article 9 of the ELD. With regard to costs resulting from a plurality of responsible parties or causes, the ELD left the question open by providing for shared responsibility under the terms established for this purpose by national legislation.

This is why there are three types of legal solutions: conjunction, solidarity or proportionality. Most states have opted for either the conjunction system, in which each operator is only liable for the part of the damage that is attributable to them, or the solidarity system, in which any party can be liable for the whole of the damage and then have a right of recourse against the others responsible for the part that would fall to them. Only a minority - France, Finland, Denmark, Slovakia and Slovenia - opted for the proportionality rule, depending on the likelihood of each of the operators involved causing the damage.

According to the ELDL, if the liability falls on several people, the obligation to compensate is joint and several, even if one or more of those responsible

acted with fault, without prejudice to the subsequent right of recourse that may arise. The option of solidarity is also the most coherent and best fits in with the traditional civil liability system.[24] In fact, this is the rule that applies to non-contractual civil liability, whether it is strict or faulty.

This system is, in fact, even in economic terms, the most advantageous for the administration since it only has to find and sue one of the responsible parties in order to claim all the costs in question. From the point of view of the defendant, on the other hand, the solidarity system is more penalising, not only because it will make him bear all the costs, but also because, in terms of the right of recourse, he runs the risk of eventually not being able to be compensated by the other parties for the part that would correspond to them. It was precisely with this in mind that Article 4(2) of the ELDL was drafted, stipulating that if it is not possible to individualise the degree of participation of each of the parties responsible, they are presumed to be liable in equal shares.[25] The scope of this solution is understandable, because if it is impossible to determine, in concrete terms, the participation of each of the operators responsible in determining the total damage, the direct attribution of liability would be practically impossible[26]. More, if several people are subjectively held liable, the right of recourse between them is exercised to the extent of their respective faults and the consequences arising from them, establishing a presumption of equal fault on the part of those responsible[27]. In other words, it will always be up to each of the responsible operators to rebut the presumption, either before the competent authority that imposes the prevention or remedial measures on them, or in their internal relationship with the other co-responsible parties, so that they can receive from each the amount relating to their respective contribution to the imminent threat of risk or its actual occurrence.

Gómez Pomar and Gili Saldaña explain in this regard that the additional

[24]Although the rule in plurality of liabilities in civil law is that of conjunction. Under the terms of Article 513 of the Portuguese Civil Code, there is only solidarity when provided for by law or by agreement of the parties.

[25] Articles 4 and 20(2) of the ELDL. The Green Paper and the ELD proposal already pointed in this direction.

[26] In US law there is the Market Shared Liability mechanism, which, in situations of massive pollution, where it seems impossible to determine the contribution of each individual operator to the environmental damage produced, establishes the market share that each one holds as the criterion for sharing responsibility. This is a mechanism that requires rigorous consideration of all the specific circumstances, otherwise it could lead to unfair and discriminatory situations. For this reason, it has not been widely accepted in doctrine and case law. The basic idea behind Market Shared Liability is like CO emission rights2. For a more detailed analysis of Market Shared Liability, see Ruda González, A., "La responsabilidad por cuota de mercado a juicio", *InDret*, 3/2003, pp. 4-6; and Shultz, D. M., "Market Share Liability under DES Cases: The Unwarrented Erosion of Causation in Fact", *DePaul Law Review*, Vol. 40, Issue 3, Spring 1991, pp. 784-789. See also, on the subject, Hastings, J. S. and Williams, M. A., "Market Share Liability: Lessons from New Hampshire v. Exxon Mobil", *Journal of Environmental Law & Litigation*, Vol. 34, 2019, pp. 220-252.

[27]Article 4(3) of the ELDL.

damage caused by a source of contamination, which is added to previous contamination caused by other operators, increases as successive discharges or waste increase. Consequently, the sum of individual responsibilities usually ends up being less than the total damage caused. For this reason, it makes no sense to split them up and, furthermore, by not doing so, it prevents society from being burdened by the possible insolvency of any of those responsible, because environmental damage is common damage, of a public nature. For this reason, they also believe that solidarity is the most appropriate regime in the case of a plurality of responsible parties.[28]

In short, if it is established that there are several operators responsible for the same contaminating event, or even for different events, and all of them have contributed to the same environmental damage[29], any one of them can be called upon to adopt all the measures that the competent authorities deem appropriate to repair the damage in question, or to also bear the full costs of those measures, and then have a right of recourse against the others.

It seems to us that this should also include cases of pollution, particularly gradual pollution, in which the permit or authorisation to operate a certain activity has been transferred in any way. If environmental damage occurs, that is attributable to either the previous or the current holder of the permit or authorisation, they should be jointly and severally liable. On this basis, the competent authority may impose on any of them the measures that appear to be required, in accordance with the environmental liability regime, and the actual contribution of each must be ascertained at a later stage and in the context of internal relations, for the purposes of exercising the right of recourse. Ultimately, joint and several liability will be the appropriate mechanism in these cases to avoid possible fraudulent transfers with the sole aim of evading payment of the costs of environmental remediation measures. Although the ELDL does not expressly refer to this type of situation, the Spanish legislator, on the other hand, has taken care to safeguard it, even going further by providing for the subsidiary liability of those who succeed the responsible operator in the ownership or exercise of the activity that caused the damage.[30]

3.3. Groups of companies

Groups of companies are organisations of several legally independent companies under a single economic management. It follows, then, that a group of

[28] Gómez Pomar, F. and Gili Saldaña, M. A., «Responsabilidad por daños al medio ambiente y por contaminación de suelos: problemas de relación», *INDRET-Revista para el análisis del derecho*, 337, 2/2006, pp. 2-31.

[29] Perestrelo De Oliveira speaks in this regard of cumulative, additive and alternative causality. See Perestrelo De Oliveira, A., *Causalidade e Imputação na Responsabilidade Civil Ambiental*, Coimbra, Almedina, 2007, pp. 12 and following.

[30] Spanish EL Law, Article 13(2)(c).

companies is made up of several legally independent companies, both in terms of assets and organisation, but in which one of them assumes the role of parent or dominant company and, in this capacity, directly or indirectly controls the other companies, which will be the subsidiary, controlled or satellite companies.[31] This is becoming increasingly common, whether in the context of commercial expansion or internationalisation, where companies can establish relationships with each other in operations of various kinds.

The CSC refers to these companies as related companies. These include companies in a control relationship and in a group relationship, expressly referred to in Article 3(2) of the ELDL. The group relationship can be total - initial[32] or supervening -, result from a joint group contract[33] or a subordination contract[34]. In turn, according to article 486(1) of the CSC, two companies are considered to be in a controlling relationship when one of them, the dominant one, can exercise, directly or through companies or persons that fulfil the requirements of article 483(2) of the same code[35], a dominant influence over the other, said to be dependent.

The question that arises here is whether the liability of subsidiary or controlled companies is transferred to the parent or controlling company. Well, under the terms of the ELDL, if a commercial company is in a group or control relationship, liability will only extend to the parent or dominant company when there is abusive use of legal personality or fraud. The aim is to avoid situations in which there appear to be separate companies, but in practice this does not correspond to reality. In this type of situation, the disregard of the legal personality or the withdrawal of the legal personality of subsidiary or controlled companies can be used, which is an exceptional mechanism with subsidiary application, recognised by Portuguese jurisprudence and doctrine, but not yet enshrined in law.[36] In fact, it

[31] Paz-Arez, C., "Uniones de empresas y grupos de sociedades", *Revista Jurídica Universidad Autónoma de Madrid*, no. 1, July 2016, p. 229. Available at https://revistas.uam.es/revistajuridica/article/view/5575/5991.

[32] A company may set up a public limited company whose shares it initially holds alone (Article 488(1) of the CSC).

[33] Two or more companies that are not dependent on each other or on other companies may form a group of companies by means of a contract in which they agree to submit to a unitary and common management (article 492(1) of the CSC).

[34] A company may, by contract, subordinate the management of its own business to the management of another company, whether or not it is its parent company (article 493(1) of the CSC).

[35] Article 483 (Companies in a simple participation relationship), paragraph 2: "For the purposes of the amount referred to in the previous paragraph, the ownership of quotas or shares by a company shall be treated in the same way as the ownership of quotas or shares by another company which is directly or indirectly dependent on it or is in a group relationship with it, and of shares held by a person on behalf of any of these companies."

[36] Article 3(2) of the ELDL. The institute of disregarding legal personality or lifting the corporate veil, although not regulated in Portuguese law, has been considered and accepted by Portuguese doctrine and jurisprudence, by reference to the figures of abuse of law, fraud and the principle of good faith. It is exceptional and subsidiary in nature and can only be used when there is no other legal basis for invalidating the behaviour of the partner or company being attacked. The disregard

is regrettable that the Portuguese legislator did not take the opportunity to refer to it expressly. The fact is that this figure makes it possible to impute responsibility to whoever is actually behind the apparently responsible operator (subsidiary or controlled company) and make them bear the costs of repairing the environmental damage.

Thus, when there is no abuse of legal personality or fraud, the rule will be that if the damage is caused by the subsidiary or controlled company, only it will be liable, unless the damage is the result of compliance with an order from someone else, in which case the person responsible will be the one who gave it, i.e. the one who exercises or can exercise decisive powers over the technical and economic functioning of the activity in question, as is clear from the concept of operator adopted by the ELDL.[37] It also follows that the parent or dominant company could be held liable if it is deemed to "control" the activity of the subsidiary or controlled company, which could be counterproductive. In fact, such a determination could eventually lead to the break-up of the control relationship simply as a means of avoiding environmental liability. This would be regrettable if the parent or dominant company had, for example, environmental management programmes with supervision, audits and compliance inspections that could be extended to subsidiaries or controlled companies and, as a result, stopped doing so as a way of avoiding future liability, bearing in mind that controlled companies may not have the structure or financial capacity to hold such programmes on their own. This solution would enhance the environmental impact of their activities.[38]

A different issue will be the so-called "corporate engineering", a concern that was already evident in the Commission's White Paper on environmental liability. What is at issue is the express creation by large companies of satellite companies or the delegation of their activities considered dangerous to smaller companies, in order to avoid liability, particularly strict liability. In fact, it is these smaller companies, usually without the financial capacity to have adequate risk management systems, that are often responsible for a higher percentage of the

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of corporate personality has emerged to systematise and explain various concrete solutions, established to resolve real problems posed by corporate personality, namely when it is used in an illicit or abusive way, to harm third parties, or when it is used contrary to general rules or principles. Traditionally, the disregard of the legal person is constructed as a technique that allows the (personal or social) assets of the partners to be removed from the benefit of limited liability, and it is in this area that the institute of the disregard of personality acquires its full dimension. See, Ribeiro, M. F., "Da Pertinência do Recurso à Desconsideração da Personalidade Jurídica para Tutela dos Credores Sociais, Anotação do Acórdão do Tribunal da Relação de Lisboa, de 29.04.2008", *Cadernos de Direito Privado*, no. 27, and, by the same author, *A Tutela dos Credores da Sociedade por Quotas e a "Desconsideração da Personalidade Jurídica"*, Teses, Coimbra, Almedina, 2009, pp. 55 and following; Serra, C., "Desdramatizando o Afastamento da Personalidade Jurídica (e da Autonomia Patrimonial)", *Julgar*, no. 9, 2009, pp. 112 and following; Antunes, F. M., "O Abuso da Personalidade Jurídica Colectiva no Direito das Sociedades Comerciais", in AAVV, Novas Tendências da Responsabilidade Civil, Coimbra, Almedina, 2007, pp. 7 and following.

[37] Article 11(1)(l) of the ELDL.

[38] Bergkamp, L. and Bergeijk, A., *op. cit.*, 2013, p. 53.

damage caused than their size would suggest. On the other hand, when they do cause damage, their financial capacity is also usually insufficient to cover the cost of repairing it. It also seems to us that, in these cases, recourse to the disregard of legal personality, or the removal of the satellite company's legal personality, could be considered as a solution to force the real party responsible to assume the costs of environmental liability. The issue, which is already difficult given the exceptional and subsidiary nature of the disregard of a company's legal personality, will be aggravated in those situations where the company behind the satellite company has its headquarters in a different state or even outside the European Union. In this case, environmental liability would be practically impossible to apply. This is, in fact, an issue that the Commission should look into, in order to propose legislation that provides a solution to this type of deviation from the environmental liability regime and allows the polluter-pays principle to be effectively applied.

4. The causal link in environmental liability

For the environmental liability regime to be applicable, in addition to identifying the responsible operator(s), the damage to natural resources and their services - which must be concrete, quantifiable and obviously significant - it must be possible to establish, as a necessary requirement, a causal link between these and the operator(s), and it is up to the competent authorities, regardless of the type of pollution in question, and in accordance with the respective legal system, to determine this[39].

As with many other issues, the ELD also left it up to the Member States to decide how to determine the causal link.

As a prerequisite for environmental liability, the causal link is set out in Article 2 of the ELDL, which proclaims that the legal regime will only apply to "environmental damage, as well as imminent threats of such damage, *caused as a* result of any activity carried out within the scope of an economic activity".

Unlikely what has happened in other countries, the Portuguese legislator chose not to establish any presumption in this matter, as it was considered that this would be contrary to the Constitution of the Republic, particularly with regard to the right to the presumption of innocence and the right to effective judicial protection. As such, the ELDL established, in a comprehensive manner and taking into account the specific characteristics of environmental damage, the criteria for determining the causal link, based on the principle that its proof must be based on "a criterion of verisimilitude and probability that the harmful event was capable of producing the damage that occurred".[40] The idea of probability has already

[39]Articles 4(5) and 11(2) of the ELD, in conjunction with Recital 13 thereof. In this regard, see the Order of the CJEU of 9 March 2010 in Joined Cases C-478/08 and C-479/08 Buzzi Unicem and Others, point 39, and the judgment in case C-378/08, point 53.

[40] Article 5 of the ELDL.

been used by the legislator, with regard to the causal link in civil liability, to determine the obligation to compensate[41]. In terms of environmental liability, in order to consider it credible and probable that the harmful event is capable of producing the damage, it is necessary to take into account the circumstances of the specific case, namely the place (proximity, or not, of the place where the damage occurs) and the time (when the damage occurred), the degree of risk and danger, the normality of the harmful action, the possibility of scientific proof of the causal path and the fulfilment, or not, of the duties of protection to which the operator is obliged. It should be noted that forensic and scientific evidence can be extremely useful in this area. In fact, along with traditional methods such as reconstructing the history of the production process, more recent techniques already make it possible to associate polluting substances with production processes and their respective operators, according to the specific contaminants that predominate in them, as if they were fingerprints.

Based on the likelihood and probability of the harmful event's ability to cause the significant adverse effect - environmental damage - the idea of risk, which the legislator included in the provision, also seems important in determining the causal link. In this regard, Perestrelo De Oliveira argues, as a way of detecting the causal link, that "the environmental damage is attributable to the agent when he concretely *creates or increases an* impermissible *risk* (in the case of faulty liability), or a risk provided for in the legal norm (in the case of strict liability), and *the harmful result is the materialisation or materialisation of that risk*".[42] The author argues that it is practically impossible to find "scientific clarity in this area, due to the way pollutants act, the frequent hypotheses of multi-causality (sometimes concurring natural and human causes) and also due to the prolongation in time and space of the polluting process, generating 'delayed damage' and 'damage at a distance', which further emphasise the announced difficulties in detecting the causal link between fact and damage".

It is true that the idea of risk and its management is at the root of the legal system of environmental liability and is predominant in it, which is evident from the fact that strict liability for damage or imminent threat of damage has been established as the rule. However, we don't think that the idea of risk alone is enough to determine the causal link. The truth is that the legislator also did not dispense with the posthumous prognosis judgement, which must be made by the average person,[43] to assess the adequacy or abstract aptitude of the harmful event

[41] Article 563 of the Civil Code (Causal link).

[42] Perestrelo De Oliveira, A., *op. cit.*, pp. 126-129.

[43] The average person is the standard or normal person (moderately attentive, careful, diligent) that laws have in mind when they establish the rights and duties of people in society, and who is required to be diligent as a bonus pater familias. This is determined on the basis of the circle of relationships in which he finds himself, in other words, his social, cultural and professional environment. We refer here to the traditional criterion of culpa in abstracto, set out in Article 487(2) of the Civil Code, according to which, if the injured party is unaware, in principle, of the offender, guilt must be assessed according to the diligence common to the generality of people and not according to the actual

to produce the damage, obviously not neglecting the circumstances of the specific case, the scientific evidence produced, the normality of the agent's action and their respect for the duties of protection. Now, knowing that liability for risk does not require fault or illegality, various elements have been included for the purposes of determining the causal link in order to facilitate this task, which is already difficult due to the special configuration of environmental damage. In fact, as has been repeatedly stated, the nature of environmental damage, due to its characteristics and the complexity or even uncertainty of its effects, often makes it difficult, and sometimes impossible, to determine the causal link between the activity carried out by the operator and the effects that may result from it. And this is for a variety of reasons: there may be multiple sources of pollution, making it impossible to determine their contribution; there may be cumulative effects, situations of multi-causality[44], with the intervention of factors of a human or natural nature (such as atmospheric conditions, the strength and direction of the wind, the occurrence of rain and floods or differences in the flow of watercourses, etc.); the damage may extend over time and space; finally, it may be difficult to obtain scientific evidence. Added to all this is the possible lack of co-operation from the operator(s), who may refuse to co-operate and provide the relevant elements and information to the competent public authorities.

In view of this difficulty, the ELD excluded from its scope cases of diffuse pollution, where it is difficult to link the environmental damage to the activity of certain individual operators. This is the case unless it is possible to establish a causal link between the damage and the harmful activities[45]. It should be noted, however, that the CJEU has already ruled that even in the case of diffuse pollution, the competent authority of a Member State may presume the existence of a causal link between the operators and the pollution found, due to the proximity of their installations to the polluted area. But to do so, it must have plausible evidence on which to base its presumption, such as the proximity of the operator's installation to the pollution found and the correspondence between the polluting substances found and the substances used by that operator in the course of its activities, which presumption the operator or operators in question will obviously be able to rebut.[46]

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diligence of the perpetrator of the unlawful act (culpa in concreto). This abstract standard requires an analysis of the circumstances of the specific case, *i.e.* the circumstances of the situation and the type of activity in question. Cfr. Menezes Leitão, L. M., *op. cit.*, 2018, pp. 322 and following; Antunes Varela, J. M., *op. cit.*, pp. 574 and following; Almeida Costa, M. J., *Direito das Obrigações*, 12.ª Ed., Coimbra, Almedina, 2009, pp. 583 and following.

[44] The term "multicausality" is used as an equivalent to concurrence of causes. See Perestrelo De Oliveira, A., *op. cit.* See also Sá, S., *Responsabilidade Ambiental. Operadores Públicos e Privados*, Porto, Vida Económica, 2011, p. 100.

[45] Article 5 of the ELDL and Article 4(5) of the ELD.

[46] See the aforementioned case C-378/08. See, in this regard, Pernas Garcia, J. J., "La exigência de comprobación del nexo causal y la determinación de medidas de reparación en el marco del régimen de responsabilidad de la Directiva 2004/35 - Comentário a dos sentencias recientes del TJCE",

We have already seen that this is not the case in Portugal. Article 6 of the ELDL states that the obligations arising from environmental liability only apply to damage caused by pollution of a diffuse nature when it is possible to establish a causal link between the damage and the harmful activities. This means that the national legislator chose not to establish any presumption of causality. On the contrary, the rule is that the competent authority is obliged to determine which operator caused the damage. This obligation applies to both strict liability, in the case of activities considered potentially dangerous in Annex III of the ELDL, and faulty liability, in the case of other activities.[47] Thus, in the context of strict liability, the competent authority, in order to be able to order the adoption of preventive or remedial measures, has the obligation to determine, in accordance with national rules on evidence, which operator caused the damage or the imminent threat of damage.

To this end, the origin of the pollution must first be investigated, but there is a certain margin of discretion as to the procedures and means to be used or the duration of the investigation. What it cannot do, under any circumstances, is apply remedial or preventive measures without having first demonstrated the existence of a causal link between the damage, or its imminent threat, and the activity of the operator that caused it. It should be remembered that when the activity in question is one of those considered potentially dangerous, the competent authority is not obliged to prove fault on the part of the operator or operators concerned, unlike in the case of faulty liability.

However, as has already been mentioned regarding the plurality of responsible parties, the ELDL allows that if the responsibility falls on several people and it is not possible to individualise the degree of participation of each of them, their responsibility should be assumed in equal shares. This solution does not seem reasonable or in line with the polluter-pays principle. Let's see. Let's suppose that several industries, of varying sizes, contribute to polluting the waters of a river, as is so often the case. If this is proven and it is not possible to accurately determine the contribution of each of them, the solution of sharing the costs of decontamination and repairing the damage equally will not be appropriate. Menezes Leitão considers this solution to be unfair, and in these cases, he advocates applying liability according to the market share of each of the operators responsible[48], a solution which, in our opinion, will also do the most justice to the polluter-pays principle.

The CJEU emphasised in the *Fipa G. e o*. ruling[49] that the importance of establishing the causal link also derives from the provisions on the consequences

Actualidad Jurídica Ambiental, no. 4 (Abril), 2010ª, pp. 1-23.

[47] Article 4(5) of the Directive. See C-378/08, points 63 to 65.

[48] Menezes Leitão, L., «A responsabilidade civil por danos causados ao ambiente», in *Estudos dedicados ao Professor Doutor Luís Alberto Carvalho Fernandes*, Vol. II, Universidade Católica Portuguesa, 2011, p. 400.

[49] Case-law of the CJEU of 4 March 2015 C-534/13, paragraph 57.

to be drawn from the operator's failure to contribute to the pollution or risk of pollution. In fact, if the operator manages to prove that the damage was caused by a third party and occurred despite the preventive measures it adopted, or that it resulted from an order or instruction from a public authority, it will no longer be obliged to pay the costs of the preventive or remedial measures and, if it has already done so, it will be entitled to reimbursement of the amount it has spent. The ELDL expressly provides for this type of solution, guaranteeing the operator's right of recourse against the third party or the administrative body, depending on the case[50]. On this specific point, the ELD went further than in other situations by expressly stating that Member States must adopt the appropriate measures to allow the operator to recover the costs incurred[51]. It is true that Article 20 of the ELDL enshrines the operator's external right of recourse against the third party responsible or the administrative body that gave the order or instruction. But if the third party doesn't have sufficient financial capacity, or if it becomes insolvent, it will be difficult for the operator to be reimbursed for the costs incurred, which, depending on the amount spent and the operator's own financial capacity, may dictate whether it is viable or not. And in any case, the polluter-pays principle would never be complied with, since it would not be the person who actually polluted who would bear the burden.

The case law of the CJEU in this area has evolved towards strengthening environmental protection. In its ruling in case C-129/16, already mentioned with regard to the concept of operator, the Court declared compatible with the ELD legislation that holds jointly and severally liable not only those who operate the land on which illegal contamination has occurred, but also the owners of that land, with no need to verify the existence of a causal link between their behaviour and the contamination. They may even be penalised by the competent national authority, "provided that such legislation is capable of contributing to the realisation of the objective of enhanced protection and that the arrangements for determining the amount of the penalty do not go beyond what is necessary to achieve that objective". In our opinion, this position is justified by the fact that the owners of the properties benefit economically from their transfer and, on the other hand, because, ultimately, it is their responsibility to properly safeguard and prevent the occurrence of possible environmental damage resulting from polluting activities that they allow to be carried out on the properties they own. The Court of Justice has also stressed that the owners of buildings transferred for the purpose of operating a given economic activity have an obligation to monitor the behaviour of those who operate them and, where appropriate, to report their behaviour to the competent national authority[52].

If no causal link is established between the damage caused and the activity of a particular operator, the ELD will not apply and the situation will fall under

[50] Article 20(1) and (2) of the ELDL.
[51] Article 8(1)(2) of the ELD.
[52] Case-law C-129/16, point 54.

national law, respecting "the provisions of the Treaty and without prejudice to the application of other acts of secondary legislation"[53].

We have to recognise that establishing the causal link is the "Achilles heel" of environmental liability. In fact, it is one of the main obstacles to the application of this legal regime, given the difficulties it raises. For this reason, it seems to us that, at least within the scope of the activities in Annex III of the ELDL, it should have gone further and established a presumption of causality, as has been done in other Member States. In fact, due essentially to the particular way in which environmental damage can reveal itself in space and time, not forgetting other factors already mentioned, determining the causal link may be impossible or ultimately pointless, even using the various elements listed by the legislator.

In short, the legal rules in force in our legal system in relation to causation make the environmental liability regime practically inoperable, even in terms of strict liability. The truth is that, as it falls to the competent authority, under the legal terms, to prove the causal link, which the courts require to be unequivocal, it is practically impossible. This situation results from the very nature of the environment, its specific characteristics, the possibility of its effects being dispersed in space and sometimes in time, its complexity and uncertainty, as well as often the need for co-operation from the operator in order to obtain the relevant information and elements. For this reason, we believe that, like the solution advocated by Spain, Portugal should establish a presumption of causation in environmental liability. It should be noted that this would not mean an *a priori* condemnation of the operator deemed responsible. The only consequence would be a reversal of the burden of proof, which would shift from the competent authority to the operator, who would have to prove that his activity did not result in the pollution that caused the damage or the imminent threat of it. We are not unaware that, in many cases, this proof is difficult, but in keeping with the polluter-pays principle, it seems fair to us that the burden of proof should fall on the operator, who is, after all, the one who benefits and profits from the polluting activity they carry out.

5. Final remarks

The fact that non-occupational activities have been left out of the concept of "occupational activity" seems to us to reflect some discrimination against the professional sector, probably because it is thought to have a stronger financial capacity and because it is thought that, from the outset, occupational activities will be the most dangerous, which may not be true. In fact, in non-occupational activities, dangerous substances or products can be used in the same way as in other activities, which can cause environmental damage. What matters for the purposes of applying environmental liability rules is that the activity in question

[53] C-534/13, point 46, and C-378/08, point 126.

is the cause of the environmental damage or the imminent threat of such damage. However, this is a strictly professional concept and was not conceived for the personal or domestic behaviour of private individuals.

In our view, it is the idea of execution, control or decision-making power over the operation of a given activity that is decisive in the concept of "operator". It doesn't seem reasonable to us that, among those who fall within this broad definition, responsibility should be imputed to those who registered or notified the activity, if they do not exercise, or have ceased to exercise, any kind of dominion or control over it. In the same way, we believe that banking and financial entities should be excluded if they do not have operational control over the activity but contribute economically to its realisation, for example by granting credit.

If the damaging activity is attributable to a legal person, the respective directors, managers or administrators, not only those designated as such, but also those who exercise the respective functions only *de facto*, *i.e.* all those who, in practice, despite not being legally invested with such functions, adopt decisions and determine behaviour that may harm the good that is intended to be protected, in this case the environment, should be jointly and severally liable. This is a logical solution, since it is the directors, managers or administrators who, in principle, exercise decisive power over the technical and economic operation of the activity that caused the damage.

According to the ELDL, if there are several operators responsible for the same contaminating event, or even for different events, and all of them have contributed to the same environmental damage, any one of them can be called upon to adopt all the measures that the competent authorities deem appropriate to repair the damage in question, or to bear the costs inherent in those measures in full, and then have a right of recourse against the others. It seems to us that this should also include cases of pollution, particularly gradual pollution, in which a permit or authorisation to operate a particular activity has been transferred in any way. In the event of environmental damage attributable to either the previous or the current holder of the permit or authorisation, they must be jointly and severally liable. Ultimately, joint and several liability will be the appropriate mechanism in these cases to avoid possible fraudulent transfers with the sole aim of evading payment of the costs of environmental remediation measures, although the ELDL does not expressly refer to this type of situation.

In groups of companies, we defend the application of the system of disregarding the legal personality or lifting the legal personality of subsidiary or controlled companies, for the purposes of transferring the liability of subsidiary or controlled companies to the parent or dominant company. Under the terms of the ELDL, where a commercial company is involved in a group or control relationship, liability will only extend to the parent company or dominant company when there is abusive use of legal personality or fraud.

We are also in favour of using the disregard of the legal personality of the satellite company in cases of "corporate engineering" as a solution to force the

real party responsible to assume the costs of environmental liability.

In Portugal, it would be advisable to establish a presumption of causality in environmental liability, even if it is rebuttable, at least within the scope of the activities listed in Annex III of the ELDL. Considering the polluter-pays principle, it seems fair to us that the difficulty of proving the causal link between the polluting activity and the environmental damage should fall on the operator, who is, after all, the one who benefits from the polluting activity carried out.

We cannot fail to recognise that establishing the causal link is one of the main obstacles to the application of the environmental liability regime, given the difficulties it raises. The truth is that proof of the causal link, which the courts require to be unequivocal, falls to the competent authority, under the terms of the law, and is very difficult to obtain. This is due to the very nature of the environment, its specific characteristics, the possibility of its effects spreading over space and sometimes time, its complexity and uncertainty, and often the need for co-operation from the operator to obtain the relevant information and elements.

We also don't think it's reasonable, or in line with the polluter-pays principle, for the ELDL to admit that if the responsibility falls on several people and it's not possible to individualise the degree of participation of each of them, their responsibility should be assumed in equal shares. It seems more appropriate in these cases to apply liability according to the market share of each of the operators responsible.

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The Protection of Ukrainian Migrants in Portugal, from the International and European Regime to Portuguese Law[1]

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Abstract

The war in Ukraine caused a major humanitarian crisis, leading thousands of civilians to leave the country and seek refuge in third countries. In this perspective, rather than being migrants, the people fleeing this war shall be considered as refugees in accordance with the 1951 Refugee Convention and its 1967 Protocol. Council Directive 2001/55, of July 2001 created a special procedure to deal with a "mass influx" of people in need of international protection. Due to the war in Ukraine, this Directive was triggered by EU Council Decision 2022/382 of 4 March 2022. In this sequence, in response to the need for assistance to and protection of refugees, Portugal presented a plan for their reception, having established a legal regime delimiting criteria for their protection, as well as the scope of temporary protection to be granted under the decree-law 24-B/2022. We propose to analyse the protection regime granted, considering the criteria defined by Public International Law and European Union Law, to assess the convenience, opportunity and sufficiency of the measures implemented before proposing solutions consistent with the humanitarian crisis-situation experienced in Europe, and the reception and integration of these migrants.

Keywords: *refugees; asylum; temporary protection; Ukraine; EU; Portugal.*

JEL Classification*:* K33, K38

1. Introduction

The history of international refugee protection has been told alongside the history of armed conflicts and state sovereignty. Forced migration (or not) is a challenge to the control of the territorial borders of states which is one of the most important dimensions of a state's sovereignty. It is these borders that define which state will be responsible for processing a migrant´s application under international law, but also under European Union law and in particular the Dublin Regulation[4].

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[4] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013

The previous refugee crisis in Europe, which occurred in the years 2015 and 2016 because of the worsening situation in Syria, laid bare a crisis of the global refugee protection regime that was, at that moment, reflected on a European scale. The existing rules and the political will of states did not prove sufficient to address the consequences of the mass flows of migrants to Europe in that period. The problems of the regime revealed themselves at various levels. Not only in terms of the violation of the human rights of the thousands of people awaiting a decision on their asylum application in Greece. But also, regarding the excessive burden placed on some states, such as Greece and Italy, which were responsible for processing most asylum applications, because of the rules imposed by the Dublin Regulation. A crisis of solidarity between European states was thus diagnosed in the face of the exponential increase in migratory flows to their territories.

The fragility of the situation meant that a different approach had to be adopted. With more than 7.4 million refugees from Ukraine across Europe[5] provoked by the invasion[6] of the Russian Federation into Ukrainian territory seven months ago, the European Union was required to respond promptly and effectively.

The Temporary Protection Directive[7] was thus activated, with the existence of a massive influx of people being recognised for the first time and the need for an additional temporary protection regime[8] to guarantee the reception and integration of the thousands of fleeing people who quickly reached the European Union's borders. This unprecedented solution put into operation a 20-year-old instrument that had never been used before. In this sequence, in response to the

establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[5] United Nations High Commissioner for Refugees (UNHCR), 'Refugees from Ukraine eager to work but need sustained support to ensure inclusion' (UNHCR, 23 Sepetember 2022) https://www.unhcr.org/news/briefing/2022/9/632d6fba4/unhcr-survey-refugees-ukraine-eager-work-need-sustained-support-ensure.html accessed 07 Oct 2022.

[6] As Motte-Baumvol et al. observes "while the UN General Assembly Resolution of 1 March 2022 (A/RES/ES-11/1) uses the concept of 'aggression' to characterize the conflict between Ukraine and Russia, the EU Council Decision of 4 March 2022 uses the concept of 'invasion' (Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1). J. Motte-Baumvol, T. C. F. Mont'Alverne, and G. B. Guimarães. *Extending Social Protection for Migrants under de European Union's Temporary Protection Directive: Lessons from de War in Ukraine.* (2022) Oxford U Comparative L Forum 1 at ouc-lf.law.ox.ac.uk.

[7] Council Directive 2001/55/EC of July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[8] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection.

need for assistance to and protection of refugees, Portugal presented a plan for their reception, having established a legal regime delimiting criteria for their protection, as well as the scope of temporary protection to be granted under the decree-law 24-B/2022. Rather than subjugate its action to the mere application of the international and European regimes, to which it would be bound, Portugal sought to create conditions for the rapid reception and inclusion of these people, who, being able to benefit from access to the right of asylum and refuge under general law, benefited from a specific regime of faster and less bureaucratic admission.

Before turning to Portuguese law, it is important to set out the framework of the rights of these individuals and the duties of States under international law and European Union law.

2. The refugee definition

The 1951 Geneva Convention, as amended by the 1967 Additional Protocol of New York, is the main normative instrument for refugee protection. Before these instruments, the efforts of the League of Nations should be highlighted, with the appointment of the First High Commissioner for Refugees (1920-1930) or the creation of the Nansen passport, an identification document for stateless or undocumented refugees.[9] But it is during the period of World War II, in which thousands of people sought refuge with states other than their own, that the current regime was triggered.[10] It is within this framework that the newly created United Nations Organisation was compelled to create a procedure for the reception of refugees and stateless persons, adopting the 1951 Convention and creating the United Nations High Commissioner for Refugees, which replaced the Nansen International Committee for Refugees.

The 1951 Refugee Convention defines "refugee" as any person who: "has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization" or "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The protection of the Convention was originally limited to people who had been displaced by events within Europe before 1 January 1951. It was the

[9] B. Meneses Queiroz, *A proteção internacional dos refugiados*, eds. J. A. Azeredo Lopes, Regimes Jurídicos Internacionais, Universidade Católica Editora, 2020, I, pp. 285-290.
[10] *Ibidem.*

aftermath of the World War II, and it was necessary to create mechanisms to respond to the many millions of people displaced across this region. The 1967 Protocol removed those temporal and geographical restrictions. It is possible to be a part of the Convention and not to be a part of the Protocol, but not the opposite. This means that a state can be bound to apply the Convention's provisions but not the Protocol provisions[11], or even be a part of but have a reservation[12]. But most of the states' who are part of both are bound to recognize the ones who fulfil the following criteria: (i) fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; (ii) being outside the country of his nationality or, if stateless, being outside the country of his former habitual residence; (iii) unable or unwilling to have the protection of their country of nationality or to return to the country of his former habitual residence.

Notwithstanding the need to fulfil these conditions, it should be noted that "refugee" status is of a declaratory nature.[13] In other words, if the conditions of the Convention are met, the person falls into the category of refugee, *ipso iure*. A different situation is the recognition as a refugee by the national authorities of the country of destination. The refugee needs formal recognition of this status to effectively benefit from international protection, but - in fact - he or she is already a refugee before this formal recognition takes place, by virtue of the fulfilment of the requirements arising from the 1951 Convention.[14]

Despite its seeming simplicity, this status is not easy to ascertain. The first thing to mention here is the need for the refugee to be outside his or her country of origin or domicile. In other words, the person may flee or be forced to

[11] For instance, Madagascar and Saint Kitts and Nevis are a part of the Convention but have not adopted the Protocol.

[12] Turkey is a signatory of but made a declaration according to which the Protocol's scope of protection applies only to persons who have become refugees as a result of events occurring in Europe.

[13] B. Meneses Queiroz, *op. cit.*, p. 287.

[14] This has been the position adopted by most of the doctrine, and by the United Nations High Commission for Refugees which, for example, in its Note on the determination of refugee status in international instruments, of 24 August 1977, 5, states that it may be concluded from an analysis of the international instruments, which relate to refugee status, that this status can only be of a declarative nature. A person is a refugee within the scope of an international instrument if he or she meets the conditions set out therein for the concept of refugee, whether he or she has been formally recognized as a refugee. Recital 21 of the Qualification Directive (Directive 2011/95 of the European Parliament and of the Council of 13 December 2011) also follows the same line. See UN High Commissioner for Refugees (UNHCR), *Note on Determination of Refugee Status under International Instruments*, 24 August 1977, EC/SCP/5, available at: https://www.refworld.org/ docid/3ae68cc04.html [accessed 1 October 2022]. See also Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

flee without crossing international borders. In this case, we will not have a refugee but an internally displaced person.[15] But if a person crosses the border of his or her country, he or she may become a refugee. So, a refugee is, first, someone who is outside his or her country of origin.

A difficult requirement to measure is the one defined as "persecution". What does it mean to be "persecuted"? What are acts of persecution? Doctrine and case law have developed several approaches to this definition,[16] but there is now a consensus on the definition which connects the concept of "persecution" to a serious, severe and discriminatory violation of the human rights of those who seek assistance outside their country of origin, although it is up to the States to decide whether a particular behaviour or set of behaviours meets the criteria for persecution.[17] Article 33 of the Convention completes this interpretation by considering as persecutory behaviours those that seriously threaten life, liberty or freedom by reason of race, religion, nationality, membership of a particular social group or political opinions. Regarding the European law, and without prejudice to the following analysis, it should be noted that these concepts have been clarified by secondary legislation and by the jurisprudence of the European Court of Justice.[18]

In addition to the persecution, there is the fear of persecution based on both subjective and objective elements. On the one hand, the asylum seeker must be in a situation where the prospect of return to the country of origin causes him extreme distress (subjective component) and, on the other hand, this subjective perception must match the available information on the de facto situation in the country of origin (objective component). Finally, and about the reasons for persecution, the Convention identifies five reasons: a) race, b) religion, c) nationality, d) membership of a particular social group and e) political opinions. Without prejudice to the updating that the 21st century human rights approach has brought to a 70-year-old Convention, one cannot fail to recognize the necessary cause-

[15] 1998 UN Guiding Principles on Internal Displacement, point 2, states that internally displaced persons are persons, or groups of persons, who have been forced or obliged to flee or abandon their homes or their usual places of residence, particularly as a result of, or in order to avoid, the effects of armed conflict, situations of mass violence, violations of human rights or human or natural disasters, and who have not crossed an internationally recognized border of a State. Available at https://www.unhcr.org/43ce1cff2.pdf [accessed 1 October 2022].

[16] J. C. Hathaway; M. Foster. *The Law of Refugee Status*, Cambridge University Press, Cambridge, 2014, pp. 186-190.

[17] B. Meneses Queiroz, *ob.cit*, p. 290.

[18] The Qualification Directive developed and specified what was already within the scope of the concept of "persecution" in the 1951 Geneva Convention, giving as examples of acts of "persecution" (Articles 6 and 9), acts of physical or mental violence, including acts of sexual violence, legal, administrative, police and/or judicial measures when they are discriminatory or applied in a discriminatory manner. The CJEU, on the other hand, when analysing the importance of religious freedom as a fundamental right, considered that it does not have an absolute nature and therefore an act of persecution cannot be drawn from an interference in its exercise. ECJ, C-71/11, C-99/11, 2012.

effect between reasons and risk of persecution, which limit it to these five cases: a) race, b) religion, c) nationality, d) membership of a particular social group, and e) political opinions.[19]

A different situation is the possible recognition of a right of asylum when these requirements are met. First, it is important to distinguish between asylum seekers and refugees. Asylum seekers are nationals of a third State (or stateless persons) who have lodged an application for international protection and in relation to which no final decision has yet been taken. In other words, asylum seeker is the legal status that is granted to a person for the purpose of the procedure until a decision is made. This decision may be positive, in which case the asylum seeker will enjoy refugee status, or negative, in which case the migrant's stay in the territory becomes irregular. For international law, asylum is therefore a broader concept than refuge.[20]

From the European perspective, international protection includes not only refugee status, but also subsidiary protection, which is an alternative status attributable to individuals who do not fall under the concept of refugee and therefore deserve guarantees of international protection. Take the example of an armed conflict such as the one currently taking place in Ukraine, which, by causing a massive displacement of people, will exempt the individual verification of the ownership of refugee status for the purposes of granting protection and the right to asylum. We would have prima facie refugees. But in cases where there is no persecution according to the criteria foreseen in the Geneva Convention, even if there is an armed conflict, at first sight it would not be possible to attribute the respective refugee status, unless we consider the concept of subsidiary protection.[21]

Finally, and back to Article 33 of the 1951 Convention, it is important to underline that Contracting States are prohibited from expelling a refugee "in any manner whatsoever" when his life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, and any forcible act of removal that may place someone at risk of persecution falling within the scope of the article. Still, it is clarified, this is not an absolute duty. Refugees can be expelled for reasons of public order or national security, under the terms of articles 33, paragraph 2 and 42 of the Convention. Still, this principle has been embodied in several international instruments that strengthen

[19] B. Meneses Queiroz, *op. cit.* p. 294-300.

[20] *Ibidem*, p. 301 ss.

