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Latest Developments in the Application of Investor-Contracting Party Dispute Resolution Mechanism under Article 26 of the Energy Charter Treaty: Between Heated Disputes and Treaty Requirements

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The Energy Charter Treaty (ECT) is a unique treaty among International Investment Agreements (IIAs). The idea of a multilateral treaty in the energy field was suggested by the Dutch Prime Minister Lubbers in June 1990, at the meeting of the European Council in Dublin, where he proposed the creation of a European Energy Network.[2] In the successful negotiation of a treaty of this magnitude, the European Energy Charter signed on 17 December 1991, the precursor of the ECT, played a crucial role.[3] Although it was rather a political declaration, the European Energy Charter did set the objectives for the successful negotiation and implementation of the ECT and it referred to, among others, the promotion of international flow of investments, with the signatory parties providing a "stable, transparent legal framework for foreign investments".[4] With this base for discussions and negotiations, the ECT's drafting process began in 1991 and was concluded in December 1994. The ECT was signed at the Final Plenary Session of the European Energy Charter Conference in Lisbon on 16-17 December 1994 and entered into force in April 1998, less than seven years after the signature of the European Energy Charter. The entry into force of the ECT, in itself, was a success.[5] The first award in an ECT arbitration was rendered in 2003, five years after the ECT became effective. Since then, the number of disputes submitted to arbitration under the ECT increased steadily, reaching 115 in July 2018, with

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[2] European Council, Presidency Conclusions, Dublin, 25 and 26 June 1990, p. 10.

[3] The European Energy Charter was signed by a significant number of parties, including the United States, the European Communities, Russia etc. See also the International Energy Charter signed in May 2015 and which represents an update of the European Energy Charter. For more information, see <https://energycharter.org /process/international-energy-charter-2015/overview/> accessed 12 March 2018.

[4] European Energy Charter of 1991, Title II, point 4(1).

[5] Crina Baltag, *The Energy Charter Treaty. The Notion of Investor*, (Wolters Kluwer 2012), 9.

more than 60% of them filed under the International Centre for Settlement of Investment Disputes (ICSID) option.[6] Putting these ECT cases in the context of the ICSID caseload, the latest statistics show that they represent over 9% of the total number of ICSID cases.[7] The dispute resolution provisions under the ECT are the guarantee that the substantive protection granted to Investments of Investors, as well as the rights of the Contracting Parties, are duly observed.

Article 26 of the ECT deals with the resolution of disputes between private parties and the Contracting Parties to the ECT. The provision restricts the application of the dispute resolution mechanism to disputes relating to an Investment and which concern an alleged breach of an obligation under Part III of the ECT. Part III of the ECT referred here encapsulates the standards of protection afforded to Investments of Investors and include, among others, fair and equitable treatment standard, protection against unreasonable and discriminatory measures, protection against unlawful expropriation, compensation for losses etc.

Scope of Article 26 of the ECT - Investor-Contracting Party Dispute Settlement

The Investor-Contracting Party dispute settlement mechanism is detailed in Article 26 of the ECT as follows:[8]

"(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;[9]

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

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[6] Full information about the disputes is available at < https://energycharter.org/what-we-do/dispute-settlement /all-investment-dispute-settlement-cases/> accessed 10 July 2018.

[7] ICSID Caseload - Statistics, 2018-1, available at <https://icsid.worldbank.org/en /Documents/ resources/ ICSID%20Web%20Stats%202018-1(English).pdf> accessed 9 March 2018. According to these latest statistics, the ICSID registered 583 arbitrations under the ICSID Convention. (p. 8)

[8] Art. 26 of the ECT was described as "unambiguous, technical, and precise", "by contrast to a number of exhortatory but fuzzy provisions in the Treaty that bespeak political compromise and are bound to generate what is commonly called soft law"(Jan Paulsson, 'Arbitration without Privity', (1995) 10(2) ICSID Review-FILJ 232, 249).

[9] Understanding 16: Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.[10]

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

[10] Referred to as the SCC Arbitration Rules.

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards."

Article 26 of the ECT is restricted to disputes "between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III". Conflictual situations or disputes related to other areas covered by the ECT are subject to specific provisions. For example, transit disputes are subject to the conciliation mechanism of Article 7(7) of the ECT.[11]

The first drafts of the ECT included a narrower scope of the provision. The Basic Protocol of 20 August 1991 referred to:

"any legal disputes between an Investor of one Contracting Party and another Contracting Party in relation to an Investment of the former concerning:

[11] In addition to the transit disputes, the ECT provides for specific mechanisms for the settlement of competition related disputes (Art. 6(5) of the ECT), for trade related disputes (Annex D to the ECT, if at least one party is not member of the WTO).

(a) the amount or payment of compensation under Articles 20 or 21 of this Agreement;

(b) any other matter consequential upon an act of expropriation in accordance with Article 21 of this Agreement, or

(c) the consequences of the non-implementation or of the incorrect implementation, of Article 22 of this Agreement;

(d) the non-compliance by a Contracting Party with any of the provisions of Part II of this Agreement having adverse implications for the Investment of an Investor in that Contracting Party subject to Article 2 above."

Article 20 of the Basic Protocol of 20 August 1991 dealt with Compensation for Losses, Article 21 provided for the protection against unlawful Expropriation and Article 22 contained the provisions on Repatriation of Investments and Returns. It is evident, therefore, that the first draft of the ECT excluded from the scope of the Investor-Contracting Party dispute settlement mechanism disputes related to alleged breaches of the fair and equitable treatment, national and most favoured nation treatment, full protection and security etc.

The scope of the dispute resolution mechanism under Article 26 of the ECT was later widened to encompass "alleged breach of an obligation… under Part III". Nevertheless, as it stands, the wording of Article 26(1) is arguably narrower if compared to the corresponding dispute resolution provision in other IIAs. For example, the 2012 US Model BIT simply refers to "investment disputes":

"In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures."[12]

To fall within the scope of Article 26(1), a dispute must (i) be between a Contracting Party and an Investor of another Contracting Party to the ECT; (ii) relate to an Investment of an Investor in the Area of a Contracting Party to the ECT; and (iii) concern an alleged breach of an obligation of the Contracting Party under Part III of the ECT.[13]

The term "Contracting Party" includes States and Regional Economic Integration Organizations, as this latter notion is defined by Article 1(3) of the ECT. The notions of "Investment" and "Investor", as well as "Area", are defined in Article 1 of the ECT. Investments of Investors which are not in the Area of a Contracting Party are not susceptible of being submitted to the dispute resolution mechanism under Article 26 of the ECT. Unlike other IIAs that link the territoriality to the definition of investment, and thus making it relevant to the jurisdiction

[12] Art. 23 of the 2012 US Model BIT, available at <https://ustr.gov/sites/default/files/BIT %20text%20for %20ACIEP%20Meeting.pdf> accessed 9 March 2018, emphasis added.

[13] *Ratione temporis*, the disputes submitted under Art. 26 of the ECT must be related to an Investment made at or after the date of entry into force of the ECT (Art. 1(6 of the ECT)).

ratione materiae,[14] the ECT includes this requirement in the scope of the dispute resolution mechanism concerning investments and their promotion and protection.

The scope of Article 26 is restricted to alleged breaches of Part III of the ECT. Some provisions under the ECT that are not included in Part III, such as taxation under Article 21 and, in particular, the carve-out mechanism under Article 21(5), received due consideration by arbitral tribunals, given the specific language of the provisions.[15]

The scope of Article 26(1) is relevant not only with respect to the nature of the disputes to be submitted to resolution under one of the options of the Investor-Contracting Party dispute settlement, but it has also significant consequences on the possibility of the Contracting Parties to initiate proceedings under the ECT or to file counterclaims. To this extent, paragraph 2 of Article 26 becomes important as it refers to "the Investor party to the dispute [who] may choose to submit it for resolution", thus, giving the Investor the power to initiate proceedings and to choose which mechanism suits best the profile of the dispute.[16]

Cooling-Off Period

Article 26(1) of the ECT provides that the disputes under this provision

[14] See, for example, the US-Romania BIT, entered into force in 1994, which refers in Art. 1(a) to *"*investment*"*means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; …"

[15] See for example, the *Yukos Cases* (*Yukos Universal Ltd v. the Russian Federation*; *Hulley Enterprises Ltd v. the Russian Federation*; and *Veteran Petroleum Trust v. the Russian Federation*, UNCITRAL/PCA Cases nos. 226-228) and *Plama Consortium Limited (Cyprus) v. Republic of Bulgaria,* ICSID Case No. ARB/03/24. For further comments on the issue of taxation in the context of the ECT, see William W. Park, 'Arbitrability and Tax' in Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives*, (Wolters Kluwer 2009), para. 10-32 et seq.; Uğur Erman Özgür, 'Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context', Energy Charter Secretariat (2015).
See also the reasoning of the arbitral tribunal in *Nykomb v. Latvia*, with reference to certain provisions of the ECT employed by the claimant as an aide in the interpretation of certain provisions under Part III of the ECT:
"The Claimant has also referred to parts of Article 22. The Respondent has objected to the Tribunal's jurisdiction on the ground that Article 22 is placed in Part IV of the Treaty. The Arbitral Tribunal notes, however, that the Claimant has stated that the provisions Article 22 referred to do not give rise to any separate claim, but are rather invoked as provisions which clarify the scope and contents of other treaty provisions, among them the provisions in Part III that the Claimant relies on as bases for its claims. The Tribunal finds that the interpretation and application of the relevant Articles of the Treaty, Articles 10 and 13, are best considered under the merits part of this award, and that the references to Article 22 cannot as such be dismissed as inadmissible in the form the references are relied on.*"*(*Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC case, Arbitral Award of 13 December 2003, p. 8)

[16] Emphasis added.

"shall, if possible, be settled amicably." Article 26(2) specifies that such settlement must occur "within a period of three months from the date on which either party to the dispute requested amicable settlement". Thus, amicable settlement provision or the cooling-off provision, as it is usually referred to, requires the parties to a dispute to attempt amicable settlement and to do so for maximum three months as of the date of notification of the dispute by the Investor. The terms of Article 26 come to suggest that such cooling-off provision must be attempted, "if possible". This would be the threshold to be retained by an arbitral tribunal, irrespective of whether the cooling-off provision is considered as procedural, of admissibility or of jurisdiction.[17] In *Al-Bahloul v. Tajikistan*, the tribunal agreed with the approach that where the respondent did not react to the notice of arbitration sent by the claimant, the request of the arbitral tribunals to direct the claimant to comply with the cooling off provision would be an "unnecessary formality".[18] A similar position took the arbitral tribunal in *Khan Resources v. Mongolia* when it held that the claimants have "met the attempt at amicable settlement requirement of Article 26 [of the ECT]".[19]

In *AMTO v. Ukraine*, the tribunal rejected respondent's contentions that the claimant failed to comply with the cooling-off period under Article 26 of the ECT. In doing so, the arbitral tribunal first looked at the nature of the cooling-off provision in the light of the scope of the ECT and held that

"The purpose of the Energy Charter Treaty includes the promotion of long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter. This purpose is facilitated by the amicable settlement of disputes. The request for amicable settlement required by Article 26(2) ensures that a State party is notified of a dispute prior to the initiation of an arbitration and has an opportunity to investigate and take steps to resolve the dispute. Article 26(2) does not raise any fundamental rights -there is no breach of due process in the loss or curtailment of a period for settlement discussions- but is an important element of the dispute resolution process and is a manifestation of the cooperation in the energy sector that is at the heart of the ECT." [20]

[17] On a discussion regarding the nature of the cooling-off provision, see Hanno Wehland, 'Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules', in Crina Baltag (ed), *ICSID Convention after 50 Years. Unsettled Issues*, (Wolters Kluwer 2017), 227-247.

[18] *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. *V* (064/2008), Partial Award on Jurisdiction and Liability of 2 September 2009, *para. 154.*

[19] *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. The Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Decision on Jurisdiction of 25 July 2012, para. 409.

[20] *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award of 26 March 2008, para. 50.

In *Al-Bahloul v. Tajikistan*, the tribunal held, "based on the factual circumstances of this case that, even if Claimant failed to comply with the three-month period, it does not affect the Tribunal's jurisdiction or the admissibility of the claims brought by Claimant."[21] In *Stati v. Kazakhstan*, the tribunal viewed the requirement of the three-month amicable settlement as a procedural requirement of the ECT:

"it is clear that the intention of Art. 26 ECT is to provide an opportunity of three months to the Parties to settle the dispute. In view of this obvious intention, the Tribunal considers that to be a procedural requirement rather than one of jurisdiction, at least as long as the Parties have indeed had such a three months opportunity."[22]

In *Eiser v. Spain*, the arbitral tribunal, having decided that the requirements of Article 26 of the ECT on the cooling off provision are complied with, did not feel the need to determine whether this cooling off period is a jurisdictional or admissibility question.[23]

ECT arbitral tribunals also held that the Contracting Party must have a proactive attitude and raise the objection regarding the cooling-off period at a very early stage in the proceedings so that the parties will have a real opportunity to engage in amicable discussions. As explained by the tribunal in *AMTO v. Ukraine,*

"… a State party that considers the amicable settlement requirements of Article 26(2) have not been complied with by an Investor has an obligation, as a matter of procedural good faith, to raise its objections immediately. This ensures the Investor can, if necessary, remedy the defect so that both parties are in a position to engage in the amicable settlement discussions envisaged by the ECT, and thereby help to preserve their long term cooperation in the energy sector."[24]

As to the formal requirements under the ECT for triggering the applicability of the cooling-off provision, the tribunal in *Khan Resources v. Mongolia* held that the ECT does not provide any such formal requirements on how an amicable settlement request should be made and on what should contain. The tribunal in *Khan Resources v. Mongolia* held that

"Article 26(1) aims at encouraging good faith negotiations between parties, without unduly limiting the recourse to arbitration. Thus, in making the amicable settlement request referred to at Article 26(2) of the ECT, the investor need only (i) describe the dispute in a manner sufficient to enable the other party to understand what is being referred to, and (ii) manifest the desire to seek an amicable resolution."[25]

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[21] *Al-Bahloul v. Tajikistan*, para. 156.
[22] *Anatolie Stati*, *Gabriel Stati*, *Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. *V* (116/2010), Award on 19 December 2013, para. 829.
[23] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017, para. 321.
[24] *AMTO v. Ukraine,* para. 53.
[25] *Khan Resources v. Mongolia*, para. 404.

Related to this, the tribunal in *RREEF v. Spain* had to decide on whether further measures challenged by the claimant and which were not part of the original notification of the respondent needed a new, separate cooling off procedure. The tribunal held that

"... it would be of no avail and would impose an unreasonable burden on both Parties to oblige the Claimants to request amicable settlement anew and to start new proceedings against the Respondent in relation to these further measures which are a mere factual extension of those initially challenged by the Claimants which announced them."[26]

Fork-in-the-Road Provision

Under Article 26(3)(a) of the ECT, the Contracting Parties give their unconditional consent to the submission of a dispute to international arbitration or conciliation under Article 26. As provided for Article 26(3)(b)(i), for the Contracting Parties listed in Annex ID to the ECT, this unconditional consent does not operate where the Investor has previously submitted the dispute to the courts or administrative tribunals of the Contracting Party party to the dispute or to a previously agreed dispute settlement procedure, under Article 26(2)(a) and (b).[27] These Contracting Parties are: Australia, Azerbaijan, Bulgaria, Canada, Croatia, Cyprus, the Czech Republic, the European Communities, Finland, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Spain, Sweden and the United States of America.[28] Essentially, under the fork-in-the-road provision, the claimant is required to select one option for the resolution of the dispute and to abide by this decision. For example, if decided to pursue litigation in the courts of the host Contracting Party, the claimant may not

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In *AES Summit v. Hungary*, the tribunal noted that the parties complied with the requirement of Article 26(1) of the ECT concerning the cooling-off period, given the "communications between the Claimants and the Respondent regarding negotiations of the dispute began in January 2007. Furthermore, in April 2007, the parties conducted in person negotiations without reaching a resolution of the dispute."(*AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, para. 6.5.1)

[26] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction of 6 June 2016, para. 230.

[27] The second exception to the unconditional consent, as provided for in Art. 26(3)(c), concerns the umbrella clause exception, whereby the Contracting Parties listed in Annex IA to the ECT (Australia, Canada, Hungary and Norway; whereas Australia, Canada and Norway are not currently Contracting Parties to the ECT) do no not give their unconditional consent with respect to disputes arising out of the last sentence of Art. 10(1) of the ECT. Art. 10(1) of the ECT refers to the following umbrella clause':
"Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

[28] With a note that Australia, Norway and the Russian Federation did not ratify the ECT, Canada and the United States of America are only signatories of the European Energy Charter (the United States also of the International Energy Charter), and Italy withdrew from the ECT effective on 1 January 2016.

switch to arbitration under the SCC option mid-way the litigation process.[29]

The investment arbitration cases, in general, reveal that the claimants pursue their best options in order to succeed in their claim and recover their alleged prejudice. This means that, often, arbitral tribunals are faced with complex situations of various proceedings running in parallel with the arbitration or which were exhausted before the commencement of arbitration. To prevent these situations and to determine if the fork-in-the-road clause was triggered or not, a great number of arbitral tribunals rely on the triple identity test in order: same parties, same object and same cause of action.

In *Khan Resources v. Mongolia*, the tribunal confirmed that Mongolia is one of the Contracting Parties listed in Annex ID to the ECT and that the respondent claimed that the domestic litigation in the Mongolian courts triggered the fork-in-the-road provision. In reaching its decision that Article 26(3)(b)(i) was not activated in this case, the tribunal looked at the triple identity test: parties, cause of action and object of the proceedings, and found that none of the elements indicated is identical in the two proceedings.[30] The tribunal concluded that "[t]his is therefore not a case where the investor seeks to try its luck a second time to obtain what it wants in relation to the same dispute but before a different forum."[31]

In the *Yukos Cases*, the panel of arbitrators emphasized that, even in the presence of domestic litigation, the fork-in-the-road provision is not triggered since the claim submitted under Article 26 of the ECT was submitted in order "to determine whether Respondent breached Claimant's rights under the ECT".[32]

In *Charanne v. Spain*, the respondent contended that the two contentious-administrative claims before the Spanish Supreme Court and the European Court of Human Rights were sufficient to prompt the application of the fork-in-the-road provision under the ECT. With regards to the European Court of Human Rights, the tribunal concluded that it does not qualify as "court" of Spain within the meaning of Article 26(2)(a) nor as a "previously agreed dispute settlement procedure" under Article 26(2)(b).[33] As to the proceedings in front of the Spanish Supreme Court, the arbitral tribunal held that there is no identity of parties with

[29] In an early draft of the ECT, Article 23(3)(b) of the Basic Agreement of 21 December 1992 (available at <https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/12_BA_31__21.12.92.pdf> accessed 9 March 2018) provided that *"*(3) An Investor may submit a dispute as referred to in paragraph (1) to international arbitration or conciliation in accordance with paragraph (4) only if: … (b) the Investor has waived its right to initiate an action, in relation to the same subject matter, before the courts or tribunals of the Contracting Party concerned or, where an action has already commenced, the Investor has discontinued it before any judgement or award is made". (emphasis added)

[30] *Khan Resources v.* Mongolia, para. 386 et seq.

[31] *Khan Resources v. Mongolia*, para. 396.

[32] *Yukos Cases,* Interim Award on Jurisdiction and Admissibility of 30 November 2009, para. 600.

[33] *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award of 21 January 2016, para. 409.

the ECT arbitration and therefore, without the need to examine the identity of subject matter and legal basis of the claim, the conditions under Article 26(3)(b)(i) to trigger the fork-in-the-road provision were not met.[34]

The triple identity test is often regarded as flawed, since most often, as seen in the examples above, the test will fail on one of the elements - frequently the cause of action -, without the tribunals being required to produce a complete assessment of the test. Although rejected by the ECT tribunals in response to the triple identify test, respondents rely to a great extent on the "fundamental basis" test, as coned in the *Pantechniki v. Albania*. Under this test, what would be relevant to activate the fork-in-the-road clause would be the ultimate effect of the proceedings on the claimant:

"To the extent that this prayer was accepted it would grant the Claimant exactly what is seeking before ICSID - and on the same 'fundamental basis'. ... The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim."[35]

Arbitration Option

Article 26(2) provides that Investors may *choose* to submit their disputes with the Contracting Parties to the ECT: (a) to the courts or administrative tribunals of the Contracting Party party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) to international arbitration under Article 26 of the ECT. As suggested by the wording of this provision, Investor may decide to abide by its original decision and resort to a previously agreed dispute resolution mechanism or they can opt directly to one of the arbitration options under Article 26(4).[36]

Under the international arbitration option in Article 26(4), the Investors may choose between: (a) the ICSID, under the ICSID Convention if the Contracting Party to the dispute and the Investor's Home State are Contracting States to the ICSID Convention, or under the ICSID Additional Facility, if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention; (b) *ad hoc* arbitration under the UNCITRAL Arbitration Rules before a sole arbitrator or three member tribunal; or (c)

[34] *Charanne v. Spain*, para. 410.
In *Nykomb v. Latvia*, the tribunal expressed its view that "according to ECT Article 26(4) the investor has the option of requesting Treaty arbitration even if it has agreed to the jurisdiction of a local forum – which, however, it has not done in the present case."(p. 10)

[35] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, para. 67.

[36] See also, Jan Paulsson, supra FN 8, 49-250.
Article 26(3) of the ECT also mentions the conciliation option. See also the Energy Charter Secretariat, 'Guide on Investment Mediation', 2016, available at <https://energycharter.org/fileadmin/DocumentsMedia /CCDECS/2016/CCDEC201612.pdf> accessed 13 March 2018.

arbitration under the SCC Arbitration Rules.[37]

The decision between the various options offered by the ECT must be a reasoned one, based on an assessment of the advantages and disadvantages offered by each option, in the light of the facts of the particular case. In general, there are certain points that should be considered by an Investor when settling on a preferred venue:

(a) institutional v. *ad hoc* arbitration. For complex cases, the management of the case by an arbitration institution might prove essential for an efficient procedure.

(b) any (additional) jurisdictional requirements. Under the ICSID Convention, the provisions of Article 25 become relevant and Investors must be aware that certain elements of the ECT are incompatible with the ICSID Convention, such as the permanent residence in establishing the notion of "Investor", which cannot be upheld under the ICSID Convention option that recognizes only the nationality of Investor. In addition, under the ICSID Convention option, arbitral tribunals and the ICSID gain additional powers: the ICSID, under Article 36(3) of the ICSID Convention will not register a Request for Arbitration if the dispute is manifestly outside the jurisdiction of the Centre; on the other hand, under Arbitration Rule 41(5), the arbitral tribunal may rule at an early stage of the proceedings that a claim is manifestly without legal merit.[38]

When a dispute is brought to resolution under the ICSID option, Article 26(7) of ECT extends its protection to Investors that have "the nationality of a Contracting Party party to the dispute … and which … is controlled by Investors of another Contracting Party". This provision applies the control test in order to

[37] The early drafts of Article 26 of the ECT did not include the ICSID option. See for example, the Basic Protocol to the European Energy Charter of 20 August 1991 referring to
"(a) the Institute of Arbitration of the Chamber of Commerce of Stockholm;
(b) an international arbitrator or *ad hoc* arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law".
The Basic Agreement of 31 October 1991 (available at <https://energycharter.org/fileadmin/Documents Media/ECT_Drafts/3_-_BA_4__31.10.91_.pdf> (last visited 13 March 2018)), included the ICSID option but excluded arbitration under the SCC Rules:
"(3) Where the dispute is referred to international arbitration, the Investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
(a) the International Centre for the (sic) Settlement of Investment Disputes (having regard to the provisions, where applicable of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 15 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and fact-Finding Proceedings); or
(b) an international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nationals Commission on International Trade Law."

[38] Under the SCC option, the Board of Directors of the SCC is also called to make an early determination on whether the SCC manifestly lacks jurisdiction (Art. 12(i) of the SCC Rules).

expand the jurisdiction to Investors that in normal circumstances would not benefit from the coverage of the ECT. This exception is strictly connected to the ICSID option and, as such, not available under the SCC and UNCITRAL options.

(c) the seat of arbitration and the involvement of the local courts in the proceedings. Except for the ICSID option where the ICSID is a self-contained system, isolated from any national laws' intervention - at least up to the execution of the award, the other options available under Article 26(4), the UNICTRAL and the SCC, are largely influenced by the choice of the seat of arbitration. In the same vein, local courts at the seat of arbitration, as provided for in the *lex abitri* and in the rules of procedure, shall also be involved, if necessary, in the arbitration procedure.

(d) setting aside and recognition and enforcement of arbitral awards. Except for the ICSID option where the ICSID award may be subject to the annulment mechanism under Article 52 of the ICSID Convention, under the other options, it is likely that the *lex arbitri* will provide for the option to set aside the arbitral award in the courts at the seat of arbitration. ICSID awards, as provided for in Article 54 of the ICSID Convention, are recognized by the Contracting States to the ICSID Convention as binding and only the execution of the award shall be governed by the laws applicable at the place of execution. Under the other options, the arbitral awards shall be subject to the recognition and enforcement laws at the place of enforcement and, for this purpose, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is an essential instrument. To this extent, Article 26(5)(b) of the ECT provides that "[an]y arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention."

In a rather interesting argument as to the arbitration options available to Investors under Article 26(4)of the ECT, the respondent in *Stati v. Kazakhstan* argued that the Russian version of the ECT, of equal authentic value to the English, Spanish, Italian, German and French language version, did not provide for the SCC option. As explained by the respondent, the Russian version of the ECT referred to the "International Court of Arbitration of the International Chamber of Commerce in Stockholm", arguably the ICC Court of Arbitration with place of arbitration, Stockholm.[39] The arbitral tribunal rejected the argument and held that the Russian language version of the ECT must be interpreted as referring to the SCC option.[40]

Deriving from the wording of Articles 26(2) and (4), it appears that the ECT does not impose an obligation on the claimant to exhaust any local legal remedy before employing the dispute resolution mechanism of its choice. As explained by

[39] *Stati v. Kazakhstan*, para. 697 et seq.
[40] *Stati v. Kazakhstan*, para. 709.

the tribunal in *Nykomb v. Latvia,* "no such general obligation to exhaust local remedies can be derived from the Treaty or international law in general."[41]

One of the essential elements of Article 26 and of the arbitration options, in particular, is the consent. Coined under 'arbitration without privity', the consent in investment treaty arbitration is formed by way of offer of the state in the relevant applicable treaty and by the acceptance via the request for arbitration submitted under the dispute settlement provision.[42] The ECT arbitral tribunal in *AMTO v. Ukraine* held unequivocally that the Investor's consent to arbitrate is given by way of the request of arbitration submitted under the relevant arbitration option. As concluded by the arbitral tribunal,

"Consent to arbitrate, as the foundation of the jurisdiction of an arbitral tribunal, should be unequivocal. The consent of an Investor under the ECT must be unconditional, as consent is mutual and also the consent of the State Party described in Article 26(3) is unconditional. However, where the consent of the Investor to arbitration is in writing, unequivocal and unconditional then the ECT imposes no further formal requirements. A request for arbitration is by its very nature consent to arbitrate because a legal proceeding cannot be requested by a party without their own participation in the proceeding. To request legal process is to submit to this process. An unconditional request to initiate arbitration proposed by another is the consent that completes the arbitration agreement and establishes the jurisdiction of the arbitral tribunal.

... The Request for Arbitration therefore satisfies the requirement of Article 26(4) that the Investor 'further provide its consent in writing' for this dispute to be submitted to arbitration."[43]

Article 26(1) refers to disputes "which concern an alleged breach of an obligation" by the Contracting Party under Part III of the ECT, while Article 26(2) provides that the Investor "may choose" to submit the dispute for resolution options there provided. In this context, a discussion on whether counterclaims are permitted or at least not prohibited by the ECT is pertinent. A counterclaim is essentially a claim presented by the respondent and must not be confused with the defences raised by the respondent in replying to the claimant and backing its position. As such, a counterclaim is a new claim that, in order to be admitted in the proceedings brought by the claimant, must fall within the consent to

[41] *Nykomb v. Latvia*, p. 10. See also, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award of 1 November 2013, para. 233.

[42] Article 26(5) specifies that the consent given in paragraph (3) - unconditional consent - together with the written consent of the Investor given pursuant to paragraph (4), by choosing one of the arbitration option, shall be considered to satisfy the requirement for (i) written consent under the ICSID Convention and for purposes of the Additional Facility Rules; (ii) an "agreement in writing" for purposes of the New York Convention 1958; and (iii) "the parties to a contract [to] have agreed in writing" for the purposes of the UNCITRAL Arbitration Rules.

[43] *AMTO v. Ukraine*, paras 46 and 47.

arbitration, thus, rendering it contingent upon the original claim. It is generally argued that where a treaty does not contain any provision in respect to counterclaims, such as the ECT,[44] but it does contain a wording which apparently restricts the commencement of arbitration to the discretion of the Investor, the host Contracting Party may not submit a counterclaim in the proceedings started by the Investor, even if submitted under the ICSID option, whereas Article 46 of the ICSID Convention allows for the filing of counterclaims.[45]

One additional issue that became prominent in the past years in investment arbitration cases is the presence of multiple claimants, sometimes referred to as class action. These disputes gained visibility with *Abaclat v. Argentina*, which settled not long after the ICSID arbitral tribunal rendered its findings on jurisdiction and admissibility in favour of multiparty claims under the ICSID Convention.[46] Such situations where multiple claimants lodge a claim against the

[44] The Basic Agreement of 31 October 1991 provided for the following:
"(2) Any such disputes which have not been amicably settled, shall, after a period of three month from written notification of a claim, be submitted to the Secretariat by either party to the dispute. …
(3) Where the dispute is referred to international arbitration, the Investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
(a) the International Centre for the (sic) Settlement of Investment Disputes (having regard to the provisions, where applicable of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 15 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and fact-Finding Proceedings); or
(b) an international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nationals Commission on International Trade Law.
If after nine months from written notification of the claim there is no agreement to any alternative procedures described above, the parties to the dispute shall be bound to submit it to the International Centre for the (sic) Settlement of Investment Disputes.*"*(emphasis added). Following the Dutch proposal, provision concerning the submission of disputes to the arbitration option was amended and the Basic Agreement of 21 January 1992 (available at <https://energycharter. org/ fileadmin/ Documents Media/ECT_Drafts/4_-_BA_6__21.01.93_.pdf> accessed 8 March 2018) provided for the following:
"(3) Where the dispute is referred to international arbitration, it may at the choice of the Investor be referred either to: …*"*(emphasis added)

[45] See the conclusion of the tribunal in *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, para. 869 et seq, highlighting that the counterclaims must fall within the consent of the parties as expressed in the relevant treaty. Where the treaty refers to *"*disputes …concerning an obligation of the latter [of the State]", then counterclaims are not envisaged by the consent of the parties, even where the dispute is submitted under the ICSID Convention, which provides for the possibility of the arbitral tribunal to rule on counterclaims.
Commentators are cautious in discarding the possibility to submit counterclaims where the treaty refers to the commencement of the proceedings by the Investor. See Dafina Atanasova, Adrián Martinez Benoit, Josef Ostřanský, 'The Legal Framework for Counterclaims in Investment Treaty Arbitration', (2014) 31(3) Journal of International Arbitration 357, 377.

[46] *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara and Others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility of 4 August 2011, with over 180,000 original claimants.

host State of the Investment concerns the consent to arbitration under the relevant treaty. Nevertheless, multiple-claimants' situations also pertain to the organization of the arbitration proceedings, for example as to how an arbitral tribunal called to assess jurisdictional requirements for a significant number of claimants will efficiently do so, or as to who is going to bear the costs of such large sized arbitrations. Although the reported ECT arbitrations usually have no more than three or four Investors as claimants, it is not excluded that multiple-claimants proceedings become common under Article 26 of the ECT.[47]

Applicable Law

Article 26(6) of the ECT provides that the arbitral tribunal shall decide the issues in dispute in accordance with the ECT and the applicable rules and principles of international law. The provision does not make reference to the domestic law of the Contracting Party host of the Investment, if and when such law becomes relevant in deciding the merits of a dispute.

In *AES Summit v. Hungary*, the tribunal decided that, since

"this Tribunal is established under paragraph (4) of Article 26 of the ECT, it is Article 26(6) of the ECT which contains the rules of law agreed by the parties and the ones that this Tribunal will use to decide the dispute.

We therefore conclude that the applicable law to this proceeding is the ECT, together with the applicable rules and principles of international law"[48]

In *Kardassopoulos v. Georgia*, the arbitral tribunal, with reference to Article 26(6) of the ECT concluded that the municipal law may be taken into consideration when deciding the merits of the dispute:

"While this Tribunal is not authorized to apply Georgian law, it is well established that there are provisions of international agreements that can only be given meaning by reference to municipal law.

In the present case, Georgian law is relevant as a fact to determine whether or not Claimant's investment is covered by the terms of the ECT and the BIT. But, whatever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law."[49]

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[47] See for example, *PV Investors v. The Kingdom of Spain,* UNCITRAL, where the information available from the Energy Charter Secretariat confirms that *"*PV Investors is a group of the following 16 investors: AES, Solar, Ampere Equity Fund, Element Power, Eoxis Energy, European Energy, Foresight Group, GreenPower Partners, GWMLux Energia Solar, HgCapital, Hudson Clean Energy, Impax Asset Management, KGAL GmbH & Co., NIBC Infrastructure Partners, Scan Energy and White Owl Capital.*"*(<https://energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/31-the-pv-investors-v-spain/> accessed 13 March 2018)

[48] *AES Summit v. Hungary*, paras 7.6.3 and 7.6.4.

[49] *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007, paras 145 and 146.

As to the interpretation of the provisions of the ECT, the *AES v. Hungary* tribunal held that "the general rules of interpretation of the Vienna Convention, established in its Articles 31 and 32 should be applied."[50]

Important parts of the pleadings of the parties in the ECT arbitrations were dedicated to the application of the EU law to the substantive matters of the dispute. The tribunal in *AES v. Hungary* held, in line with the pleadings of the parties, that EU law shall be considered "as a fact".[51] In *Blusun v. Italy*, the tribunal concluded that the application of international law to the merits of the dispute "does not exclude any relevant rule of EU Law, which would fall to be applied either as part of international law or as part of the law of Italy."[52] Furthermore, the *Blusun v. Italy* arbitral tribunal added that it is evident that the tribunal "cannot exercise the special jurisdictional powers vested in the European courts, but it can and where relevant should apply European law as such."[53]

Arbitral Award

Article 26(8) of the ECT confirms that arbitral awards rendered under the ECT, including any award of interest that they might contain, shall be final and binding upon the parties to the dispute. Furthermore, each Contracting Party shall carry out without delay any arbitral award and shall make provision for the effective enforcement in its Area of such awards.

As mentioned above, if the dispute under Article 26 of the ECT is brought under the ICSID option, Article 54 of the ICSID Convention provides that the arbitral award shall be recognized by the Contracting States to the ICSID Convention as binding and only the execution of the award shall be governed by the laws applicable at the place of execution. Where the other arbitration options are selected, and mindful to the generous provision under Article 26(5)(b) of the ECT which provides that "[an]y arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention", the parties must observe the provisions of the New York Convention of 1958 or, where this is not applicable, of the municipal law at the place of enforcement of the arbitral award.

[50] *AES Summit v. Hungary*, para. 7.6.5.
[51] *AES Summit v. Hungary*, para. 7.6.6.
[52] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian* Republic, ICSID Case No. ARB/14/3, Final Award of 27 December 2016, para. 278.
[53] *Blusun v. Italy*, para. 278. On the issue of *inter-se* application of the ECT, the *Blusun v. Italy* tribunal briefly concluded that *"*the European Member States remain 'Contracting Parties' and that the ECT does create *inter se* obligations for European Member States.*"*(para. 284) See also the reasoning of the arbitral tribunal on this matter in *RREEF v. Spain*, para. 71 et seq.

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Platform Economy Regulation

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Abstract

The new technologies have had a great impact in all kinds of social and commercial exchange, foremost in the past thirty years. All the regulation concerning the digital economy, nonetheless, have become obsolete and could not follow the transition from a digital economy to a platform economy.

This transition was due to two phenomena: the disintermediation and the reintermediation of the market. The new form of intermediaries, the platforms, offer a great challenge for the regulators, since they are not comprehended by the current legislation on the online service providers, which refers only to technical intermediaries (providers, hosts), nor by the regulation of the classic intermediaries, such as distribution and agency laws.

The new configuration of the market defies not only the current regulation, as well as the Westphalian model of national laws, based on geographical criteria. The new market intermediaries are ubiquitous and form a delocalized, a-nationalized community of users, with its own rules, sanctions and dispute resolution methods. Are we looking at new juridical systems?

1. CONTEXT

The present paper aims to investigate what kind of regulation would be convenient to the new market intermediaries that act in the digital environment, giving special attention to their liability regime.

Bay, Airbnb, Uber, Facebook, etc. Mentioning a few of these platforms allows us to have an idea of the penetration that they have in our personal, family and commercial relationships, as well as the relevance of their study.

Nonetheless, at least in the European context, we already have rules that regulate the liability of the digital intermediaries, as we can see in the EU Directive 31/2000. The problem that we will see in the next pages is that said rules were not designed for the electronic platforms.

But, even though they were, is an EU Directive the necessary and sufficient regulation that we want for the operation of the emerging electronic platforms?

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What kind of regulation would be the most adequate taking into consideration the specificities of this new world that we come across? What should be its content?

2. REGULATION IN EUROPE

The first digital intermediaries, emerged in the 90`s, had as purpose to provide access to the internet, host data and facilitate the search of content. Those first intermediaries operated as merely technical intermediaries, allowing the functioning of internet.

The problems arise when damages are produced. New issues derive from this new structure, namely the dispersion and the delocalization of the damages, as well as the difficulties to locate the real authors of the damage, that is users.

As a solution to these problems and against the risk of living the damaged forsaken, in the USA, there was a tendency to make the technical intermediaries liable, since they were easy to identify and, depending on the case, they had deep pockets.

This extended to the point of considering that a discussion forum - which is a mere facilitator - is liable for the damage caused by its users.

Facing the cases where intermediaries were held liable, diverse complains were addressed to the American government, highlighting that the burden of being held liable for any and all damage caused by its users would turn the operation of the intermediaries inviable, and they would have to abandon the market. Before the imminent annihilation of the internet services that would be caused by the disappearance of the intermediaries, Section 512 of the Digital Millennium Copyright Act was enacted. Section 512 established the exemption from liability to the technical intermediaries for the intermediaries, on the condition that the intermediary has no actual or apparent knowledge of the violations.[2]

In Europe, the Safe Harbor system was imported to the electronic intermediaries, but with a broader and more generic approach than the American one. EU Directive 31/2000 was the norm that established this system.

The European regulation, despite being inspired by the American one, follows a model of exclusion (and not exoneration) of the liability, and is horizontal. That means that the Information Society Service Providers (ISSP, henceforth) are not liable for any kind of violation, since some requisites are fulfilled.

The ISSP protected by the Directive are access providers (art. 12), hosters (art.14) and temporary hosters (art. 13 “caching”).

The Directive, in its art. 15, determines that the Member States shall not impose on the ISSPs a general obligation to monitor the information that they transmit or store, demonstrating that a key to this regulation is the preservation of

[2] We could mention the paradigmatic Napster case, where the peer to peer (P2P) platform was held liable for the PI violations perpetrated by its users, by freely exchanging mp3 songs.

the neutrality of the intermediaries. Since they are not responsible for the information nor are obliged to monitor it, they preserve the freedom of expression, thanks to the neutrality of the network.

The special protection regime given to the ISSPs, nonetheless, do not encompass all the ISSPs, namely the new market intermediaries. The regulation was designed in an embryonic phase of the internet development, focusing on merely technical intermediaries. The new market intermediaries, the platforms, have many more functions that only to provide access or to store information, adding value to the commercial and personal relationships. Platforms offer services to the users, such as rating (trust generators), payment, logistics, insurance etc.

The beginning of internet was accompanied by a process of disintermediation of the market, by which individuals did not depend anymore on the work of the intermediaries to locate and relate to other users. To this process, followed the one of reintermediation of the market, by which the digital intermediaries - the platforms- emerged to offer a wide variety of services to the individuals (users) and enable a more efficient exchange, with reduced transaction costs.

The legislation that establishes the Safe Harbor, nevertheless, did not follow up this transition process from a digital economy to a platform economy, regulating solely looking to the first generation of intermediaries, merely technical intermediaries that have no control over their users.

The platforms, therefore, do not subsume under the definition of mere (technical) intermediaries of the information society and do not find shelter under the regime of exclusion of liability established. Although the platforms penetrate the market to reintermediate commercial and social relationships, they do not fit in the definitions of legal intermediaries, such as agent or distributor. Thus, before the lack of specific regulation, platforms have as their legal framework the general rules on (contractual or tort) liability.

The general rules on liability, nonetheless, do not seem to be the most appropriate to deal with the new issues arisen from the digital platforms. If we talk about the tort liability rules (the ones that set out most of the problems in the field of platforms) from the French system, said rules started to be designed -as we know them nowadays - since the 18th century.

A traditional tort liability system does not have the sufficient tools to solve the issues that arise, or at least not without its complementation or the implementation of new resources. For example, what is the causal link existent between the provision of a service by a platform and the damage that a user causes to another user?

It seems necessary to innovate and to create specific rules (even if only complementary to the liability general regimes existent) to the new market intermediaries, the digital platforms.

3. REGULATORY STRATEGY

In this context, we understand that it is indeed necessary some kind of regulatory innovation in the field of the new market intermediaries. That said, what kind of regulation do we want?

3.1. TRADITIONAL OPTIONS

3.1.1. National Law

The first option that comes to mind would be to have the national legislations dealing with the specificities of the platforms. Nonetheless, the fact that each State has its own (possibly) different national regulation does not concur with the a-nationalized and cross-border character of the digital platforms.

Discrepancies between national regulations would be strongly harmful to the development of the platform economy, favoring the lack of legal certainty and the loss of trust, which is one of the principal attributes that the platforms provide to the users.

Moreover, in the scenario where different national legislations are at stake, another factor that leaves to the lack of legal certainty of the participants of this new digital economy is the determination of the applicable law to each case, as well as the determination of the competent jurisdiction. It is when private international law rules come into play. Rules that were not designed for the digital context.

To illustrate the problem, if we imagine a case where damage was cause within the European Union territory from a digital platform, it is possible that the injured suffers damages at different countries. If the claim against the platform is filed in its domicile, the competent tribunal would have to apply the laws of all the countries in which the claimant suffered damages, according to the Rome II Regulation[3], with the consequent discrepancies existent between them.

Furthermore, in the case where there are different national laws that regulate the digital platforms, a platform shopping could take place, in which the ISSP's, due to their delocalized character, would select the most favorable laws, establishing their headquarters in such country or contractually selecting said law as the applicable one.

As we see, the conflict rules are not adapted to these new issues, since they were designed for another world, the analog world.

3.1.2. International Law

The difficulties presented by the national regulation of the platforms, as we saw, does not concur with the sole nature of the current digital market (or world), in which the relationships are established between participants from different countries and with eventual damages caused in many different jurisdictions at a time.

[3] Regulation (EC) No. 864/2007.

One solution for this problem is the uniformization of the applicable regulations. The traditional way to uniformize different laws is by the signature of international instruments among the States. Nonetheless, the only way to have a real uniformization is assuring that all, absolutely all, the States in the world sign the international convention or treaty in question, which is really difficult to achieve, if not impossible.

Besides, the necessary formalities to approve the public international law instruments is something complex and tardy. The time necessary for the signature and the ratification of the instrument by all the countries in the world, as well as the national formalities for its approval and incorporation to the national legal system prevents the constant updating of the regulation. The difficulty in updating the regulation of such a changing object, where innovation is constant, brings this regulation to become obsolete and inadequate in a short period of time. And this has two outcomes (both undesirable): (i) confinement of the technological development and of the digital economy; or (ii) constant obsolescence of the regulation.

Therefore, we discard the public international law instruments as a possible solution for the regulation of the digital platforms.

3.2. TRANSNATIONAL LAW: SELF-REGULATION?

We saw that the traditional norms, based on a Westphalian model, according to which the norms can only emanate from a State authority, being divided in national and international law, do not serve the necessities of the platform economy. The connecting factors of the conflict of law rules, based on a territorial approach, cannot cope with a totally delocalized activity in the digital world.

Nonetheless, the Law has instruments flexible and autonomous enough to regulate the relations in this field that is truly transnational.

Since the second half of last century, some authorities started defending the existence of this modern transnational law, which is product of a parallel codification that emanates not from the State authority, but from the market players. Here we refer to what is known as the new *lex mercatoria.*

The new *lex mercatoria* had its cradle in the international commercial arbitration, tribunals that are transnational and autonomous from the State jurisdictions[4]. In the area of the new digital economy we are dealing with the same case, of transnational relations, which are not subject to any specific State jurisdiction, but are relations that take place in truly autonomous communities.

The digital communities are formed by the operators (platform service providers) and the users. The operators establish the rules and the sanctions to their users, whom accept them contractually, creating a law between the parties

[4] Even though it is controversial, that are important advocates of the completely autonomous character of the international commercial arbitration, as, for example, Prof. Julian D.M. Lew.

(operator-user). Besides this vertical, bilateral and contractual relationship, there are many other horizontal relationships in the digital community, that is amongst the users (user-user). This autonomous and delocalized structure (taking into account that operator and users can be located in different parts of the world) escapes from territorial Law conception in the same way that the aforementioned authors defended that international commercial arbitration does. Thus, its regulation should follow the same pattern, being delocalized and a- nationalized.

The best way to establish a uniform regulation around the world, flexible enough to keep up with the constant technological developments, and without the State bureaucratic obstacles, is by establishing it outside of the State's scope of action, in the most autonomous, organic and spontaneous way possible. We refer to self-regulation, by which the platform economy players gather themselves to determine standards, models, forms, protocols and rules for the participation at this market.

Therefore, the regulation technique that should be fostered is the self-regulation, by which the main platform operators should gather together and propose a body of uniform principles and rules to their action in the internet.

The establishment of codes of conduct and principles to be followed arises from the interested parties in conferring greater legal certainty to their field of action. For example, there is the Copyright Alliance, which is a group that represents and advocates for the interests of the intellectual property community in the USA. Amongst other activities, the Copyright Alliance issues comments before the U.S. Copyright Office, presenting its conclusions regarding the application of Section 512 of the Digital Millennium Copyright Act. On its comments, it proposes changes in the interpretation and suggests the affected how to better protect their I.P. rights as well as protocols of action.

The work of the community of platform operators would not be that different. They should discuss and agree on standards and protocols to be implemented by platforms.

The normative body would constantly be updated and the operators themselves would publicize on their platforms the respect and adherence of such rules, building trust in the market and among users and influencing the rest of platforms to adopt them. In this way, users would tendentially feel attracted by the platforms that follow the same rules, for the (legal) certainty and familiarity they offer. It is a vicious circle of creation, implementation and imposition of the norm. It is an organic and autopoietic model of imposing a set of norms to the intermediaries that wish to enter the market.

Before the impossibility of the States of generating trust and guaranteeing legal certainty in this digital environment (a-national and delocalized), the sole market would provide it and preserve it.

4. REGULATION'S CONTENT

As we saw, the current regulation is not enough to deal with the issues of the new ISSPs, since it was design for the first generation of ISSPs, merely technical intermediaries. Thus, we need a new (self)regulation.

Professor de las Heras Ballell explains that there are three possible regulatory approaches[5]. The first is a continuist approach that proposes the extension of the current regulation on the technical intermediaries, granting a Safe Harbor to the platforms. The second is a hybrid approach, that preserves the principle of not imposing a general monitor duty on the platforms, but imposing duties to establish adequate monitor and report mechanisms in accordance with preestablished standards. The third is a disruptive approach, imposing to the platforms duties of monitoring, user protection and control of the veracity of the information, being held liable for all the damage caused (a diametrical opposed approach to the Safe Harbor).

The first - continuist - approach should be dismissed, since the Safe Harbor system was not designed for the new market intermediaries that play a completely different role than the technical intermediaries. The digital platforms offer important services that add value to the relationships between users and to the market, generating trust, efficiency and reducing transaction costs, allowing relations that were not possible before. Platforms have an active role in the market and cannot be exempted from all responsibilities under the Safe Harbor system.

The third - disruptive - approach should also be dismissed, for the inherent risks of imposing a general duty of vigilance to the platforms, making them responsible for the control of all information exchanged. Needless to mention the dangers to the freedom of speech and to the freedom of information in leaving the control of information at the hands of private parties with economic interests.

Therefore, we opt for the hybrid approach that seems to be the most adequate. The new regulation should preserve the existing general provisions on liability[6] and complement it with more specific and pragmatic rules that establish the expected behavior of the operators, in a way of providing a diligence standard for them.

Even though they are not mandatory rules, they serve as a standard of conduct that can be used in the same way that other international standards are used and taken into consideration in the determination if a professional acted diligently of not.

With this regulatory technic, we can preserve the preexistent Law (one of

[5] Rodriguez de las Heras Ballell, "The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU", *The Italian Law Journal*, nr. 01, vol. 03, 2017, p. 169.

[6] Advocates for maintenance of the general liability regime for the digital economy: Rodriguez de las Heras Ballell, "Intermediación en la Red y responsabilidad civil. Sobre la aplicación de las reglas generales de la responsabilidad a las actividades de intermediación en la Red", *Revista Española de Seguros*, nr. 142, 2010, pp. 217-259.

the principles of e- commerce law) but introducing a standard of conduct (for the users, the operators, third parties, judges and arbitrators, in case of disputes), which confers legal certainty and predictability to all of these parties.

Moreover, it seems to be an easier and better solution than trying to unify the liability systems of the different legal cultures. We understand that this is not necessary. The specific liability system to be applied would be determined, in case of a dispute, according to the applicable law. In case of contractual liability, it would be the law chosen by the parties (the agreement being the general terms of use of the platform). In case of tort liability, the liability rules would be determined by the law which the conflict rules applicable determine.

Even if the general rules on liability do not need modifications, they do need a complementation. The regulation should determine a minimum parameter of diligence for the operators. The regulation should establish minimum procedural duties. In that way, in case of a dispute, the judge or arbitrator can assess if the intermediary fulfilled its duties and determine if the latter is liable or not for the damage caused.

4. BRIEF CONCLUSIONS

The emergence of the new market intermediaries, the platforms, imposes new issues to be solved by the current liability regulation. Our proposal is that the general (contractual and tort) liability rules be preserved but complemented by a new regulation.

The new regulation should emanate from the market players in the form of self-regulation, be it common standards, codes of conduct, templates for the terms of use (similar to the idea of the FIDIC contract templates), amongst others.

Concerning the content of the regulation, it is our view that it should determine minimum procedural or protocolary duties for the platform operators. The breach of those minimum duties would represent that the operator did not act with the minimum degree of diligence expected and, therefore, according to the general rules on liability, could be held liable for the eventual damages caused by the platform directly or indirectly (by its users).

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Domicile of Individuals as an essential notion for understanding the allocation of UK-Common Law Jurisdiction under the Brussels (recast) Regulation

Tania MAYNARD BROWNE[1]

Introduction

The European Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 ("the Recast Regulation"),[2] is a critical European Union (EU), cross-border instrument enacted on 10 January 2015. From then on, the regulation governs the jurisdiction, enforcement and recognition of matters in civil and commercial disputes in all twenty-eight of the contracting Member States of the EU with the exception of Denmark,[3] and concerns "legal persons" or (corporations) and "natural persons" hereinafter (individuals). Given this, the provisions of the scheme are not applicable to other disputes, as seen in the case of Netherlands State v. Rüffer [1980] where a claim brought by the public administering body for, waterways failed, since it was not of a commercial or civil nature.[4]

Thus, in seeking to discuss the concept of domicile of an individual in relation to the European Recast Regulation, particularly in the context of the UK, attention should be given to the background of the provision, the concept of domicile, EU enforcement mechanisms and the protective measures afforded to individuals domiciled in the EU Member States.

Background of the Recast Regulation

The Recast Regulation, established out of the old Council Regulation (EC) No 44/2001 (Brussels Regulation), is a fundamental piece of European legislation that

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[2] REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), <http://eur-lex.europa.eu/legal-content/EN/ALL/ ?uri=celex%3A32012R1215>, accessed 14 July 2018.

[3] Sarah Garvey,`Brussels Regulations (Recast): Are You` Ready, <http://www.allenovery.com /publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx>, accessed 14 July 2018.

[4] *Netherlands State v. Rüffer,* Judgment of the Court of 16 December 1980, Case 814/79.

regulates civil and commercial disputes. For the most part, the Brussels Regulation was satisfactory, although the application procedures of some of the provisions received criticisms. This led to the implementation of some changes in the Recast version and clarified provisions in some areas that make its application clearer.

The Recast Regulation expressly precludes under Article 1(2)(a) that applies to matters relating to the legal capacity of individuals, Article 1(2)(c) social security, Article 1(2)(e) maintenance obligations arising from family relationships, parentage, marriage or affinity. It also, excludes under Article 1(2)(f) any disputes arising out or wills and succession, including maintenance obligations arising out of death.

Today, the Recast Regulation provides many jurisdictional benefits and safeguards for individuals and corporations in its scope that covers jurisdiction, the recognition and enforcement of judgements in civil and commercial matters. As a result, of this, the free circulation of judgments given in one court of a Member State should be recognised and enforced in other Member State even if it is given against a person not domiciled in a Member State under paragraph 27 of the Preamble.

The Concept of Domicile

In matters relating to the Recast Regulation, the concept of domicile has an altered meaning since the term has different connotations and rules attached to it in the various EU Member States, depending on whether it is a civil or common law jurisdiction. For instance, civil law countries define domicile as habitual residence,[5] while in common law countries like the UK, domicile is defined as an individual's "permanent residence" as Lord Cranworth acknowledges in the case of Whicker v. Hume [1858].[6]

A further conflict associated with domicile is the difference in domestic rules surrounding the concept, one illustration of this was highlighted in the matrimonial case of Mark v. Mark [2005] where it was held that an individual must at all time have a domicile and one cannot be domiciled in two countries simultaneously.[7] In contrast to that view, in some EU Member States, domicile is possible while an individual is a resident in two separate places at the same time. These examples are some of the differences that have made the traditional definition of domicile problematic amongst the EU Member States nonetheless, despite the importance placed on establishing an individual's domicile; it has no uniform definition under the Recast Regulation.

Yet, domicile remains a "key concept"[8] in the EU scheme, the connecting

[5] Nikolaos Davrados, "Nationality, domicile, and private international law revisited", <http://crime-in-Crisis.com/en/?p=133>, accessed 14 July 2018.
[6] *Whicker v. Hume* [1858] 7 HLC 124.
[7] *Mark v. Mark* [2005] UKHL 42.
[8] Trevor C. Hartley, *International Commercial Litigation Text, Cases and Materials on Private International, Law* (2nd edn, University Print House, United Kingdom 2015) 25.

element that links an individual to a particular legal system.[9] Moreover, it is clear from the emphasis placed on words like habitual and permanent that there must be a period of continuous living, which suggest more than nationality is required to prove that an individual is domiciled within a Member State. Nationality within an EU Member State will not automatically substantiate one's domicile and by extension and give the individual access to the privileges afforded under the Recast Regulation.

Likewise, in a decided case, the International Court of Justice examined this view and held that nationality is merely a bond, with reciprocal rights and duties conferred on individuals due to their citizenship and as such, it was possible to overlook nationality, since it is relevant only to that specific nation.[10] This is especially applicable to the EU, a community consisting of individual States with separate internal systems and laws and which function as a united Union.

For that reason, the general principle that makes domicile so critical to individuals under the Recast Regulation is Article 4, which affirms that unless a second forum has jurisdiction or the dispute is subject to an exclusive jurisdiction, that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

Protective Measures for Individuals Domiciled in a Member State

Therefore, when the concept of domicile is used within the framework of the Recast Regulation its precise purpose is to set out the test that courts must adhere to when applying the provisions under the law.[11] Consequently, establishing an individual's domicile is thus essential, since it underpins the key principle of the European cross-border rule outlined by Article 4(1) of the Recast Regulation.

However, it is important to note that there are special jurisdictional rules set out in the Recast Regulation that apply solely to individuals and which outline how courts within the Member States must establish a person's domicile, so they may rely on the benefits afforded by the Recast Regulation. For this reason, Article 62(1) of the Recast Regulation states:

(1) In order to determine whether a party is domiciled in the Member State […] courts seised of a matter, shall apply its internal law.

(2) If a party is not domiciled in the Member State whose courts are seised of the matter […] to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

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[9] Rafał Mańko,"Habitual residence*"*as connecting factor in EU civil justice measures", <http://www.europarl.europa.eu/RegData/etudes/ATAG/2013/130427/LDM_BRI(2013)130427_REV1_EN.pdf >, accessed 14 July 2018.

[10] *Liechtenstein v. Guatemala - Nottebohm* - Judgment of 6 April 1955 - Second Phase - Judgments [1955] ICJ 1; ICJ Reports 1955, p. 4; [1955] ICJ Rep 4 (6 April 1955), <http://www.worldlii.org/int/cases/ICJ/1955/1.html>, accessed 14 July 2018.

[11] Trevor C. Hartley*, International Commercial Litigation Text, Cases and Materials on Private International, Law* (2nd edn, Cambridge University Print House, United Kingdom 2015) 24.

Therefore, any court seised in the UK to determine an individual's domicile, must apply UK national law. As a result, UK courts will apply Section 9(2)(a) of the Civil Jurisdiction and Judgments Order (2001) (CJJO) which enforce the Recast Regulation into domestic law, and sets out the test for establishing if an individual is domiciled in the UK. In summary, an individual must be resident in the UK and have a substantial connection with the UK.[12] There is a strong presumption of this if the individual has been resident in the UK for the last three months or more according to legislation.[13] No individual can be without a domicile, even if he is a vagrant or owns multiple properties elsewhere. Accordingly, domestic legislation will take precedence when deciding the domicile of an individual resident in the UK.

Moreover, if the domicile of the individual is determined to rest within another Member State as outlined in Article 7 of the Recast Regulation, a person domiciled in a Member State might be sued in another Member State, in matters relating to tort, delict or quasi-delict if the courts where the harmful event occurred. The case of *Handelskwekerij G J Bier BV v. Mines de Potasse d'Alsace SA* [1978] illustrates this where the court had to decide on the question of where a claimant may file a claim. The court laid out that the defendant might be sued either in the courts where the damage occurred or in the courts where the contract originated.[14]

In contrast, the case of *Dunez v. Hessische Londonesbank* [1990][15] involves an indirect victim (a German businessman) and indirect harm i.e. (the claimant was not the actual victim, nor did they suffer actual harm). Although, the claimant later suffered harm due to the damage caused to the actual victim in France by the German defendant. Subsequently, the German claimant sort to rely on the provisions of the old Brussels Regulation - now Article 7 of the Recast Regulation - to claim damages in two places, where the harmful event occurred in addition, to where it may occur. The court found that the provision was valid and applicable to indirect victims and it further sustained that the place where such victims suffer the harm must be the actual place where the claimant experienced the detriment. Therefore, the claimant was unsuccessful in claiming damages in the second court. This decision settles that indirect victims, in spite of being domiciled in the Member State, do not have the full privileges under Article 7(2) of the Recast Regulation.

In addition, paragraph 13 of the Preamble of the Recast Regulation states there must be a connection between the proceedings and the territory of the Member State, unless, the dispute satisfies one of the categories under the special jurisdiction in Section 2, Article 7.

[12] Civil Jurisdiction and Judgments Order 2001, s 9(2).
[13] Civil Jurisdiction and Judgments Order 2001, s 6(b).
[14] *Handelskwekerij G J Bier BV v. Mines de Potasse d'Alsace SA*, Judgment of the Court of 30 November 1976, Case -21/76.
[15] *Dumez France SA and Tracoba SARL v. Hessische Landesbank and others,* Opinion of Mr Advocate General Darmon delivered on 23 November 1989, Case C-220/88.

In special circumstances, the Recast Regulation is called to protect the weak party in a contract and to allow claims to be submitted either in the courts of the domicile of the claimant or of the defendant. For example, under Article 18(1) of the Recast Regulation, a consumer may bring proceedings against the other party either before the courts of the Member State in which that party is domiciled, or regardless of the domicile of the other party, in the courts where the consumer is domiciled. For example, in this particular scenario, a consumer (the weak party) who is domiciled in the UK may commence legal proceedings against the other party to the contract, domiciled in France, in either English courts or in the French courts.[16] The other party to the consumer contract may only sue the consumer in the courts of the Member State where the consumer is domiciled, as outlined by Article 18(2) of the Recast Regulation. Similar provisions are found in Articles 10-16 and 20-23 of the Recast Regulation, concerning insurance and employment contracts. With respect to Article 21(1) of the Recast Regulation, employees may commence proceeding against an employer in either the Member State where the defendant is domiciled at the time the contract was concluded or where the employee habitually works or has previously worked. The rule will apply to any branches of the business if the defendant's office is not located in the Member State of the individual.[17] The term "habitual" may create challenges in cases where the claimant typically worked in various locations. In this sense, the Court of Justice of the European Union affirmed that "habitual" refers to the place where the individual routinely carries out work.[18]

Concerns

As with any new regulation, there are areas of uncertainty and this is even more valid in the context of the UK, especially given the application of Article 50 of the Lisbon Treaty - i.e. the commencement of the Brexit.[19] Consequently, individuals in the UK will cease to benefit from the Recast Regulation since the country will no longer be an EU Member State, unless some alternative is agreed between the UK and the EU.

Conclusion

Generally, the fundamental principle of establishing an individual's domicile is linked to the benefits granted by the Recast Regulation and, unless an individual can satisfy the test and prove they are domiciled in an EU Member

[16] Maebh Harding, *Conflict of Laws* (5th edn, Routledge United Kingdom 2013) 40.
[17] Maebh Harding, *Conflict of Laws* (5th edn, Routledge United Kingdom 2013) 41.
[18] *Ibid*.
[19] Jurisdiction and Enforcement of Judgments Post-Brexit: State of Play, <https://www.stibbe.com /en/news/2017/march/jurisdiction-and-enforcement-of-judgments-post-brexit-state-of-play>, accessed 14 July 2018.

State, they cannot rely on the ambit of the Recast Regulation. Particularly, in the case of the UK, any court seized to answer a question of domicile in the UK must apply UK internal laws to establish the classification of domicile.

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Territorial Scope under GDPR - Is EU legislation intend to be the first Global Law?

Sharma YOGITA [1]

Rapid technological developments and globalisation have brought new challenges for the protection of personal data.[2] General Data Protection Regulation (GDPR) came into force on 25 May 2018,[3] motivated by the development in technology and globalization, which triggers the need for a new data protection legal framework that safeguards human rights. Failure to comply with GDPR could lead to businesses facing sanctions and punishments, including fines of up to £20 million or 4% of annual turnover, whichever is greater. The article will focus on the GDPR new feature which is 'newly expanded jurisdiction,' that could impact businesses based outside the European Union (EU). This is a broad expansion of the requirements that will affect many organizations across the globe.[4] This raises a question – How GDPR will be applied internationally and what will be the implications?

This is a complex piece of legislation which will impose sanctions in jurisdictions beyond the EU, when EU citizen data protection rights are at risk.[5] However, commentators warned that the EU was in danger of overstepping its jurisdictional boundaries and, as a member of the international community, the EU is bound to observe the general principles of customary international law of jurisdiction.[6]

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[1] *LLM, University of Bedfordshire.*

[2] Recital 6 GDPR; ensuring a high level of data protection despite the increased exchange of data.

[3] REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528874672298&uri=CELEX%3A32016R0679> accessed 15 July 2018.

[4] *Jennifer Kiesewetter,* 'The EU GDPR: What To Know About The EU's General Data Protection Regulation', Forbesbrandvoice.

[5] Taylor Wessing, Territorial Scope and establishment under GDPR, <https://globaldatahub.taylorwessing.com/article/territorial-scope-and-establishment-under-the-gdpr>, accessed 30 April 2018.

[6] Gert Vermeulen & Eva Lievens,' Data Protection and Privacy Under Pressure,' Transatlantic tensions, EU Survillence,and Big Data/ Brendan Van Alsenoy,'Reconciling the (extra) territorial reach of the GDPR with Public International Law.

Article 3 of the GDPR, is the overextension of EU law to apply to the entire internet. GDPR can apply to all international organizations and businesses and this may have ramifications. Such a move will result in a framework, which is unenforceable and infringes upon principles of comity, interoperability and international law.[7] It has number of new concepts and handles a wide range of issues across different areas of law. However, this paper will focus on examining the territorial scope of the GDPR under Article 3(2) which is an important change in the GDPR.

Various measures and protocols are required to tackle the cybersecurity issues which evolve with changing technology and cyber threats globally. Recognizing this need, the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention and Resolution (CPR) and the New York City Bar Association has established a Working Group on Cybersecurity in Arbitration (the "Working Group").[8]

GDPR came into force on 25 May 2018 and it will be interesting to see how successfully this is regulation will be on an international platform.

General Remarks

Europe is now under the umbrella of the world strongest data protection rules due to the extensive General Data Protection Regulation (GDPR) that came into force on 25 May 2018. The GDPR builds upon many existing concepts in European data protection law and creates new rights for data subjects.[9] The intention of the EU legislator was to provide individuals more control over their personal information and to protect individuals' fundamental rights. The paper, thus, focuses on Article 3(2) of the GDPR, but, nevertheless, other provisions such as Article 3(1) and Recital 22 will be discussed to determine the territorial scope.

The territorial scope of the GDPR is determined under Article 3. This states that:

1) *This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.*
2) *This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*
    a) *the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or*

[7] Omer Tene & Christopher Wolf, The Future of Privacy law,' Overextended: Jurisdiction and Applicable Law under the EU General Data Protection Regulation' January 2013.

[8] ICCA, Cybersecurity Task Force, <http://www.arbitration-icca.org/media/10/43322709923070/draft_cybersecurity_protocol_final_10_april.pdf>, accessed 30 April 2018.

[9] Hintze, M. (2017). Viewing the GDPR through a De-Identification Lens: A Tool for Clarification and Compliance.

b) *the monitoring of their behaviour as far as their behaviour takes place within the Union.*

3) *This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.*

The wider scope of GDPR is inevitable. It explicitly states that data processing does not necessarily have to take place in the EU for the GDPR to apply. By adding the place of establishment of a processor in the territorial scope it has expanded its jurisdiction. This confirms that territory is the main base upon which the EU may exercise jurisdiction.[10]

Territorial Scope under GDPR

Article 3 (1) does not define the term 'establishment'. However, GDPR Recital 22 states that

'Establishment implies the effective and real exercise of activity through stable arrangements and the legal form of these arrangements, whether through a branch or subsidiary with a legal personality, is not the determining factor.'

"Establishment" was considered by the Court of Justice of the European Union ("CJEU") in the 2015 case of *Weltimmo.*[11] This case confirmed that an organisation may be "established" where it exercises "any real and effective activity even a minimal one through "stable arrangements" in the EU. The presence of a single representative may be sufficient. This results in a flexible definition of the concept of 'establishment'.[12] Although the case was decided under the EU Data protection directive (Directive 95/46/EC), most likely the concept of 'establishment' will be interpreted the same way under GDPR. International businesses having a branch or any kind of representation based in the EU would qualify as having an EU establishment and will fall under the GDPR.

Article 3(2)(a) or (b) of the GDPR extends the territorial scope as it applies to processing carried out by data controllers and data processors without an EU establishment, when the processing activities are related to 'the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union' or to 'the monitoring of their behaviour as far as their behaviour takes place within the Union'. In *Google Spain*,[13] the CJEU also

[10] Brussels Privacy Hub Working Paper, 'VOL. 2,No.6 MAY 2016, <www.brusselsprivacyhub.org/publications.html>, accessed 30 April 2018.

[11] *Weltimmo s.r.o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság*, Judgment of the Court (Third Chamber) of 1 October 2015, Case C-230/14.

[12] *Weltimmo s.r.o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság*, para 28 to 32.

[13] *Google Spain*, Judgment of the Court of 13 May 2014, Case C131-12, at paras. 42-61.

found that EU data protection law granted individuals a right to suppress search engine results against a company with an establishment in the EU, even though the servers on which the search engine operated were based in a third country and were operated by the company's parent entity, since the activities of the entities were 'inextricably linked'.[14] The businesses or entities that are not established in the EU could still fall under the GDPR if they interact with EU individuals in a way mentioned in Article 3(2).[15] The controller or processor will be subject to GDPR even if they move establishment to a third country because the relevant factor is if the business is offering goods or services to data subjects in the EU.

Furthermore, the provision is explained in Recital 23 of the GDPR which states that:

> *"In order to ensure that natural persons are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union should be subject to this Regulation where the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment. In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union."*

The provision clearly mentions that Regulation applies where the processing activities related to offering goods or services irrespective of whether connected to a payment. It does not matter if the data subject buys the goods or services. What is more relevant is the company offering goods or services in the EU territory. It can be argued, thus, that it is important to know the intention of the controller or processor. Just because company has a website that offers goods or services and processes the personal data of the visitor does not automatically mean that GDPR will apply.[16] In *Lindqvist,*[17] the CJEU held that only because the data is uploaded on an internet page and also accessible in third countries does not mean that there

[14] Christopher Kuner, 'International Organizations and the EU General Data Protection Regulation', February 2018.
[15] *Ibid*.
[16] Anni-Maria Taka, 'Cross-Border Application of EU's General Data Protection Regulation (GDPR)'.
[17] *Bodil Lindqvist* Judgement of the Court of 6 November 2003, Case C-101/01, OJ 2004 C7/3.

has been a transfer of a data to a third country.[18] However, it will be interesting to see the interpretation of the GDPR if the question is referred again to the CJEU in order to decide on the basis of intention of the controller or processor processing the personal data of the EU individuals. Nevertheless, it is very important to have a balance between the protection of personal data and the legitimate interest of the businesses operating worldwide on the internet. The application of Article 3(2) (a) of the GDPR should be reasonable and proportionate and, if it applies to all websites in the world accessible from the EU, it can have major ramifications. Therefore, it is fair to mention that 'intention' of the processor or controller targeting the data subjects in the EU should be construed proportionally.

Furthermore, in the era of rapid technology development and globalization many businesses want to be global and expand, but that does not mean that they want to target the EU individuals specifically. The question is if the website unintentionally falls under the virtue of targeting data subjects in the EU without intending to offer any good or services or monitoring the behaviour, will GDPR apply to such organizations? It is fair to state that GDPR will have a broader territorial scope which can result in legal uncertainty and unpredictability and that can undermine the objective of implementing the GDPR.

Furthermore, in Article 3(2) (b) of the GDPR, the term 'monitoring' is not defined. Recital 24 of the Regulation provides explanation as follows:

> *'The processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union should also be subject to this Regulation when it is related to the monitoring of the behaviour of such data subjects in so far as their behaviour takes place within the Union. In order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.'*

It is apparent that the companies that may fall under this provision are those conducting online tracking and, in several cases, those businesses are established outside EU. It is an important change under the GDPR that seeks to explicitly cover businesses which are into profiling customers online. It is an attempt to cover social networks, search engines and other services that are using tracking tools to monitor the behaviours of users. The businesses involved in online tracking have to make sure that their business is conducted in accordance with the GDPR rules and regulations, in order to avoid huge penalties. One may argue that in the era of rapid technology there is a necessity to have a legislation that may provide protection to personal data. The previous data protection law was implemented in 1995 and since then, the technology has developed vastly and is

[18] *Bodil Lindqvist*, paras 64 to 71.

developing rapidly and may be due to the same reason the drafters of the GDPR do not want to give any defined term which they feel may change in future.

However, despite of all the important changes, GDPR has been implemented and the enforcement issue will always be present. Territoriality is up to date one of the most nettlesome issues in the world of data protection. Every country has to respect borders and sovereignty of other States. This reflects a reciprocal duty in international law. In this matter, extraterritorial data orders could constitute an interference with the territorial sovereignty of other States.[19] Especially, in cases of internet behaviour and its global nature, courts might tend to use global remedies. Those global remedies often quarrel with laws of different countries. The principles of comity and territoriality show that the geographic limit of States' power and the actual risk of conflict of laws must be born in mind by applying the newly established rules. Particularly, in disputes with regard to internet, where numerous laws may have a connection to the conduct as where there is no clear geographic setting of the people affected.

Therefore, theories of jurisdictional rationality should be applied.[20] However, the CJEU underlined the autonomy of EU law on several occasions and it does so regardless of conflicting obligations under Public International Law.[21] As being a self-contained system, the data protection in the EU depends only on its own rules and cannot be assessed by international doctrines.[22] The GDPR does not clearly state when it is applicable in cross-border situations. Therefore, authorities and courts have to find a way to balance fundamental rights of data protection, international comity and sovereignty.

Conclusion

Article 3 of the GDPR does not provide clarity and there is a chance of extensive interpretation depending on the issues at hand. Rapid development in technology can be a big challenge when it will come to the interpretation of GDPR. However, in order to maintain the objective of GDPR, it is recommended that its interpretation should not deviate from the wording given in Article 3. If the application of the GDPR is interpreted extensively it can result in legal uncertainty. However, it will be interesting to see how the CJEU will interpret the

[19] Hogan Lovells, *European Commission and Article 29 Working Party Urge Respect for International Law in Data Cases,* <https://www.hldataprotection.com/2018/02/articles/international-eu-privacy/european-commission-and-article-29-working-party-urge-respect-for-international-law-in-data-cases/>, accessed 13 July 2018

[20] Christopher Kuner, Extraterritoriality and International Data Transfers in EU Data Protection Law, August 2015, Paper No. 49/2015 (Legal Studies Research Paper Series, University of Cambridge), p. 12.

[21] *Ibid*.

[22] E.g., center of gravity or minimum link to the other forum.

of Article 3(2). It cannot be doubted that GDPR will cross the EU boundaries, but it is yet to see the reaction of other countries where it will question its applicability. It seems that EU legislators were of the view that few countries might have weaker data protection laws or some countries might not even have any data protection law. In this sense, the application of GDPR is essential in protecting the fundamental right of EU individuals, especially in this era of rapid development in technology.

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7. Christopher Kuner,' International Organizations and the EU General Data Protection Regulation,' February 2018, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050675> accessed 15 July 2018
8. Anni-Maria Taka, 'Cross-Border Application of EU's General Data Protection Regulation (GDPR)', <http://uu.diva-portal.org/smash/record.jsf?pid=diva2%3A1127596& dswid=-283> accessed 15 July 2018.
9. Hogan Lovells, European Commission and Article 29 Working Party Urge Respect for International Law in Data Cases, <https://www.hldataprotection.com/2018/02/articles/international-eu-privacy/european-commission-and-article-29-working-party-urge-respect-for-international-law-in-data-cases/>, accessed 13 July 2018
10. Christopher Kuner, Extraterritoriality and International Data Transfers in EU Data Protection Law, August 2015, Paper No. 49/2015 (Legal Studies Research Paper Series, University of Cambridge).
11. Brussels Privacy Hub Working Paper, 'VOL. 2, No.6 MAY 2016, <www.brusselsprivacyhub.org/publications.html>, accessed 30 April 2018.
12. REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and

repealing Directive 95/46/EC (General Data Protection Regulation), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528874672298&uri=CELEX%3A32016R0679> accessed 15 July 2018.

13. Weltimmo s.r.o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság, Judgment of the Court (Third Chamber) of 1 October 2015, Case C-230/14, http://curia.europa.eu
14. Google Spain (Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González), Judgment of the Court (Grand Chamber) of 13 May 2014, Case C131-12, http://curia.europa.eu
15. Bodil Lindqvist, Judgement of the Court of 6 November 2003, Case C-101/01, http://curia.europa.eu

International legal harmonisation in theory and practice

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Legal harmonisation in international law is composed of common legislative development, consistent implementation, and uniform interpretation of legal texts across jurisdictions. These three different stages are under the authority of and subject to the influence of different state and non-state actors contributing towards a multi-dimensional concept of contemporary legal development.

The current legal harmonisation process diverges from the processes started hundreds of years ago. In the present days lawmaking and domestic implementation have become more sophisticated. A variety of methods may now be used to frame and implement uniform rules. However, the object of developing legal certainty and predictability is still the main driving force of international harmonisation efforts. The work of legal harmonisation nowadays encompasses a large number of bodies - both governmental institutions and private sector representatives.[3]

States, as primary actors of international law, develop and ratify treaties to regulate international relationships, with input from NGOs and industry lobbying groups representing public and private interest. Legal harmonisation can then occur at a domestic, regional, or international level, as states commit to respect and enforce the particular rights and obligations envisaged by the treaties, implementing international law and ensuring that their domestic law is compatible with the international regulation.[4] However, the potential of domestic courts to implement and enforce international norms in accordance with their intended purpose has remained largely divergent,[5] challenging the success and efficiency of legal harmonisation efforts. In any country, the judiciary is one of the most important

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[4] Abbott, Kenneth W., and Duncan Snidal, *"*Hard and soft law in international governance. *"International organization* 54.3, 2000, pp. 421-456.
[5] Alam, M. Shah, *"*Enforcement of International Human Rights by Domestic Courts in the United States. *Annual Survey of International & Comparative Law* 10.1, 2004, p. 3.

institutions discharging the protective responsibility of legal rights of the state and its citizens in the international arena, and implementation of international law at that level is often inconsistent with the intended harmonisation purposes.

This paper will analyse the first two stages of legal harmonisation, namely legal development and implementation, on one hand from a theoretical, and on the other hand from a practical perspective mainly through the lens of the work done by the UNCITRAL in harmonising international trade law. This paper will theorise on the possible reason behind the challenges faced by the harmonisation efforts and propose a potential solution in the form of an independent, neutral platform to serve as a bridge between the different actors influencing the process at these different stages. While divergent interpretation is also a significant challenge for practical legal harmonisation, the role of the judiciary and case law remains outside the scope of the present paper, to be analysed in a separate publication.

Developing legal texts towards harmonisation of international trade regulation

Due to rapid globalization and regional integration, the development of international trade law and the international organizations dealing with private and commercial law are facing a range of challenges.[6] The driving force behind the phenomenon of globalization is not governmental policy but private initiative, such as expanding markets; global competition; increasing mobility of individuals, companies, goods, services, and capital; and developing of means of communication and instant sharing of information through the media and the Internet.[7] The result is a variety of new international legal issues not only between states, but also between private and commercial parties, usually involving the legal systems of more than just one jurisdiction.

The impact of globalization on private international law constitute a particular subject that has been widely researched by scholars,[8] but has not always been within the scope of international organisations established to harmonise international law. Initially, private commercial law and especially investment law were not within the focus of the United Nations (UN), the main purpose of which

[6] Rodrik, Dani, *"*How far will international economic integration go?*"Journal of Economic Perspectives* 14.1, 2000, pp. 177-186.

[7] Brown, Tony, *"*Challenging globalization as discourse and phenomenon.*"International Journal of Lifelong Education* 18.1, 1999, pp. 3-17.

[8] Basedow, Jurgen, *"*Worldwide harmonisation of private law and regional economic integration-General report.*"Unif. L. Rev. ns* 8, 2003, p. 31; *See* Bazinas, Spiros V, *"*Harmonisation of international and regional trade law: The UNCITRAL experience.*"Unif. L. Rev. ns* 8, 2003, p. 53; *See also* Kronke, Herbert, *"*UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions.*"Unif. L. Rev. ns* 8, 2003, p. 10; *See also* Andersen, Camilla Baasch, *"*Defining uniformity in law.*"Unif. L. Rev. ns* 12, 2007, p. 5.

in the legal sphere was the development of public international law.[9] However, later it became obvious that to foster balanced relations among states, decrease poverty and promote the economic prosperity of the nations of the world, the UN needed to advance the rule of law among nations as well as trade, as an important principle of international peace and stability.[10] Therefore, it was important to provide countries, in particular developing ones, with the legal tools to involve them in the productivity of international or domestic trade, and international investors to protect their interests and investments in such countries. Accordingly, the UN recognised that for trade to prosper, countries ought to have laws that support contemporary contract practices and ensure the rule of law and contract discipline in commercial transactions.[11]

In the early 1960s, UN Member States considered the drafting of rules regulating international trade which could benefit from the different contributions of countries with diverse legal, social and economic systems. The result of that consideration was the creation of the UN Commission on International Trade Law (UNCITRAL). Since that time, UNCITRAL has become the core legal body within the Organization in the area of international trade law,[12] leading the harmonisation of international trade law globally through a concentrated effort. The formation of UNCITRAL was a significant step toward the unification and harmonisation of international trade law,[13] one of its most visible successes being in the harmonisation of arbitration laws.[14]

The area of dispute resolution and arbitration has famed UNCITRAL in many circles of international commercial practice.[15] UNCITRAL is the legal body behind encouraging business entities and investors to make use of alternative dispute resolution (ADR) to remove barriers created by state court proceedings based on domestic codes of civil proceedings. As major texts, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules are a good example of promoting a particular

[9] Teubner, Gunther, *"*Global Bukowina: legal pluralism in the world-society", 1996.
[10] Von Glahn, Gerhard, and James Larry Taulbee, *Law among nations: an introduction to public international law*. Routledge, 2017.
[11] One of the first efforts of the UN in the area of trade law was the negotiation in 1958, on the initiative of the International Chamber of Commerce, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
[12] Sono, Kazuaki, *"*UNCITRAL and the Vienna Sales Convention.*"The International Lawyer,* 1984, p. 7-15; *See also* Honnold, John. *Uniform law for international sales under the 1980 United Nations Convention*. Kluwer law international, 2009.
[13] Horvath, Eva, *"*A Handy Tool for the Settlement of International Commercial Disputes.*"Penn St. Int'l L. Rev.* 27, 2008, p. 783.
[14] *Ibid*.
[15] Dezalay, Yves, and Bryant G. Garth, *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1996.

dispute resolution mechanism and shaping public acceptance of the system by providing world-wide legal recognition to it. The New York Convention has boosted the acceptance and practice of commercial arbitration by creating a global legal framework recognising arbitration as a valid dispute resolution method and the resulting awards as legally binding and enforceable across jurisdictions. As there are currently 159 member states to the Convention[16], the uniform legal framework created by the success of the Convention naturally leads to an undisputed success of arbitration as well. Similarly, the Arbitration Model Law is recognized as a major source for procedural harmonisation because it is an international instrument that has been adopted by a great number of countries[17] and its rules are ingrained in the international arbitration community and the image of real arbitration practice. Its main goal is to provide a fair and efficient framework for international dispute resolution.[18] A similar success story is currently being developed for mediation through the development of 'instruments on enforcement of international commercial settlement agreements resulting from mediation',[19] demonstrating that legal harmonisation is both the cause and the effect of practical developments in a field.

Divergence among various domestic procedural regulations is a source of insecurity and indeterminacy in international commercial disputes, which justifies the UN's movements toward harmonisation in this field.[20] International bodies such as the UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), The Hague Conference and others are called upon to form legal structures that allow for a necessary coordination between legal systems and interaction among courts and other governmental organs, for an effective legal harmonisation. These structures are necessary, first, because there is a rising demand to remove legal barriers arising from the present blend of state-based private and commercial legal systems, and second, because they are needed to protect values and interests at jeopardy, such as cultural property. International institutions and organizations are indispensable in building stepwise worldwide international commercial and private law, thus creating a global legal frame or structure that provides important commercial and personal protection.

[16] As of July 2018 – *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY Convention_status.html

[17] As of July 2018, 80 states are considered to be 'Model Law countries' – *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

[18] General Assembly Resolution 40/72 (11 December 1985) Recital 4; General Assembly Resolution 61/33 (4 December 2006) Recital 5.

[19] See UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session (New York, 5–9 February 2018), A/CN.9/934, available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

[20] For example, the UN General Assembly adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958.

Dynamic communication by UNCITRAL with the UN Member States, while not limited to official tasks but stretched to include an agreed list of specialists and academics in the subject areas involved, can create a very valuable network of information exchange, bridging regional differences. Regional integration is in some measure a demonstration of globalization because the intensity of expanding markets and mobility naturally penetrate neighbouring countries even more than remote countries.[21] However, regional integration is also an endeavour to return some measure of governmental regulation and control, and indeed a new common regional individuality, to emerging societies and markets. Considering the nature of the forces at the function, this certainly heads to regional activity in private and commercial law. Such kind of activities can be observed in all regions of the world, from Asia to Africa and from Europe to Latin America, and consequently, the relationship between regional and global rulemaking is becoming a global issue and becoming a key issue for all organizations.

The Hague Conference may be a good example of the impact of European integration[22] on its techniques and methods of rulemaking, and even on its institutional framework.[23] The challenge of globalization and integration for the relevant stakeholders is to work towards the correct balance between three scales of lawmaking and law implementation: national, regional and global. Where possible, solutions for global issues are discussed and disputed at the global scale, although there should be versatility to permit for extra legislative activity at the national and the regional scales.[24] Global law-making is, however, only one aspect of creating a harmonised legal framework to effectively support predictability and efficiency in trade. The effective implementation at domestic level of the instruments developed at international level can just as equally 'make or break' the effort of any such harmonisation.

Implementing harmonised legislation

International conventions and treaties are considered as the main mechanism for the international unification of domestic private law,[25] together with model laws and legislative guidelines. However, it is not an easy process to implement those conventions and treaties into the domestic system. The process of ratification, depending on whether the country has a monist or dualist system, may

[21] Mittelman, James H, *The globalization syndrome: Transformation and resistance*. Princeton University Press, 2000.

[22] European integration is the process of industrial, political, legal, economic, social and cultural integration of states wholly or partially in Europe.

[23] Shore, Cris, *Building Europe: The cultural politics of European integration*. Routledge, 2013.

[24] For example, Hague conventions consistently provide for respect for legal pluralism, whether based on territorial or personal standard, at the national scale.

[25] Franck, Susan D, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*."Fordham L. Rev.* 73, 2004, p. 1521.

entail several formal stages, involve numerous authorities and sometimes take several years to complete, which in turn leads to an extended provisional period between the ratification of international conventions or treaties and their entry into force and actual domestic implementation.[26] International law does not prescribe how any country binds itself to treaties or conventions. Each nation decides what steps are necessary for that to occur. Some countries' law provides that treaties or conventions can become binding without legislative action.[27] When this mode of implementation is used, there is no place for state law.

UNCITRAL became very successful in promoting harmonisation among states who understood that harmonisation and unification of international trade law involves a high level of specialized skills and dynamic negotiations, which UNCITRAL mastered effectively by welcoming international non-governmental organizations and non-state actors with relevant skills and knowledges during the negotiations.[28] However, it was not enough to reach uniformity through a convention that might be ratified by states, as harmonisation faces difficulties when the states resist to ratify international instruments touching upon their familiar domestic procedure law. Many jurisdictions are facing the same challenges.

International organizations do not have the power to legislate. Representatives of members taking part in international negotiations have personal and diplomatic commitments to each other that they will try to have final proposals implemented, but the success of proposals for international law necessarily depends upon what happens when the proposals are taken up domestically. Each national legal system determines, in its own way, the manner of implementation of international agreements. The situation of the countries is similar in many respects, where lawmaking authority is divided between a central government and the governments of smaller territorial units.