[21] This notion is laid down in Directive 2004/83/EC, whose main objective is to protect persons who are at risk of serious harm to their fundamental rights. In the case of victims of armed conflicts, the Court of Justice has held that for the purposes of subsidiary protection it is not subject to the condition that the applicant proves that he is specifically targeted by reason of factors particular to his personal circumstances. Court of Justice of the EU, Case C - 465/07, 17 February 2009. See in this regards A. S. Pinto de Oliveira. "Introdução ao Direito de Asilo". *Direito de Asilo, Proteção Subsidiária e Apátrida*, Coleção de Formação Contínua do CEJ, 2021, p. 55

it.[22]

Portugal, as all the EU members[23], is a signatory of both 1951 Convention and 1967 Protocol. Upon its accession to the 1967 Protocol, Portugal declared that (1) "the Protocol will be applied without any geographical limitation", and (2) "in all cases in which the Protocol confers upon the refugees the most favoured person status granted to nationals of a foreign country, this clause will not be interpreted in such a way as to mean the status granted by Portugal to the nationals of Brazil or the nationals of other countries with whom Portugal may establish commonwealth type relations". In any case, even if Portugal had established a geographical limitation, Ukraine is a European country, and as such, most of the Ukrainians would be entitled to [guaranteed] refugee status.

This protection may**,** however**,** be withdrawn in cases where (i) there are serious reasons for considering that the person has committed a crime against peace, a war crime, or a crime against humanity or (ii) the person is a danger to the security of the host State or (iii) a danger to his or her community.

3. The EU regime

The Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 is the key instrument for granting refugee status. In addition to this directive, the "ordinary European asylum system"[24] is governed by two other directives and a regulation: Directive 2013/32/EU, which establishes common procedures for granting and withdrawing international protection status, and Directive 2013/33/EU, which establishes minimum standards for the reception of applicants for international protection. Regulation (EU) 604/2013, commonly known as the "Dublin Regulation", is also in force.

However, it should be noted that this instrument was not activated in the case of reception of Ukrainians fleeing Ukraine because of the armed conflict launched by the Russian Federation. The European Union has chosen to trigger another Directive: Council Directive 2001/55/EC of 20 July 2001. The question is whether a Ukrainian national who arrives on the territory of the first safe State of the European Union after leaving his country of origin where he fears persecution, and who is legally a refugee, should not automatically be entitled to asylum?

The right to asylum is a fundamental right, granted on an individual basis,

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[22] The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights or the European Convention on Human Rights.

[23] In relation to the other EU countries, objections were raised by Belgium, France, Germany, Italy, Luxembourg and the Netherlands and, with respect to territorial application, the Netherlands excluded the territory of Suriname.

[24] A. R. Gil, "Proteção Internacional Revisitada: As soluções da União Europeia para a proteção dos deslocados da Guerra da Ucrânia num contexto de "múltiplas crises de refugiados", in *Relações Internacionais,* September 2022, 75, pp. 045-062. https://doi.org/10.23906/ri2022.75a04.

depending on the specific circumstances of the case.[25] The right to grant asylum is, in essence, a right of the State and so cannot be regarded as a subjective right of the applicant. To grant this right, in addition to the prerequisites already analysed in the above paragraph, it would be necessary that an application for asylum be submitted for any right to remain in the Member States to exist. In this respect Article 2(i) of the Qualification Directive and Article 9 of the Asylum Procedures Directive are very clear: 1. Applicants shall be allowed to remain in the Member State, for the purpose of the procedure only, until such time as the determining authority has taken a decision (...). This right to remain shall not entitle the asylum seeker to a residence permit. International protection from the European perspective includes refugee status and subsidiary protection and brings the concepts of asylum and refuge closer together, thus expanding the alternatives for protection. Even in this broadening, for the right to asylum to be granted, it would always be necessary to submit an asylum application. Article 18 of the Charter of Fundamental Rights of the European Union enshrines the guarantee of the right of asylum, within the framework of the 1951 Geneva Convention and the 1967 Protocol and the Treaty on European Union and the Treaty on the Functioning of the European Union. In this regard, the doctrine has considered that Member States have the obligation to grant asylum or international protection to migrants who fall within the concept of beneficiaries of these statutes and, therefore, "the secondary legislation already enshrines a right to asylum as a right to obtain asylum".[26] Therefore, if the requirements for the granting of asylum are met, whether or not the applicant is a refugee, he/she will have the right to this concession. The right to asylum is associated to the right to non-refoulement, and the Zambrano case is illustrative. It should be remembered that we were dealing with a Colombian migrant who had requested asylum in Belgium and that although this was not granted and the Belgian authorities had issued an order for his return, this was accompanied by a non-refoulement clause, preventing this return, because Zambrano and his family were at risk of torture, inhuman or degrading treatment.[27] The interesting thing about this case is that the interpretation of the Court of Justice went even further by considering that in cases where an individual deserves international protection because he/she runs the risk of having his/her human rights violated if returned to his/her country of origin, but is not granted refugee status or any other type of protection, once the asylum request is rejected and a non-return order is issued, whether by respect for the principle of non-refoulement or for another reason, he/she will be a non-returnable migrant.

[25] Pinto de Oliveira refers that the material substance of this right is not a particular sphere of life, but a personal history, a history that, by being marked by the persecution of which one is a victim, places a foreigner or a stateless person in a situation of lack of protection. A. S. Pinto de Oiliveira. *The right to asylum in the Portuguese Constitution*, Coimbra, 2009, p. 341.

[26] A. R. Gil, "A Garantia de um Procedimento justo no Direito Europeu de Asilo", in *O contencioso do direito de asilo e proteção subsidiária*, Centro de Estudos Judiciários, 2016, p. 169.

[27] ECJ, C-34/09, Judgment of the Court (Grand Chamber) of 8 March 2011. Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm). *European Court Reports 2011 I-0117.*

Once the framework of European Union law has been established, we will move on to the legislation that has been triggered by the flow of refugees from the Ukrainian conflict. First, we should mention the Council Implementing Decision (EU) 2022/382. This is in line with Council Directive 2001/55/EC of 20 July 2001.

Council Directive 2001/55/EC of 20 July 2001 introduced a set of minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.[28] This directive was adopted as a response to the refugee's crisis resulting from conflicts following the break-up of former Yugoslavia in the 1999s.[29]

Although the Directive dates to the beginning of this century, it was only in March this year that the existence of a "mass influx of displaced persons into the Union" was recognized for the first time. The aim is to relieve the burden on national asylum systems and allow displaced persons to enjoy harmonised rights throughout the European Union, which include residence, access to the labour market and housing, social assistance, and children's access to education. It is an emergency mechanism that can be triggered in the event of a mass influx of displaced persons and aims to grant immediate and collective protection to displaced persons who are unable to return to their country of origin.[30]

The Council Implementing Decision (EU) 2022/382 defines the categories of displaced persons entitled to temporary protection or appropriate protection under international law. Temporary protection will thus be granted to (i) Ukrainian nationals residing in Ukraine who are displaced on or after 24 February 2022 and (ii) third-country nationals who are displaced on or after the same date and enjoy refugee status or equivalent protection in Ukraine, as well as (iii) members of their families.[31] This protection also extends to stateless persons and third-country nationals who were legally residing in Ukraine before 24 February 2022. It is enough for the person concerned to prove that they belong to one of these categories of people in order to benefit from this status. This is because the protection granted is collective, i.e. granted to members of a group, individual analysis is dispensed with. Under the terms of both the directive and the Council decision that activated it, states can only deny temporary protection to one of these people if it is concluded that they would pose a threat to public order and national security. This is the usual exception clause in all EU immigration and asylum policy instruments, so that the fulfilment of European and international asylum

[28] Official Journal of the European Communities, L 212, 07 August 2001, p. 12.
[29] For further developments see J. Motte-Baumvol, T. C. F. Mont'Alverne, and G. B. Guimarães. *op. cit.*
[30] See https://www.consilium.europa.eu/pt/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/, consulted on 1.10.2023.
[31] See recital 11.

obligations does not jeopardise the cohesion and survival of the host state. [32]

Following their admission to EU territory, Ukrainian nationals will be able to move freely for a period of 90 days, choosing the Member State in which they wish to enjoy the rights attached to time-limited protection and joining their family and friends, provided that once this period has expired and once a residence permit has been issued under Directive 2001/55/EC, they can only enjoy this permit **i**n the territory of the state which issued it.[33] Member States have the ability to apply another regime for Ukrainian nationals provided it is more favourable. Otherwise, their legislation will have to be adapted to ensure the additional rights provided for in the Directive.[34] The Directive also provides for the possibility of this protection being withdrawn in cases provided for under international law. The temporary protection will last for a minimum of one year (until 4 March 2023) and a maximum of three years, depending on developments in Ukraine.[35]

The Commission also issued a communication on receiving and addressing the needs of people fleeing the war in Ukraine, expressing its intention to offer safe refuge in Europe to Ukrainians, with access to accommodation and housing, health care and employment. There is particular concern for Ukrainian children, especially unaccompanied children, who are vulnerable to the risk of trafficking or abduction, and the need to give all children access to education.[36] Not being considered a binding instrument, this communication determines the lines of action that are being developed according to a 10-point plan: i) creating an EU platform for registration; ii) coordinating [an] approach[es] for transport and information hubs; iii) mapping reception capacity and accommodation; iv) developing national contingency plans; v) providing uniform guidance for the reception and support of children; vi) creating and implementing a common anti-trafficking plan; vii) reinforcing solidarity with Moldova; viii) reinforcing the framework for international cooperation on safe destinations; ix) addressing internal security implications of the war in Ukraine and; x) securing adequate resources and funding.[37] In this framework, legal acts like Regulation 2022/1280 have emerged,[38] which are binding on all Member States and their nationals, and directly applicable from the date of their publication in the Official Journal of the European Union.

[32] A. R. Gil, (2022) op. cit.
[33] See recital 16.
[34] See recital 17.
[35] See recital 17.
[36] COM (2022) 0131.Welcoming those fleeing war in Ukraine: Readying Europe to meet the needs.
[37] See https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en, consulted on 1.10.2023.
[38] Regulation (EU) 2022/1280 of the European Parliament and of the Council of 18 July 2022 establishing specific and temporary measures, in view of the invasion of Ukraine by Russia, concerning driving documents issued by Ukraine in accordance with its legislation.

Despite the advantages of speed, urgency and legal certainty that the temporary protection regime confers on displaced people, it does not grant them refugee status or subsidiary protection. Unlike these two, beneficiaries of temporary protection only have a residence permit valid for one year, extendable for a further six months and possibly another six months. In exceptional cases, there may be a further exceptional extension of one year. During each of these periods, the situation in the country of origin is re-examined to see if the conditions that led to the granting of protection still apply. This situation has been maintained thanks to extensions, and is currently in force until 4 March 2025.[39] Temporary protection status is therefore more precarious than the status granted under Directive 2011/95.[40]

4. The Portuguese law

The procedure for the concession of asylum and subsidiary protection and the attribution of refugee status in the Portuguese legal system is regulated by Law 27/2008 of 30 June, which transposes Directive 2004/83/EC of 29 April and Directive 2005/85/EC of 1 December.

To the Right to asylum corresponds a duty of the State to grant it, provided the respective legal prerequisites are met. Law 27/2008 enshrines some rights that poor asylum seekers enjoy, namely social support for food and housing (articles 51 and 56), medical assistance and medication (article 52), access to education for minors (article 53) and the right to work. By granting the right of asylum, the respective applicant acquires refugee status, and is therefore entitled to rights, freedoms and guarantees and social rights.

Portuguese asylum law[41] brings the concept of refugee, as provided for in the Constitution of the Portuguese Republic, into line with that contained in the 1954 Convention. In short, to acquire refugee status according to the Portuguese asylum law, some requirements shall be fulfilled. First, one must be a national of a Foreign State; secondly, there should be a well-founded fear of persecution[42], and it must be determined whether the fear shown is legitimate in the light of the circumstances existing in the country of nationality. In relation to the material scope of persecution and in the absence of a provision defining the concept, we must use Directive 2011/95/EU, of 13 December, in Article 9(1)(a), which defines persecution as an act of persecution within the meaning of Article

[39] See https://www.consilium.europa.eu/en/press/press-releases/2023/09/28/ukrainian-refugees-eu-member-states-agree-to-extend-temporary-protection/, consulted on 1.10.2023.
[40] A. R. Gil, (2022) *op. cit.*
[41] Law 27/2008, of 30 June, as amended by Law 26/2014, of 5 May.
[42] Thus, in the terms of the Judgement of the Supreme Administrative Court, of 9 February 2005, in the Case 01397/04: "Fear of persecution, given the legal requirement of its reasonableness, implies that it should not be reduced to a mere subjective condition (the appellant's state of mind), but should rather be based on a situation or factual reality of an objective nature, normally (in terms of the average person) generating such fear".

1(A) of the Geneva Convention, which must be sufficiently serious by its nature or repetitiveness as to constitute a severe violation of fundamental human rights, in particular those rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[43]

The Portuguese Constitution provides in its article 33, 8 that "the right of asylum is guaranteed to foreigners and stateless persons persecuted or seriously threatened by persecution as a consequence of their activities in favour of democracy, social and national liberation, peace among peoples, freedom and human rights.

The concept of asylum in the Portuguese fundamental law has a more restricted scope of application than in International Law. While in the international and European context the right to asylum is granted to those who are persecuted because of their race, religion, nationality, or political opinions, from the constitutional legal point of view the criterion is persecution based on certain activities. As the placement of the right as fundamental has advantages, concerning the corresponding protection, the interpretation of this right in the light of the open clause of fundamental rights could be the answer. This clause "operates a reception of extravagant rights contained, namely, in applicable norms of public international law, of European law and of ordinary laws, which may benefit (at least) from the substantive rule of rights, freedoms and guarantees if they are similar in nature to these".[44]

In short, we cannot conceive that the list of circumstances on which asylum is based, provided for in article 33 (8) of the Portuguese Constitution, represents a closed range of situations.

Article 16 (2) of the Constitution provides that constitutional norms must be read in accordance with the provisions of the Universal Declaration of Human Rights. We cannot forget that this diploma was the source of the Portuguese Constitution, in this diploma "we even find some articles (...) that usefully clarify constitutional rules, avoid doubts, overcome differences in location or formulation, provide richer perspectives than, apparently, the perspectives of the text issued by the domestic law".[45]

In this sense, it will be crucial to consider, when interpreting article 33 (8) of the Portuguese Constitution, article 14 of the Universal Declaration of Human Rights, which grants the right of asylum to any person subject to any kind of persecution and not only through the forms provided in that precept of the

[43] A. F. Neves. *Estatuto do Refugiado: Ameaça, receio e motivos de perseguição, Direito de Asilo, Proteção Subsidiária e Apátrida*, Coleção de Formação Continua do CEJ, 2021, p. 13-14.
[44] T. Fidalgo de Freitas, B. Menezes Queiroz; B. Esperança. *O conceito de refugiado nos ordenamentos jurídicos Internacional*, Europeu e Português, in Contencioso do Direito de Asilo e proteção subsidiária, coleção formação inicial CEJ, 2016, pp.129-135.
[45] J. Miranda. *Direito de asilo e refugiados na ordem jurídica Portuguesa*, Universidade Católica Editora, Lisboa, 2020, p. 19.

Fundamental Law.

In implementation of the Constitutional norms and the ordinary legislation already mentioned, the Portuguese State created a normative block that details the protection to be granted to Ukrainian refugees and the terms of that protection.

Faced with the urgency of the situation, the Portuguese State anticipated the European Union and created specific temporary mechanisms to respond to this influx of refugees through the Council of Ministers' [R]esolution 29-A/2022 of 1 March 2022, and decree-law 24-B/2022 of 11 March. The latter introduced exceptional measures to grant temporary protection to displaced persons from Ukraine and ensure the "effective, reliable and rapid reception and integration of the massive influx of displaced persons from Ukraine as a result of the recent armed conflicts in that country".

The diploma provides for i) a set of exemptions regarding certain registration acts and procedures that are requested by registry services, ii) the possibility to apply for student status in emergency situations for humanitarian reasons, iii) drivers who benefit from temporary protection will not be required to provide a certificate attesting to the authenticity of the driving license and may apply for automatic recognition of professional certification, iv) Entrance Door Scheme – Urgent Accommodation Support Programme, v) Simplified procedures for recognition, validation, and certification of competences.

This way, when a Ukrainian citizen arrives in Portugal, an immediate authorisation mechanism called "temporary protection title" for a residence permit is activated, with automatic attribution of Social Security identification numbers, tax identification**,** and access to the National Health System.

The Resolution of the Council of Ministers 29-A/2022 laid down the specific criteria for granting temporary protection to displaced persons from Ukraine. Due to the Exploitation Decision (EU) 2022/382, this resolution had to be extended. Thus, Decree-Law 28-D/2022 extended this temporary protection, under the same terms already recognized, i) to foreign citizens of other nationalities or stateless persons benefiting from international protection in Ukraine, coming from that country and unable to return there, as a result of the war and ii) to foreign citizens of other nationalities or stateless persons who are in the circumstances referred to above and who prove to be family members, or (iii) who can prove that they are permanent residents of Ukraine, or that they have a temporary residence permit, or that they are in possession of a long-stay visa for this type of permit and that they cannot safely and permanently return to their country of origin.

Additionally, [to extend the scope of the instrument] Decree-Law 28-B/2022, published on 25 March, establishes measures for the recognition of professional qualifications of beneficiaries of temporary protection in the context of the conflict. The legislation regarding this last instrument had to be completed by

additional diplomas. Ministerial Order 144/2022 of 13 May has clarified that certain professions are excluded from the scope of application of this recognition. This ordinance is a complement to article 8, paragraph a) of the Decree-Law 28-B/2022, which foresaw the need for additional legislation regarding certain activities, mainly in the areas associated with flights and aeronautics, electrical installations, gas, hospital technical activities, and the exclusion of drivers of collective transport of children or dangerous goods.

Professional qualifications in respect of the above definition require recognition by a competent authority and, if obtained outside of Portugal, such recognition shall comply with the legal framework approved by Law 9/2009 of 4 March, as amended, which transposes Directive 2005/36/EC into Portuguese law. The application for recognition of professional qualifications shall be addressed to the competent authority empowered to receive the evidence of training and other documents and information, as well as to receive applications and make decisions regarding those applications.

Regarding Ukrainian students, Dispatch 3597/2022, of 25 March, from the Ministry of Science, Technology and Higher Education ensured the exceptional allocation of social support to students who had been granted temporary protection and who entered higher education in Portugal. To date, and since 24 February, Portugal has granted temporary protections to more than 50,000 people fleeing the war in Ukraine, 27% of whom are minors.[46] In addition to the approved legislation, the online platform created by the SEF (Foreigners and Borders Service),[47] available in three languages, has contributed greatly to this, facilitating the legalization process, integration and access to benefits for affected individuals, but also greater control by the State of entries into national territory of people in fragile situations, particularly women and children, who could be an easy target for trafficking and prostitution networks.

5. Conclusions

Exceptional situations call for exceptional measures. The act of aggression perpetrated by the Russian Federation against the Republic of Ukraine in February 2022 caused an exodus of refugees not seen in Europe since World War II. As such, the European Union has created specific mechanisms to ensure the harmonization of protection policies on its territory, ensuring an additional protection beyond that arising from the concession of the right to asylum, or from the norms arising from international law.

These mechanisms do not prevent Member States from adopting more

[46] See Portuguese Bar Association, https://portal.oa.pt/comunicacao/imprensa/2022/08/22/portugal-ja-atribuiu-mais-de-50-mil-protecoes-temporarias-a-refugiados-da-guerra-na-ucrania/; e Portuguese newspaper https://observador.pt/2022/08/22/sef-ja-atribuiu-mais-de-50-mil-protecoes-temporarias-a-pessoas-que-fugiram-da-guerra/.

[47] See Foreign Borders Service of Portugal in https://sefforukraine.sef.pt.

favourable policies. Portugal has created mechanisms for the automatic attribution of residence permits, with automatic attribution of Social Security identification numbers, tax identification, and access to the National Health System, and has anticipated the recognition of the qualifications of Ukrainian citizens in order to integrate them swiftly into the labour market, thereby making a very active contribution to their integration into Portuguese society and to the possible normalization of the life of someone fleeing from armed conflict. Despite being the European State territorially furthest away from Ukraine, Portugal is one of the States that has received the most displaced Ukrainians, and it is worth mentioning the many Portuguese schools and universities where Ukrainian children and young adults have continued their studies.

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Romania's Accession Process to the Organisation for Economic Co-operation and Development, Prospects, Advantages and Compatibility

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Abstract

Romania's accession to the Organisation for Economic Co-operation and Development (OECD) is, after joining NATO and the EU, the most ambitious foreign policy objective. Romania submitted its application for membership to the OECD in 2004, repeated in 2012 and 2016. The mission, objectives, areas of expertise of the organisation and the stages of accession are little known in Romania. The OECD Council Ministerial meeting in June 2022 adopted the roadmap setting out the terms, conditions and stages of our country's accession process. The paper aims to present the objectives and role of the OECD, the mission, values and principles of the organisation, the internal organisation structure, the steps taken by Romania, the institutional framework, as well as the areas identified in the roadmap that will be the subject of the OECD Committees' technical assessment.

Keywords: Romania, *OECD, application, roadmap, OECD legal frameworks, evaluation, reform.*

JEL Classification: K23, K33

1. Introduction. On the objectives and role of the OECD

The Organisation for Economic Co-operation and Development is an intergovernmental forum of the elites of the world economy that aims to identify, disseminate and evaluate the implementation of optimal public policies to ensure economic growth, prosperity and sustainable development among member states as well as globally.

The OECD is the successor of the former European Organisation for Economic Cooperation (OECE), founded in 1948 to implement the Marshall Plan, funded by the US for the reconstruction of the European continent after World War II. The Convention establishing the conversion of OECE into the OECD was signed on 14 December 1960 in Paris and entered into force on 30 September 1961.

The objectives of the Organisation for Economic Cooperation and Development as defined in the 1960 OECD Convention (the OECD Establishment

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Convention)[3] are the promotion of public policies aimed at:

a) achieve the highest sustainable economic growth and employment, a growing standard of living in the Member States, while preserving financial stability and thus contributing to the development of the global economy;

b) contribute to a solid economic expansion in both member countries and non-member countries in the process of economic development; and

c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis, in accordance with international obligations.

The Organisation[4]'s mission, which evolves over time, is to promote inclusiveness and sustainability, economic growth and increased employment and living. The OECD does not aim to become a universal organisation in terms of size, but rather to ensure that OECD standards and policies are applied and implemented globally[5].

The current 38 OECD members[6] are developed countries, owning approx. 70 % of global production and trade and 90 % of global foreign direct investment. The headquarters of the organisation are in Paris, France[7].

The OECD is successful and effective as a network of inclusive policies and in promoting its legal instruments, standards and norms around the world. In many areas, they have become global references: *the Convention on Combating Bribery of Foreign Civil Servants in International Business Transactions*[8], *the Declaration on Automatic Exchange of Information for Tax Purposes, Internal Tax Base Erosion and Profit Shifting*[9] (G20/OECD BEPS Project) and *the Multilateral Convention on the Implementation of Tax Treaty Measures to Prevent Database Erosion and Profit Shifting', the Codes forthe Liberalisation of Capital Movements*[10], *the Declaration on International Investment and Multinational Enterprises*[11], *the G20/OECD Principles on Corporate Governance*[12] and *the OECD Guidelines for Multinational Enterprises*[13], which are among the most important. In addition, the OECD's engagement in the G20 continues to gain importance as a strategic tool to improve the overall dissemination of OECD standards, legal instruments and policy advice.

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[3] https://www.oecd.org/about/document/oecd-convention.htm#Text.
[4] https://www.oecd.org/mcm/2022-OECD-SG-Strategic-Orientations-EN.pdf.
[5] Ibid.
[6] Australia, Austria, Belgium, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Türkiye, United Kingdom, United States of America — https://www.oecd.org/about/.
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[13] https://www.oecd.org/corporate/soes/.

The OECD is not just the club of countries that own 70 % of global production and trade and 90 % of the world's direct investment. The OECD is an association of countries that share the same values and principles, which believe in democracy, rule of law, human rights, which have an open and transparent market economy[14].

The entire process of accession to the OECD is lengthy and extremely complex, as from a legal and technical point of view, it amounts to a genuine takeover of the OECD "acquis", similar in terms of requirements, rigour and complexity, to the process of accession to the European Union[15].

2. Presentation of the Organization for Economic Cooperation and Development structure

The OECD has an extremely simple internal organisation structure at first sight, consisting of a collegiate political decision-making body (Council), a secretariat and over 300 working formats dedicated to different public policy areas.

The OECD Council is composed of representatives of the Member States and the European Commission at ambassador level. This Council shall meet regularly with the aim of establishing, on the basis of consensus, priority directions and objectives in the organisation's work; once a year the Council meets at ministerial level;

As regards the organisation's *working formats* (the Sectoral Departments more specifically called '*Committees*') they bring together technical experts in various fields (investment, corporate governance, competition, economic affairs, environment, education, trade, agriculture, employment and social affairs, etc.), who identify and debate best practices in specific sectors. These formats are assigned to specialised and essential **committees** which have an organisational and institutional structure similar to a genuine ministry, but with cross-cutting tasks involving interaction with other areas or committees. Key working formats (Committees) have one or more sub-formats/groups or subgroups (Groups/ working party, etc.) and are in a continuous transformation according to the priorities set by the OECD Council[16].

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[14] Cristina-Elena Popa Tache**,** *Introduction to International Investment Law,* ADJURIS International Academic Publisher, Bucharest, 2020, ISBN 978-606-94978-2-1 (E-Book), p. 121, ht tp://www.adjuris.ro/reviste/iiil/E-book%20Cristina%20Popa%20-Tache.pdf; Cristina-Elena Popa Tache**,** *International investment protection in front of the states role in crisis times to managing disputes*, „Juridical Tribune - Tribuna Juridica", volume 10, issue 3, 455-465, December 2020.

[15] See some considerations in Richard Woodward, *The organisation for economic cooperation and development,* New Political Economy, 9:1, 113-127, 2004, DOI: 10.1080/1356346042000190411; Panayotis Gavras, *The Black Sea and the European Union: developing relations and expanding institutional links*, Southeast European and Black Sea Studies, 4:1, 23-48, 2004, DOI: 10.1080/14683850412331321708.

[16] For example, the Public Governance Committee consists of several technical working party

The *OECD Secretariat* is the main technical management body of the OECD and is headed by a Secretary-General (GS) of the Organisation. The Secretary-General, who is unanimously appointed by the OECD Council[17], chairs the Council meetings, ensuring the interface between the national delegations and the Secretariat, while coordinating the work of the Sectoral Departments Current Secretary-General Mathias Cormann took up his duties on 1 June 2021 for a term of five years.

3. Mission, values and principles of the Organisation

The organisation aims to continuously strengthen its global vocation and expertise through cooperation with the G7[18], G20[19], UN[20], WTO[21] and other international and regional economic organisations, as well as its relevance as a "*best practice club"*in the field of *economic governance.*

The OECD is a member-led organisation, based on consensus, which relies on a Secretariat-General for the fulfilment of its mission. The quality of its work is ensured through close cooperation between Members and the Secretariat to develop, test and promote evidence-based policies and OECD standards, using comparable data, peer reviews, expert committees and structured dialogues. This makes the OECD a unique multilateral organisation in international architecture. At the same time, according to recent documents adopted by the Organisation, the OECD's[22]mission, which evolves over time, is also to promote inclusive and sustainable economic growth and to raise employment and living[23].

50 years after the founding of the OECD, *OECD members form a community of nations dedicated to the values of democracy based on the rule of law*

subgroups such as the *Public Procurement* Group, the *Senior Party of Integrity Officials, the Open Governance Working Group, the Digitalisation Group E-Leaders, etc.*

[17] Article 10, OECD Convention, https://www.oecd.org/about/document/oecd-convention.htm#Text.

[18] The G7 (originally the G8) originated in 1973 and was established in 1975 as an informal forum bringing together heads of government and ministers of the world's leading industrialised nations. Over the years, the annual G7 summits have become a platform for determining the direction of multilateral discourses and policy responses to global challenges. The G7 complements the role of the G20, which is generally seen as the framework for global economic coordination.

[19] G20 members account for about 90 % of global GDP, 80 % of world trade and two thirds of the world's population, as well as about 60 % of total agricultural land and about 80 % of world trade in agricultural products. The G20 members are Argentina, Australia, Brazil, Canada, China, France, Germany, Italy, India, Indonesia, Japan, Mexico, the Republic of Korea, Russia, Saudi Arabia, South Africa, Türkiye, the United Kingdom, the United States, the European Union.

[20] The United Nations.

[21] The World Trade Organisation.

[22] OECD 60th Anniversary Vision Statement (C/MIN(2021)16/FINAL) as well as in the 2021 Ministerial Council Declaration (C/MIN(2021)25/FINAL).

[23] Injy Johnstone, *Organisation for Economic Cooperation and Development (OECD)*, „Yearbook of International Environmental Law", Volume 32, Issue 1, 2021, pp. 284–289, https://doi.org/10.1093/yiel/yvac037.

and human rights and adherence to open and transparent market economy principles. This is a fundamental requirement for membership and has also been developed in the Declaration of Vision for the 60th Anniversary of the OECD: "*we form a similar community, committed to preserving individual freedom, the values of democracy, the rule of law and the defence of human rights. We believe in the principles of open and transparent market economy. Guided by our Convention, we will pursue sustainable economic growth and employment while protecting our planet. Our common effort is to end poverty, address inequalities and leave no one behind. We want to improve everyone's lives and prospects, inside and outside the OECD. As a global pawn, the OECD will therefore continue to develop evidence-based analyses to help generate innovative policies and standards to build stronger, more sustainable and inclusive economies, inspiring trust and trust for resilient, responsive and healthy societies*."[24]

Candidate countries are expected to demonstrate this similar attitude in their statements and actions in their relations with the Organisation and its members. This similar concept includes the willingness to engage constructively in open and sincere discussions with the aim of finding consensus, as well as the willingness to accept the Organisation's unique working methods, including peer review, a distinctive sign of the OECD. Candidate countries' actions in other international fora may also be considered appropriate. Bilateral issues should not constitute an obstacle to the accession process and should therefore be resolved in a similar and constructive manner.

4. The extension of the OECD to new potential members state

Although there were many voices asking for new members for a long time, the organisation faced a **deadlock** as none of the enlargement scenarios met the consensus of the members. Romania's discussion partners stressed that the **US reluctance** and the connection that Americans establish between enlargement and OECD reform have decisively influenced the slow pace of negotiations.

As regards Romania's candidacy, two main scenarios were discussed: a) a launch of all six applications (Romania, Bulgaria, Croatia, Argentina, Brazil and Peru) simultaneously, and the pace of accession negotiations will reflect the individual merits of each candidate state; and b) a staggered launch of the applications, with Argentina and Romania in a first stage, and the other four states later in one or two stages (variants 2+ 4 or 2+ 2+ 2). The solution adopted in 2022 was the one foreseen in the first scenario, i.e. the simultaneous official launch of talks for all 6 aspiring states.

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[24] https://www.oecd.org/mcm/Roadmap-OECD-Accession-Process-Romania-EN.pdf. See Radaelli, C. M., *Regulatory indicators in the European Union and the Organization for Economic Cooperation and Development: Performance assessment, organizational processes, and learning,* „Public Policy and Administration", 35(3), 227-246, 2020, https://doi.org/10.1177/0952076718758369.

As constant in all diplomatic discussions, there has always been a unanimous appreciation of the efforts Romania has made so far, our country being perceived as having a level of preparation that generated a significant advance towards its European counterparts, Bulgaria and Croatia.

At the 2016 OECD Council Ministerial meeting, ministers called for *a strategic reflection on the size and members of the Organisation.* Consequently, a new Framework for the Consideration of Prospective Members (*the Framework for the Consideration of ProspectiveMembers) was developed and adopted at the*meeting of the OECD Ministerial Council on 7-8 June 2017[25].

For OECD member states, the framework document is a tool to inform the decision to open accession talks with an aspiring state, i.e. it allowed aspiring states to assess their position before signaling their interest in joining the Organisation.

The framework was used for the 2022 OECD Member States' decision to open accession talks with all six aspirants (Argentina, Brazil, Bulgaria, Croatia, Peru, Romania – in alphabetical order) in January 2022.

5. Romania's candidacy for the OECD and the 'Roadmap'

Romania's accession to the OECD has been a major objective of Romanian foreign policy since 2004. In this respect, Romania officially applied for OECD membership in previous enlargement exercises, namely in April 2004 and November 2012, and renewed it annually as of 2016.

On 25 January 2022, the OECD Council decided to start accession talks with all 6 aspiring countries.

The candidates were informed of the decision by a letter from the OECD Secretary-General who also requested confirmation of the attachment to the values, principles and standards of the organisation mentioned in the relevant organisation documents.

The Ministerial Meeting of the OECD Council in June 2022 adopted the '*Roadway for Romania*'[26], along with those for four other candidate countries – Brazil, Bulgaria, Croatia, Peru.

On 25 January 2022, Romania obtained the status of candidate country for accession, which is the culmination of the consistent efforts of political decision-makers and Romanian authorities over the past two decades, in order to bring Romania closer to OECD standards and practices.

The *roadmap* sets out the terms, conditions and stages of Romania's accession process to the Organisation and aims to align domestic legislation, policies and practices with those of the OECD. The document mentions the sectoral committees that will assess compliance with OECD legislation and practices, the

[25] http://www.oecd.org/mcm/documents/C-MIN-2017-13-EN.pdf.
[26] https://www.oecd.org/mcm/Roadmap-OECD-Accession-Process-Romania-EN.pdf.

principles that will guide their work, as well as the manner in which accession talks with the Romanian authorities will take place.

The main areas identified in the roadmap to be covered in the Committees' technical evaluations concern the following:

- *structural reform*: shaping candidate status structural reform policies in an ambitious way as a basis for strong, sustainable, sustainable and inclusive growth;

- *trade and Investment*: strengthening the candidate state's free trade and investment regime from the perspective of an open, competitive, sustainable and transparent market based on clear rules. Particular attention should be paid to the multilateral trade system, based on the World Trade Organisation, avoiding protectionism, fostering international competition conditions by increasing competitiveness, better integrating SMEs into global value chains and dismantling unnecessary barriers to trade. All these measures aim at enhancing the benefits of consumers and promoting economic growth and innovation;

- *sustainable and inclusive development*: developing economic policies conducive to sustainable development and centred on the principle of equal opportunities, contributing to favourable and inclusive economic growth with benefits for all citizens;

- *governance*: strengthening public governance, integrity and enhancing efforts to fight corruption.

- *environment, biodiversity and climate*: ensuring effective protection of the environment and biodiversity and action on climate change to achieve the goals of the Paris Agreement (2015) on climate change. This includes the need to align policy measures for the whole economy with the objectives of the Paris Agreement and, in particular, with the objective of achieving zero to global greenhouse gas emissions by 2050, by substantially reducing the emission levels allowed for each individual state and increasing private investment in decarbonisation. These measures include, inter alia, the obligation for each state to adopt and implement public policies in line with its environmental objectives, including reversing and halting biodiversity loss and deforestation, as agreed during the COP26 summit in Glasgow.

- *digitalisation*: promoting the inclusive digital economy, including through concerted action at international level;

- *infrastructure*: develop quality infrastructure in a transparent, accountable and inclusive manner.

Stages of the accession process. During the accession process to the OECD Romania will be assessed by 26 Committees and will have to internalise more than 250 legal instruments at the level of domestic legislation, policies and practices, which equates to a genuine takeover of aquis, on the model of EU accession[27].

[27] See more about accession in general in Roy Lewis, *Organisation for Economic Cooperation and*

The Roadmap foresees 2 stages of evaluation of Romania's status in relation to the OECD acquis: first stage – self-assessment by institutions and authorities in Romania and the second stage represented by the OECD assessment;

The first step (I) has already been completed and is the self-assessment of national legislation, policies and practices in relation to OECD legal instruments. Phase I was completed in December 2022 with the submission of the Initial Memorandum (Ml);

The second phase (II) hasnow begun, namely the external evaluation, which is carried out by the OECD Committees. They already organise work missions in Romania, make observations, requests and recommendations, including on the amendment/adoption of new legislative measures, the fulfilment of which is mandatory, being prerequisites for accession, according to the provisions of the *Roadmap.* As an example of recent legislative measures adopted in this respect by Romania can be listed the accession to the *Convention for Combating the Corruption of Foreign Civil Servants in International Economic Operations*[28], the amendment of the legislation on corporate governance, through the recently adopted Law amending and supplementing Government Emergency Ordinance No. 109/2011 on corporate governance of public enterprises[29].

6. The institutional framework established by Romania after receiving the invitation to join: National Committee, National Coordinator, Task Force and National Focal Points

By *Prime Minister Decision No. 481 of 23 September 2022 on the establishment, organisation and powers of the National Committee for the Accession of Romania to the Organisation for Economic Cooperation and Development (OECD)* a new organisational structure for Romania's candidacy file[30]was established, as follows:

- establishment of a National Committee for Romania's accession to the Organisation for Economic Cooperation and Development (OECD), an advisory body without legal personality, headed by the Prime Minister of Romania. This

Development, „Industrial Law Journal", Volume 6, Issue 1, 1977, pp. 52–54, https://doi.org/10.1093/ilj/6.1.52.

[28] It is one of the most important legal instruments of the OECD. Following the positive assessment of March 2023, Romania became an associate member of the Anti-bribery Working Group on 5 May 2023. In accordance with its Article 13(2), following ratification by the Romanian Parliament, the Convention entered into force on 22 September 2023 for Romania.

[29] Law No. 187 of 28 June 2023 amending and supplementing Government Emergency Ordinance No 109/2011 on corporate governance of public enterprises, published in Official Gazette No 594 of 29 June 2023; this normative act was carried out by the Romanian authorities benefiting from OECD advice, as set as an objective under Romania's National Recovery and Resilience Plan (NRRP).

[30] Published in Official Gazette No. 936 of 23 September 2022.

normative act defined the position of national coordinator representing the process of Romania's accession to the OECD (MFA Secretary of State) and Deputy National Coordinator for the accession to the OECD (at the level of State Counsellor in the Chancellery of the Prime Minister) with the role of collegial executive coordination of the inter-institutional Task-Force. The National Committee for Romania's accession to the OECD meets at political level (Minister/Head of Institution) and is headed by the Prime Minister, who, as Chairman of the Committee, ensures the overall political coordination of the entire process.

- establishing a National Coordinator for Romania's accession to the OECD – at the level of Secretary of State within the MFA; it coordinates the Task Force. Task-Force – as the working body of the National Committee, under the leadership of the National Coordinator (MFA Secretary of State) seconded by the Deputy National Coordinator (state adviser at the Prime Minister's Chancellery), as a structure without legal personality consisting of the senior executive management levels (Secretary of State) and the environmental and technical management levels (Director General/Director + experts).

- the Secretariat of the National Committee and the Task Force shall be established within the General Secretariat of the Government: he works in collaboration with the technical structure of the Ministry of Foreign Affairs, which is subordinated to the national coordinator established at the level of the Secretary of State, preparing the technical working meetings and the OECD missions on the Romanian file.

Since 2022, according to the Prime Minister's Decision No. 481/2022[31], the coordination of the technical process of the preparatory activities for Romania's accession is carried out by the General Secretariat of the Government (GSG) and the Ministry of Foreign Affairs (MAE), under the political coordination of the *national coordinator* who is represented by a State Secretary of the Ministry of Foreign Affairs, seconded by the *Deputy National Coordinator*, represented by a State Advisor from the Prime Minister's Chancellery.

In order to better coordinate the accession process, from the level of coordination carried out by the MFA and the SGG, a practical approach was carried out in relation to the concept established at informal level, under the name of the '*National Institutional Focal*Point' for each of the 26 key OECD committees that will assess Romania in sectoral areas. Practically, each of the OECD commissions below corresponds in Romania to an institution or ministry providing the '*National Focal Point*' in relation to these committees, maintaining permanent contact and providing information requested for assessment by the OECD. According to *the Roadmap*[32], the OECD committees that will carry out evaluations in Romania's accession process are:

[31] Published in Official Gazette No 936 of 23 September 2022.

[32] Item 13 of the Roadmap, https://www.oecd.org/mcm/Roadmap-OECD-Accession-Process-Romania-EN.pdf.

- the Investment Committee and the Working Party on Responsible Business Conduct;
- the working group on bribery in international trade transactions;
- the Corporate Governance Board;
- the Financial Markets Commission;
- the Insurance and Private Pensions Committee;
- the Competition Committee;
- the Committee on Tax Affairs;
- the Environment Policy Committee;
- the Committee on Chemistry and Biotechnology;
- the Public Governance Committee;
- the Committee of Senior Budgetary Officials;
- the Regulatory Policy Committee;
- the Committee for Regional Development Policy;
- the Commission for Statistics and Statistical Policy;
- the Economic Assessment and Development Committee;
- the Education Policy Committee;
- the Committee on Employment, Employment and Social Affairs;
- the Health Committee;
- the Trade Committee and the Export Credits Working Party;
- the Agriculture Committee;
- the Committee on Fisheries;
- the Committee for Scientific and Technological Policy;
- the Commission for Digital Economy Policy;
- the Commission for Consumer Policy;
- the Steel Committee;
- the Council Working Party on Shipbuilding.

7. The advantages of Romania's accession to the OECD and the prospect of achieving this objective

The OECD accession process can serve as a lever to achieve many major reform objectives for Romania. We are talking about public policies based on objective data, extensive OECD expertise and recommendations in almost all areas of government policy. According to the Organisation's motto – *Better Policies for Better Lives – the* OECD is a public policy promoter for the benefit of the citizen.

We need to build on this expertise and this process that will lead to stronger economic growth and better social justice. We can achieve this goal only through a joint effort, an integrated approach across the administration. The OECDis an economic NATO, in the sense of ensuring sustainability guarantees of their values for the member states (for NATO known in the sense of 'security

guarantees')[33], but certainly it can be said that the mere fact that Romania will be there will require a guarantee of maintaining through joint efforts all the values of this organisation (values of democracy based on the rule of law and human rights and adherence to the principles of open and transparent market economy).