Implementation occurs at two stages. At a formal level, an international or uniform text is implemented when States adopt it through ratification or enactment into domestic legislation. At a practical level, implementation occurs when those standards and texts are taught to students, used by practitioners and applied by courts. The legal harmonisation work of a drafting agency, therefore, does not end with the finalisation and adoption of a text, but includes raising awareness of it and promoting its correct implementation.[29] In addition,

[26] Chinkin, Christine M, *"*The challenge of soft law: development and change in international law.*"*International & Comparative Law Quarterly 38.4, 1989, pp. 850-866.
[27] Reitz, Curtis R, *"*Globalization, International Legal Developments, and Uniform State Laws.*"Loy. L. Rev.* 51, 2005, p. 301.
[28] Rubino-Sammartano, Mauro, *"*Developing Countries vis-a-vis International Arbitration.*"J. Int'l Arb.* 13, 1996, p. 21.
[29] Jose Angelo Estrella Faria, Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage, 14 Unif. L. Rev. 5, 2009.

international conventions are not flawless,[30] and with the harmonisation process itself full of difficulties, they become an easy target for disapproval by domestic readers. The ultimate end users of international texts are educated and familiar with their own domestic laws and therefore, might highlight the advantage of domestic law over the creation of international discussions and conferences,[31] which may effectively frustrate the harmonisation process. International conventions and treaties are also difficult to amend in cases needing accommodation to economic change or development of practice or technology.[32] Even after amendments are agreed upon, another problem may arise when amending protocols may not be ratified by all the original signatory States, resulting in a complex patchwork of Contracting Parties.[33]

Accordingly, problems in formal implementation have two main sources: low acceptance of uniform texts at the domestic level, and insufficient coordination in foreign assistance to domestic law reform. With regard to the first impediment, one must recognise that uniform law instruments typically attract little political interest. Their main purpose being to facilitate the business activities to which they relate, uniform instruments in the private law area are not typically treated as a priority for domestic adoption. Furthermore, as States usually act according to the principle of reciprocity and only move forward on certain matters after other key partners have moved in the same direction, international conventions may take several years to enter into force or be ratified by a sufficiently significant number of a countries.[34]

Foreign assistance to domestic law reform is another area where lack of co-ordination is leading to repeated problems at the implementation level. Since the end of the cold war and the shift back to capitalism in the former Soviet Republics and Eastern European countries, there has been an incredible growth in international assistance to modernisation of domestic laws, either within the framework of bilateral assistance programmes (such as USAID and its various counterparts in industrialised countries) or under the country assistance programmes of multilateral financial institutions (such as the World Bank, the International Monetary Fund or the regional development banks). For several years now, the activities of these institutions have extended well beyond financing

[30] Farnsworth, E. Allan, *"*Unification and Harmonization of Private Law.*"Can. Bus. LJ* 27, 1996, p. 48.
[31] Hobhouse, J.S, *"*International conventions and commercial law: The pursuit of uniformity.*"Law Q. Rev.* 106, 1990, pp. 530-534. The future of harmonisation of contract law, for instance, will consist of *"*some kind of interaction between the binding law of international conventions or directives/ordinances on the one hand and the new phenomenon of Principles of Contract Law on the other hand".
[32] Rosett, Arthur, *"*Unification, harmonization, restatement, codification, and reform in international commercial law.*"Am. j. Comp. L.* 40, 1992, p. 683.
[33] A.O., Alan, D. Rose, *"*The challenges for uniform law in the twenty-first century.*"Uniform Law Review-Revue de droit uniforme* 1.1, 1996, pp. 9-24.
[34] *Ibid.*

traditional projects (infrastructure, health, education) to cover also the modernisation of various elements of the legal system of the receiving countries. Assistance to law reform has often included assistance to the preparation of draft legislation on commercial and business law matters, such as arbitration, company law, public procurement, bank guarantees, or carriage of goods.[35] Ultimately, successful co-ordination depends on persuading the organisations involved of the advantages of co-ordinating the substantive aspect of their assistance to domestic law reform with the work of international formulating agencies. It is not surprising, therefore, that the ultimate success of legal harmonisation is very much dependent on the harmonisation of the various roles the different stakeholders and active actors play in the legal harmonisation effort.

Harmonising the role of the actors influencing legal harmonisation

The important challenge for legal bodies like the UNCITRAL is to inform the society worldwide that all negotiated multilateral instruments such as conventions, principles, model laws and legislative directives in the area of commercial law, of judicial cooperation, of access to justice and dispute resolution in civil and common matters exists to cater for global needs.[36] For this reason, the need for cooperative work of the organizations, multilateral institutions and regional organizations such as MERCOSUR[37] and OHADA,[38] is vital to provide information on these instruments in order to assist with implementation and application of international instruments.[39]

From an institutional point of view, it is important to also consider the role of the private sector in the harmonisation of laws. The usefulness of standard clauses and contract terms in the creation of a "common language of international trade" is well-known. The International Chamber of Commerce (ICC) and other, similar institutions have made a remarkable contribution in this field. Most formulating agencies have, over the years, maintained a very good level of co-operation with the ICC and non-governmental organisations in general, and they have often participated in the work of intergovernmental bodies. However, an exchange of ideas out of the formal context of intergovernmental meetings, in the form, for instance, of more or less periodic briefings with the private sector, could

[35] *Ibid.*
[36] Gabriel, Henry Deeb, "Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference, THe."Brook. J. Int'l L. 34, 2008, p. 655.
[37] MERCOSUR is a South American trade bloc established by the Treaty of Asunción in 1991 and Protocol of Ouro Preto in 1994.
[38] Organisation for the Harmonization of Corporate Law in Africa (OHADA) is a system of corporate law and implementing institutions adopted by seventeen West and Central African nations in 1993 in Port Louis, Mauritius.
[39] Deeb *op.cit.*

be explored further. Consultations of this type might offer a meaningful forum for identifying practical needs for further harmonisation and devising the best ways to approach them, beyond the development of 'soft law' materials originating exclusively from the private sector. The pursuit of harmonisation has traditionally focused on transactions that take place entirely or primarily in the international sphere. It has not yet fully plumbed the depths of the need for domestic law reform in transition economies and developing countries.

It is true that the classical reading of the mandate given to formulating agencies would limit their activities to harmonising private law at the international level, rather than to modernising domestic private law. A more constructive and forward-looking interpretation, however, would enable formulating agencies, where appropriate, to promote the modernisation of the law of particular groups of States in need of special assistance. In the same way that awareness of economic impact may strengthen the case for legal unification and harmonisation, the consistent integration of economic analysis in the harmonisation process enhances the role of formulating agencies in promoting domestic legal reform.

Greater attention to law reform, as distinct from classical legal harmonisation, may open up a broad range of substantive areas of future work for UNIDROIT as well. In principle, this would preferably include instruments "based solely on commercial considerations and not in need of universal acceptability".[40] The model law on leasing and the proposed legislative guide on trading in securities in emerging markets are examples of projects that fit well in this innovative line of work.

The legal harmonisation process also faces an imprecise idea that it is a purely theoretical process, poor of practical value and in due course followed only for the glee of academics or the researchers.[41] In the mix of such misconceptions and procedural challenges at both drafting and implementation stages of the process, neutral organisations could play the catalyst that enhances communication and provides a bridge between governmental, non-governmental, academic and private entities, acting as a platform where the differing approaches and perceptions can effectively work together towards a unified effort of legal harmonisation.

One such entity has been established and is successfully functioning in Australia since 2013. The UNCITRAL National Coordination Committee for Australia (UNCCA) is a private initiative, grassroot-like organization created with the endorsement of the UNCITRAL, to bring together the academic, private sector, judiciary and government stakeholders working in the field of international trade law within Australia. Built on the voluntary contribution of its fellow members, UNCCA secures an ongoing dialogue between these otherwise isolated

[40] Kronke, Herbert, *"*Which Type of Activity for Which Organization-Reflections on UNIDROIT's Triennial Work Programme 2006-2008 in Its Context.*"Unif. L. Rev. ns* 11, 2006, p. 135.
[41] Kronke, Herbert. *"*Methodical freedom and organizational constraints in the development of transnational commercial law.*"Loy. L. Rev.* 51, 2005, p. 287.

segments through conferences, seminars and lectures, and the establishment of so-called Expert Advisory Committees (EACs) researching and formulating policy recommendations in areas of law currently in work at the UNCITRAL. The organization is also actively contributing to the presence of Australia at the UNCITRAL by sending delegates to the sessions of all six Working Groups.

While policy documents and input into the legislative developments at UNCITRAL are within the sphere of control of government bodies, private practitioners and academics have much to contribute to the development of harmonised trade laws both regionally and globally. UNCCA now provides the vehicle for those interested and capable to participate in that contribution in key UNCITRAL areas. By sending delegates as observers to the UNCITRAL Working Group sessions, UNCCA fellows are also able to directly contribute to the development of legal harmonisation instruments, investing a much larger sphere of expertise into the process than otherwise available exclusively from the relevant government agencies. As a neutral platform sitting at the crossroad between private and public sector and academia, UNCCA is also capable of avoiding and even diffusing the tension between conflicting political and personal agendas potentially tainting the collaboration of the relevant stakeholders. The first of its kind globally, the UNCCA model has since been replicated through similar National Coordination Committees in India and Japan, with the prospect of more to follow. The successes of the past four years demonstrate that this innovative type of organisation gathering unbiased brain power in an independent environment can successfully serve the ultimate goal of legal harmonisation free of political and industry lobbying. Whether the structure can withstand the challenges common to all private organisations dependent on voluntary contributions and collaboration is something for the coming years to tell.

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The place and role of Romania in the European Union

Nicoleta DIACONU[1]

Abstract

Romania's relations with the European Union have been carried out in several stages, embracing different legal forms, evolving from simple trade collaboration to Romania's integration into the European Union.

The integration of Romania into the European Union, started at the moment of accession, is a complex process, with a specific national character, which implies the economic, legislative, institutional adaptation in relation to the European exigencies.

The complexity of the integration process is influenced both by the general dynamics of the European Union and by the transformations of the Romanian society.

Keywords: *Cooperation; negotiation; accession; Integration; European Union*

1. The evolution of the trade agreements between Romania and the European Communities

➲ The first official relations between Romania and the European Economic Community were established in 1967, consisting in concluding sectoral agreements on agri-food products, which included the exemption of Romanian products from additional taxes, as well as the obligation of the Romanian party to respect a certain price levels on the Member States' market.

In 1974, the two sides signed an agreement by which Romania was included in the Generalized System of Preferences of the European Community.

➲ A Commercial Agreement was concluded in 1980, which was subsequently suspended by the Communities, due to a violation of democratic principles by the communist power system. The legal nature of this agreement was specific to the classical sources of public international law, being put into practice in the general forms provided by the law of the Treaties.

➲ A new Trade and Cooperation Agreement was signed in 1991, following the changes in the political-legal system in Romania.

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The agreement marks a qualitative leap in the diplomatic relations between Romania and the European Communities. This agreement foresees the future legal approximation between Romania and the European Communities.

Although this agreement falls into the category of classical sources of public international law, it nevertheless marks the shift to more in-depth cooperation, specific to European Union law, given that since January 1991, Romania benefited from the PHARE program, received technical and financial support in the most important areas of the economy.

Romania started diplomatic relations with the European Community in January 1990, accrediting an ambassador in addition, and the European Commission opened its first delegation in Bucharest in September 1993[2].

2. The European Agreement establishing an Association between Romania, of the one part, and the European Communities and their Member States, of the other part

➲ The European Association Agreement with Romania, which entered into force on 1 February 1995, was signed on 1 February 1993.[3] The agreement establishes a framework conducive to political dialogue and includes provisions on economic, social, financial, and cultural cooperation.

Economic provisions establish the establishment of a free trade area through the phasing out of all tariff and non-tariff barriers to trade in a 10-year transition period. The creation of the respective free trade area is achieved through concessions agreed by parties that have an asymmetric character as a result of the removal of its obstacles by the EU during the first part of the transition period, and by Romania in its second part.[4]

The institutional provisions contained in Title IX of the Agreement establish:

- Establishment of an Association Council consisting of members of the Government of Romania and members of the Council and of the European Commission; (having the right of decision).

- Establishment of a Parliamentary Association Committee - composed of members of the Parliament of Romania and of the European Parliament (having consultative powers).[5]

The European agreement is part of a specific category of agreements concluded by future candidate countries to join the European Union - the "Europe

[2] *"Romania - 10 years in the European Union"*- report IER 2017, Authors: Gabriela Drăgan (coord.), Oana Mocanu, Bogdan Mureşan, Eliza Vaş, Mihai Sebe, Global Print BDV SRL, www.tipografia-global-print.ro/, p. 5.

[3] Ratified by Romania through the Law 20/6 April 1993.

[4] http://www.dce.gov.ro/Materiale%20site/Acordul_european_01[1].03.06.html

[5] Following the signing of the Association Agreement, Romania accredited an ambassador to the EU in Brussels, and the European Commission opened a Delegation in Bucharest in September 1993.

Agreements". As a legal nature, these agreements have a hybrid form of presentation, bringing together both public international law and specific EU law provisions. Thus, the Europe Agreements largely retain the features specific to international law, but it establishes for the signatory states a series of obligations with an integrating character, specific to the law of the European Union.

The Copenhagen European Council (June 1993) sets out a series of economic and political criteria for accession, known as the Copenhagen criteria, according to which, in order to become a member of the EU, a candidate country had to fulfill a number of conditions, namely:

- stable institutions guaranteeing democracy, the rule of law, respect for human rights and the protection of minorities;
- a functioning market economy;
- the ability to assume the obligations of a Member State;
- the capacity and the obligation to transpose Union law into the national legal order.

3. Accession negotiations

➲ On 22 June 1995, Romania submitted its application for EU membership.

At the Luxembourg European Council meeting in December 1997 it was decided that Accession Partnerships are the key factor of the pre-accession strategy and will mobilize all forms of assistance to candidate countries in a single framework.

The Commission has decided to implement the Accession Partnership following consultations with Romania on the basis of the principles, priorities, objectives and conditions set by the Council.

Implementation of the Accession Partnership is controlled by the European Commission in the framework of the implementation of the Association Agreement.

In the Opinion that the Commission submitted to the Council in July 1997, according to Art. 0 of the Maastricht Treaty recommended that accession negotiations with Romania be started when it will make sufficient progress in meeting the conditions for becoming a member of the EU as defined in Copenhagen by the European Council.

➲ The accession partnership begins in 1998.

In 1999 the Romanian Government submitted to the Commission the National Program for Accession to the European Union. The European Council meeting in Helsinki in December 1999 recommends opening accession negotiations with Romania.

➲ Romania's accession negotiations with the European Union were officially opened in February 2000 at the Intergovernmental Conference for EU Accession and closed in 2004.

4. Accession

➲ On 22 February 2005 the Treaty of Accession of Romania and Bulgaria to the European Union was signed.

➲ Since 1 January 2007 Romania and Bulgaria have become EU Member States.

Romania's Treaty of Accession to the European Union is common to Bulgaria's accession and is the full result of the negotiation process of the 31 chapters. This treaty was drafted on the basis of the same principles and the same working method used in drafting the Treaty of Accession of the ten new Member States.

Unlike the ten Member States that joined on 1 May 2004, in the case of Romania and Bulgaria, the Accession Treaty also provides for the possibility of joining the Treaty establishing a Constitution for Europe if it had been ratified by all States Member States until the effective accession of Romania and Bulgaria. Consequently, given that the Treaty of Accession of Romania and Bulgaria had to contain the necessary adaptations to the Treaty establishing the Constitution for Europe, an Accession Act and an Accession Protocol were drafted in parallel.

The Act of Accession provides for an alternative entry into force of the Act and the Protocol, subject to the entry into force of the Treaty establishing a Constitution for Europe. Thus, if the Treaty establishing a Constitution for Europe had come into force before the accession of Romania and Bulgaria (1 January 2007), the Accession Protocol would have been directly enacted. However, given that the Constitutional Treaty did not come into force, the Act of Accession came into force at the time of their accession.

The Act of Accession includes the amendments brought about by the accession of Romania and Bulgaria to the European Union to the Treaties in force at present: the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community (EURATOM). The Accession Protocol adapts the Constitutional Treaty to make it possible for Romania and Bulgaria to join this document. The Act and the Protocol are, in principle, identical (the reference to the texts of the European Constitution, respectively the Treaty establishing the European Community and the Treaty on European Union differ only).

Romania's accession has also been accompanied by a series of monitoring measures set up to prevent or remedy shortcomings in the fields of food safety, agricultural funds, judicial reform and the fight against corruption.[6]

Regarding judicial reform, a cooperation and verification mechanism has been established to improve the functioning of the legislative, administrative and judicial system and to address serious shortcomings in the fight against corruption.[7]

[6] Report from the Commission to the European Parliament and the Council on the evolution of accompanying measures in Romania after accession, COM (2007) 378 final, Brussels, 27 June 2007, available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ. do? uri = COM: 2007: 0378: FIN: EN: PDF.

In the short term, the impact of Romania's EU accession has been consistent with the reforms, measures and policies promoted by the Union in each of the three major economic sectors.[8] In the medium term, the impact of accession implies raising the standard of living and economic re-establishment of Romanian society.

5. The integration and future of the common European

The integration of Romania into the European Union, started at the moment of accession, is a complex process, with a specific national character, which implies the economic, legislative, institutional adaptation in relation to the European exigencies.

The complexity of the integration process is influenced both by the general dynamics of the European Union and by the transformations of the Romanian society.

The European Union is currently experiencing a difficult historical moment, marked by political and economic crises and uncertainties.

On March 1, 2017, European Commission President Jean-Claude Juncker presented a White Paper on the Future of Europe, which proposes five scenarios on how the Union could show in 2025.[9]

At national level, we find social and political tensions, the lack of a national consensus on the main directions of national economic development.

In the attempt to adapt to European standards, all economic, social, political, civic elements have seen a new dynamic. The transformation of Romanian society is also influenced by the need to introduce a European dimension in the field of public administration, in line with the values of the European administrative space.

Integration involves going through several stages of economic, social and political integration:[10]

- customs union - consisting in the free movement of goods and the adoption of a common customs tariff and the exercise of a common commercial policy towards third parties;

- the common market - which involves three more elements in addition to the free movement of goods, namely the free movement of persons, capital and

[7] Conclusions of the Council of Ministers, 17 October 2006 (13339/06); Commission Decision establishing a mechanism for cooperation and verification of progress made by Romania with a view to achieving specific benchmarks in the field of judicial reform and the fight against corruption, 13 December 2006 (C (2006) 6569 final).

[8] Lucian-Liviu Albu (Coord.), Radu Lupu, Adrian-Cantemir Călin, Oana-Cristina Popovici, *The Impact of Romania's Accession to the European Union on the Romanian Economy. Sectoral analysis (industry, agriculture, services, etc.)*, IER, Bucharest, 2018, p. 144; http://www.ier.ro/sites/default/files/pdf/SPOS_2017_Studiul%201_FINAL.pdf

[9] The European Commission's White Paper on the Future of Europe, available at: https://ec.europa.eu/commission/sites/beta-political/files/cartea_alba_privind_viitorul_europei_en.pdf.

[10] Nioață Roxana Mihaela, Nioață Alin, *"*Economic Dimension of Romania's Integration in the European Union*"*http://www.utgjiu.ro/revista/ec/pdf/2007-01/33_Nioata%20Roxana%20Mihaela.pdf, p. 181

the freedom of establishment of businesses throughout the common market;

- economic union - in addition to the principles of the common market, requires the harmonization of national economic policies in order to strengthen their coherence and efficiency;

- economic and monetary union or total economic integration - involves the unification of monetary, fiscal, social and conjunctural policies.

The Romanian economy has developed with the help of the European Structural Funds, which have had a positive impact on society as a whole.[11]

Between January and June 2019 Romania will take over the Presidency of the Council of the European Union, having the opportunity to affirm itself in the general policy of the Union.[12] The holding of the Presidency of the European Council by Romania takes place in a complex European context, taking into account the future perspectives of the European Union. Romania has the mission and the opportunity to express its belonging to European values and to support the evolution and integrity of the European project.

Romania is working to strengthen European integration, its principles and values, in order to maintain the intergenerational character of European construction, allowing the unprecedented challenges the Union is facing through joint, consensual efforts.[13]

The European Union must find the best solutions to meet the economic and political challenges it faces. In this respect, greater involvement of Member States in finding consensual solutions, as well as better co-ownership and accountability of European citizens, is needed.

[11] http://www.fonduri-ue.ro/images/files/comunicate/2015/15.12/Alocari.programe.2014.2020

[12] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1316&from=EN. The Member States holding the Presidency work in groups of three, called "trioules". This system was introduced by the Treaty of Lisbon in 2009. The trio in which Romania holds the Presidency consists of: Romania (January-June 2019) Finland (July-December 2019) and Croatia (January-June 2020). The Trio establishes long-term goals and prepares a common agenda, determining the topics and major issues to be addressed by the Council over an 18-month period. Based on this program, each of the three countries is preparing its own program, in more detail, for 6 months.

[13] "Romania - 10 years in the European Union"- report IER 2017, Authors: Gabriela Dragan (coord.), Oana Mocanu, Bogdan Muresan, Eliza Vas, Mihai SebeGlobal Print BDV SRL, www.tipografia-global-print.ro/, pag. 33.

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5. eur.lex.ro.

The most recent revision of the VIAC Rules of Arbitration and Mediation

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1. Introduction to arbitration, mediation and other alternative dispute resolution (ADR) methods

A dispute can be resolved by state jurisdiction, arbitration, or other alternative methods e.g., mediation, conciliation or direct negotiations.

Arbitration is an alternative form of dispute resolution, where the parties agree that the dispute will not be decided by a state court, but rather by a sole arbitrator or panel of arbitrators.[1] Parties may agree upon ad-hoc arbitration or institutional arbitration; in the latter case the competent institution will administer the arbitral proceedings according to its (the agreed) set of rules (including the cost provisions), will act as appointing authority and provide administrative services to the parties and arbitrators.

Mediation and conciliation are alternative forms of dispute resolution supported by a neutral third party (mediator, conciliator). Both in mediation and conciliation proceedings, the third-party neutral supports the parties in the resolution of their dispute whereas the ultimate decision to agree on the settlement remains with the parties.

In comparison to state court proceedings, commercial arbitration may be faster and less expensive, and offers a higher degree of confidentiality. Furthermore, parties are able to shape the proceedings to a great extent (e.g., language, seat of arbitration, applicable law and the arbitrators) to the need of the parties involved. The final decision is an arbitral award, which is effective and enforceable in the same way as a judicial decision (court judgment). The award becomes binding upon service to the parties. Thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("NYC"), an award is recognised and enforceable in most countries worldwide, which is of great advantage in international business.[2]

[1] VIAC, *What is arbitration?* http://www.viac.eu/en/arbitration (last accessed 22 August 2018).
[2] VIAC, *What is arbitration?* http://www.viac.eu/en/arbitration (last accessed 22 August 2018).

2. Overview of the Austrian arbitration law

The most important statutory provisions of the Austrian arbitration law are contained in Sections 577-618 of the Austrian Civil Procedure Code ("ACCP"). In 2002, a Reform Commission prepared a first draft for a new Austrian arbitration law, based on the UNCITRAL Model Law on International Commercial Arbitration ("ML"). The new arbitration law ("SchiedsRÄG 2006") entered into force on 1 July 2006 and applies to domestic and international arbitration likewise.

It is seen as another milestone that the Austrian legislator in 2013 adopted a significant change to the Austrian arbitration law: as of 1 January 2014, if the place of arbitration is in Austria, for claims to set aside an arbitral award (and for actions for declaration of existence or non-existence of an arbitral award as well as for proceedings concerning the constitution of the arbitral tribunal such as challenge proceedings against an arbitrator) the Austrian Supreme Court acts as first and final instance (Sec 615 ACCP). This unique feature ensures swift and high-quality decisions and further foster Austria's position as a leading venue for international arbitrations (in Europe, only Switzerland has a comparable one-instance annulment procedure to the Swiss Supreme Court).

There are no special courts dealing with arbitration matters in Austria; legal assistance is usually provided by the district court in whose district the arbitral tribunal has its seat. If the seat of the arbitral tribunal has not yet been determined or if it is not in Austria, the Commercial Court of Vienna shall have jurisdiction. Vienna is frequently chosen as a place for arbitration and was ranked no 6 in a recent ICC survey[3] on the most prominent seats for arbitral proceedings. Austria has ratified both the NYC (ratified on 2 May 1961; Austria has withdrawn the reciprocity reservation on 25 February 1988; no other reservations have been made) and the European Convention on International Commercial Arbitration 1961 in Geneva (ratified on 6 March 1964), and is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ("Washington Convention", ratified on 25 May 1971).

The place of arbitration has manifold consequences as the parties thereby stipulate the legal framework in which the proceedings are embedded. According to Art. 25 Vienna Rules, in absence of a choice by the parties, the place of arbitration is Vienna. This fall-back provision is especially important in cases where parties were unable to decide or simply have forgotten to choose the place of arbitration or deliberately left it open. It ensures predictability and enables parties to conduct their arbitration in an arbitration-friendly environment. The fact that Austrian arbitration law and Austrian courts have always been arbitration friendly is widely known.[4]

[3] ICC, *Places of Arbitration*,. ICC Bull. 2015 (2), p. 14.

[4] A. Fremuth-Wolf, *Austria as a place for arbitration, new developments at VIAC in 2017 and outlook for 2018,* Russian Arbitration Association Annual Rep. 2017-2018, RAA, Moscow, 2018, p. 48.

3. Introduction to VIAC

a. Institutional history and organizational framework

Until 1974, the various Regional Economic Chambers of the nine Austrian federal provinces handled mostly national cases with their permanent arbitral tribunals under their uniform Arbitration Rules. The growing importance of Austria as a venue for East-West disputes in the 1960s led to the establishment of a permanent arbitral centre for the administration of international disputes by the Austrian Federal Economic Chamber (AFEC) in 1974. The Vienna International Arbitral Centre (VIAC) of AFEC became operational on 1 January 1975.[5]

AFEC is a self-governing body established under Austrian public law. VIAC is functionally, structurally and legally integrated into AFEC and not a separate legal entity. Despite this, VIAC and its Board members are independent in that they are not subject to any directives from AFEC. This independence is guaranteed by the Austrian Federal Act on Economic Chambers (Wirtschafts-kammergesetz 1998; BGBl I 103/1998 as amended). Also, the arbitration services offered by VIAC are of private contractual nature. VIAC is not an arbitral tribunal itself but solely administers arbitral proceedings.[6][7]

b. Organs

VIAC consists of:

• the Board (Art. 2 Vienna Rules) of at least five members (currently thirteen members and an honorary member) appointed for a period of five years by the Enlarged Presiding Committee of the AFEC by recommendation of the President of VIAC. Reappointment is permissible. The Board members are not employees of AFEC and consist mainly of prominent members in the field of arbitration from various professions, including lawyers, academics and judges. It is an unremunerated honorary office. VIAC acts through its Board, the meetings of which are convened by its President in regular intervals. Meetings are not open to the public. Decisions are taken by majority vote (alternatively by written circular) and are treated as confidential;

• the President of the Board (Art. 2 para. 2 Vienna Rules) is elected by the members of the Board (and is one of their number);

• the International Advisory Board (Art. 3 Vienna Rules) consisting of 24 international arbitration experts who are invited by the Board of VIAC;

• the Secretary General and the Deputy Secretary General (Art. 4 Vienna Rules) are appointed by the Enlarged Presiding Committee of the AFEC for a period

[5] W. Melis, *Austria*, IV (1979) YB Comm. Arb. 21.

[6] F. Schwarz and C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer Law International, 2009, para.1-006 and following.

[7] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, p. 267.

of five years. The Board has a right to propose a candidate for the positions of Secretary General and Deputy Secretary General. Reappointment is permissible. The Secretary General and his/her deputy, unlike the Board members, are employees of AFEC. As executives, they enjoy special rights, such as being independent and not subject to any directives. If a Deputy Secretary General has been appointed, he/she may render decisions that fall within the competence of the Secretary General if the latter is unable to perform his/her duties or, with authorisation from the Secretary General. The Secretary General does not need to consult with the Board concerning matters entrusted to him or her. The tasks of the (Deputy) Secretary General are to direct the activities of the Secretariat and to perform the administrative activities of VIAC insofar as they are not reserved for the Board, including setting in motion the arbitral proceedings (prima facie scrutiny of a claim, its delivery to the respondent, the arbitrator's contract, collection of the advance on costs) and determining the costs at the end of the proceedings, confirming the award and delivering it to the parties.[8] The Secretary General also assists the Board in its tasks and is generally available to parties and arbitrators for requests and advice regarding the administration of the cases. If the Secretary General and the Deputy Secretary General become unable to perform their duties, a Board member is appointed to perform the relevant functions until a Secretary General is appointed; and

• the Secretariat which is the executive arm of the Secretary General, consisting of legal counsels, case managers and assistants.[9]

c. Regional scope and statistics

VIAC is a permanent arbitral institution offering its services worldwide but with a strong focus on the CEE/SEE and CIS region. Before the new VIAC Rules of Arbitration ("Vienna Rules" or "VR") and VIAC Rules of Mediation ("Vienna Mediation Rules" or "VMR"), jointly referred to us "VIAC Rules", came in to force as from 1 January 2018, VIAC has been administering international disputes only, where either at least one of the parties had its seat outside Austria, or the dispute had an international character (in domestic cases). As of 1 January 2018, VIAC administers domestic and international cases, implementing the amendment of Sec. 139 WKG (Austrian Federal Act on Economic Chambers) of 17 May 2017 (Federal Law Gazette I No.73/2017 of 19 June 2017) (Art. 1 VR and Art. 1 VMR). There are no regional limits.[10]

[8] F. Schwarz and C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer Law International, 2009, para.5-007 and following.

[9] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, pp. 267-268; VIAC, *About us*, http://www.viac.eu/en/viac/about-us-en (last accessed 22 August 2018).

[10] G. Horvath and R. Trittmann, *Handbook Vienna Rules*, WKÖ Service GmbH, 2013, Vienna, Art.1 mn.6 and following; M. Heider and A. Fremuth-Wolf, *Handbook Vienna Rules* (2014), WKÖ Service GmbH, 2013, Vienna, Art. mn.13 and following.

The number of pending cases, as per 31 December 2017, was 59 with an aggregated amount in dispute of EUR 621 million. It is noteworthy that in 2017 out of 84 parties involved in arbitration cases, 27 were of Austrian nationality (32 per cent) while 57 were from abroad (38 per cent from the remaining European countries, 18 per cent from Asia, 10 per cent from America, 2 per cent from Africa and Oceania).[11]

d. Institutional Advantages

VIAC is a leading arbitration institution in Central and Eastern Europe. VIAC offers high-level services tailored to the specific needs of its users from around the world. The 7 Best Reasons for Choosing VIAC as the preferred arbitration institution are:

Experience:

• there have been more than 1,600 successfully administered arbitral proceedings since VIAC's foundation in 1975.

Quality:

• leading arbitrators from all over the world sit on tribunals under the Vienna Rules; and

• the VIAC's Board and Secretariat administer the proceedings to the highest level of quality.

Custom-tailored arbitrations:

• the conduct of proceedings can be freely determined by the arbitral tribunal to meet the parties' needs and wants;

• free choice of arbitrators is permitted; and

• parties are also free to choose the language of the proceedings and of the applicable law on the merits.

Vienna is the preferred venue in Central and Eastern Europe:

• the legal framework is modern, arbitration friendly and based on the UNCITRAL Model Law on International Commercial Arbitration;

• the Austrian Supreme Court is the court of first and last instance for claims setting aside an arbitral award or for challenging an arbitrator;

• interim measures of protection issued by arbitral tribunals are immediately enforceable by Austrian courts;

[11] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, pp. 268-269; VIAC, *Annual Rep. 2017*, Austrian Federal Economic Chamber, Vienna, 2018, pp. 10-11.

- Austrian courts support and assist before or during arbitral proceedings where needed;
- Austria, as a neutral country, is a well-established meeting point for business and governments; and
- Vienna is the most important hub for public transport in the region and offers superb hotels and restaurants at a reasonable price.

VIAC offers the following ancillary services:

- organisation of hearing and breakout rooms in AFEC's hearing centre;
- rental audio and video equipment;
- assistance with further logistical organisation, e.g. identifying and obtaining court reporters or interpreters; and
- in-house luncheons and catering services.

Arbitration under the auspices of the Vienna Rules offers an excellent cost/performance ratio:

- there is a binding schedule of fees and thus predictable costs; and
- fees of arbitrators and administrative services are modest in comparison to other institutions;
- the new opt-in system for fast-track proceedings guarantees even swifter awards at lower costs.

VIAC provides a link between academic research and legal practice:

- VIAC has a close link with the Austrian Arbitration Association and is a recognised partner for Austrian and foreign law schools;
- VIAC is a founding partner of the "Willem C. Vis International Arbitration Moot" which is the leading competition of law students in arbitration;
- VIAC together with the IBA and with support of ELSA Austria organises the First IBA-VIAC Mediation and Negotiation Competition in July 2015.[12]

4. Introduction to the VIAC Rules

The most current rules of VIAC were adopted on 29 November 2017, entering into force on 1 January 2018. This revision of the 2013 rules was mainly triggered by the change in the law regarding the administration of domestic disputes and left most parts of the 2013 version unchanged. The current Vienna Rules and Vienna Mediation Rules can be downloaded at the VIAC website in German and English (authentic versions).[13] The 2013 version is available in 13 additional

[12] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, pp. 286-288.
[13] http://viac.eu/en/arbitration/arbitration-rules-vienna (last accessed 22 August 2018).

languages such as Arabic, Chinese, Czech, Italian, Korean, Polish, Portuguese, Romanian, Russian, Slovak, Spanish, Turkish and Ukrainian. We are currently working on the translation of the 2018 rules into all these and more languages with the help of learned arbitration practitioners from the respective regions.

A detailed commentary on the Vienna Rules 2013 in English or German language was published as "Handbook Vienna Rules, A Practitioner's Guide" in December 2013 and may be ordered online or at the VIAC Secretariat. VIAC is currently revising the (German and English) Handbook and preparing a second edition, providing insight into the background of the amendments.

The Vienna Rules cover the following main areas: all actions necessary to initiate and maintain arbitral proceedings, i.e. receipt of statement of claim and answer to the statement of claim as well as counterclaim, forwarding of these statements to the other parties; collection of registration fees and deposits against costs of arbitration; confirmation of arbitrators; substitute appointment of arbitrators; challenge and replacement of arbitrators; liability; conduct of the arbitral proceedings; multi-party arbitration, including joinder of third parties and consolidation; interim measures of protection and security for costs; termination of the proceedings and rendering of the award; publishing of awards; correction, clarification and supplementation of the arbitral award; costs and fees; and special regulations for expedited proceedings.[14]

5. Revised VIAC Rules

The new version of the VIAC Rules of Arbitration and Mediation which entered into force on 1 January 2018 took care of recent developments in the market by introducing-inter alia-the following new features into the well-established 2013 version of the rules:

- the possibility for VIAC to administer purely domestic cases (Art. 1 VR and Art. 1 VMR);
- an electronic case management system to administer all matters from 1 January 2018; thusthe provisions on the submission of Statement of Claims and on service have been adapted accordingly (Art. 7, 12 and 36 VR and Art. 1 and 3 VMR);
- security for costs to be requested by respondent (Art. 33 paras 6 and 7 VR);
- conduct of the proceedings in an efficient and cost-effective manner (matters which are taken into consideration in determining the arbitrators' fees/costs, Art. 16 paragraph 6, Art. 28 paragraph 1, Art. 38 paragraph 2 VR);
- greater flexibility for the Secretary General when determining the arbitrators' fees (Art. 44 para. 7 and 10 VR);

[14] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, pp. 269-270; VIAC, *Vienna Rules,* http://www.viac.eu/en/arbitration/arbitration-rules-vienna (last accessed 22 August 2018).

• (re-)appointment of members of the Board has become more flexible (Annex 2; Art. 2).[15]

6. Revised VIAC model clauses

VIAC's recommended *model arbitration clause* reads as follows:[16]

"All disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, shall be finally settled under the Rules of Arbitration (Vienna Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber by one or three arbitrators appointed in accordance with the said Rules."

Optional supplementary agreements on:

(1) the number of arbitrators (one or three) (Art. 17 VR);

(2) the language(s) to be used in the arbitral proceedings (Art. 26 VR);

(3) the substantive law applicable to the contractual relationship, the substantive law applicable to the arbitration agreement (both Art. 27 VR), and the rules applicable to the proceedings (Art. 28 VR);

(4) the applicability of the provisions on expedited proceedings (Art. 45 VR);

(5) the scope of the arbitrators' confidentiality obligations (Art. 16 para. 2 VR).

We are currently working on sector specific model arbitration clauses, such as post-hoc M&A and competition disputes, art disputes and space law disputes.

VIAC's recommended *model mediation clauses* read as follows:[17]

Model Clause 1: Optional Mediation

"Regarding all disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, the parties agree to jointly consider Proceedings in accordance with the Mediation Rules (Vienna Mediation Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber."

Model Clause 2: Obligation to Refer Disputes to Mediation followed by Arbitration

"All disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, shall first be submitted to Proceedings in accordance with the Mediation Rules (Vienna

[15] VIAC, *Vienna Rules,* http://www.viac.eu/en/arbitration/arbitration-rules-vienna (last accessed 22 August 2018).

[16] Annex 1 to the Vienna Rules of Arbitration and Mediation.

[17] Annex 1 to the Vienna Rules of Arbitration and Mediation.

Mediation Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber. In the event that within a period of [60][18] days from commencing Proceedings under the Vienna Mediation Rules the dispute or claims are not resolved, they shall be finally settled under the Rules of Arbitration (Vienna Rules) of VIAC by one or three arbitrators appointed in accordance with the said Rules."

Model Clause 3: Obligation to Refer a Present Dispute to Mediation

"The parties agree that the present dispute shall be submitted to Proceedings in accordance with the Mediation Rules (Vienna Mediation Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber. The Proceedings shall be initiated by submitting a joint request. The registration fee shall be borne by the parties in equal shares."

Optional supplementary agreements on:

(1) the number of mediators or other third party neutrals (e.g. one or two);

(2) the language(s) to be used in the Proceedings (Art. 6 VMR);

(3) the substantive law applicable to the contractual relationship, the substantive law applicable to the mediation agreement, and the rules applicable to the Proceedings (Art. 1 paragraph 3 VMR);

(4) the admissibility of parallel proceedings (Art. 10 VMR);

(5) the interruption of the statute of limitations or waiver to invoke the statute of limitations for a specific period of time.

7. Arbitration Proceedings under the Vienna Rules[19]

a. Overview

A VIAC arbitration is governed by the VIAC Rules of Arbitration and conducted under the supervision of the VIAC Secretariat. The tribunal will consist of arbitrators nominated by the parties, confirmed by the VIAC Secretary General or the Board, or directly appointed by the VIAC Board.

VIAC arbitrations are generally international in scope and flavour and enjoy all the benefits of administered arbitrations. The Secretariat will, where necessary, take steps to ensure that the arbitration keeps moving at a reasonable pace. The administrative fees are moderate compared to other international arbitration institutions. The average duration of proceedings at VIAC is about one year from the time the case is transferred to the tribunal until the rendering of the award. There are also provisions in the Vienna Rules containing specific opt-in fast-track regulations (the so-called expedited proceedings pursuant to Art. 45).

[18] Or a different period of time agreed upon in writing by the parties.

[19] Any reference in this chapter to articles refers to the Vienna Rules 2018.

The default seat of the arbitration will be Vienna, unless the parties agree otherwise (Art. 25). The arbitral tribunal may deliberate or take procedural actions at any location it deems appropriate, without thereby resulting in a change of the place of arbitration.

b. Main procedural steps

In the following, a short overview of the main procedural steps in VIAC administered arbitration proceedings under the Vienna Rules will be provided.

1. The Claimant
   - files the statement of claim in hardcopy and in electronic form with the Secretariat (Art. 7 para. 1 and Art. 12 para. 1);
   - pays the registration fee (Art. 10 para. 1);
   - nominates an arbitrator or requests that an arbitrator be appointed by the Board (Art. 7 para. 2.5).
2. The Secretariat determines whether the statement of claim complies with the mandatory requirements and requests the claimant to remedy any defect or supplement the claim (Art. 7 para. 3).
3. The Secretariat serves the statement of claim on the Respondent (Art. 7 para. 4)
   - if the submission complies with the minimum standards (Art. 7 para. 2); and
   - after the claimant's full payment of the registration fee (Art. 10 para. 4).
4. The Respondent
   - files an answer to the statement of claim within 30 days (Art. 8);
   - may raise a counterclaim (Art. 9);
   - may plead lack of jurisdiction no later than at the first pleading on the merits (Art. 24);
   - may request security for costs (Art. 33 para. 6);
   - nominates an arbitrator or requests that an arbitrator be appointed by the Board (Art. 8 para. 2.4).
5. Constitution of the arbitral tribunal (Art. 17 et seqq.):
   - The Secretary General confirms the nominated arbitrator(s) unless the confirmation is reserved for the Board (Art. 19).
   - If no agreement regarding number of arbitrators: The Board determines whether the dispute will be decided by a sole arbitrator or a panel of three arbitrators (Art. 17 para. 2).
   - The Board appoints the arbitrator(s) in case of default of the parties (Art. 17 para. 3-4).
6. The Secretary General determines the advance on costs that shall be paid in equal parts by the parties before transmission of the file to the arbitral tribunal (Art. 42).

7. The Secretary General transmits the file to the arbitral tribunal (Art. 11) if
   - a complete statement of claim (counterclaim) has been received; and
   - all members of the arbitral tribunal have been appointed; and
   - the advance on costs has been paid in full.

8. Conduct of the arbitral proceedings and establishment of the facts of the case (Art. 28 et seq.)
   - at the discretion of the arbitration tribunal in an efficient and cost-effective manner;
   - with fair and equal treatment of the parties.

9. Closure of the proceedings and announcement of the anticipated date of issuance of the final award by the arbitral tribunal (Art. 32).

10. The Secretary General calculates the administrative and arbitrators' fees and fixes these fees together with the expenses (Art. 44 paras. 2-12) while the arbitral tribunal fixes the parties' costs and other expenses related to the arbitration and decides on the allocation of costs (Art. 38 in connection with Art. 44 para. 2 last sentence).

11. Issuance of the final award and service on the parties by the Secretary General (Art. 36).[20]

c. Selected Special Features

Joinder of Third Parties and Appointment of Arbitrators in Multi-Party Proceedings

Cases have become more complex over the past years, often involving more than two parties. Art. 14 provide an answer for increasing multi-party scenarios that may arise already at the beginning of proceedings or in the course of pending proceedings. It is characterized by high flexibility which distinguishes it from similar provisions in other arbitration rules, and allows the arbitral tribunal to respond flexibly to the particular circumstances of each individual case, including - amongst others - aspects of the substantive law.

Party autonomy prevails: Any party or third party itself may, at any stage of the proceedings, request the joinder of an additional party. It is then up to the arbitral tribunal to decide whether and to what extent multi-party proceedings and thus the joinder are admissible as well as the manner of such joinder. It thereby enjoys wide discretion, provided that it has heard all parties and the third party to be joined. Issues to be taken into account in making this decision are (implicit) consent of all parties involved to multi-party proceedings, good faith, compatibility of arbitration agreements, underlying legal relationships or the

[20] A. Fremuth-Wolf, *Austria as a place for arbitration, new developments at VIAC in 2017 and outlook for 2018,* Russian Arbitration Association Annual Rep. 2017-2018, RAA, Moscow, 2018, pp. 49-50.

manner of joinder sought. Third parties can be admitted as a party with full party status, but also in other ways, e.g. as amicus curiae, and also only for a particular part of the proceedings.

A request for joinder may be made by a mere "request for joinder" or together with a statement of claim. If made with a statement of claim, the third party enjoys full party status with all party rights if the joinder is granted by the arbitral tribunal; in particular, if no arbitrator has yet been appointed when the request for joinder is filed, the third party may participate in the constitution of the arbitral tribunal according to the provisions governing multi-party proceedings (Art. 18). If the arbitral tribunal does not or cannot admit a request for joinder of a third party with a statement of claim because the necessary prerequisites were not met, it has to return the statement of claim to the Secretariat to be treated in separate proceedings; in such case special rules apply to the constitution of the arbitral tribunal.

In case more than two parties are involved in arbitral proceedings, the issue of the appropriate appointment mechanism for arbitrators arises in order to safeguard each party's fundamental right to nominate one arbitrator. If only a sole arbitrator is to be appointed, simply all parties have to agree on a candidate, and if they fail, the sole arbitrator will be appointed by the Board (Art. 18 para. 1 VR). In case of a panel of three arbitrators and unless the parties have agreed otherwise, the general rule is that each side (claimant's and respondent's) has to jointly nominate one arbitrator. If one side fails to agree on a nominee to be confirmed as arbitrator, this failure will not, contrary to many other arbitration rules, automatically invalidate the nomination by the other side. In such a case, the Board of the VIAC will as a general rule only appoint the arbitrator for the defaulting side (Art. 18 para. 4 first sentence). However, in exceptional cases and in order to re-establish balance between the parties, the Board of the VIAC has the power to revoke appointments and appoint new co-arbitrators or all arbitrators (Art. 18 para. 4 second sentence).