According to the Ministry of ForeignAffairs[34], the main advantages of Romania's accession to the OECD are:

- the benefit of belonging to the small club of developed economies and the implicit recognition at global level of its status as a functioning market economy[35] and enhanced democracy[36], with an impact on the country rating and attracting foreign investment;

- the benefit of example. The favorable image of Romania towards both the major economies of the world (USA, China, Japan, etc.) and towards the countries in the region with European aspirations (the Republic of Moldova, Macedonia, Albania, Serbia, etc.);

- the benefit of expertise. Direct access to the necessary information in the priority areas for Romania (government framework, legislative reform, anticorruption, fiscal policy, transport infrastructure, agriculture, education, etc.);

- the benefit of access to OECD economic decision-making tools and centres and the possibility to contribute to global economic governance;

- the benefit of public policy assistance from OECD members through regular peer reviews and recommendations for improving them.

At this point, Romania can say that it has made efforts to achieve the eight standards necessary for joining the Organisation for Economic Co-operation and Development (OECD), by carrying out the formalities for taking over the OECD acquis in these areas, but there are still steps to go, including steps of new regulations and legislative amendments. The evaluation of these formalities

[33] NATO is an association of free states, united by their determination to protect their security, through mutual guarantees and stable relations with other countries; https://www.mae.ro/node/5337.

[34] https://www.mae.ro/node/59549.

[35] As the concept appears in the 'Copenhagen Criteria' established by the European Union for states wishing to join the organisation after the 1990s, one of which is that the State willing to have a 'functioning market economy and the ability to cope with competitive pressure and market forces within the Union', in 12 Lessons on Europe, https://publications.europa.eu/resource/cellar/009305e8-2a43-11e7-ab65-01aa75ed71a1.0009.01/DOC_1.

[36] Enhanced democracy – a more elaborate concept of a "democracy" which should be appreciated as not only reflecting the purely formal criteria for its existence, which may be appropriate for the beginning of the democratisation process in a country, the strengthened democracy being the one that reflects the social penetration of democratic skills and values that become a modus vivendi (Jahn & Steward, 2003), apud Marius Ioan Tatar, *Democracy and political participation*, https://www.ssoar.info/ssoar/bitstream/handle/document/76200/ssoar-2021-tatar-Democratie_si_participarepolitica.pdf.

will be carried out externally, within the OECD sectoral committees with technical tasks in these areas[37] and which will also come up with sets of recommendations for each area.

8. Conclusions

As in the case of EU membership, this process does not end with accession and the acquisition of OECD membership, on the contrary, will become permanent, specialised and complex; as an OECD Member State, Romania, including and especially through public administration institutions and staff, will have to ensure constant participation and representation, at high political and/or technical level, in all the organisation's activities and working formats (over 26 Committees and other follow-up structures, all with a pronounced cross-sectoral/transversal profile).

It is extremely important to note that, given that EU standards are similar or close to those of the OECD (the EU itself being an OECD member), for Romania alignment with OECD policies, legislation and practices is easier to achieve in this context.

The Initial Memorandum submitted by Romania to the OECD in December 2022 contains a self-assessment of national legislation, policies and practices, in relation to all OECD legal instruments (249 legal instruments), supervised by the Secretariat of the Organisation.

Analysing the effective and thorough way in which the Romanian administration has gone through these two stages, highlighted by the OECD experts managing the Romanian file, we consider that it could be estimated that the moment of the celebration of accession will be as close as possible to the period of 3 or 4 years from the moment of receiving the invitation to become a candidate state.

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[37] It is about: the Declaration on Investments; Principles of Corporate Governance; Principles for the development of Internet policies; Recommendation of Good Practices in Statistics; BEPS Including Framework – Internal *Tax Base Erosion and Profit Shifting*; The Global Transparency and Information Exchange Forum; Adherence and implementation of capital flows liberalisation codes; Accession to the Convention on Combating the Corruption of Foreign Civil Servants in International Economic Operations (known by direct reference to the 'Anti-bribery Convention').

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Invalidity of Treaties, as a Legal Sanction Specific to Public International Law

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Abstract

While in domestic law, the sanction of invalidity is often encountered in practice in both substantive and procedural law, the same cannot be said of the sanction of invalidity in public international law. This paper aims to analyse this legal institution of public international law by identifying the main grounds for invalidity of treaties. Using the research methods of law in general and public international law in particular, by researching its sources, identifying the customs and practice of States in this area, the paper aims to demonstrate that the invalidity of international treaties is a legal sanction specific to public international law. The paper contributes to the creation of a general theory of legal sanction in public international law.

Keywords: *invalidity of treaties, legal sanction, public international law.*

JEL Classification**:** K33

1. Introduction

The legal sources of the invalidity of treaties are the provisions of Articles 46-53 of the 1969 Vienna Convention on the Law of Treaties. Although Romania is not a party to this Convention, not having signed the treaty alongside France, public international law doctrine states that this treaty is *"a particularly valuable instrument"*[2], both because of its broad participation (116 States Parties by July 2023)[3], and *"because it reflects, for the most part, customary law"*[4], as a result of the codification of treaty law within the International Law Commission.

Therefore, despite Romania's reasons for not being a party to this convention[5], the fact that many of the rules laid down in the 1969 Vienna Convention are in fact a crystallisation/codification of customs already existing in the practice of States, makes this convention an international instrument worthy of consideration in any serious scientific approach to the issue of the invalidity of treaties.

Moreover, legal doctrine considers that the vast majority of the rules of

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[2] Ion Gâlea, *Dreptul tratatelor*, C.H. Beck Publishing House, Bucharest, 2015, p. 5.

[3] According to the official UN fact sheet accessed on 01.07.2023 on the official page on treaties deposited at the UN:https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp =mtdsg3&clang=_en.

[4] Ion Gâlea, *op. cit.,* 2015, p. 5.

[5] Universal participation and jurisdictional procedure; for details see Ion Gâlea, *op. cit*., 2015, p. 5-6.

the 1969 Vienna Convention reflect customary law[6], and the case law of the International Court of Justice confirms this in at least two cases: The *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) and *Mutual Assistance in Criminal Matters* (Djibouti v. France).

In the *Gabcikovo-Nagymaros Project case* (Hungary v. Slovakia), the International Court of Justice ruled in its 1997 judgment that *"The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62".*[7]

In its 2008 judgment in *Mutual Assistance in Criminal Matters* (Djibouti v. France), the International Court of Justice applied the provisions of Articles 26-27 and Article 31 of the 1969 Vienna Convention, even though neither France nor Djibouti, like Romania, is a party to the Convention, as they are not signatories to it: "*In the view of the Court, Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties of 23 May 1969 is pertinent as regards this matter. It states that, in interpreting a treaty, "[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties". This provision is to be regarded as a codification of customary international law (see Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II), p. 1075, para. 18) and is therefore applicable to the treaty relations between Djibouti and France under consideration in the present case despite the fact that neither Djibouti nor France is a party to the Vienna Convention"*[8]

It is therefore clear that the provisions of the Vienna Convention on the Law of Treaties between States of 23 May 1969 concerning the invalidity of treaties are customary rules which apply even to States which are not party to the Convention.

The Vienna Convention on the Law of Treaties between States of 23 May 1969 provides for eight grounds for invalidity of the effects of treaties: violation of domestic law relating to the competence to conclude treaties (Art. 46 of the Convention), specific restrictions on authority to express the consent of a State (Art. 47), error (Art. 48), fraud (Art. 49), corruption of a representative of a State (Art. 50), coercion of a representative of a State (Art. 51), coercion of a State by the threat or use of force (Art. 52), invalidity for violation of a jus cogens rule

[6] *Ibid,* p. 7.
[7] I.C.J. Reports, *Judgment of the International Court of Justice in the Gabcikovo-Nagymaros Project Case (Hungary v. Slovakia),* 1997, paragraph 46, p. 38.
[8] I.C.J. Reports, Judgment of the International Court of Justice of 4 June 2008 in the Case Concerning Mutual Assistance in Criminal Matters (Djibouti v. France), paragraph 112, 2008, p. 219.

(Art. 53 and Art. 64).

Starting from the idea that the law of treaties is dominated by the rule of consensualism[9] , which assumes that states freely express their consent to the conclusion of a treaty, it was natural that a theory of defects of consent should develop in international law, inspired by Roman civil law, although, as professor Grigore Geamănu points out, *"analogies with civil law contracts should only be used in a relative and limited way"*[10], since *"in external relations, the will of States, as subjects of international law, is manifested under different conditions than the will of individuals in internal relations."*[11]

This is also evident from the fact that public international law has recognised other defects of consent than those enshrined in civil law, which corresponds to the existence of specific features of public international law in relation to the particular legal relationships it regulates, since *"international law cannot be a derivation of domestic law, but a separate branch based on its own institutions and concepts"*.[12]

2. Infringement of national law on the competence to conclude treaties

Provided for in Article 46 of the 1969 Vienna Convention on the Law of Treaties between States[13] , this is a specific vice of consent in public international law[14], since in this case it does not involve "*an infringement of the very substance of the treaty*"[15], but is a case of violation of the fundamental rules of the State party, i.e. the rules of constitutional value relating to the competence to conclude treaties.

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[9] Carmen Moldovan, *Drept Internațional public. Principii și instituții fundamentale*, Hamangiu Publishing House, Bucharest, 2017, p. 187.

[10] Grigore Geamănu, *Drept internațional public*, Vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 156.

[11] Marian C. Molea, *Viciile de consimțământ în dreptul internațional public*, Scientific Publishing House, Bucharest, 1973, p. 30.

[12] *Ibid,* p. 47.

[13] Article 46 of the 1969 Vienna Convention provides: *"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.*"

[14] Grigore Geamănu, *op. cit.*, vol. II, p. 158.

[15] Carmen Moldovan, *op. cit.*, p. 194.

In the doctrine, this consent defect is also referred to as imperfect ratification[16] or unconstitutionality of treaties[17].

With regard to this article, it should be noted that it is drafted in a negative formulation[18] (a State may invoke this defect of consent only under certain conditions), which makes this case an exception.

The exception granted is as clear as can be: this vitiation of consent can only be invoked if there is a manifest breach of a rule of fundamental importance of its domestic law, and the manifest nature of the breach relates to the fact that the breach must be sufficiently obvious to any other State.

A first problem that could arise in the interpretation of Article 46 of the 1969 Vienna Convention is the conflict with the general rule of interpretation according to which no one may invoke his own fault (*nemo propriam turpitudem allegans*), since the party invoking the invalidity of the treaty on the ground of this defect of consent is the State whose internal law has been violated. The provisions of Article 46 therefore lay down clear conditions of strict interpretation: the breach of a rule of fundamental importance in domestic law concerning the competence to conclude treaties must be so objectively obvious to any State which would behave in such circumstances in accordance with customary practice and in good faith.

3. Breach of a restriction on the power to give consent

Provided for in Article 47 of the 1969 Vienna Convention on the conclusion of international treaties between States[19], this also constitutes a specific vice of consent in public international law, along with the one analysed earlier in this scientific research.

The ground for invalidity of treaties is a natural continuation of the vice of consent regarding violation of domestic law on the competence to conclude treaties, "*in essence Article 47 designating the same type of conflict of interest as Article 46*"[20], but "*in 1963 about half the members of the International Law Commission considered the provision to be unnecessary, among other things, because*

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[16] Pierre-Marie Dupuy, *Droit international public*, Dalloz, 1992, p. 194; John Mervyn Jones, *Full powers and ratification*, Cambridge, 1946, pp. 134-157; Robert Kolb, *The law of treaties. An introduction*, Edward Elgar, 2016, pp. 91; Ion M. Anghel, *Dreptul Tratatelor*, vol. I, Lumina Lex, Bucharest, 1993, pp. 496; Paul Reuter, *Introduction to the law of treaties*, Routledge, 1995, p. 174.

[17] Paul Reuter, *op. cit.* 1995, p. 174.

[18] Oliver Dörr, Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer Publishing, 2012, p. 783.

[19] Art 47 of the 1969 Vienna Convention - Specific restrictions on authority to express the consent of a State: *"If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent."*.

[20] Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, p. 805.

it referred to such a rare event."[21]

Moreover, the extremely limited applicability of this article in practice is also due to the fact that only one case has been identified in the practice of the Member States in which this defect of consent has been invoked. This was the case of Hungary in 1923, when, at the Council of the League of Nations, the representatives of Hungary and Romania initialled a draft resolution of the Council of the League of Nations, which contained in its preamble a passage stating that the Treaty of Trianon did not constitute an impediment to the expropriation of the property of the optants[22]. Subsequently, the Hungarian Government sent a letter to the leadership of the League of Nations, disapproving of the acts of the Hungarian representative to the League of Nations, citing the fact that the full powers of the Hungarian representative were granted only for the conclusion of an agreement with Romania. The arguments were rejected, however, by the League of Nations, considering that *"a State cannot disavow the acts of its representative which fell within the scope of the authority apparently conferred by full powers".*[23]

However, Article 47 differs from Article 46, which deals with the general limitations imposed by national law on the competence to conclude treaties, "*Art. 47 refers to specific restrictions of authority in respect of a particular treaty"*[24].

Article 47 deals with the situation where the representative of a State had the necessary powers for the conclusion of the international treaty, but violated them by exceeding the limits of his power to represent and bind the State internationally. In other words, "*the consent of a State to become a party to a treaty can only be valid if the manifestation of will by the State's representative corresponds to the powers given to him by the authorization to conclude treaties on behalf of the State"*[25] .

Moreover, the doctrine specifies that "*this rule is limited to those cases where the treaty is not subject to ratification or a similar process, since in this case the State would have the opportunity to reject any unauthorized act of its representative"*[26], considering that in this case the State can refuse ratification or approval[27].

We note in Article 47 the same drafting technique as in Article 46, which is drafted in a negative formulation (a State may invoke this defect of consent only under certain conditions), which also gives it an exceptional character: "*the lack of validity of the treaty may be invoked by the State concerned as a defect in*

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[21] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, 2009, pp. 598.
[22] For details see League of Nations Official Journal, 4, no. 8, p. 1011.
[23] Ion Gâlea, *op. cit.*, 2015, p. 281.
[24] Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit*., p. 805.
[25] Marian Molea, *op. cit*., 1973, p. 113.
[26] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2007, pp. 315.
[27] See Ion Gâlea, *op. cit.*, p. 280; Robert Kolb, *op. cit.*, p. 97; Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, p. 805.

its consent only if the authorization given to the representative was subject to special restrictions notified to the other party, which restriction was not taken into account during the negotiations"[28].

It is considered in the doctrine that the exception in Article 47 is worded much more restrictively: *"only if the restriction has been notified to the other negotiating States prior to the expression of consent."*[29]

With regard to the interpretation of Article 47, no "*notable difficulties"* are identified[30], as proof that this is also the interpretation of international courts.

In the cases of *Phillips v Iran* and *Amoco Iran Co v Iran* before the Iran-United States Claims Tribunal, the Government of Iran invoked Article 47, arguing that Iran's representative in the negotiations on the Treaty establishing the jurisdiction of the Tribunal gave invalid consent as he acted contrary to a set of instructions.

In both cases, the Iran-United States Claims Tribunal held that Article 47 cannot be invoked as long as the situation was not notified to the United States prior to the expression of consent: "*Article 47, however, requires that any such restriction must be "notified to the other negotiating States prior to [the representative's] expressing [his] consent" to the treaty. The only evidence submitted on this point is the affidavit of Bahzad Nabavi, the former Iranian Minister of State for Executive Affairs, and Iran's chief negotiator of the Algiers Declarations. He states only that he had neither the "authority", nor "the slightest intention" to nullify or abrogate the January 1980 Single Article Act in entering into the Algiers Declarations, viewing himself bound by the terms of that Act. We accept that view as Mr. Nabavi's understanding of his limited role; we note, however, that he nowhere states that he communicated that understanding to the United States. It can therefore not be invoked as a valid limit on Iran's consent."*[31]

A current criticism of the applicability of Article 47 in the practice of States today has been expressed by Professor Mark E. Villiger, echoed by Romanian Professor Ion Gâlea, according to whom the relevance of this invalidity case is questioned, as long as in the current era new technologies allow instant communication[32].

However, we agree with the contrary view expressed in the doctrine that new technologies allow both the rapid conclusion of international treaties and rapid and often contradictory communication between the representative of a

[28] Marian Molea, *op. cit.*, 1973, p. 113.
[29] Ion Gâlea, *op. cit.*, 2015, p. 280; Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, p. 805.
[30] Robert Kolb, *op. cit*., p. 97.
[31] Judgment of the Iran-United States Claims Tribunal of 1982, Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company, Case No. 39, paragraph 10 and Judgment of the Iran-United States Claims Tribunal of 1982, Amoco Iran Oil Company v. The Government of the Islamic Republic of Iran, the National Iranian Oil Company, Iranian Offshore Oil Company and Iranian Oil Company, Case No. 55, paragraph 8.
[32] Mark E. Villiger, *op. cit*. 602; Ion Gâlea, *op. cit.*, p. 281.

state and the central authorities of its state, with instructions being given, cancelled and modified in a very short time, which leads to misunderstandings.[33] This is why Professor Ion Gâlea does not rule out the possibility of adapting Article 47 to the new realities dominated by new technologies.[34]

4. The error

Error is one of the defects of consent in public international law which draws its inspiration from civil law and is influenced in a serious way by the theory of civil law *(erreur fondamentale, Grundlagenirrtum)*[35]. This is evident from the wording of Article 48 of the 1969 Vienna Convention on the conclusion of treaties between states[36].

The error is a misunderstanding of reality, which alters consent, the will to conclude the treaty, an essential element based on the principle of freedom of consent, as it follows from the Preamble to the Vienna Convention on the Law of Treaties between States: *"the principle of free consent and good faith and the rule pacta sunt servanda are universally recognised"*.

We note that the wording of Article 48 of the 1969 Vienna Convention provides for a number of *"restrictive conditions"* in the area of error as a defect of consent:[37]

1. It is not permitted to plead an error of law, only an error of fact (if the error relates to a fact or situation);

2. The fact or situation wrongly determined by the State at the time of the conclusion of the treaty must have a decisive bearing on the formation of the will to conclude the treaty;

3. Based on the general principle of law that no one may plead his own fault (*nemo auditur propriam turpitudinem allegans*), Article 48(2) introduces the essential condition that the State must not have contributed to the error by its conduct, which in public international law translates into the principle of estoppel (*venire contra proprium factum*) - a condition inspired by the Judgment of 15 June 1962 in the Preah Vihear Temple case (Cambodia v. Thailand)[38];

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[33] Mark E. Villiger, *op. cit*., p. 602-603.
[34] Ion Gâlea, *op. cit.*, p. 281.
[35] Robert Kolb, *op. cit*., p. 98.
[36] The 1969 Vienna Convention states in Article 48 - Error: "*1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error. 3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies."*
[37] Carmen Moldovan, *op. cit.*, p. 188.
[38] Ion Gâlea, *op. cit.*, p. 284.

4. The conduct of a diligent State is taken into account, since in the presence of circumstances such as to alert the State to the possibility of error, then the defect of consent can no longer be invoked as such.

5. The error as a defect in consent does not refer to possible material errors that may occur in the text of the treaty, which have their own procedure for rectification under Article 79 of the 1969 Vienna Convention, especially as material errors do not affect the formation of consent.

5. Fraud

In the Preamble to the 1969 Vienna Convention on the Law of Treaties between States, it is stated that the principle of good faith is universally recognised, and it is precisely this principle that underlies the existence of fraud as a defect in consent, being an application of the Latin adage *fraus omnia corrumpit* (fraud corrupts everything), *"in the sense that fraud may lead to a misrepresentation of reality"*[39], since *"fraud is the opposite of good faith"*[40].

In the commentary to the 1969 draft Vienna Convention, as it emerged from the work of the International Law Commission, it is stated that, unlike mistake, consisting of misrepresentation, "*fraud affects consent at its root, destroying the whole basis of mutual trust between the parties"*[41]. This is also the reason why the 1969 Vienna Convention establishes a different legal regime for fraud than for error: "*error is unintentional, whereas fraud (provoked mistake) is based on the bad faith of one of the parties".*[42]

On fraud, legal doctrine and even the International Law Commission documents are unanimous in accepting:

1. The rarity of cases of fraud in state practice;

2. Absence of international courts practice on fraud;

3. The fact that all legal systems are aware of the institution of fraud, but there are some differences between the conceptions of fraud in certain legal systems;

4. The International Law Commission concluded, however, that it would be sufficient to formulate the general concept of fraud applicable in treaty law and leave its precise scope to be established in practice and in international tribunal decisions.

That is why the wording of Article 49 of the 1969 Vienna Convention is so general and so unsatisfactory.

However, from the wording of Article 49, several important elements of

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[39] Mark E. Villiger, *op. cit*., p. 615.

[40] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 158 *apud* Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit*., p. 835.

[41] United Nations Conference on The Law of Treaties, *Official Records*, A/CONF. 39/11/Add.2, 1971, p. 64.

[42] Ion Gâlea, *op. cit.*, p. 285.

fraud can be deduced: 1. Fraudulent conduct of a State Party in the treaty negotiations; 2. Intention to mislead the State committing the fraud (animus decipiendi); 3. Misrepresentation of reality, the error of the State which is the victim of the fraud as a result of the fraudulent manoeuvres.[43]

6. Corruption of a representative of a State

The legal doctrine is unanimous in stating that in the practice of States no case of bribery of a state representative in the process of negotiating and concluding treaties has been identified[44].

It should be noted that at neither of the two sessions of the Vienna Conference for the Codification of the Law of Treaties (1968 and 1969) were concrete examples given of precedents for invoking bribery of a State's representative as a ground for annulment of a treaty, but in the speeches of some States' representatives it was expressly stated that in the history of international relations bribery of a State's representative has existed as a practice[45].

However, the 1969 Vienna Convention enshrines this new defect of consent in Article 50.[46]

According to some established international law authors, the International Law Commission played "*a pioneering role*"[47] in establishing the bribery of a State representative as an autonomous, self-contained vice of consent, whereas until the work of the Vienna Conference for the Codification of the Law of Treaties (1968 and 1969), the bribery of a State representative was considered a practice that could be classified as fraudulent misconduct, attracting the plea of fraud.

The originality of the outcome of the International Law Commission stems from the recognition that although both forms of action, fraud and bribery, alter the consent of a State, bribery is a much more serious action and has a more serious effect than simple fraud: the representative of the victim State, by accepting the bribe, *de facto* loses his representative status, acting to the detriment of

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[43] For details see Mark E. Villiger, *op. cit*., p. 618; Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit*., pp. 839-846.

[44] See Robert Kolb, *op. cit.*, p. 100; Anthony Aust, *op. cit*., p. 317; Mark E. Villiger, *op. cit.*, p. 623; Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, p. 855; Ion Gâlea, *op. cit.*, 2015, p. 288.

[45] The position of the representative of Spain in the work of the Vienna Conference on the preservation of corruption as a vice of consent is quoted at length: *A speaker in the International Law Commission argued that the phenomenon of corruption was a common practice in the colonialist era and is still common in neo-colonialist activities. (Forty-Sixth Meeting, Tuesday, 30 April 1968, at 8.55 p.m, Document: A/CONF.39/C.1/SR.46, 46th meeting of the Committee of the Whole*, p. 259, paragraph 16).

[46] The provisions of Article 50 - Corruption of the representative of a State - are as follows: "*If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."*

[47] Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit*., p. 849.

the victim State and in the interest of the State that corrupted him.

7. Coercion of a representative of a State

Some public international law authors treat coercion of a State's representative alongside coercion of the State as part of the broader category of the exercise of coercion, both of which are forms of the exercise of coercion[48] . The view is influenced by civil law theory in domestic law, where the two types of coercion are equated *mutatis mutandis with* violence.

Professor Stelian Scăunaș classifies the two types of coercion in the group of defects of consent which automatically lead to the invalidity of the treaty, while the other defects of consent dealt with above (error, fraud, corruption of the representative of a State, violation of a provision of domestic law concerning the competence to conclude international treaties and failure to observe the special restriction on the power to express a State's consent) would fall within the group of defects of consent leading to the invalidity of the treaty if invoked by the State whose consent has been vitiated[49]. This classification follows from the interpretation of Article 45 of the 1969 Vienna Convention in conjunction with Articles 51[50] and 52 of the same Convention.

Thus, Article 45 of the 1969 Vienna Convention has the marginal title *'Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty'*, and refers in its content only to the defects of consent provided for in Articles 46-50 of the Vienna Convention. Articles 51 and 52 of the 1969 Vienna Convention are therefore not subject to a right to invoke a ground for invalidity of a treaty, but as is clear from their content, in the case of both types of coercion, the expression of consent is void of any legal effect, the treaty being invalid by the very activity of coercion.

As noted in the doctrine *"Art 51 constitutes the dividing line between the grounds for invalidity which render consent to be bound merely voidable (Arts 46–50) and those which the Vienna Convention declares ipso facto void (Arts 51–53)".*[51]

In fact, this is the main reason why public international law also distinguishes between the absolute and relative invalidity of treaties, with distinct legal regimes[52]:

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[48] See Pierre-Marie Dupuy, *op. cit.*, 1992, pp. 192-194; Dumitru Mazilu, *Drept internațional public*, Vol. II, 2nd edition, Lumina Lex, Bucharest, 2005, pp. 60; Carmen Moldovan, *op. cit.*, pp. 192-194; Ion Gâlea, *op. cit.*, p. 288.

[49] Stelian Scăunaș, *Drept internațional public*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2007, pp. 96-97.

[50] Article 51 - Coercion exercised over the representative of a State - provides: "*The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."*

[51] Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, p. 858.

[52] Raluca Miga Beșteliu, *Drept internațional public, Vol. I,* 2nd edition, C.H. Beck Publishing

1. relative invalidity[53] can only be invoked by the State whose consent has been vitiated, whereas absolute invalidity can be invoked by anyone, being enforceable *erga omnes*, affecting the validity of the treaty from the moment of its conclusion.

2. relative invalidity may affect only part of the terms of the international treaty, whereas absolute invalidity affects the entire treaty, being total;

3. relative invalidity can be covered by the victim State's confirmation of the terms of the treaty, whereas absolute invalidity cannot be covered by acquiescence, as consent is deemed not to have been given;

4. both types of invalidity have *ex tunc* effects, applying to the past.

The author Valentin Constantin takes the opposite view, considering that the similarity of the effects of invalidity between domestic law and public international law is not a fair argument for distinguishing between relative and absolute invalidity. The professor starts from the premise that in international law there is no international public order whose violation entails, de facto, a sanction of the type of absolute invalidity and concludes that in public international law "*nullities cannot be conveniently classified into absolute and relative"*[54] . Instead, he proposes a classification of nullities in international law into partial and total, taking strict account of the principle of the divisibility of treaties[55].

Authors such as George Schwartzenberger and Robert Kolb consider that jus cogens rules constitute the international public order[56].

The Romanian author Ion Gâlea, quoting the French professor Joe Verhoeven, appreciates that the doctrine would not refer to these aspects.*[57]*

While we appreciate the legal reasoning of Professor Valentin Constantin, we believe that in international law one can also distinguish between absolute and relative nullities, and our arguments are as follows:

1. We consider erroneous the opinion that doctrine does not make such a distinction, or that only French and Romanian doctrine make this distinction. For example, the Austrian professor Stephan Wittich admits the distinction between absolute and relative invalidity in international law in German law doctrine: *"Moreover, while invalidity cases distinguish between relative and absolute invalidity (void treaties and voidable treaties), this distinction is generally immaterial in the context of Art. 69 and the only debatable question is the right to*

House, 2010, p. 109; Carmen Moldovan, *op. cit.*, pp. 198-199; Nasty M. Vlădoiu, *Drept international public*, Universul Juridic Publishing House, Bucharest, 2021, p. 342-343.

[53] Florian Coman, *Drept international public,* vol. II, Sylvi Publishing House, Bucharest, 1999, pp. 37; Ion M. Anghel, *op. cit.* 493. Marian Molea, *op. cit.,* p. 166.

[54] Valentin Constantin, *Drept Internațional*, Universul Juridic Publishing House, Bucharest, 2010, p. 149.

[55] *Idem.*

[56] *"International public order means jus cogens, rules which subjects of international law, even in their mutual relations, cannot modify or vary by agreement.",* Georg Schwartzenberg, *International Law and Order,* London, 1971, p. 425.

[57] Ion Gâlea, *op. cit.*, p. 274.

invoke invalidity. In the case of relative invalidity, the victim State may invoke invalidity (Art. 46-50), and in the case of absolute invalidity, the treaty is null and void and without any legal effect (Art. 51-53). These are in line with the general approach taken at the Vienna Conferences to refrain from referring to legal concepts that have developed in different ways in different domestic legal orders"[58]. Austrian Professor Stephan Wittich therefore also explains why the 1969 Vienna Convention does not deal with these two concepts: absolute invalidity and relative invalidity, even though they exist in public international law. Another example is the distinction made by the British professor Stephen Allen between absolute grounds for invalidity and relative grounds for invalidit[59]. The same view is shared by the British professor Malgosia Fitzmaurice: *"The grounds for invalidity of treaties in the 1969 Vienna Convention can be divided into two groups: relative grounds in Articles 46-50 and absolute grounds in Articles 51-53. The main difference between these causes is that relative invalidity may annul the treaty on the invocation of the victim State, whereas absolute invalidity means that the treaty is void ab initio, without any legal effect."*[60]

2. Even the International Law Commission Commentary states that *"It was concluded that the use of coercion against a State's representative for the conclusion of the treaty is a matter of such gravity that this article should sanction the absolute invalidity of the treaty whose consent has been so obtained."*[61]

3. International jurisprudence operates with the notion of absolute invalidity of treaties, as Judge Gaetano Morelli stated in his separate opinion on the Advisory Opinion of 20 July 1962, Certain Expenses of the United Nations (Article 17(2) of the UN Charter): *"In the case of acts of international organizations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the absolute nullity of the act."*[62]

Thus, as we have shown, both the majority of doctrine and the practice of States and the practice of international courts distinguish between absolute invalidity and relative invalidity, which is also the reason why we share the view that in public international law, in the area of treaty invalidity, we distinguish between absolute invalidity and relative invalidity, with the legal effects described above.

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[58] Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, p. 1183.

[59] Stephen Allen, *International Law. Law Express edition*, 3rd edition, Pearson Education Limited, 2017, pp. 56.

[60] Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties* in Malcolm D. Evans, *International Law*, 1st edition, Oxford University Press, 2003, p. 180.

[61] Draft Articles on the Law of Treaties with commentaries, 1966, p. 246, paragraph 3.

[62] Separate Opinion of Judge Morelli, Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 222, paragraph 8.

Returning to the defect of consent enshrined in Article 51 of the 1969 Vienna Convention, the doctrine establishes that both types of coercion, Articles 51-52, lead to "*the result of absolute invalidity*"[63].

With regard to the wording of Article 51, we note that it does not provide a definition of coercion exercised against a State's representative, but merely lists acts or threats directed against the State's representative as ways of exercising coercion. It is therefore up to international doctrine and courts to interpret what actions give rise to coercion of a State representative.

Thus, the legal literature mentions the following:

1. Acts of coercion can be physical *(vis absoluta)* or moral *(vis compulsiva)*.

2. Acts of physical coercion can be the leading of the State representative's hand to sign the treaty or the use of substances under the influence of which the State representative will sign the treaty: *"The coercion of an individual could take different forms, especially if the individual is a diplomat domiciled in the country where the negotiations took place. (...) there was no substantial difference between bribery and undermining an agent's resistance through the use of drugs or blackmail."*[64]

3. In most cases of coercion, consent is obtained by *vis compulsiva*, *"because it is the implied threat and concomitant fear of continued violence that motivates the representative to yield to the will of the coercer rather than endure further pain or discomfort"*[65].

4. *Vis compulsiva* may include the form of blackmail or *"threatening to ruin the reputation of the representative or his career by exposing a private indiscretion*"[66]. An example of the latter practice is referred to what is called in intelligence jargon as "Kompromat" and involves threatening a diplomat/spy/ representative of a state with the disclosure of footage or photographs proving an extramarital sexual relationship. Another example of vis compulsiva may be the threat of "*liquidation of hostages as a matter of conscience*"[67].

5. The acts or threats must be directed against the person of the representative of the victim State or members of his or her family, taking into account the individual interests of the representative and the interests of the victim State[68]. Although there is also criticism in the doctrine that Article 51 of the 1969 Vienna Convention could have been formulated much more clearly so as to include the notion of coercion directed against the loved ones of the State representative[69] , it should be noted that the majority view expressed in the doctrine, including in

[63] Dungan B. Hollis, *The Oxford Guide to Treaties*, 2nd edition, Oxford University Press, 2020, pp. 560.
[64] Yearbook of the International Law Commission 1963 Volume I Part I, p. 27, paragraph 30.
[65] Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, p. 862.
[66] Mark E. Villiger, *op. cit.*, p. 633.
[67] Marian Molea, *op. cit.* p. 162.
[68] Ion Gâlea, *op. cit.*, p. 288.
[69] See Marian Molea, *op. cit.*, p. 162.

the International Law Commission Commentary on the Draft 1969 Vienna Convention, is that Art. 51 also covers the situation where acts of coercion or threats are directed against members of the family of the State representative: "*This article deals with coercion of individual representatives "by acts or threats directed against them personally". This phrase is intended to cover any form of coercion or threat against a representative affecting him as an individual and not as an organ of his State. It therefore includes not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as well as a threat to harm a member of the representative's family in order to coerce the representative."*[70]

6. In contrast to bribery of a State's representative, we note that there is no requirement that the act or threat originate only from the negotiating State. This follows both from the wording of Article 51 and from the proceedings of the Vienna Conference, where the United States of America proposed an amendment to add this condition to the article, which was rejected.[71]

7. It has been argued in the doctrine that normal acts in treaty negotiations, such as argument, advice or persuasion, do not constitute coercion.[72] This view is fully confirmed by the practice of international courts:[73] *"of course, this does not mean that some pressure may not have been brought to bear upon the Rulers in order to secure their consent to the delimitations of the boundaries. Every kind of international negotiation is subject to influences of this kind. Mere influences and pressures cannot be equated with the concept of coercion as it is known in international law."*[74]

8. Coercion of the State by threat or use of force

This vice of consent represents the view shared by the entire international community on the prohibition of the use of force after the Second World War. Art 2 para. (4) of the Charter of the United Nations[75] is often cited in doctrine as

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[70] International Law Commission, *Draft Articles of the Vienna Convention on the Law of Treaties with Commentaries*, Yearbook of the International Law Commission, 1966, Vol. II, p. 246, paragraph 2 to art. 48 (now art. 51).

[71] Ion Gâlea, op. cit., p. 289; Mark Villiger, *op. cit.*, p. 634.

[72] Oliver Dörr, Kirsten Schmalenbach (eds.), *op. cit.*, 863.

[73] This is the Arbitral Award on the Border between Dubai and Sharjah, the vice of coercion being invoked by the League of Arab States and the United Arab Emirates, coercion exercised by Iran on the Emir of Sharjah to accept a 1971 treaty authorising the presence of Iranian troops on the Abu Mussa Islands.

[74] Arbitral Award of 19 October 1981 on the Border between Dubai and Sharjah, accessible at https://international.vlex.com/vid/dubai-sharjah-border-arbitration-870727212, accessed on 8 July 2023.

[75] Art. 2 para. (4) of the UN Charter states: *"All Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".*

the basis for the understanding of Art. 52 of the 1969 Vienna Convention[76]. We also share the view that "*the rigid text of Article 52 is far from sufficient to enshrine in international law the absolute invalidity of forms of coercion other than physical force per se*".[77]

9. Infringement of a rule of jus cogens

The doctrine states that the work of the Vienna Conference on the Law of Treaties marks a very important event, namely the mention in positive law, for the first time, of the notion of the jus cogens norm[78], it being considered that *"Article 53 of the Vienna Convention, as the point of formal codification of jus cogens in international law, provides the best available guidance to the formal source of the concept."*[79]

Indeed, Article 53 of the 1969 Vienna Convention provides a definition of a jus cogens norm, i.e. a peremptory norm of general international law: *"a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".*[80]

The concept of jus cogens comes from Roman law, meaning "*binding law*"[81], from the general theory of obligations, *"meaning those particular rules and principles which cannot be set aside by the will of the parties to a contract"*[82].

10. Conclusions

British author and diplomat Anthony Aust, in his wok *Modern Treaty Law and Practice*, considers the invalidity of treaties to be a *"rara avis"*, criticising the enshrinement of this legal institution throughout nine articles of the Vienna Convention on the Law of Treaties between States[83] (articles 46-53 and article 64), because despite the intellectual appeal of the subject, to which many academic works still devote much space, *"the subject is not relevant to the day-*

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[76] Article 52 of the 1969 Vienna Convention on the Law of Treaties states: *" A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."*

[77] Ludovic Takacs, Marțian Niciu, *Drept international public*, Didactica and Pedagogica Publishing House, Bucharest, 1976, p. 249.

[78] Dinah Sheldon, *Jus Cogens*, Oxford University Press, 2021, p. 13.

[79] Thomas Weatherall, *Jus Cogens. International Law and Social Contract*, Cambridge University Press, 2015, p. 130.

[80] Article 53 of the 1969 Vienna Convention on the Law of Treaties between States.

[81] Lucian Săuleanu, Sebastian Rădulețu, *op. cit.*, p. 157.

[82] Thomas Weatherall, *op. cit*., p. 3.

[83] Adopted on 22 May 1969 (opened for signature on 23 May 1969) and entered into force on 27 January 1980.

to-day work of a foreign *ministry*"[84].

We believe that it is not so much the intellectual attraction that this subject has for anyone who dares to tackle it, but the similarity of this legal institution to invalidity in domestic law that is the main reason for the amount of ink spilled on it, despite the obvious scarcity of case studies on the subject.

The invalidity of treaties seen as a sanction specific to public international law is also a rarity in the doctrine. With the exception of the work of Professor Grigore Geamănu[85], which expressly lists the invalidity of treaties among the legal sanctions encountered in public international law, we have not identified many significant works in national and international legal doctrine that expressly name the invalidity of treaties as a legal sanction specific to public international law. However, it cannot be concluded that the opinion of the Romanian professor Grigore Geamănu is a minority opinion, unsupported in doctrine. Other authors do not list the invalidity of treaties among the sanctions specific to international law, but when they define the invalidity of treaties, they expressly mention that it is a sanction[86], while other scholars consider invalidity as a cause of termination of the effects of treaties[87], not expressly defining it as a sanction.

In a monograph dedicated to the subject of defects of consent in public international law, Romanian author Marian C. Molea devotes an entire chapter to the invalidity of treaties, which he entitles "*Sanction of non-compliance with the conditions for the conclusion of treaties, an idea which he develops in the chapter by offering the following definition: we consider that in the sense of public international law invalidity is a sanction of violation by the treaty, violation at the time when the treaty was concluded, either of a norm of ius cogens or of the consent of a contracting party"[88].*

The French author Pierre-Marie Dupuy is of the opinion that the invalidity of treaties has been interpreted in various ways, but the idea of sanction is

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[84] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2007, pp. 312.

[85] See Grigore Geamănu, *op. cit*. 57: *"Other sanctions without the use of armed force that may be applied in international law are: - the invalidity of treaties concluded under the force of violence or in violation of peremptory norms of international law".*

[86] See Carmen Moldovan, *op. cit.* 2017, p. 187: "The *1969 Vienna Convention codified the rules applicable to the free expression of consent and the sanction for non-compliance - the invalidity of the international treaty, and even established a procedure with regard to invalidity (for which there are no examples from State practice)"*; See Ion M. Anghel, *Dreptul Trattatelor*, vol. I, Lumina Lex Publishing House, Bucharest, 1993, pp. 491: *"Invalidity is a sanction that applies to legal acts that have been concluded in breach of the rules of law";* See Florian Coman, *Drept international public*, vol. 37: *"Invalidity is a sanction applicable to those treaties which have been concluded in breach of the rules of law".*

[87] See Raluca Miga-Beșteliu, *op. cit.,* 2010, p. 289: *"Invalidity, cause of termination of the effects of treaties"*; Ion Gâlea, *op. cit*. 375: *"The differences between invalidity and termination, in international law, follow the elements retained in the general theory of law, namely invalidity implies the non-fulfilment of a condition of validity at the time of the conclusion of the treaty, which makes the treaty to be considered not to have been validly concluded, whereas termination implies that a treaty has been validly concluded, has produced effects, but, at a given moment, comes to an end".*

[88] Marian C. Molea, *op. cit.*, p. 172.

what defines the institution of invalidity: *"an act contrary to international law must not produce legal effects."*[89] Moreover, this represents the application to public international law of the general principle of law *"quod nullum est, nullum producit effectum"* (what is null produces no effect), a general rule of law *"which concerns the effects of invalidity, meaning the consequences which occur when the sanction of invalidity is applied"*.[90] Dutch professor Jan Klabbers also refers to treaty invalidity as a sanction for an invalid treaty[91].

Another argument in favour of the sanctioning nature of the invalidity of treaties is the debate on the adoption of the 1969 Vienna Convention. Thus, the representative of the United States of America supported Switzerland's proposal to delete the paragraph. (2)(a) and (2)(b). (3*)* of the draft text of Article 65 of the 1969 Vienna Convention on the grounds that the sanctions provided for in these paragraphs are a matter of State responsibility and would not always be satisfactory in practice: *"Such a limited range of sanctions, with their potentially harsh results, discourages parties from resolving their disputes amicably and encourages them to seek the maximum benefit from invalidity. Moreover, it has been a basic principle of the Convention that treaties should continue to be performed until such time as they have been found invalid."*[92]

We consider that the invalidity of treaties is clearly a legal sanction. Moreover, the Romanian legislator itself, in the Law on Treaties No. 590/2003[93], considers the invalidity of treaties as a sanction of public international law, since it includes Article 42 in section 5 of the normative act entitled *"Sanction of non-compliance with the rules on the conclusion of treaties"*.

The content of Article 42 of the Law on Treaties No. 590/2003 is clear enough for our reasoning: "*Treaties concluded in violation of the rules of international law on the validity of treaties and the rules on capacity and/or the procedure for concluding treaties may be declared void, the procedure for approving the declaration of invalidity being similar to that followed for the entry into force of the respective category of treaties."*[94]

Thus, the invalidity of treaties is a specific sanction of public international law, which arises as a result of non-compliance with the rules governing the conclusion of treaties.

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[89] Pierre-Marie Dupuy, *op. cit.* 1992, pp. 198-199.
[90] Lucian Săuleanu, Sebastian Rădulețu, *Dicționar de termeni și expresii juridice latine*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2011, p. 238.
[91] Jan Klabbers, *The Validity and Invalidity of Treaties* in Duncan Hollis (editor), *The Oxford Guide to Treaties*, 2nd edition, Oxford University Press, Oxford, pp. 551.
[92] Official Records - United Nations Conference on the Law of Treaties, A/CONF.39/11 - *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, 74th meeting, pct. 75, p. 446.
[93] Published in the Romanian Official Journal, Part I, No. 23 of 12 January 2004.
[94] Article 42 of the Law on Treaties No. 590/2003.

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4. Raluca Miga Beșteliu, *Drept internațional public,* Vol. I, 2nd edition, C.H. Beck, Bucharest, 2010.
5. Florian Coman, *Drept internațional public*, vol. II, Sylvi, Bucharest, 1999.
6. Valentin Constantin, *Drept internațional*, Universul Juridic, Bucharest, 2010.
7. Oliver Dörr, Kirsten Schmalenbach (editors), *Vienna Convention on the Law of Treaties. A Commentary,* Springer, 2012.
8. Pierre-Marie Dupuy, *Droit international public*, Dalloz, Paris, 1992.
9. Malcom D. Evans, *International Law,* 1st edition, Oxford University Press, 2003.
10. Gyula Fabian, Gabriela Dănilă, Reka Kis, Orsolya Leszai, Cantemir Păcuraru, *Hotărâri importante din jurisprudența Curții Internaționale de Justiție*, Hamangiu, Bucharest, 2019.
11. Ion Gâlea, *Dreptul tratatelor,* C.H. Beck, Bucharest, 2015.
12. Grigore Geamănu, *Drept international Public,* Vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983.
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16. Dumitru Mazilu, *Dreptul Internațional Public*, Vol. II, 2nd ed., Lumina Lex, Bucharest, 2005.
17. Carmen Moldovan, *Drept international public. Principii și instituții fundamentale*, editura Hamangiu, București, 2017.
18. Marian C. Molea, *Viciile de consimțământ în dreptul internațional public*, editura Științifică, București, 1973.
19. Paul Reuter, *Introduction to the law of treaties*, Routledge, 1995.
20. Lucian Săuleanu, Sebastian Rădulețu, *Dicționar de termeni și expresii juridice latine*, 2nd ed., C.H. Beck, Bucharest, 2011.
21. Stelian Scăunaș, *Drept internațional public*, 2nd ed., C.H. Beck, Bucharest, 2007.
22. Georg Schwartzenberg, *International Law and Order,* London, 1971.
23. Dinah Sheldon, *Jus Cogens,* Oxford University Press, 2021.
24. Ludovic Takacs, Marțian Niciu, *Drept internațional public,* Didactic and Pedagogical Publishing House, Bucharest, 1976.
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28. United Nations Conference on The Law of Treaties, *Official Records, A/CONF. 39/11/Add.2,*1971.

Constitutional Aspect through the Prism of International Principles

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Abstract

I would like to note that, in contrast to substantive legal norms, which establish the content of the rights and obligations of individuals and legal entities of private international law and at the same time regulate their behavior, the conflict of law norm determines the law of which state can be applied to a given relationship. A very significant difference between the conflict of laws rule and a number of subsequent regulations is the overcoming of the conflict of laws problem by determining the applicable law. In the case when we are talking about the connection of a private law relationship with the legal order of several states, the question arises: by the law of whose state is it possible to resolve this issue. The likelihood of national authorities applying foreign law is the main difficulty of private law. The application of foreign law is possible due to the provisions of national legislation, as well as an international treaty.

Keywords: *international treaty, conflict of laws, rule of power, power rights, obligations.*

JEL Classification: K10, K33

1. Introduction

Those legislative provisions that oblige national law enforcement agencies to turn to foreign law are contained in special provisions, namely conflict of laws rules, i.e. through the application of the law of other states in national courts, there is a noticeable narrowing of the scope of domestic law and at the same time - an expansion of the scope of foreign law. Moreover, the application of foreign law must in no way cause harm to persons of another state during the resolution of the dispute. As practice shows, when applying foreign law, the rights of individuals are fully protected than their own legislation are concluded in special provisions, namely conflict of law rules, i.e. through the application of the law of other states in national courts, there is a noticeable narrowing of the scope of domestic law and at the same time - an expansion of the scope of foreign law.

Today it is recognized that the application of a norm of foreign law cannot be limited only on the grounds that this norm is of a public law nature. This approach is expressed in the UNIDROIT Resolution (1975) and the Resolution

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of the 63rd Conference of the International Law Association (1988)[3]. As is known, the application of foreign public law norms is carried out according to the rules of international agreements. For example, the 1993 CIS Convention includes a provision on the impossibility of refusing to apply a foreign legal norm due to its public law nature. Many legal scholars are supporters of the concept of "conflict of laws of civil procedural law". Foreign procedural law provides legal assistance. Today, the legal doctrine contains a variety of definitions of conflict of law rules such as:

a) "The conflict of laws rule, together with the substantive legal norm to which it refers, forms a real rule of conduct for participants in civil transactions"[4].

b) A conflict of laws rule is a "super rule", through which power is given to one piece of legislation at the expense of another, as well as a rule of a public law nature, since with its help the "power" of one legal order is coordinated in relation to another[5].

c) "The conflict of laws rule is a rule that determines which state's law should be applied to a given private law relationship complicated by a foreign element"[6].

d) A conflict of laws rule is a rule of a general, abstract, reference nature, which does not contain a material model of behavior, does not establish the rights and obligations of the parties, but, on the basis of the objective criterion inherent in it, determines which state's law should regulate the relevant relations. The main difference between the conflict of laws rule and other legal regulations is to overcome the conflict of laws problem by determining the competent law, i.e. law subject to application by virtue of the conflict of laws rule[7]. The conflict of laws rule is intended to perform certain functions. The domestic doctrine identifies the following functions of conflict of laws rules[8]:

a) delimitation of national legal orders;

b) ensuring the application of foreign law on the territory of a particular state;

c) coordination of the extent of intersection and contact of the legal orders of two or more states;

d) ensuring the regulation of private law relations based on generally recognized principles of international law.

The functions of private law are created through conflict of laws rules, which establish which of the legal orders is competent. With their help, conflicts

[3] Getman-Pavlova, I.V., *International private law: textbook for masters*. Moscow: Yurayt Publishing House, 2013. p. 135.
[4] Lushch L.A., *Course of private international law*: In 3 volumes. Moscow. 2020. p. 78.
[5] Altenov I., *International private legal system*. Bulgaria. Sofia. 2005. p. 231.
[6] Dmitrieva G.K., *International private law*. Moscow. 2022. p. 65.
[7] Marysheva N.I., *International private law*. Moscow. 2021. p. 105.
[8] Anufrieva L.P., *Correlation between public international and private international law (comparative study of legal categories)*. Moscow. 2004. p. 32.

between different legal systems are resolved, legal order is ensured and the dispute is resolved on the merits. Relatively recently, the concept of "conflict of laws" appeared, which not all scientists recognize. Some believe that there is no conflict of law relationship, while other researchers emphasize that conflict of law relationship is an objectively existing phenomenon of legal reality; their presence is due to the fact of the existence of conflict of laws rules and the conflict of laws method of legal regulation[9].

The subject of conflict of law relations is the definition of the law that will be applicable to private law relations directly related to the foreign legal order. The object of conflict of laws relations is private law relations that are inseparable from the foreign legal order. The subjects of conflict of law relations are law enforcement agencies that apply conflict of laws rules to determine the applicable law, and the parties to a controversial private law relationship, in whose interests the court determines the competent law.

Conflict of laws relations are aimed at resolving a conflict of laws issue, and their totality forms conflict of laws law - a special subsystem of private international law, which is of a national character, because the legal order of any state has its own conflict of laws. The purpose of the conflict of laws rule determines the differences in its structure from the structure of other regulatory legal provisions, i.e. The conflict of laws rule includes the following elements:

1. volume (designation of the range of relations of a civil law nature to which this norm applies);

2. binding (grounds, criterion for determining the applicable law);

3. hypothesis[10].

A conflict of laws rule of an abstract and referential nature, which determines which state's law must be applied to resolve a particular case. Although the conflict of laws rules is similar in nature to the reference and blanket rules of national law, the peculiarity of the reference and blanket rules is that they refer to the legal system of a particular state, at the same time defining the applicable legislative act and rule of law. Conflict of laws rules are more abstract in nature - they provide for the possibility of applying national, foreign, and international law. The conflict of laws rule is "a kind of leap to nowhere"[11].

The general theory of law determines the main elements that form the structure of a legal norm: hypothesis, disposition, sanction. The disposition acts as a basic element of the norm, characterizing its sectoral affiliation and place in the legal system. Regarding hypothesis and sanctions, they cannot be called integral elements of a legal norm. The hypothesis promotes the correct application of the disposition by indicating the circumstances of such application. A sanction

[9] Kudashkin V.V., *International private relations in the system of socio-economic relations of society.* In: Journal of Russian Law. 2014. No. 2, p. 76-82.

[10] Sadikov O.N. *Conflict of laws rules in modern international private law*. In: Soviet Yearbook of International Law. Moscow, 1983. p. 207-215.

[11] Raape L., *International private law*. Moscow. 1980. p. 72.

makes a rule of conduct legally binding.

The structure of the conflict of laws rule differs sharply from the structure of the ordinary rule of law. The main structural details of a conflict of laws rule are scope and reference, where scope determines the content of the regulated legal relationship, and reference is the law that should be applied to regulate such legal relationship. According to Art. 37 of the Belgian International Private Law Code "the determination of the name and surname of an individual is governed by the law of the state of which the person is a citizen"[12]. Many scientists adhere to the "traditional" concept: "The referential nature of conflict of laws rules means that their text does not contain a combination of hypothesis, disposition and sanction - an integral quality of other legal rules. They consist of scope and binding, and their action always presupposes the existence of corresponding substantive law"[13]. Conflict of laws rules contain a public law nature, because are addressed not to subjects of civil circulation, but to law enforcement agencies of the state. The exception is dispositive conflict of law rules that fix the autonomy of the will of the parties, i.e. the choice of the applicable legal order is made by private individuals, and the court implements their will. The conflict of laws rule is mandatory, because requires finding an adequate solution.

2. Types of conflict of laws rules

In the modern doctrine of law, types of conflict of laws rules are known depending on the characteristics of their conflict of laws, regulated conflicts, sources of origin, action in time and space. Types of conflict of laws rules are classified as follows: the way of expressing the will of the legislator: a) imperative, b) alternative, c) cumulative, d) dispositive conflict of laws rules.

A mandatory conflict of law rule is an authoritative instruction of the legislator on the application of the law of one state, established on the basis of some objective criterion, where there is only one conflict of law connection and the right to choose legislation is excluded by both the court and the subjects of the legal relationship. The legislator establishes imperatively what law should govern the relationship (national law or foreign law). Alternative conflict rules are characterized by the presence of several conflict bindings. Through the alternative rule, the court, at its own discretion, has the right to choose the applicable law (the right to choose is inherent only in the court, not the parties).

Dispositive rules, as the main conflict of laws provisions, provide for the autonomy of the will of the parties, i.e. The parties to the contract, during the conclusion of the contract or in the future, have the right, at their choice, to establish the law to be applied to their rights and obligations in accordance with the contract signed between them. Autonomy of will regulates, first of all, obligatory

[12] Belgium PIL Code of July 16, 2004. Date of visit [07/29/2023]. Available: https://pravo.hse.ru/intprilaw/doc/041801.

[13] Erpyleva N.Yu., *International private law*. Moscow. 2011. p. 98.

legal relations associated with foreign legal order. The main difference between alternative and dispositive norms is that alternative ones involve a choice from several specific legal orders, i.e. these are "rigid" conflict principles, while dispositive norms contain at least one "flexible" binding. But, according to the general rule, a norm may have a dispositive character when it states: "unless otherwise provided by law," "unless otherwise follows from the law", "unless otherwise follows from the law, the terms or essence of the contract or the totality of the circumstances of the case." The imperative nature of regulation presupposes an exception and is specifically stipulated in the rule of law. As for the forms of conflict of laws, these are bilateral and unilateral conflict of laws rules. Unilateral conflict of laws rules involves the application of only national law, the law of the country of the forum, they also indicate the circumstances in which national law is applied, and consider legal relations associated with a foreign legal order only from the point of view of national law. As for the forms of conflict of laws, these are bilateral and unilateral conflict of laws rules. Unilateral conflict of laws rules involves the application of only national law, the law of the country of the forum, they also indicate the circumstances in which national law is applied, and consider legal relations associated with a foreign legal order only from the point of view of national law. As for the forms of conflict of laws, these are bilateral and unilateral conflict of laws rules. Unilateral conflict of laws rules involves the application of only national law, the law of the country of the forum, they also indicate the circumstances in which national law is applied, and consider legal relations associated with a foreign legal order only from the point of view of national law.

Bilateral conflict of laws rules considers the possibility of applying both national and foreign or international law and there are significantly more of them than unilateral ones. They can be imperative, alternative, cumulative and dispositive in nature. Unified conflict of laws rules is uniform conflict of laws rules formed as a result of international agreements and representing the coordination of the wills of states. Unified conflict of laws rules in the national legal system act as rules of internal law. The presence of an international treaty containing conflict of law rules presupposes that unified conflict of law rules will be applied to private law relations associated with a foreign legal order[14].

General conflict bindings are conflict of laws rules. These are general (end-to-end), i.e. Conflict of law rules applicable in all branches and institutions of international private law: personal law of an individual, the law of the court, the law of the flag, the law of the seller, autonomy of will, the law of the place where the act was committed. Currently, to the "classical" general bindings, general rubber conflict of law rules has been added: *lex causae* - the law of the essence of the relationship, *lex benignitatis* - the most favorable law. Currently,

[14] Getman-Pavlova, I.V., *op. cit.*, p. 140.

there is a tendency to transform the *lex benignitatis* into one of the basic principles of private law: "In relation to contracts concluded with parties considered weaker, these parties should be protected by conflict of laws rules that are more favorable for their interests compared to the general rules." (Clause 23 of Preamble Rome I)[15]. Regarding special conflict of laws links, they are formulated for specific private law institutions and are applied in certain areas of relations). Thus, special conflict of laws provisions is a kind of transformation of general conflict of laws rules. Among the special conflict of laws links, the following are very common: *lex arbitri* - the law of the super-arbiter's place of residence; *lex loci arbitri* - the law of the place of arbitration; *lex cartae* - the law of the place of location of securities, the law of the place of issue of securities; *lex loci laboris* - the law of the place of work; *lex fori (loci) concursus* - the law of the place of bankruptcy proceedings; *lex loci celebrationis* - the law of the place of marriage; *lex loci protectionis* - the law of the country in which protection is sought; *lex originis* - law of origin (child, cultural property[16].

Taking into account the effect of the law in space, conflict of laws rules is divided into international and interterritorial. International conflicts involve a clash of legal systems of different states. Interlocal collisions (interterritorial) arise in states "with multiple legal systems," i.e. comprising several administrative-territorial units, where legal systems have distinctive features. Interlocal conflict of laws rules tend to complement the "national" conflict of laws rule. Complex interlocal (interterritorial) conflicts are inter-payment collisions in the USA, where each state is endowed with the maximum amount of legal independence. Each state has its own criminal, civil, commercial and family laws and its own private law.

Conflicts of laws are part of the legal systems of individual states, but not part of the federal legal system. The complexity of American interlocal law lies in the fact that state legislation is fundamentally different (for example, depending on the state, the age of majority occurs between the ages of 18 and 21; the concept of permanent residence in the state of Nevada is 24 hours of stay on its territory, in the federal district Columbia - six months; in the state of California, both secular and church forms of marriage give rise to legal consequences, in the state of Alabama - only church forms).

The special legal nature of interpersonal conflicts is determined by the differences between ethnic, religious, tribal and other associations from the general structure of the state. There is a point of view when the norms of interpersonal law act as transitional between church and civil law. For example, in India and Cyprus, the concept of "personal law" is based on adherence to a particular religion - Muslim, Hindu or Christian. Interpersonal conflicts are inherent not

[15] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I"). Date of visit [07/29/2023]. Available: https://eulaw.edu.ru/.

[16] Getman-Pavlova, I.V., *op. cit*., p. 143.

only in the countries of the East, where the legal status of individuals is determined depending on their belonging to a particular religion, but also in the countries of Equatorial Africa. This division of law according to personal criteria operates in Palestine and Israel; in states of the Islamic legal family, especially in Arab countries with populations professing different religions.

Taking into account personal law, there are three systems of law based on religious movements: Judaism, Hinduism, Islam, where the main role in legal regulation is occupied by: the Koran, Torah, hadith[17]. Interpersonal conflicts in private law are resolved in the same way as interlocal ones, i.e. according to the law of a given state: "If a person is a citizen of a country where the application of certain rules depends on the status of its citizens, the law of his country of citizenship is the law determined in accordance with the rules of that country, or, if there are none, the law with which the person most closely related" (Article 40.1 of the Japanese Private Law Law[18]). Interpersonal conflicts arise on the territory of a certain state, and the possibility of regulating them is an internal matter of the state.

In addition to interpersonal collisions, if we are talking about the operation of the law in time, namely the source of intertemporal collisions, which are not characterized by an international, but an internal character. Intertemporal collisions arise from the presence in a state of laws issued at different times, which are designed to regulate the same relations. Intertemporal conflicts are resolved on the same basis as interlocal or interpersonal ones - in accordance with the regulations of the state whose law should be applied to a given relationship.

3. Basic types of collision bindings

Types of conflict bindings are understood as generalized rules used to construct conflict rules. The system of conflict principles is based on conflict bindings. Conflict of laws regulation is a kind of division of legal relations into statutes - a set of issues that provide for the application of a certain legal order. A statute is nothing more than a legal order, to which the conflict of laws rule refers and which regulates a certain type of relationship. Statutes are divided into: personal, formal, real, basic, obligatory, monetary, tortious, hereditary, family, auxiliary, testamentary, etc. Conflict of laws rules determine the basis of the statute of relations. With the help of the conflict of laws rule, the type and range of relations subject to the statute, the scope of its action, and the list of issues to be resolved are established. By linking the conflict of laws rule, the applicable substantive law is established, i.e. content of the statute.

The personal law of an individual (*lex personalis*), depending on the state's affiliation with a particular legal system, is revealed in two versions. Law

[17]Anufrieva L.P., *International private law: textbook*. Moscow. 2000. p. 89
[18] Japan PIL Law. Date of visit [07/29/2023]. Available: https://pravo.hse.ru/intprilaw/VA.

of citizenship (*lex patriae*) - the legal status of a person is determined by the legislation of the state whose citizenship this person has. The understanding of personal law as the law of citizenship is inherent in most continental law countries such as: Germany, France, Belgium, Spain, Japan. "The legal capacity of an individual is determined by the law of the state of which he is a citizen"[19].

Law of domicile (*lex domicilii* - law of place of residence) - the legal status of a person is determined by the legislation of the state in whose territory the person resides. The understanding of personal law as the law of domicile is characteristic of: Great Britain, USA, Iceland. In civil law countries, the law of domicile is established based on the criteria of place of residence, usual place of residence, and place of business establishment. The Hungarian legislator defines the concepts of "place of residence" and "usual place of residence": "The place of residence is the place where a person resides permanently or with the intention of settling permanently. A habitual residence is a place where a person stays for an extended period of time without the intention of permanent residence"[20].

According to Swiss law, the law of domicile is based on a number of criteria: "An individual has: a) a place of residence in the state in which he resides, with the intention of living there permanently; b) the place of usual residence in the state in which he resides for a certain period, even if this period is limited in advance; c) place of business establishment in the state in which his professional or commercial activities are concentrated. No one can have several places of residence at the same time"[21]. The conflict of laws principle of the personal law of individuals establishes the personal status of individuals: legal capacity, its content and limitations. The personal status of a legal entity presupposes its personal law, through which the following are determined: the status of the organization as a legal entity; its organizational and legal form; requirements for the name of a legal entity; issues of creation, reorganization and liquidation of a legal entity, issues of legal succession; content and scope of legal capacity of a legal entity; procedure for acquiring rights and obligations; internal relations, including relations of a legal entity with its participants; ability of a legal entity to meet its obligations[22].

The law of the location of a thing (*lex rei sitae*) is the oldest conflict of law link that defines the property law statute of legal relations, including: issues of division of things, their legal qualification (negotiable and non-negotiable things, movable and immovable, generic and individually defined) "legal the division of things... is determined according to the law of the state in which the

[19] GC of Greece. Date of visit [07/30/2023]. Available at https://pravo.hse.ru/intprilaw/VA.
[20] Hungarian PIL Decree No. 13 of 1979. Date of visit [30.07.2023]. Available: https://pravo.hse.ru/intprilaw/doc/040301.
[21] Swiss PIL Act 1987. Date of visit [30.07.2023]. Available: https://pravo.hse.ru/intprilaw/doc/042901.
[22] Getman-Pavlova, I.V., *op. cit*., p. 173.

things are located"[23]; content, exercise and protection of property rights and other real rights - "the legislation of the state on the territory of which the property is located establishes any real right, the nature and content of these rights"[24]; the emergence, change and termination of ownership and other real rights to property are determined by the law of the state "on whose territory the thing is located at the time of the occurrence of the fact that caused the legal consequence"[25]; legal status of real estate: "the law of the place in which it is located applies to real rights to real estate"[26].

In modern law, the attachment formula "the law of the location of the thing" also applies to movable property: "The emergence, transfer or termination of real rights to property, the location of which has changed, is regulated by the law of the place where it was located at the time when the legal fact that created, who has changed or terminated the relevant right"[27]. The fate of the property of a foreign legal entity is determined by the national law of that legal entity. Issues of ownership of the property of a branch of a foreign enterprise are regulated by the law of the state to which this legal entity belongs[28]. Rights in relation to movable things that a person "has in his person" ("personal or cabin baggage") are determined by the personal law of their owner or possessor[29]).

Law of the seller's country (*lex venditoris*) a conflict of laws clause of most contractual obligations, which is of an auxiliary nature and is applied in the event that there is no choice of applicable law by the parties to the contract. This law is understood in a broad and narrow sense: in a narrow sense it means the application to a sales contract of the law of the state on whose territory the seller's place of residence or main place of business is located. Typically, the seller's principal place of business is the seller's place of business. The law of the seller's country in a broad sense is a general attachment formula that regulates not only purchase and sale, but also all other contractual relationships (loan, lease, contract, insurance, storage). This conflict of law link is a reference to the law of the country with which the contract is most closely related.

The law of the place where the offense was committed (*lex loci delicti commissi*) - (the law of the place where harm was caused) is a conflict of law link

[23]Austrian PIL Act 1978. Date of visit [30/07/2023]. Available: https://pravo.hse.ru/data/2021/03/13/.

[24] Dutch Civil Code 2011. Date of visit [30.07.2023]. Available: https://pravo.hse.ru/data/2015/10/28/.

[25] Hungarian PIL Law XXVIII of 2017. Date of visit [30.07.2023]. Available: https://pravo.hse.ru/data/2019/01/21/.

[26] China PIL Law 2016. Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/VA.

[27] Romanian PIL Law No. 105 of 1992. Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/doc/041301.

[28] Civil Code of Spain 1889 Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/doc/040601.

[29] Civil Code of Brazil of 2002. Date of visit [07/30/2023]. Available: https://constitutions.ru/?p=1628.

for regulating obligatory relations of a non-contractual nature, issues of causing harm, i.e. non-contractual obligations are determined by the law of the state in whose territory the damage was caused. It is used to regulate tortious obligations and determine the tortious statute of the legal relationship: "in the field of tortious and quasi-delict obligations, only the law of the place of the tort or quasi-delict is applicable"[30].

In American doctrine there is a position according to which the law of the place where harmful consequences are discovered should be applied. American courts rule torts according to the law "peculiar to the tort": "Any question in tort or quasi-tort liability shall be governed by the law of the state whose aspirations would be most seriously prejudiced if its law were not applied to the question"[31]. Section 11 of the UK PIL Act states: "(1) The general rule is that the applicable law is the law of the locality in which the events constituting the offense or tort in question occurred. (2) Where the constituent parts of these events occurred in different places, the applicable law as a general rule should be taken to be: (a) for an action with a cause of action for personal injury to a person, or death arising out of personal injury,— the law of the locality where the person was when he suffered harm; (b) for an action for damage to property, the law of the locality where the property was located when it was damaged; (c) in any other case - the law of the locality in which the most significant component or components of these events occurred"[32].

Currently, the law of the place where the tort was committed is assessed as a "hard" conflict of laws binding, and in the practice of most states there is a tendency to abandon its application. Almost all states have legislated the "presumption of common citizenship or domicile" - if the victim and the delinquent have common citizenship, residence or usual place of residence in the same state, the law of that state applies (Canada, Portugal, China, Italy)[33]. The main principle of resolving non-contractual obligations is the possibility of choosing legislation favorable to the victim: "The obligation to compensate for harm is subject to the law of the country that is more favorable to the victim"[34].

The law of the currency of payment and the law of the currency of debt (*lex monetae*) In monetary obligations, there are the concepts of "currency of debt" (the monetary unit in which the loan is made) and "currency of payment" (the monetary unit in which the debt is paid)[35]. With their help, it is possible to express a monetary obligation in foreign currency, international monetary or

[30] Ordinance on the PIL of Madagascar. Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/South_Africa.
[31] Louisiana Civil Code as amended by Law 1991. Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/doc/020102.
[32] UK PIL Act 1995. Date of visit [30/07/2023]. Available: https://pravo.hse.ru/data/2015/10/20/.
[33] Getman-Pavlova, I.V., *op. cit*., p. 184.
[34] Georgia PIL Law of 1998. Date of visit [07/30/2023]. Available: https://matsne.gov.ge/ru/document/view/93712?publication=3.
[35] Getman-Pavlova, I.V., *op. cit*., p. 188.

units of account, conventional monetary or units of account. The law of the currency of payment and the law of the currency of debt are special conflict of laws provisions that make it possible to regulate the issue related to the content of monetary obligations. In foreign doctrine and practice, it is believed that the law of the currency of payment (debt currency) can be used to determine the currency statute of the legal relationship. The essence of a currency peg is that if a transaction is concluded in a certain foreign currency, then in all currency matters it is subject to the legal order of the state to which the currency belongs: "The payment currency is determined by the law of the state that issued it."[36]. Currency changes of a particular state must be recognized everywhere for all debts denominated in the currency of the states, then the monetary content of the obligations will automatically be subject to the law of the currency of the debt. The law of the currency of debt (currency of payment) is used to localize the contract and determine its connection with the law of a particular state. In the UK, in cases "where a judgment is made in respect of an amount denominated in a currency other than sterling. The court may order that the rate of interest applicable to the debt shall be such rate as the court deems proper"[37].

The law of the court (*lex fori*) is a binding of a unilateral conflict of laws rule, suggesting the application of "local" law, the law of the state whose court is considering the case. Law enforcement agencies of the state are obliged to be guided by the law of their country, although the legal relationship is connected with a foreign legal order. The conflict of laws issue is resolved in favor of the law of the state on whose territory the private law dispute is being considered. The legislation of most states provides that if "within a reasonable time" it was not possible to establish the content of foreign law, the court decides the case on the basis of its national law: "If the judge was unable to establish the content of foreign law, the law selected using other similar criteria is applied. In their absence, Italian law applies"[38]. National law is applied when resolving issues of limitation and deprivation of legal capacity, missingness and declaration of death of foreign individuals, divorce: "The conditions and legal consequences of declaring a person missing are determined by Swiss law"[39].

Flag law (*lex flagi, lex banderae*) - transformation of the "personal law" binding in relation to aircraft and water vessels, space objects. The main scope of application of flag law is international sea, river and air transport, merchant shipping and navigation. Flag law is applied to resolve the following issues: powers, competence, rights and duties of the captain or commander of the ship; contract for hiring crew members; responsibility of the shipowner or airline for the actions of the commander (captain) and crew; duties of crew members and internal ship

[36] Romanian PIL Law No. 105 of 1992. Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/doc/041301.
[37] UK PIL Act 1995. Date of visit [30/07/2023]. Available: https://pravo.hse.ru/data/2015/10/20/.
[38] Italian private law. Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/SE.
[39] Swiss PIL Act 1987. Date of visit [30.07.2023]. Available: https://pravo.hse.ru/data/2019/01/29/.

regulations; real and security rights to ships; maritime mortgage, privileges and guarantees of a proprietary nature; forms of registration of acts on the basis of which real and security rights to ships arise, are transferred or terminated; rights of creditors after the sale of the vessel and repayment of these rights[40].

The law of autonomy of the will of the parties is the basic conflict of law binding for all contractual obligations. The Preamble of Rome I (Article 11) states: "The freedom of the parties to choose the law to be applied should be one of the cornerstones of the system of conflict of laws in the field of contractual obligations"[41]. Autonomy of will is the most "flexible" conflict of laws rule, enshrined in judicial practice and laws of most states. The principle of autonomy of will occupies a central place in national legal systems. "Contractual obligations are governed by the law of the place of residence of the contracting parties, the law of the place where the contract was concluded. All this applies unless the parties agree"[42]. The general approach of the Anglo-American legal system is that the choice of law by the subjects of a transaction must be conscientious and legal. Louisiana Civil Code provides (Art. 3540): "Matters of contract shall be governed by the law chosen by the parties or the law upon which the parties expressly relied, but only to the extent that such law does not violate the public policy of the State whose law would otherwise be applicable"[43].

The main restrictions on the autonomy of the will of the parties: the choice by the parties of the law applicable to the contract should not contradict the public policy of the state on the territory of which the autonomy of the will is realized; the choice by the parties of the law applicable to the contract should not be made for the purpose of circumventing the law, i.e. in order to exclude the application to the contract of mandatory norms of the national legal system, the refusal to use which the parties formulated through autonomy of will; if the contract is most closely related to the law of another country, then the choice of law by the parties should not be detrimental[44]. The law of the country with which the contract is closely related will be the law of the state where the place of residence or the main place of activity of the central party to the legal relationship is located. In the courts of such countries as: Great Britain, USA, France, Austria, in the absence of a clause on the applicable law in the contract, the "implied" will of the parties is established. For this purpose, the criteria for "localization" of the contract are used; "justice"; "a kind, caring owner", a "reasonable" person. The Rome II Regulation states: "The parties may choose the law to be applied to the non-contractual obligation: a) through an agreement entered into by them after

[40] Getman-Pavlova, I.V., *op. cit.*, p. 192.
[41] Regulation (EC) No. 593/2008 of the European Parliament and of the Council dated June 17, 2008 on the law applicable to contractual obligations ("Rome I"). Date of visit [07/30/2023]. Available: https://eulaw.edu.ru/.
[42] Civil Code of Egypt. Date of visit [07/30/2023]. Available: https://constitutions.ru/?p=23917.
[43] Louisiana Civil Code as amended by Law 1991. Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/doc/020102.
[44] Getman-Pavlova, I.V., *op. cit.*, p. 201.

the legal fact giving rise to the harm has occurred; b) when all parties are engaged in commercial activities, also by means of an agreement freely entered into by them before how the legal fact causing the harm occurred. This choice must be expressly expressed or clearly follow from the circumstances of the case and not prejudice the rights of third parties"[45].

4. Conflict of laws regulation

Through the Internet, which acts as a means of communication, a wide range of social relations is realized. Thus, any Internet relationship that is of a private law nature is potentially subject to regulation by private law. The presence of a foreign element in Internet relations can always be traced, and it can manifest itself in a wide variety of ways: a) the server is located on the territory of a foreign state; b) the service provider has the citizenship of a foreign state; c) has a permanent place of residence in the territory of a foreign state; d) an electronic transaction is concluded by entities of different states; e) as a result of using the website, damage was caused in the territory of a foreign state; f) the information posted on the website significantly violates the laws of a foreign state,

Every Internet relationship contains many foreign elements. For example, an object on the Internet is located on an Internet site, the domain name of which indicates that it belongs to one state, and the server that supports this Internet site is located in another state. At the same time, the subject can carry out commercial activities on the Internet site of his state and sell digital goods from a server in a foreign state. Subjects can enter into legal relations relating to an object located on a foreign Internet resource and use the services of a foreign service provider. Foreign characteristics of Internet legal relations are formed artificially by subjects in order to locate a web server in countries with the most favorable legislation.

The formation of any legal relationship is associated with a specific legal fact, the so-called. factual circumstance, this may be an event or action, the foreign components of which contribute to the onset of certain legal consequences. There must be a legal connection between the factual circumstance and the legal systems of two or more states. A legal fact should play "the role of a qualifying feature of a legal relationship of an international nature on the Internet"[46]. It is considered that an Internet legal relationship is international in nature if the circumstances of its occurrence, change or termination allow the occurrence of legal consequences that are provided for by the norms of several legal orders. This kind of connection of a legal relationship with the legal orders of several states reflects

[45] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II") Date of visit [07/30/2023]. Available: https://pravo.hse.ru/intprilaw/doc/040002.
[46] Gorshkova L.V., *New problems of regulation of private law relations of an international nature on the Internet*: dissertation of a candidate of legal sciences. Moscow. 2005, p. 43.

the legal fact underlying the emergence of this legal relationship, the legal significance of which is given within the framework of the legal orders of the relevant states.

Any Internet relationship is characterized by the onset of legal consequences in the real world. Any relationship of a private law nature, somehow connected with a foreign legal order, is a priori within the scope of the international private law[47]. In practice, it is very difficult to determine the connection between Internet relations and the law of a foreign state. One of the solutions is proposed: a) when the connection with a foreign legal order is obvious or the parties insist on the application of a foreign legal order, then the law should be applied on the basis of the conflict of laws rules of the country of the forum, revealing the content of the principle of close connection in relation to a specific relationship. b) when the connection with a foreign legal order is not clearly evident, a pragmatic solution is necessary, namely: i) the court decision must be recognized and enforced on the territory of a foreign state, ii) the court is obliged to resolve the conflict of laws issue and establish the applicable law; iii) the court decision is executed on the territory of the given state, iv) the law of the country of the forum must be applied. Often, in Internet relations, subjects in most cases have the right to choose the applicable law and place of consideration of the dispute. In foreign doctrine, the transnational law of electronic business (lex informatica) arose, with the help of which it is possible to dynamically regulate Internet relations by implementing the principles, customs, rules and practices accepted throughout the world. Lex informatica is a set of trading rules applicable to transnational electronic commerce transactions, created for subjects of transnational electronic transactions, used by online arbitrators to resolve disputes based on the intentions of the parties and formal comparative law analysis. Lex informatica is the product of a private, decentralized process of lawmaking, arising from various factors[48]. The definition of *lex informatica comes from lex mercatoria*, a long-standing regulator of international commercial activities. The formation of a "general Internet law" by analogy with the *lex mercatoria* is a very long process, and therefore the adoption of a universal international convention governing the Internet is not an easy task, due to differences in national legislation and judicial practice. Unification of conflict of laws rules is the best option for solving conflict of laws problems on the Internet, but it is not without problems. Let's consider two opposing approaches: a) the specifics of the Internet require the creation of special rules provided for determining the law and subsequently applied to Internet relations; b) consolidation in international and national legal orders of criteria for determining the applicable law and delimitation of their jurisdiction[49].

[47] Getman-Pavlova, I.V., *op. cit*., p. 201.
[48] Patrikios A., *The role of international online arbitration in regulating cross-border trade*. Date of visit [08/07/2023]. Available: http://www.sciencedirect.com/science7_ов= ArticleURL&_udi.
[49] Leanovich E.B., *Problems of legal regulation of Internet relations with a foreign element.* Date

Most researchers are inclined to believe that conflict of laws regulation of Internet relations should develop not through the development of special Internet bindings, but through the use of existing conflict of laws rules enshrined in legislation[50]. Thus, in order to establish the law applicable to the form of the transaction, it is necessary to determine what is considered to be the place of the transaction on the Internet. So, the place of execution of an Internet transaction must be considered the place of residence of an individual or the main place of activity of a legal entity acting as an offeror. The place of a unilateral Internet transaction is the place of residence of an individual or the main place of a legal entity that has already concluded the transaction. A similar position is expressed in the UNCITRAL Model Law on Electronic Commerce (1996), which provides: 1. The place of origin of an electronic message is the place of residence or place of business of the sender. 2. The place of receipt of an electronic message is the place of residence or place of business of the recipient of the message[51]. The form of the concluded Internet transaction, as well as the procedure and methods for signing it, should be governed by the law chosen by the subjects of the transaction. This possibility of regulating the statute of relations through the autonomy of the will of the parties is set out in most national codifications of private international law, because in those transactions that are concluded in the process of electronic interaction, the presence of free choice among legal subjects will simplify the resolution of conflicts on the issue of the legal validity of electronic documents. As practice shows, an Internet contract is closely related to the law of the country of the entity carrying out the decisive execution - the service provider. Thus, in Internet contracts, the law of the main place of business of the party that carries out the characteristic performance is recognized as the law of the country of the main place of business of the service provider.

The close connection of the contractual relationship with the legal order can be established through the use of private presumptions[52]. When an agreement is concluded online, but it is executed offline (delivery of goods, performance of work, provision of services), in this case it must be governed by the law of the place of execution of the agreement. As for the agreement on the distribution of advertising on the Internet, its regulation is possible through the law of the country to whose residents the advertising is directed. The place of the consumer's actions, without which it is impossible to conclude an Internet contract, will be the consumer's place of residence. When establishing the rights applicable to ob-

of visit [08/08/2023]. Available: http://evolutio.info/index.php?option=com_content&task=view&id=385Itemid=51.

[50] Getman-Pavlova, I.V., *op. cit*., p. 206.

[51] UNCITRAL Model Law on Electronic Commerce 1996. Date visited [08/08/2023]. Available: https://uncitral.un.org/ru/texts/ecommerce/modellaw/electronic_commerce.

[52] Maltsev A.S., *Conflict of law regulation of cross-border legal relations arising in the process of electronic interaction*: dissertation of a candidate of legal sciences. Moscow. 2007. p. 22.

ligations resulting from harm, one should distinguish between "off-network" (infection with a computer virus) and "on-network" (posting defamatory information on the Internet) harm. The conflict of laws of "intranet" harm includes "simple" (the cause of harm affects the interests of a specific victim) and "complex" (the cause of harm affects the interests of third parties). The law of the place where harm was caused is recognized as: a) the law of the state from which the person who caused the harm connected to the Internet; b) the law of the location of the computer of the recipient of the virus message; c) the law of the place from which the viral information became available to other persons; d) the law of the location of the server.

A very well-known form of unfair competition in the field of information technology is "cybersquatting" - the registration of domain names that coincide with someone else's trademarks or trade names. Another form of unfair competition in the use of information technology is considered to be inappropriate electronic advertising that misleads users regarding the relevance of search results. Unjust enrichment on the Internet involves the acquisition of non-cash funds, so-called ("electronic money") and property rights without proper legal basis. In Internet relations, subjects of one state who have completed an Internet transaction, where all circumstances are related only to this state, have the right to express autonomy of will in favor of the application of a foreign legal order. The fact that the transaction was concluded on the Internet automatically connects it with the legal systems of other states. So far, neither judicial practice nor legislation has been able to create a system of consistent and uniform conflict of laws rules for solving conflict of laws problems on the Internet.

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PRACTICAL AND ADMINISTRATIVE CONSIDERATIONS. LEGAL IMPLICATIONS

Decentralization in Public Administration and Redefining Power for More Effective Governance

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Abstract

Local Autonomy and Administrative Decentralization are fundamental principles in the state organization of power, in building the rule of law, in the development of democracy at all levels. Decentralization is an essential principle in the construction of Public Administration. Along with Local Autonomy and the Deconcentration of Public Services, this principle contributes to defining the way in which power and responsibility are distributed between the different levels of administration, with the aim of improving the efficiency and relevance of decisions made according to the needs and particularities of communities. Described as a transfer of administrative and financial powers from central Public Administration to local Public Administration, Decentralization is seen as a tool that facilitates more effective management of community and citizen needs. Putting the citizen at the centre of administrative reform strategies is a common point in governments' efforts. The objective of making the Administrative System more efficient and closer to the citizen reflects a desire to improve the experience and satisfaction of citizens in the interaction with the Public Administration. Even if ambitious goals are included in governance programmes and reform strategies, their effective implementation requires administrative capacity and effective coordination. Sometimes implementation can be hampered by insufficient resources, lack of expertise, or lack of a coordinated approach between different entities and levels of Administration.

Keywords: p*ublic administration, decentralization, administrative deconcentration, local autonomy, local collectivities, power, state.*

JEL Classification: H83, K23

1. Introduction

The principles of Decentralization and Local Autonomy are enshrined both in the Constitution and in the Romanian legislation. This shows the importance given to the distribution of power and the involvement of local communities in the decision-making process.

Article 120 paragraph (1) of the Romanian Constitution emphasizes the importance of the principles of Decentralization, Local Autonomy and Deconcentration of Public Services in Public Administration at the level of administrative-territorial units[2]. This constitutional provision establishes a legal framework for the distribution of responsibilities and powers at the local level.

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[2] Revised Constitution of Romania from 1991.

Decentralization, Local Autonomy and the Deconcentration of Public Services are important pillars of local Public Administration. The idea of Local Autonomy entails administrative decentralization, autonomy is a right and a decentralized system which implies autonomy.[3]

Decentralization contributes to the transfer of responsibilities and authority to the local level, autonomy gives local communities the opportunity to manage their own affairs within established limits, and deconcentration implies the distribution of administrative responsibilities to different levels of the state apparatus[4].