It was clarified in the 2018 version of the Rules in Art. 18 para. 3 last sentence that if the admissibility of a multi-party arbitration is disputed, it is the arbitral tribunal that shall decide thereon upon request after hearing all parties as well as after considering all relevant circumstances.[21]

Costs Issues, the Power of the Arbitral Tribunal to Order the Non-paying Party to Reimburse the Paying Party for the Advance on Costs and Security for Costs

The procedural costs of an arbitration under the Vienna Rules comprise (1) the administrative fees, arbitrators' fees and expenses (incl expenses for a tribunal

[21] A. Fremuth-Wolf, *Austria as a place for arbitration, new developments at VIAC in 2017 and outlook for 2018,* Russian Arbitration Association Annual Rep. 2017-2018, RAA, Moscow, 2018, pp. 50-52.

secretary), (2) the party's costs and (3) other expenses related to the arbitration. The fees under (1) are calculated, based on the amount in dispute as listed in Annex 3 of the VIAC Rules, and fixed by the Secretary General at the end of the proceedings and communicated to the arbitral tribunal to be included in the award. The other costs (2, 3) are to be determined and fixed by the arbitral tribunal itself (Art. 44 para. 1). The final decision on the allocation of the costs of the proceedings is left for the arbitral tribunal in the final award or a separate award on costs (Art. 38), in the manner it deems appropriate.

Generally, the system of flat-rate costs (in comparison to hourly rates for arbitrators) has remained unchanged, as it provides the parties with a better opportunity to plan ahead and has proven to be an incentive for arbitrators to streamline proceedings. The only exception is the fee for mediators; this fee rate shall be fixed by the Secretary General at the time of the mediator‘s appointment or confirmation following consultation with the mediator and the parties (Art. 8 para. 6 VMR). VIAC's schedule of fees in Annex 3 has been revised slightly: (1) the Registration Fees and Administrative Fees for low amounts in dispute have been staggered in a new manner and thereby reduced. At the same time, the Administrative Fees for very high amounts in dispute have been slightly increased, but they are still very moderate in comparison to other institutions. (2) The Registration Fees and Administrative Fees for proceedings pursuant to the Rules of Mediation have been aligned with those of the Rules of Arbitration (Annex 3; Art. s 4 and 8 VMR). (3) In determining the arbitrators‘fees, the Secretary General is now more flexible to increase the fees on a case-by-case basis by a maximum total of 40 % or, conversely, to decrease the fees where appropriate (Art. 44 paras. 7 and 10). (4) The Vienna Rules now explicitly specify that arbitrators and parties as well as their representatives shall conduct the proceedings in an efficient and cost-effective manner; this may also be taken into consideration in determining the arbitrators‘fees / costs (Art. 16 para. 6, Art. 28 para. 1, Art. 38 para. 2).

The amount for the advance on costs is fixed by the Secretary General at the beginning of the proceedings and consists of the VIAC's prospective administrative fees, the arbitrators‘fees and the expenses (Art. 42 para. 1). The parties are obliged to bear the advance on costs in equal shares. If one party refuses to pay its share of the advance of costs, the other party has to step in in order to prevent the arbitration from being terminated (Art. 42 para. 3). In such case, the Vienna Rules empower the arbitral tribunal upon request to order the defaulting party by an award or other appropriate form to reimburse the paying party for its share of the advance on costs - provided that it has jurisdiction over the dispute (Art. 42 para. 4).

Respondents now have the possibility to request security for costs under certain circumstances (Art. 33 paras. 6 and 7). The main objective of security for

costs is to protect a respondent, who has no choice but to defend its case even if the claim of an impecunious claimant is without substance and frivolous. Even if the respondent at the end of the proceedings is entitled to recover its costs, it might be difficult to enforce the award on costs against an impecunious claimant. In addition, such claimants are often funded by a third party against whom the final award is not enforceable. In view of the rise of third party funding, the need to order security for costs is likely to increase and thus had to be addressed.

The new provisions on security for costs in the Vienna Rules are modern in the sense that they confirm the general discretion of an arbitral tribunal to order security for costs, but give guidance on matters which the arbitral tribunal shall take into regard, i.e. the respondent has to show cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. Prior to deciding on a request for security for costs, the arbitral tribunal shall give all parties the opportunity to present their views.

As a consequence, if a party fails to comply with an order by the arbitral tribunal for security for costs, the arbitral tribunal may, upon request, suspend in whole or in part, or terminate, the proceedings (Art. 34 para. 2.4).[22]

Expedited proceedings

One notable innovative aspect introduced by the Vienna Rules 2013 concerns the possibility of arbitrating under a fast-track procedure (Art. 45). This procedure will apply where agreed by the parties under an opt-in mechanism, irrespective of the amount in dispute.

The median duration of proceedings at VIAC is just over one year (12.5 months). If the parties have included the supplementary rules on expedited proceedings in their arbitration agreement or subsequently agreed on their application until the submission of the Answer to the Statement of Claim, the special provisions on expedited procedures apply (shorter time limits, fewer submissions and hearings, sole arbitrator unless otherwise agreed).[23]

Ad hoc proceedings - VIAC as appointing authority

VIAC also assists in ad hoc proceedings by providing necessary infrastructure and regularly acts as an appointing authority (see Annex 4 of the VIAC Rules). This also applies to arbitral proceedings under the auspices of the UNCITRAL Arbitration Rules.[24] VIAC may also be called upon to appoint experts. A flat fee of EUR €2,000 will be charged for each request.

[22] A. Fremuth-Wolf, *Austria as a place for arbitration, new developments at VIAC in 2017 and outlook for 2018,* Russian Arbitration Association Annual Rep. 2017-2018, RAA, Moscow, 2018, pp. 51-52.
[23] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, pp. 270-271.
[24] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, p. 271.

European Convention 1961-AFEC as appointing authority

The president of AFEC regularly performs all tasks under the European Convention on International Commercial Arbitration of 1961 and is also available as appointing authority under the UNCITRAL Arbitration Rules.[25]

8. Mediation and Other ADR Proceedings under the Vienna Mediation Rules[26]

a. Overview

VIAC offers administration of mediation, conciliation and other ADR proceedings as part of its services and, since 2016, has a separate set of mediation rules that can be used for other forms of ADR-proceedings. Those rules now form Pt II of the VIAC Rules.

The applicable procedure is similar to that existing for arbitration proceedings, i.e. in relation to the initiation of proceedings, calculation of advances of costs, assistance in the appointment of an appropriate mediator, monitoring function, determination of costs at the end of the mediation. The mediator's fees are not based on a fixed fee schedule but are an hourly rate approved by VIAC.

Once the file is transferred to a mediator, the Vienna Mediation Rules leave significant flexibility with respect to the conduct of the proceedings. Upon receipt of the file, the mediator shall promptly discuss with the parties the manner in which the proceedings shall be conducted, in order to assist the parties in finding an "acceptable and satisfactory solution" for their dispute.

As confidentiality is crucial in mediation, Art. 12 contain detailed provisions not only in relation to the mediator and the parties, but also any other person taking part in the proceedings; all such individuals are required to treat as confidential anything that has come to their attention in connection with the proceedings and that would not have come to their attention had the proceedings not taken place. In addition, any written documents that were obtained during the proceedings and would otherwise not have been obtained must not be used in subsequent judicial, arbitral or other proceedings. Finally, any statements, views, proposals or admissions made during the mediation, as well as one party's willingness to settle the dispute amicably, shall remain confidential.

Mediation proceedings under the Vienna Mediation Rules are formally terminated by an act of the Secretary General, i.e. a written confirmation upon occurrence of the earliest of certain circumstances, in particular upon an agreement of the parties for the settlement of the entire dispute.

Upon termination, the Secretary General will calculate the administrative fees, mediator's fees and expenditures and fix these (Art. 8 para.5). Any remaining

[25] M. Heider and A. Fremuth-Wolf, *Vienna International Arbitral Centre (VIAC)*, in K. Nairn et al. (eds.), Arbitration World (5th ed., 2015), Thomson Reuters, London, 2015, p. 271.

[26] Any reference in this chapter to articles refers to the Vienna Mediation Rules 2018.

amounts will be refunded to the parties according to the payment of the advances or any other agreement the parties might have reached in this connection.

b. Arb-Med-Arb Proceedings

Arb-Med-Arb means any combination of proceedings whereby mediation is initiated in addition to arbitration and which has received much attention most recently due to the parties' wish to come to an amicable solution but still obtain an enforceable award. VIAC offers a one-stop-shop for these scenarios; this is a unique feature of the VIAC Rules and is aimed at making other alternative means of dispute resolution more attractive.

Arbitration proceedings must first be initiated under the Vienna Rules, the arbitrators have to be appointed and the file has to be transferred to them. Should the parties then wish to resort to mediation with the help of a mediator, the arbitral proceedings may be stayed for the time of the duration of the mediation proceedings (it is recommended to have a fixed time-limit as it avoids uncertainties with regard to grounds for termination of arbitral proceedings as defined in Art. 34 VR.

No separate fees (neither registration nor administration fees) will be charged by VIAC for the mediation proceedings (Art. 44 para. 11 VR). The mediator is to be remunerated separately based upon an approved hourly or daily fee.

If the parties were able to settle their dispute by mediation in whole or in part, the arbitration may be continued upon request of the parties and the arbitral tribunal may render an arbitral award on agreed terms (Art. 37 para. 1 VR) or simply record the settlement (Art. 37 para. 2 VR) and end the arbitration proceedings. If the mediation was not successful, the arbitral proceedings may be continued and the arbitral tribunal renders an award (Art. 36 VR).[27]

References

1. Fremuth-Wolf, *Austria as a place for arbitration, new developments at VIAC in 2017 and outlook for 2018,* Russian Arbitration Association Annual Rep. 2017-2018, RAA, Moscow, 2018, pp. 48-52.
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Nicolae Titulescu's diplomatic activity in international unique Romania

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Abstract

Peace, seen as a fundamental and sacred right which belongs to all nations, identifies in Nicolae Titulescu one of the most fervent defenders and promoters.

It surely is remarkable that Nicolae Titulescu understood, affirmed and protected the essential role that peace has in a world that constantly lives under the threat of war. He also apprehended that peace and security are indivisible, in a time when international dependencies were very few and more difficult to understand. Nicolae Titulescu debated around the notion of global peace, claiming peace to be a dynamic process, a construction of general interest, in which the nations were the first ones called to manifest within the international system.

Keywords: *international public law, diplomacy, security, disarmament, peace*

After World War I, the peace treaties reconfigured the map of Europe with the emergence of new national states, thanks to the triumph of the principle of the self-determination of nations at the Paris Peace Conference (1919-1920). Present through his delegates (N. Titulescu and dr. I. Cantacuzino) during the 1919 -1919 Pact of the League of Nations - and its signing, Romania attached great importance to this document of the League of Nations, hoping, like other states, in the new possibilities to prevent regional armed conflicts, to respect international peace treaties. Ratifying the Covenant, the Romanian Parliament debated its text, formulating the imperative of achieving the universalism of the Geneva Forum. Nicolae Titulescu, in his famous speech "The Dynamics of Peace" held in the Reichstag on May 6, 1929, stated: "The Pact of the League of Nations is the result of a long evolution and thus the starting point of a new evolution," and the Geneva institution is in a Perpetual becoming. Even though the League of Nations would have all the sins imputed to it, we do not have another organization that can

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be substituted. It is the result of a convention concluded by 54 states. Only within the League of Nations and its laws can action be taken to establish international relations on the basis of justice. Between a defective mechanism for peace and war, my choice is heading towards the first "[2]

Article 19 of the Covenant reads as follows: "The Assembly may, from time to time, invite the members of the Society to proceed to a new examination of the treaties that have become inapplicable, as well as of the international situations whose preservation could jeopardize the peace of the world."[3] Nicolae Titulescu reveals: "There is an article 19 in the Pact of the League of Nations, famous by the speculation surrounding it, that the Assembly may, from time to time, invite the members of the Society to proceed to a new examination of the treaties that are inapplicable, as well as international situations whose preservation could jeopardize the world's peace. As for the Treaties, Titulescu said, the revision is only provided for treaties that have become inapplicable, ie for the pending clauses, for which it is found that the application is not possible. However, territorial clauses are already in place. Their review is therefore legally impossible[4].

The great diplomat said: "The borders of treaties that have ended a great war are drawn in blood and are the fruit of unrequited suffering." He congratulated our foreign minister: "In unanimous opinion, the fate of the review is in our hands: it is only possible when we want it"[5]

After the emergence of the new national states, important ideas and projects of European unity were proclaimed, due to unresolved ethnic problems and the emergence of the danger of extremist nationalism.

In 1922, Coudenhove-Kalergi, in his "Pan-Europe", provided for the establishment of a European federation based on sovereignty limitations, agreed by the European states. In order to accomplish this project, he created the Pan-European Union Movement, where the honorary president was Aristide Briand, French Foreign Minister.

The General War Waiver Treaty signed on 27 August 1928, which entered into history under the name of the Briand-Kellogg Pact or the Paris Pact, was a compromise formula between European and American politics.

The Paris Covenant prohibits any use of force but does not provide for measures to punish the aggressor.

In his capacity as a permanent representative of Romania to the League of Nations and its president (1931-1933), Nicolae Titulescu expressed his support for strengthening the legal aspects regarding international security.

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[2] Nicolae Titulescu, *Diplomatic Documents* (further N.D.D.D.), Bucharest, Political Publishing House, 1967, doc.169, p. 205.
[3] Le Pacte de la Société des Nations..., p. 23.
[4] Nicolae Titulescu, *Speeches* (in N.T.D.), Bucharest, Scientific Publishing House 1967, p. 410.
[5] N.T.D., p. 410-411.

The Romanian Government, which had been consulted on the text of the Paris-1928 Covenant, signed the document on 27 August 1928.

On September 7, 1929, Aristide Briand, at the Conference of the League of Nations, proposed the creation of a federal link between the European states, without prejudice to the sovereignty of these states. Following this spectacular proposal, Aristide Briant received the mission to present a memorandum on the "organization of a European federal regime".

Nicolae Titulescu, the illustrious Romanian diplomat, appreciated Aristide Briand's proposal as "a generous initiative aimed at bringing European peoples closer to regulating economic and social issues." The Romanian diplomat, twice the president of the League of Nations, proposed in March 1932 the creation of a Danubian Economic Union including the following states: Austria, Czechoslovakia, Hungary, Yugoslavia and Romania.

These European unification initiatives were blocked by the economic crisis of 1929 - 1932, corroborated with the rise of Hitler, but they have the merit of creating the premises of community building.

In June 1932, the US President - Hoover - demanded significant disarmament (in personnel and technique) for European states. As a response to this request, Nicolae Titulescu considered: "Romania should not apply mechanically the reduction of military units for reasons of national security".

The Council of the League of Nations convened the General Conference on Disarmament (the official name of the meeting was the "Conference on Arms Reduction and Limitation") on January 25, 1932, in Geneva, to discuss and adopt the Disarmament Convention, a document that had been drafted and adopted as a project in 1930 by the Preparatory Commission of the Conference[6].

The Romanian views, proposals and initiatives were received with interest. The presentation of the overall position of Romania in the plenum of the Disarmament Conference by the Minister of Foreign Affairs Dimitrie Ghica was appreciated. The head of our country's diplomacy emphasized Romania's attachment to the principles of peace and disarmament, good neighborliness and reaffirmed the importance of building a world peace climate based on the force of international law.

Presenting our country's position on the disarmament-security interrelation, Nicolae Titulescu, the Romanian minister of the League of Nations, showed that Romania is inclined to address this issue in close connection with the geographical position and the military potential of the European states.

Nicolae Titulescu distinguished between the proposed disarmament projects the ones meant to lead to a fair synthesis between the "degree of disarmament, the

[6] The draft Convention was based on the French conception of the correlation between disarmament and the creation of a collective security system and resumed a series of provisions in the Versailles treaties on the defeated states (especially those of a military character).

degree of security and the degree of application of the principle of equality"[7]. For him disarmament had to be limited to a minimum compatible with national security, which was also a matter of national dignity.

One of the valuable Romanian contributions at the Disarmament Conference was the Pella Memorandum, a document presented to the Committee on Disarmament by the eminent Romanian jurist Vespasian V. Pella. At the heart of the document were the points of view presented to the representatives of our country in the plenum of the Conference. It gave the document a clear political stamp with the thesis of the need to harmonize the basic principles of the covenants and treaties regulating international life (the principles of the League of Nations and the Briand-Kellogg Pact) which forbade war and guaranteed the domestic law of each state.

The document, which remained in the history of the League of Nations under the name of the Pella Memorandum, was adopted by the Disarmament Committee; a special legal committee was established under the leadership of the Romanian representative. V.V. Pella elaborated an Anteproject on the current state of development of the international organization[8]. The proposals elaborated by the eminent Romanian jurist consecrated him as a true precursor of the International Criminal Law[9]. The failure of the disarmament plans, after the end of the First World War, the failure of the League of Nations to organize a collective security system, clamored the revision of the provisions of the Luasanne Treaty (July 24, 1923), documenting the sovereignty of the Republic of Turkey by the demilitarization of the straits. defending one of the most important areas of its territory.

On April 10, 1936, the Turkish Government sent an official note to the Lausanne Convention signatories inviting states to participate in negotiations for a new settlement of the status of the Bosporus and Dardanelles, while guaranteeing the security of the Turkish state and the constant development of commercial navigation between the Sea Mediterranean and Black Sea.

In Montreux, Switzerland, at the opening of diplomatic debates (June 22), Nicolae Titulescu proposed SMBruce, the representative of Australia, and Nicolae

[7] N. Titulescu, diplomatic papers, p. 484.

[8] Société des Nations, Conférence pour la réduction et la limitation des armements, Documents de la Conference, vol. II, p. 701. The Legal Committee submitted to the Committee on Disarmament the debate on the questionnaire and texts proposed by the Legal Committee, ideas of the Memorandum and anteproject elaborated by V. Pella. Faced with the refusal of certain delegations representing revisionist and re-emergent states and currents who refused to assume any obligations in this area in the Committee for Moral Disarmament, the documents presented by V. Pella did not go beyond the desideratum.

[9] Some changes to the text of the aggression definition proposed at the Disarmament Conference. (February 1933), and sent for consideration to the Committee on Security Issues of the Conference - were taken from the Pella Memorandum.

Politis, the plenipotentiary minister of Greece in Paris, as president and vice-president of the conference, and as honorary president M. Motta, head of Switzerland's federal political department. In his speech on the same day, he stressed the vital importance of the straits for Romania's security, noting that Turkey's action will find all the understanding and support of the delegation of our country. The Romanian diplomat reveals the major significance of the procedure adopted by the Ankara government, which respects international law and concludes: "But Turkey's gesture also requires a reward. Let's examine each of our interests. Let us defend each one in this conference, with energy, our national interests. But let us not forget that when a country that has made respect for the current territorial order in Europe and the means that provide this order itself the basis of its foreign policy, presents in some areas rational demands and does not find the understanding it seeks, it would could be a serious blow to faith in the system of adopting laws through mutual consent. "

The Montreux Convention has been an important diplomatic tool in the evolution of international law. States' agreement was based on a real spirit of harmonizing political and economic interests within a conciliatory framework.

From the drafting of the texts of the Montreux Convention it follows that the interests of Romania, especially those deriving from the assistance treaties, were respected, that the identity of the aims pursued by the political actions in the interests of peace facilitated the observance of the Romanian interests by concluding additional security agreements.

The 1936 Montreux Convention gave Turkey the right to militarize the strait area (Bosphorus, Dardanelles) in the armed conflict situation.

The great Romanian diplomat, during the Montreux Conference, raised the issue of the European Commission of the Danube. In 1936 there were two Danube Commissions: one called the International Commission, created by the 1921 peace treaties, based in Vienna; the other, called the European Commission, created by the Treaty of Paris in 1856, based in Galati.

Romania considered it necessary to suppress the Second Commission, in 1956, because it represented an anachronistic institution, through which an unacceptable foreign territorial control was exercised, the international body failing to meet the purposes for which it was created.

Romania does not contest the international character of the Danube. It was considered that the Danube International Commission, based in Vienna, had to expand its material competence to the mouths of the river.

In an interview with the newspaper LE TEMPS, July 10, 1936, Nicolae Titulescu said: "The Danube crosses, among other countries, Czechoslovakia, Hungary, Yugoslavia. Romania claims the right to be treated on an equal footing with the Danube regime, Austrians, Czechoslovaks, Hungarians and Yugoslavs. To accept as Romanians restrictions on sovereignty over the same Danube simply

because no one dared in the past to impose any servitude to Austro-Hungary because it was great power, while we were forced to accept, almost a hundred years ago, the conditions imposed by the great powers to receive the right to open their eyes to the light of the day as a national state, is an act contrary to the Romanian dignity, which nobody, but no one in my country, could accept."

Nicolae Titulescu devoted his life, his diplomatic career and the force of his brilliant mind to the purpose of developing and promoting a viable and moral policy of global peacekeeping. He has made remarkable contributions to solving the major international problems of the interwar period: placing the relations between states on the foundations of public international law; diplomatically settling disputes between states. Instead of European and global security, he did not remain at the level of abstract constructions, realizing that peacekeeping calls for a firm policy to prevent regional armed conflicts.

For Nicolae Titulescu peace was a sine qua non condition of economic development, the plenary affirmation of the spirit and creative force of all the world's citizens. Peace, as the fundamental right of all states, had in Nicolae Titulescu a defender and a promoter of the most fervent. Remarkable is the fact that Nicolae Titulescu asserted the essential role of peace in a time of war, he understood the indivisibility of global and national security in a world where politico-diplomatic, politico-economic collaboration was difficult to achieve. He manifested himself as a global peace diplomacy as a dynamic process, as a construction of general interest, where states were called to be reasonable in the international legal system.

Nicolae Titulescu understood that, ignoring the frontiers and particularities of social-political systems, citizens belong to a large human community. He pleaded with the path to integrating the idea of human solidarity into the consciousness of the people, convinced that the realization of a humanistic policy was able to provide diplomatic tools and mechanisms for achieving global security.

Regarding the organization of peace, any analysis of Nicolae Titulescu's ideas and actions in this direction can reveal that the diplomat has developed a coherent international legal system based on the ideas of force necessary for the social-historical development of the nation state, militating for diplomatic actions based on rationality and morality, promoting objectives that address the interests of the citizens of the world in a grand way.

Nicolae Titulescu had a broad visionary spirit and committed himself with full consistency on the road to achieving political-diplomatic progress, to build a future for the rule of law.

The development of relations between states on the basis of the principles of national independence and sovereignty, full legal equality of rights, territorial integrity, non-interference in domestic affairs represented in its view the sine qua non condition of global security, assertion of fundamental rights, for the citizens of the world.

Eliminating the threat of force in the practice of international relations, banning international armed conflicts, defining the aggressor and assuming the commitment of international institutions not to resort to aggression, irrespective of the internal or external arguments that could have been invoked, the elaboration of international legal instruments establishing the obligation peaceful settlement, politics, disputes and conflicts between states, represented for Nicolae Titulescu peacekeeping objectives and reasonable arguments for achieving this goal of universal interest. He considered that that division of international law could not be conceived in the two branches: the right of peace and the right of war, removing the absurd terminology of the law of war, that is to say the right to commit the crime, by admitting a single right - the right of mankind to security peace.

The Romanian diplomat understood that peace was just a simple concept if it was not based on state security. After a comprehensive analysis of international life, Nicolae Titulescu has demonstrated the need to achieve European security, considering that an anachronistic theory has emerged that appreciates the level of security of a country by its degree of arming.

The intensification of the disarmament process was, according to the Romanian diplomat, the sure way to ensure global security and peace. Nicolae Titulescu demonstrated the direct relationship of mutual determination between security and disarmament, pleaded for a new security concept to be achieved by the balanced and progressive reduction of the armed forces and armaments of the world's states. He has consistently acted to unlock disarmament negotiations, place them on the diplomatic channels of concrete talks, and democratize the framework for addressing legal mechanisms for decision-making in this area.

Representing one of the architects of the 1919 League of Nations, Nicolae Titulescu pleaded for an organization of universality, constantly emphasizing his prime role in defending global peace and defending his prestige against all denigrators who wanted to fail this grandiose project of humanity.

Nicolae Titulescu acknowledged the political and administrative limits of the League of Nations, but not to reduce his powers but to develop policies and strategies designed to improve the mechanisms of the Pact of the League of Nations, to eliminate divergent positions and to find legal instruments of constructive action for people's security interests.

In making a robust peacekeeping policy Nicolae Titulescu paid great attention to the balance of regional powers, a diplomatic construct in which he believed unreservedly. Emphasizing the great political and moral responsibilities of the political people, Nicolae Titulescu supported the concept of diplomacy based on international cooperation.

The Romanian diplomat, in the framework of diplomatic negotiations and diplomacy at the level of international conferences of the interwar period, was considered a “peace pearl”, “peace tribunal” or “academician of peace”. International

organizations, academic societies and the media of his time congratulated him with the best attributes for his outstanding political and diplomatic work. Nicolae Titulescu has been a soldier of peace for more than 20 years in the trenches of diplomatic peace struggles. He consistently devoted his political work and efforts to a noble goal, safeguarding global and national peace. He was a peace missionary in an age characterized by troubled political and social developments, a period in which the forces of fascism and Nazism seemed to dominate the world, and the conciliation policy had lost its power of manifestation in the diplomatic arena.

The passage of time can not, for the memory of the treaties of diplomacy, blur the magnitude of the attitudes adopted by Nicolae Titulescu in the fourth decade of the 20th century. He manifested, with principled and remarkable firmness, the aggressive, sad, celebrity actions of German Nazism, Italian fascism and Japanese militarism. In this regard, we can refer to its implications in the "Japanese-Chinese File", the "Ethiopian File", the "Spanish File", the "Rhenan File", diplomatic instruments analyzed and solved by Romania as Foreign Minister. To the holders of the diplomatic chancelleries of the great European capitals, to his interlocutors in the international forums of the times, Nicolae Titulescu systematically presented his manifestations of positive activism, to get them out of a state of passivity and to mobilize them in a constant effort to prevent a World War.

Nicolae Titulescu proposed a set of concrete initiatives for world peace, meant to ensure the realization of the desiderata of international diplomatic approaches in action. Analysts of inter-war politico-juridical evolution noted that the establishment of dictatorial regimes in Europe led to a relevant strengthening of Nicolae Titulescu's ideological and practical commitment, which, more than any of his contemporaries, did not let himself be seduced by false political promises.

Nicolae Titulescu left a posterity of a diplomatic work that fueled deep love for the Romanian people and legitimate ambitions to resolve on the legal-humanistic foundations of the era the peace aspirations of the citizens of the planetary states.

Nicolae Titulescu is part of the gallery of the great personalities of mankind, who conveyed a profound message of peace, a diplomatic commitment that puts it in place of honor in the consciousness of humanity.

The dimensions of his political and diplomatic actions constantly invite reflection, their analysis revealing convincing evidence of activities of remarkable legal harmony. The humanism and realism of its actions had a world-wide, high-value practice, where national interests were promoted in harmony with those of the international community.

The eulogies brought to Nicolae Titulescu by the illustrious personalities of the epoch outline the fascination that the Romanian diplomat and the work have exercised over the contemporaries. The illustrious diplomat was remarked:

encyclopedic culture; his solid legal knowledge; its spirit and political refinement; exemplary logic of discourse; the eloquence of argumentation; labor power; his inner discipline; pronounced political intuition; his broad-based vision; the realism of his judgments on the diplomatic plane, the firmness with which he defends and promotes the interests of Romania.

Nicolae Titulescu's work has the value of a firm message for humanity and peace and is of remarkable utility. The great jurist and his diplomatic work reverberate into the consciousness of contemporaryity as an appeal to reason and responsibility, is of a high spiritual and moral attitude, being a call for the full liberation of the international community under the armed force and its placement under the rule of international public law.

Nicolae Titulescu was an active presence in the arena of the struggle for rational economic and political order, based on the international legal system, on the perennial values of humanity of international cooperation, based on trust and harmony in the field of security and peace. The remarkable Romanian diplomat did not give up his ideas, did not lose his hopes in the victory of humanitarian justice, fought until the last moment against the war, and worked for the reconstruction of peace.

When, for a moment, the hope had died, when the shadow of fascism and Nazism seemed to dominate the world, his voice was clearly and optimistic, for he had a firm conviction - and time had given him the right - that "the brown mist would rise, leaving instead of the light of a new era in which states will act to eliminate the war in the life of the planet and to establish a lasting peace. " Nicolae Titulescu understood that the future belongs to peace and was the man who made great efforts for Euro-Atlantic cooperation, considering, in those troubled times, that global security is possible and that it needs to be strengthened.

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The main objectives of Romania's diplomacy at 100 years of the great union

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Abstract

Romania is situated in a region that has long been characterized by the presence of frozen conflicts. The Romanian diplomacy must value the position of the Romanian state at the external border of the EU and NATO, with the awareness of the risks and opportunities resulting from this geopolitical position. The active promotion of the objective of transforming Romania's neighborhood, both in the south, including the Western Balkans and the East, into a democratic area of stability and security, prosperity and predictability, is necessary to ensure national security. The strategic partnership with the United States of America, being a NATO Member State and European Union Member State are the foundations of our foreign policy. The construction of strong Romania is closely related to these. Romania will strengthen its strategic credibility on these three pillars, being recognized for predictability and continuity in both foreign, security and defense policy, as well as in strengthening democracy and the state of law.

In the year that celebrates the 100th anniversary of the Great Union, Romanian diplomacy through a collective inter-institutional effort will support national interests in relation to external partners and will make an active contribution to solving major global issues.

Keywords: *foreign policy, main objectives, three pillars, 100th anniversary, Great Union*

In some authors' opinion, diplomacy is a foreign policy instrument for establishing and developing peaceful relations between governments in several countries through the use of intermediaries recognized by each other.[2]

Missions play a key role when putting resources into the ethics of mutual relationships that change it as a positive positive component in the time spent, establishing global relationships based on good, reasonable and legal standards.[3] Ideally, the role of the Foreign Ministry in relation to other institutions is to coordinate the relevant external activities of all central state institutions through various instruments ranging from the posting of a major diplomat to the Prime

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[2] Jonsson, C., *Diplomacy, Bargaining and Negotiation*. Handbook of International Relations, 2002.

[3] Iucu, O, *Diplomacy and diplomatic functions*. Manager Journal, 11(1), 2010.

Minister until the endorsement of all international agreements to which other ministries and institutions become part, and the approval of the other members of the government.[4]

The Romanian diplomacy will, as an essential objective of foreign policy, aim at strengthening the international profile of the Romanian state. It will also try to increase the quality of our country's contribution to the EU and NATO in consolidating these two organizations as well as deepening the 21st Century Strategic Partnership with the US, the basics of Romanian foreign policy. Romanian diplomacy must be active and dynamic, in order to better protect the interests and objectives of Romania and to ensure the security of the Romanian state. At the same time, Romanian diplomacy must appreciate the position of the Romanian state at the external border of the EU and NATO, aware of the risks and opportunities arising from this geopolitical position. From this point of view, a priority will be the contribution to the enlargement of the area of democratic prosperity, security and predictability in Romania's neighborhood, necessary to ensure national security, especially in the existing unstable context.[5]

Increasing the positive and active involvement of Romania, both bilaterally and through European and regional projects it is of major importance, in the Western Balkans (by supporting, within the EU and through bilateral expertise, the European perspective of the states in the region) and especially in the Eastern Neighborhood - the extensive Black Sea area, South Caucasus and Central Asia.

1. Increasing the role of Romania as an allied state within NATO

In order to promote the quality of our country's contribution to strengthening the Alliance, the following are important tasks:[6]

- Further promote the strengthening of the relevance of Article 5 of the Washington Treaty and collective defense as the core task of NATO.
- Appropriate implementation of the decisions of the 2016 NATO Summit in Warsaw, of interest for Romania, on the advanced presence adapted to the southern flank of the Alliance, in the context in which the Summit reconfirmed the strategic importance for the Alliance of the Sea Black.

In this respect, the Romanian diplomacy will work, together with the other institutional partners, for the operationalization of the multinational brigade, of the strengthened NATO and Black Sea naval presence in the Black Sea, of the Intensified Training Initiative, respectively for the implementation of the reinsurance measures, reconfirmed at the Summit from July 2016.

[4] Olivia Toderean, Cap.III *Diplomația*, în Daniel Biró, *Relațiile internaționale contemporane*, Edit. Polirom, 2013, pp. 59-77.
[5] Guvernul României, 2017. *Programul de guvernare 2017-2020.*
[6] Guvernul României, 2017. *Programul de guvernare 2017-2020.*

- To support the development of the NATO missile defense system in order to ensure the protection of the Alliance's entire territory, forces and populations on the basis of the progress achieved at the Summit in Poland, including the declaration of the initial operational capability of the allied system
- Implementing Allied support measures to strengthen the defense capability of Eastern Partners, focusing on Moldova, Ukraine and Georgia.
- Continue to support NATO's "open door" policy.
- Support allied efforts to counteract the hybrid war, encouraging NATO-EU cooperation in the field, on the basis of the declaration adopted at the NATO Summit in Poland.
- Enhanced energy and cyber security issues within NATO.
- Continue Romania's commitment to Afghanistan, according to NATO's decisions.

2. Developing, deepening and expanding the 21st Century Strategic Partnership with the US

The history of the Romanian-American bilateral diplomatic relations begins officially 135 years ago. On June 14, 1880, US President Rutherford B. Hayes signed the letter informing Prince Carol I about the appointment of Eugene Schuyler as a diplomatic agent / US general consul in Romania, this time marking the establishment of bilateral diplomatic relations. The first meeting of the members of the Romanian diplomatic mission with the American officials took place on 15 January 1918, when Dr. Constantin Angelescu was received in the White House Diplomats Salon, where he presented his letters of credence to President Woodrow Wilson.[7]

The Romanian-American relationship during the First World War, in the context of a global policy, is determined by the evolution of the military operations and the political orientation of the belligerent states. At that time, the US accredited the first consul in Romania. Until the outbreak of World War I, relations between the two countries consisted of discussions, treaties and conventions initiated by the consulate and later continued to develop during the war. When war broke out, Romania and the US were in similar neutrality, for different reasons.

The US has declared its intention to build a new world order by applying its internal values to the whole world. Towards the end of the Second World War, Franklin Delano Roesevelt and Truman seemed to be able to remodel the whole world according to the American model.[8]

All contacts between Romania and the US were initiated during the First World War, and the development of relations between the two countries was

[7] *Adevărul*, 15 ianuarie 2018.
[8] Henry Kissinger, *Diplomația*, Editura ALL București, 2013, pp.710-711.

intensified, diversified and strengthened. Romania, with her struggle, her problems and her people claiming her rights, was a subject of debate both in the American newspapers and the White House.

The outbreak of World War I changed international relations between states. The significance of interstate relations has changed under the impact of military events, some have been disrupted or seriously interrupted, others have continued, but with different coordinates and intensity, leading to new connections. The "neutrality" of both states had both capitals, Bucharest and Washington, on the same international stance against the conflict. This situation has inevitably highlighted the convergence of interests and has created closer ties between the two countries. In the first two months of the war, economic and trade relations between Romania and the United States have increased. Both the rapid development of Romanian-American trade in the years 1910-1913 and the general business conditions promised a favorable development. Demand on the national markets behind the front has increased sharply and everywhere American trade has come out of the crisis between 1912-1913 and has begun to take a short-term lending method that is more convenient for trading partners. Thus, US exporters came to the attention of markets in the Far East and Southeast Europe. In August 1914 Avram Tetian, a businessman from Boston, was in a hurry to visit the capital of Romania. He noted that this was the best time for Romania to exchange and create direct links with US producers, replacing German and French intermediaries.[9]

The relationship between Romania and the US defines the entire foreign policy strategy of our country and, more than anything else, received special attention from every government. Romania is currently pursuing a broad and successful diplomatic activity aimed at new relations between states, equality and respect among nations, security, thus contributing significantly to the creation of a proper geopolitical climate.[10]

The relationship between Romania and the US is a defining one for the whole foreign policy strategy of our country and one that has received special attention from every government. At present, Romania has a broad history of successful diplomatic activity aimed at new relations between states, equality and respect among nations, expansion and security, thus contributing to the creation of a better world. Although the United States is not close to our borders, traditional ties have seen a positive trend in recent years due to the strict observance of the fundamental principles of international relations and law, and the high-level visit exchanges between the two countries' presidents. Romanian-American relations continued on the backdrop of extremely important, even essential, events in Romania's history.

Developing, deepening and expanding the 21st Century Strategic Partnership with the US on the basis of the Joint Statement on the 21st Century Strategic

[9] Arhiva Ministerului Afacerilor Externe Bucureţti, Problema 75, dosar 48, p. 185.
[10] Guvernul României, 2017. *Programul de guvernare 2017-2020.*

Partnership between Romania and the United States "(Washington, 13 September 2011) will remain a priority area of diplomatic action, this being a guarantee for Romania's security and stability in the region, affected by the worrying developments in the Black Sea region.

Fructuring the 2017 anniversary of the 20th anniversary of the launch of the Partnership, for its development in all its dimensions: enhancing excellent cooperation in the political-military and security field, including cyber security, but also its deepening in the economic field, with an emphasis on attracting investments, respectively in the energy field, stimulating cooperation on the dimension of education, innovation, research of the Strategic Partnership.

Particular attention will be paid to stimulating the American military presence in Romania, in the known regional security context, including through cooperation for the proper implementation of the relevant Summit decisions in Poland.

Also a special attention will be paid on continuing to act for Romania's admission to the Visa Waiver program.

3. Romania will have the first presidency of the EU Council in 2019

Taking over the first presidency of the EU Council in 2019, just after the centenary of the United Nations, will be an opportunity to create a consolidated European profile of Romania.

We will have a Presidency with a complicated agenda with negotiations for the Financial Perspective 2021-2028, with the possible conclusion of the negotiations on the Great Britain exit process, with the election of the European Parliament, the election of a new President of the European Commission, of the European Council, of the European Parliament. Actually, we are talking about the most important post-accession project that will have to be supported by all political forces in Romania and will be an important exam for the state institutions.

European affairs will have to support the competitiveness model chosen for Romania, focusing on industry and value-added services. How we will lead the negotiations for the new financial framework will be essential for the cohesion policy of the Union and implicitly the convergence of Romania. Also in the context of the negotiations on the new financial framework, we will have to make sure that discrimination on the agricultural subsidy disappears. Internal efficiency, good governance and administrative capacity will be very important for achieving the objectives at European level.

Effective use of the Brexit moment will be required to preserve our comparative advantages. Thus, remaining in the group of low-tax member countries will be important as an anchor of convergence. An important stake will be to ensure fair treatment of criminals in the eyes of the Roma people in the context of future EU-UK arrangements, but also within the EU, given the growing

challenges to the principle of free movement in several Member States, against the backdrop of the internal political developments in these states.[11]

4. Romania's accession to the OECD

Romania's accession to the Organisation for Economic Co-operation and Development (OECD) is a strategic objective of the Romanian foreign policy, being included in the 2013-2016 government programme.

Romania's accession to the OECD depends on various issues:

- The organisation's enlargement process. At the moment, the OECD is undergoing an internal reform process in order to simplify the decision-making process among its members and to review its global role in promoting sustainable development in the current context of economic instability. In the short run, this internal reform could include the opening of a new enlargement process
- Meeting the accession criteria by candidate countries:

Like-mindedness - referring to the existence of a market-based economy and a functional democracy;

- Significant player - regarding the size and economic importance of the candidate state;
- Mutual benefit - requiring for the accession to be advantageous for both the candidate country and the OECD;
- Global considerations - regarding the assurance of geographical balance between the organisation's members.

As an EU member state, Romania fulfils the OECD accession criteria, since the EU acquis (acquis communautaire), applied by Romania, is inspired by the organisation's recommendations.

At the moment, Romania has a general favourable assessment from the OECD, in light of its relevant position in the region, its constructive involvement in the organisation's activity and its economic development potential.

Main benefits for Romania as an OECD member:

- The benefit of Romania being a member of a select club of developed economies and the implicit recognition, at global level, of its status of functional market-based economy and consolidated democracy, with impact on the country's rating and on attracting foreign investment;
- The benefit of example. Romania's favourable image with regard to both the world's major economies (USA, China, Japan etc.) and to the states in the region with European integration ambitions (the Republic of Moldova, the Republic of Macedonia, Albania, Serbia etc.);
- The benefit of expertise. The access to necessary information in Romania's top priority fields (government framework, legislation reform, anti-corruption, fiscal policy, transport infrastructure, agriculture, education

[11] Guvernul României, 2017. *Programul de guvernare 2017-2020.*

Conclusion

Romania is situated in a region that has long been characterized by the presence of frozen conflicts. The Romanian diplomacy must value the position of the Romanian state at the external border of the EU and NATO, with the awareness of the risks and opportunities resulting from this geopolitical position. The strategic partnership with the United States of America, being a NATO Member State and European Union Member State are the foundations of our foreign policy.

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The rural development of Romania in international context. Historical background and perspectives

Ilie MARIAN
Roxana-Daniela PAUN

Abstract

The present article proposes a synthetic analyse of the evolution of rural development regulations and achievements from the perspective of the Rural Development Program 2014-2020 under conditions of competition with the other beneficiaries and European funders on CAP.

In The Juncker Commission's priorities for its 5-year mandate, the Common Agricultural Policy (CAP) has a key role to play in delivering on all those priorities presented in the European Commission's document. (boosting investments, growth and job creation, combating climate change, relaunching the Digital Single Market and concluding trade deals, notably with the US).

In fact, the fundamental objectives of the CAP - the viable production of food, the sustainable management of our natural resources, and maintaining a living countryside - mirror the Juncker priorities. Approximately 38% of the EU budget (equivalent to 0.4% of the Union's GDP) is spent on agriculture and rural development.

This article emphasizes some measures taken by Romania within the National Rural Development Program 2014-2020, in order to achieve the goals of the CAP in delivering clean, environmentally friendly agriculture that will provide food for all Europeans. Here are also presented the measures to simplify the procedures for accessing European funding in agriculture field.

Keywords: *The Common Agricultural Policy (CAP), Rural Development Program (RDP 2014-2020), rural areas, rural development funding, challenges and opportunities for rural development.*

National Rural Development Programme 2014-2020- Romania, simplifying procedures for accessing European funds, multiannual financial framework (MFF).

European Background:

Although the EU budget is adopted every year, it must be established within the limits of the multiannual financial framework (MFF). The MFF is an expenditure plan setting maximum annual amounts which the EU can spend in different fields of activities over a 7-year period. It therefore shapes the EU's political priorities for 7 years.[1]

For the next financing period (2014-2020), the Commission wants to focus on what Europe needs to overcome the economic and financial crisis, and concentrate on areas where the EU can make a difference. Key proposals include:

[1] http://ec.europa.eu/budget/mycountry/SE/index_en.cfm

- **A focus on growth, jobs and competitiveness** with increased investment in education and research, and a new Connecting Europe Facility fund to boost pan-European infrastructure projects for transport, energy, information and communication technologies.
- **A higher quality of spending** thanks to simpler rules for EU funds, a clear focus on investments producing tangible results, as well as the possibility of suspending EU-funding if a country fails to implement sound economic and fiscal policies.
- **A reformed common agricultural policy** for a more competitive and environmentally-friendly European agriculture.
- **The fight against climate change** as a key component of all major EU policies and devoting 20 % of the 2014-20 MFF to measures related to this.
- **Solidarity** with the poorest EU countries and regions by concentrating the largest portion of regional funding in those parts of the EU and by introducing a new youth employment fund.
- **reduced administrative expenditure growth** thanks to cuts in staffing numbers at European institutions.

It is easy to see that some of the multiannual financial framework's objectives (MFF) are mentioned as priorities in the RDP and being evaluated in the European Commission document "EU agriculture spending focused on results September 2015"

Up to 80% of the EU budget expenditure is managed by Member States under shared management in areas such as agriculture, cohesion policy, growth and employment.

Agriculture is not a strong area in Sweden, given that the most important sectors of the Swedish economy are: public administration, defence, education, health and social assistance (21.5%); industry (19.9%) and wholesale and retail trade, transport, accommodation and catering (17.9%).[2]

Swedish experience is analysed by the experts of the AgriFood Economics Centre and Swedish University of Agricultural Science, which presented in a paper "Evaluation of results and adaptation of EU Rural Development Programmes", in 2017. In this paper, the authors quotes The First Vice-President of the EU Commission Frans Timmermans, stated on the occasion[3], that: "We must rigorously assess the impact of legislation in the making … so that political decisions are well-informed and evidence-based. …we must devote at least as

[2] https://europa.eu/european-union/about-eu/countries/member-countries/sweden_ro#suedia_%C8% 99i_uniunea_european%C4%83

[3] The EU Commission launched its Better Regulation Agenda, in May 2015. See: http://europa.eu/rapid/press-release_IP-15-4988_en.htm

much attention to reviewing existing laws and identifying what can be improved or simplified." An implicit assumption in the statement is that a review will result in policy improvement if deficiencies are detected. Hence, it seems worthwhile to examine whether past policy reviews/ evaluations of EU policies have actually resulted in better policies. The Followed recommendations set the measures that the states in the table have to adopt in order to fulfil the political goals in the field of rural development. (knowing that Rural Development Programmes (RDPs), is the second pillar of EÚs Common Agricultural Policy (CAP), which have been evaluated on several occasions.)

Table 1 - Followed recommendations.[4]

Recommendation	Country/Region
Target larger investments	Austria
Remove bonus for creating an operational concept	Austria
Target local problems/adapt to local conditions	France
Keep support for investments that lets farmers anticipate new standards or go beyond existing levels	France
Continue to target young farmers	France
Target technological innovations	France
Focus on the provision of public goods such as animal	Bremen − Lower
welfare and environmental protection	Saxony
Focus investment support on interventions that differ from ordinary business activities (e.g. quality improvement certification, new technologies, protection of environmental resources),	Marche
Give more support to farmers/sectors that have not received support before, less to those that have been supported	Latvia
Redistribute support to small and medium-sized farms	Latvia
Target investments in public goods or investments with positive external effects (e.g. animal welfare, environment) positive external effects (e.g. animal welfare, environment)	Sweden
Continue to support investments that improve the durability and structure of the sector the and structure of the sector	the Netherlands
More product innovation-oriented implementation	the Netherlands

[4] Anna Anderssona, (AgriFood Economics Centre, Lund University, P.O. Box 730, SE-22007 Lund, Sweden) Sören Höjgårdb, (AgriFood Economics Centre, Swedish University of Agricultural Sciences, P.O. Box 730, SE-22007 Lund, Sweden), Ewa Rabinowicz, (AgriFood Economics Centre, Swedish University of Agricultural Sciences), P.O. Box 730, SE-22007 Lund, Sweden), *"Evaluation of results and adaptation of EU Rural Development Programmes*,", Land Use Policy, 2017, p. 302.

Romania's Experienced After Implementing the Provisions of the National Rural Development Program 2014 - 2020 (NRDP)

The NRDP responds to three of the development challenges set out in the Partnership Agreement:

Competitiveness and local development, People and society, Resources.

Through the NRDP 14 rural development measures are financed with a financial allocation of 9.363 billion Euro, of which 8.015 billion EAFRD and 1.347 billion national contributions. The NRDP (funded by the European Agricultural Fund for Rural Development) supports the strategic development of the rural area through the strategic approach of the following objectives:

- OS1 Restructuring and increasing the viability of agricultural holdings
- OS2 Sustainable management of natural resources and combating climate change
- OS3 Diversification of economic activities, job creation, improvement of infrastructure and services to improve the quality of life in rural areas (P6)

The main Rural Development Priorities for 2014-2020:

Modernizing and increasing the viability of agricultural holdings through their consolidation, market opening and processing of agricultural products;

- Encourage rejuvenation of farmers' generations by supporting the setting-up of young farmers;
- Developing basic rural infrastructure as a prerequisite for attracting investment in rural areas and creating new jobs and implicitly for rural development.
- Encouraging the diversification of the rural economy by promoting the creation and development of SMEs (Small and Medium Entrepreneurship) in non-agricultural sectors in rural areas;
- Promoting the fruit sector as a sector with specific needs through a dedicated subprogram;
- Encourage local development under the responsibility of the community through the LEADER approach. LEADER cross-cutting competence improves competitiveness, quality of life and diversification of the rural economy, and combating poverty and social exclusion.

In order to achieve the first strategic objective (Restructuring and increasing the viability of agricultural holdings) the following types of intervention will be financed through the NRDP measures:

- Establishment, extension and upgrading of farm facilities (buildings, access roads, irrigation, pollution reduction and renewable energy technologies, storage, trading and processing facilities, including in the context of short chains);
- Investment in processing and marketing, including energy efficiency, marketing, storage, conditioning, adaptation to standards;

- Support for restructuring of farms, especially small ones, and the rejuvenation of farmers' generations;
- Risk management in the agro-food sector;
- Counselling and training activities, including through producer groups.

In order to achieve the second strategic objective, the following types of intervention will be financed through the NRDP measures:

- Afforestation of agricultural and non-agricultural land, as well as realization of forest curtains on these lands;
- Compensation payments to farmers who voluntarily undertake agro-environment commitments;
- Compensation payments to farmers who voluntarily commit themselves to adopting or maintaining practices and methods specific to organic farming;
- Compensation payments to farmers who voluntarily undertake to continue their activity in designated areas as areas experiencing natural constraints or other specific constraints.

In order to achieve the third strategic objective, the following types of intervention will be financed by the NRDP measures:

- Support for investment for micro-enterprises and small non-agricultural enterprises in rural areas;
- Improvement of local infrastructure (water supply systems, sewerage, local roads), educational, medical and social infrastructure;
- Restoration and preservation of cultural heritage;
- Supporting local strategies that provide integrated approaches to local development;

In 2017, Romania drew 3.3 billion euros from the money allocated through the special programs in agriculture and rural development, the sector "ticking" and in 2017 the first position at the national level regarding the absorption of European funds.

Romania's achievements in the light of the funds used so far form the RDP's 2014-2020:

- 99.9% of the European Agricultural Guarantee Fund (EAGF),
- 35% through rural development measures - NRDP 2020 - financed by the European Fund for Agriculture and Rural Development (EAFRD)
- 6% through the Operational Program for Fisheries and Maritime Affairs 2014-2020

Agricultural Payments and Intervention Agency (APIA) pays a record amount of over 3 billion euros to farmers, both for schemes and support measures financed from European funds and for those financed from the state budget.

According to the official statements of the Romanian Ministry of Agriculture and Rural Development, Romania initially moved from 24th place with an absorption stage of 10.45%, achieving an acceleration of implementation by 13% in the first six months of 2017, and ranking 15th at European level, which means recovering 9 places on the implementation side.

The Romanian National Authorities took some ***simplification measures to increase the absorption of European funds,*** to streamline and increase the efficiency of the implementation of the PNDR 2020 program as follows:

- Simplification of procedures (the possibility of online submission in order to reduce the time and costs required for the submission of projects; the reference price database for specialized machinery, equipment and equipment that can be purchased through the 2014-2020 NRDP purpose of reducing administrative burdens on beneficiaries);
- Accelerating the submission, evaluation or contracting phases, with an estimated estimated period reduction of approximately 70%, thus increasing the quality of the projects and the efficiency of the program;
- Reducing the number of documents requested when submitting projects and imposing ongoing evaluation of the submitted projects in order to shorten the terms of reference from submission to contracting.

The financial allocation of the European Union from the European Agricultural Fund for Rural Development (EAFRD) granted to Romania through the Ministry of Agriculture and Rural Development for the implementation of the National Rural Development Program (NRDP) for 2014-2020 is € 8.128 billion.

According to the statistical data of the Agency for Rural Investment Financing (AFIR), through NRDP 2020: 122 units of meat and dairy products were set up and 2,737 people were employed in new jobs.

The investments funded through NRDP 2020 have brought:

- 1,118 kilometers of water supply network in rural areas,
- 2,104 kilometers of sewerage network in the countryside and
- 647 km of agricultural roads established or upgraded,
- 3.3 million people in rural areas benefit from rural infrastructure and cultural heritage rehabilitated.

It is also necessary to mention the area of agricultural holdings financed by NRDP 2020 - about 216,127 hectares - and the support for 3,183 farmers in the mountain area.

Conclusion

After analysing a large number of national and European documents on the 2014-2020 RDP, we came up with some conclusions that are listed below.

First of all, we have found that the vast majority of analyses in this field are carried out by agricultural specialists, and few academics have approached this issue.

Secondly, most analyses synthesize how the objectives outlined in the 2014-2020 RDP and additional funding programs in the agricultural field.

Thirdly, beyond the concrete status of each European economy in accessing these funds, it is a confirmed reality that all Member States are in a harsh competition regarding access to these funds on the one hand and on the other hand, this competition is often driven to absolute in selling their own products on the European markets.

Romania has focused its attention on ***two key issues*** for accessing funds in rural development and improving the absorption of these funds.

1. **There have been significant developments in the ongoing programs, including**[5]:

- Continue the National Irrigation Program, the National Tomato Program, and New investments in the National Anti - Hedging Program and Continuation of Wool Trading Support Program.

2. **Starting new MADR programs as:**

- The support program for swine breeders (wild pigs and domestic pigs derived from them) for the production of pork from the local breeds Bazna and Mangaliţa,
- Breeding support program in the buffalo breeding sector,
- Support program for cattle breeders from Bălţata Românească (Romanian Spotted) and/or Brown breeds,
- The program for setting up collection centers for vegetables and fruit.

A certainty of the performances of the local structures for the implementation of the European funding programs in the field of rural development and agriculture is the analysis carried out by the ECA (European Court of Auditors), which concluded in the latest European Commission audit report without any recommendations, which is a concrete appreciation of the efficiency of the work carried out[6].

In Romania, the National Irrigation Program, the National Tomato Program and the Wool Trading Support Program will continue, new investments will be made under the National Anti-Hearing Program.[7]

[5] For more details see: http://fonduri-euro.ro/2017/12/12/la-inceputul-lui-2018-noi-masuri-prin-pndr/

[6] The EU Commission launched its Better Regulation Agenda, in May 2015. See: http://europa.eu/rapid/press-release_IP-15-4988_en.htm

[7] http://fonduri-euro.ro/2017/12/12/la-inceputul-lui-2018-noi-masuri-prin-pndr/

At the same time, new programs will be launched by the line ministry:

- The support program for swine breeders (wild pigs and domestic pigs derived from them) for the production of pork from local breeds Bazna and Mangalița,
- Breeding support program in the buffalo breeding sector,
- Support program for cattle breeders from Bălțata Românească and/or Brună breeds,
- The program for setting up collection centres for vegetables and fruits.

From the point of view of rural development, a serious problem in Romania is the severe fragmentation of agricultural land.

Unfortunately, only 4% of the national arable land is owned by approx. 50 leading agricultural producers with potential for exploitation and exploitation. 2.4 million hectares are subsistence farms).

In the rural economy field, Romania is in a risk and insecurity area, due to poor development, especially in the livestock sector, but also in the service sector. Romania is present on foreign markets, especially with raw materials, with low value added products (derived from crop production - field crops). Instead, we are importers of animal food, which also have high value added.

Increasing the degree of exploitation of the agricultural potential can turn Romania into an independent state in terms of ensuring the food security of the population, but also by providing such security to other countries through a net export of agricultural products, raw materials and food.

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EXPROPRIATION

Mariana RUDĂREANU[1]

Abstract

In some cases, the social concern may lead not only to limit the exercise of certain attributes of the right of ownership, but also to loss of the right to private immovable property, that can be expropriated and turned over to public property or administrative - territorial units, with pay compensation to the owner.

Keywords: *expropriation, public utility, just and preceding compensation, object of expropriation, expropriation procedure, expropriation effects*

1. The Concept and Legal Regulation

Article 1 of Protocol 1 of the *European Convention on Human Rights* established the Principle on Protection over the Right of Ownership, the Principle on the Possibility Deprivation of Property for the Public Utility, and the Principle on Exercising the Right of Property in accordance with the public interest.

Expropriation was defined as a primary way of acquiring property, consisting of the forced transition to public property, by judicial decision, of some private-owned immovable property, with a just and prior compensation, for a cause of public utility.[2]

In another approach, the expropriation was defined as an act of political power, by which is accomplished the forced acquisition of the private property over the real estate needed for the execution of public utility works, in exchange for compensation[3].

Expropriation is regulated by article 44 paragraph 3 of the Constitution, article 562, align. 2 of the Civil Code, Law no. 33/1994 on Expropriation for Public Utility, the Decision of Government no. 583/1994 approving the

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[2] Liviu Pop, *The Right of Ownership and its Dismemberments,* Lumina Lex Publishing House, Bucharest, 1996, p. 49.

[3] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Civil Law Course. The Main Real Estate Law,* Hamangiu Publishing House, Bucharest, 2013, p. 46.

Regulation on the working procedure of the commissions for conducting prior research in order to declare public utility for works of national or local interest.

The public interest may lead not only to limit the exercise of certain attributes of ownership, but also to loss of the right to private immovable property. This possibility is regulated by the Constitution, which in article 44 paragraph 3 provides that "no one will be expropriated except for a cause of public utility, according to the law, with a just and prior compensation", as well as Law no. 33/1994[4], which contains provisions that ensure the legal framework for expropriation procedures and compensation setting, but also defend the right to private property.

Law no. 33/1994 is supplemented by the Regulation on working procedure of committees for conducting preliminary investigation, in order to declare public utility for works of national or local interest.[5]

2. The Principles of Expropriation

Expropriation is governed by the following principles[6]:

A. *The existence of a public interest*

According to article 5 of Law no. 33/1994, expropriation is possible only for works of public utility, that is works of national or local interest.

According to art. 6 of Law no. 33/1994, public utility refers to works relating to: geological prospecting and exploration, mining and minerals processing, facilities to generate electricity, paths for communications, opening, aligning and widening roads, systems for electricity supply, telecommunications, gas, heating, water, sewerage; facilities for environmental; embankment and regularization of rivers, reservoirs for water supply and flood mitigation, flow derivatives for water supply and flood diversion, hydrometeorological, seismic stations and irrigation and drainage systems; works to combat depth erosion ; buildings and land required for social housing and other social objectives of education, health, culture, sports, and social protection and public administration and judicial authorities; saving, protection and enhancement of monuments, ensembles and historical sites and national parks, natural reserves and monuments, prevention and elimination of consequences of natural disasters - earthquakes, floods, landslides, defense, public order and national security.

B. *The existence of a just and prior compensation*

The expropriator reimburses the person whose property has been expropriated,

[4] Law no. 33/1994 on expropriation for a cause of public utility, published in The Official Journal of Romania no. 139/2.06.1994

[5] The Regulation was adopted by Government Decision no. 583/31.08.1994, published in The Official Journal of Romania no. 271/26.09.1994.

[6] Corneliu Bîrsan, *Civil Law. The Main Real Estate Law Regulated by the New Civil Code,* Editura Hamangiu, Bucureşti, 2013, p. 139-143

or the holders of rights *in rem*, a compensation for the loss, which has to be fair, that is to cover the entire loss suffered by individuals affected by the expropriation.

In this respect, provisions of article 26 of Law no.33/1994 provide that compensation is made up of the actual value of the immovable property and the damage caused to the owner or other entitled persons. When calculating the amount of compensation, the experts and the Court will take into account the selling price for same immovable property, in the administrative - territorial unit, at the date of the expertise report, as well as the damage caused to the owner or, where appropriate, to other entitled persons, considering the evidence submitted by these.

Compensation must be in advance, character which represents an important guarantee given to persons entitled to expropriation.[7]

C. *Expropriation is disposed and compensation is established by Court ruling*

The court disposes of the expropriation and establishes the compensation that the expropriated will receive.

3. The Object of Expropriation

The objects of expropriation are the immovable property of individuals or legal persons with or without lucrative purpose, as well as those under private ownership of communes, municipalities and counties.

In the listing made by the legislature, in article 2 of Law no. 33/1994, state-owned immovable property is not included. In this respect, the Constitutional Court ruled that the expropriation cannot refer to state-owned assets.[8]

4. The Procedure of Expropriation

The Procedure of Expropriation is conducted in three stages distinctly governed by law:

a) Public utility and its declaration;
b) Preparatory measures of expropriation;
c) Expropriation and pay compensation.

The following conditions must be met cumulatively, in order to perform the expropriation:[9]

- the existence of a declaration of public utility
- the existence of a special advertising
- the existence of a just and prior compensation

[7] Valeriu Stoica, *Expropriation by Cause of Public Utility*, The "Law" Journal no. 5/ 2004, p. 34.
[8] Constitutional Court, Decision no. 115/21.05.1997, published in The Official Journal of Romania no. 141/1997.
[9] Ion Dogaru, Teodor Sâmbrian, Romanian Civil Law, Treaty, Vol II, *General Theory of Real Rights*, Europe Publishing House, Craiova, 1996, pp..339-343.

According to article 7 paragraph 1 of Law no.33/ 1994, the public utility is declared for works of national interest, by the Government; and for works of local interest, by county councils[10] and Local Council of Bucharest.

According to the Law, the declaration of public utility is made only after conducting a preliminary research and registration of the work, in urban planning and landscaping, approved for cities or areas where its execution is intended.[11]

Based on the results of preliminary research, the act of declaration of public utility is adopted and brought into public notice, by posting it at the Local council, in whose jurisdiction the immovable property is located: for public utility of national interest in The Official Journal, and for public utility of local interest in the local press.

After the declaration of public utility, the expropriator of the immovable property[12] will execute the plans, including land and buildings proposed for expropriation, indicating the owners, as well as the offers for compensation.

Together with the protocol which concluded the preliminary investigation of the declaration of public utility, the proposals for expropriation is notified to the holders of rights *in rem* over immovable property within 15 days after publication. These individuals can make a counter-statement against the acts in question within 45 days of notification.

For works of national interest, the counter-statements will be resolved, within 30 days, by a committee established by the decision of Government. For works of local interest, the counter-statements will be resolved by the decision of Permanent delegation of the county council, or by disposition from the Mayor of Bucharest.

According to the Law on Administration and Litigation no. 544/2004, the Decision of the Committee is handout to the parties, within 15 days from adoption, and these can appeal to the Court of Appeal, in the area where the property is situated, within 15 days from communication.

Settlement of the application for expropriation is a matter for the Court in whose jurisdiction is located the immovable property proposed for expropriation.

The Court will verify if all the conditions required by law are met for the expropriation, and will establish the amount of compensation due to each party.

According to article 26 of Law no. 33/1994, compensation consists of the

[10] George Gruia, Politică şi Administra□ie Publică, Editura Sitech, 2018, p. 177-179

[11] Corneliu Bîrsan, Maria Gaiță, Mona Maria Pivniceru, *Civil Law. Real Rights*, European Institute Publishing House, Iaşi, 1997, pp. 33-36; Eugen Chelaru, *Civil Law. Main Real Rights*, pp. 28-29; Corneliu Bîrsan, *Civil Law. Main Real Rights*, Hamangiu Publishing House, Bucharest, 2007, pp.63 - 65; Liviu Pop, *op.cit.*, pp.51 - 53.

[12] Within the meaning of Law no. 33/1994, for works of national interest the Expropriator is the state, through the agencies designated by the Government, and for works of local interest, the Expropriators are the counties, cities, towns and villages, according to art. 12 para. 2 of the Law.

actual value of the immovable property and the damage caused to the owner, or other entitled persons.

To determine the amount of compensation, the Court will constitute a committee, composed of three experts: one appointed by the Court, one designated by the expropriator, and one by the individuals subject to expropriation.

When calculating the amount of compensation, the experts and the Court will take into account, on one side, the selling price for same immovable property, in the administrative - territorial unit, to the date of the expertise report; on the other side, the damage caused to the owner or, where appropriate, to other entitled individuals, considering the evidence submitted by these.

When receiving the outcome of the expertise, the Court will compare it with the offers and claims made by the parties and will decide. The offered compensation cannot be less than that offered by the expropriator, or greater than that required by other interested individual.

5. The Effects of Expropriation

The essential effect of expropriation consists in the transition of the expropriated immovable property from private-owned to public-owned, by judicial decision, free of any constraints.

The expropriation determines the following effects:[13]

– the transfer of the right of ownership, over the property subject to expropriation, into the inheritance of the expropriator;

– the expropriated immovable property passes into public property, free of any constraints;

– the end of the dismemberments of the right of ownership: use, *usufruct*, habitation and *superficie*;

– the end of the personal rights acquired by other individuals over the expropriated immovable property, like the rights under a tenancy agreement or loan agreement;

– the real subrogation with particular title: by right, the mortgage and the real estate privilege shift over the fixed compensation, and once the compensation was settled, the mortgagee cannot proceed to the enforcement of that immovable property.

According to article 35-37 of the Law, two rights are regulated in favour of the owner of the expropriated property:

a) The right to demand restitution of expropriated property;

b) The preemptive right to purchase the immovable property.

[13] Eugen Chelaru, *Legal effects of Expropriation for the Cause of Public Utility*, The "Law" Journal no. 4/ 1998, pp.15-17; Flavius Baias, Bogdan Dumitrache, *Discussions on Law 33/1994 on Expropriation for Public Utility*, the "Law" Journal no. 4/ 1995, p. 27.

According to article 35 of Law no. 33/1994, if the expropriated immovable assets have not been used, within one year, to the purpose for which they were taken from the expropriated, that is the works have not started, the former owners may claim their restitution, only if a new declaration of public utility has not been made.

The restitution claim is addressed to the Court which, after having verified its bases, it may order restitution.

Through the Decision no. VI, 29th September 1999, pronounced by the United Sections[14], the Supreme Court upheld an appeal in the interest of law and ruled that the provisions of Law no. 33/1994 are applicable in the case of the claims for restitution of immovable property, expropriated before the entry into force of Law no. 33/1994.

The restitution of the immovable property is made in exchange of a price which is established as in the case of expropriation, and it cannot by greater than the updated compensation.[15]

Article 37 of Law no. 33/1994 stipulates that, if the works for which expropriation was made have not been completed, and the expropriator wants the alienation of the immovable property, the expropriated - former owner - has right of priority to acquire the property, at a price that cannot be greater than the updated compensation. In this end, the expropriator will write to the former owner; if the expropriated chooses not to purchase the immovable property, or not to respond to the expropriator, within 60 days of receiving notification, the expropriator may dispose of the immovable property.

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10. Valeriu Stoica, *Expropriation by Cause of Public Utility*, The "Law" Journal no.5/ 2004.

The Development of Financial Accounting and Reporting Standards in Romania

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Abstract

The development of financial accounting and reporting standards is a priority for the Romanian government. The globalization of accounting and auditing standards is crucial for the development of economic entities and for minimizing corruption and fraud. The implementation of the International Financial Reporting Standards (IFRS) has significant implications for the accounting practices all over the world.

The evolution of financial accounting and reporting standards has significant effects on the comparability and transparency of financial information for the company management. The Romanian accounting organizations are encouraging the public and private entities to adopt the International Financial Reporting Standards (IFRS) in order to improve management reporting and to increase the transparency of the financial information.

Keywords: *management, accounting, standards*

JEL Classification: M48, H0, I30

1. INTRODUCTION

The development of financial accounting and reporting standards is a priority for the Romanian government and for the professional organizations, as well. The Romanian accounting profession is regulated by The Body of Expert and Licensed Accountants of Romania (CECCAR), an organization greatly involved in the development of the Romanian accounting system. CECCAR is encouraging all the professional accountants to advise their clients to implement the International Financial Reporting Standards (IFRS). In June 2002, the European Union adopted the International Accounting Standards regulation requiring all European companies listed in an EU securities market, including banks and insurance companies, to prepare their consolidated financial statements in accordance with International Financial Reporting Standards (IFRS) in order to improve the financial reporting.

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The national accounting and reporting legislation has been developed in the last 20 years, especially after Romania became a member of the European Union on January 1st, 2007. According to the Order of the Minister of Public Finance no. 881/2012, the listed Romanian companies as well as all the companies under the supervision of the Financial Supervisory Authority (FSA) have the obligation to apply the International Financial Reporting Standards (IFRS). At the national level, the Financial Supervisory Authority (FSA), established in 2013 under GEO no. 93/2012 approved by Act no. 113/2013, is the authority in charge with the regulation and supervision of insurance, private pensions and capital markets. The Financial Supervisory Authority (FSA) contributes to consolidating the integrated framework of operation of the three sectors totaling over 10 million participants. The evolution of the development of financial reporting is presented in the figure below:

Figure no. 1. The evolution of financial reporting
Source: Author's own work

2. IFRS ADOPTION BY ENTITIES SUPERVISED BY THE FINANCIAL SUPERVISORY AUTHORITY IN THE FINANCIAL INSTRUMENTS AND INVESTMENTS SECTOR

An increasing number of public entities are adopting International Financial Reporting Standards (IFRS). The advantages of the International Financial Reporting Standards (IFRS) are widely acknowledged. The reform of the Romanian accounting and financial reporting system started a few decades ago, because accounting is an important instrument for government in order to develop the society (Cooper, D, 2012).

This research considers the experiences of other European countries, for example France, Italy, Germany and United Kingdom, which implemented IFRS years ago. These countries decided to shift to a developed accounting system and

financial reporting system many years ago. For Romania the reform of the accounting and financial reporting sector control represents a new era.

Romania's progressive transition towards IFRS also implied a phase meant to shape the accounting system according to the IFRS provisions (an harmonization phase), followed by the full adoption of the International Accounting Standards (IAS) in conformity with the EU requirements (Traistaru, D.A., 2014). Among the first reasons presented by the Romanian accounting regulators, there are important arguments for supporting the implementation of IFRS, such as the need of an alignment with the international practice of promoting the financial statements' transparency and compatibility of the financial information in order to create and maintain an attractive investment market (Albu, C.N., Albu, N., Alexander, D., 2013).

The new accounting regulations compliant with International Financial Reporting Standards (IFRS) were adopted in 2015 and are applicable to entities authorized, regulated and supervised by the Financial Supervisory Authority in the Financial Instruments and Investments Sector.

According to the regulation issued by the Financial Supervisory Authority (FSA), provisions of this new financial reporting shall apply to the following categories of entities[2]:

a) financial investment services companies;
b) investment management companies;
c) alternative investment fund managers;
d) undertakings for collective investment;
e) market/system operators;
f) central depositories;
g) clearing houses/central counterparties;
h) Investors Compensation Fund;
i) subunits without legal personality, from abroad, belonging to entities referred to in letters a)-h), Romanian legal entities;
j) subunits without legal personality, from Romania, belonging to legal entities from abroad.

According to Rule no. 39/2015, all the administrators, economic directors, chief accountants and any other persons required to manage the entities subject to this rule shall ensure the necessary measures to properly implement it. The new regulation will impact the accounting information reported in the trial balance, the individual annual financial statements, the notes to the financial statements and

[2] RULE No. 39/2015 approving the Accounting Regulations compliant with International Financial Reporting Standards, applicable to entities authorized, regulated and supervised by the Financial Supervisory Authority in the Financial Instruments and Investments Sector.

the consolidated annual financial statements. We can see in the figure below the influence of IFRS on the financial reports:

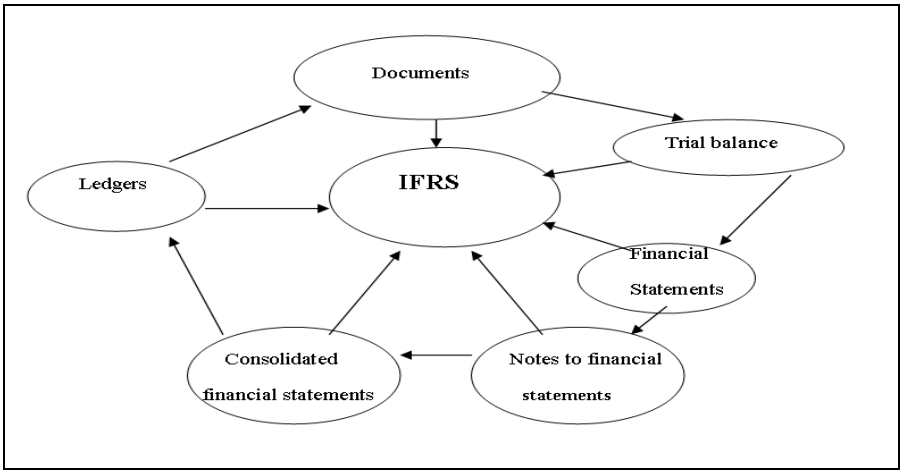

Figure no. 2. The influence of IFRS on the financial reports
Source: Author's own work

Also, starting with the financial year of 2015, all entities referred to above shall submit to the units of the Ministry of Finance an annual report prepared based on data in the trial balance including the items determined according to IFRS provisions. Therefore, in the annual reports, the presentation of items such as assets, liabilities and equity, respectively income and expenditure, may be different from the one in the annual financial statements in accordance with IFRS, this being determined by the information requirements of the state institutions[3].

According to Rule no. 2/2018, if the changes in accounting policies or the correction of accounting errors require the restatement of comparative information, the financial reporting will contain restated comparative information. In this case, the comparative information on items such as assets, liabilities and equity, respectively income and expenses, are the ones determined by the application of the new accounting policies and the correction of accounting errors.

We consider that the adoption and implementation of IFRS in Romania created the premises for the development of the accounting and reporting system, and in the same time to facilitate the circulation of the business data to other European users of the financial information. In practice, IFRS are implemented all over the world, including South Korea, the European Union, India, Hong Kong, Australia, Malaysia, Pakistan, Russia, Chile, The Philippines, Singapore and Turkey, but not in the United States. The USA regulation did not approve the

[3] RULE NO. 2/ 2018 amending and supplementing the Financial Supervisory Authority's Rule No. 39/2015.

IFRS and continued to use the US GAAP, in order to protect the national regulations.

3. Conclusions

The role of the International Financial Reporting Standards (IFRS) is to create a common global language for businesses all over the world, so that company's financial reporting be more understandable and comparable across international boundaries.

The International Financial Reporting Standards (IFRS) are a consequence of business globalization and have changed in an irreversible manner the financial accounting system and the financial reporting, despite criticism from the American specialists. There are many countries adopting and implementing IFRS. Romania has successfully implemented the new financial standards replacing the national accounting regulations in order to improve the accounting regulation and the financial reporting system as all the EU Member States.

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Romania's foreign policy in the Middle East - between the heritage of the communist era and its lack of predictability of the present period

Eugen LUNGU[1]

Abstract

Romania's foreign policy with the Middle East countries was an important direction of action of the Romanian diplomacy in the communist era due to the huge potential offered by the countries of the region in conditions of economic exchanges and the participation of the Romanian specialists in the development of the industrial infrastructure in various Arab countries. The significant reduction of economic exchanges, but and the diminution of diplomatic relations with the states of this region, in the last twenty-five years, in the rethinking context of Romanian foreign policy, in accordance with NATO and EU membership, are aspects that characterize, as a whole, the current Romanian diplomacy in relation to the Middle East states. Considering the communist era and the period after December 1989, we are trying to make a brief analysis of the Romanian foreign policy in the Middle East region and to draw a series of conclusions regarding the predictability of the Romanian diplomatic actions in this geopolitical space.

Keywords: *Romania's foreign policy, realism in foreing policy, Middle East, foreign policy strategy of Romania, predictability of Romanian diplomacy, strategic partnership with the USA*

1. Introduction

The complexity of the current world, at the beginning of the millennium, in which the international system continues to resettle from the perspective of multipolarity, in which the forces of globalization set up supreme state-owned economic and financial power centers with a growing influence in the global environment, demand a rethink of the way in which states carry out their functions in the field of foreign policy. The great challenges of today's world, felt as a result of the acceleration of the planetary globalization process in the political and security sphere, economic, financial, social, communicational, cultural, ecological, ethics, etc., requires a different approach of foreign policy by the states of the world today, compared to the last century, that responds better to fast regional and international changes. In this context, Romania, a member of the North Atlantic Organization since 2004, and the European Union since 2007, builds its foreign policy strategies

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in relation to these challenges, as outlined above, bearing the mark of our belonging to these two organizations, a position that requires an identity reconfiguration of Romania as a state from a geopolitical perspective, in the Euro-Atlantic area and in the international relations system in general.

In the literature, realistic approaches school emphasizes the fact that diplomacy represent one of the most important power resources of a state, along with military force, the quality of governance, the population of the country concerned, the capacity of the industrial, national territory, the national ethics, geography and natural resources. Hans Morgenthau, considered the father of the realistic school in international relations, appreciate that, between the factors that builds the power of a nation, diplomacy is the brain of the national power and morale is the soul.[2] Therefore, it can be easily deduced from this that the foreign policy of a state, the quality of the services and of diplomatic missions carried out by the bodies empowered, represents an important resource of power which allows that state actor to exert his influence on the regional and international spheres.

A well-known issue, in the field of foreign policy, is that "the credibility of commitments, the reputation of fulfilling a promise, represents a power resource which the state can cultivate over time."[3] Starting from this incontestable truth, in the context of diplomatic theory and practice, this study proposes a brief approach concerning the realism of Romanian foreign policy in the Middle East region during the last years of the communist regime, but at the same time, to answer the question regarding the possibility of the implementation of the realistic principles by the Romanian diplomacy, after NATO and EU integration. Therefore, in the first part of the study, we will try to highlight some relevant aspects of Romanian diplomatic actions in the Middle East, in the last part of the communist dictatorship, starting from the great density of diplomatic actions of the Ceaușescu regime in Arab and non-Arab states of the region, actions that would set up a positive identity of Romania in this geopolitical area. Our approach will also try to capture the latest aspects and developments of Romanian foreign policy in this region, in the context in which Romania continues to build a new geopolitical identity - that of a NATO member state and an EU member country. Beyond certain efforts with which Romania is trying to boost foreign policy in the Middle East, in recent years, we note the inconsistency and lack of vision, regarding the interests of the Romanian state, of the foreign policy-makers, referring to the much discussed problem of moving Romania's embassy Israel, from Tel Aviv to Jerusalem. In view of our strategic partnership with the US, the special relations established long time between Washington and Tel Aviv, as well as our

[2] Hans J. Morgenthau, *Politica între națiuni. Lupta pentru putere și lupta pentru pace*, Editura Polirom, Iași, 2007, p. 179.
[3] Joshua S. Goldstein, Jon C. Pevehouse, *Relații internaționale*, Editura Polirom, Iași, 2008, p. 101.

membership of NATO and the EU, this diplomatic issue is imposed on the political agenda of 2018 as an extremely sensitive issue the political leaders of Romania's foreign policy, who have the responsibility to find the best solution in order not to affect the strategic interests of the Romanian state.

2. Marks on Romania's foreign policy in the Middle East region in the communist period

A serious analysis of the over four decades of communism in Romania (1947-1989) leads to the conclusion that many important areas of the Romanian society, such as the economy, social security, defense, health, the environment, scientific research, etc., were much lagging behind compared to the development of these areas in Western democracies. The isolation of our country, as part of the socialist camp, deprived Romania of access to state-of-the-art research and technologies in the Western world, and it was easy to observe, right after 1989, the very large development gap on many fronts between Western democracies and the center of Europe and the post-communist world, emerging from Eastern and Southeastern Europe. We propose, within the framework of this chapter, an analysis of the low performance of the communist regime in Romania in the areas listed above. We do not intend, within this chapter, to analyze the low performances of the communist regime in Romania in the areas listed above. We want to briefly refer to a few aspects regarding the field of Romanian political activity promoted by the communist regime with the Middle East countries in the last years of this regime, trying to deduce what were the geopolitical reasons underlying the decisions important of the Romanian diplomacy of the totalitarian era.

We first point out that if in the communist period many of Romania's gaps in comparison to the Western world can be enumerated, as shown above, from the point of view of foreign policy it can be appreciated that the Ceauşescu regime has achieved some notable successes, including in the Middle East, achievements that have not gone unnoticed by some political personalities and foreign policy analysts from the Western world.

When it comes to Romanian diplomatic activities in relation to the states of the Middle East in the Communist era, we need to reveal the central “axis” on which the whole foreign policy of Romania was oriented and developed in this geopolitical area: the relationship with the Palestinian Authority and with Israel. Nicolae Ceauşescu, despite poor training in the diplomatic field, had a special intuition by understanding that a very good relationship with Yasser Arafat, President of the Organization for the Liberation of Palestine (EPO), is extremely beneficial for the development of political, economic, commercial relations, etc. with the Arab world, given the capital of political influence of this leader in the Arab states of the Middle East. A close relationship with the Palestinians, according to Nicolae Ceauşescu's thought, gave the possibility of foreign policy

opportunities to the Jewish state, taking into account the role of mediator in the conflict between Palestinians and Israelis, assumed unofficially by the former communist president of Romania. Thus, since 1972, during the visit to Egypt, Ceauşescu met for the first time with the President OEP for the first time, and he realized that represents a "foreign policy target" of great importance for Romania, from the perspective of the strategy that the Romanian diplomacy was trying to develop with the Middle East. If we take into account that many Arab states (Jordan, Lebanon, Egypt, Syria) still have Palestinian refugees on their territory, it is easy to deduce the influence of President Yasser Arafat in these Arab states and to what extent could this Arab political leader help develop relations between Romania and the Arab world.

Given the impetus offered by Nicolae Ceauşescu to foreign relations with the Arab world, the Romanian economic diplomacy in the Middle East has become more and more effective since the first decade of the last century, with beneficial effects for Romania's economy. Trying to attract cheap resources from this region, economic relations with a number of Arab states have materialized in a series of important partnerships for Romania, consisting in the construction of many factories in some Arab states, the development of infrastructure, the access of Romanian companies to the enrichment of resources petroleum products, irrigation works, export of industrial products (tractors, armaments, etc.), export of agricultural products, etc. If we consider that 1989 Romania finds itself in a very favorable[4] situation concerning the economic relations with a number of states in the Middle East - 7th, 8th and 10th, commercial partners for Romania were occupied by Iraq, Egypt and Iran, and exports to these states were 10% of the total exports of Romania, the volume of imports accounted for 17% of the total of the products we import - we can conclude that the foreign policy promoted by the Ceauşescu regime in the Middle East was advantageous for the Romanian state.

Simultaneously with the promotion of Romania's economic interests in the region, the favorite diplomatic theme of former President Nicolae Ceauşescu in his relationship with President Yasser Arafat, during the numerous meetings in the twenty-four years that he led Romania, was the one related to the settlement on a peaceful path to the conflict between the Palestinians and Israelis, promoting the idea of Israeli withdrawal from the occupied territories in 1967 and the existence of two independent states - Israel and Palestine, following negotiations. Besides, in order to understand the realism of Nicolae Ceauşescu's foreign policy related to the issue of this old conflict, we would like to remind that since 1967 (July 24-26), in an exposition on the party's foreign policy, only two weeks after the end of the Six-Day War between Israel and a coalition of Arab states, Nicolae Ceausescu

[4] Petrişor Peiu, *Ambiţiile României din Orientul Mijlociu, cu toate cărţile pe masă*, 29.04.2018, pe site-ul http://www.ziare.com/international/israel/ambitiile-romaniei-din-orientul-mijlociu-cu-toate-cartile-pe-masa-1511422

said, " We want to honestly say to our Arab friends that we do not understand and do not share the position of those circles who are ruling on the liquidation of Israel (...) The only rational way to resolve the conflict in the Near East is to immediately withdraw Israeli troops from occupied territories and starting the negociations with the participation of stakeholders to resolve disputable issues. ".[5]

The consistency of Romania, under the leadership of Nicolae Ceauşescu, under the leadership of Nicolae Ceauşescu, in promoting a predictable foreign policy line with the Middle East states, particularly in the peaceful settlement of the conflict between the Palestinians and the Israelis, created a positive identity for the Romanian state, even if it belonged to the communist world, our country being sympathetic to many states in the region. It is also to be remembered that although it was part of the socialist camp, Romania had her own foreign policy in this region of the world, without being influenced by Moscow, appearing at certain important moments that the Middle East was seen as a competitor of the Kremlin for some foreign policy issues.

The Romanian foreign policy consistency, promoted by the communist regime in the Middle East region not only concerned with the development of diplomatic relations with the Arab World, but also with relations with the non-Arab states - Israel and Iran. Thus, it is worth to remember, in this context, that Romania was the only communist state to maintain diplomatic relations with the Jewish state, after 1967, an option of foreign policy that had a very positive echo in the Western political space. Nicolae Ceauşescu's decision in this direction was determined, on the one side, as a result of his desire to build a Romanian foreign policy independent of Moscow and, on the other side, of the desire to promote the principle of equity in relations with other states, considering that the responsibility of the Six-Day War has been started by both the Arabs and the Israelis, and the determination of Arab rulers to destroy the Jewish state was unacceptable to the leadership of communist Romania. It is also important to remember, in respect of our relations with Israel from the last half-century, according to documents from the archives, declassified in Israel in 2012, that the communist Romania has played an intermediary role in the preparation of the negotiations of peace between Israel and Egypt, in the year 1977. In accordance with those sources[6] found in the archives, Israel had overstepped connections with Egypt through Romania, and the statements made by the Prime Minister, Israeli Menachem Begin, are relevant to show the positive role played by Nicolae Ceauşescu in approaching the Egyptian and Israeli parties for signing the peace treaty.

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[5] Michel P. Hamelet, *Nicolae Ceauşescu. Biografie şi texte selectate*, Editura Politică, Bucureşti, 1971, pp. 220-221.

[6] Irina Olteanu, *Ceauşescu, intermediar al negocierilor între Israel şi Egipt, documente desecretizate*, 28.11.2012, pe site-ul http://www.ziare.com/nicolae-ceausescu/comunism/ceausescu-intermediar-al-negocierilor-intre-israel-si-egipt-documente-desecretizate-1204191

As regards Iran, although it was well known in Bucharest about the tense relations of this state with Israel and with many states of the Arab world, the communist regime had the ability to develop a foreign policy strategy in the Middle East in which to develop political-diplomatic and economic ties with the Tehran regime without affecting relations with the Arab states. The fact that the last visit by former communist President Nicolae Ceauşescu to Israel on December 18, 1989, a week before he was executed abroad, represent the last proof that Communist Romania has developed important diplomatic relations with Tehran and that the Romanian diplomacy in that time had the intelligence to promote a credible and predictable Romania for Middle Eastern state partners. If we take into account that in 1994 Romania's imports were secured in the proportion of 9.3% from Iran, given that our traditional partners in the former CAER no longer represented the force of the past, it can be appreciated that the foreign policy of the Ceuşescu regime still has produced positive effects for Romania, four years after the transition to democracy.

After the Revolution of December 1989, compared to the communist period, there were spectacular changes in Romania's foreign policy. The disappearance of the Communist camp in Europe, of the old economic and military alliances Romania was part of - CAER and the Warsaw Treaty - placed Romania in an unprecedented geopolitical situation, the option of getting closer to the Western world becoming the most viable way to ensure state independence of the prosperity of the Romanian people. Thus, in the years following the transition to a democratic regime, the old foreign policy strategies have changed, the political, diplomatic, economic, etc. relations of Romania with various states of the world, including the ones in the region of the Middle East.

If our relations in foreign affairs, with the Western world, would have a very special development, due to the elaboration of the strategic foreign policy objective from the first years after the Revolution - Integration into NATO and the EU - Romania's foreign relations with some states located in regions like the Middle East would have a significant recovery. The same was supported by journalist Florel Manu in 2015: "Since 1989, both relations with Iran and other Middle Eastern countries have begun to cool down".[7] We believe that this fact was due first of all concerning the new strategy for the development of Romanian foreign policy which she was wanted to be broken by the way of diplomacy manifestated in the communist era, eluding the efforts made by the Romanian diplomats in the years of dictatorship, on the other hand, the inability of Romanian diplomacy to implement the realpolitik principles in external relations with the Middle East states. The special feature of this region was another

[7] Florel Manu, *Epoca de aur a prieteniei româno-arabe: Câți bani avea de recuperat Ceuușescu din Orientul Mijlociu*, pe site-ul http://adevarulfinanciar.ro/articol/epoca-de-aur-a-prieteniei-romano-arabe-cati-bani-avea-de-recuperat-ceausescu-din-orientul-mijlociu/

important element that contributed to changing the foreign policy strategy in this geopolitical area: "The Middle East is one of the most unstable regions of the world, crossed by many contradictions, deep and persistent: territorial, ideological violence (Arab nationalism, political Islam, Judaism), economic, ethno-religious, diplomatic "[8]. This change of strategy of the Romanian diplomacy in relation to the states of the Middle East, after 1989, a more and more "busy" diplomacy in building viable relations with the European and Euro-Atlantic structures, was not and is not beneficial on the long term, especially if we take into account the contribution of this region to the energy supply of the current world.

3. Romania's foreign policy in the Middle East - between the constraints imposed by the membership to EU and NATO and its lack of predictability

The study of Romania's foreign policy with the states of the Middle East throughout the period after the overthrow of the communist regime reveals, from the point of view of the Romanian diplomatic activities, a period of over a quarter of a century in which we could not record major events the recent history of the Romanian state. A first stage, within this time frame, is represented by the revolution of December 1989 and has as a final point the moment of Romania's adherence to NATO, that is April 4, 2004. It is the stage in which, in general, in the first years after the revolution, when a series of foreign policy actions, initiated by the old regime, continued with both the Middle East and Middle East Arab countries, Iran and Israel.