These three pillars together can create a framework where local communities have more flexibility and power to shape their destinies and better respond to their specific needs.

At the same time, the principles of Decentralization and Local Autonomy are also supported in specific legislation, including Law no. 215/2001 of the local Public Administration, Framework Law no. 195/2006 on Decentralization and Law no. 199/1997 for the ratification of the European Charter of Local Self-Government. These laws contribute to the consolidation of the legal framework that supports and regulates the way local Public Administration operates in Romania.

2. Decentralization and administrative deconcentration

Public Administration reform is a broad concept that includes all aspects of the organization of the public sector, among which stand out: the general 'architecture' of ministries and agencies, organizations and institutions at the local level, systems, structures, processes, motivations, as well as the way of their supervision and periodic adaptation of the system.[5]

Under these circumstances, the member states of the European Union or those aspiring to integration, chose first of all the measure of deconcentration of decision-making structures, followed by administrative-territorial decentralization. This approach indicates a systematic evolution towards the distribution of power and decision-making towards lower levels of administration.

The transition from centralism to decentralization was perceived as a 'historical necessity'. Indeed, this change is happening not only for practical rea-

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[3] Anibal Teodorescu, *Administrative Law Treaty*, vol. I, 2nd editon, Institute of Graphic Arts Eminescu S.A., Bucharest, 1929, p. 75; Antonie Iorgovan, *Administrative Law Treaty*, vol. I, 4th edition, All Beck Publishing House, Bucharest, 2005, p. 450.

[4] See in this regard Cătălin-Silviu Săraru, *Drept administrativ*, vol. I, Ed. Universul Juridic, Bucharest, 2023, p. 133-143; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 653-663; Verginia Vedinaș, *Tratat teoretic și practic de drept administrativ*, vol. I, Ed. Universul Juridic, Bucharest, 2018, p. 123 et seq.

[5] Marius Profiroiu, Tudorel Andrei, Dragoș Dincă, Radu Carp, 2006. *Reforma administrației publice în contextul integrării europene. Studiul nr. 3.* Institutul European din România – Studii de impact III, Bucharest, p. 131.

sons, but also from an ideological perspective to impose itself in a world accustomed to centralism.

Administrative decentralization is the political and legal process triggered in democratic states with a centralist tradition in the last decades of the 20th century. This process aims to redefine the relations between the government and Local Administration by transferring powers to the latter and strengthening the autonomy of local communities.

Administrative deconcentration is another important aspect of administrative organization.

This implies the existence of central authorities and some state authorities located in the territory. Authorities located in the territory receive decision-making power, but under the control of hierarchically superior authorities.

Decentralization is indeed a process of significant transformation in the system of administrative organization[6]. This process gives local collectivities or public services the opportunity to self-administer, grants them legal personality, facilitates the establishment of their own authorities and provides them with the necessary resources to fulfil their duties.

The essence of the decentralization of the Administration consists in the transfer of some attributions of the central authorities to the authorities designated by the local collectivities, in the administrative-territorial units. This devolution move aims to bring decisions and responsibilities closer to citizens and enable local authorities to better respond to the needs and specificities of their communities.

One of the major benefits of decentralization is the increase in efficiency and effectiveness of Public Administration. When responsibilities are transferred to the local level, problems can be solved more quickly and efficiently, and decisions can be made in a way that is more appropriate to the specifics of each community.

Decentralization manifests itself in two distinct forms: technical and administrative territorial. The first refers to the transfer of responsibilities and autonomy regarding state public administrative services, while the second focuses on the creation and autonomy of local communities, giving them the status of political actors distinct from the central state.

Technical decentralization, as described, involves the creation of public or utility institutions that have legal personality and are equipped with resources and authority. It is interesting that these institutions can be based on private property, either of the state or of individuals or other legal entities.

Decentralization of public services, as described, involves giving them legal personality, removing them from hierarchical control and placing them under the rules of administrative custody. This structural change suggests greater

[6] Corneliu Manda, Cezar C. Manda, *Law of Local Collectivities*, 4th edition revised and expanded, Universul juridic, Bucharest, 2008, p. 67.

autonomy and independence for these public services.

Administrative-territorial decentralization is related to the recognition of local communities and granting them the right to administer themselves. This process aims to provide autonomy and decision-making power at the local level, allowing communities to manage their own affairs according to their specific needs and characteristics.

This distinction emphasizes the diversity of ways in which decentralization can influence Public Administration.

The recognition of the legal personality of the local collectivities, treated as elements of national collectivity, underlines the fact that these entities have their own interests and face specific problems at local level. Giving them legal personality recognizes their ability to make autonomous decisions and manage their own affairs within a legal framework.

The State does not have the capacity to solve all problems and this idea reaffirms the need to distribute responsibilities and autonomy at local level. By devolving powers to local collectivities, it is recognized that these can better respond to the specific needs and challenges of their communities. The responsibilities or competences transferred through decentralization are only of administrative nature and the public people who have them benefit from a relative decision-making autonomy at local level.[7]

The State's decision to transfer certain sectors to local authorities is crucial for defining their boundaries and responsibilities. This approach allows the State to adapt the decentralization process according to the needs and specifics of each sector or field of activity.

Local authorities have a central role in managing the specific problems of administrative-territorial units, such as communes, cities, municipalities, counties and regions. This promotes the idea that those best placed to understand and respond to local needs are those which are part of that community.

In order for there to be administrative decentralization, it is necessary for the local authorities to be the representatives of the community and not representatives of the State placed at the head of the administrative-territorial units.

At the same time, administrative decentralization does not imply the total independence of local collectivities from the State in which they are organized. There are always limits and conditions set by the State to maintain coherence and legality in the functioning of local administration.

In the context of decentralization, it is common for there to be some degree of control or supervision by central public authorities, referred to as administrative tutelage. This type of control is based on the dependence of local communities on the State and ensures compliance with national laws and regulations.

It is interesting to note that the term 'administrative tutelage' taken from

[7] Michael Verpeaux, *Droit des collectivités territoriales*, Ed. Presses Universitaires de France, Paris, 2005, p. 95.

civil law has a specific and original meaning in protecting the interests of a minor or a person placed under guardianship. The transfer of this name in the context of decentralization could suggest a protective or supervisory role, especially to ensure compliance with laws and regulations in local administration.

This distinction underlines the fact that in administrative law, the concept of tutelage does not focus so much on protecting the interests of local communities, but rather on protecting the general interest. It is relevant to emphasize this aspect, because a tension can arise between local interests and the general interests of the State.

3. Reform of local public administration

Local autonomy is seen as the modern expression of the principle of administrative decentralization. This principle codified in European developments emphasizes a more specific and clear approach to the distribution of power and autonomy to the local level.

The principle of local autonomy, as expressed in the European Charter on the autonomous exercise of local power, highlights the importance of local communities within governance. Their definition, in accordance with national regulations, includes both basic local collectivities (such as communes, districts, departments) and regional collectivities, with the caveat that this depends on the absence of reservations that the Charter allows.

This principle is intrinsically linked to the existence of adequate financial resources of local communities. According to the European Charter, the right of local communities to their own and sufficient financial resources is recognized, allowing them to freely exercise their powers recognized by law.

We note that, despite the presence of the principles of administrative decentralization and local autonomy in the constitutions, significant progress in their implementation has been registered only in the last three to four decades in European countries. This development suggests that the recognition of the principles in legislation has not always been accompanied by effective application and significant changes in the way powers are administered and exercised at local level.

Decentralization appears as a process by which the specific powers of the State are transferred to distinct legal institutions, which then benefit from a certain management autonomy under the close supervision of the State[8]. This approach suggests a balanced distribution of responsibilities and power between central and local levels.[9]

Decentralization can also appear as a method of dividing State power.

[8] René Chapus, *Droit administratif général*, tome 1, 15e édition, Ed. Montchrestien, Paris, 2001.
[9] Nadine Dantonel-Cor, *Droit dee collectivités territoriales*, 3e édition, Ed. Bréal, Rosny sous Bois, 2007, p. 214.

The process of decentralization has seen significant progress in Europe, with notable beginnings in France through the decentralization laws of 1982 and 1983, continuing with other important initiatives in countries such as Belgium, Italy, Romania and the Republic of Moldova. These laws and reforms marked significant transitions towards greater local autonomy and administrative decentralization.

The period of the last **23 years** was a turning point in Romania's political evolution, characterized by significant changes and the diversity of political alliances. Alternation of governments and the dynamics of alliances have contributed to the shaping of the political landscape and the evolution of society.

Political divergences can also influence administrative and legislative processes. Delays or postponements in the implementation of measures, the adoption of the budget law or the reform of public institutions may reflect political tensions and affect the normal functioning of government.

The configuration of conjuncture governments, made up of technocrats specialized in certain fields and apparently without any political affiliation, can be interpreted as an attempt to address the inefficiencies of previous governments and to redress the economic-social situation. This strategy can be seen as a reaction to social tensions and dissensions within coalitions, offering a more pragmatic and skills-oriented approach.

During 2000-2019 there were five legislatures, but the number of governments was almost three times higher, and this discrepancy between the number of legislatures and the number of governments during the mentioned period, suggests significant governmental instability and frequent change in government configurations. Such frequent changes can have an impact on the coherence and continuity in the implementation of public policies.

To this purpose, professor Ioan Alexandru showed that 'a thoughtful and lasting reform of the administration entails, indisputably, primarily a political reform.'[10]

During 2020-2024, the reform of local Public Administration has not been limited to decentralization, but it involves the establishment of an efficient administrative structure, capable of leading to the efficiency of large-scale projects at local level and to ensuring extended local autonomy.

The decentralization process has started with Romania's efforts to join the European Union, as a tool for modernization and reform of the Public Administration.

The principle of subsidiarity, which involves decision-making at the level most appropriate and closest to citizens, has been fundamental in this process.

[10] Ioan Alexandru, *Public Administration Treaty*, Universul Juridic Publishing House, Bucharest, 2008, p. 325.

Nevertheless, implementing decentralization can be complex and involve challenges such as securing the necessary resources at local level and developing administrative capacity at that level.

However, this process has been carried out partially and in a partisan way, dominated by the political interests of the moment.

That is why, in the future, the decentralization process will continue simultaneously with the increase of administrative capacity at local level.

It must be built on real analysis based on the collection and interpretation of data and on an extensive consultation process between the relevant public authorities.

No decentralization of tasks will be done without the transfer of the corresponding financial resource. The financial resource will have to be precise, quantifiable and permanent. It will consider two major stages:

- analysis of the powers of the Central Public Administration that can be transferred to the Local Administration, as well as the administrative capacity of the latter to manage new powers;

- correlation of the transfer of powers with that of the transfer of budgetary resources.

Reforms in the field of Public Administration must promote both the consecration of the principle of integrity and fairness and the change of administrative culture.

On the other hand, the reform of the local Public Administration must not be limited to decentralization, but must imply the establishment of an efficient administrative structure, capable of leading to the efficiency of large-scale projects at local level and to ensuring an extended local autonomy.

It is absolutely necessary for the Government to carry out as serious an assessment as possible to clarify the coordination and management mechanisms of decentralized institutions, orienting them towards a paradigm focused on performance and effectiveness. Periodic assessment of these institutions is crucial to ensure that they are meeting their goals and to identify possible improvements in their functioning.

Improving coordination and management may also involve the promotion of effective communication between these institutions, the relevant ministry and the prefect's institution, the establishment of clear and measurable objectives, as well as the implementation of appropriate performance monitoring and evaluation tools.

4. Public administration and digitalization

The COVID-19 pandemic brought to the forefront the importance of a modern and agile administrative apparatus, able to respond quickly and efficiently to society's challenges. This period highlighted the need for flexibility,

digitalization and coordination between different levels of administration to manage crises and ensure the protection of citizens.

Public Administration can play an essential role in the promotion and implementation of digital technologies, including artificial intelligence and massive data analysis (Artificial Intelligence, Big Data). By adopting and using such technologies, the Administration can improve efficiency, transparency and services provided to citizens.

A crucial aspect is to ensure that these technologies are implemented in an ethical and legal way, protecting the privacy and rights of citizens.

Digitalization is a significant force in the evolution of contemporary society. It brings with it a number of benefits, including contributions to economic growth and strengthening global competitiveness. Adapting to digital technologies can improve efficiency, innovation and access to resources and services.

These four essential pillars of digital architecture, i.e. electronic identification, interoperability, unique access platform to online public services and cloud infrastructure, are certainly fundamental for an effective digitalization of Public Administration. Electronic identification and interoperability facilitate the exchange of information between different administrative entities, while a unique access platform and cloud infrastructure can strengthen online services and citizens' access to them.

The 'once only' principle and the interoperability architecture based on API management are powerful approaches for Public Administration efficiency. By implementing these principles, redundancy is reduced, and data is collected only once and is then accessible and used effectively by various public institutions. Identifying and constantly updating these elements, along with ensuring a robust technical infrastructure, are important considerations to creating an environment where access to data is fast, secure and flexible.

In parallel, I believe that the electronic signature of Public Administration officials will have to be generalized and used en masse. And this initiative represents a significant step towards the modernization and efficiency of administrative processes. By using electronic signature, digital communication with companies becomes faster, safer and more efficient.

Consequently, the introduction of an electronic identity system with SSO authentication and the possibility of remote enrolment is a significant evolution in the direction of streamlining and securing interactions with the Public Administration.

This e-identity scheme not only reduces the costs of implementing new platforms, but also facilitates citizens' access to online public services, contributing to a simpler and more efficient experience.

In addition, the integration of this system with the European cross-border communication node eIDAS indicates an orientation towards European standards and interoperability at European Union level.

5. Conclusions

Increasing the visibility of public services and simplifying access to information for companies and citizens are essential aspects of Public Administration modernization.

By reducing the time needed to search for information, the user experience is thus improved, and the use of online services is stimulated.

In the medium and long term, I believe that the migration of public services to a government cloud will have to be carried out, and this would represent a significant evolution in the direction of efficiency and modernization of Public Administration. This change can bring multiple benefits, including increasing the availability of public services and improving the user experience.

Lowering the costs for companies in the interaction with the State can stimulate their collaboration and participation in digital public services. Furthermore, reducing pressure on the public budget can free up resources to be directed to other public priorities and needs.

Managing cyber risks (phishing or ransomware attacks are more and more numerous) is a crucial priority in the era of accelerated digitization. Investments in cyber security are essential to protect critical infrastructure, sensitive data and digital public services. The creation of a dedicated centre like EU Cyber shows a proactive and centralized approach in the fight against cyber threats.

This initiative could bring significant benefits, such as increasing the ability to detect and prevent cyber-attacks, collaboration between the public and private sectors to share information and the development of common security standards.

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8. Michael Verpeaux, *Droit des collectivités territoriales*, Ed. Presses Universitaires de France, Paris, 2005.

9. Nadine Dantonel-Cor, *Droit dee collectivités territoriales*, 3e édition, Ed. Bréal, Rosny sous Bois, 2007.
10. René Chapus, *Droit administratif général*, tome 1, 15e édition, Ed. Montchrestien, Paris.
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Exercising the Right of Preemption in the Field of National Cultural Heritage

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Abstract

The national cultural heritage includes all assets identified as such, regardless of their ownership regime, which represent a testimony and an expression of values, beliefs, knowledge and traditions in continuous evolution; it includes all the elements resulting from the interaction, over time, between human and natural factors. Any state understands to protect in a more or less restrictive manner certain goods which, regardless of whose property the subject of law is in - public or private, constitute special values, testimony of its historical development, often contributions to the creation of the values of universal culture. The right of preemption is one of the measures that states keep in order to achieve these objectives. By establishing this right, the Romanian State pursued, on the one hand, the possibility of maintaining in the state heritage buildings of historical and cultural importance, precisely to ensure the restoration, preservation and conservation of these goods, in much better conditions than in private patrimony of natural or legal persons, and, on the other hand, emphasizing the importance of conservation and restoration in the order of priorities of the actions to be taken on historical monuments that, following the exercising of the preemption procedures, enter the civil circuit. In order to better understand the possible shortcomings of the normative framework, but also the real possibilities of circumventing the legal restrictions regarding the legal circulation of goods from the national cultural heritage, it is necessary to carry out continuous studies, especially from a jurisprudential perspective. The analysis of the administrative work procedures on the occasion of the exercise of the right of preemption and of the court rulings given in the cases regarding the sale of such goods is a good source for understanding the phenomenon and for the elaboration of legal proposals.

Keywords: *movable national cultural heritage, classification of cultural assets, historical monuments, right of pre-emption, legal pre-emptors, freely consented sale, forced sale.*

JEL Classification: K11, K12, K15

1. Preliminaries

Justified by reasons of social policy, economic policy, urban planning policies, cultural policies, etc., the Romanian legislator instituted legal preemption rights in certain situations. The protection of culture, regardless of the property of whose legal subject it is, must be the concern of any state because cultural assets, through their special value, ensure the preservation of the identity of a

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nation[2].

The national cultural heritage includes all assets identified as such, regardless of their ownership regime, which represent a testimony and an expression of values, beliefs, knowledge and traditions in continuous evolution; it includes all the elements resulting from the interaction, over time, between human and natural factors. By protecting the national cultural heritage is understood the set of measures having a scientific, legal, administrative, financial, fiscal and technical nature, aimed at ensuring the identification, research, inventory, classification, preservation, security assurance, maintenance, preparation, restoration and enhancement of mobile national cultural heritage, in order to ensure democratic access to culture and the transmission of this heritage to future generations.

From this perspective, it was natural for the Romanian State to establish specific legal norms to restrict the sale of movable and immovable goods that are part of the national cultural heritage. The right of preemption of the state or territorial administrative units is one of the legal levers necessary for the Romanian State and local communities to exercise a form of control on the occasion of the alienation of assets that are part of the national cultural heritage, with a particular impact on the current population and future generations.

The Romanian legislation regulates the protection of the national cultural heritage through two distinct normative acts. Thus, Law no. 182/2000 establishes the legal regime of goods belonging to the movable national cultural heritage, as part of the national cultural heritage, and regulates the specific activities to protect them, and Law no. 422/2001 regulates the general legal regime of historical monuments as an integral part of the national cultural heritage.

2. The legal circulation of goods belonging to the movable national cultural heritage

2.1. Terminological clarifications

In order to be able to analyze the legal circulation of the goods that make up the movable national cultural heritage, some terminological clarifications are needed.

In this sense, Law no. 182/2000, provides that the movable national cultural heritage is made up of goods with historical, archaeological, documentary,

[2] For a comprehensive view see Xanthaki, Alexandra, Sanna Valkonen, Leena Heinämäki, and Piia Nuorgam, eds. *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*. Brill, 2017. p. 15 et seq., http://www.jstor.org/stable/10.1163/j.ctv2gjwsw2. Benjamin Folkinshteyn, *National Treasure: Implicit Protections of Cultural Property in the United States*, „The Journal of Arts Management, Law, and Society", 37:2, 143-169, 2007, DOI: 10.3200/JAML.37.2.143-169; and Hodder, Ian, *Cultural Heritage Rights: From Ownership and Descent to Justice and Well-Being*, „Anthropological Quarterly" 83, no. 4 (2010): 861–82. http://www.jstor.org/stable/40890842.

ethnographic, artistic, scientific and technical, literary, cinematographic, numismatic, philatelic, heraldic, bibliophile, cartographic and epigraphic value, representing material testimonies of the evolution of the natural environment and of man's relations with it, of the human's creative potential and of the Romanian contribution, as well as of national minorities contribution, to universal civilization. The goods that make up the movable national cultural heritage are: 1. archaeological and historical-documentary goods; 2. goods with artistic significance; 3. goods with ethnographic significance; 4. goods of scientific importance; 5. goods of technical importance.

The goods belonging to the movable national cultural heritage are part, depending on their historical, archaeological, documentary, ethnographic, artistic, scientific and technical, literary, cinematographic, numismatic, philatelic, heraldic, bibliophilic, cartographic and epigraphic significance, on their antiquity, their uniqueness or rarity, from: a) the treasure of the movable national cultural heritage, hereinafter referred to as the treasury, consisting of cultural goods of exceptional value for humanity; b) the fund of the movable national cultural heritage, hereinafter referred to as the fund, consisting of cultural goods of exceptional value for Romania.

The procedure for establishing movable cultural assets that are part of the legal categories of movable national cultural heritage, treasury and fund, is called classification and is carried out on the basis of an expert report drawn up by experts or specialists accredited by the National Commission of Museums and Collections. The classification has the effect of registering movable cultural assets in the Inventory of movable national cultural heritage, in one of two categories, treasury or fund.

Owners, holders of other real rights or of the right of administration, as well as holders with any title of classified movable cultural goods have specific obligations regarding the preservation, storage and security of movable cultural goods[3].

2.2. Circulation of movable cultural assets. The state's right of preemption for the sale of movable cultural assets classified in the treasury

Classified movable cultural assets, in the public ownership of the state or its territorial units, have the general legal regime of public property assets, that is, they are inalienable, imprescriptible and unseizable.

Public institutions owning movable cultural assets can lend them, for the organization of exhibitions or the realization of other cultural projects, to other public institutions or private legal entities in the country, under the conditions of

[3] E. Polymenopoulou, *Indigenous Cultural Heritage and Artistic Expressions: "Localizing" Intellectual Property Rights and UNESCO Claims*, "Canadian Journal of Human Rights" 2017, Vol. 6, p. 99.

common law, with the approval of an expert of the National Commission of Museums and Collections and with the approval of the Ministry of Culture. In turn, under the conditions of common law and Law no. 182/2000, natural and legal private persons can lend classified movable assets from their property to specialized public institutions. If the goods in question belong to religious cults, the loan is made under the conditions of common law and Law no. 182/2000, but with the approval of the religious leaders.

According to art. 35 of Law no. 182/2000, cultural assets can be alienated through public sale. The commercialization of movable cultural assets in private ownership can only be carried out by economic operators who have obtained the operating authorization issued by the Ministry of Culture based on the approval of the National Commission of Museums and Collections. Such a measure is necessary to draw the owners' attention to the importance of the goods they are going to dispose of and, at the same time, to create the framework for a correct evaluation of the goods to be sold.

When the goods to be sold are part of the categories of goods that make up the movable national cultural heritage, but they have not been subject to the classification procedure, prior to the sale, the classification procedure will necessarily be triggered.

It should be emphasized that the rules regarding the trade in movable cultural goods do not apply to the sale of works of plastic and photographic art, works of decorative or religious art, works of an ethnographic nature, folk crafts, as well as other works created of living authors that cannot be the subject of ranking[4].

Economic operators authorized to sell movable cultural goods must comply with the following obligations: a) display in a visible place the rules regarding the trade in movable cultural goods; b) holding a register in which the name and address of the bidder, the description and the price of each good are mentioned, correctly and completely; the information contained in the register is confidential; c) notification in writing, within 5 days from the date of the offer, to the decentralized public services of the Ministry of Culture about the existence of goods likely to be classified. If, following the expertise of the goods that are the subject of the notice, it has been established that the goods in question are not goods that are part of the treasury category, the decentralized public services of the Ministry of Culture, communicate this to the respective owner and economic operator; d) notifying in writing, within the same term, the owner of the property regarding the possibility of triggering the classification procedure; e) for the movable cultural assets of the treasury, the communication in writing, within 3 days from the date of their registration in the own register, to the decentralized public

[4] Donders, Yvonne, *Cultural Heritage and Human Rights*, in Francesco Francioni, and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford Handbooks (2020; online edn, Oxford Academic, 8 Oct. 2020), pp. 21-29, https://doi.org/10.1093/law/9780198859871.003.0017, accessed 25 Jan. 2023.

service of the Ministry of Culture, in whose territorial radius they are based, their sale, as well as , as the case may be, to send a copy of the catalog edited for the purpose of organizing a public auction, regardless of whether the goods put up for auction are or are not classified as movable national cultural heritage.

Assets privately owned by natural persons and legal private entities, classified as treasury movable cultural assets, may be the subject of a public sale only under the conditions of exercising the right of preemption by the Romanian State, through the Ministry of Culture. The term for exercising the right of preemption is 30 days from the date of receipt of the written communication with the intention to sell, from the specialized economic operator.

The decentralized public services of the Ministry of Culture are obliged to transmit to the Ministry of Culture, within 3 days of receiving the written communication of the authorized economic operator, the following documents: a) the registration regarding the sale of a movable cultural asset placed in the treasury; b) the offer of the authorized economic operator regarding the movable cultural asset classified in the treasury; c) the documentation regarding the purchase of the respective asset, drawn up according to the legal provisions in force regarding public procurement; d) color photographs of the property, assembly and details; e) expert reports carried out at the time of classification of the respective asset.

Within 5 days from the submission of the documents, the Ministry of Culture establishes, by order of the minister, a procurement commission for exercising the right of preemption. It is made up of specialists in the field and representatives of the Ministry of Culture. Within 10 days from the submission of the above-mentioned documents, the procurement commission analyzes the offer regarding the listed movable cultural asset and prepares a supporting note regarding the purchase of the respective asset or, as the case may be, a rejection note to the offer and submits it to the Minister of Culture, for approval. If the purchase of the cultural asset is proposed, the commission has the right to negotiate the price and the obligation to determine whether to accept the price proposed by the seller or the intermediary economic operator or, as the case may be, to decide the maximum price that can be offered in the situation the auction is organized.[5]

Non-compliance with the procedure regarding the exercise of the right of preemption by the Romanian State attracts the absolute nullity of the sale. Likewise, the sale of cultural assets classified in the treasury at a price lower than that offered by the Ministry of Culture, during negotiations or that established during the public auction, attracts the absolute nullity of the sale.

If the state does not acquire the cultural asset listed in the treasury, following its sale, the economic operator has the obligation to communicate the identification data of the buyer of this asset to the decentralized public service of the Ministry of Culture in whose area it is based, and the specialists of this service

[5] Government Decision. no. 1,420 of December 4, 2003, published in the Official Monitor no. 900 of December 16, 2003.

will draw up an annex to the classification order of the cultural asset, in which all the successive owners of the said asset are listed.

Therefore, the only holder of the right of preemption for the sale of movable cultural assets classified in the treasury is the state, but in its capacity as a subject of civil law, a legal person and not in its capacity as a subject of public law as the holder of sovereign power. The birth of the right of preemption is conditioned by the manifestation of the owner's intention to sell the movable cultural property, and the exercise of this right must be carried out within 30 days of the notification and, in case of agreement, it is completed with the conclusion of the sales contract. The right of preemption is recognized to the state in its capacity as the owner of movable cultural assets classified as public property, which gives it the character of being inalienable, but, at the same time, the character of being temporary, it will be exercised within for thirty days.

The right of preemption arises only in the case of a sale. If the alienation is gratuitous, such as a donation, such as a maintenance or life annuity contract, or even through an exchange contract, whether with or without interest, the right of preemption does not arise and cannot be exercised. The right of preemption can only operate at equal price, the price being the specific element of the sales contract.

Also, the right of preemption is recognized to the state only in the case of movable cultural goods classified in the treasury, not in the case of movable cultural goods classified in the fund. In this second situation, the public sale is made without notifying the Ministry of Culture in order to exercise the right of preemption. However, in the case of the sale of movable cultural goods classified in the fund, the economic operators authorized to sell movable cultural goods will transmit to the decentralized public service of the Ministry of Culture, corresponding to the territorial area related to the headquarters of the economic operator, copies of the sales certificates issued to the buyers.

On the other hand, the sales must include individually determined movable cultural goods classified in treasury and not universal goods that would also include such goods; that's why the sale of inheritances escapes the domain of the right of preemption (art. 1747-1754 Civil Code). The right of preemption includes both sale and purchase contracts through which the right of ownership of movable cultural goods classified in the treasury is transferred, as well as those through which only bare ownership is transferred, regardless of the holder of the right of usufruct.

In the matter of the right of preemption, the provisions of art. 123 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code states that from the date of entry into force of the Civil Code, the provisions relating to the right of preemption included in the special laws in force at that date are supplemented with the provisions of art. 1730-1740 of the Civil Code. However, the provisions of the Civil Code will apply in the case of movable cultural assets

classified in the treasury only to the extent that they do not contravene the provisions of the special law. Thus, the legal framework regarding the exercise of the right of preemption in the Civil Code establishes two modes of regulation: 1. ante rem venditio, which represents the classic method, with a pre-contractual character, by which the right of preemption can be made effective by the seller granting the preemptor the benefit of buying a good, with preference over any other person, by simply exercising the option; the modality is practiced, mainly, in the sphere of legal preemption, given that the special normative acts establishing the benefit of the right of preemption regulate in detail both the procedure - ante rem venditam - that must be followed in order for these preemption rights to be respected, as well as the sanction applied in case of its violation; 2. post rem venditio - according to the provisions of art. 1.731 Civil Code, the sale of the property in respect of which there is a legal or conventional right of preemption can be made to a third party only under the suspensive condition of the non-exercise of the right of preemption by the preemptor, an aspect that does not contravene the character of public order of legal preemption.

The text of the law grants the possibility of concluding the sale with the third party buyer before the offer is sent to the preemptor in view of the exercise of the right of preemption, but the sale-purchase contract will be concluded under the suspensive condition of not exercising the right of preemption by the preemptor, case in which the suspensive condition is of the essence of the contract, being considered by law as implied even in the event that the parties omit to expressly provide for it. The post rem venditio modality thus operates as an automatic legal remedy with the consequence of blocking the possibility of the seller (in complicity or not with the third party) to circumvent the interests of the preemptor.[6]

In our opinion, in the case of the sale of movable cultural goods classified in the treasury, only the ante rem venditio modality can be applied, considering the express provision of Law no. 182/2000 according to which the non-compliance by the economic operators authorized to sell movable cultural goods of the obligation to notify in writing the decentralized public service of the Ministry of Culture, in whose territorial radius they are based, about the sale in order to exercise the right of preemption, attracts the absolute nullity of the sale. Moreover, all the obligations that fall to the authorized economic operators are prior to the sale of movable cultural assets classified in the treasury, except for the obligation to issue sales certificates to the buyers of the goods.

The State's right of preemption will operate even in the case of forced sales of movable cultural assets. According to art. 1738 Civil Code "If the property is the object of forced pursuit or is put up for forced sale with the authorization of the syndic judge, the right of preemption is exercised under the conditions provided by the Code of Civil Procedure." Therefore, the rules of procedure established by the Code of Civil Procedure will be applicable both in the case of

[6] Ruxandra Badoiu, *The legal right of preemption*, Bulletin of public notaries, no. 1, 2020, p. 57.

enforced execution and in the case of sales made according to Law no. 85/2014 on insolvency prevention and insolvency procedures.

The provisions of the civil procedure regarding the methods of valorization of the assets seized during the sale by public auction, carried out by the bailiff in the exercise of the measures regarding forced execution, are the provisions of art. 758 - art. 778 of the Civil Procedure Code, in the case of enforcement of movable property. However, considering the provisions of art. 35 para. 1 of Law no. 182/2000 according to which the public sale of movable cultural assets in private ownership or the intermediation of the sale is carried out only through authorized economic operators, in compliance with the provisions of this law, we appreciate that the bailiff is obliged to do the enforced execution by public sale through a authorized economic operator, since the law refers to public sale without distinguishing whether it is a regular sale or a forced sale. In this situation, the authorized economic operator will be obliged to comply with the obligations provided for in art. 35 of Law no. 182/2000, respectively those regarding: 1. displaying in a visible place the rules regarding trade in movable cultural goods; 2. mentioning in the register, correctly and completely, the name and address of the person executed by force, the description and the price of each good; 3. notification in writing, within 5 days from the date of the bailiff 's request, of the decentralized public services of the Ministry of Culture about the existence of assets likely to be classified; 4. informing the judicial executor about the possibility of triggering the classification procedure; 5. the registration in their own register of the goods placed in the treasury; 6. written notification of the decentralized public service of the Ministry of Culture, in whose territorial radius they are based, about the sale of the goods in order to exercise the right of preemption.

We appreciate that only by calling on an authorized economic operator, the bailiff will be able to ensure a correct evaluation of the movable cultural assets that are to be subject to the sale through forced execution by triggering the classification procedure[7]. Obviously, such a procedure - the classification of an asset must be completed within 3 months at most from the moment the classification procedure is triggered - will prolong the foreclosure of the assets, but it is the only one capable of guaranteeing that a movable cultural asset is sold according to the law. On the other hand, the classification of the movable cultural asset has the effect of registering the movable cultural assets in the Inventory of the movable national cultural heritage, in one of the two categories, treasury or fund, which also leads to an increase in the starting price in the auction. Of course, if the asset to be foreclosed upon was previously classified and included in the National Cultural Heritage Inventory, the foreclosure will proceed much faster.

The bailiff will be obliged to respect the right of preemption only in the

[7] See for a comparative example Stener Ekern & Peter Bille Larsen, *Introduction: The Complex Relationship Between Human Rights and World Heritage*, „Nordic Journal of Human Rights", 41:1, 1-7, 2023, DOI: 10.1080/18918131.2023.2192063.

case of movable cultural goods classified in the treasury, not in the case of movable cultural goods classified in the fund.In the case of movable cultural assets placed in the treasury, the bailiff will have to wait for the expiry of the 30 days in which the Romanian State, through the Ministry of Culture, can exercise its right of preemption. Considering the specifics of forced execution, if the Ministry of Culture wants to purchase the movable cultural asset classified in the treasury, it will have to participate in the public auction, as a direct negotiation with the bailiff is not possible.

The bailiff will be able to initiate the effective procedure of forced sale by public auction only after completing the previously mentioned stages. Thus, after notifying the parties and other interested persons about the day, time and place of the auction sale, at least 48 hours before the deadline set for the sale, as well as the fulfillment of the measures for advertising the sale according to the law (art. 761 - art. 762 Civil Procedure Code), based on art. 769 of the Civil Procedure Code, the bailiff will proceed with the sale at public auction of movable cultural goods placed in the treasury. According to the provisions of para. 10 of art. 769, in all cases, at an equal price, preference will be given to the one that has a right of preemption over the object in question, i.e. the Romanian State through the Ministry of Culture.

Art. 770 of the Civil Procedure Code establishes special rules both for the exercise of the right of preemption and for its termination. Thus, the holder of the right of preemption, informed under the conditions of art. 761 - 762 Civil Procedure Code, has the obligation to participate and bid at a price at least equal to the highest price offered by the competitors, in order to be able to buy the good, otherwise, the right of preemption is extinguished. The provisions of art. 770 of the Civil Procedure Code establishes, de facto, a sanction, the holder of a right of preemption regarding the asset put up for auction being deprived of the right to subsequently invoke this benefit and to effectively exercise this right if he does not take part in the auction. However, in order to apply the sanction, it is necessary that the beneficiary of the right of preemption, in the present case, the Romanian State through the Ministry of Culture, was aware of the asset being put up for forced sale, respectively of going through all the stages prior to the sale provided for by Law no. 182/2000. Per a contrario, if he did not know these things, or if the measures to advertise the sale were not correctly applied, he could file an appeal to the execution, requesting the declaration of the nullity of the adjudication act and the auction minutes according to art. 36 para. 5 of Law no. 182/2000 following that, in the framework of a new auction, he will exercise his right of preemption.

The moment at which the right of preemption expires, in the case provided for by art. 770 of the Civil Procedure Code, is that of the adjudication of the asset, "the holder of a right of preemption who did not participate in the auction will no longer be able to exercise his right after the adjudication of the asset". This means that the holder of the right of preemption is not obliged to bid on the

first deadline for the amount specified in the auction announcement, he can wait, in the absence of competitors, for the second auction of the same day or even the establishment of the second deadline for the auction, for the obvious and legitimate purpose of paying the lowest possible price.[8]

In the event that the Ministry of Culture has not adjudicated the movable cultural goods classified in the treasury, upon completion of the procedure, the economic operators authorized to commercialize movable cultural goods will issue sale certificates to the adjudicators of the goods they are commercializing and will transmit them to the decentralized public service of the Ministry of Culture, corresponding the territorial area related to the headquarters of the economic operator, copies of the sales certificates issued to the buyers.

According to art. 43 of Law no. 182/2000, natural or legal private persons who own classified movable cultural assets have the obligation to notify in writing the decentralized public services of the Ministry of Culture about any transfer of such an asset into the ownership of another person within 15 days from on the date of making such a transfer, the same obligation, within the same term, falls to any natural or legal private person that constitutes another real right over such an asset.

3. Legal circulation of historical monuments - part of the national cultural heritage

3.1. Terminological clarifications

Historical monuments are a part of the national cultural heritage and are protected by law. The general legal regime of historical monuments is regulated by Law no. 422/2001 on the protection of historical monuments. According to this normative act, historical monuments are real estate, constructions and land located on the territory of Romania, significant for national and universal history, culture and civilization.[9]

Law no. 422/2001 establishes the following categories of historical monuments, immovable property located above ground, underground and underwater: a) monument - construction or part of construction, together with the installations, artistic components, interior or exterior furniture elements that are an integral part of them, as well as commemorative, funerary, public works of art, together with the related topographically delimited land, which constitute significant cultural-historical testimonies from an architectural, archaeological, historical, artistic, ethnographic, religious, social, scientific or technical point of view; b) ensemble - coherent group from a cultural, historical, architectural, urban or

[8] Ibid, p. 58.
[9] Art. 2 of Law no. 422/2001 regarding the protection of historical monuments, published in the Official Monitor of Romania, Part I, no. 573 of July 3, 2006.

museum point of view of urban or rural constructions that, together with the related land, form a topographically delimited unit that constitutes a significant cultural-historical testimony from an architectural and urban point of view, archaeological, historical, artistic, ethnographic, religious, social, scientific or technical; c) site - topographically delimited land including those human creations in a natural setting that are significant cultural-historical testimonies from an architectural, urban, archaeological, historical, artistic, ethnographic, religious, social, scientific, technical or cultural landscape point of view.

3.2. Circulation of historical monuments. The right of preemption of the state and of administrative-territorial units for the sale of historical monuments

Historical monuments belong either to the public or private domain of the state, counties, cities or communes, or are the private property of natural or legal persons.

Historical monuments public property of the state or administrative-territorial units are inalienable, imprescriptible and unseizable; these historical monuments can be given under the administration of public institutions, they can be concessioned, given for free use to institutions of public utility or rented, under the conditions of the law, with the approval of the Ministry of Culture or, as the case may be, of the decentralized public services of the Ministry of Culture.

Historical monuments belonging to the private domain can be subject to the civil circuit under the conditions established by Law no. 422/2001. Historical monuments owned by individuals or private legal entities can only be sold under the conditions of exercising the right of preemption of the Romanian State, through the Ministry of Culture, for historical monuments classified in group A, or through the decentralized public services of the Ministry of Culture, for historical monuments classified in group B, or of administrative-territorial units, as the case may be, under sanction of absolute nullity of the sale.

Any owner, natural person or private legal entity, must notify in advance of his intention to sell to the decentralized public service of the Ministry of Culture within the radius of which the historical monument building to be alienated is located. The term within which the Ministry of Culture or the decentralized public service must express its intention to acquire the historical monument or inform the seller about the non-exercise of the right of preemption is 25 calendar days from the date of registration of the notification and the corresponding documentation at the Ministry of Culture, respectively, the decentralized public service.

Within three working days of receiving the notification with the intention to sell, the decentralized public services analyze the notification and may, as the case may be, request the owners, natural or private legal persons, who intend to sell historical monuments, a series of relevant documents : (i) a legalized copy of

the property title (for both the land and the building); (ii) copies of identification documents of the natural or legal person; (iii) plans of the building with the marking of the surfaces that are the subject of the sale, if it is intended to sell only a part of the building; and (iv) photographs that include the interior and exterior of the building. The decentralized public services of the Ministry of Culture can complete the documentation with a copy of the analytical (minimum) inventory file of the monument or historical ensemble and with a copy of the Obligation to use the historical monument, if they exist.

For historical monuments classified in group A, the decentralized public services of the Ministry of Culture formulate a response proposal in the form of an opportunity report, which will include the reasoned recommendation regarding the exercise or non-exercise of the right of preemption, recommendations regarding the destination that the building in question will have, as well as data on the technical condition. The notification, the opportunity report and, as the case may be, the complete documentation are sent to the Cultural Heritage Directorate within the Ministry of Culture within 5 working days of their receipt. In the situation the opportunity report will include the recommendation for the exercise of the right of preemption by the Ministry of Culture, and the Cultural Heritage Directorate appropriates the recommendation, a note is drawn up subject to the approval of the Legal, Litigation Service and approval by the Minister of Culture. If the opportunity report will include the recommendation for the exercise of the right of preemption by the Ministry of Culture, and the Directorate of Cultural Heritage does not adopt the recommendation, a response draft will be drawn up regarding the non-exercise of the right of preemption subject to approval by the Minister of Culture. In the event that there are funds in the ministry's budget for the exercise by the Ministry of Culture of the right of preemption, the Directorate of Cultural Heritage will prepare a justification note through which it will argue the proposed solution simultaneously with the issuance of the response draft.

In the event that the opportunity report of the decentralized public service recommends the non-exercise of the right of preemption by the Ministry of Culture, and the Directorate of Cultural Heritage adopts the recommendation, a draft response will be drawn up regarding the non-exercise of the right of preemption, subject to approval by the Minister of Culture. In the conditions the opportunity report of the decentralized public service recommends that the Ministry of Culture not exercise the right of preemption, and the Directorate of Cultural Heritage recommends the exercise of the right of preemption, a supporting note will be drawn up subject to the approval of the Legal, Litigation Service and approval by the Minister of Culture.