An extremely important moment of the Romanian foreign policy in this first stage, with echoes on the future diplomatic relations of the Romanian state, represented the signing of the strategic partnership between Romania and the USA on July 11, 1997, during the visit to Bucharest of US President Bill Clinton. This bilateral treaty concluded by Romania with the only planetary superpower, at that time, but also the traditional interests and connections of the US in the Middle East region, are elements that, willingly or unwillingly, have introduced a series of constraints for Romania's future foreign policy with some states from this region. Certainly, the leaders of the Romanian diplomacy knew that our strategic partner, the only superpower of the world, is not loved and respected by all the states of the planet, which could easily lead to the idea that our country, in the new geopolitical position, will also take over some of the antipathy that some states have towards the US Thus, the adage "my enemy's friend is my enemy" is applied in foreign policy, which makes states to be reserved when they intend to join another state partner in a bilateral diplomatic project, or even within the broader framework of a regional organization. In this context, generally speaking, after July 11, 1997, Romania could not avoid applying this dictum in its

[8] Dan Dungaciu (cord), *Enciclopedia relațiilor internaționale*, Vol II, Editura Rao, Bucureşti, 2017, p. 73.

diplomatic approaches in the Middle East. Therefore, a series of diplomatic actions and positions taken by the Romanian state that targeted Middle Eastern countries without being formally recognized by the Romanian Foreign Ministry had to take into account the sensitivities of the US foreign policy in this region and throughout the Arab world.

The geopolitical situation of Romania in the first years after the December 1989 Revolution, the massive popular populist approach to the West, but also the risks and threats existing in the regional security environment were the main impulses that led to the strategic partnership with the USA, an option shared at that time by all the political forces in our country. Obviously Romania's growing political rapprochement with the United States, the strengthening of the strategic partnership with Washington over the past two decades are elements that have not favored the development of Romanian foreign policy projects with some Middle Eastern countries, states that are not in good relations with the American administration. Having regard to the themes of this research, naturally, we are wondering: How beneficial has been and is the strategic partnership with USA, in over twenty years of existence, from the perspective of the results obtained by the Romanian diplomacy in the region of the Middle East?

The stage that followed Romania's adherence to NATO (2004), beyond the beneficial effects on the national security and defense agenda, imposed on Romania other limitations and foreign policy constraints, naturally resulting from the provisions of the Adherence Treaty as well as the bilateral agreements of the alliance partners.The Irak war since 2003, and especially the geopolitical regional effects of the armed conflict triggered by the US-led coalition against an independent state, has greatly transformed Middle East's power relations and geopolitics during the defeat of the armed confrontation and post-conflict stage. Although Romania participated with military peacekeeping forces in the post-conflict phase after the defeat of the Saddam Hussein regime, the Romanian companies failed to gain important positions in the reconstruction phase of Iraq.

Romania's current governance program, drafted by the Social Democratic Party (PSD) and the Alliance of Liberals and Democrats (ALDE) parties that formed the winning coalition of the last elections, states in the first paragraph of the chapter devoted to Romania's diplomatic activities that "Foreign Policy of Romania must be a national consensus policy to achieve its objectives in an effective manner, managed with professionalism and integrity, to promote and defend national interests."[9] Thus, national consensus represents theoretically the fundamental element of any diplomatic approach, given that most foreign policy decisions, if not all, have medium- and long-term effects. In this context, all the

[9] The governing program 2018-2020, Bucharest 2018, p.216, on the site http://gov.ro/fisiere/pagini_fisiere/PROGRAMUL_DE_GUVERNARE_2018-2020.pdf

political forces of our state are called to get agreements on the measures and actions of foreign policy suggested by the governors in a given situation, because those diplomatic decisions will take effect over long periods of time when it is very likely there is an alternation to the leadership of Romania.

Considering the the latest controversial debates in the Romanian political environment, as well as in various civil society organizations, about the intention of the Romanian government to join the US decision to move the Israel Embassy from Tel Aviv to Jerusalem naturally, we are putting the issue if there is a consensus between the Romanian political forces that would be based on such a diplomatic approach. Considering the extremely strong controversy between the President of Romania and the government based on the intention concerning the future relocation of the embassy of Romania in Israel, it is obviously that today's Romanian diplomacy is facing a lack of consensus on an extreme problem of a sensitive foreign policy, which may have consequences that can hardly be estimated in the long term from the perspective of Romania's relations with the Middle East states. US State Politologist Joseph S. Nye said: "To predict the foreign policy of a state, you must look at the internal organization of that state"[10]. Unfortunately for Romania, we believe that the profound disagreement between the ruling and opposition political forces, the one between the government and the president of the country, on the intention to relocate the Israel Embassy in Israel from Tel Aviv to Jerusalem represents the expression of a highly agitated domestic political life, with many syncopes and controversies, having a singular feature for post-December history: the succession of three governments in Romania over a year and five months since the last parliamentary elections.

Rober Cooper, a former counselor of British Prime Minister Tony Blair during the Iraq war, claimed in 2003, referring to foreign polic, in general, that "In a long term, countries choose their own national identity. This can be done through political decisions that often result from internal pressures."[11] From this perspective we considering that even though in Romania, during the communist period, the foreign policy decisions were not generated under the pressure of the masses, as is the case in the democratic states, however, the leadership of the communist regime outlined a certain identity of diplomacy ours, implicitly of Romania, in the Middle East. Considering the divergent views between the government and the presidency about the relocation of our embassy in Israel, we can consider.without getting wrong, that in these days in the international diplomatic environment, Romania has already been perceived as a country that changes its way of approaching foreign policy under the influence of a global

[10] Joseph S. Nye, *Descifrarea conflictelor internaţionale. Teorie şi istorie*, Editura Antet, Filipeştii de Târg-Prahova, 2005, p. 49.
[11] Robert Cooper, *Destrămarea naţiunilor*, Editura Univers Enciclopedic, Bucureşti, 2007, pp. 161-162.

power, substantially altering its external image as a state in relation to the way our country has been perceived in the last decades in the Middle East.

4. Conclusions

It is well-known that, in general, a country's foreign policy "is full of dilemmas, compromises and ambiguities."[12] The strategies developed and followed by the diplomacy of a state in the context of various foreign policy issues are circumscribed to the national interest, but at the same time these strategies are often influenced by a series of historical, religious, linguistic factors established between various human communities. In this context, we believe that Romania's foreign policy strategies with the Middle East countries should not avoid the positive image capital accumulated before 1989, which Romania still gets benefits from. The large number of specialists with higher education in the Arab world, who have graduated in Romanian universities, over many decades, the important objectives achieved by Romania in various Arab states, in the industrial, agricultural, construction, etc. fields, as well trade with the states of the region is undisputable evidence that our country has been and is a living presence for Arab and non-Middle Eastern societies. Thus, we believe that the present Romanian diplomacy has the chance to capitalize much better than the positive image of Romania in many Arab countries so far, boosting trade with these countries through the involvement of Romanian companies in the reconstruction of some Arab countries, such as Iraq and Syria, who suffered from devastating wars.

Romania's membership of the European and Euro-Atlantic structures requires a different foreign policy manner, compared to the traditional Romanian diplomacy of the past epochs, during were frequently applied the principles of the realistic school. Accordingly, the most important global policy themes, which European Union has to provide solutions to the, impose to Romanian diplomacy new rules of diplomatic behavior, completely different from the way the diplomacy of the communist era acted, the principle of consensus with the union partners being at central level. Romania's membership of the European and Euro-Atlantic structures requires a different way of doing foreign policy, compared to the traditional Romanian diplomacy of the past epochs, during which the principles of the realistic school were frequently applied. Thus, the great world politics issues, which are called upon to offer solutions to the European Union, impose to Romanian diplomacy new rules of diplomatic behavior, completely different from the way the diplomacy of the communist era acted, the principle of consensus with the union partners being at central level.

Considering the current status of Romania, as a NATO and EU member state, imposes some limitations on the national strategic foreign policy options,

[12] Robert Cooper, *op.cit*, p. 166.

implies, from the point of view of the effectiveness of the diplomatic activities, a very high level of training of the diplomatic staff and of the politicians top, which have top-notch powers in foreign policy. As it results from recent debates on the internal political scene considering moving of Israel's Embassy from Israel, from Tel Aviv to Jerusalem, we conclude that a very sensitive issue for world politics is treated unprofessionally by some politicians and diplomatic circles for us, avoiding the idea of national consensus The necessity of well-trained political leaders in the field of foreign policy, taking into account the complexity of the problems currently present on the agenda of the Romanian diplomacy, is essential, being one of the most important conditions of the progress in this field of the Romanian state policy. It is one of the basic requirements for the Romanian diplomacy to add value to our foreign policy, in order to contribute to the achievement of the objectives of the national interest.

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Air transport in Romania.
Historical evolutions in European context

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Abstract

The European aviation market is constantly changing and improving in terms of the services offered to ensure the airlines customers' free movement respecting the rights of passengers in line with the European and international standards. The European competitive environment for air transport has undergone the necessary transformations to ensure fair competition for all air operators.

The article carries out a synthetic analysis of the single aviation market in three stages: -1987 - when, following the Single European Act, national aviation markets have turned into a single air market;

-1990 - which made the rules on tariffs and transport capacities more flexible;

-1992 - which removed the rest of the trade restrictions for airlines. The common rules for the protection of air passengers' rights create compensation mechanisms for passengers for delays and cancellations.

Keywords: *air transport, free competition, free movement of citizens, rights of passengers.*

History of air transport in Romania

Seventy years ago[3], the Romanian authorities set up the „Aviation Directorate of the Ministry of Communications". The new structure, created in 1920, represented the pioneering of commercial air traffic in Romania and Bucharest aligned with the norms of the international aviation. The right to operate the flight lanes reached the French-Romanian Air Navigation Company, established in the same year in Paris. Until then, the only flights to and from Romania were operated by the French government.

The Romanian State Air Operations, LARES, are set up ten years later in 1930 and represent the first airline in Romania. King Carol II, who remains in

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[3] *https://ro.wikipedia.org/wiki/TAROM*

history as the most corrupt leader of the modern Romania, capitalizes it with 360 million lei, an impressive amount of money for those times, as part of a strategy to encourage tourism. LARES airplanes reach all corners of the country, from Chernivtsi to Balchik and from Cetatea Albă to Arad, but also in capitals such as Vienna, Athens or Constantinople.

In 1934, four years after the establishment of LARES, Romania also produced the first passenger airplane - ICAR Comercial - based on a German model - at the Romanian Aeronautical Constructions Company in the capital. Until 1945, LARES expanded its destinations and changed its name to SARTA - Romanian Air Transport Society.

After the war, the state-owned company came under Russian influence and was reorganized on August 8, 1945 in the Romanian-Soviet Air Transport Society (TARS). For 10 years, the airline revenue reaches Moscow and the state-owned company is forced to use only Soviet-produced aircrafts. In 1954, with the abolition of SOVROM, TARS was transformed into TAROM and returned entirely to the Romanian state.

During these periods, the air transport to the general public was very reduced, almost non-existent. The Tarom flight operator was making mostly commercial flights and less attention was paid to the external passenger transport because during the communist period there was no concept of free movement of Romanian citizens outside the country.

In 1959, four years after the departure of the Russians, the Communists started a large procurement program for TAROM. The fleet increases significantly, and the routes are diversified.

Until 1967, the number of passengers transported by TAROM increased more than 14 times. If in 1950 TAROM was carrying 39,000 passengers, in 1967 the salt traffic jumped by half a million passengers a year. The worst period of the national company's history followed. TAROM had five serious accidents since 1959. Five serious accidents in six years have resulted in more than 100 deaths (3 domestic and 2 international)[4]. In 1966 Tarom faced a serious pilots crisis. „The airline has been accused by the press and some government officials of nepotism in appointing and establishing pilots' missions."[5]

In 1968, TAROM operated 23 international races per week - six to the Soviet bloc states and 13 to non-communist states. The same year, Romania ordered six BAC 1-11 aircrafts and became the first airline in the Warsaw Pact to purchase Western production aircrafts.

The trade relations between Romania and the UK begin even in the year of the invasion of Czechoslovakia. In full conspiracy and in full technological

[4] *https://www.money.ro/tarom-o-companie-nationala-lasata-in-voia-sortii-de-toate-guvernarile/*
[5] Central Intelligence Agency.

embargo, since 1968, in Bucharest are assembled engines for BAC 1-11 aircraft. Thus, in 1970 in Romania has already produced line planes based on a secret agreement. According to a CIA report about the Romanian aeronautics market: „Romanians produce about one plane per week, since 1970, using subassemblies from England. The BAC 1-11 result is sold on the world market through Britten-Norman Company at a substantially lower price than the US-produced aircraft."

In parallel with the UK contracts, the Communists also discussed with US representatives for the acquisition of Boieng planes capable of linking Bucharest to New York and Beijing. Thus, in March 1973, a contract of 45 million dollars was signed for three Boeing 707 - transatlantic aircraft - and one year later the air flights were opened to JFK and Peking airports.

At this moment, TAROM also owns 23 aircraft (Boeing, ATR and Airbus).

If at that time there was an interest in the development of this sector after 1990, serious mistakes were made (the injurious sale of aircraft, the abandonment of some contracts already concluded before 1990 and to be honored between 1992 - 1993, etc.) on the administration and development of the air transport sector.

In 1997, by the government ordinance[6] for the „establishment" of TAROM, the social capital is shrinking after nearly seven years from one billion dollars ($ 1,127,338,129) to just over 7 million dollars (7,078,290 dollars), divided between Ministry of Transit (70%) and SIF Muntenia (30%). Only between 1996 and 1999, Tarom has accumulated over 145 million dollars of debt. Since then, this company has been periodically recapitalised from the state budget until now and always in the process of economic rehabilitation. The biggest loss occurred in the first six months of 2017, of 106,000,000 Lei.[7]

Although the state-owned airline had also foreign management, the company's problems are many that do not necessarily have anything in common with management. A big problem is the trade unions, which are extremely powerful and interfere with management. There are more employees in the administrative and auxiliary staff than cash-generating staff (pilots, sailors, etc.). Another issue is the subordination of the management to the line ministry and the political imposition of the members of the boards of directors. Also Tarom airplanes are non-performing airplanes and we are talking about Airbus 318, which was produced in few copies because it is technically a failure (it has a short fuselage).[8]

[6] Ordonanță nr. 45/1997 *din 28/08/1997*, Publicat in Monitorul Oficial, Partea I nr. 223 din 29/08/1997 privind înființarea Societății Comerciale „Compania națională de transporturi aeriene române – TAROM"- S.A.

[7] *http://www.mediafax.ro/politic/premierul-mihai-tudose-tarom-are-2000-de-angajati-si-o-pierdere-istorica-corpul-de-control-va-investiga-16700100*

[8] *https://republica.ro/ar-trebui-compania-tarom-inchisa*

The air transport in E.U.

The European air transport includes the 28 Member States and not only but also Guadeloupe, French Guiana, Martinique, Réunion, Mayotte, Saint-Martin (French West Indies), the Azores, Madeira and the Canary Islands as well as Iceland, Norway and Switzerland .

The legal basis for which the EU has set itself the objective of establishing a single air transport market in Europe, ensuring its proper functioning and extending it to certain third countries, was Article 100 (2) (ex art. 80 TCE) of the Treaty on the Functioning of the European Union.[9]

Historically, the air transport has developed under the auspices and control of the national authorities. In Europe, this largely meant monopolistic national transporters and publicly owned/ managed airports. The international air transport, which is based on inter-state bilateral agreements, has expanded accordingly - with strict control of, in particular, the market access and ownership regimes of transporters. This fragmentation into national markets and the absence of a real competition were less and less with the increasing standards of living and the resulting growing demand for air transport. From the mid-1970s, the civil aviation had to switch from an administered economy to a market economy. Thus, the 1978 Airline Deregulation Act completely liberalised the US market.

The same occurred in Europe in a decade-long process, in the wake of the Single European Act of 1986 and the completion of the internal market: several sets of EU regulatory measures have gradually turned protected national aviation markets into a competitive single market for air transport (de facto, aviation has become the first mode of transport - and to a large extent still the only one - to benefit from a fully integrated single market).

Notably, the first package (1987) which gradually transformed, following the Single European Act (1986), the national aviation markets into a single air transport market in the European space.

The second package (1990) included the flexibility of the rules on tariffs and capacities, and in 1992 the „third package" (ie the Council Regulations (EEC) No 2407/92, 2408/92 and 2409/92, now replaced by the Regulation (EC) No 1008/2008 of the European Parliament and of the Council)[10] removed all remaining trade restrictions for European airlines operating within the EU, thus creating the „European Single Aviation Market". Subsequently, this single market was expanded to Norway, Iceland and Switzerland. It could be further extended to several neighboring countries through the *European Common Aviation Area Agreement*, provided that these countries progressively implement all relevant EU rules, which is not yet the case.

[9] *http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?ftuId=FTU_3.4.6.htm l*
[10] *http://eur-lex.europa.eu/legal-content*

The „third package" substituted „The Community air transporters" for the national air operators, and set as the basic principle that any Community air transporter can freely set fares for passengers and cargo and can access any intra-EU route without any permit or authorisation (with the exception of some very particular routes on which the Member States can impose public service obligations, subject to conditions and for a limited period of time).

The „third package" also laid down the requirements that the Community air transporters must comply with in order to start or continue operations.

At the same time, operators have adequate civil liability insurance in case of accidents and the professional and organizational capacity necessary to ensure the safety of operations in accordance with the regulations in force. This capacity is attested by the issuance of an „air operator certificate".

In parallel with the setting-up of the Single Aviation Market, *common rules have been adopted to ensure its proper functioning,* which requires, notably, a level playing field and a high and uniform level of protection for passengers.

The fair access to airports and airport services is ensured by the Regulation (EEC) No 95/93, which provides that at congested airports „slots" (i.e. permission to land or take off on a specific date and at a specific time) shall be allocated to airlines in an equitable, non-discriminatory and transparent way by an independent „slot coordinator". However, this slot allocation system prevents the optimal use of airport capacity. For that reason, the Commission proposed in 2011, a number of amendments to Regulation 95/93 to improve the efficiency of the system, but so far there has been no agreement on those between the two legislators. Directive 96/67/EC has gradually opened up to competition the market for groundhandling services (i.e. the services provided to airlines at airports such as passenger and baggage handling, fuelling and cleaning of aircraft, etc.). A Commission proposal from 2011 to further open up this market at the biggest European airports was not approved by the legislator and was withdrawn by the Commission in 2014. In addition, Directive 2009/12/EC lays down the basic principles for the levying of the airport charges paid by air transporters for the use of airport facilities and services. *This, however, has not prevented disputes between airports and airlines from multiplying.*

To ensure fair access to the distribution networks and prevent them from influencing consumer choice, common rules have been in force since 1989. They provide that the Computerised Reservation Systems or CRSs (which serve as the 'technical intermediaries' between the airlines and the travel agents) shall display air services of all airlines in a non-discriminatory way on the travel agencies' computer screens.[11] However, the role of CRSs is decreasing since the online distribution is more and more in general use, including by the transporters' websites.

[11] Regulamentul (CE) nr. 80/2009.

Although the Regulation (EC) 868/2004 aimed at combating unfair competition from foreign transporters, this instrument proved to be impossible to apply. As a result, the Commission presented a new mechanism in early 2017 to ensure fair competition between EU transporters and foreign transporters, a proposal finalized by a decision in June 2017.[12]

To protect passengers and aircrafts and to ensure a high and uniform level of safety throughout the EU, national safety rules have been replaced by common safety rules which have been progressively extended to the whole air transport chain. In addition, an European Aviation Safety Agency has been set up which, among other things, elaborates these rules. There were also harmonized safety requirements in all EU airports to improve prevention of malicious acts against aircrafts and passengers and crew (it should be noted, however, that the Member States retain the right to apply measures more stringent security). In addition, the common rules for the protection of the rights of air passengers use the purpose of ensuring that passengers receive at least a minimum level of assistance in the event of major delays or cancellations. These rules also provide for compensation mechanisms. The enforcement of these rules is still difficult, which it is why legal action is often initiated. In March 2013, the Commission therefore proposed clarifying the rules in order to facilitate their implementation by both transporters and passengers. This proposal was materialized in June 2016 when the Commission adopted a set of guidelines based on case-law.

More than twenty years after the entry into force of the „third package", the functioning of the single aviation market continues to be per se, as the following factors demonstrate: the shortcomings in the system of allocation of (80%) of routes departing from EU airports are still served by only one (60%) or two transporters (20%), the financial difficulties faced by a number of airlines and secondary airports or the complexity of air transporter surveillance currently operating in several Member States.

However, the main objective was fully achieved: between 1995 and 2014, while the number of kilometers per passenger in the EU-28 increased by about 23%, for air transport it increased by about 74%. Over the same period, the share of the airline sector in total passengers transport increased from 6.5% to 9.2%, which is by far the strongest increase in all modes of transport in the EU.

In this context, the European Parliament nevertheless stressed that the liberalization of air transport needs to be carefully and gradually implemented and that a balance needs to be struck between the interests of consumers and industry.

In the last quarter of the century, the European Parliament has always advocated *fair competition, aviation safety, quality of service and passengers' rights, while safeguarding the working conditions of airline staff and environmental protection.* For example, the Parliament since the beginning of the

[12] COM(2017) 286.

liberalization process it has been that it was called for the establishment of the criteria for state aid for airports and airlines and the adoption of common rules on groundhandling services, airport charges and rights passengers.

Related decisions of the European Commission The European Parliament regulates the aviation sector

Some of the European regulations are as follows:

- Resolution of 14 February 1995 on the Commission communication on the future of civil aviation in Europe.[13]

- European Parliament legislative resolution of 11 July 2007 on the proposal for a regulation of the European Parliament and of the Council on common rules for the operation of air transport services in the Community.[14]

European Parliament legislative resolution of 12 December 2012 on the proposal for a regulation of the European Parliament and of the Council on common rules for the allocation of slots at the airports of the European Union.[15]

European Parliament legislative resolution of 16 April 2013 on the proposal for a regulation of the European Parliament and of the Council on groundhandling services at the Union airports and repealing Council Directive 96/67 / EC.[16]

European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) 2027/97 on the liability of air transporters for the transport of passengers and their baggage by air.[17]

A study entitled 'Overview of EU aviation agreements', conducted by the European Parliament in 2013, provides an analysis of the content and effects of these agreements.

It should be noted that in 2016 the EU has around 90 "coordinated" airports (ie "hourly slots").[18]

Descriptive sheets on: civil aviation safety, civil aviation security[19], passenger rights have also been regulated. In order to clarify the rules in force, in June 2016 the Commission adopted a set of guidelines based on case-law.

[13] JO C 56, 6.3.1995, p. 12.
[14] JO C 175E, 10.7.2008, p. 371.
[15] JO C 434, 23.12.2015, p. 217.
[16] JO C 45, 5.2.2016, p. 120.
[17] JO C 93, 24.3.2017, p. 336.
[18] A se vedea mai ales studiul *„Airport slots and aircraft size at EU airports"*(Sloturile orare şi dimensiunea aeronavelor de pe aeroporturile din UE) realizat de Parlamentul European în 2016.
[19] A se vedea studiul *„The EU regulatory framework applicable to civil aviation security"*(Cadrul de reglementare al UE aplicabil securității aviației civile) realizat de Parlamentul European în 2013 prezintă în mod cuprinzător legislația UE în domeniul securității aviației.

Who wins (Qui bono) and who loses?

The liberalization of the free market creates a healthy competitive environment for the economy, but especially for the consumers. The rehabilitation of airports and the construction of new ones.

In the program of governance by 2020[20] there are some works and extensions of some airports: „Traian Vuia" in Timișoara, „Mihail Kogalniceanu" International Airport in Constanța, „Aurel Vlaicu" International Airport in Bucharest Băneasa and „Henri Coandă" International Airport. It remains to be seen what will be accomplished, since by 2018 things have not evolved in the sense assumed by the governance program

Who loses? The whole population of Romania and implicitly the Romanian economy.

In the European Union, through the approved directives on the development of the air transport over time, and by creating a favorable competitive environment, Romania and all the Member States have been offered the optimal conditions for achieving a modern air transport.

A concrete example is the construction of new airports and the rehabilitation of existing ones. The construction of an airport in Brasov - Ghimbav is a problem that has been delayed by all the governments so far.

At the moment, it is said that after a five-year break, the yard could be reopened in April 2018 and the works would be ready in 2020.[21] Until the other, the Braşov County Council argues the delay by invoking the lack of budgetary allocations and the approval of the Competition Council, but also conducting feasibility studies.

However, unofficial sources (hardly because of excessive bureaucracy) started in 2017, the works of a small and private airport near Brașov, an airport that will be in use at the end of 2019.

Conclusions

The situation of the existing airports is more or less good. If there is an airport and it is functional, there is a bad management that hinders all kinds of low cost airlines for passenger transport. An example is the Timișoara Airport, which although has grown in the recent years, expanding its services to the most diverse destinations (Memmingen, Valencia, Tel Aviv, Dortmund, Bologna, Antalya, the Greek islands - Heraklion - Crete and Zakynthos) 2018 "simply" drove out almost all the flight companies that had contract with it (Ryanair, Blue Air and Wizz Air) on

[20] M. Of. al României, Partea I, Nr. 496/29.VI.2017, *http://gov.ro/fisiere/pagini_fisiere/17-06-29-08-28-44Programul-de-guvernare2017-2020-2.pdf*, pp. 41-42

[21] *http://www.mediafax.ro/social/cand-va-fi-gata-aeroportul-brasov-santierul-va-fi-redeschis-dupa-o-pauza-de-cinci-ani-cele-cinci-obiective-noi-din-prima-etapa-de-lucrari-17031828*

internal flights. Why did they go? Because they were asked for more money because they landed at Timişoara airport, and private flight companies for internal races, if not profitable, canceled the contracts with the airports. Basically, the internal flights competition has suffered, but, surprise, TAROM has won, unprofitable nowadays, with a lot of debt and a huge hole in the state budget. With all of these TAROM debts, it will not be privatized too soon, although it has been convinced that in 2017, the company will close the financial year on zero (no debt).[22]

In the first three months of 2018 there was an increase in passengers' numbers by 2.6% compared to the previous year for Timişoara airport, the press release issued by Timişoara Airport is proof at the beginning of April 2018.[23]

The internal air traffic increased by 77% in 2017 (almost 900,000 passengers for the four airlines that bet on the internal flights segment), according to Eurostat[24], and although there is a great demand for the internal flights due to the situation of rail and road infrastructure, and (such as the west of the country Cluj, Timişoara, Oradea, Satu Mare to Constanța - 15 hours by train and 9 hours by car)[25], however, there are obstacles to the continuous development of this market segment - the internal „low cost" flights for passengers.

Instead of facilitating the internal flights for the population, at low prices, the flights on internal routes (Timişoara - Iaşi, Timişoara - Cluj, Timişoara - Bucharest, Timişoara - Craiova) were chosen with TAROM Company, which has high prices, in order to revitalize the company.

In September 2016, the Government approved the Master Plan of Transport of Romania[26], a strategic document setting out the main directions for the development of transport infrastructure in Romania over the next 15 years, on all modes of transport: road, rail, naval, air and multimodal. The document outlines the general framework for the development of the transport infrastructure, financing sources, project implementation strategy, as well as the maintenance and repair work until 2030. It also sets strategic objectives, transport corridors, specific interventions and scenarios implementation for a balanced, sustainable development and harmonized with the trans-European strategic transport infrastructure objectives in our country.

[22] *http://www.bursa.ro/ministrul-transporturilor-este-exclus-sa-privatizam-tarom-si-compania-aeroporturi-323544&s=companii_afaceri&articol=323544.html*
[23] *http://www.bursa.ro/ministrul-transporturilor-este-exclus-sa-privatizam-tarom-si-compania-aeroporturi-323544&s=companii_afaceri&articol=323544.html*
[24] *http://ec.europa.eu/eurostat/statistics*
[25] *http://www.zf.ro/companii/zborurile-interne-au-luat-cota-de-piata-de-la-cfr-calatori-si-merg-spre-1-mil-pasageri-16697897*
[26] *http://gov.ro/ro/guvernul/sedinte-guvern/master-planul-general-de-transport-al-romaniei-document-strategic-de-dezvoltare-a-infrastructurii-nationale-de-transport-aprobat-de-guvern*

Although the adoption of the Master Plan is also a conditionality for Romania's transport financing, the Operational Program for Large Infrastructure states that it will contribute significantly to Romania's long-term sustainable development by increasing the intermodal connectivity (links created by combining all modes transport between the regions, access of the population and the business environment to the transport network and supporting the development of the regions with potential for economic growth, we do not find a viable strategy for the development of the passenger air transport, in this case its infrastructure (aircraft, control systems and air traffic safety).

The state policies on the development of inland passengers' traffic are good on paper, but judging by the results so far, these policies remain dubious and prove to be ineffective.

Impact of the ECHR jurisprudence on the rights of detainees

Aura PREDA[1]

Abstract

The paper analyzes the case law of the ECHR on the conditions of detention in Romanian prisons, including the overcrowding. The social response of the State to these realities, following the April 2017 pilot decision of the ECHR, generated measures that has made changes to some rights of detainees. The legislation adopted as the compensatory remedies that has not solved the problems faced by the prison system in Romania, as some statistical data demonstrate.

Keywords: *the case law of the ECHR, overcrowding, rights of detainees, compensatory remedies, the prison system in Romania*

1. What is the legal framework of the penitentiary system in Romania?

Legal framework will regard, on one hand, main ***n***ational legislation and, on the other hand, secondary legal rules.

National main legislation refers to:

2. **Constitution** (art. 22 on the right to life and to physical and mental integrity, art. 11 par. (1) on international law and national law, art. 20 regarding International Treaties on Human Rights, art. 148 par. (1), (2) and (3) on integration into the European Union)

3. **Penal Code** (ex. the abusive investigation - art. 280, subjecting to ill-treatment - art. 281, torture -art.282)

4. **Penal Procedure Code**

5. **Law no. 254/2013** on the execution of sentences and custodial measures of the judicial bodies in the course of criminal proceedings;

6. **Law no. 169/2017** for amending and completing the **Law no. 254/2013** on the execution of custodial sentences and coercive measures imposed by the judiciary in criminal proceedings

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7. **Government Decision no. 157/2016** for approval of Regulations for the application of Law no. 254/2013 ;

8. **Government Decision no. 756/2016** on the organization, operation and the tasks of the National Administration of Penitentiaries;

Secondary legal rules on the rights and activities of prisoners include:

- Order no. 1676 / C / **2010** of the Minister of Justice for approval of Regulations on the Safety of Detention Sites under the Administration National Penitentiaries;
- Order no. 2199/**2011** of the Minister of Justice for the approval of the Regulation on the conditions for organizing and carrying out educational, cultural, therapeutic, psychological counseling and social assistance in prisons;
- - Order no. 429 / C / **2012** of the Minister of Justice on Assistance medical services of the persons deprived of their liberty under the custody of the National Administration of Penitentiaries ;
- - Order no. 1072/**2013** of the Minister of Justice on the Regulation on religious assistance to persons deprived of their liberty under the custody of the Administration National Penitentiaries.
- Decision no. 438/**2013** of the General Director of the National Administration of Penitentiaries for approving the Methodology for granting rewards for persons under the custody of the National Administration of Penitentiaries on the basis of the Credit system for the participation of detainees in activities and programs of education, psychological and social assistance, to lucrative activities, as well as in risk situations;
- - Decision no. 377/**2014** of the General Director of the National Administration of Penitentiaries for the modification of the Methodology regarding the granting of rewards for persons under the custody of the National Administration of Penitentiaries on the basis of the Credit system for the participation of the detainees in educational activities, programs, psychological and social assistance, as well as in risk situations, approved by the decision of the General Manager of NAP no. 438/2013.
- **National strategy** for social reintegration of persons deprived of their liberty 2015-2019, approved by the Government Decision no. 389/2015

2. What is the case law of the European Court of Human Rights - in connection with the field?

The jurisprudence of the European Court of Human Rights incidental in the field is:

- in connection with the violation of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (prohibiting inhuman or degrading treatment):

Year	Number of judgments delivered against Romania
2011	26
2012	37
2013	33
2014	34
2015	93

Judgments finding at least one violation[2]:

Countries	Number of judgments delivered against **2016**	Number of judgments delivered against **2017**
Russia	222	293
Turkey	77	99
Romania	**71**	**55**
Ukraine	70	82

Total number of pending applications at[3]:

Pays	30 june 2017	1 janvier 2018
Ukraine	**18 700**	7100
Turkey	12 000	7500
Hungary	10 050	3550
Romania	9 600	**9900**

3. What is the history of special reports written by the Ombudsman /People's Advocate on the enforcement of custodial sentences?

History of Special Reports Drafted by the Ombudsman in the matter of the execution of custodial sentences shows that:

a) **In 2003**, in the exercise of its duties, the Ombudsman elaborated The special report on the execution of sentences in penitentiaries. Following the proposals a law, a government decree, an emergency government order and three orders of the Minister of Justice were adopted.

b) **In 2008**, Special report on regulations issued by the Minister of Justice and the Director General of the National Administration of Penitentiaries in matters of execution of punishments and educational measures at the admission of juvenile offenders to reeducation centers.

c) **In 2014**,[4] in collaboration with UNICEF, the Special Report was drafted on respect for the rights of children deprived of their liberty in Romania.

d) **In 2015,** Special Report on prison conditions in penitentiaries and detention and preventive arrest centers, determinants in respect for human dignity and human rights

[2] https://www.echr.coe.int/Documents/Stats_violation_2017_ENG.pdf
[3] https://www.echr.coe.int/Documents/Stats_pending_2018_BIL.pdf
[4] http://www.avp.ro/rapoarte-speciale/raportspecial_iulie2014.pdf

Information in the press presented the conditions of detention in prisons (with referring in particular to Iaşi, Craiova, Braila, Galati, Colibaşi, Giurgiu, Aiud, Oradea, Târgu Jiu and others), mentioning by way of example: overcrowding from the detention rooms; the existence of harmful insects in some detention facilities ;insufficient time allocated to the detainees' toilet; inappropriate state a bed linen; the absence of storage facilities for personal property prisoners; inadequate quality of served food; undersize riding courts; inadequate quality of care; prices large practices in penitentiary shops and conversations telephone; the inadequate attitude of prison staff from detainees, as well as various events involving people deprived of their liberty.

The Ombudsman made an ex officio notification willing to conduct investigations in places of detention and to prepare the Special report of dec.2015[5].

Thus, the Ombudsman decided to conduct surveys throughout the system of Romanian penitentiary and, in addition to issues reported in the press, established the request information on: table service conditions; water supply program and electricity; water and feed quality; distribution of hygienic-sanitary materials; the apportionment of detainees according to their degree of danger; existence dryers; the number of deaths and the number of persons deprived of their liberty; the events in which private individuals were involved during the period 2014-2015 (physical aggression, possible sexual intercourse) between prisoners or between prisoners and prison staff of detention); other relevant aspects of the prison situation.

4. What was the starting point of the communication?

But, in the file on the desk of *ECHR*, about Rezmiveş and Others v. Romania[6], april 2017 we find oaut that:

- The applicants, Daniel Arpad Rezmiveş, Marius Mavroian, Laviniu Moşmonea and Iosif Gazsi, are Romanian nationals who were born in 1970, 1966, 1976 and 1972 respectively. Messrs. Rezmiveş, Moşmonea and Gazsi, who are currently detained in the prisons of Timişoara, Pelendava and Baia Mare, as well as Mr. Mavroian, who was detained in Focşani Prison and was released on 13 January 2015.
- The applicants complain, among others:
  - of the overcrowding of cells,
  - the inadequacy of poor sanitation and hygiene (presence of rats and insects in the cells, mold in the walls),
  - poor quality of food and equipment,
  - the material supplied,

[5] http://www.avp.ro/rapoarte-speciale/raport_special_mnp_decembrie2015.pdf

[6] https://www.google.ro/search?q=l%E2%80%99affaire+Rezmive%C8%99+et+autres+c.+ Roumanie &oq=l%E2%80%99affaire+Rezmive%C8%99+et+autres+c.+Roumanie&aqs=chrome..69i57.9792j0j7 &sourceid=chrome&ie=UTF-8

- inadequate access showers and toilets,
- lack of natural lighting, lack of ventilation.

o The conditions of detention of the applicants, taking also into account their duration subjected them to a test of an intensity which exceeded the inevitable level of suffering inherent in detention.

o The conditions of detention in the Romanian prison environment are contrary to The Convention and are part of a structural dysfunction which demands the adoption of general measures by the State.

o The Court considers that the State should put in place:

1) measures to reduce overcrowding and to improve the material conditions of detention;
2) remedies (a preventive remedy and a specific compensatory remedy).

Article 46 (binding force and execution of judgments)

The Court decided to apply the procedure of the **pilot judgment,** considering that the situation of the applicants is a general problem arising from a structural dysfunction the Romanian prison system which persists, although it has already been identified by the Court in Iacov Stanciu v. Romania, No. 35972/05, 24 July 2012).

- To remedy this, the State must put in place general measures of two types:

On the one hand, the State must put in place measures to reduce overcrowding and improve the material conditions of detention. The Court leaves it to the respondent State to make, under the control of the Committee of Ministers, the concrete steps it deems necessary for this purpose, specifying that where the State is not in a position to guarantee to each prisoner conditions of detention in accordance with Article 3 of the Convention, it encourages it to act in such a way as to many of the incarcerated.

- the Court decides to apply of the pilot judgment, considering that the applicants' situation was a general problem which originated from a structural dysfunction in the Romanian prison system.

- Therefore, the Romanian Government must provide, in cooperation with the Committee of Ministers, within **six months** from the date on which the judgment becomes final, a specific timetable for the implementation of appropriate general measures.

- the Court decided to adjourn the examination of the unreported overcrowding and the poor conditions of detention in prisons and the depots attached to the police stations in Romania, and to continue the examination of already communicated to the Government.

Article 41 (just satisfaction)

On the other hand, the State must put in place remedies (a preventive remedy and an compensatory). The preventive remedy must enable the supervisory judge to enforcement and the courts to put an end to the situation

contrary to Article 3 of the Convention and to grant compensation. The specific compensatory remedy must make it possible to obtain adequate compensation for any violation of the Convention relating to insufficient living space and / or precarious physical conditions.

So, the Court decided that Romania must pay some amount to applicants.[7]

So, the Romanian Government provide, in order to take the measures demanded, Law no. 169/2017 for amending and completing the Law no. 254/2013 on the execution of custodial sentences and coercive measures imposed by the judiciary in criminal proceedings

Art. 55.1. - Compensation in case of inappropriate accommodation

[1.] In calculating the punishment actually executed, regardless of the punishment execution regime, as a compensatory measure, and the execution of the punishment under inappropriate conditions, in which case, for each period of 30 days performed under improper conditions, even if they are not consecutive, 6 days of the applied punishment are also executed.

[2.] For the purposes of this article, inappropriate conditions for the accommodation of a person in any detention center in Romania, which lacked the conditions imposed by the European standards, shall be considered inadequate.

[3.] For the purposes of this Article, punishment shall be considered inappropriate for accommodation in any of the following situations:

a) accommodation in a space of less than or equal to 4 square meters per person, calculated, excluding the area of sanitary groups and food storage areas, by dividing the total area of the holding rooms by the number of persons accommodated in the respective rooms, irrespective of the endowment of the space in question;
b) lack of access to outdoor activities;
c) lack of access to natural light or sufficient air or availability of ventilation;
d) lack of adequate room temperature;
e) the lack of the possibility to use the private toilet and to comply with the basic sanitary standards as well as the hygiene requirements;
f) the existence of infiltration, dampness and mold in the walls of the detention chambers.

To complete the new legal framework we must underline also:

- Order no. 2.772 / C of 17 October 2017 of the Minister of Justice for the Approval of the Standard Minimum Rules for the Accommodation of Persons Deprived of their Liberty[8].

[7] EUR 3,000 (EUR) to each of the applicants, Rezmiveş and Gazsi,
EUR 5,000 to each of the applicants, Mavroian and Moşmonea, for moral damage
EUR 1 850 for costs and expenses to Mr. Moşmonea

[8] http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=147015

- Orde no. 2.773 / C of 17 October 2017 of the Minister of Justice for the approval of the centralized situation of buildings that are inadequate in terms of conditions of detention [9].

Conclusions (1)

Possible solutions for overcrowding:

A. short-term solutions

- repairing and completing penitentiary infrastructure
- rearranging of new rooms by transforming spaces with other destinations in detention spaces;
- the mansarding of existing penitentiaries (for eating, educational or vocational activities)
- conditional release and collective pledges
- facilities for employers who receive ex- prisoners
- providing transit houses after release (for preventing recidivism)
- to release of prisoners from the open or semi-open regime during the weekend

B. long-term solutions

- the allocation of funds needed to build new detention facilities ensuring decent conditions (may 2017- project for 2 new penitenciaries: Caracal (P46 - 1000 places) and Berceni (P47 - 1000 places);
- changes at the level at penal policies;
- changes at the level of legal norms ;
- public-private partnerships;
- private penitentiaries

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[9] http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=147016

Application of the rules relating to the mandate with representation in the case of the commission contract (II)

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Vlad-Teodor FLOREA[2]

Abstract

The present study was based on the fact that the current Civil Code stipulates that the special rules on the regulation of the commission contract, contract of mandate without representation, shall be supplemented with the rules in the contract of mandate area with representation.

The attempt to supplement the commission contract with the regulations from the contract of mandate itself has highlighted problems of interpretation, given the confrontation between these rules, on the one hand, and those specific to the commission, on the other.

The article deals mainly with the rules applicable to the obligations incumbent on the parties to the commission contract.

The authors identify some possible different interpretations of the application of these provisions, interpretations they present and on which they formulate their own solutions, including in the form of the proposals of lex ferenda.

The study is aimed at specialists in civil law, as well as theoreticians and practitioners, as well as at students and master students in the field of juridical sciences, to whom it proposes topics of reflection and the urge to express their opinion on them, in order to consolidate some substantiated theses in the field.

Keywords: *commission contract; consignee; principal; sub-commissioning; plurality of consignees; exception to the principle of symmetry of forms; revocation of the commission.*

1. Preliminary remarks

In a previous study[3], we have expressed a point of view on how some rules apply to the mandate with representation, also known as the trust mandate, (the

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[3] See *Applying the rules related to the mandate with representation (I)*, a study presented at the International Conference on the Efficiency of Legal Norms - 7th Edition, *"Democracy through Civil Law Rules, Criminal Law Justice*", May 17-18, 2018, Cluj-Napoca.

mandate itself) to the situation of the commission contract. Therefore, we have examined the application, in the above-mentioned case, of the rules related to: acceptance of the mandate; the diligence of the trustee; the trustee's obligation to be liable; payment of interest on amounts owed by the trustee; the trustee's liability for the insolvency of the third party; plurality of trustees; substitution made by the trustee; taking cautionary measures; the amounts required to execute the contract and the obligation to pay compensation; the plurality of trustees.

In this article, we continue the process, by analysing the way in which the commission contract applies, the rules in the actual mandate, relative to: the way of termination of the contract in question; the conditions of revocation; the effects of revocation; advertising the revocation; waiver of the contract; death, incapacity or bankruptcy of one of the parties; termination of commission in the case of multiple commissioners.

2. Rule application relating to the mandate contract itself

The rules regarding the termination of the trust mandate contract are a separate category of rules that apply to the commission contract (art.2030-2035 of Civil Code). We consider the specific ways of terminating the mentioned commission contract in the foregoing.

2.1. Revocation of the commission contract

The Committee may, by virtue of the law (art. 2031 of Civil Code), revoke contractual commission, expressly or tacitly, regardless of the form in which the commission was concluded, including in the case where it contained a clause according to which the contract would be irrevocable.

Therefore, if a commission contract has been concluded in authentic form, it can be revoked by the principal tacitly as well.

The provisions permitting the revocation of the commission in any form represent an exception to the principle of symmetry of forms, according to which the revocation of a legal act, especially an express power, must be done in the same form as the revoked legal act (empowerment).

It is our opinion that the exception to the principle of symmetry of forms related to the revocation of the commission by applying the rules of the matter of the proper mandate constitutes an uninspired regulation of the legislator.

Thus, the solution of a commission contract concluded in authentic form to be revoked by a tacit act may have negative consequences in the civil circuit security plan.