The Minister of Culture analyzes the recommendation to exercise or not exercise the right of preemption, and in case he orders the non-exercise of the right of preemption, the Directorate of Cultural Heritage will communicate the answer to the owner within the term provided by law and a copy of the answer will be communicated to the decentralized public service. In case of non-exercise

of the right of preemption, the notice will stipulate the obligation of the owner of the historical monument to expressly stipulate in the sales contract, which he is going to conclude, the quality of the building as a historical monument, to inform the buyer about the obligation to use the historical monument and to inform the decentralized public service about the change of owner. If the Ministry of Culture or its decentralized public services do not exercise their right of preemption within the term provided by law, this right is transferred to the local public authorities, who can exercise it within a maximum of 15 days. If the exercise of the right of preemption is ordered, the Directorate of Cultural Heritage informs the decentralized public service, the Directorate of Acquisitions, Administration and Investments, notifies the owner of the start of the negotiation procedure for the purchase of the respective building and requests the completion of the documentation with an up-to-date extract from the land register.

If it is decided to start the procedure for exercising the right of preemption, the market value of the building is established, as well as the funds necessary for its rehabilitation and commissioning, the Ministry of Culture or its decentralized public service, as the case may be, being able to order the carrying out of some expertise. In order to purchase the historical monument building, the evaluation is carried out by ANEVAR experts.

In order to negotiate, the Minister of Culture appoints a negotiation commission by order. By the order appointing the commission, the limits of competence of the members, their attributions, the scope of the mandate regarding the starting amount of the negotiation and the maximum amount, the right of the commission to negotiate a possible payment of the price in installments, in equal or unequal installments, are expressly established, combined with the establishment of a maximum price payment period. The negotiation commission, after the completion of each stage, has the obligation to inform the Minister of Culture of the status of the negotiation. Also, when the negotiation commission reaches the maximum amount established by the entrusted mandate or for any other reason why the negotiation is not completed, the commission brings this matter to the attention of the Minister of Culture in order to make a decision. If the parties agree during the negotiations, the sales contract is concluded before the public notary. The Procurement, Administrative and Investment Department undertakes the steps regarding the registration of the historical monument in the Inventory of Public or Private State Assets, as the case may be.[10]

If the termination or conclusion of the negotiations is completed without a purchase, the right of preemption is considered not to have been exercised by the Ministry of Culture, following which, through the care of the Directorate of Cultural Heritage, the owner of the property is notified of the non-exercise of the right of preemption and the notification of the fact that the exercise of the right

[10] Order of the Ministry of Culture no. 3,143 of December 2, 2019, published in the Official Monitor, no. 1001 of December 12, 2019.

of preemption is transferred to local public authorities.

For historical monuments classified in group B, if, after analyzing the notice regarding the intention to sell and the documents, as the case may be, the director of the decentralized public service orders the non-exercise of the right of preemption, the decentralized public service communicate the answer to the owner. If the decentralized public service proposes the exercise of the right of preemption for historical monuments classified in group B, the previously presented negotiation procedure is applicable.

If the Romanian State, through the Ministry of Culture or through decentralized public services, does not exercise its right of preemption, this right is transferred to the local public authorities. Practically, the administrative-territorial unit benefits from a subsidiary right of preemption upon the alienation of a building classified as a historical monument, provided that the main right of preemption, recognized by the Romanian State through the Ministry of Culture, is not exploited by the latter.

The administrative-territorial unit has at its disposal a term of 15 calendar days in which it can exercise its right of preemption.

Regarding the notion of administrative-territorial unit relevant is a court decision of the Bucharest Court of Appeal[11] pronounced in a file in which a non-compliance with the right of preemption of the City Hall of Sector 6 Bucharest was invoked: "In relation to these provisions (art. 4 paragraphs 4 and 8 of Law no. 422/2001), it is noted that the scope of the notion of administrative-territorial unit must be determined, considering that it has the subsequent right of premption. Also, for greater legal accuracy, it is necessary to specify that the right of subsequent preemption belongs to the administrative-territorial units, which exercise it through local public authorities (according to art. 3 of GEO no. 57/2019, local public administration authorities are local councils, mayors and county councils).

According to art. 5 (pp) from GEO no. 57/2019, administrative-territorial units are "communes, cities, municipalities and counties" and art. 100 para. 1-3 of the same Ordinance provides that "(1) The Municipality is the administrative-territorial unit declared as such by law, based on the fulfillment of the criteria provided by law. The municipality is made up of residential areas, industrial and business areas, with multiple building facilities with administrative, industrial, economic, political, social, cultural and scientific functions, intended to serve a population from a geographical area wider than its administrative limits, usually located in an area larger than the city. (2) Administrative-territorial subdivisions can be created in the municipalities, whose delimitation and organization are done according to the law. (3) The Municipality of Bucharest is organized in 6 administrative-territorial subdivisions, called sectors." Therefore, it is found that the sectors of the Municipality of Bucharest are not administrative-territorial

[11] Bucharest Court of Appeal, Fifth Civil Section, Civil Decision no. 326/01.03.2023, unpublished.

units, but administrative-territorial subdivisions.

Since art. 4 para. 4 of Law no. 422/2001 regulates a derogation from the principle of freedom of will, establishing the obligation to respect the right of preemption for the sale of a historical monument, it follows that its provisions are of strict interpretation and application, its scope cannot be extended to unforeseen situations clearly and expressly, however similar they may seem to those expressly and limitedly listed in the text of the law. Therefore, representing an administrative-territorial subdivision of the Municipality of Bucharest, and not an administrative-territorial unit, Sector 6 Bucharest does not have its own right of preemption derived from the provisions of art. 4 para. 4 of Law no. 422/2001, so that there was no obligation to obtain the manifestation of his will, as the appellant erroneously claimed.

What is specific to the procedure for exercising the right of preemption regulated by Law no. 422/2001 is the fact that, if the holders of the right of preemption decide to exercise this right, the purchase value of the historical monument is negotiated with the seller. In other words, regardless of the price proposed by the seller, it is subject to direct negotiation. Analyzing the relevant legal provisions, the High Court of Cassation and Justice notes that the right of preemption regulated by Law no. 422/2001 has some special legal provisions, not constituting a right of preference to purchase at an equal price, the legislator understanding to provide favorable conditions in favor of the preemptor regarding the price of the contract, imposing the requirement to negotiate the purchase price of the historical monument building.[12]

The decision of the competent authority to exercise its right of preemption does not have as a direct consequence the automatic conclusion of the sales contract regarding the historical monument, but the start of the price negotiation procedure.

However, the jurisprudence of the High Court of Cassation and Justice ruled that the negotiation of the price, its establishment and acceptance must be done within the terms of exercising the right of preemption established by law:

"The right of preemption gives its holder, the preemptor, the possibility to buy a good with priority, under the law. According to art. 4 para. (7) from Law no. 422/2001, the term for exercising the right of preemption is 25 days from the date of registration of the notification, documentation and response proposal of the Ministry of Culture or, as the case may be, at the decentralized services of the Ministry of Culture, and the holders of the right of preemption will provide in their own budget the necessary amounts, intended for the exercise of the right of preemption, the purchase value being negotiated with the seller. According to paragraph (8) of art. 4, if the Ministry of Culture or the decentralized public services of the Ministry of Culture do not exercise their right of preemption within

[12] High Court of Cassation and Justice, First Civil Section, Decision no. 51909 of November 7, 2013.

the term provided for in paragraph (7) this right is transferred to the local public authorities, which can exercise it in a maximum of 15 days. In the present case, the Ministry of Culture did not exercise its right of preemption within the legal term of 25 days so that the local public authority, respectively the plaintiff, had a period of 15 days in which to exercise this right, fully, in the sense of accepting the offer and recording the negotiated price. Since, the plaintiff, even if he expressed his agreement regarding the purchase of the building at the price established by the evaluation report ..., did not record the price available to the buyer within the same 15-day period, for which purpose, according to art. 4 para. (7) of the law, he had to provide in his own budget the sums necessary to exercise the right, his right of preemption was extinguished by not exercising it within the term provided by the legislator. It should be noted that the right of pre-emption does not constitute a restriction of the owner's right of disposal over the asset, the ownership right being constitutionally guaranteed, but it manifests itself only in the situation where the owner of the asset decides to sell the asset and is exercised only within the legal term, thus established, so as not to obstruct the owner-seller in his right to dispose of the property."[13]

Concluding, within this procedure related to the exercise of the right of preemption, 4 stages are established: 1. informing the holders of the right of preemption of the intention to sell accompanied by the documentation provided by the legislator; 2. the exercise of the right of preemption by the holders of the right of preemption; 3. the negotiation between the seller and the holders of the right of preemption regarding the contract price; 4. the conclusion or not of the sale-purchase contract.

If neither the Ministry of Culture or the decentralized public service, nor the administrative-territorial unit exercised their right of preemption, or informed the seller about the non-exercise of this right, then the right of preemption affecting the building will be considered extinguished. It should be emphasized that refusals to exercise the right of preemption have a validity period, namely the entire calendar year in which they were issued, including for situations where the historical monument is sold several times. Therefore, the extinguishment of the right of preemption has a temporary character. In the specialized doctrine, attention was drawn to the situation in which a refusal to exercise the right of preemption issued, for example, in December, will not be valid for the conclusion of a sales contract in January of the following year - which can constitute a real impediment in the operation of selling the property which may involve steps over a longer period of time.[14]

In the event of non-exercise of the right of preemption by the authorities, the seller will have the obligation to inform the buyer about the historical monument status of the building, by introducing appropriate provisions in the sales

[13] High Court of Cassation and Justice, Second Civil Section, Decision no. 2054 of April 24, 2012.
[14] Alexandru Sorici, Andreea Gheorghiu, *The right of preemption over historical monuments*, "Arena Constructiilor", no 6/2019, p. 25.

contract. Also, the seller will send to the new owner the Obligation regarding the use of the respective historical monument - a document specifying the conditions and rules for the use or exploitation and maintenance of the respective historical monument.

In the matter of the right of preemption, the provisions of the Civil Code will apply in the case of historical monuments only to the extent that they do not contravene the provisions of the special law. And in the case of the sale of historical monuments, as in the case of the sale of movable cultural assets classified in the treasury, only the ante rem venditio modality can be applied, considering the express provision of Law no. 422/2001 according to which the non-compliance by the sellers of the obligation to notify in writing the decentralized public service of the Ministry of Culture, in whose territorial radius they are based, about the intention to sell in order to exercise the right of preemption entails the absolute nullity of the sale. Moreover, all the sellers' obligations are prior to the moment of the sale of the historical monuments.

The right of preemption arises only in the case of a sale of individually determined goods and not of a universality of goods that would also include such historical monuments so that the sale of inheritances escapes the domain of the right of preemption (art. 1747-1754 Civil Code).

There should be no confusion between universality of goods and plurality of goods. According to art. 1735 para. 1 Civil Code, when the preemption is exercised in respect of a good purchased by a third party together with other goods for a single price, the seller can claim from the preemptor only a proportional part of this price. Art. 1735 para. 2 Civil Code provides that in the event that goods, other than the one subject to preemption were sold, but which could not be separated from it without damaging the seller, the exercise of the right of preemption can only be done if the preemptor records the price established for all goods sold. The significance of the provisions analyzed is that, in the hypothesis in which the goods from the plurality would be separated, and they would be sold separately, the total price would be lower.

The previously mentioned legal provisions do not expressis verbis provide the benchmarks according to which the connection between the good subject to preemption and the other goods sold is established. Therefore, the question arises as to whether the criterion used will be objective, being determined by the concrete situation of the goods, or, as the case may be, subjective, i.e. whether the connection between the goods determined unilaterally by the seller on the occasion of formulating an offer is relevant for sale.[15]

The problem was raised in jurisprudence regarding a bank's offer to sell a package of real estate, from which, from its perspective, the asset subject to preemption right, would be considered more valuable, and the others would be

[15] Adrian Laboș, *Exercising the right of preemption for the hypothesis of the plurality of goods sold, one of which is a historical monument*, 2021, www.bihorjust.ro.

devoid of economic, investment interest, reason for which, the price was set in relation to the entire package of real estate, in order to increase the interest of the potential buyer.

Analyzing this legal issue, the National Institute of Magistracy expressed the opinion that, in the case of exercising the right of preemption for the hypothesis of the plurality of goods sold, the criterion according to which it is established that the goods cannot be separated without damaging the seller is the objective one, based on a connection between goods pre-existing the sale.[16] Such an approach is based on the provisions of art. 1735 para. 2 of the Civil Code, which refer to "goods that could not be separated from it" - the good subject to preemption. So, the premise of the text is that, from an objective point of view, there was a connection, a cohesion of the goods that make up the plurality, and this cohesion preceded the sale, not being pre-constituted in order to conclude the legal transaction under the most advantageous conditions from an economic point of view for the seller. The hypothesis of the sale by a bank of a package of real estate, located in various localities, some of which are devoid of economic, investment interest, so that, by including in the sale offer of a historical monument, the interest of the potential buyer has increased, which, in the absence of the connection with the more valuable asset, would be totally disinterested in the other assets, is not circumscribed by art. 1735 para. (2) Civil Code. In such a hypothesis, art. 1735 para. (1) Civil Code will be applied, since the building, a historical monument, was bought together with other goods for a single price, hypothesis covered by these legal provisions. In this situation, there is no question of the asset subject to preemption being separated from the other assets in the plurality, as long as it was not in any connection with these assets prior to the formulation of the sale offer, so that the prerequisites for such an operation are not met. For the provisions of art. 1735 para. (2) Civil Code, it is not enough to produce a harmful effect for the seller as a result of the separate sale of the goods that make up the plurality, but it is necessary that there be a connection between the goods referred to by the premise of the legal text.

There is, objectively, no connection between the goods that make up the plurality, this being determined exclusively by the unilateral conduct of the seller who understood to formulate an offer to sell a package of goods in order to determine the conclusion of the transaction under more advantageous conditions for him.[17]

Moreover, the contrary interpretation would lead to the unacceptable conclusion that the seller, through his unilateral conduct, availing himself of the levers specific to the negotiation process, determined by his exclusive will the

[16] Repertoire of non-unitary practice issues discussed during the meetings of CSM representatives with the presidents of the civil sections of the High Court of Cassation and Justice and the appeal courts, p. 58, http://inm-lex.ro/wp-content/uploads/2021/02/repertorio-civil-right.pdf.
[17] http://inm-lex.ro/wp-content/uploads/2019/11/minuta-intalnire-sectii-civile-Oradea-6-7-iunie-2019.pdf, p. 45.

incidence of art. 1735 para. (2) Civil Code. Such an interpretation of the analyzed provisions, indisputably intended to protect the seller's interests, would be likely to divert them from their purpose and cause the exercise of the preemptor's right to be blocked. This would be conditioned by the recording of the price set for all the goods sold, and in scenarios such as the one that constitutes the object of the present analysis, which aims to conclude a large-scale transaction, the right of preemption would be practically devoid of content.[18]

We also mention that the procedure related to the right of preemption of the Romanian State must be followed even in the situation where the building with historical monument status is subject to enforcement or is put up for sale in the seller's insolvency procedure. Therefore, if, for example, the sale at public auction of a classified historical monument is carried out, the normative provisions regarding the holders of the right of preemption, the method of notification, the deadlines will be fully applicable.

The sanction provided by law for non-compliance with the formalities related to the right of preemption of the Romanian State regarding a building classified as a historical monument is the absolute nullity of the sales contract. Absolute nullity can be invoked at any time (there is no statute of limitations) and by any person justifying an interest.

In the doctrine, the opinion was expressed according to which non-compliance with the right of preemption of the preemptor should be sanctioned with relative nullity, as it is regulated by art. 1.248 of the Civil Code, respectively: "The contract concluded in violation of a legal provision established to protect a private interest is voidable". The legal act affected by relative nullity could be abolished at the preemptor's request, the ownership right being transferred to him, and the value of the asset could be paid directly to the third party buyer, to the seller or made available to them through a bailiff until the resolution of the dispute between the latter. However, if the preemptor does not intend to buy, he will be able to confirm the act, because, only seeking the annulment of the act, without capitalizing on the right itself, appears as an action without any meaning.[19] This approach was supported in the context in which, in a dispute, the Ministry of Culture requested the court to declare the absolute nullity of a sales contract concluded with the disregard of the right of preemption, and after admitting the judicial request, it did not exercise its right of preemption and neither wanted to purchase the historical monument.

However, we appreciate that the sanction of absolute nullity is the one that must be applied considering that, in the case of historical monuments, we are not talking about a particular interest of the Romanian State or of the administrative-territorial units, but of a general interest, that of supervising the circulation

[18] Adrian Laboș, *op. cit.*

[19] Tomescu Raluca Antoanetta, *The right of preemption of the Romanian state over historical monuments*, https://www.academia.edu/49143219/Dreptul_de_preemp%C8%9Biune_al_statului_rom%C3%A2n_asupra_monumentelor_istorice.

of goods that are part of the immovable national cultural heritage to ensure the restoration, preservation and conservation of these assets for present and future generations.

We agree that an addition to the legal rule would be required, in the sense that the preemptor could confirm the deed affected by absolute nullity, when there is no interest in exercising the right of preemption and acquiring the historical monument. According to art. 1247 para. 4 Civil Code, "The contract affected by absolute nullity is not susceptible to confirmation except in the cases provided by law", per a contrario "The contract affected by absolute nullity is susceptible to confirmation in the cases expressly provided by law". For this reason, a simple completion of the normative framework with the possibility of confirming the act affected by absolute nullity would be sufficient to avoid litigation without a concrete goal.

4. Conclusions

The Romanian State pursued, by establishing the right of preemption for the sale of goods that are part of the movable or immovable national cultural heritage, on the one hand, the possibility of maintaining in the state heritage movable goods classified in the treasury and buildings of historical and cultural importance, precisely for to ensure the restoration, preservation and conservation of these goods, in much better conditions than in the private patrimony of natural or legal persons, and, on the other hand, to emphasize the importance of conservation and restoration in the order of priorities of the actions to be taken on the treasury goods and on historical monuments that, following the fulfillment of preemption procedures, enter the civil circuit. In the spirit of special laws, the procedure for exercising the right of preemption is also an administrative-legal form of education in the field of protecting goods that are part of the national cultural heritage; the transactions carried out with non-respect of the right of preemption reflect, in fact, the desire of the seller and the buyer not to transmit/take notice of the special regulated status of the transferred good, and of the obligations that this status imposes on them, i.e. defeating the spirit of the law and emptying it of content[20].

In order to understand as well as possible the shortcomings of the normative framework, but also the real possibilities of circumventing the legal restrictions regarding the legal circulation of goods from the national cultural heritage, it is necessary to carry out continuous studies, especially from a jurisprudential perspective. The analysis of the administrative work procedures on the occasion of the exercise of the right of preemption and of the court rulings given

[20] At the universal level see Vrdoljak, Ana Filipa, *UNESCO, World Heritage and Human Rights*, „International Journal of Cultural Property" 29, no. 4 (2022): 459–86. https://doi.org/10.1017/S094073912200039X. See also Veysel Apaydin, *Rights, Abuses and Cultural Resistance*, Ed. Bloomsbury Publishing, 2023, pp. 220-231.

in the cases regarding the sale of such assets is a good source for understanding the phenomenon and for the elaboration of legal proposals. Especially, in the context in which the normative acts regulating the movement of goods from the national cultural heritage were developed more than twenty years ago, and the general normative framework regarding the right of preemption, introduced by the Civil Code, has a somewhat different approach, of French inspiration, oriented towards a post rem venditam procedure.

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The Controversies of Israel Judiciary Reform

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Abstract

In the last months, Israel faced with a very contested and divisive draft bill from the behalf of the government, putting into discussion the relation the three powers in the state. The draft bill in the parliament is aimed at limiting Supreme Court oversight of government policy has deepened social divisions and raised concerns about a possible democratic comeback. The Knesset passed a law that overturns the "principle of common sense" used by Israel's Supreme Court to evaluate government policies. This is especially the case in Australia, Canada and the UK. Judges decide whether a particular public policy is reasonable and sound. Because Israel is a parliamentary system, the proposed reforms, including weakening judicial oversight and changing the way judges are appointed, would shake the balance of power between Israel's government agencies. Opponents argue, future changes will destabilize Israeli democracy. Supporters of the reform argue the opposite, arguing that the judiciary has become an unaccountable government agency that usurps policy-making power from the Knesset and the government.

Keywords: *Israel; judiciary; Constitution; Supreme Court; judicial review; judicial independence.*

JEL Classification: K33

1. Introduction

Israel operates with a common law system.

Like Great Britain, it doesnt have an written Constitution.

Instead, he opted for basic legislation known as basic laws, which he treated as constitutional provisions. But it is very easy to change them. As is the case in most common law systems, particularly in England, most legal doctrines derive from the history of judicial decisions.

It is no different from other administrative review processes in other countries, but it has expanded and today many, including most of the opposition, are indeed open to reforms, but certainly not to those imposed by the government[2].

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[2] Yaniv Roznai & Liana Volach, *Law reform in Israel*, „The Theory and Practice of Legislation", 6:2, 291-320, 2018, DOI: 10.1080/20508840.2018.1478330.

2. General aspects

The Supreme Court is the highest court at the top of judicial system. It is based in Jerusalem and has jurisdiction over the entire state.[3]

Israel's three-tier (levels) judicial system—the trial courts, the district courts, and the supreme court—was established during British rule (1917-1948).

After gaining independence in 1948, Israel adopted Article 17 of the Law and Administrative Code.

The Statute provides that the laws in force in the country before the establishment shall remain in force to the extent that they do not contravene the principles of the Declaration.

This does not conflict with laws passed by the Knesset (parliament).[4]

The legal system therefore includes Ottoman law (in use until 1917), British Mandate law (including most of British customary law), elements of Jewish religious law and some aspects of other systems.

However, the dominant feature of the legal system is the extensive and independent legislation and jurisprudence established after 1948.

Its main content, the Courts Act (5717-1957), maintained the existing British legal structure (with minor changes) and laid down clear rules for limiting the powers of the courts. In 1984, the Basic Law: 5744-1984 was revised to replace the previous edition.

The "Judiciary and Courts (Complete Works) Act" was published. It states that judicial power in Israel is vested in courts and tribunals.

Courts have general jurisdiction over criminal, civil and administrative cases, while tribunals have special jurisdiction over certain specific cases.

Composition and organization. The number of judges of the Supreme Court is established by Knesset decree (resolution).[5]

Currently, there are 15 judges at the Supreme Court. Of these, 14 are members of the permanent commissions, and one is appointed as a temporary judge of the Supreme Court for a term of six months to one year. The Chief Justice serves as the head of the court and the judiciary branch. The president is assisted by the vice president.

Basic Law and the Law on the Judiciary and Courts (Consolidated Version), 5744-1984 defines the way judges are appointed.[6]

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[3] Venice Commission - Supreme Court of Israel Working document for the Circle of Presidents of the Conference of European Constitutional Courts, https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2006)036-e, p. 2. See some literature review in John Zhuang Liu & Lei Chen, *Jury trial and public trust in the judiciary: evidence from cross-countries comparison*, „Asia Pacific Law Review", 28:2, 412-436, 2020, DOI: 10.1080/10192557.2020.1867794; and Yair Sagy, Guy Lurie & Amnon Reichman, *A history of the administration of courts in Israel*, „Journal of Israeli History", 40:2, 355-379, 2022, DOI: 10.1080/13531042.2023.2235784.

[4] Venice Commission - *op. cit.* (Supreme Court of Israel...), p. 2.

[5] Ibid, p. 2.

[6] Ibid, p. 3.

A judge's term of office begins with a declaration of faith and ends with mandatory retirement at age 70, resignation or death, and election or appointment to an office that disqualifies him from being a member of the Knesset. A judge may be dismissed according to the decision of the Commission for Appointment of Judges or the Commission for Discipline of Judges.

The court is open throughout the year, with a break (judicial holiday) from July 15 to September 1.

During this break, the court will reconvene to hear emergency cases, criminal appeals and sentencing.

The court usually consists of a panel of three judges. A single judge of the Supreme Court can hear applications for interim orders, injunctions, appeals against interim orders of local courts and appeals against decisions of the same local courts. The Supreme Court, a panel of five or more judges, will hear "subsequent hearings" of cases where the court previously had a panel of three judges.[7]

For cases involving fundamental legal questions and particularly important constitutional questions, the court may be composed of extended panels of three or more judges, with an odd number of judges.

When the Chief Justice is President, the President becomes President.

If the vice president holds office and the president is absent, the vice president becomes president.

In all other cases, the most senior judge is the presiding judge.

Seniority is calculated from the date of appointment as a judge of the Supreme Court.

The judges staff consist of a secretary, two legal advisers (lawyers) and two law clerks.

The current Chief Justice has four administrative assistants, two law clerks, two legal advisers and two comparative law clerks.

Salaries and pensions of judges are established by law or by resolution of the Knesset or one of its committees.

But the law does not allow statutes specifically designed to reduce judges' salaries.

Also, the budget of the judicial system is established by the Knesset.

The Supreme Court is a court of appeal like the High Court of Justice.[8]

As an appellate court, the Supreme Court reviews criminal and civil cases, as well as other decisions of local courts. It also hears appeals against judicial and quasi-judicial decisions of a diverse nature, including the legitimacy of Knesset elections, disciplinary orders for lawyers, prisoner appeals, and administrative detention.

As the Supreme Court, as the first and last court, the Supreme Court

[7] Ibid, p. 3.
[8] Ibid, p. 3.

mainly hears cases concerning the legality of decisions made by state agencies, such as the government, local governments and other agencies and persons performing state functions under the law.

It decides matters which the Supreme Court deems necessary to grant measures in the interest of justice and which are not within the competence of other courts or tribunals.

3. The Supreme Court of Justice

The Supreme Court of Israel is the highest judicial body in Israel.

This precedent is binding on all lower courts, as well as on all persons and public authorities. It is not binding on the Supreme Court itself.

Supreme Court opinions are published in Hebrew in a series called Piskei Din.

An official print version will be available shortly after the final decision. The decision can also be viewed online immediately after issuance.

If the law does not provide otherwise or the court is not otherwise established by law, the court will hold a public hearing.

Judges are appointed by the President after being elected by the Judges Electoral Commission. The Commission consists of nine members, including the Chief Justice, two judges chosen by the judges of the Supreme Court, the Minister of Justice and other minister appointed by the Government, two representatives of the Knesset elected by the Knesset and two representatives of the Israel Chamber of Advocates Bar.

The president of the commission is the minister of justice. The Committee may make decisions if the number of members is 7 or more.

A criminal case cannot be brought against a judge without the consent of the Attorney General and no information about the judge can be given to anyone other than the Attorney General.

A criminal charge against a judge may not be tried in a three-judge district court unless the judge consents to it being tried in the ordinary way.

Judges are subject to the jurisdiction of the disciplinary court.

The disciplinary tribunal is composed of judges appointed by the Chief Justice and judges receiving severance pay. The grounds for disciplinary proceedings, the procedure for filing complaints, the composition of the tribunal, the powers of the disciplinary tribunal and the rules governing disciplinary actions are provided by law. The rules of procedure must be in accordance with the law.

In the event that a complaint is filed against a judge, a criminal action is brought against him, or a criminal case is opened, the chief judge may suspend him for a period to be determined by him[9].

[9] See some considerents in Assaf Meydani, *Political Entrepreneurs and Public Administration*

The Supreme Court hears appeals against judgments and other decisions of district courts.[10]

Other powers of the Supreme Court are established by law. The establishment, powers, location and jurisdiction of district courts, trial courts and other courts are governed by law.

In addition to the decision of the Supreme Court, a legal appeal can also be made to the first decision of the trial. Additional hearing Cases tried by the three-member conciliation division of the Supreme Court may be heard by the five-member conciliation division in accordance with the grounds and procedures established by law.

The retrial may be carried out in accordance with the grounds and procedures established by law for a criminal case that has been finally resolved. Rules prescribed by the court are for the guidance of lower courts.

4. The public debate

On August 4, 2023, the Israeli Knesset passed a bill in 2023 that would limit the use of judicial "discretion" in reviewing government decisions in July limit.

The law was one of several government proposals presented by Prime Minister Benjamin Netanyahu's coalition in January to limit the judiciary's power to monitor government activities. Netanyahu and his supporters have sparked a nationwide debate, including mass protests, that they say will tip the scales in the Israeli system, which lacks clear constitutional limits on judicial review. Some opponents of the proposal argued that it could change the nature of Israeli democracy, affect the ongoing criminal trial against Netanyahu and exacerbate tensions with the Palestinians.[11]

The legitimacy of judicial review of the Supreme Court quickly became a hotly debated issue in Israeli politics.[12]

Since the mid-1990s, the process of individually appointing judges to the court has been subject to intense public and political scrutiny.

One of the important effects of the 1992 constitutional amendments is the development of a constitutional dialogue through which the courts can influence future legislation and review administrative decisions on new grounds established in the Basic Law. Although the Supreme Court has struck down only a handful of laws since 1992, it has proven capable of changing the nature

Reform: The Case of the Local Authorities' Unification Reform in Israel, „International Journal of Public Administration", 33:4, 200-206, 2010, DOI: 10.1080/01900690903393947.

[10] Venice Commission - *op. cit.* (*Supreme Court of Israel...*), p. 4.

[11] Jim Zanotti, *Israel: Controversy over Judicial System Changes and Proposals*, 2023, https:// crsre ports.congress.gov/product/pdf/IN/IN12214, p. 2.

[12] Menachem Hofnung, Mohammed S. Wattad, *The Judicial Branch in Israel*, „The Oxford Handbook of Israeli Politics and Society", pp. 317-330. Oxford University Press, 2018, https:// doi.org/10.1093/oxfordhb/9780190675585.013.19.

of the legislative conversation.[13]

Parliamentarians and politicians are now debating not only what is good or bad policy, but also what is most likely to survive the scrutiny of the judicial system. Technical constitutional arguments are developed, debated and refuted along with other constitutional arguments in Knesset and Cabinet meetings.

It does not matter that after the constitutional coup of 1992, the composition of the judiciary changed significantly and its activities decreased.[14]

In response to political criticism of its independence, the judiciary has adopted its own tactics to avoid making certain decisions in sensitive cases, such as delaying decisions in difficult cases or pressuring litigants to settle. This is done in an attempt to preserve the power base of the court.

It protects both the formal powers of the judiciary and the method by which judges are currently selected.

Decisions declaring laws unconstitutional or repealing executive actions can be cited here and there, but it is important to note that the repeated appeals to judicial intervention in political decisions are not necessarily related to actual decisions, but to political events.

Although the court's formal powers remain intact and the Supreme Court can still act as a veto player at critical moments, its ability to do so on a regular basis has declined significantly since the early 1990s.

In several cases over the past decade, the administration chose not to enforce court orders (many of these cases involved court orders from the West Bank, causing little protest in Israel).

He thus tamed the Supreme Court despite his successful efforts to retain power.

A general assessment of judicial independence allows us to conclude that, although the Supreme Court has maintained its neutrality and political significance, it is no longer free from political pressures that can affect the outcome of sensitive court cases.[15]

We can identify some reasons of the current situation.

First, Israel has never been a fully liberal democracy, and its dual nature as a Jewish state and a democracy creates internal tensions[16]. The state has always been present in the legal system.[17]

Second, Israel does not have a complete constitution and does not have

[13] Ibid, p. 317.
[14] Ibid, p. 318.
[15] Ibid, p. 319.
[16] https://constitutionnet.org/news/upsetting-israeli-jewish-democratic-balance-declaration-declaration)-rate-state-state-promissory note. Enrico Albanesi, *Beyond the British model. Law reform in New Zealand, Australia, Canada, South Africa and Israel*, „The Theory and Practice of Legislation", 6:2, 153-166, 2018, DOI: 10.1080/20508840.2018.1475054.
[17] Gila Stopler, *The Israeli Government's Proposed Judicial Reforms: An Attack on Israeli Democracy*, ConstitutionNet, International IDEA, 16 February 2023, https://constitutionnet.org/news/israeli-governments-proposed-judicial-reforms-attack-israeli-democracy, p. 4.

full constitutional protection of human rights.

Third, Israel's parliamentary system allows the government to exercise complete control over the Knesset through close coalition control. In Israel's multi-party system, a multi-party coalition must always win an absolute majority of at least 61 of the 120 members of the Knesset to take control of the Knesset and form a government.

Fourth, the government ignores the harsh criticism of Knesset legal advisers and pushes the reform through the legislative process without trying to build a consensus.

Proposed reforms are including full government control of the Knesset.

External oversight by the courts and binding internal legal opinions by the attorney general and the department's legal advisers are the only safeguards against executive branch excesses.

Accordingly, the government proposes the fundamental reforms to deprive these institutions of their ability to function as a check on the executive branch.

A point is the changing the composition of the Judicial Selection Commission (JSC) to give state politicians full power over selection: the current method of selecting judges has been in use since 1953.[18]

According to the Basic Law, all judges in Israel will be appointed by the judiciary selection committee.

For years, right-wing politicians have criticized the composition of the Supreme Court.

Giving the government absolute control over the appointment of judges in all courts undermines judicial professionalism, undermines judicial independence and politicizes the judiciary.

Judges know that their appointments, promotions and dismissals are in the hands of the politicians in power and are likely to align their decisions in all areas of the law, including human rights, criminal law and even civil law, with the views of the ruling coalition.

Moreover, and more importantly, the proposed reform would deprive the courts of the right to invalidate or limit primary laws, regardless of their content.[19]

This is particularly harmful because the Knesset has the power to pass any law as a primary law without special procedures or special majorities. The ease with which primary laws can be passed gives rise to heated debate over the terms of the repeal provisions.

This provision allows the Knesset to reintroduce a law even after the court rejects it, because the Knesset controls court oversight and such oversight could be avoided entirely by adopting simple laws.

[18] Ibid, p. 4.
[19] Ibid, p. 4.

As a result, these changes almost completely deprive the courts of their ability to protect human rights and the fundamental principles of democracy.[20]

The proposed reforms would remove the "reasonableness" standard in administrative review.

This prohibits the courts from reviewing the decisions and actions of the government, ministers and other executive branches and deeming them unreasonable. The proposed changes will make it much more difficult, and sometimes impossible, to prevent the incorrect, arbitrary or objective use of administrative powers without regard to human rights or the public interest.

The Attorney-General and legal advisers to various ministries are now professional appointments representing the public interest, and their legal opinions are binding on the Government and ministers.

Under the proposed reforms, the ministry's legal adviser would be a position of trust chosen by the minister through a political and non-professional process.

Legal opinion status of a General Counsel is optional, and civil servants have extensive access to private legal advice and private legal representation in the courts.[21]

These changes will allow governments and ministers to exercise their powers without regard to the law and could increase public corruption.

Furthermore, the Attorney General's position states that the reforms will leave Israel's system of government without institutional tools to prevent the misuse of the law to undermine Israel's fundamental character as a Jewish and democratic state.

The new Justice Minister, Yariv Levin, is a member of Netanyahu's Likud party.

Levin's bill aims to reorganize the Judicial Selection Commission to give politicians more control over the composition of the courts.[22]

The committee consists of 11 members, the minister of justice (who chairs the committee); two additional ministers appointed by the Government; the chairmans of 3 Knesset Committees, the first judge and other two judges of the Supreme Court elected by the members of the Court; and two members from civil society. selected by the Minister of Justice One of them must be a lawyer.

The draft law provides that committee members have autonomy in their choices.

This means that no government agency, including the courts, can interfere with their decisions, proceedings or decisions.

In addition, the bill provides for the appointment of the court president and vice president for a six-year term, as judges are generally appointed and

[20] Ibid, p. 6.
[21] Ibid, p. 7.
[22] Rivka Weill, *War over Israel's Judicial Independence*, VerfBlog, 2023/1/25, https://verfassungsblog.de/war-over-israels-judicial-independence/, DOI: 10.17176/20230125-201849-0, p. 2.

may be appointed from outside the judiciary.

A judge can be removed without reason by a decision of nine out of 11 members of the commission.

In a letter explaining the bill, the democratic pretext of the proposal rejects the current composition of the Judicial Selection Commission as inadequate.

Currently, the commission consists of 9 members, the Minister of Justice and an additional government minister, the President of the Supreme Court and two Supreme Court judges, two representatives of the Knesset, and two representatives of the Israeli Bar Association.

Levin's bill seeks to prevent judges from refusing to appoint their own replacements and to give politicians a veto over Supreme Court appointments.

The intention is to give priority to politicians over professionals (judges and lawyers) in the personnel process.

The draft argues that the proposed appointment process would be more democratic, as it would lead to a more diverse judiciary that better reflects public opinion.

He also explains that the current composition of the committee does not take into account the fact that Israel's constitutional revolution in the mid-1990s led to judicial review of fundamental rights. The judicial powers granted to the courts after the 1992 also include the elaboration of policies. The new structure is likely to ensure that courts with such powers are bound to respond more effectively.

The bill calls for "equal weight to be given to the three branches of government," with three judges, a minister and a member of the Knesset (MK) serving on the commission.[23]

Since the Bar does not represent the general public, the representative of the Bar will be replaced by a national representative chosen by the Minister of Justice.

In fact, it is argued that the bill does not represent the interests of lawyers, since most of them do not participate in government elections, although they have the right to vote.

A closer look at this proposal reveals an intention to concentrate the power to appoint judges in the hands of a minority rather than a majority in government, much less in the legislature.

Members of the Judicial Selection Committee must make independent decisions in accordance with Israeli law.

Therefore, there is no way to translate the will of the government or the National Assembly into a committee vote.

Therefore, the current composition of the committee is appropriate.

This ensures a consensus process in which representatives of the four

[23] Ibid, p. 2.

institutions - the Knesset, the government, the judiciary and the bar - must sign an agreement on the appointment of Supreme Court judges.

This in turn affects lower court appointments. This process prevents the appointment of inappropriate individuals who do not represent the people of Israel, including radical candidates[24].

5. Conclusions

On the content side, Israelis across the political spectrum have long expressed concern about the judiciary[25].

Americans are accustomed to a constitutional system that defines the separation of powers and checks and balances between three equal branches.

This gives the Supreme Court a lot of power. But even the American system has created many battles between branches of power.

The British system is completely different.

The doctrine of parliamentary sovereignty severely limits the power of judicial review.

The Supreme Court cannot overturn basic laws of Congress.

Israel's Supreme Court has long exercised powers beyond those recognized or recognized by other major democracies.

Generally, the "reasonableness standard" applies to violations of the law.

It is the exact opposite of the British system. While the UK Supreme Court can invalidate any bill in parliament, Israel's Supreme Court can invalidate any bill in the Knesset on grounds it deems "reasonable".

Which system is preferred is a matter of legitimate debate.

The Israeli judicial system has both strong defenders and brave critics. But the existence of these heated debates does not mean "the end of democracy".

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[24] Ibid, p. 3.

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Legal Responsibility in the Operating Room in the Particular Case of Retained Surgical Foreign Bodies

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Abstract

The study presents an analysis of legal liability in the operating room, in the hypothesis of a retained surgical foreign bodies, as well as the interpretation of the procedure for completing the checklist of surgical procedures, imposed by Order no. 1,529 of December 13, 2013 issued by the Romanian Ministry of Health. Ab initio, there are exposed the legal status of civil liability in medical activity, the definitions of medical personnel and the notion of malpractice, as well as aspects related to the prescription of the right of action and the competent court in such cases. In corollary, jurisprudential elements related to the medico-legal expertise and the relevant conclusions of such evidence administered in the civil process are highlighted.

Keywords: *legal liability, operating room, foreign body, health reform.*

JEL Classification: K15, K32

1. Prolegomena

De lege lata, medical activity is regulated by Law no. 95/2006 regarding health reform[2], Law no. 46/2003 regarding the patient's rights[3], a series of orders of the Minister of Health, all these special normative acts being in accordance with the provisions of the Romanian Constitution and complementing the norms issued in the civil, criminal or labor code. In the framework law, respectively in art. 653 of Law no. 95/2006 regarding health reform, we find *expressis verbis* the definition of medical personnel, as well as the notion of malpractice: *(1) According to this title, the following terms are defined as follows:*

a) the medical staff is the doctor, the dentist, the pharmacist, the medical assistant and the midwife who provide medical services;

b) malpractice is the professional error committed in the exercise of the medical or medico-pharmaceutical act, causing damage to the patient, involving the civil liability of the medical staff and the supplier of medical, sanitary and pharmaceutical products and services.

Thus, we consider that medical malpractice is a professional error generating damage to the patient, which involves the civil liability of the medical

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[2] Published in the Official Monitor of Romania, Part I, no. 172 of April 28, 2006.

[3] Published in the Official Monitor of Romania, Part I, no. 51 of January 29, 2003.

staff or the provider of medical, sanitary or pharmaceutical services and products.[4]

According to the encyclopedic dictionary of the Romanian language, malpractice means „*incorrect or negligent treatment applied by a doctor to a patient, which causes him harm of any kind, in relation to the degree of impairment of physical and mental capacity*"[5].

In this sense, the same art. 653 of the normative act indicated above reveals the fact that: (*2) Medical personnel are civilly liable for damages caused by error, which also include negligence*[6]*, imprudence*[7] *or insufficient medical knowledge in the exercise of the profession, through individual acts in the framework of prevention, diagnosis or treatment procedures*.

According to art. 655 of the same normative act, *public or private health units, providers of medical services, are also civilly liable for damages caused, directly or indirectly, to patients, generated by non-compliance with the internal regulations of the health unit* and according to art. 654 *all persons involved in the medical act will answer in proportion to the degree of guilt of each one*.

In such conditions, the provisions applicable in the matter of malpractice are represented by Title XVI - civil liability of medical personnel and the supplier of medical, sanitary and pharmaceutical products and services from Law no. 95/2006 on health reform, with subsequent amendments and additions and its application rules.[8]

2. Legal responsibility in the operating room. General aspects

Law no. 95/2006 regarding health reform needs to be corroborated with the Regulation of order and operation of hospitals, approved by the local Councils, respectively the provisions that refer to the rules regarding the function of the Operating Block as well as with the provisions of the New Civil Code.

In a civil case, regarding the Regulation of order and operation of the

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[4] The term malpraxis derives from the Latin word "malus," meaning bad, and the Greek word "praxis," meaning practice. In corollary, malpractice means bad practice or inappropriate practice. http:// revistaprolege.ro/consideratii-juridico-penale-privind-raspunderea-personalului-medical-caz-de-malpraxis/.