The consequences to which we refer may arise, for example, from the coexistence of the commission contract concluded in authentic form with the act of tacit revocation. In this case, it is no longer possible to speak of the opposability of the revocation of the commission in authentic form, which may affect the security of the civil circuit.

That is why, we propose, de lege ferenda, the alteration of the text of the law regarding the conditions of the mandate's revocation form and, implicitly, of the revocation of the commission, in the sense that the revocation complies with the rule of symmetry of forms. This was also the case in the previous regulation (art. 399 of the Civil Code), which stipulated that the revocation of the express mandate should be done in the same way in which it was concluded.

Another legal issue to be analyzed results from the comparison of the provisions of art. 2051 of the Civil Code regarding the revocation of the commission contract, the only way of terminating this contract expressly regulated by the legislator, with the rules regarding the revocation of the mandate itself stipulated in the art. 2031 para. (1) of the Civil Code, applicable, according to art. 2039 paragraph (2) of the Civil Code and in addition to the commission rules.

From the comparative examination of the two texts of law, a natural legal question arises, for which we will try to formulate an answer.

This is the question of when the commission may be revoked by the principal.

In accordance with the provisions of Article 2031 paragraph (1) of the Civil Code, the mandate contract may be revoked at any time by the principal.

In contrast, according to Article 2051 paragraph (1) of the Civil Code, the revocation of the commission can only be made until the third person has concluded the legal act for which the commission was given.

It is our opinion that in the situation presented, the time until the commission can be revoked by the commissioner is until the conclusion with the third party of the prefigured contract. The subsequent commissioning of the commission is unreasonable as it ceased by putting it in execution.

Starting from the above mentioned observations, we believe that the regulation contained in art. 2051 paragraph (1) Civil Code on the revocation of the commission until the conclusion of the act for which the power of attorney has been given, should also apply to the time until the revocation of the mandate can take place.

As a consequence, we propose, de lege ferenda, the modification of art. 2031 paragraph (1) of the Civil Code, in order to remove the provision that the mandate may at any time revoke the mandate and replace it with the rule that the mandate may revoke the mandate given to the trustee only until he has concluded with the third party the prefigured legal act.

The revocation of the commission also operates in the event that the principal concludes a new commission contract for the same legal operation (art.2031 paragraph (2) Civil Code). The legislator presumed that the first commission was revoked when the commissioner entered into another commission with the same object as another commissioner, and the content of the two contracts did not show that the two commissioners worked together (doesn't mean plurality of commissioners)[4].

[4] See, in the same way, Gh. Piperea, *The Mandate Contract*, Fl.A. Baias, E. Chelaru, R. Constantinovici,

A special legal condition for the revocation of commission refers to the assumption that the revocation relates to such a contract concluded by a plurality of commissioners. In the case of a plurality of commanders who have given a single commissioner the power to carry out a joint operation, the will of a commissioner or of some commanders to revoke the legal act in question does not take effect unless there is unanimity of the commanders in respect of the revocation.

2.2. Effects of revocation

The first effect of the revocation is the right of the commissioner to receive part of the commission (art.2051 paragraph (2) Civil Code). This part of commission is determined in relation to the diligence and the expenses incurred by the commissioner up to at the time of the contract revocation.

In the doctrine[5] it has been emphasized that there is no relationship of interdependence between the obligation of the principal to reimburse the part of the fee highlighted above, on the one hand, and the commissioner's duty to execute the contract, on the other.

But, as the case law has stated[6], the amounts claimed by the commissioner must be demonstrated by documents (authentic or under private signature), bills, witnesses, accountancy expertise, etc. The commissioner who claims the amounts as commission is also responsible for the proof of the respective amounts[7].

By applying to the commission the rules in the matter of the revocation of the mandate (art. 2032 Civil Code) there are other effects, such as: the immediate effect; the unexpected effect; the presumption of unjustified revocation of the irrevocable commission[8] and the validity of acts concluded by the commissioner without knowing the revocation of the commission.

Thus, with regard to the immediate effect of the revocation, it should be pointed out that it consists in ending the power of representation of the commissioner.

In the literature[9], it has been shown that, according to the case-law[10], the absence of reasons for revoking the commission cannot be a cause of nullity of the commission. As far as we are concerned, we consider that the nullity of the

I. Macovei (coord.), *The New Civil Code Comment on articles. art.1- 2664*, C.H. Beck Publishing House, Bucharest, 2012, p. 2043.

[5] See, G.Al. Ilie, *Risks in Contracts*, Universul Juridic Publishing House, Bucharest, 2012, p. 108.

[6] See, Decision No. 1743 of 8 March 2002 of the ICCJ-Commercial Section, in the Romanian Business Law Magazine no. 3/2004, p. 108.

[7] See, C. Cucu, M. Gavris, *Commercial Contracts. Judicial Practice*, Hamangiu Publishing House, Bucharest, 2006, p. 80.

[8] See, Ghe. Piperea, *op.cit.*, p. 2043.

[9] See, L. Uta, *Special Contracts in the New Civil Code*, Hamangiu Publishing House, Bucharest, 2012, p. 242.

[10] See, *Commercial Sentence No. 9468 of 3 November 2006 of Trib. Bucharest* - Commercial Section VI in C. Cucu, M. Gavris, *op.cit.*, p. 146.

contract is not a cause of its termination, as is the revocation of that contract. An invalid contract is one that ended with the failure to comply with the legal conditions, that is to say, invalid, and as such, does not exist, nor can it cease by any way of termination, even less by nullity. Nullity is the sanction of termination of the contract, with retroactive effect, that is, from the date of its conclusion[11]. The invalid contract being abolished cannot be ended.

As we have seen, the principal revoking the commission contract remains obliged to pay a part of the commission fee.

The unexpected effect of the revocation lies with the initiating initiator's obligation to repair the damages suffered by a commissioner due to the revocation[12].

The revocation of the commission by the principal is considered inconvenient if he does not notify the commissioner of his intention to revoke within a reasonable time. The obligation to notify the commissioner of revocation arises from the intuition-persona character of the commission contract, based on the principal's confidence in the commissioner[13].

Another effect of the revocation is *the presumption of unjustified revocation of the irrevocable commission*. In other words, if an express clause stipulating the irrevocable nature of the contract is provided in the content of the commission, its revocation, although possible, is presumed to be unjustified. For the revocation to presumably be unjustified, one of the following conditions must be met: not to be determined by the commissioner's fault; not to be determined by a fortuitous case or by a major force. In these circumstances, the presumption of unjustified revocation is not applicable.

Therefore, if the commissioner's fault is found in the execution of the contract or the existence of a major force or a fortuitous case, the commission may be revoked, even though the clause on the irrevocability of the contract has been provided.

The last effect of the revocation to which we refer is *the validity of the acts concluded under the commission agreement* by the commissioner who did not know the reason for the termination of the commission, the revocation of the commission to be exact (art. 2036 Civil Code). In this case, the acts concluded by the commissioner, without being honestly aware of the act of revocation of the given commission, remain valid and oblige the principal to execute them[14].

[11] See M. Costin, M. Muresan, V. Ursa, *Dictionary of Civil Law*, Scientific and Encyclopedic Publishing House, Bucharest, 1980. p. 341-342.
[12] In the same way, see C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Romanian Civil Law. Doctrine and jurisprudence studies*, Socec Publishing House, Bucharest, 1943, p. 1012.
[13] See, in the same way, by analogy, Gh. Pipera, *op.cit.*, p. 2037.
[14] See, in the same way, Gh. Pipera, *op.cit.*, p. 2046.

2.3. Advertising of commission revocation

In case the commission contract was concluded in authentic form, the notary in front of which the principal is presented for authentication of the revocation shall be obliged to transmit it immediately to the National Notarial Register (art. 2033 paragraph (1) Civil Code).

This operation is for the notary to find out if the contract fee for the authentication of the revocation is still valid.

Also, for the commission given in authentic notary form, its revocation takes effect on third parties after the registration of authentication in the National Notarial Register.

The doctrine[15] has rightly pointed out the fact that the text of the law on revocation advertising, which is mentioned in the foregoing, does not cover enough practical situations, which could affect the security of the civil circuit[16]. In the absence of legal solutions in such cases, the good faith third parties will oscillate between relying on the commission contract or the act of revoking it in relation to their own interest.

In order to clarify these situations, we propose, de lege ferenda, the completion of the legal text with provisions that will provide solutions to the cases mentioned above.

2.4. Recruitment of the commissioner to the commission contract

Another way of terminating the commission from the application of the rules of trust mandate (art. 2039 para. (2) Civil Code) is the renunciation to the contract on the commissioner part.

The ability of the commissioner to discard commissions originates from the intuition-persona character of the commissioner to the contract.

According to the law, the commissioner may denounce (renounce) the commission by notifying this manifestation of will to the principal.

The renunciation may be exercised at any time, according to the legal provisions in the field (art.2034 paragraph (1) Civil Code). This legal provision must be corroborated with the novelty provision contained in art. 2015 Civil Code, after which the duration of the commission contract is maximum 3 (three) years. As such, the commissioner may at any time give up during the execution of the contract the commission, even if it has been concluded for a specified period.

[15] See, Gh. Pipera, *op.cit.*, p. 2044.

[16] This is about, for example, cases of revocation, such as: - the commission was revoked not by an authentic act but by a private signature; - the commission, even authenticated, was not given for the conclusion of an authentic act; - the commission was not authenticated, given by private signature, - the notary invested with the authentication of a commission for which a commission was given does not check the National Notarial Register to determine whether there is any revocation of the commission.

The act of waiver of the commission does not lead to the right of the commissioner to waive the remuneration for the acts he has performed on behalf of the principal's account until the date of the renunciation.

If the waiver of the commission contract causes prejudice to the principal, the commissioner will be obliged to repair them.

Exceptionally, if it proves that by continuing the commission, the commissioner himself suffered a significant prejudice, which could not be foreseen at the conclusion of the commission contract, then the commissioner would be relieved of payment of the prejudices caused to the principal by renouncing the contract.

Each party will have the burden of proof of the prejudice it claims: the commissioner will have to prove the damage that would have been caused by continuing the performance of the contract while the principal is required to prove the prejudice he suffered as a result of the renunciation of the commissioner's commission.

2.5. Death, incapacity or bankruptcy of one of the parties

In theory, in the event of the death of one of the parties, the commission contract ceases to be lawful, the heirs or representatives of the party in one of the situations referred to have the obligation to inform the other party immediately of the event which led to the termination of the contract (art.2035 paragraph (1) Civil Code).

However, by way of exception, the commission does not cease if the delay in performance of the contract risks jeopardizing the interests of the principal or his heirs (art.2035 paragraph (2) Ccivil Code). In this case, the commissioner, his heirs or his representatives are forced to continue the contract.

We consider that the same reasons for continuing the performance of the contract in respective to protecting the interests of the principal or his heirs may be as many arguments in support of the continuation of the contract and the hypothesis that there is a risk that the interests of the commissioner or his heirs may be jeopardized. That is why we propose, de lege ferenda, the modification of the provisions of art. 2035 paragraph (2) Civil Code, in the way of continuing the contract, if the delay in its execution would jeopardize the interests of the parties and their heirs. Thus, the principle of equity and equivalence of benefits would be embodied.

2.6. The plurality of commissioners

A special case of termination of the commission contract operates in the situation of the plurality of commissioners when the commission ceases for one of them (art. 2038 Civil Code).

The justification for terminating the commission in such a situation is the intuitive nature of the commission contract. Therefore, if the principal gave the power to represent several commissioners to work together to execute the object

of the commission, the death, incapacity or bankruptcy of one of the commissioners would lead to the termination of the contract as a whole, to the other commissioners as well.

However, the legislator has given these rules a suppressive character, so that if the parties otherwise provided in the content of the commission, it will only cease for the commissioner for whom the death, incapacity or bankruptcy has occurred, but will remain valid for the other commissioners.

3. Conclusions

Types of the mandate contract without representation, the commission contract applies, in silence of its specific regulations, the norms related to the mandate with representation. The analysis of the application of these norms to the commission contract has given us the formulation of some legal reflections, in the sense that the norms either do not enjoy legal accuracy or do not fit the specificity of the commission.

Obviously, we have mentioned the aspects considered equivocal, in the form of critical touches or by formulating the proposals of the lege ferenda.

We consider that a review of the subject should be required, through the contribution of specialists to the interpretation and application of the legal rules in question.

A Time for Change: Internationalizing Romanian Institutional Arbitration Rules

Cristina Ioana FLORESCU[1]

Abstract

Undoubtedly, an approach favouring arbitration is essential in developing international markets. Encouraging viable alternatives for the resolution of international commercial disputes is vital in developing free trade and economic development. Accordingly, every arbitral institution should struggle towards a coherent promotion of arbitration at its venue through its rules, regulation and attitude towards ensuring that the finality of the procedure, the arbitral award, is a solid and quality enforceable decision under the New York Convention.

In the commercial context, time and costs are often crucial concerns when a dispute arises. Thus, the parties' possibility to choose their decision makers, the efficiency and the flexibility of the proceedings, and moreover the finality of a decision are ones of the most attractive features of the arbitration procedure. Parties considering resorting to an arbitration agreement balance competing interests of justice, efficiency and finality and make a conscious decision to invoke the benefits of institutional arbitration.

The reform of The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, the most renowned, reliable and old permanent arbitral institution in Romania, which celebrate this year its 65th anniversary, changed its rules starting 1 January 2018. The new rules strive for coherently promoting Bucharest as a modern arbitration hub and they have a strong, modern, international, slim and flexible focus, being developed according to the best existing practices in the field. Now these rules propose improving the functioning of commercial arbitration in Romania by facilitating arbitration in the business environment through this alternative mechanism, offering an efficient, flexible, faster procedure, proposing an accelerated option without sacrificing but enhancing its quality.

Keywords: *International Arbitration; Arbitration Rules; New York Convention; Efficiency; Romanian Court of International Commercial Arbitration*

New York Convention - The Pillar of International Arbitration

What distinguish arbitration from litigation and other dispute resolution methods are the finality of the proceedings, the relatively easy international enforceability of arbitral awards as well as the opportunity to choose one's own fact finder and decision maker. Also other factors of equal prominence that contribute to

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this difference are neutrality, case specific expert competence, flexibility, efficiency and effectiveness as well as the confidentiality of the process.

The New York Convention is widely recognized as a foundation instrument of international arbitration. It requires courts of contracting States to give effect to arbitration agreements and to recognize and enforce awards made in other States, subject to specific limited exceptions. This year marks the 60th anniversary of the Convention, an event that is celebrated on many conferences all over the world and also on the occasion of UNCITRAL 51st session, on 28 June 2018, at the UN Headquarters in New York.

Although New York Convention language is at times dated and certain of its provisions could be adjusted to correspond to the modern developments, the New York Convention continues, on the whole, to fulfill its purpose in a satisfactory manner and there would be, in the majority opinion in the arbitration community, no need for a further need to revise it, as it is considered that it is more to lose than to gain in embarking upon a revision process. It is not even certain that the degree of liberalism achieved in 1958 could be attained today ("The Urgency of Not Revising the New York Convention", Emmanuel Gaillard, *The New York Convention at 50*, 2008). The enforcement of awards made outside the country of enforcement is rarely sought on any basis other than the Convention, and the Convention has worldwide coverage extending to 159 Contracting States (Cabo Verde becomes the 158th State party to the Convention this year in March and later Sudan the 159th). The modern demanding is to develop internationally acceptable standards and that equally applies to the institutional rules to be adopted.

I have to confess, for me NYC means the "golden age" of arbitration, after its birth, when the first generation of arbitrators (like Peter Sanders, Wellis Melis, Gerold Herrmann, Eric Bergsten which I had the privilege to meet) were the pioneers, those who ventured out to establish arbitration as viable private alternative to state court litigation. They contributed to the cause of international arbitration and enables us to understand the drafters' aspiration of 1958 and to finally reach a state of uniform application worldwide.

The legal and procedural framework with which this *first generation* worked was rather rudimentary and the cases they handled were moderately complex compared to those of nowadays, mostly relating to the international sale of goods, distribution and construction and engineering cases. To be a first generation arbitration practitioner required mostly the capability to speak different languages, an interest in international, private international and comparative law, as well as the willingness to understand and accommodate cultural differences.[2]

[2] Johannes Willheim, *Why International Arbitration and How? Reflections and Visions for a new generation.* 28 February 2018, https://www.linkedin.com/pulse/why-international-arbitration-how-reflections-visions-willheim. The author is considering, analyzing and commenting on this possible classification of the generations of arbitrators, their role and functions.

With a substantially increasing number of cases being referred to arbitration instead of litigation, a number of substantive and procedural issues arose at all stages of the process, including the enforcement phase. This triggered the need for more in-depth advance regulation to provide more legal certainty for the process and to thereby gain or regain the trust of its users. This need led to the emergence of a *second generation* of arbitration practitioners. They focused on the development of elaborate procedural rules as well as best practices which today are reflected in a number of amendments of arbitration rules. These rules could be in international model laws like the UNCITRAL Model Law on International Commercial Arbitration, the repeatedly amended arbitration rules of the various arbitral institutions or state arbitration laws as well as best practices which are often encoded in guidelines like the various IBA Guidelines or Guidelines of the International Institute for Conflict Prevention and Resolution (CPR).

Based on the experience of the first generation, this second generation elevated arbitration to the sophisticated and effective dispute resolution process it is today.

Globalization and technology were the drivers for the creation and establishment of truly global markets in a myriad of industries and sectors. Global markets require for their smooth functioning transnational commercial, transactional and legal standards as well as transnational dispute resolution processes. Arbitration is best placed to assume the role as default dispute resolution process in global markets. This is to a great extent due to the fact that its private and commercial nature subject its players, institutions and professionals, to market forces and competition. Competition is the best guarantor for the necessary fast evolution to pick up and serve market demand.

As a consequence of the evolutionary process related to a global market where globalization and technology are the drivers, it is no longer sufficient for a successful career in international arbitration to pair the basic know-how and skill set which secured success to the first generation with the know-how and skills of the second generation.

Instead, this combination of know-how and skill is now the basics. In addition to these minimum requirements of know-how and the skills developed by the first two generation, the *third generation* of arbitration practitioners needs extensive legal, business and industry know-how and experience in those areas which generate the disputes they are called upon to resolve in order to succeed in today's competitive landscape. Third generation arbitration practitioners are not only leader lawyers, advocates and neutrals versed and experienced in the fundamentals of international and private international law as well as the ins and outs of international arbitration, but also experts in specific legal fields, such as antitrust/competition law, corporate and M&A, financial regulation, IP/IT etc. as well as insiders in certain industries, such as construction and engineering, energy, life sciences, media and entertainment etc.

Efficiency and effectiveness requires in-depth specialized knowledge and expertise as constantly evolving complexity of the arbitration and its users became a certainty. In order to meet the needs of the users today, *the new generation* to come will have to shift their inner mindset and attitude from being mere litigators and/or arbitration experts to being professional dispute managers, i.e. professionals who at every phase of a potential dispute deliberately determine and reassess the most effective and efficient way to prevent or resolve a dispute and who manage a dispute in every phase effectively and efficiently. This requires fare more than knowledge of the relevant procedural and substantive law as well as familiarity and experience with available ADR methods. Consistent evaluation and application of emerging case assessment/analysis and case management tools, such as early case assessment tools, screening tools, analytical tools, technological and visual tools will be a must.

Coming back to the New York Convention, part of its success is the relative simplicity with which it can be applied: enforcement cases are subject to normal procedural rules in the relevant state and the grounds under which a court can (but is not obliged to) refuse enforcement are limited to those set out clearly in Articles V(1) and V(2) of the New York Convention. The only formality with which the party seeking to enforce must comply with is to produce an original or certified copy of the award and of the original arbitration agreement.

Attitude is everything. Obviously, a party seeking to enforce in a pro-arbitration court will have more, and quicker, success than in a jurisdiction that is only just developing its arbitral jurisprudence, although both may be NYC Contracting States. But attitudes change quickly in the last years and arbitral institutions strive for developing a more sound and quality jurisprudence and moreover, to promote the arbitration benefits and to implement them in their rules. As ever, the key to success is having a well-drafted arbitration agreement that complies with local law requirements, and good procedural compliance throughout the arbitral process.

I consider there is simply nothing to touch the NYC in terms of cross border enforcement. The enforceability of awards is one of the key reasons parties chose arbitration and I still see no reason for this to change in the foreseeable future.

In the commercial context, time is often a key concern when a dispute arises. Thus, *the finality of a decision* is one of the most attractive features of the arbitration procedure. Parties to an arbitration agreement balance competing interests of justice and finality and make a conscious decision to invoke the benefits of arbitration. Although judicial review may increase the accuracy of arbitration decisions, the costs of such review is passed on to the parties submitting to arbitration, thereby negating the benefits of arbitration and undermining the system altogether.[3] For example, the efficiency and finality of resolution is eliminated; the parties are subject to great expense, potentially

[3] Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, Marquette Law Review, Volume 80 Issue 2 Winter 1997, Art. 4, pp. 625-644, http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1493&context=mulr.

excluding them from the opportunity to protect their interests; and the nature of the problem becomes public, destroying the aspect of confidentiality. Inflation and rising interest rates occurring during the review process may also erode the original value of the award. Moreover, parties dissatisfied with the arbitral award could potentially use the judicial system to harass the other party, causing additional legal fees and subjecting them to the uncertainty of a national court decision. Due to the negative impact that a system of review has on international commercial arbitration, review acts as a "roadblock" to its effectiveness. Consequently, it is crucial that the standards be clarified and narrowed such that parties to arbitration are afforded a reasonable level of certainty in their expectations.

All the arbitration players should safeguard the enforceability of an award. First are the parties through their agreement that initiated the arbitration and also subsequently by complying the award, and later the arbitrators whose duty is to render an enforceable award. However, the arbitrators are not the only ones responsible for this goal as the arbitral institutions are also a link in this chain. Of course the arbitrator's efforts are honoured but also the credibility and stability of the institutions strengthened. Should the award be set aside or enforcement denied, the result can cast doubt or at least dark shadow over the proceedings themselves.

The vast majority of arbitral awards are complied with voluntarily. In many cases, the parties have a continuing commercial relationship and wish to get on with business. This is the case even with large international awards.[4] Even the record of award enforcement has been so far a good one, faith in the international and national systems should be improved as the parties are no longer resorting to arbitration as it used to do a decade ago. The risk of not ensuring the award enforceability lies over the entire system of arbitration as the costs paid for curing is a high one and it is paid by everyone: by the parties - as mentioned above, by the arbitrators - losing their reputability, by the institutions - losing the trust of their clients. After such an experience everyone becomes just a little more reluctant to revert to arbitration in general and to that arbitrators and that institution in particular and may avoid the inclusion of an arbitration agreement in the next business.

To avoid such result, the institutions are called to keep up to the modern and progressive times we live and implement rules that respond to the parties' needs and expectations, by respecting the main principles of law and the mandatory applicable law. The key challenges of the modern age have led to an unprecedented increase in the number and diversity of institutional reforms, each of which being an opportunity to promote itself as a place of arbitration by implementing the most significant and fashionable innovations.

[4] Dorothy Murray, Daisy Mallett, Charlotte Angwin, *Enforcing arbitration awards: the how, the why and latest developments,* 15 September 2016, https://www.lexology.com/library/detail.aspx?g=0bc6cc2c-82e5-4a98-925e-76d777fcf356.

Therefore, the institutions have the mission and the duty to harmonise and offer their flexible and trendy rules to meet the actual requirements in the field. Among the most significant parties' rights an institution should ensure are the following: the right to choose a particular person as arbitrator; the right to declare a challenge to the arbitrator; the right to request the acceptance of interim and urgency measures by all parties concerning a disputed subject; the right to choose the arbitration applicable law, venue and language; the right to appeal to the institution or the local courts to request support in order to remove potential obstacles in the organization and unfolding of the arbitral proceedings; the right to establish the arbitral procedure, the timetable, the hearing, the evidence and their conventional representation.

To ensure these parties' rights and other needs related to a smooth procedure, it is worth noting the *massive reform* that has taken place over the last two years at international level in the updating and redeployment of arbitration rules by the most famous arbitration institutions, leaders of the moment.

Several institutions such as ACICA (Australia), SIAC and KCAB (Korea) updated their arbitration rules for 2016, while SCC, ICC and ICAC (Russia) introduced new rules for 2017. SIAC also released its draft Investment Arbitration (IA) Rules, followed by a public consultation process and finally enact its new rules. 2018 already finds renewed arbitration rules for VIAC, DIS, DIAC (Dubai), ICC became appointing authority for ad-hoc UNCITRAL Rules and other institutions are expected to release new set of rules, like HKIAC or LCIA. Several institutions published detailed practice notes and statistics: HKIAC, SIAC, LCIA, SCC and the ICC updated its note on the conduct of arbitration and issued a guidance on the expeditious determination of manifestly unmeritorious claims or defences (thereby ensuring costs and time are not wasted pursuing patently bad arguments).

The increasing competition between arbitral institutions benefits the users as it has stimulated quality and cost competition. Almost every institution has revised its rules multiple times in order to address past shortcomings and to meet user expectations as well as to increase cost transparency and decrease costs. National arbitration laws as well arbitration rules of institutions have been substantially amended as state have recognized the economic value of being perceived as viable venue for international arbitration.

The Romanian Institutional Reform

In assessing the problems surrounding these issues, the Romanian legislation and moreover the institutional rules are now tailored to better reply to the parties' needs and to be adapted and equipped with the necessary tools to ensure the enforceability of the arbitral awards. Rendering an enforceable award is the key issue the parties are aiming for in the final step after completing the arbitral procedure.

The Romanian national reform of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, the

most renowned and old permanent institution, which celebrate this year its 65th anniversary, changed its rules (the Rules) starting 1 January 2018.[5] The arbitration organized by the this Court is distinguished from that organized by other domestic and international arbitration institutions through essential aspects such as time-tested institutional reputation, the quality of arbitrators and arbitration procedure, the consolidated reputation of an arbitration institution related to Romanian law and a rich jurisprudence on the application of Romanian law.

Even from the beginning of the Rules the principles that are coordinating them are enumerated. These Rules set forth the principles and regulations for the resolution of domestic and international disputes subject to institutionalized arbitration organized by the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania. Throughout the entire proceedings, the Court of Arbitration, the President of the Court, the Board, the Secretariat of the Court, the arbitral tribunal and the parties are encouraged to act in good faith, in an effective and expedited manner, with the observance of the equal treatment, of the right of defense and of the adversarial principle. During the arbitration, each party has the right to the fair adjudication of its case, within an optimal and predictable time limit, by an independent and impartial 6 arbitral tribunal. The parties have the right of access to all the documents in the case file, subject to the observance of the principle of confidentiality of the arbitration. In case of discrepancy between the arbitration agreement and the Rules, referred to in the arbitration agreement, the arbitration agreement shall prevail, unless these Rules expressly provide otherwise. Regarding the application of the Rules in time, unless the parties agreed otherwise, the arbitration shall be organized and carried out in accordance with the arbitration rules in force at the date of commencement of the arbitration.

The second chapter is devoted to the commencement of the proceedings, which contains the necessary details on request for arbitration, its registration, arbitration fee (a new Schedules of Arbitral Fees and Expenses entered into force also), date of commencement of the proceedings, answer to the request for arbitration, counterclaim, request for additional information, participation of the third parties and consolidation of the proceedings. The next chapter contains provisions related to the arbitral tribunal and its constitution. Issue as number of arbitrators, nomination and appointment of arbitrators, date of the constitution of the arbitral tribunal, impartiality and independence (a special declaration of the arbitrators is annex to the Rules), incompatibility cases, challenges of the arbitrators, termination of the arbitrator's mission, and replacement of the arbitrator are considered. As regards the chapter IV, proceedings before the arbitral tribunal, there are specified the conduct of the proceedings and applicable

[5] http://arbitration.ccir.ro/wp-content/uploads/2018/05/Arbitration-Rules-of-the-Court-of-International-Comercial-Arbitration-attached-to-CCIR.pdf

rules and substantial laws, procedural orders, seat and language of arbitration, case management conference, submission of memoranda by the parties, amendments of new claims, evidence, hearings, witnesses and experts and experts appointed by the arbitral tribunal, cases of default in complying with obligations, loss of right, interim and conservatory measures, closing of the proceedings and deliberations, abandonment of arbitration, term of the arbitration and the limit for the award (six months as default for domestic and double for international cases), awards and order of the President of the Court, making, content, effects, correction, interpretation and supplementing of the award, costs of arbitration and the allocation of the arbitration costs. The final provisions ascertain that These Rules are supplemented by the provisions of the Code of Civil Procedure because the Rules apply for domestic cases and they have to be complemented by the law. The final provisions also refer to the arbitrators' liability and to the annexes that are integral part of the Rules and they are the standard arbitration clause and submission agreement (Annex Ia and Ib), emergency arbitrator (Annex II), the statement of acceptance, independence, impartiality and availability for the arbitrators to be filled in upon their nomination (Annex III), case management techniques (Annex IV), special rules for expedited arbitration (Annex V).

The new rules have a strong modern, international, slim and flexible focus, being developed according to the best existing practices in the field. They propose improving the functioning of commercial arbitration in Romania by facilitating litigation in the business environment through this arbitration mechanism, offering an efficient, flexible, faster procedure, proposing an accelerated option without sacrificing it but enhancing the quality.

The rules, and especially the efficiency tools, are designed to correct the parties' attitudes and to respond to their needs and the latest trends. All the updates in the rules are designed to make the procedure more efficient and to ensure the most favourable climate for optimal resolution of disputes in high professional conditions.

At the same time, it is useful to state that the drafting of the new Rules was not carried out without public investigation. This was accomplished over almost 2 past years, asking for opinion on all the more sensitive issues of the business community, lawyers, arbitrators, practitioners and specialists in the field, in order to find the opinions of the professionals, the various users and therefore respond to their requirements for strengthening the benefits of arbitration, such as confidentiality, flexibility, confirmation and enhancing the arbitral tribunal's authority and, in general, the satisfaction of the parties' interests.

The views of all those who considered it useful to intervene and contribute have been taken into account and the most appropriate and relevant amendments have been so adopted. The need for internationalization, harmonisation and alignment with current international modern trends has been greatly emphasized,

and especially the need to create and implement additional disciplinary and support instruments for the parties, so that some additional mechanisms have been adopted in the form of annexes to increase efficiency.

Annex no. 2 contains a novelty related to the establishment of the Emergency Arbitrator and the respective procedure. The need for provisional emergency measures often occurs before or simultaneously with the request for arbitration, perhaps even until the arbitral request is drafted and forwarded to the arbitration institution so that it can begin the organization of the case, including the appointment and establishment of the arbitral tribunal. This is because, in practice, it may take weeks or months to designate an arbitral tribunal. If a party needs urgent assistance during this period, it may only seek interim measures from local courts, unless the arbitration agreement of the parties includes provisions for the appointment of such an emergency arbitrator. This has been overcome and achieved by the institution's incorporation of the rules of the Emergency Arbitrator into their arbitration proceedings, specifying the way in which such a procedure should be conducted.

Therefore, the arbitration agreement of the parties mentions specific arbitration rules, which now include and allow for requests for interim measures to be issued by an arbitrator appointed in a neutral manner by the President of the Court (nominating authority generally in the Rules for any procedural incidents or where this is the case) to deal with an urgent request before the establishment of a regular tribunal. The competence of an emergency arbitrator is limited to decisions on interim measures and does not extend to any decision on the merits of the case. Additionally, the decision of an emergency arbitrator does not link ordinary arbitrators which will form the arbitral tribunal of that case, and they may modify, suspend or terminate any decision granted given by the emergency arbitrator, which has a temporary effect until the arbitral tribunal has delivered the final award. The rules of this special institution of the Emergency Arbitrator apply automatically when the parties' convention refers to the Rules, so the exemption from them is opt-out, i.e. it applies if the parties expressly state that they do not want their application and agree otherwise. The urgency is obvious as the arbitrator is proposed within 48 hours by the institution and is called upon to pronounce within 10 days of its appointment. And internationally it is running rapidly, with statistics showing an interval of 10-20 days.

Annex no. 4 is devoted to the efficiency procedures that are internationally used. They are very important for the smooth run of the process and they are designated to support the arbitrators' endeavor to respond to the parties' need for efficiency in arbitration.[6] This annex provides an illustrative list of methods for

[6] See also the International Arbitration Survey QMUL 2015 and 2018, http://www.arbitration. qmul. ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf and http://www.arbitration. qmul.ac.uk/research/2018/, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International -Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF

increasing the efficiency of the proceedings that can be used by the arbitral tribunal and by the parties for the purpose of reducing the duration and costs of the arbitration. Arbitration must be conducted in an expedited manner, especially in cases of low complexity and value, where the arbitral tribunal shall ensure that the duration and costs of the proceedings shall be commensurate with at is at stake in the dispute. It follows that the arbitral tribunal, relying on its procedural autonomy, may use any of the methods presented below: a) the bifurcation of the proceedings, when the arbitral tribunal finds that such measures may result in a more effective conduct of the arbitration: (i) the bifurcation of the proceedings means the split of the proceedings into two or multiple stages, in order to decide on certain disputed matters that might make unnecessary the administering of evidence and submissions with respect to the merits of the case; (ii) the bifurcation of the proceedings may consist, for instance, in the stage of determining the jurisdiction or the stage of establishing if a party is liable in principle. Such determination may be made by means of an interlocutory minutes or award, as the case may be, and may be followed or not by the determination of the quantum of financial damages by means of the award. b) the issuance of one or multiple partial awards, whenever permitted by law. c) the identification of the issues that can be resolved by agreement between the parties or their experts. d) the identification of the issues to be decided solely on the basis of documents, rather than by hearing witnesses or experts or the presentation of oral arguments by the lawyers. e) the production of documentary evidence: (i) requiring the parties to produce with their written submissions, the documents on which they rely; (ii) avoiding requests for document production, when appropriate in order to control the duration and costs of the proceedings; (iii) in those cases where the requests for document production are found justified, the limitation of such requests to documents or categories of documents that are relevant and material to the outcome of the case; (iv) establishing reasonable time limits for the production of documents; (v) the use of a timetable for the production of documents to facilitate the resolution of issues with respect to the document production. f) establishing the length and scope of written submissions, as well as for the written and oral statements of the witnesses and experts, in order to avoid repetition and maintain the focus on key issues. g) the use of remote, audio and video communication means for procedural hearings where attendance in person is not essential and the use of electronic means that enables online communication among the parties, the arbitral tribunal and the Secretariat. h) the organization of a preliminary conference with the arbitral tribunal to discuss and determine the organizational aspects related to the hearing as well as the issues that the arbitral tribunal believes that the parties should address with priority at the hearing. i) the establishment of the procedural timetable, indicating the dates when each procedural act should be made. j) the selection, if appropriate, of neutral experts

and specialists with adequate training, professional experience and availability for the issues in dispute. k) the amicable settlement, in full or in part, of the dispute.

Annex no. 5 introduces a new type of accelerated simplified procedure whereby parties can resolve less complex, less-value disputes through a small-scale procedure where not all the steps of the standard procedure are required, thus reducing costs and time until the award is delivered. It can be noticed that the new Code of Civil Procedure has also tried to construct such a written procedure, the one on small claims, which takes place in its entirety in the council chamber, with short deadlines and in an efficient formula.

The simplified procedure established by the Rules also has an opt-out regime, but it applies not only with the entry into force of the Rules but only for litigations based on arbitration conventions concluded after the entry into force of the Rules. But the right of option is not limited, the procedure may be used whenever both parties agree to apply it, regardless of the fulfillment of the conditions and amount in question, to the extent that they wish to speed up the procedure for their dispute. It was considered more appropriate to set certain threshold conditions to avoid abuse and so the special rules apply when the value of the arbitration litigation is up to 50,000 lei (about 10,000 EUR) and the complexity is less because it is judged by an arbitrator who will take a decision in maximum 3 months from the date of the first arbitration term (conference). Of course there is also the reverse of the medal, even if the simplified procedure is *prima facie* applicable, there is a safety valve (Article 3 paragraph 4 of Annex 5) to return to the standard procedure as it is found that although the value is low and falls into the threshold, the litigation proves to be more complex than expected (expedition requires more comprehensive evidence, including expertise or disproportionate expenditure in general).

Also, in order to streamline the arbitration procedure in general, clearer provisions have been established regarding the possibility of third parties participation (Article 16), as well as the arbitrators' nomination in the case of multi-party arbitration (Article 19, paragraphs 4 and 6) and also for consolidation of the proceedings (Article 17).

Below, to conclude, it is a summary of the *the main novelties* brought by the Rules aim to highlight the principle of procedural autonomy of parties and arbitrators, by:

- emphasizing the arbitrators' pro-active role,
- introducing a clear boundary between the written and oral phases of the arbitration process,
- emphasizing the importance of the written phase,
- improving the leadership, a more efficient conduct and administration of the case by the arbitral tribunal, by setting the requirement for establishing a provisional or complete procedural calendar, the possibility of bifurcating the procedure, and establishing other procedural aspects with the parties consultation

from the beginning of the case through the case management conference (new term in the Rules, with special legal connotation) until the post-hearing briefs (where certain limitations can be requested),

- facilitating the administration of evidence and appointing experts,
- regulating a simplified accelerated procedure,
- introducing the institution of the emergency arbitrator,
- but especially diminishing the difference of treatment between international and national arbitration.

I want to emphasize that it has been chosen to regulate the resolution of the dispute by splitting the procedure into two parts, similar to the international procedure, which is extremely welcome and is particularly common in litigations of greater complexity. There is also the possibility of submitting developed submissions, an element left to the parties' discretion, as the parties can choose whether it deems fit to submit a full arbitration request from the beginning or wish to develop it later. In general, procedural moments become more permissive in arbitration for the flexibility of the procedure, but respecting the limits of the imperative norms of the law.

Thus, users are faced with new terminologies, tools and procedures that are more than welcome and useful in conducting the arbitration procedure as close as possible to the needs of each case and in line with international practice already known by more experienced users.

The Government Ordinance no. 1/2018

Another important change in the Romanian arbitration which also started on 1 January 2018 and it is close related to the new rules, is related to the fact that arbitration organized by the International Commercial Arbitration Court attached to the CCIR becomes mandatory for litigations resulting from construction and works contracts (especially FIDIC type) higher than 5 million lei (about 1 million EUR) and the Adjudication procedure disappears. The solution was adopted by Government Ordinance no. 1/2018 for the approval of general and specific conditions for certain categories of procurement contracts related to publicly funded investment objectives.[7]

For the entities that enter into such contracts, entrepreneurs and beneficiaries, this solution will certainly mean the resolve of possible disputes with the highest efficiency, with speed and high quality standards:

- The parties may choose arbitrators with experience and training in the specialized field of construction law for dispute resolution;
- The arbitration procedure may be bifurcated so that, for example, it can be established on the basis of the documents if the conditions of liability are met and

[7] http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-hg-nr-1-10-01-2018&page=12

a partial judgment is passed, and only then, if there is accountability, complex evidence (expert witnesses, witnesses) to determine the extent of the damage;

- Arbitration deadlines may be organized remotely by videoconference, including on the administration of evidence;

- Experts appointed in disputes may be elected by the parties on the basis of professionalism, experience, availability, regardless of whether they appear on the list of judicial experts or other public lists of experts.

Therefore, entrepreneurs and beneficiaries will have to consider a particular importance to the management of works contracts, not only technically, but also legally, in order to manage the complexity of a dispute in the most efficient way before the Arbitral Tribunal.

The settlement of disputes in arbitration contracts comes to align Romania with the normality already existing in most countries. Perhaps the same solution could be implemented in other areas, where the arbitrators' specialization gives assurances about the quality and speed of the act of justice.

Conclusion

The institutional challenges for an institution to establish its strategy and ensure its stability is to promote arbitration in an more pro-active role, permanently adapting and modernizing its rules by paying attention not to disrupt the arbitration' control and balances as we used to know. General endeavours should be towards providing and looking for a sustainable future framework for arbitration adapted to progress, diversity, new technologies, evolution and revolution.

It is the duty of institutions, policymakers, judges, arbitrators and practitioners to ensure that its use and practice are tailored to the particularities of national's legal system, otherwise there is a risk of driving participants away instead of encouraging them to develop this industry. Framing a safe and steady practice that embraces the needs of the national business community is key to the success of ensuring an enforceable award also at an international level.

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Great Romania: The International Challenge

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Abstract

Even if at the begining of the First World War 1, Romania declared her neutrality, and did not wanted to join it along side with her alies that were part of the Triple Aliance. In 1916 there is a change in Romania's policy that decides to join the war, but on the side of the Entente, which will prove to be a winning playing card.

At the end of the First World War I the borders of Europe have changed. The empires paid the supreme price and colapsed. The geopolitical situation, forced the new Great Romania to move towards an anti-revisionist foreing policy through aliances that would provide border security.

1918 is a very important year for the history of the Romanians, rich in events that marked our destiny: the end of the First World War, the support of the traditional allies France, England and the United States for the purpose of unification, re-entry into war with the Entente, as well as the union of the provinces with Romania.

At first was the unification of Basarabia with Romania, on 27 march 1918, then of Bukovina with Romania on November 28 1918, all culminating in the unification of Transylvania with Motherland Romania on 1 December 1918.

Keywords: *1916, 1918, Ionel Bratianu, Alexandru Vaida Voievod, Peace Conference in Paris, Basarabia, Bucovina, Transylvania*

Content

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1. Introduction

The international system was marked at the end of the nineteenth and early twentieth centuries by the rivalry of the great powers to control the extra-European world. In Europe, Germany had become the main power and its behavior on the continent led to an extraordinary breakdown and recomposition of alliances over the previous decades.

The Kingdom of Romania, a small state on the outskirts of Europe, was itself caught in these power games. On the one hand, it was the target of the rivalries of the neighboring empires, which had plans to join its territories, on the other hand Romania seeks to create favorable conditions for the fulfillment of the national ideal of assembling in one state of its historical provinces.

At the time of the outbreak of the 1914 world conflagration, Romania declared its neutrality, although at that time it was part of the Triple Alliance. Only in 1916 Romania decides to join the world's conflagration, this time on the Entente side, which will eventually prove to be a welcome step at the end of the war.

2. The external relations of Romania before the Great War and during the period of neutrality

Throughout the nineteenth century, modern Romania was formed through the interactions between internal transformations and international ties that took place properly. In just six decades, the principals of Moldavia and the Wallachia became state-owned vessels under Turkish sovereignty, in a sovereign Romanian state[3].

In 1881, Prince Carol was proclaimed king, and Romania reigned. His previous experiences with Russia, the loss of power that France suffered after 1871, the dominant position of the German-Austrian alliance, made King Carol, along with a significant part of the Roman political elite, seek an alliance with the German Empire. On October 30, 1883, Romania joined the Triple Alliance[4].

The Alliance with Central Powers has been the cornerstone of Romania's foreign policy for thirty years, the King and the Liberal and Conservative political leaders have perceived the Central Powers as Europe's most powerful military and economic force[5].

Since the Bosnian crisis and Balkan wars, Romania has begun to distance itself from the Triple Alliance[6], as well as a process of appropriation by the

[3] Pop, Ioan-Aurel / Bolovan, Ioan (eds.): *Istoria României* [History of Romania], Cluj-Napoca 2004, pp. 496-534.
[4] Ungureanu, Mihai-Răzvan: *Die Modernisierung der rumänischen Gesellschaft*, in: Kahl, Thede / Metzteltin Michael / Ungureanu, Mihai-Răzvan (Hg.): Rumänien, Vienna 2006, pp. 265.
[5] Mihai Bărbulescu, Dennis Deletant, Keith Hitchins, Şerban Papacostea, Pompiliu Teodor, *Istoria României*, Editura Enciclopedică, Bucureşti, 1998, p. 413.
[6] https://forum.axishistory.com//viewtopic.php?f=31&t=6905

Entente[7] countries. Contacts with the Entente countries intensified after the two Balkan wars, discussing ways in which they could have supported Romania in meeting its national goals[8].

After the outbreak of the first global conflagration, both the Triple Alliance and the Central Powers called for Romania to enter the war, each on its side. Germany, through Emperor Wilhelm II and Chancellor T. von Belthmann-Hollweg, asked King Carol I to implement the alliance treaty; on the other hand, Entente, through Russian plenipotentiary minister Stanislas Poklewski-Koziel, proposed the entry in action on his side, in return for the recognition of the rights to the territories inhabited by the romanians in the Habsburg Empire[9].