[5] http://dexonline.ro/definitie/malpraxis.

[6] Negligence, s. f. The fact of being careless; attitude of carelessness, neglect in fulfilling a duty; deed, attitude denoting lack of care, attention, interest (towards something, someone or oneself), dexonline.ro

[7] Imprudence, s. f. Lack of prudence; recklessness; contingency ♦ Deed, word, etc. reckless, risky, dexonline.ro.

[8] Bianca Lacrima Luntraru, *Civil liability for professional malpractice*, Ed. Universul Juridic, Bucharest, 2018, p. 30; G. Viney, P. Jourdain, *Traité de droit civil*, L.G.D.J., Paris, 2013, p. 46; Ion Ristea, *Legal-criminal considerations regarding the liability of medical personnel in case of malpractice*, http://revistaprolege.ro/consideratii-juridico-penale-privind-raspunderea-personalul ui-medical-caz-de-malpraxis/.

Municipal Hospital "...", more specifically in art. 131 marginally entitled "Operating block" it is stated that „*The operating block represents an independent structure being nominated in the structure of the hospital and is organized according to the provisions of Law no. 95/2006 and WHO no. 914/2006*", specifying at the same time very importantly that „*The Operating Block in the structure of the Municipal Hospital ... is coordinated by the coordinating doctor appointed according to the legal provisions*".

Regarding the civil code, according to art. 252 of this code, marginally titled Defense of non-patrimonial rights and which refers to the protection of human personality: „*Every natural person has the right to the protection of the intrinsic values of the human being, such as life, health, physical and mental integrity, dignity, privacy of private life, freedom of consciousness, scientific, artistic, literary or technical creation*."

Therefore, moral damages are those consequences of a non-patrimonial nature caused to a person by committing culpable illicit acts, consisting of the harm caused to his physical, mental and social personality, by injuring a non-patrimonial right or interest, the reparation of which follows the rules of tortious civil liability, if the illegal act occurred outside of a contractual framework.

Next, we specify that for the existence of tortious civil liability, the following conditions must be cumulatively met: a) the existence of a damage; b) the existence of an illegal act; c) the existence of a causal relationship between the illegal act and the damage (in the sense that that act caused that damage); d) the existence of guilt (deed imputable to its author).

The culpability of the conduct of the perpetrator is an essential condition, because we will not be able to discuss the presence and applicability of civil liability where there is no guilt. Thus, an analysis of guilt is important, because only an attitude that is qualified as a negative one, disapproved by the law, will be able to lead to the engagement of a civil liability.

In order for the civil liability of the one who caused a damage to be engaged, it is not enough to have had an illegal act in a causal relationship with the damage that was caused, it being necessary that this act can be imputed to its author, as well as that the author was at fault when he committed it, acting culpably. It should be noted that in cases of malpractice, the law also establishes the form of guilt of negligence and imprudence.[9]

Specifically, regarding the fulfillment of the conditions for the existence of a malpractice, in the case exposed in the present study, we have shown the court that the culpable act is the performance of an erroneous surgical treatment for the sake of certainty, since due to negligence and imprudence a foreign body was forgotten after performing the laparoscopic surgery, respectively a gauze - exogenous material of 13 gr. with the maximum longitudinal diameter of approx.

[9] Alexandra Weisman, *Medical malpractice in Romania*, 05.03.2021, https://www.juridice.ro/720450/malpraxisul-medical-in-romania.html.

40cm, as it appears from the patient's clinical record prepared by the Oncology Hospital, which consists of a number of 28 pages.

In the studied case, we assessed that the conditions of tortious civil liability are met in full, since the damage was caused by the illegal act of the defendants, there is undoubtedly a causal relationship between the damage caused and the illegal act, as well as the existence of guilt under the aspect of imprudence and negligence.

The plaintiff proved to the court that the act of malpractice caused moral damage (physical pain, mental suffering, restricting the patient's ability to enjoy life) and material (the sums of money paid for a new surgical intervention).

Regarding the moral damages, we specify that they are established by the court in relation to the negative consequences suffered by the plaintiff, the importance of the values damaged to the patient, to what extent these values were damaged, the intensity and consequences of the physical and mental trauma suffered, to what extent his family, social and professional situation was affected.

We come back and show that in cases of malpractice, moral damages are the negative consequences of a non-patrimonial nature caused to a strictly determined person (the patient), through the illicit and culpable act of another person (medical staff), which consist of physical, mental and social harm to the personality, by injuring a non-patrimonial right, damage whose reparation through monetary compensation follows the rules of tortious civil liability.

The compensations representing the moral damages must be reasonable, their assessment and quantification must be fair and equitable, must correspond to the real and effective moral damage caused to the patient and suffered by him, in such a way that the beneficiary is not unjustly enriched to claim and receive moral damages, but not to be ridiculous either.[10]

In such a situation, we asked the court to take into account the physical pain - ***pretium doloris*** - that the patient suffered as a result of the illegal act of the medical staff, both immediately after the surgical intervention and afterwards, until the critical situation is resolved by other medical personnel. We made it clear that these pains persisted until the date of the new intervention performed in the Hospital in Italy.

Moreover, when determining the amount of compensation, we asked to note the mental trauma experienced by the patient as a result of being involved in a case of malpractice and the traumatic consequences suffered further, all of which are likely to create an extremely negative mental state that affected not only the family life, but also the relationships with friends. The psychological shock experienced, caused by great pain, created a permanent fear of requesting specialized medical treatment.

Taking into account that the court will judge in equity the request to

[10] See Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macoovei, *The New Civil Code, Commentary on articles*, 3rd ed., Ed. C.H. Beck, Bucharest, 2021, p. 135.

compel the civilly responsible person to pay moral damages, since there are no regulated criteria for determining the moral prejudice caused, we ordered the court to consider the following criteria: the danger in which life was put, in the hypothesis that the patient would not have requested a new surgical intervention; the consequences produced by the malpractice occurring until the new surgical intervention; the non-existence of the plaintiff's fault in the medical recovery after the first surgical intervention; the intensity of the pains suffered, their duration; mental suffering; the leisure bias.

3. Prescription of the right to action and competent court

According to art. 687 of Law no. 95/2006 regarding health reform, the competent court to resolve the disputes provided for in this law is the court of first instance in whose territorial constituency the malpractice act complained of took place and according to art. 688 of the same normative act, acts of malpractice in the medical activity of prevention, diagnosis and treatment are prescribed within 3 years from the occurrence of the injury, except for acts that represent crimes.

Regarding the admissibility and competence of a court to resolve the pending action, the plaintiff stated that according to the decision issued by the High Court of Cassation and Justice, Civil Section I, decision no. 875 of March 20, 2018, states that the liability for malpractice is regulated within a special law, Law no. 95/2006, in the framework of a procedure prior to the referral to the court, provided by art. 679 - 684 of the law, finalized by the decision of the Monitoring and Professional Competence Commission for malpractice cases. The provisions of art. 684 of Law no. 95/2006, however, expressly mentions the fact that „*the procedure for establishing cases of malpractice does not prevent free access to justice according to common law*", a provision that removes the derogatory character of the special law from common law, accepting that the party has the choice between the two types of action.

The victim of an act of malpractice has, therefore, the possibility to address either the Monitoring and Professional Competence Commission for cases of malpractice, in which case there is a procedure prior to the referral to the court, completed by a decision of this Commission, or to address directly to the court that will resolve the case according to common law.

Therefore, in the absence of contesting a decision of the Commission, even if the plaintiff stated that he bases his claim on the provisions of Law no. 95/2006, the court could not be considered vested with a challenge based on the provisions of the special law, but with an action in common law claims, based on tortious civil liability and as the value of the claims made exceeds the value threshold of 500,000 lei, mentioned by Art. 2 point 1 lit. b) from the Code of Civil Procedure, the court competent to judge the case is the tribunal and not the court of first instance.

We showed the honorable court the fact that this judgment is not pronounced by the High Court of Cassation and Justice in an appeal in the interest of the law or in the interpretation of some legal norms to be binding, in the sense that it is subject to the unanimously recognized principle that case law it is not a source of law.

Contrary to what the High Court of Cassation and Justice reviewed, we showed the fact that under art. 21 para. 4 of the Constitution „*Special administrative jurisdictions are optional...*", meaning that the parties are not required to go through the preliminary procedure before the Monitoring and Professional Competence Commission for cases of malpractice, and if the party has chosen to file an action directly in court in tortious civil liability, not only the general provisions of the civil code will apply, but also the special provisions of the legislation in the matter of malpractice, respectively Law no. 95/2006, which receives by virtue of the *specialia generalibus derogant principle*. The High Court of Cassation and Justice shows that such an action would be an action „*in common law claims*" but as a result of the specialization of the matter, namely the existence of the special provisions of Law no. 95/2006 we consider that it is not an action in common law claims, but an action in special claims arising from a medical act.

In support of our opinion, we invoked the majority opinion of the courts - Civil Sentence no. 170F/05.11.2015 pronounced by the Bucharest Court of Appeal – Civil Section III, which certifies the following: *„However, in relation to the factual and legal grounds of the introductory action, specified but also to the legal norms previously evoked, the Court appreciates that the circumstance that in justifying the amount of the claimed damage was suffered by the plaintiff, it also referred to the provisions of common law, which regulates tortious civil liability, is not likely to justify the conclusion that, as far as the jurisdiction to resolve the case is concerned, the rules of common law, listed in art. 95 of the Code of Civil Procedure and not the special ones contained in art. 687 of Law no. 95/2006, which give the jurisdiction of the court in whose territorial jurisdiction the malpractice act claimed was committed, all disputes provided for in this law.*

Moreover, art. 687 of Law no. 95/2006 does not distinguish in relation to the nature of the compensation requested or the manner in which the claimant intends to quantify the damage claimed to have been attempted, nor in relation to the value of the claims deduced from the judgment or, where the law does not distinguish - the interpreter cannot distinguish.

As in the case is requested the reparation of a damage under the conditions established by art. 653 of Law no. 95/2006, and according to art. 687 of the special normative act, all disputes provided for by the special law are within the competence of the court of first instance, the Court will establish the competence of the 4th District Court (first instance) of Bucharest to resolve the case."

Secondly, the topography of the text must be considered. Art. 687 is located in Chapter VII - Final Provisions of Title XVI of the Law, entitled „Civil liability of medical personnel and suppliers of medical, sanitary and pharmaceutical products and services", being an independent norm, which aims to resolve all disputes based on the provisions of Law no. 95/2006. Moreover, Article 656 which provides that „*Public or private health facilities, providers of medical services, are also civilly liable for damages caused, directly or indirectly, to patients, generated by non-compliance with the internal regulations of the health facility*" is included in the same Title XVI of Law no. 95/2006.

De lege lata, the Law no. 95/2006 was amended and article no. 687 stipulates the following: the court competent to resolve the disputes provided for in this law is the second degree court (id est „tribunalul" and not the first degree court „judecătoria") - the civil section in whose territorial constituency the malpractice act complained of took place.

4. Medico-legal expertise carried out in the case

In the case, the evidence with the medico-legal expertise was admitted, and following the administration of the evidence, we assessed that the first medico-legal expertise report with the examination of the person drawn up in the pending case required some additions and clarifications from the expert, in which sense we presented the objections ours related to each objective admitted by the honorable court, correlated with each response of Dr. ..., for a clearer observation of them.

Next, we present each objective admitted by the court, the response to this objective, as well as the objections/requests regarding the clarification or completion of these responses.

1. *To establish the origin and nature of the foreign body found inside the cystic cavity by the doctors from the Oncological Hospital ... Italy*. In point 3 of the Conclusions of the expert report, the primary forensic doctor states that the table detected during the surgical intervention in 2017 was forgotten during the surgical intervention of 10.11.2015.

In point 2 of the Conclusions of the Expertise Report, the primary forensic doctor states that in 2017, an anterior centro-pelvic cystic formation was detected, with a diameter of 6 cm, with the inclusion of a foreign body which, according to the histopathological result, was a exogenous material of 13 gr, with a length of about 40 cm, similar to a table.

1.1. In this regard, we asked the primary forensic doctor to specify whether the exogenous material of 13 grams, with a length of about 40 cm can be a table (given that she mentioned "similar to a table") or can it be rather a surgical field, considering the length of this foreign body?

2. *To determine if the patient's life was put in danger and if a permanent physical infirmity was caused to her according to the medical history.* In point 5

of the Conclusions of the Expertise Report, the primary forensic doctor states that the damage caused to the patient as a result of this error consisted in affecting her clinical condition and requiring a laparoscopic surgery to remove the foreign body, but it did not endanger her life the person and did not cause permanent physical infirmity, sequelae in the genital area or impairment of reproductive function.

2.1. We requested to specify what the consequences would have been in the hypothesis that the patient would not have endured the laparoscopic surgical intervention to evacuate the foreign body and that foreign body would have remained in the patient's body, taking into account the fact that after 5 years from the intervention the applicant has serious health problems, with investigation results not in accordance with normal physiological parameters (see the medical analyzes that were attached to the objections).

2.2. We requested to indicate why the conclusion was reached that the reproductive function was not affected, since the operative protocol states that the right ovary is surgically absent, also taking into account the fact that in Italy a previous centro-pelvic cystic formation was detected. Related to these aspects, indicate if the reproductive function was affected or if there are sequelae in the sphere of the pelvis, as a result of the medical mistake of forgetting a foreign body, which led to a new surgical intervention.

2.3. We requested to indicate whether, in the hypothesis in which the patient decided not to re-intervene laparoscopically in Italy, there would have been a high risk of septicemia (which leads to death), given that it is shown that life was not put in danger.

3. *To establish the existence or not of a medical fault and to determine who is guilty*. In point 4 of the Conclusions of the expert report, the primary forensic doctor states that the forgetting of a meal during the surgical intervention of 10.11.2015 constitutes a medical error occurred during the treatment procedures, possibly by violating the rule of counting instruments and of the materials used during the operation.

3.1. Regarding this answer, I asked the doctor to indicate **precise and clear** (respectively not "possible") which rule is violated in the surgical treatment procedure. In such a situation, we appreciate that the term possible does not reliably denote which rule is observed to be violated.

Next, in the conclusions it is indicated that this error could have been prevented if the procedure had been followed and the medical team that performed the surgical intervention on 10.11.2015 is responsible for it, more precisely the person whose task was to count the materials used during intervention.

3.2. We requested to indicate precisely what is the procedure that must be respected in this surgical treatment and with reference to this aspect what is the normative act/protocol that must be respected in the operating room.

3.3. Furthermore, we requested to specify which was the complete medical team that performed the surgical intervention, considering that we requested

this information of public interest Municipal Hospital "...", but this institution did not answered.

3.4. Since the primary medical examiner sees that the person whose task was to count the materials used during the intervention is responsible for the medical error, we requested that it be clearly indicated who is the person who has this task, and what is the act normative/regulation/protocol in which this task is established.

3.5. In the same register, we requested to indicate who is responsible for the coordination of the operating room, respectively who is responsible for counting the instruments and materials used during the intervention, regardless of who is responsible for this obligation.

4. *To establish whether the damage suffered by the patient, by forgetting the foreign body in the body, produced any medical damage.*

In point 5 of the Conclusions of the expert report, the primary forensic doctor states that the harm caused to the patient as a result of this error consisted in affecting the clinical condition.

4.1. With regard to this answer, I requested to clarify what "inflicting the clinical condition" actually means, respectively to indicate to what degree the patient's health condition was affected, also taking into account the connection between the serious condition the patient went through in the 2 years from the time of the initial intervention and the time of the intervention for the evacuation of the foreign body.

5. *To determine if there is a causal link between the medical act of ... and subsequent interventions suffered in Italy by the plaintiff*. In point 3 of the Conclusions of the expert report, the primary forensic doctor notes that the patient has pathological history and other surgical interventions in the pelvic area, but the abdominal CT performed on 06.11.2015, before the surgical intervention on 10.11.2015 did not reveal other lesions outside the left ovarian cyst. From this it follows that the table detected during the surgical intervention in 2017 was forgotten during the surgical intervention of 10.11.2015.

Given that the primary medical examiner verified the causal link between the medical act in ... Romania and the surgical intervention in Italy, we had no objection to the clarification or completion of this answer.

In the case, a counter-expertise was admitted and the Report from the new medico-legal expertise shows that:

- the foreign mass certainly originates from the surgical intervention for ovarian cyst, performed at the Hospital;

- the foreign body caused a reaction of the body that encapsulated it and formed a structure that can be called a cyst;

- there is an obvious deviation from the protocol both on the part of the surgical team and on the part of the operating room nurses, since the check-list did not include data on the counting of the compresses and it is not signed, it can

be concluded that the counting was not done neither when handing over the compresses by the ward nurse, nor when closing the abdominal cavity, bypassing the provisions

- there is a possibility that the foreign mass can infect or erode a segment of intestine, fistulize or general other secondary complications;

- surgical intervention in the pelvic area causes adhesions, which **at least** theoretically can affect the reproductive function;

- the CT description is correct, because CT cannot be done on one side of the body;

- there is a direct causal link between the intervention at the Tecuci Hospital and the intervention in Italy.

Related to the fact that in the appeal the doctor tried to blame the nurse in the operating room by invoking some aspects of the Surgical Procedures Checklist, approved by Order no. 1529/2013 of the respective Ministry of Health[11] that „*Preserved instruments, needles and sponges left after the surgical procedure represent risk factors in medical errors. Thus, the nurse must verbally confirm the final count of the sponges and needles after the operation, and in the case of open cavities the count is mandatory*.", we deemed it appropriate to see that according to the Regulation of order and operation of the Municipal Hospital "...", respectively Art. 131 marginally entitled "Operating block" it is also shown that the chief assistant of the operating block carries out its activity under the coordination of the coordinating doctor of the operating block and the medical director and the general nurse from the operating block prepares the equipment, instruments and sterile material necessary for the interventions and assists the doctor on during surgery.

Ab initio, we invoked the meaning of the notion to confirm, in order to concretely understand what happens in the operating room. Thus, according to dex.online, „confirm" is vb. I. Trans. 1. To acknowledge and confirm the accuracy of a statement made by another; to attest, testify to authenticity; to strengthen a hypothesis, a statement, etc. 2. (Jur.) To waive the right to request the annulment of a legal act, to which it thus recognizes its legal effects.

As a corollary, although there is an attempt to interpret this normative act in the medical field in favor of the doctor, namely that the nurse counts the recovered stitches/grafts on her own initiative, and if she did not have this initiative, she would be the only one guilty of the illegal act, we see that confirming represents a recognition and reinforcement of the accuracy of a statement made by someone else, respectively by another person, in our case the doctor, the coordinator of the medical team. In corollary, the coordinating surgeon of the team is responsible for how many grafts are inserted and for how many grafts are removed from the person's cavity.

[11]Published in the Official Monitor of Romania no. 824 of December 23, 2013.

5. Conclusions

The undeniable conclusion that emerges is that the procedure for completing the checklist of surgical procedures disposes the fact that before the induction of anesthesia, the checklist coordinator verbally confirms a series of details, and before the incision the list coordinator will discuss operative plans and critical hazards with the medical team, with the nurse verbally confirming that sterilization has been achieved.

De lege ferenda, it is necessary to amend Order no. 1,529 of December 13, 2013 not only to eliminate spelling errors related to the fact that in some passages the notion of „medical assistance" appears and in others "the nurse can confirm/the control can be carried out by medical assistance", but in particular to identify clearly who can be the coordinator of the checklist, who completes this checklist, who asks the team what type of surgical procedure is being performed, who maintains the number of instruments, sponges and needles for the nurse to confirm that it is correct. At the same time, with the risk of redundancy, it could be considered necessary to detail all the completion procedures in a much more exact way, in order to reduce medical errors, considering the latin adagio *primum non nocere, deindere curare*.

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Effectiveness of the Social Protection System, with Reference to the Minimum Inclusion Income

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Abstract

The Minimum Inclusion Income is a useful financial support in terms of transparency, funding – it is granted by the state to ensure a minimum standard of living. The measure in question is in the legal nature of a social assistance benefit granted to families and single persons in difficulty for the purpose of preventing and combating poverty and the risk of social exclusion. This income is granted to persons who, at some point in their lives, for socio-economic or health reasons and/or because of their social living environment, have lost or have had their capacity for social integration limited. Depending on the needs of the family/single person, the minimum inclusion income is also accompanied by other complementary social assistance measures, granted in cash and/or in kind, as follows: incentives; contributory facilities; other complementary rights – measures designed to make a clear contribution to increasing people's income, with a direct impact on reducing poverty and extreme poverty. For situations of hardship and to prevent or reduce the risk of poverty and social exclusion of one or more family members whose identified need constitutes a particular situation and requires individualised intervention, emergency aid and/or community aid may be granted, as well as measures to facilitate access to the labour market, access to health and education services, social services and housing, supported by the state budget, local budgets or external funds. In order to prevent/combating the risk of poverty and social exclusion, and to increase the quality of life, employable persons from families receiving the minimum inclusion income, registered as job seekers with the territorial employment agencies, also benefit free of charge from: vocational training/retraining services; measures to stimulate employment, provided for by the legal regulations in force.

Keywords: *social security law; social protection; minimum inclusion income; financial support; social assistance benefit.*

JEL Classification*:* K31

1. Introductory aspects

A. The existence of a legal framework[2] on minimum inclusion income – a selective[3] social assistance benefit based on means testing – is a necessity in

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[2] Respectively: Law no. 196/2016 on minimum inclusion income, published in the Official Monitor of Romania, part I, no. 882 of 3 November 2016; Methodological rules for the application of the provisions of Law no. 196/2016 on minimum inclusion income, approved by Government Decision no. 1154/2022, published in the Official Monitor of Romania, part I, no. 937 of 26 September 2022.

[3] Defined in accordance with the provisions of art. 8 para. 1 lit. a of the Law on Social Assistance

the current context based on social coordinates/social assistance benefits granted to families and single persons in need, in order to prevent and combat poverty and the risk of social exclusion. The causes justifying the situation of hardship can be: socio-economic[4], health and/or resulting from the social living environment (loss or limitation of one's social integration capacities). The minimum inclusion income is the financial support granted by the state to ensure the minimum standard of living – in reference to the limit expressed in lei that covers basic needs such as food, clothing, personal hygiene, maintenance and sanitation of the home and is calculated in relation to the poverty line according to the methodology used in the Member States of the European Union – for families and single persons in situations of hardship and to prevent the risk of poverty among children and encourage their participation in the education system (according to art. 3 para. 1 of the Law no. 196/2016 in connection with art. 54 of the Social Assistance Law no. 292/2011).

B. The minimum inclusion income consists of one or more of the following categories of financial aid (according to art. 3 para. 2 of Law no. 196/2016): inclusion aid – financial aid granted to families with incomes below the level provided for in art. 9 para. 3 letter a[5], to ensure the daily necessities of life; aid for families with children – financial aid granted to families with incomes below the level provided for in art. 9 para. 3 letter c)[6], who have one or more dependent children up to the age of 18, with the aim of preventing the risk of child poverty and encouraging the child's participation in the education system.

It should be pointed out that – in addition to the minimum inclusion income – other benefits may also be granted, as follows:

- complementary social assistance measures, in cash and/or in kind[7] (respectively, incentives/special incentive measures for participation in the labour market, granted in cash or representing deductions applied to the person's income; contributory facilities/insurance in the social health insurance system, without payment of the social health insurance contribution, in relation to the

no. 292/2011, published in the Official Monitor of Romania, part I, no. 905 of 20 December 2011.

[4] See for details Ionel Didea, Diana Maria Ilie, *Restructuring Practice is Now Growing Worldwide Post-Covid Insolvency*, „International Investment Law Journal", Volume 2, Issue 1, February 2022, pp. 14-44.

[5] According to which, the minimum inclusion income is made up of all the amounts of financial assistance referred to in art. 3 para. 2, which are determined according to the family's adjusted monthly net income within the following limits: a) for inclusion aid, up to a monthly adjusted net income of 275 lei inclusive, which is taken into account when determining the family's cumulative income (...).

[6] According to which, the minimum inclusion income is made up of all the amounts of financial assistance referred to in art. 3 para. 2, which are determined according to the family's adjusted monthly net income within the following limits: (...) c) for aid for families with children, up to a monthly adjusted net income of 700 lei inclusive.

[7] The amounts related to the minimum inclusion income and complementary social assistance measures are granted from the state budget and, where appropriate, from local budgets (art. 3 para. 4 of Law no. 196/2016).

needs of the family/single person (art. 3 para. 3 in conjunction with art. 5 para. 1 letter c and d of Law no. 196/2016)[8];

- emergency aid and/or community aid, as well as measures to facilitate access to the labour market, access to health and education services, social services and housing, supported from the state budget, local budgets or external funds – for situations of hardship/for preventing or reducing the risk of poverty and social exclusion of one or more family members whose identified need constitutes a particular situation and requires individualized intervention (art. 4 of Law no. 196/2016)[9].

C. With reference to the beneficiaries of the minimum inclusion income, the following clarifications are justified (art. 7 paragraphs 1, 2 and 3 of Law no. 196/2016):

- families and single persons must be Romanian citizens, domiciled or residing in Romania;

- families and single persons who are Romanian citizens, without domicile or residence and without housing (hereinafter referred to as homeless persons) receive the minimum inclusion income only for the period during which they are registered with the public social assistance services of the administrative-territorial units in which they live;

- families and single persons who do not have Romanian citizenship must be in one of the following situations: they are citizens of a Member State of the European Union, of the European Economic Area, of the Swiss Confederation or foreigners, hereinafter referred to as foreign citizens, for as long as they are domiciled or, as the case may be, reside in Romania, in accordance with Romanian legislation; they are foreign citizens or stateless persons who have been granted a form of protection in accordance with the law; they are stateless persons who are domiciled or, as the case may be, reside in Romania, in accordance with the law.

2. Legal regime of the duties of the beneficiaries of the minimum inclusion income

The minimum inclusion income is targeted at the poorest sections of society and is designed to help them escape from their poverty level without discouraging work[10]. Several duties have been judiciously imposed on beneficiary's

[8] More about health insurance system see in Anamaria Groza, *The European Health Insurance Card, between Benefits and Limitations "Another Piece of Europe in Your Pocket"*, „Perspectives of Law and Public Administration", Volume 12, Issue 4, December 2023, pp. 575-581.

[9] For an analysis of high impact transdisciplinary issues at international level see Cristina Elena Popa Tache, *Le dynamisme du droit international public contemporain et la transdisciplinarité*, Préface de Florent Pasquier, Ed. L`Harmattan Paris, la collection « Le droit aujourd'hui », 2023, pp. 89-112.

[10] Marieta Radu, *Raport: România. Analiza situației cu privire la sistemele de venituri minime din România. Studiu privind politicile naționale*, available here: https://ec.europa.eu/ social/BlobServ

ex lege, which can be summarised as follows:

- the holder of the minimum inclusion income has the obligation to notify the town hall in whose territorial district he/she has his/her domicile or residence of any change regarding domicile, income and number of family members, within a maximum of 15 days from the date on which the amendment occurred (art. 56 of Law no. 196/2016);

- single persons and beneficiary families are required to submit to the town hall, every 6 months, an affidavit[11] (art. 57 of Law no. 196/2016); therefore, in the event of changes in the composition of the family and/or income of beneficiaries of the minimum inclusion income, the entitlement holder is required to submit to the town hall, within a maximum of 10 working days from the date on which the change occurred, an affidavit, accompanied by supporting documents, as appropriate (art. 40 para. 1 of Law no. 196/2016);

- employable persons who do not earn income under an individual employment contract, service relationship or other legal form of employment, nor from self-employment or agricultural activities, are required to report, whenever requested by the territorial employment agency in whose records they are registered as job seekers, for employment or participation in employment stimulation and vocational training services (art. 58 para. 1 of Law No 196/2016). The verification of the conditions regarding the maintenance of the status of job seekers, the fact that they have not refused an offered job or the participation in the services for the stimulation of employment and vocational training is carried out by the territorial agency through the SNIAS or, as the case may be, on the basis of lists of beneficiaries (art. 58 para. 2 of Law no. 196/2016);

- in the case of families receiving the minimum inclusion income which includes the inclusion aid component, one of the adult able-bodied persons in the family is obliged to perform monthly, at the request of the mayor, activities or works of local interest, in compliance with the normal duration of working time and the rules of health and safety at work (art. 59 para. 1 of Law no. 196/2016); families for which the amount of inclusion aid is up to 50 lei are exempt from this duty. For them, the working hours are determined quarterly and are carried out in any of the months of the quarter.

3. Measures for situations of hardship and for preventing or reducing the risk of poverty and social exclusion

A. The local public administration authorities at the level of communes, towns, municipalities and sectors of Bucharest, through the public social assistance service, shall carry out an assessment of the persons/families benefiting from minimum inclusion income and shall draw up, on the basis of the needs and

let?langId=ro&docId=9040& (accessed on 11.11.2023).

[11] The declaration shall be completed in accordance with the model approved by the methodological rules for the application of the relevant legal provisions.

risks identified, an intervention plan – containing the social assistance measures, i.e. the recommended social services available in the community and the social assistance benefits to which the person/family benefiting from minimum inclusion income is entitled, as well as the necessary interventions in order to prevent and combat the risk of social exclusion (art. 27^1 para. 1 in conjunction with para. 2 of Law no. 196/2016).

Ex lege, the applicant for the right to minimum income for inclusion is obliged to register, *ex officio*, as an applicant for social services (art. 27^1 para. 3 of Law no. 196/2016).

B. Local public administration authorities are obliged to draw up community action programmes aimed at preventing and combating the risk of poverty and social exclusion, which are approved by resolutions of local councils (art. 27^2 para. 1 of Law no. 196/2016). The consequence of the above is that local public administration authorities are required to include, as a priority, beneficiaries of the minimum income for inclusion in the Community action programmes and to analyse annually how the measures for preventing and combating the risk of poverty and social exclusion among beneficiaries of the minimum income for inclusion, established by the Community action programmes, have been implemented (art. 27^2 para. 2 of Law no. 196/2016).

These community action programmes are transmitted to the county directorates of social assistance and child protection for the elaboration of county strategies for the development of social services, as well as to the county commissions for social inclusion, respectively to the social inclusion commission of the municipality of Bucharest (art. 27^2 para. 3 of Law no. 196/2016).

C. In order to prevent and combat the risk of poverty and social exclusion, as well as to increase the quality of life, employable persons from families receiving the minimum inclusion income, registered as job seekers with the territorial employment agencies, benefit free of charge from: vocational training/retraining services; measures to stimulate employment (art. 27^3 of Law no. 196/2016)[12].

D. Within a maximum of 3 months from the date of communication by the local public administration authorities of the list of employable persons, the territorial employment agencies shall register the persons benefiting from the minimum inclusion income as job seekers and draw up the individual mediation plan (art. 27^4 para. 3 of Law no. 196/2016). The Territorial Employment Agency is obliged to communicate to the County Agency for Payments and Social Inspection, respectively to the Bucharest Municipality, on a quarterly basis, the list of persons benefiting from minimum inclusion income who have not complied with the measures set out in the individual mediation plans, for the purpose of

[12] For some comparative view see Diana-Mihaela Malinche, *The Right of Work of Disabled Persons. Comparative Approach Between the Situation of Romania and that of the Republic of Moldova,* „Perspectives of Law and Public Administration", Volume 8, Issue 1, May 2019, p. 120-127.

recalculating the amount of minimum inclusion income or, where applicable, suspending or terminating the entitlement (27^3 para. 5 of Law no. 196/2016).

If the employable persons receiving inclusion aid must travel more than 5 km from the place of their residence or domicile – for the application of the measures of the individual mediation plan – the social protection measure becomes applicable, the content of which is the monthly payment of 50 lei for transport (art. 27^5 para. 1 of Law no. 196/2016).

E. Beneficiaries of inclusion aid have the status of insured persons in the social health insurance system, without payment of the social health insurance contribution (art. 27^9 para. 2 of Law no. 196/2016).

F. Students attending full-time education, coming from families receiving inclusion aid, are entitled to social aid scholarships paid from amounts deducted from some state budget revenues through the local budgets of administrative-territorial units, as well as to other support measures in the field of education (art. 27^{10} para. 1 of Law no. 196/2016).

G. The local public administration authorities facilitate access of persons belonging to vulnerable groups, including beneficiaries of inclusion aid, to housing and public services of strict necessity available within the administrative-territorial unit (art. 27^{12} para. 1 of Law no. 196/2016). In application of these provisions, the local public administration authorities grant material and financial aid for the rehabilitation of housing or for new construction, provide housing for the homeless, allocate a home, as a priority, from their own housing fund, for families with children at risk of eviction, subsidies, in whole or in part, the payment of rent, purchase, construct or rehabilitate buildings for social housing, in relation to the share of persons and families at risk of social exclusion in the total population of the locality concerned and within the limits of the budgetary appropriations approved for this purpose in the local budgets (art. 27^{12} para. 2 of Law no. 196/2016).

In order to ensure access to housing and utilities for persons receiving minimum inclusion income, local public administration authorities may conclude agreements with service providers, whereby they undertake to bear part of the debts owed by persons and families receiving inclusion aid within the limit of the budgetary appropriations approved for this purpose in the budget.

4. Conclusions

Social protection benefits target the poor and contribute to a reduction in inequality, with the exception of maternity and parental allowances, which are regressive in nature as they are the only benefits conditional on previous participation in the labour market[13].

[13] Marieta Radu, *op. cit.*, p. 20; Cătălin Zamfir, (coord.) 2005, *Understanding the Dynamics of Poverty and Development Risks on Children in Romania*, Raport UNICEF, Bucharest, p. 75.

The establishment of a legal requirement for ongoing communication between minimum inclusion income recipients and employment agencies aims to promote an active attitude towards opportunities to work legally[14].

Although the minimum inclusion income legislation contains provisions for recipients to carry out community work as a prerequisite for social inclusion, there is little evidence that recipients are integrated into the labour market[15].

The low prospects of labour market integration have a particular effect on minimum income inclusion recipients in economically inactive regions or rural areas with very limited employment opportunities and labour mobility[16].

The majority of people who enter the minimum inclusion income scheme do not leave it, and for those who leave the scheme, the reason is that they become ineligible due to unequal indexation of different social transfers (so they may leave and re-enter the scheme several times)[17].

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[14] Marieta Radu, *op. cit.*, p. 20.
[15] Ibid, p. 21.
[16] Ibid, p. 21. See also for a comparative analyses Cristina Elena Popa Tache, Administrative *Review and Reform Movements from the Perspective of International Investment Law,* in Julien Cazala, Velimir Zivkovic (eds.), *Administrative Law and Public Administration in the Global Social System*, Contributions to the 3rd International Conference „*Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective",* October 9, 2020, ADJURIS - International Academic Publisher, 2021, pp. 212-218.
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Quality and Interest to Address the Romanian National Council for the Settlement of Complaints in the Field of Public Procurement in Judicial Practice

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Abstract

Any person who considers to be harmed in its rights or legitimate interests through an act of a contracting authority or through an unsolved demand in the legal term can ask the annulment of the act, the coercion of the contracting authority to emit an act or to adopt a remedy measure, to acknowledge the pretended right or the legitimate interest through administrative-judicial review or through judicial review, according to Law no. 101/2016. The person considered affected is any economic operator which fulfils in the same time the next conditions: "has or had an interest in relation to a procurement procedure" and "suffered, suffers or risk suffering a prejudice as a consequence of an act delivered by the contracting authority, able to generate judicial effects or as a consequence of an unsolved demand in the legal term concerning a procurement procedure". The aim of the article is to underline the fact that it is not necessary for the economic agent to have submitted an offer in the procedure; in order to justify its quality and interest to contest acts or operations of the contracting authority pretended to be harmful.

Keywords: *public procurement, judicial remedies, harmed person, contracting authority, quality to contest, interest to contest.*

JEL Classification: K22, K41

1. Introduction the factual and legal circumstances of the case that led to the Decision no. 1592 of 6 September 2023 of the Craiova Court of Appeal

In a first section we will present, in summary, the factual and legal circumstances of the case that led to the Decision no. 1592 of 6 September 2023 of the Craiova Court of Appeal. The court's reasoning will be illustrated in the second section, followed by our conclusions on the legal issue highlighted.

The complainant UAT Commune M., as contracting authority, initiated a simplified procedure for the award of the works contract for the "Design and execution of works within the project Modernisation of roads of local interest in Commune M., Dolj County", by publishing a simplified contract notice in SEAP. The award criterion established was "lowest price" and the tender documentation

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was published in SEAP together with the contract notice.[2]

On 07.04.2023, the contracting authority published in SEAP a response to the clarifications requested by the defendant company D. SRL, a company that did not participate in the tendering procedure. These clarifications concerned the tender documentation. The company D. SRL lodged an appeal against the tender procedure with the National Council for the Settlement of Disputes (hereinafter referred to as the CNCS). The Council upheld the appeal in part and annulled the public procurement procedure. In reaching this decision, the Council held, in essence, that the contracting authority either did not reply to the requests or that its replies were inadequate, since they did not relate to the clarifications requested.

The CNCS determined that it was no longer possible to remedy the contested act by means of an appeal, as the stage of drawing up tenders on the basis of the unlawfully clarified tender documents had been exceeded. The only remedial measure that could be adopted in this situation was to annul the award procedure, since the contracting authority could no longer be obliged to draw up responses to the legal and proper clarification of the tender documents, which would then form the basis for the preparation and submission of tenders which also took account of those clarifications by the purchaser.

The petitioner UAT Commune M., as contracting authority, lodged a complaint with the Craiova Court of Appeal against the decision of the CNCS, based on the provisions of Article 29 of Law No 101/2016 on remedies and appeals in the award of public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as on the organisation and functioning of the National Council for the Settlement of Disputes, requesting the amendment of the Council's decision and, in retrial, the rejection of SC D. SRL's appeal**.**

In the grounds of its complaint, the complainant argued that the company D. SRL could not be an injured party within the meaning of Articles 2 and 8 of Law 101/2016, as it had not submitted a tender in the procurement procedure. In the complainant's view, the company could not justify its interest in contesting a procedure in which it did not understand to participate. The provisions of Article 160 of Law No. 98/2016 cannot be interpreted as meaning that, by way of requests for clarification, the injured party is being put back within the time limit for challenging the tender documentation, which the complainant itself claims is incorrect. The right to obtain clarification of the tender documents must not be confused with the right to have the tender documents amended or supplemented, since the latter right can be exercised only by means of a challenge to the tender documents. In that context, the criticisms made by the appellant in relation to the content of the tender documentation were submitted out of time, since the administrative act is the tender documentation published in SEAP on 28 March 2023 and the allegedly incorrect, unclear and inconclusive answers relied on by the

[2] For these procedures at comparative level see Jeton Shasivari, *Challenges and perspectives of administrative judiciary in the Republic of North Macedonia*, Juridical Tribune - Tribuna Juridica, Volume 9, Special Issue, October 2019, pp. 60-76.

appellant result from the content of the documentation. The applicant also stated that its replies met the requirements of Article 103(2) of the EC Treaty. 2 of the Methodological Norms for the application of the provisions on the award of the public procurement contract/framework agreement of Law No. 98/2016 on public procurement of 02.06.2016**.**

The company D. SRL, as respondent, submitted a statement of defence, claiming that it wished to participate in the simplified tendering procedure initiated by the applicant. With a view to clarifying the situation and completing the tender documentation appropriately, the company submitted a request for clarification, to which the contracting authority replied evasively or gave purely formal answers, so that it did not clarify a multitude of contradictory aspects and did not complete the documentation where necessary.

The respondent considered that a complete and correctly prepared tender could not be submitted in the context of the responses given by the contracting authority and that its challenge to the CNCS was submitted before the deadline for submission of tenders had expired.

2. The Court's reasoning

The contracting authority criticised, first, the way in which the body with administrative-jurisdictional activity interpreted the provisions of Articles 2 and 8 of Law No 101/2016, in conjunction with Article 3(f) of the same act. The applicant argued that the respondent company did not submit a tender to be analysed and evaluated, and in this situation, it does not justify an interest in the tender procedure[3].

The Court referred to the provisions of Article 154 of Law No. 98/2016, which requires the contracting authority to draw up the tender documentation in such a way that it contains all the information necessary to provide economic operators with complete, correct and accurate information on the requirements of the procurement, the subject matter of the contract and the manner in which the award procedure is to be conducted.

Next, the court reiterated Article 2 para. (1) of Law No. 101/2016, according to which "any person who considers that he/she has been harmed in his/her right or legitimate interest by an act of a contracting authority or by the failure to respond to a request within the legal time limit may request the annulment of the act, order the contracting authority to issue an act or to adopt remedial measures, or the recognition of the alleged right or legitimate interest, through administrative-jurisdictional or judicial means, in accordance with the provisions of this law".

[3] See for a comprehensive understanding, Cătălin-Silviu Săraru, *Tratat de contencios administrativ,* Ed. Universul Juridic, Bucharest, 2022, pp. 15-29 and the following.

The act of the contracting authority is any act, any operation which produces or may produce legal effects[4]. This category includes the failure to fulfil within the legal time limit an obligation laid down in the relevant legislation, the omission or refusal to issue an act or to carry out a specific operation in connection with or in the context of an award procedure provided for in Article 68 of Law no. 98/2016 on public procurement, as amended and supplemented, Art. 82 of Law no. 99/2016 on sectoral procurement, as amended and supplemented, or Art. 50 of Law no. 100/2016 on works concessions and service concessions, as amended and supplemented (Art. 3 para. 1 of Law no. 101/2016).

The Court held that according to Article 3(f) of Law no. 101/2016, the person who considers himself injured is any economic operator who cumulatively meets the following conditions: 'has or has had an interest in connection with an award procedure' and 'has suffered, is suffering or is likely to suffer damage as a consequence of an act of the contracting authority which is liable to produce legal effects, or as a result of the failure to settle within the legal time-limit a request relating to an award procedure'.

The Court underlined the relevance of Article 3(3) of Law no. 101/2016, according to which a person is deemed to have or to have had an interest in an award procedure if he has not yet been definitively excluded from that procedure. An exclusion is final if it has been notified to the interested candidate/bidder and either has been deemed lawful by the Council/body or is no longer subject to appeal.

The Court then based its reasoning on the relevant provisions of European Union law, namely Directives 89/665 and 2004/18/EC, and on the case-law of the Court of Justice.

In its judgment of 19 June 2003 (Case C-249/01), the European Court established as a matter of principle that, under Article 1(1)(b) of the EC Treaty, the Court of Justice of the European Communities (3) of Directive 89/665, Member States are obliged to ensure that the review procedures established by the Directive are available *"at least" to any person who has or has had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of Community law on public procurement or national implementing rules*. This provision does not oblige Member States to make remedies available to any person wishing to obtain a public procurement contract, but allows the State to require that the person concerned has been or risks being harmed by the alleged infringement. Therefore, Art. 1 para. (3) of Directive 89/665 does not preclude those remedies from being available to persons seeking to obtain a particular public contract only if they have been or are likely to be harmed by the infringement which they allege. In case C-355/15, the CJEU ruled that tenderers must be considered as interested persons if they have not yet been

[4] See Rastislav Funta, Kristína Králiková, *Obligation of the European Commission to review national civil court judgements?*, „Juridical Tribune - Tribuna Juridica", Volume 12, Issue 2, June 2022, pp. 215-225.

definitively excluded from the procedure.

The conclusion of the Court of Appeal of Craiova was that as long as the defendant company had not previously been definitively excluded from the tendering procedure and was at risk of being harmed by the infringement it had alleged in the event of an inconclusive reply to the request for clarification, it justified its standing and interest in challenging the act of the contracting authority containing the requested clarifications.

3. Conclusions

Law no. 101/2016 transposed the Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. The Directive is part of a larger body of European public procurement directives[5], adopted with the aim of ensuring access for economic operators in the Union to public procurement procedures in the Member States and fair competition between them as a catalyst for the internal market (in terms of free movement of goods, right of establishment, freedom to provide services). The Remedies Directives have obliged Member States to implement national public procurement rules that meet the objectives and principles set out in the Directives, i.e. non-discrimination, equal treatment, transparency, proportionality, accountability. At the same time, Member States are obliged to set up judicial review bodies to ensure the application of these rules[6].

The National Board of Appeal is an administrative jurisdiction and the procedure it follows is administrative-jurisdictional. Complaints against decisions taken by the Council, which fall within the material jurisdiction of the courts of appeal, are a *sui-generis*, devolutive remedy, in which the appellant may not invoke any grounds against the acts of the contracting authority other than those contained in the complaint to the Council.

According to Article 2 of Law 101/2016, any person who considers that

[5] Directive 2014/23/EU on the award of concession contracts; Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Directive 89/665/EEC of the Council of the European Communities on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

[6] For a note on security terms implications of the issue see Peráček Tomáš, *A few remarks on the (im)perfection of the term securities: a theoretical study*, Juridical Tribune - Tribuna Juridica, Volume 11, Issue 2, June 2021, pp. 135-149.

he/she has been harmed in his/her right or legitimate interest by an act of a contracting authority or by the failure to respond to a request within the legal time limit may request the annulment of the act, order the contracting authority to issue an act or to take remedial measures, or the recognition of the alleged right or legitimate interest, by administrative-jurisdictional (by bringing the matter before the CNCS) or judicial means. In addition, any member of an association of economic operators without legal personality may bring any appeal governed by this law[7].

The grammatical interpretation of Article 2 of Law No 101/2016 shows the legislator's intention to open as wide as possible the possibility of referring the matter to the CNCS or the courts. This is evidenced by the term "any" and the subjective element of reporting (the person who considers himself or herself injured, and not only the person who has actually been injured).

The injured party is defined by Art. 3 para. 1(f) of the Act as "any economic operator who cumulatively fulfils the following conditions: i. has or has had an interest in connection with an award procedure; and ii. has suffered, is suffering or risks suffering damage as a consequence of an act of the contracting authority, which is liable to produce legal effects, or as a result of failure to take a decision within the legal time-limit on a request relating to an award procedure". This definition is also extensive, since it is sufficient that the person had an interest and risks suffering damage. The transposed Directive is characterised by an even more extensive wording in order to ensure that the principles in this area are implemented as effectively as possible. "Member States shall ensure access to legal remedies, under such detailed rules as Member States may lay down for this purpose, *at least to any person* who has or has had an interest in obtaining a particular contract and who has been harmed or risks being harmed by an alleged infringement"[8]. The courts of the Member States are obliged to interpret national law in the light of the text and purpose of the Directive.

The conclusion reached by the Craiova Court of Appeal is therefore correct. The fact that the economic operator did not submit a tender in the public procurement procedure does not make it impossible for it to use the remedies provided for by Law No. 101/2016. In the present case, the economic operator's request for clarification and including its challenge to the CNCS were submitted before the deadline for submission of tenders had expired. These elements proved that the defendant company had an interest in the tender procedure in question.

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[7] Some general considerations on the role of other higher courts find in *Cristina-Elena Popa Tache, High Court of Cassation and Justice - The role of the Complex for the resolution of questions of law in civil matters in the unification of judicial practice*, article published in the electronic volume of the Scientific Communications Session of the Institute of Legal Research "Acad. Andrei Radulescu" of the Romanian Academy with the title: "The role of the Constitutional Court and the High Court of Cassation and Justice in the shaping of Romanian law after the entry into force of the new codes", communications presented at the scientific session of the Institute of Legal Research "Acad.Andrei Radulescu".

[8] Art. 1 para. 3 of the Directive.

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Double-Edged Sword of Lapse of Arbitral Award as a Ground for Annulment

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Abstract

Raising the exception of the lapse of the arbitral award (caducitate) in the arbitration proceedings has certain implications and effects. What expectations we should have when invoking the lapse of the arbitral award within the arbitration proceedings and how this can be successfully invoked in a claim to set aside an arbitral award, will be considered in the following article. Furthermore, the analysis of the relevant case law on the subject matter will help us understand this institution and to use it properly.

Keywords: *lapse of the arbitral award, arbitration, arbitration rules, Romanian Code of Civil Procedure, annulment of the arbitral award.*

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

1. Introduction

The institution of the lapse of the arbitral award is closely linked to the celerity of the commercial arbitration proceedings. However, in order to understand the effect of invoking the exception of the lapse of the arbitral award, we need to analyse its particularities and decide, depending on the situation, whether it is appropriate to use it.

Raising the lapse of the arbitral award as a ground for setting aside the arbitral award involves certain steps which will be analysed below.

2. Theoretical issues on the concept of the lapse of the award as a ground for setting aside the arbitral award and the conditions of admissibility

In accordance with the provisions of Article 608 para. (1) letter e) of the Civil Procedure Code, the arbitral award may be set aside by a claim for annulment when the award was rendered after the expiry of the arbitration timeframe provided for by Art. 567 of the Civil Procedure Code, although at least one of the parties has declared that it intends to invoke the lapse of the award and the parties have not agreed to continue the proceedings, according to Art. 568 para. (1) and (2).

From the text, it is clear that three cumulative conditions must be met for

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the arbitral award to be set aside on this ground, namely: (i) the award was rendered after the expiry of the arbitration timeframe; (ii) at least one of the parties has declared that it intends to invoke the lapse of the award; and (iii) the parties have not agreed to continue the proceedings.

Although the wording of the quoted text expressly refers to the arbitration timeframe provided for in Art. 567 of the Civil Procedure Code, respectively to the lapse of the award as regulated by Art. 568 of the Civil Procedure Code, it is important to underline that the institution of the lapse of the award may have another regulation in the parties' agreement or in the procedural rules of the chosen institution of institutionalised arbitration, in which case the respective provisions will be applied with priority.[2] Thus, in our view (also supported by other authors in the field[3]), if the parties agree on a shorter arbitration timeframe than the one provided for by the Code of Civil Procedure, in the analysis of the fulfilment of the conditions for the admissibility of the claim for annulment, the timeframe in question will be taken into account, and not the one provided for by art. 567 of the Code of Civil Procedure. Also, if the mechanism of operation of the limitation timeframe imposes different or additional conditions in the rules of arbitral procedure of the institution chosen by the parties, the court seized shall analyse the admissibility of the claim for annulment in relation to these conditions. Unfortunately, the unfortunate wording of the text creates confusion, so that in the case law some courts of law have not given priority to the application of the rules chosen by the parties[4], applying literally the text of Article 608 para. (1) lit. e) of the Civil Procedure Code.

(i) The award was rendered after the expiry of the arbitration timeframe. The arbitration timeframe is, according to art. 567 of the Civil Procedure Code, of 6 months[5] and starts to run from the date of the constitution of the arbitral

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[2] Alin Daniel Florescu, *The claim for annulment of the arbitral award in case of lapse of the arbitration proceedings*, Universul Juridic Premium 2 Magazine, 2019.

[3] Ibid.

[4] Bucharest Court of Appeal, Decision no. 239/2017 of 8 December 2017, available at www.sintact.ro. In this dispute, although the 2014 Rules of Arbitration Procedure of the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry were applicable, which provided for a different mechanism for the operation of the lapse of the award, the Court of Appeal misapplied the provisions of the Code of Civil Procedure. The defendant indicated that "*the six-month time-limit provided for in Article 23 para. (1) of the RPA for the settlement of the arbitration dispute is doubled in the case of international arbitration, and this is an international arbitration, given the Brazilian nationality of the plaintiff declared in the Request for Arbitration, the one-year time limit not having expired at the date of the award (1 August 2016 - date of registration of the Request; 12 April 2017 - date of the award).*"

[5] Under the old Code of Civil Procedure of 1865, the limitation timeframe was of 5 months and was provided for in Article 353[3]*: "(1) Unless the parties have provided otherwise, the arbitral tribunal shall render its decision within 5 months from the date of its constitution. (2) The time limit shall be suspended during the hearing of a challenge of the judge or any other incidental application to the court under section 342. (3) The parties may consent in writing to an extension of the arbitration timeframe. (4) The arbitral tribunal may also, for good cause shown, order an extension of the time-limit for not more than two months. (5) The time limit shall be automatically extended*

tribunal, i.e. from the date of the acceptance of the sole arbitrator's mandate or, as the case may be, of the last acceptance of the arbitrator's or chairman's mandate, according to art. 566 of the Civil Procedure Code.

The 6-month time limit is a time limit provided both by national procedural rules[6] on arbitration and by most arbitral procedure rules in the case of institutional arbitration[7]. It is important to establish the legal nature of this timeframe. This time-limit is certainly waivable, of private order, the parties having the possibility to agree on another time-limit, either shorter or, if they anticipate that the complex evidence and the factual and legal issues arising require it, longer[8]. In the case of setting very long time limits for the arbitration (e.g. several years), this would not directly create a problem, but it would raise the question of the usefulness of invoking the exception of lapse of the award, as the parties could waive the raising of such exception.[9] Thus, arbitrators are to resolve the dispute without being constrained by an effectively prohibitive time limit. However, this is implicitly permitted where neither party makes the statement provided for in Article 568(1) of the Code of Civil Procedure or expressly declares that they agree to the continuation of the proceedings, pursuant to Art. 568 para. (2) of the Code of Civil Procedure.

Problems may arise, however, if the parties set too short time limits for the arbitration that are incompatible with the applicable procedural rules. If the will of the parties cannot be given effect because of an unrealistic time-limit and if there is no agreement to extend the time-limit, the arbitration agreement risks becoming pathological[10], leading to questions about its validity.

Even in the absence of the parties' agreement, the arbitration timeframe shall be suspended during the hearing of a challenge of an arbitrator, or any other incidental application addressed to the tribunal provided for in Article 547 of the

by two months in the case referred to in Article 3603 and in the event of the death of one of the parties. (6) The expiry of the time-limit provided for in this Article shall not constitute a ground for the lapse of the award of the arbitration unless one of the parties has notified the other party and the arbitral tribunal, by the first date for appearance, that it intends to invoke the lapse of the award."

[6] Art. 820-821 Italian Code of Civil Procedure; Art. 1456 French Code of Civil Procedure.

[7] See in this regard the provisions of Art. 31 of the Rules of Arbitral Procedure of the International Court of Arbitration of the ICC Paris of 2021; Art. 45 para. (8) of the Rules of Arbitral Procedure of the VIAC of 2021; Art. 24 of the Rules of Arbitral Procedure of the Court of International Commercial Arbitration of the CCIR of 01.01.2018.

[8] Viorel Mihai Ciobanu, Marian Nicolae, *New Code of Civil Procedure. Commented and annotated*. Vol. II, Ed. Universul Juridic, Bucharest, 2016, p. 173.

[9] Alin Daniel Florescu, *op. cit.*

[10] Ph. Fouchard, E. Gaillard, B. Goldman, *International Commercial Arbitration*, Ed. Kluwer Law International, 1999, p. 756 where the authors analyse the effects of such a clause in ad-hoc arbitration, where the time limit for issuing the arbitral award runs from a date prior to the constitution of the arbitral tribunal and national courts take a long time to appoint the arbitral tribunal. Thus, the clause becomes pathological.

Code of Civil Procedure. Among these applications, one may mention the application for the order of security and provisional measures, the application for the ordering of sanctions or measures of constraint to witnesses or experts (Art. 585 Civil Procedure Code), the application for verification of arbitration costs (Art. 598 Civil Procedure Code). Also, independently of the will of the parties, the arbitration timeframe is automatically extended by 3 months in the event of the death of one of the parties (Art. 567 para. 5 C. pr. civ.) and may be extended by a maximum of 3 months[11], once only, for good reason, by the arbitral tribunal.

Very relevant to the calculation of the limitation timeframe is the national or international character of the arbitration. This is particularly relevant because, according to Article 1115 of the Code of Civil Procedure, in the case of international arbitration, the duration of the time limits set out by Book IV shall be doubled. Thus, if we are in the presence of an arbitration arising from a private law relationship with a foreign element, among other things, the arbitration timeframe is doubled, becoming of 12 months. With regard to the concept of "*foreign element*", for individuals, nationality, domicile or residence may be considered foreign elements, while for legal entities the main foreign elements are: the seat, nationality, goodwill, etc. There is also a foreign element, if the disputed property is located abroad, or is subject to a foreign law (such as the property of a foreign embassy in Romania), or, if the place of conclusion of the contract, of performance of the contract or of the characteristic performance is abroad.

Certainly, the rule laid down by Article 1115 para. (4) of the Code of Civil Procedure concerning the doubling of time limits in international arbitration is not applicable if the parties have fixed the time limit of the arbitration by the arbitration agreement. In this case, the parties' choice shall apply with priority.

In the doctrine[12] it has agreed that the rendering of the arbitral award also includes the drafting of the award, since it is not expressly provided, as in the case of the court proceedings, the stage of drafting the minutes of the deliberations, after such deliberations of the arbitrators have taken place. Otherwise, it would not be possible to discuss compliance with the time limit for drafting the award, and there is practically no penalty if the arbitrators do not comply with the one-month time limit for drafting the award.

Contrary views have also been expressed[13], to the wording provided by Art. 605, para. 1 of the current Code of Civil Procedure, according to which the

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[11] An extension is only granted if the death occurred before the end of the hearing on the mertis. See, in this regard, Viorel Mihai Ciobanu, Marian Nicolae, *op. cit*., p. 174. For a comparative study on international arbitration costs see Cristina Elena Popa Tache, Silviu Constantin, *Allocation of Costs in ICSID Arbitration a Continuing Challenge to International Law*, „International Investment Law Journal", Volume 3, Issue 1, February, pp. 4-16, 2023.

[12] Ion Băcanu, *Judicial Review of Arbitral Awards (III),* „Revista de Drept Comercial", 2005, no. 1, p. 129.

[13] Roxana Maria Roba, *Claim for the annulment of the arbitral award*, „Curentul Juridic", p. 168, available online at: http://revcurentjur.ro/old/arhiva/attachments_201501/recjurid151_13FR.pdf.

arbitral award shall be communicated to the parties within one month of its rendering. Therefore, the legislator makes a clear demarcation between the rendering of the award and its drafting in the same way as it does in the case of court proceedings.[14] As regards the failure to comply with the one-month time limit for the drafting of the award, such a situation cannot affect the validity of the arbitral award, but it may render the arbitrators liable for breach of their duties.

The Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania differentiate clearly the stage of drafting the minutes of the award, which takes place immediately after the deliberation and rendering of the award, from the stage of drafting the entire arbitral award. Therefore, the time limit for arbitration expires on the date of rendering of the award, which is equivalent to the time of drafting the minutes of the award.

(ii) At least one of the parties has declared that it intends to invoke the lapse of the award. According to Art. 568 para. (1) of the Code of Civil Procedure, at the first hearing to which they have been legally summoned, the parties are obliged to state in writing, under penalty of forfeiture, whether they intend to invoke the lapse of the arbitration.

Although Art. 568 para. (1) of the Code of Civil Procedure establishes an obligation for both parties to express their intention as to the applicability of the lapse of the award, in the respective arbitral dispute, under Art. 568 para. (2) of the Code of Civil Procedure, it is sufficient for only one party to make the statement for the sanction to operate.

In other words, the lapse of the arbitration is a sanction which must be triggered at the beginning of the proceedings by an express written statement by at least one of the parties. In the absence of such a statement, the provision that the arbitral tribunal must render its decision within a maximum of 6 months from the date of its constitution has no effect. Also, for the same reasoning, in the absence of a statement to activate the sanction of lapse of the award, the time limit for arbitration set by the parties in the arbitration agreement shall have no effect.

A first problem that may arise with regard to the statement is related to the timing of such statement. The text seems to be rather rigid in this respect, providing that the statement must be made at the earliest opportunity, under penalty of forfeiture. The question is whether it must be made only at the first hearing, or whether the text can be interpreted as meaning that the statement can also be made before that time. The doctrine states that it is possible to make the statement of lapse of the award even before the first hearing, provided that it is made in writing, the rationale of the law being to have an express manifestation of the will of the parties[15]. A contrary position, which cannot be accepted, would be

[14] For an analysis of the two interpretations, see also Viorel Roș, *International Commercial Arbitration*, Bucharest Publishing House, 2000, pp. 468-469.

[15] Dragos Alexandru Sitaru, *Private International Law - Treatise*, Ed. ACTAMI, Bucharest, 1997, p. 7.

justified only by a very rigid interpretation of the text of the law, which would start from the idea that the written statement of the party at the first hearing, and not at any time before that date, would be a requirement of solemnity, consisting in the presentation of such statement before the arbitrators[16].

In a 2017 decision of the Bucharest Court of Appeal[17], this contrary position seems to be confirmed: "*However, in the present case, the Court holds that the allegations regarding the invocation of the plea of lapse of the arbitration by the Respondent-Defendant in the statement of defence at page 84 vol. I of the arbitration file do not meet the requirements of Article 568 para. (1) of the Code of Civil Procedure. First, these allegations regarding the lapse of the arbitration are made as defences in relation to the Claimant well before the first arbitration hearing. Secondly, the defendant evokes the possibility of invoking the lapse of the arbitration under condition, i.e. that it intends to invoke the lapse of the arbitration in the event that the legal timeframe for rendering the arbitral award would be exceeded, due to the claimant's tendency to unreasonably delay the proceedings. However, noting that at the first hearing the defendant did not invoke the plea of lapse of the arbitration in the form and under the conditions required by Article 568 para. (1) of the Code of Civil Procedure, the Court can only conclude that by the first hearing date this condition mentioned at length above had not been met, and consequently the plea of lapse of the award was not invoked, thus triggering the forfeiture, as it is regulated*."

We consider that this position taken by the court is nevertheless open to criticism. The rationale of the text, as pointed out in the doctrine, is to have an express manifestation on the applicability of the time-bar of arbitration at the earliest possible stage of the dispute, so that both the parties involved, and the arbitral tribunal know as early as possible about this possibility and adjust their procedural conduct accordingly. Moreover, the previous rules expressly stated that the statement could be made before the first hearing date[18]. It is highly unlikely that the legislator's intention has changed in the sense of increasing the degree of solemnity. Thus, this strict interpretation of the text of the law by the court seems unjustified and excessive.

A second issue that may arise in practice is whether the party who did not make the statement of lapse of the award can also avail itself of this sanction. In other words, we have to consider the situation where only the defendant has made the statement under Art. 568 para. (1) of the Code of Civil Procedure, and to consider whether the claimant can request the arbitral tribunal to render an award

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[16] Crenguța Leaua, *Statements of the parties regarding the nullity of arbitration. Some Questions*, available at https://www.juridice.ro/396911/declaratiile-partilor-in-privinta-caducitatii-arbitrajului-cateva-intrebari.html.

[17] Bucharest Court of Appeal, Decision no. 239/2017 of 8 December 2017, cited in Alin Daniel Florescu, *Action for annulment of the arbitral award in case of lapse of the arbitration*, Universul Juridic Magazine Premium 2 of 2019.

[18] Art. 353^3 from the Civil Procedure Code of 1865.

for the lapse of the arbitration proceedings at the end of the timeframe. Under the Civil Procedure Code, the answer must be in the affirmative. Thus, the mere statement of one of the parties triggers the lapse of the award mechanism, putting both the arbitral tribunal and the other party on notice that the award must be rendered within the agreed or statutory time limit. From the moment the statement is made, according to Art. 568 para. (2) of the Code of Civil Procedure, no further expression of will is required for the arbitral tribunal, upon expiry of the arbitration timeframe, to pronounce a decision declaring the lapse of the arbitration.

Of course, given that failure to comply with the arbitration timeframe can incur liability for arbitrators[19], it is hard to imagine that arbitrators will rush to issue a statement of the lapse of the award, when the conditions are met. However, even in the absence of such a ruling, and even if the parties do not raise any objection to this effect, and the dispute continues in its natural course, either party may invoke the lapse in exercising the claim for annulment on the ground provided for in Article 608 (1) (e) of the Code of Civil Procedure. This is because the occurrence of the lapse is not conditional upon the party concerned reiterating the objection. Moreover, the only way to stop this mechanism of the lapse is, according to Art. 568 para. (2) final thesis of the Code of Civil Procedure, an express statement of waiver by both parties. However, the continuation of the arbitral proceedings, although may appear as an implicit waiver of the sanction of lapse of the award, does not meet the requirements of the law as it is not express.

The current provisions on lapse of the arbitral proceedings are open to criticism, because they are open to abuse by the party who is dissatisfied with the substantive outcome of the arbitral award. Thus, if the statement of claim has been made by the first hearing, there is nothing to prevent the party dissatisfied with the way in which the arbitrators have resolved the dispute on the merits from bringing a claim for setting aside the award on the grounds of lapse of the award, if all other conditions are also met. In our view, in this case, the statement activating the sanction of lapse of the award would be diverted from its original purpose, being a mere pre-constitution of a ground for annulment. In an arbitration dispute under the previous regulation, the court qualified this conduct as an abuse of law[20]: "*According to Article 723 para. (1) of the Code of Civil Procedure (in force throughout the course of this arbitration process), "Procedural rights must*

[19] Giorgiana Dănăilă, *Arbitration procedure in domestic commercial disputes*, Ed. Universul Juridic, Bucharest, 2006, p. 154.

[20] Arbitral award no. 13 of 28 January 2013 rendered in case no. 389/2009 in Marin Voicu, *Commercial arbitration: annotated and commented case law*, Ed. Universul Juridic, Bucharest, 2014, p. 225; The arbitration dispute in question was subject to the RPA adopted in 2008, which contained a regulation identical to that of the Civil Procedure Code of 1865 and similar to that of the current Civil Procedure Code, namely: "*The expiry of the timeframe for the settlement of the dispute may not constitute a ground for the lapse of the arbitration, unless one of the parties has notified the other party and the arbitral tribunal by the first hearing that it intends to invoke the lapse of the award.*"

be exercised in good faith and in accordance with the purpose for which they have been recognized by law". It is therefore not permissible for the party to the proceedings who has opted for the notification provided for in Article 35(1) to delay the completion of the proceedings by failing to comply with its duties (preferably as early as the first arbitration hearing after the expiry of the 5-month timeframe), to exercise such right and benefit from the time lapse of the proceedings. If interpreted otherwise, the subjective right could be diverted from the purpose for which it was recognised by the legislature, thus favouring recourse to this institution, not in order to encourage speedy proceedings, but to ensure that the defendant can continue or interrupt the proceedings as the progress of the case may be favourable or unfavourable to him".

In the above case, the plea of lapse of the arbitration proceedings was raised in the course of the arbitration proceedings, at a later date than the hearing during which all the conditions for raising the plea of lapse of the proceedings had been met.

The previous arbitration provisions did not provide that both parties must expressly consent to the continuation of the proceedings, so it was reasonable that voluntary participation in the trial, even after the conditions had been met, was sufficient to constitute a waiver of the time-bar.

It is questionable, however, whether the party was indeed obliged to raise the plea of lapsing before the arbitral tribunal in the absence of an express legal text to that effect, or rather the arbitral tribunal was at fault for failing to raise this issue at the time when the conditions were met. We have not so far identified any decision of a domestic arbitral tribunal finding that the lapsing of the award had intervened, which would amount to a finding of the own fault.

This problem has been temporarily resolved, at least in the case of the Rules of Arbitration Procedure of the Court of International Commercial Arbitration of the CCIR (2018), which provide in respect of the time lapse of the award the following[21]: "*Where at least one of the parties has declared in writing to the arbitral tribunal, by the first arbitration hearing, that it intends to invoke the lapse of the award, the arbitral tribunal shall, at the expiry of the timeframe provided for in the above paragraphs, render an award finding that the arbitration has lapsed, unless the parties expressly declare that they waive the lapse of the award.*"

Thus, there are essential differences between the two sets of rules as regards the mechanism of lapse of the award. According to the Rules of Arbitration Procedure of the Court of International Commercial Arbitration of the CCIR, the invocation of the lapse of the award by the interested party is made in two stages: the first consists in reserving the right to invoke this procedural sanction by a written statement addressed to the arbitral tribunal before the first hearing for

[21] Art. 43 para. 6 of the Rules of Arbitration Procedure of the Court of International Commercial Arbitration attached to the CCIR, as of 1 January 2018.

which the parties have been legally summoned and the second consists in the arbitral tribunal's finding of this fact after the expiry of the arbitration timeframe.

By the written statement in which the party intends to invoke the sanction of the lapse of the award, the party informs the arbitral tribunal that the time limit for arbitration is one of the determining factors that persuaded it to choose this dispute resolution method and, in particular, this arbitral tribunal. To the extent that a party does not make such a statement within the time limit prescribed by law, it can be inferred that its reliance on the arbitral tribunal is independent of the delivery of the award within a certain time limit.[22] It can be concluded that if the time limit for arbitration expires but the parties have agreed to continue the proceedings, this is tantamount to a waiver of the statement originally made by the party expressing its consent to continue the arbitral proceedings. In these circumstances, neither party may challenge the arbitral award on the ground that the arbitration has lapsed, if the plea of lapsing has not been raised before the arbitral tribunal at the first hearing after the expiry of the timeframe imposed by the law.

An important amendment provided by Art. 43 para. (7) of the Rules of Arbitration Procedure of the Court of International Commercial Arbitration before the CCIR (2018 version "RPA 2018"), is that, in addition to the provisions of the Code of Civil Procedure, it provides that a party who by his own conduct has caused delay in the resolution of the arbitral dispute may not claim that the arbitration timeframe has been exceeded. Thus, procedural abuses can be sanctioned. Moreover, in the recent practice of the Bucharest Court of Appeal, the application of Article 43(7) of the RPA (2018) was confirmed in the context of the claim for annulment, when the applicant argued that the application of this text concerning the lapse of the RPA (2018) would have had the effect of violating public order, which was contradicted by the court of judicial review: "*What the claimant alleges is that the arbitral tribunal's assessment of the claim for lapse of the award violated public policy or mandatory provisions by assessing the claimant's passivity and did not take into account the delay in the resolution of the case before the arbitral tribunal by the opposing party. Of course, such a criticism would be closer to the final thesis of violation of mandatory rules with express reference to Article 43 of the Rules of Arbitration Procedure. From a review of the rule of law relied on, the Court notes that unless the parties have agreed otherwise, the arbitral award will be rendered within a maximum of six months from the date of the constitution of the arbitral tribunal.*

The time limit may be suspended while the following events are taking place: the hearing of a motion for challenge of an arbitrator; the resolution of a plea of unconstitutionality; the hearing of an incidental application to the court; the suspension of the dispute on the basis of a legal provision; the carrying out of an expert opinion ordered by the arbitral tribunal.

[22] Alin Daniel Florescu, *The claim for annulment of the arbitral award in case of lapse of the arbitration*, Universul Juridic Premium 2 Magazine, 2019.

The parties may consent at any time during the arbitration to an extension of the time limit for arbitration, either in writing or by an oral statement made before the arbitral tribunal and recorded in the record of the hearing. It would therefore have been open to the party concerned to request this or to invoke the provisions of paragraph 7 of the same article, expressly asking the tribunal to find that the party which invoked the lapse was relying on its own conduct in breach of mandatory rules. However, as expressly pointed out, none of the parties requested an extension of the six-month time-limit, given that the applicant concerned was aware of the plea from the first moment the statement of defence was served. The Arbitral Tribunal pointed out to the parties the risks to which they were exposed by the non-existence of an agreement to extend the time limit (see in this respect the conclusion of 16.12.2021) but the parties did not react and did not avail themselves of their rights.[23]

It should also be noted that, even at the hearing of 21.01.2022, the date on which the claimant could have agreed to extend the arbitration timeframe and could have opposed the exception, it did not react, but instead left the resolution of the exception to the court. However, in such a context, in which the applicant had the possibility to act and had legal levers to fight the objection, but refused to use them, expressly knowing the risks to which it was exposed, it cannot be argued that the arbitral award was contrary to any mandatory legal provision, public policy or morality, and the claim for annulment must therefore be dismissed."

(iii) The parties did not agree to continue the trial. As discussed above, once the mechanism of lapse of the award is set in motion, the parties can only expressly and unanimously waive the lapse of the award. As regards the form of the statement of waiver, the law does not necessarily require a written form. For reasons of symmetry, it could be argued that, since the statement triggering lapse must be done in writing, the statement of waiver should also follow this requirement. However, the law does not require such a form. Therefore, it is considered that the statement can also be made orally before the arbitral tribunal and recorded in the closing of the hearing[24].

There may also be a discussion as to when this statement of waiver can be made. A first opinion argues that the waiver could only be made within the arbitration timeframe since, upon expiry of this timeframe the lapse of the award has automatically operated, the arbitral tribunal only rendering a decision stating this fact[25]. Moreover, this can also be inferred from Art. 567 para. (3) of the Romanian Civil Procedure Code, which provides that the parties may consent to an

[23] Bucharest Court of Appeal, Fifth Civil Division, Civil Decision no. 97/2022 of 7 November 2022.

[24] Crenguța Leaua, *Statements of the parties regarding the lapse of the arbitration. Some questions*, available at https://www.juridice.ro/396911/declaratiile-partilor-in-privinta-caducitatii-arbitrajului-cateva-intrebari.html.

[25] Ibid.

extension of the time limit only within that time limit.

However, given that the legislator has not set a time limit for the waiver, other authors[26] have taken the view that the statement can be made at any time up to the rendering of the award declaring the lapse. However, it is difficult to imagine that, at the time when the conditions for the operation of the lapse are met, the arbitral tribunal will deliver the award directly, without having to question the parties on this fact, giving them the possibility to make the statement of waiver on the spot.

What should be emphasised with regard to invoking the lapse as a ground for setting aside the arbitral award is that it is not sufficient simply to mention it in a court claim, but that this ground must be detailed, with reference to the meeting of all the elements and the sequence of events over time. [27]In this regard, the Bucharest Court of Appeal has recently ruled[28] that: *"With regard to the violation of the provisions relating to the time limits of the arbitration, Article 568 NCPC, in the sense that by the date of the award the time-limit provided by Article 567 para. 1-5 NCPC was exceeded, such claims cannot be considered as a reasoned ground for setting aside the arbitral award to be analysed by the court, these being only vague assertions. This is because the reasoning of such a claim should include the grounds on which it is based, and in the present case this ground of nullity should also be accompanied by a statement of reasons. The statement of reasons means the development of the factual grounds (in the case in question, these were those relating to the content of the arbitration clause, the dates of commencement of the arbitration, the date of expiry of the time-limit provided for in Article 567(1) NCPC, as well as the other factual elements of the arbitral dispute referred to in Art.567 and Art.568 NCPC necessary for the establishing of the lapse of the award), but also of the legal grounds (in this case meaning a logical-legal demonstration of the application of Art. 568 NCPC) with regard to the factual elements set out in the factual grounds, and then a reasoning for the alleged violation of Article 568, as one of the grounds of annulment provided by Article 608). Moreover, taking into account that the case concerns an institutionalised arbitration, the grounds in question should also be connected to the rules of procedure of this forum according to Article 619 (3) of the NCPC. In the absence of all these elements, the court cannot analyse whether there is an alleged violation of articles 567-568 NCPC and what the value of such a violation would be, because the court cannot fill in these gaps in the court claim (both because the obligation to submit a reasoned court claim lies with the plaintiff and because the court cannot "help" the plaintiff to provide a reasoning for his court claim)."*

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[26] Alin Daniel Florescu, *The claim for annulment of the arbitral award in case of lapse of the arbitration*, Universul Juridic Premium 2 Magazine, 2019.

[27] It can be seen that, this decision is aimed at giving priority to the application of the time limits concerning the lapse of the award as provided by the RPA, thus confirming the suppletive nature of these rules.

[28] Bucharest Court of Appeal, Fifth Civil Division, Civil Judgment no. 11 of 3 February 2023.

3. Effects of the admissibility of a setting aside claim on the ground that the award was rendered outside the provided time limits

If the annulment claim is granted, the arbitral award will naturally be set aside, the law making a distinction as to the fate of the dispute depending on the ground for annulment. Thus, if the dispute was not subject to arbitration, if there was no arbitration agreement, or if the arbitration clause was null and void or ineffective, or if the award was rendered after the expiry of the arbitration timeframe, under the conditions analysed above, the court will set aside the award and refer the case to the court competent to rule on the merits, in accordance with Article 613 (3) (a) NCPC.

Although in the first two cases the outcome seems natural, since a referral back to arbitration would be affected by the same flaws, in the case of expiry of the arbitration timeframe the solution is at least questionable. Thus, from the perspective of the effects of the granting of the claim for annulment, the legislator considers the lapse of arbitration as an end to the consent of the parties to arbitrate, denying the possibility of returning the dispute to an arbitral tribunal, even if one of the parties so requests. This position is not consistent with the solution reached if the arbitral tribunal itself finds the arbitration has exceeded the provided time limits. From Art. 568 para. (3), it follows that the party concerned may refer the dispute to the arbitral tribunal based on the same arbitration agreement, which has not exhausted its effects, despite the initial finding of lapse of the award.

The current rules therefore provide for two diametrically opposed solutions, depending on which court finds the lapse of the award. If the party successfully invokes this sanction before the arbitral tribunal, a new arbitration dispute may be initiated using the evidence administered in the lapsed proceedings. If the party successfully invokes this sanction in the annulment proceedings, the case will be referred to the competent State court for resolution. It is argued in the doctrine that this different approach is not justified[29], preferring the one where the court refers the case to the arbitral tribunal for retrial if at least one of the parties so requests, according to Art. 613 para. (3) (b) of the Code of Civil Procedure. It is also pointed out in the doctrine that this solution is also found in the legislation of other countries.[30]

The recent case law of the Bucharest Court of Appeal[31] confirms the solution provided by the Code of Civil Procedure, according to which the case is sent back for retrial to the competent court: *"With regard to the plea of illegality governed by Article 608(e) of the Civil Procedure Code, the Court finds that it is*

[29] Brândușa Ștefănescu, *Judicial Review of Arbitral Awards in the Light of the New Code of Civil Procedure*, „Revista Română de Drept Privat" no. 3/2012, p. 75.
[30] Ion Deleanu, Sergiu Deleanu, *Domestic and International Arbitration*, Ed. Rosetti, Bucharest, 2005, p. 303-304, with reference to French jurisdiction.
[31] Bucharest Court of Appeal, Fifth Civil Panel, Civil Decision no. 93/2022 of 27 October 2022.

well founded for the following reasons:

According to Art.567 para. I Civil Procedure Code, "unless the parties have provided otherwise, the arbitral tribunal shall render its decision within a maximum of 6 months from the date of its constitution, under penalty of lapse of the arbitration".

According to Art.568 para. 1 of the Civil Procedure Code, "at the first hearing to which they have been legally summoned, the parties are obliged to state in writing, under the sanction of forfeiture, whether they intend to invoke the lapse of the arbitration", and according to para.2 "when at least one of the parties has made the statement provided for in para. I, the arbitral tribunal shall, on the expiry of the time-limit provided for in article 567, render a decision that the arbitration has lapsed, unless the parties expressly declare that they waive the lapse of the award, in which case it shall continue the proceedings".

In the present case, the respondent in the appeal, Casa de Asigurări de Sănătate Dolj, referred the matter to the Central Arbitration Commission of the National Health Insurance House with a request for arbitration on 12.01.2015. As it appears from the arbitration file no.2018/2018, the first summonses for 06.05.2021 were issued on 05.03.2021, more than 6 years after the date of registration of the request for arbitration.

According to the reports provided by the Central Arbitration Commission of the National Health Insurance House, the Central Arbitration Commission was established, according to the provisions of art.307 of Law no.95/2006 and art.3 para. 1 and 2 of the Regulation on the organization and functioning of the Central Arbitration Commission, approved by GD no.650/2014, in September 2015, which in the same composition resolved and settles all the cases. Therefore, the 6-month timeframe provided for in Article 567(1) of the Civil Procedure Code, within which the arbitral tribunal had to render its decision, began to run in September 2015 and expired in February 2016.

The Court also finds that the provisions of Article 568 paragraph 1 of the Civil Procedure Code have been complied with in the sense that the claimant in the appeal has declared in writing, in the statement of defence filed for the first hearing for which he was legally summoned, that he intends to raise the lapse of the arbitration.

Therefore, as long as the time limit within which the arbitral award had to be rendered, which was not suspended or extended pursuant to Article 567 para. 2, 3 and 4 Civil Procedure Code and the respondent had invoked the lapse of the award expressly, in writing, the arbitral tribunal had to find that the arbitration had lapsed.

Finding this plea of illegality to be well founded, the Court will no longer consider the last plea raised, based on the provisions of Article 608, letter h of the Civil Procedure Code and, pursuant to Article 613, paragraph 3, letter a of the Civil Procedure Code, will grant the claim for annulment, will annul the Ar-

bitration Decision no. 203/12.08.2021 rendered by the Central Arbitration Commission of the CNAS and will refer the case to the Băileşti Court of Law, Dolj County, this being the court with material and territorial jurisdiction, according to art. 94 paragraph 1 letter k and art. 107 paragraph 1 of the Civil Procedure Code, to rule upon the case".

4. Conclusions

As regards the institution of the lapse of the arbitration proceedings, we consider that it was originally conceived as a way of encouraging speedy arbitration. However, it is the essence of arbitration that the tribunal resolves the dispute expeditiously, without being under express threat from the parties of liability for non-compliance. If, however, the arbitration time limit is not complied with, the sanction is, in practice, the resumption of the proceedings. From the point of view of the effects of the lapse of the award, the raising of the exception has the effect that, in the event of a delay attributable to the arbitral tribunal, the proceedings will resume with another arbitral tribunal, causing further delay.

The claimant will be adversely affected by this exception, because no matter much he would like this dispute to be resolved quickly, it is hard to imagine that he will raise the exception of the lapse of the arbitration proceedings, running the risk of having to restart the proceedings after the arbitration timeframe has expired. Even if the arbitrators were liable, in our view, it was not the original purpose of this institution to hold the arbitrators liable.

As regards the benefit of lapsing of the arbitral proceedings for the defendant, it should be stressed out that the intervention of the lapsing does not prevent the claimant from bringing a new claim with the same subject-matter, and this would, therefore, in no way be equivalent to a favourable outcome on the merits. If one were to consider that the institution of the lapsing of the award could be used as a delaying tactic, one must bear in mind that there would be no interest of the defendant to activate the sanction of lapsing by the first hearing date, putting the arbitral tribunal in the position of having to render the award within 6 months, in the hope that it could further delay the dispute if the tribunal would not comply with this deadline.

As regards the activation of the lapsing of the award only to pre-establish a ground for annulment, this is conditional on the refusal of the arbitral tribunal to render a decision on the lapsing of the arbitration proceedings, notwithstanding the fulfilment of all the conditions. If the statement on the lapsing is submitted and the conditions are fulfilled, and the arbitral tribunal renders a decision in this respect, in such case the proceedings are resumed, this being detrimental for both parties.

Under the previous regulation of the former Code of Civil Procedure, the sanction of lapsing of the arbitration proceedings was rarely activated, which is why this ground was practically rarely invoked as a ground for setting aside the

arbitral award[32]. In recent case law, the lapsing of the arbitration proceedings is often invoked[33] in an easy manner in a claim for annulment, given that many arbitration disputes exceed the 6-month time limit, without, however, complying with the condition of its *a priori* activation. In this context, it can be considered that the issue of lapsing of the arbitration proceedings only arises following the rendering of an unfavourable decision on the merits.

Also, the raising of the lapsing of the arbitration proceedings in complex disputes, especially where the arbitral tribunal is of the view that not only the rendering of the minutes of the decision, but also the drafting of the complete arbitral award must be submitted within the 6-month time limit, imposes reduced time limits for the arbitral tribunal. Furthermore, there is no provision in the rules of arbitration procedure suspending the course of the timeframe for rendering the award during the court recess. Such an amendment would be required to the Rules of Arbitration Procedure of the Court of International Commercial Arbitration of the CCIR.

Concerning the law to be enacted *(lege ferenda)* one could also include a clarification in the current provisions of the Code of Civil Procedure that the timeframe in relation to the lapsing of the arbitration proceeding does not have an imperative nature and that various arbitration rules may have derogatory provisions in this respect.

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