During this period and within Romania there were serious political disagreements between the king and a small group of Germanophilists on the one hand and the majority of politicians and public opinion, favorable to Entente, on the other.

In front of this situation, the King decides to convene the Crown Council at Peles Castle on August 3, 1914. The Council analyzed the two possible options: the first supported by King Carol I and Conservative leader Petre Carp who demanded immediate entry into war on the side The Central Powers, in pursuit of the alliance treaty, the second, supported by most other political leaders, demanded neutrality by failing to meet the conditions for "casus foederis"[10] provided for in Article 2 of the Treaty[11].

Following the heated debate that took place, Romania's neutrality and the rejection of Central Powers' requests were decided.

In the next two years of neutrality that followed both camps (Central Powers and Entente), they made intense efforts to attract Romania on their side.

On October 1, 1914, a Russian-Roman secret agreement was signed at Sankt Peterburg: the Sazonov-Diamandy Convention, whereby Russia guaranteed the territorial integrity of Romania and the recognition of its rights over the Austro-Hungarian provinces inhabited by the romanians, regarding Bucovina, the principle of nationalities was to serve as the basis for the delimitation of the territories of the two states. In turn, on 29 June 1915, the Austro-Hungarian Minister in Bucharest, Count Ottokar Czernin presented the government's offer, which provided for the recognition of Romania's rights over Bessarabia, the full

[7] Istoria militară a poporului român, vol. V, Editura Militară, Bucureşti, 1989.
[8] Vasile Vesa, *România şi Franța la începutul secolului al XX-le (1900-1916), Pagini de istorie diplomatică*, Editura Dacia, Cluj, 1980, pp 27-35.
[9] Ioan Calafeteanu, Cristian Popişteanu, *Politica externă a României. Dicționar cronologic*, Editura Ştiințifică şi Enciclopedică, Bucureşti, 1986, p. 157.
[10] Casus foederis: The situation in which a state allied with another state must enter into war on the part of the Allied State in order to fulfill the obligations it has undertaken by signing a bilateral, multilateral or multilateral alliance treaty.
[11] Ion G. Duca, *Amintiri politice*, volumul I, Jon Dumitru Verlag, München, 1981, pp. 51-66.

rebirth of Bucovina and a series of concessions on the regime of the romanian population in Transylvania[12].

3. The decision to enter the world's first conflagration

Romania's strategic positioning, at the flank of the two conflicting allies (Central Powers and Entente), as well as an army of 600,000 people, were the reasons why both camps have made efforts to attract Romania on their side. Marshal Paul von Hindenburg best expressed this conviction: "Judging by the military situation, we believe that it is enough for Romania to take action to decide the fate of the world war"[13].

Prime Minister Ion I.C. Bratianu negotiated carefully and cautiously the conditions for entering the war on the part of the Entente, aiming especially at recognizing the rights of Romania on the territories inhabited by the romanians in the Austro-Hungarian Empire[14].

On August 17, 1916 the representatives of the Entente (England, France, Russia and Italy) accepted the conditions of Ion I.C. Bratianu and the political and military conventions were signed. Based on the political convention was acknowledged, the Territorial Integrity of the Old Kingdom, the right to annex the territories under Austro-Hungarian rule, the same rights as allies in peace negotiations and negotiations, and Romania's obligation to declare war on Austria-Hungary.

The signing of the treaty represented a great diplomatic victory for Romania because "*it managed to convey through an international act, bearing the essentials of the greatest powers in Europe, the secular rights of the Romanian people on all the lands inhabited by the Romans in the Habsburg Monarchy. Whatever had happened, the winners or the winners, was the first time in our people's history when these claims were formally recognized*."[15]

The official approval of the Treaty by which Romania joins the world's conflagration was made by the Crown Council held on 27 August 1916.

Unlike the Crown Council in August 1914, King Ferdinand opened the works by announcing that "*he summoned the country's peoples not to ask for advice, because their decision is taken but to ask for their support*." The King then announced his decision to engage Romania on the Entente side and against the Central Powers[16].

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[12] Ioan Calafeteanu, Cristian Popişteanu, *Politica externă a României. Dicţionar cronologic*, Editura Ştiinţifică şi Enciclopedică, Bucureşti, 1986, p. 159.

[13] Paul von Hindenburg, *Out of My Life*, vol. 1, New York, 1921, p. 243 apud. Glenn E. Torrey, „*The Rumanian Campaign of 1916: Its Impact on the Belligerents*", în Slavic Review, Vol. 39, No. 1 (Mar., 1980), p. 27.

[14] Samuel Lyman, Atwood Marshal, *World War I*, American Heritage Inc., New York, 1992, pp. 262-263.

[15] Ion G. Duca, *Amintiri politice*, volumul I, Jon Dumitru Verlag, München, 1981, p. 29.

[16] Richard F. Hamilton, Holger H. Herwig, *The Origins of World War I*, University Press, Cambridge, 2003, p. 405.

The council ended without any announcement, but in the afternoon of the same day it was announced that the state of siege and the general mobilization decree[17].

4. The Great Union of December 1918

After the summer of 1917, with the help of the French military mission, the reorganized Romanian army managed to stop the German offensive (Marasti, Marasesti and Oituz)[18] and after the Russian troops abandoned the front because of the revolution in Russia, the romanian political figures realized that Romania could no longer support the war effort alone. Although the Crown Council of December 2, 1917, decided with continued resistance, in opposition to what the Powers of Entente believed and contrary to internal resistance, Prime Minister Ion I.C. Bratianu chose to sign the armistice with the Central Powers on December 7, 1917, just two days after Russia and the Triple Alliance Powers began peace talks in Brest-Litovsk.

After Russia signed the Brest-Litovsk Peace Treaty on March 3, 1918, the King appointed the German-conservative Alexandru Marghiloman, Prime Minister, hoping to negotiate more efficiently with Germany and Austria-Hungary, the conditions of the Romanian capitulation. The Treaty of Peace with the Triple Alied countries was signed in Bucharest on May 7, 1918, but was never formally accepted by King Ferdinand, which led to the resumption of hostilities against the Central Powers on November 10, 1918, just one day before the end of the world's conflagration, which led to the settlement of Romania alongside the victorious powers at the end of the war.

Due to its position during the war, throughout 1918, Romania was able to annex the provinces promised in the 1916 agreement: Bessarabia (April 1918), Bucovina (November 1918), Banat, Crisana, Maramures and Transylvania (December 1918) led on 1 December 1918 to the de facto union of all Romanian territories.

5. Peace Conference from Paris, 1919

On January 18, 1919, the Peace Conference was held in Paris, which had the mission of building a new political and territorial order in Europe.

Romania participated in the Peace Conference in Paris, in the category of states with special interests, represented by Ion I.C. Bratianu, Nicolae Misu, Alexandru Vaida-Voievod, Victor Antonescu and Diamandy, having a series of revisions that mainly aimed the consecration of the acts of union in 1918.

Romania's position at the Conference had a difficult start because the powers of the Entente considered that the 1916 Treaty had lost its validity as a result of the May 1918 peace, signed in Bucharest, and the US refused to recognize any agreement signed before their entry into war.

[17] Ion Mamina, *Consilii de Coroană*, Editura Enciclopedică, Bucureşti, 1997, p. 82.
[18] Rommel, Erwin, *Infanterie greift an*. Erlebnis und Erfahrung, Potsdam 1941, p. 176.

Ion I.C. Bratianu firmly rejected any thesis according to which Romania had itself canceled the 1916 Political and Military Convention, promising Transylvania, Banat and Bukovina in exchange for entering into conflict with the Entente, and on the other side it advocated recognition joining with Bessarabia and the border crossing in Banat. Adopting the position of the state man responsible for defending national interests and unable to accept Romania's position towards the provisions of the Peace Treaty, Ion I.C. Bratianu left the Conference proceedings.

On November 15, 1919, the successor of Ion I.C. Bratianu, Prime Minister Alexandru Vaida-Voievod, was summoned to accept the signing of peace treaties with Austria and those of minorities. A more flexible and more pragmatic thread, he managed to defuse the crisis of diplomatic relations by signing treaties.

Thanks to Alexandru Vaida-Voievod and the signing of the Treaties (the Treaty of Saint-Germain-en-Laye, with Austria - recognizing the Union of Bukovina with Romania, December 10, 1919, the Treaty of Trianon with Hungary - with Romania, June 4, 1920, the Treaty of Paris - by which France, Great Britain, Italy and Japan recognized the unification of Bessarabia in Romania, October 28, 1920), the national unity of Romania has gained international recognition.

Following the Peace Treaty, the great powers recognized the union resolutions in Chisinau, Chernivtsi and Alba-Iulia, as well as the contribution and sacrifices of Romania for the victory of the Entente in World War I.

6. Conclusions

The Great First World War, meant for Romania more than it probably meant for other European countries that entered the war.

When Romania decided to choose neutrality instead of participating near his allies, the Central Power, to join the war, it was a wise decision took by the politicians who figured out that was better not to do it at that momemt, even thought some of them did not agree.

1916 the year in which Romania, lead by prime minister Ion I.C. Bratianu took the ambitious decision to turn the weapons against its formers alies and join the war near Entente, was the moment in which the future of Great Romania was established

A great year for Romania was 1918, the year in which the historical teritories joined the mother state, first Bessarabia in April 1918, folowed by Bucovina in November 1918, and the last Banat, Crisana and Transylvania in December 1918, which led at 1 December 1918, to the facto union of all Romanian territories.

Through the ambition and the the refusal to give up national ideals of the Prime Ministers Ion I.C. Bratianu and Alexandru Vaida-Voievod, the great union of December 1918, was recognized internationally by all the great powers.

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Some observations on harassment through computer systems

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Abstract

With the development of the Internet and especially the use of social networks, new forms of harassment and abuse have emerged, such as grooming, cyberstalking and cyberbulling. Starting from the provisions of Article 208 of the Romanian Criminal Code, the article presents and analyzes the new types of online harassments.

Keywords: *online harassments; grooming; cyberstalking; cyberbulling.*

1. Introduction

In the Chapter VI of the Title I, which is entitled *Offence against the person* was also included the *offence of harassment* (Article 208) arguing that: "the act of an individual who, repeatedly, stalks, without right or a legitimate interest, a person or monitors his/her house, workplace or other places where he/she goes, thus causing a state of fear, shall be punishable by imprisonment from 3 to 6 months or with fine; making of phone calls or communications by means of distance communication, who, by frequency or content, causes fear to a person, shall be punishable by imprisonment from one month to 3 months of by fine, if the act does not constitute a more serious offence; the criminal action is initiated upon the prior charge of the injured party".

The offence of harassment is stipulated in a variant-type and an attenuated variant. Thus, the variant-type, pursuant to paragraph 1 of Article 208 of the Romanian Criminal Code refers to the act of that individual who, repeatedly, stalks, without right or a legitimate interest, a person, or monitors his/her house, workplace or other places where he/she goes, thus causing a state of fear. At paragraph 2 of Article 208 of the Romanian Criminal Code is stipulated the attenuated variant, which refers to making phone calls or communication by means of transmission at distance, which, by frequency and content, cause fear to a person.

The term *harassment* is not explicitly defined by the criminal legislation in Romania, but this term refers to repeated acts committed by the perpetrator in

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order to agitate, trouble and tease the injured person. Hence, harassment includes any behaviour or action that endangers the victim's security and silence[2].

For the crime to exist, it is necessary to meet two requirements. The first requirement is that the illegal act is repeatedly committed. Repeating the act of pursuing or monitoring the victim leads to the constitutive elements of the harassment offence. In the specialty literature and practice, it has been established that, in order to meet the constitutive elements of the harassment offence, in accordance with the provisions of Article 208 of the Romanian Criminal Code, at least two incidents are required, at reasonable intervals, causing a sense of fear about the continuing criminal behaviour[3].

The second requirement is that the illegal act is committed without right or without legitimate interest.

Besides the variant-type of the harassment offence, which is done through the victim's, pursuit or surveillance, the harassment offence also includes an attenuated variant, which is achieved by making telephone calls or by means of remote transmission communications which, by frequency or content, causes fear to a person. The communications by means of remote transmission refer primarily to the use of information and communications technology, i.e. through sms, e-mails, groups of discussions, as well as telegrams, letters, etc.

2. The harassment committed through computer systems

Once with the development of Internet and especially with the use of social networking, new forms of harassment occurred: cyberstalking, cyberbulling and grooming. Cyberstalking is a form of harassment by information systems of adults through electronic mail, groups of discussions, instant messages, which involves a physical threat which induces to the victim a feeling of fear[4]. Cyberbulling is a form of harassment through information systems of minors[5].

Cyberstalking refers to the use of the Internet, e-mail, or other electronic communications devices, in order to create a criminal level of intimidation, harassment and fear for one or more victims [6].

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[2] Dobrinoiu, Vasile; Hotca, Mihai Adrian; Gorunescu, Mirela; Dobrinoiu, Maxim; Pascu, Ilie; Chiş, Ioan; Păun, Costică; Neagu, Norel; Sinescu, Mircea Constantin (2014). *Noul Cod penal comentat. Partea specială*, Second Edition, Bucharest: Universul Juridic Publishing House, pp. 118.

[3] Dobrinoiu, Vasile; Hotca, Mihai Adrian; Gorunescu, Mirela; Dobrinoiu, Maxim; Pascu, Ilie; Chiş, Ioan; Păun, Costică; Neagu, Norel; Sinescu, Mircea Constantin, *op.cit.*, pp. 118-119.

[4]Moise, Adrian Cristian (2011). *Metodologia investigării criminalistice a infracțiunilor informatice*, Bucharest: Universul Juridic Publishing House, pp. 26-27.

[5] Holt, Thomas J.; Turner, Michael G.; Lyn Exum, M. (2014). *The Impact of Self Control and Neighborhood Disorder on Bullying Victimization*, Elsevier, in Journal of Criminal Justice, no. 42, pp. 347–355; Sabella, Russell A.; Patchin, Justin W.; Hinduja, Sameer (2013). *Cyberbullying myths and realities*, Elsevier, in Computers in Human Behavior, no.29, pp. 2703–2711.

[6] Reyns, Bradford W. (2012). *The Anti-Social Network. Cyberstalking Victimization among College Students*, El Paso, Texas: LFB Scholarly Publishing LLC, pp. 5-6.

Most cyberstalking behaviours are premeditated and repetitive, and may be aggressive in committing them. However, cyberstalking is criminologically and legally a new form of deviant criminal behaviour. We note that for the cyberstalking offence, the tactics and the behaviors are used to harass, threaten and intimidate the victim. Moreover, this criminal behaviour is also motivated by unconditional desire and the need to have power, control and influence on the victim.

In the case of cyberstalking, the offender can harass the victim from any place around the globe, unlike the form of harassment in the real space. An advantage of cyberstalking towards stalking refers to the fact that cyberstalkers have the opportunity to use the Internet in order to easily conceal their true identity.

Cyberstalking criminals select their victims most often through discussion groups, discussion forums and e-mails.

The victims of cyberstalking can be both adults and minors, being usually people without experience in the online environment[7].

Another special form of online harassment, is grooming in the online environment, which is being defined as a „strategy used by a sexual offender to manipulate the child, so that the sexual abuse take place subsequently, in circumstances that allow total control of the offender on the child"[8].

Grooming in the online environment is the process by which a person makes friends with a child in the virtual space with the intention of facilitating the establishment of a sexual relationship in cyberspace or with the intention of facilitating the establishment of a sexual relationship in the real space for the purpose of committing a sexual abuse of a child.

In the Article 6(1) of the Directive 2011/92/EU[9] on combating the sexual abuse and sexual exploitation of children and child pornography is stipulated the offence of solicitation of children for sexual purposes and consists in „the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in the Article 3(4) (engaging in sexual activities with a child who has not reached the age of sexual consent) and the Article 5(6) (production of child pornography), where that proposal was followed by material acts leading to such a meeting".

Directive 2011/92/EU stated that grooming in the online environment is a threat with specific characteristics in the context of the Internet, as the latter

[7] Moise, Adrian Cristian (2015). *Dimenisiunea criminologică a criminalității din cyberspațiu*, Bucharest: C.H. Beck Publishing House, p. 314.

[8] Vasiu, Ioana; Vasiu, Lucian (2011). *Criminalitatea în cyberspațiu*, Bucharest: Universul Juridic Publishing House, pp. 248-249.

[9] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JAI, Official Journal of the European Union, 17.12.2011, L335/1.

provides unprecedented anonymity to users because they are able to conceal their real identity and personal characteristics, such as their age.

We noted that online grooming is also criminalised in the Council of Europe Convention[10] on the protection of children against sexual exploitation and sexual abuse, specifically in article 23[11]. The groomer often pretends to be a young person and draws the child into discussing intimate matters, and gradually exposing the child to sexually explicit materials in order to reduce resistance of inhibitions about sex.

If a physical encounter is established, the child may be sexually abused or even injured.

3. Conclusions

As cyberstalking and cyberbulling are not expressly stipulated within the legal instruments in the field of cyberspace at the level of the European Union, the Member States of the European Union began to elaborate specific regulations to criminalise the two forms of harassment or to elaborate provisions that comprise certain forms of harassment by electronic communications along with the traditional forms of harassment[12]. The last variant is also the choice of Romanian legislators to regulate the offence of harassment in Article 208 of the Romanian Criminal Code.

The text of Article 208 of the Romanian Criminal Code adapted to the provisions of Article 3 (offences related to sexual abuse) of the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, as well as to the provisions of Article 18 (sexual abuses) of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse.

We underline that grooming is done more easily through the online environment than via the offline environment, as children feel more uninhibited in the online environment than in the offline environment, making them more vulnerable to offenders.

[10] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.201), Lanzarote, 25 October 2007.

[11] Article 23 provides: *"*Each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a, against him or her, where this proposal has been followed by material acts leading to such a meeting".

[12] Constantinos M. Kokkinos, Nafsika Antoniadou, Angelos Markos, Cyber-bullying: An investigation of the psychological profile of university student participants, în Journal of Applied Developmental Psychology, No.35/2014, p.204-214.

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3. Moise, Adrian Cristian (2011). *Metodologia investigării criminalistice a infracțiunilor informatice*, Bucharest: Universul Juridic Publishing House.
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6. Sabella, Russell A.; Patchin, Justin W.; Hinduja, Sameer (2013). *Cyberbullying myths and realities*, Elsevier, in Computers in Human Behavior, no.29.
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8. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JAI, Official Journal of the European Union, 17.12.2011, L335/1.
9. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.201), Lanzarote, 25 October 2007.

Convergence of regulations regarding shareholders of European listed companies

Raluca PAPADIMA[1]

Abstract

This article discusses the past and future convergence of regulations regarding EU listed companies by analyzing a particular aspect: exit rights granted to shareholders. It analyzes Romania and France, and, for comparative purposes, the United States, as countries representatives of weak, strong and respectively very strong capital markets, with varying levels of shareholder activism and litigation (low, high and respectively very high). It concludes, among others, that there is convergence with respect to listed companies and that the scope of legal exit rights for listed companies is correlated with the strength of the capital markets. Shareholders of listed companies in the US benefit from fewer legal exit rights that shareholders of Romanian or French listed companies, presumably because they have the most active and liquid capital markets. The categories of extraordinary corporate events that trigger legal exit rights are quite similar in all three countries. Similarities also exist regarding the use of contractual exit rights (applicable mostly to unlisted companies). The existence of this convergence and of clear particularities with respect to listed companies invites to a reorganization of the national company laws based a new summa divisio, between listed and unlisted companies instead of the traditional national classifications.

Keywords: *listed company, stock exchange, financial market, convergence, harmonization, globalization, European Company Law, European Capital Markets Law, French law, Romanian law, American Law, compared law, exit right, sell-out right, buy-out right, squeeze-out, appraisal, withdrawal, minority shareholder, litigation, mergers and acquisitions, takeovers, summa divisio*

Introduction

Listed companies[2] are a world apart, as noted more than 20 years ago already by professor Yves Guyon[3]. According to our statistics, there are

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[2] In this article, we use the term *"*company*"*to refer to a variety of business organizational forms in various countries, which share all or most of the following main characteristics: (i) legal personality, (ii) limited liability, (iii) transferable shares, (iv) delegated management and (v) shareholder

approximately 5 000 companies listed on regulated markets of the European Union (EU) stock exchanges. Another 2 500 companies are listed on EU multilateral trading facilities (MTFs). Although they represent less than 1% of the European businesses, the market capitalization of companies listed on the stock markets of the EU amounts to approximately 80 % of the GDP of EU Member States. Therefore, they have a systemic importance for national economies and for the European economy as a whole.

It has been demonstrated that presently there is a convergence of national regulations applicable to EU listed companies despite only partial harmonization at the supranational level and that this convergence will deepen as a result of the forces and factors of causality[4], in particular with respect to shareholder rights and obligations. In May 2017, the EU adopted Directive 2017/828 ("Shareholder Engagement Directive") amending Directive 2007/36/EC ("Shareholder Rights Directive") as regards the encouragement of long-term shareholder engagement. With the Shareholder Rights Directive from 2007, shareholders of listed companies were empowered through the granting of a number of fundamental rights. With the 2017 Shareholder Engagement Directive, the notion of obligations of shareholders of listed companies was created. Both are convergent.

EU listed companies operate in an ever more competitive environment. The 16 most powerful stock exchanges are located, from a geographical perspective, in the United States, Japan, China, Europe, Canada, India, Korea, Australia and South Africa. This clearly shows that the stock markets are dominated by Anglo-Saxon and Asian companies. Against this background, European listed companies and their shareholders must be equipped with an efficient legal framework enabling them to compete with their American and Asian counterparts. Our article will assess if this is the case, by focusing on a specific aspect: convergence of shareholder exit rights.

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ownership. For Romania, we use this term to refer to (i) all forms of commercial companies, regulated by Romanian corporate law (*societate pe acțiuni*, *societate cu răspundere limitată*, *societate în nume colectiv*, *societate în comandită simplă* and *societate în comandită pe acțiuni*) and (ii) civil companies (*societate simplă*), regulated by Romanian civil law. For France, we use this term to refer to (i) all forms of commercial companies, regulated by French corporate law (*société par actions*, *société par actions simplifiée*, *société à responsabilité limitée*, *société en nom collectif*, *société en commandite simple* and *société en commandite par actions*) and (ii) civil companies (*société civile*), regulated by French civil law. For the US, we use this term to refer to corporations and LLCs.

[3] Guyon Y., *L'évolution de l'environnement juridique de la loi du 24 juil. 1996 (aspects de droit interne)*, *Rev. sociétés*, 1996, p. 503. See also Ohl D., *Droit des sociétés cotées*, 3rd edition, Ed. Litec, Paris, 2008, p. 7.

[4] Papadima R., *La convergence en matière de droit applicable aux sociétés cotées de l'Union européenne*, doctoral thesis, University Paris II and University of Bucharest, 2017, *passim*. See also Papadima R., *Droit européen et comparé des sociétés et des affaires (European and Comparative Corporate and Business Law)*, Ed. Hamangiu, Bucharest, 2018, pp. 109-216, 254-299.

The study the convergence of several legal systems in a certain area of the law is to question what bring the legal systems closer together and grasp what predisposes to approximation or, instead, limits approximation or prevents it from happening. It is therefore to observe actions of opposing forces and then to take stock of the present and of the likely future, on the basis of the past[5]. Convergence is the action of moving towards a common point or tending towards the same result[6]. Studying a phenomenon of convergence implies an analysis over a certain period of time. The phenomena of convergence, legal transplant and globalization are not new[7]. They started a very long time ago, continued over the centuries and recent developments, as well as those to come, are well in line with this evolution, and may not be separated from it. Therefore, our focus will be in particular on recent developments, without however ignoring the historical aspects.

Moreover, although this article discusses the EU (in particular France and Romania), we will often offer comparisons with the United States, who have the most powerful financial markets of the world and the two largest stock exchanges worldwide, on which are publicly traded, or are also publicly traded, many European companies. We believe that it is useful for comparative purposes to look both at *civil law* systems and *common law* systems[8], and the United States have the same two-tier regulatory system (federal and State) that exists in the European Union (European and national).

This article assessed convergence by first discussing general particularities of listed companies (I) and then by focusing on the particularities of listed companies with respect to a specific aspect, exit rights provided to shareholders as a protection mechanism (II).

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[5] Coffeee J. C., *The Future as History. The Prospects for Global Convergence in Corporate Governance and Its Implications*, *Northwestern University Law Review*, 1999, no. 93, p. 679 et seq.; Siems M., *Convergence in Shareholder Law*, Ed. Cambridge University Press, Cambridge, 2011.

[6] Canivet G., *La convergence des systèmes juridiques du point de vue du droit privé français*, *RIDC*, 2003, vol. 55, no. 1, p. 7 et seq.; Legrand P., *European Legal Systems Are Not Converging*, *International and Comparative Law Quarterly*, 1996, no. 45, p. 53 et seq.; Gilson R. J., *Globalizing Corporate Governance. Convergence of Form or Function*, *Am. J. Comp. Law*, 2001, no. 49, p. 329 et seq.

[7] See Watson A., *Legal Transplants. An Approach to Comparative Law*, 2nd edition. Ed. The University of Georgia Press, Athens, Georgia, 1993; Berkowitz D., Pistor K., Richard J.-F., *The Transplant Effect*, *Am. J. Comp. Law*, 2003, no. 51, p. 163 et seq.; Mattei U., *Efficiency in Legal Transplants. An Essay in Comparative Law and Economics*, *International Review of Law and Economics*, 1994, no. 4, p. 3 et seq.; Wise E. M., *The Transplant of Legal Patterns*, *Am. J. Comp. Law*, 1990, no. 37, p. 1 et seq. See, however, Legrand P., *What "Legal Transplants"?*, in Nelken D., Feest J. (editors), *Adapting Legal Cultures*, Ed. Hart, Oxford, 2001, p. 55 et seq.; Legrand P., *The Impossibility of "Legal Transplants"*, *Maastricht Journal of European and Comparative Law*, 1997, no. 4, p. 112 et seq.

[8] See, however, Gordley J., *Common law und civil law. Eine überholte Unterscheidung (Common law and civil law. An obsolete distinction)*, *ZEuP*, 1993, no. 1, p. 498; Kötz H., *Abschied von der Rechtskreislehre? (Goodbye to the theory of legal families?)*, *ZEuP*, 1998, no. 6, p. 493.

I. Particularities of listed companies: General overview

Listed companies are not characterized by their social form, their object of activity, their number of shareholders or even by the fact that the can offer their securities to the public, but by the fact that their shares are admitted to trading on a regulated market and are being traded on such a market[9]. Consequently, the characterizing feature of listed companies is that the market tends to express the value of its securities through the market stock price[10]. It is for this reason that listed companies are subject to special regulations, destined to ensure the transparency of the stock exchanges and the security of the operations that take place on the stock exchanges[11]. That is because listed companies not only affect private interests (in particular, minority shareholders). Their correct functioning is part of the economic public order[12]. We first analyze the EU definition of listed companies (1) and then the complex legislative and regulatory framework that they are subject to (2).

1. Definition of listed companies

European law defines listed companies, using the notion of "issuer", as "a natural person, or a legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market"[13]. In this sense, the phrase "listed company" is incorrect, because it is not the company that is being listed, the securities of the company are being listed. However, the phrase is commonly used both by legal scholars and by regulators[14]. We will therefore use it as well, instead of the traditional paraphrase. The multiple meanings of the phrase "listed company" are actually useful to evidence the fundamental link that exists between the stock market and the companies that use it.

(a) Definition of securities. The European notion of transferable "securities" means "classes of securities which are negotiable on the capital market, with the

[9] Boizard M., *La distinction entre la société cotée et la société non cotée comme summa divisio du droit des sociétés*, doctoral thesis, University Paris II, 2002, p. 11-13, par. 6-12, p. 29, par. 41-42.
[10] Bouthinon-Dumas H., *Le droit des sociétés cotées et le marché boursier*, Ed. LGDJ, Paris, 2007, p. 2, par. 3 ("La cotation, entendue comme détermination de la valeur de la société par le marché, caractérise les sociétés cotées et repose sur un corps de règles spécifiques").
[11] Guyon Y., *Droit des affaires*, t. 1 (*Droit commercial général et Sociétés*), 12th edition, Ed. Économica, Paris, 2003, p. 228, par. 219-220.
[12] Frison-Roche M.-A., *La distinction entre sociétés cotées et non cotées*, in *Mél. AEDBF-France*, Ed. Revue Banque, Paris, 1997, p. 195.
[13] Art. 2(1) Transparency Directive (as modified in 2013).
[14] Ohl D., *Droit des sociétés cotées*, 3rd edition, Ed. Litec, Paris, 2008, p. 1; Bouthinon-Dumas H., *Le droit des sociétés cotées et le marché boursier*, Ed. LGDJ, Paris, 2007, p. 2; Merle P., *Droit commercial. Sociétés commerciales*, 20th edition, Ed. Dalloz, Paris, 2017, par. 21; Piperea G., *Protecția investitorilor în legislația românească a valorilor mobiliare*, *RRDA*, no. 11-12/2003, *passim*; David S., Dumitru H. D., *Principiile fundamentale care guvernează reglementările aplicabile pieței valorilor mobiliare*, *Revista de Drept Comercial*, no. 7-8/1997, p. 40 et seq.

exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures"[15]. Consequently, the European definition of a listed company includes companies that only have listed bonds (as opposed to shares). In this sense, the definition is too broad because there are fundamental differences between the stock market for shares and for debt.

(b) Definition of regulated market. A "regulated market" means "a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments - in the system and in accordance with its non-discretionary rules - in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of [the MIFID II Directive]"[16].

Regulated markets are authorized by the national competent authorities. There are more than 100 regulated markets presently functioning in the European Union. The most important groups are, according to their market capitalization, London Stock Exchange Group (which operates includes the Milan Stock Exchange), Euronext (which operates the stock exchanges of Paris, Amsterdam, Brussels and Lisbon), the Deutsche Börse group (which operates the Frankfurt stock exchange) and the group Nasdaq OMX, the European arms of the American Nasdaq (which operates the stock exchanges of Stockholm, Helsinki, Copenhagen, Reykjavik, Vilnius, Riga, Tallinn and Erevan).

These 4 groups account, together, almost 90% of stock market capitalization of the European Union and approximately 66% of the listed companies within the European Union are listed on their markets. The total market capitalization of the European Union is approximately 12 trillion euros (17% of the market capitalization worldwide). For comparison purposes, the market capitalization of the United States (through its only 2 main stock exchanges: New York Stock Exchange and Nasdaq) is approximately 26 trillion euros (38% of the market capitalization worldwide)[17]. To the 4 European groups mentioned before, we must add the equally important Swiss group SIX (which operates the Zurich stock exchange).

[15] Art. 4(1)(44) of the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (Directive MIFID II).

[16] Art. 4(1)(21) of Directive MIFID II. For the evolution of this definition, see Couret A., Le Nabasque H. *et al.*, *Droit financier*, 2nd edition. Ed. Dalloz, Paris, 2012, par. 34 et seq.

[17] WFE, Domestic Market Capitalization, report for the month of May 2017.

The notion of "regulated market" must be differentiated from two other notions: (i) multilateral trading facility (MTF) and (ii) organized trading facility (OTF).

(i) Multilateral trading facility. A MTF is "a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments - in the system and in accordance with non-discretionary rules - in a way that results in a contract in accordance with Title II of [the MIFID II Directive]"[18]. There are presently approximately 150 MTFs, a majority of which operate in the United Kingdom (which poses significant problems in the context of the Brexit). Given the significant reform in 2014 of financial law, it will be particularly difficult to differentiate between a regulated stock market and a MTF. The definitions are extremely similar and so is their general legal framework.

Historically, MTFs were created in order to offer an alternative to smaller companies, who did not meet the requirements (thresholds) in order to be listed on a regulated market. This is actually the reason why the Directive MIFID II created a sub-category of MTFs, the "SME growth markets". However, for the time being, companies whose securities are admitted to trading on a SME growth market are not "listed companies" in the sense of the European definition (of "issuer").

The operator of a MTF may apply to its home competent authority to have the MTF registered as an SME growth market. The home competent authority may register the MTF as an SME growth market if the competent authority is satisfied that the following requirements are complied with in relation to the MTF: (a) at least 50 % of the issuers whose financial instruments are admitted to trading on the MTF are SMEs at the time when the MTF is registered as an SME growth market and in any calendar year thereafter, (b) appropriate criteria are set for initial and ongoing admission to trading of financial instruments of issuers on the market, (c) on initial admission to trading of financial instruments on the market there is sufficient information published to enable investors to make an informed judgment about whether or not to invest in the financial instruments, either an appropriate admission document or a prospectus, (d) there is appropriate ongoing periodic financial reporting by or on behalf of an issuer on the market, for example audited annual reports, (e) issuers on the market, persons discharging managerial responsibilities and persons closely associated with them comply with relevant legal requirements, (f) regulatory information concerning the issuers on the market is stored and disseminated to the public and (g) there are effective systems and controls aiming to prevent and detect market abuse on that market[19].

(ii) Organized trading facility. The Directive MIFID II also created a third category of multilateral systems, the OTF, defined as "a multilateral system which

[18] Art. 4(1)(22) of Directive MIFID II. For the evolution of this definition, see Couret A., Le Nabasque H. *et al.*, *Droit financier*, 2nd edition, Ed. Dalloz, Paris, 2012, par. 62 et seq.
[19] Art. 33 of Directive MIFID II.

is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of [the MIFID II Directive]"[20]. This new notion was created in order to capture "dark pools" and "crossing networks", private securities exchanges in which investors, typically large financial institutions, are able to make trades anonymously[21].

Going forward, it will be relatively easy to distinguish between a regulated market (or a MTF) and a OTF. The main distinction will be that the execution of orders must be made pursuant to non-discretionary rules on a regulated market (or a MTF) but will be made on a discretionary basis on an OTF, that is, allowing the intervention of the operator[22]. The second distinction, less important, is that only certain financial instruments can be negotiated on an OTF: bonds, structured finance products, emission allowances or derivatives. Shares in companies and other securities equivalent to shares cannot be negotiated on OTFs.

2. Complex legislative and regulatory framework

The life of a listed company, from its initial public offering to the squeeze-out following a successful takeover bid, is subject to a complex legislative and regulatory framework. Unlike unlisted companies, whose life and operations are regulated from A to Z by classic Company Law, the delimitation of the Listed Company Law requires a double operation of regrouping followed by exclusion. It is first necessary to bring together usually separate rules and then to exclude other rules with which the first are usually associated. Mathematically, the operation translates into a union of sets followed by an operation of set intersection. Therefore, Listed Company Law is an "orphan law" having as its adoptive parents of Company Law and Financial Law, which together form the hard core of the applicable regulations. This adoptive family is complemented by a peripheral set of distant cousins, represented by other branches of law (Competition Law, Tax Law, Employment Law, etc.) as well as by certain specific industry regulations (banking, insurance, etc.).

European law is now the most important source of (imposed) convergence, as well as of divergence, regarding the regulations that apply to European listed companies. Company Law is significantly less harmonized at the European level than Financial Law. However, within Company Law, there is significantly more harmonization with respect to joint stock companies than with respect to any other

[20] Art. 4(1)(23) of Directive MIFID II.

[21] Bréhier B., Guérin P., *Un peu de lumière sur les Dark Pools*, *BJB*, Nov. 2009, no. 11, p. 456 et seq.; Blimbaum J., *Les dark pools : entre fantasme et réalité. D'une émergence incontrôlée à un encadrement pragmatique*, *RDBF*, May 2011, no. 3, p. 35 et seq.

[22] Barban P., *Modernisation et rationalisation du droit des plateformes de négociation par l'ordonnance no 2016-827 du 23 juin 2016*, *RISF*, no. 1/2017, p. 69.

types of companies and, historically, these harmonizing efforts were aimed specifically at listed companies. That is because listed companies are almost always joint stock companies: the Romanian *societate pe acțiuni (SA)*, the French *société par actions (SA)*, the German *Aktiengesellchaft (AG)*, the Dutch *Naamloze Vennootschap (NV)*, the English *public limited company* (plc) and the US corporation.

Some exceptions exist. For example, in France, there are several *sociétés en commandite par actions (SCA)* that are listed: Bonduelle, Etam, Euro Disney, Financière Pinault, Hermès, Lagardère, M.B.D., Michelin, Paris Orléans, Sofibol, Soparind, Rubis and Touax. We believe that, theoretically, Romanian and German SCAs could also be listed[23]. With respect to Romania, authors generally agree that both SAs and SCAs can offer their securities to the public (because there is no express prohibition and because the rules of the SAs are generally applicable to SCAs[24]) but some authors take the view that SCAs could not list their shares on a stock exchange[25].

II. Particularities of listed companies: Exit rights for shareholders

Two of the core structural characteristics of a company are legal personality and limited liability, which can also be described as "entity shielding" and "owner shielding"[26]. Entity shielding protects the assets of the company from the creditors of the company's owners, while owner shielding protects the assets of the company's owners from the creditors of the company. A component of entity shielding, which serves to protect the going concern value of the company against destruction by either individual owners or their creditors, is that the individual owners of the company (the shareholders) cannot withdraw their share of the company's assets at will, thereby forcing partial or complete liquidation of the company, nor can the personal creditors of an individual owner foreclose on the owner's share of the company's assets. It follows that, unless a legal or contractual exception applies, shareholders may not abandon the company at will.

[23] Menjucq M., *Droit international et européen des sociétés*, 4th edition, Ed. LGDJ, coll. Domat droit privé, Paris, 2014, par. 412, p. 282.

[24] Art. 9 and art. 187 of the Romanian Company Law no. 31/1990. For this opinion, see David S., *Commentary on article 18 of the Romanian Company Law no. 31/1990*, in Cărpenaru S.-D., David S., Piperea G., *Legea societăților. Comentariu pe articole*, 5th edition, Ed. C.H. Beck, Bucharest, 2014, p. 138, par. 8.

[25] David S., *Commentary on article 18 of the Romanian Company Law no. 31/1990*, in Cărpenaru S.-D., David S., Piperea G., *Legea societăților. Comentariu pe articole*, 5th edition, Ed. C.H. Beck, Bucharest, 2014, p. 138, par. 9-10; Șcheaua M., *Legea societăților comerciale nr. 31/1990 comentată și adnotată*, Ed. All Beck, Bucharest, 2000, p. 28 and p. 39. For the contrary opinion, see Prescure T., *Commentary on article 9 of the Romanian Company Law no. 31/1990*, in Schiau I., Prescure T., *Legea societăților comerciale nr. 31/1990. Analize și comentarii pe articole*, Ed. Hamangiu, Bucharest, 2007, p. 92.

[26] For these terms, see Hansmann H., Kraakman R., Squire R., *Law and the Rise of the Firm*, *Harvard Law Review*, vol. 119, 2006, p. 1333.

At the origins of corporate law, shareholders had an absolute veto over extraordinary corporate events, which required unanimous approval. However, as this burdensome protection gave way to majority voting requirements, exit rights were granted as a compensation for the loss of the veto right.[27] Consequently, exit rights are instances where the applicable law or contractual arrangements (bylaws of a company or in shareholder agreements) provide that a shareholder has a withdrawal right (also referred to as a sell-out right). In certain cases, a sell-out right of a minority shareholder is paired with a correlative buy-out right of the majority shareholder. We discuss separately contractual exit rights (1) and legal exit rights (2).

1. Contractual exit rights

Shareholders of listed companies typically have fewer (if any) contractual exit rights than shareholders of unlisted companies because they are not as concerned in having, nor would it be appropriate or possible for them to have, rights and protections beyond those available at law.

In contrast, significant minority shareholders in unlisted companies typically negotiate additional protections and rights, including exit rights. Such contractual exit rights of a shareholder may include: (i) the right, but not the obligation, under certain circumstances, to exit the company by selling its interest to the company or to the other shareholders (in proportion to their ownership interest) at either a pre-agreed price, as determined by a formula set out in the agreement, or at a price to be determined by an independent third party (a "put" right or a sell-out right, the company or a majority shareholder generally having a correlative "call" right or buy-out right), (ii) the right to be offered to buy the shares of another shareholder prior to such shares being offered by the seller to a third party (right of first offer), (iii) the right to be offered to buy the shares of another shareholder on the same terms and conditions as agreed with a third party (right of first refusal) or (iv) the right to sell a pro rata portion of its ownership interest to any third party acquiring the majority interest in the company (right of co-sale or tag-along right, the majority shareholder generally having a correlative drag-along right).

These contractual exit rights are typically convergent both within the EU and between the EU and the US. This convergence is the result of the powerful influence of the Anglo-Saxon law firms and the *common law* drafting methods (convergence imposed by practice)[28].

[27] Thompson R. B., *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, *Georgetown Law Journal*, vol. 84, 1995, pp. 11-14; Călin D., *Retragerea acționarilor din societățile comerciale pe acțiuni*, *Revista Română de Drept al Afacerilor*, no. 3/2011, pp. 73-75.

[28] Fontaine M., Ly (de) F., *Drafting International Contracts, An Analysis of Contract Clauses*, 2nd edition, Ed. Martinus Nijhoff, Leiden, Boston, 2009, pp. 636-639 (Ţthe battle for the *lingua franca* of international business transactions has been won by the English language (…) and [as] to contract drafting and techniques, the influence of Anglo-American law cannot be deniedŢ). See also Drolshammer J., Pfeifer M. (editors), *The Internationalisation of the Practice of Law*, Ed. Kluwer Law International, London, 2001, p. 173 et s.

French law predominantly focuses on shareholders' exclusion rather than their right to exit. As such, most exit rights are organized contractually. The French Code of commerce (FCOC) grants certain forms of company the right to contractually stipulate exit rights. That is particularly true for a form of commercial company that is specific to France, the simplified joint stock company ("*société par actions simplifiée*"), where the contractual nature is extremely pronounced.

In the US, there are two main forms of companies: corporations and limited liability companies (LLCs). LLCs cannot be listed. Corporate law is left to the national legislators, except for areas where the federal legislator has intervened (mostly regarding listed companies), and each US State has adopted national laws governing each of these two forms of companies. The national laws adopted by Delaware (the Delaware Limited Liability Company Act (DLLCA) and the Delaware General Corporation Law (DGCL)) are particularly important because the State of Delaware is the privileged venue for company incorporations. More than one million companies are incorporated in Delaware, including more than 50% of all public companies and more than 60% of the Fortune 500 companies[29]. Exit rights for shareholders of LLCs generally exist only if and to the extent provided in a shareholder agreement or in an agreement governing a specific corporate transaction. For example, the DLLCA allows for broad contractual exit rights in the case of LLCs[30]. Because this form of company is regarded inherently as a "creature of contract" and regulated accordingly, there are generally no legal exit rights for LLCs in the US. However, even for corporations, we will see that shareholder protection is typically ensured by contractual, not legal, exit rights.

2. Legal exit rights

In theory, shareholders of listed companies should also have fewer legal exit rights than shareholders of unlisted companies because they have the ability to sell their shares on the market if they are dissatisfied with the management or the plans of the company. We will demonstrate that, when carefully reviewing relevant national laws, the outcome is relatively different, and for no good reason. The remainder of this subsection discusses legal exit rights for listed companies, as a minority shareholder protection, in Romania (a), France (b) and the United States (c).

[29] See http://corp.delaware.gov/aboutagency.shtml; Romano, R., *The Genius of American Corporate Law*, Washington: AIE Press, 1993, p. 14 et seq.; Bebchuk, L. A., Cohen, A., *Firms' Decisions Where to Incorporate*, 46 Journal of Law and Economics 383, 2003, p. 389-391.

[30] Section 18-210 of the DLLCA (Contractual appraisal rights) provides that "[a] limited liability company agreement or an agreement of merger or consolidation or a plan of merger may provide that contractual appraisal rights […] shall be available […] in connection with any amendment of a limited liability company agreement, any merger or consolidation in which the limited liability company is a constituent party to the merger or consolidation, any conversion of the limited liability company to another business form, any transfer to or domestication or continuance in any jurisdiction by the limited liability company, or the sale of all or substantially all of the limited liability company's assets".

(a) Legal exit rights for listed companies in Romania

Pursuant to recently enacted regulations, shareholders of listed companies in Romania have broader exit rights that shareholders of unlisted companies. They have an exit right in connection with extraordinary corporate events (i), squeeze-out exit rights (ii), an exit right in case of delisting (iii) and an indirect exit right through mandatory offers (iv).

(i) Extraordinary corporate events. Art. 134 of the Romanian Company Law (Law no. 31/1990, as subsequently amended, to which we will refer as the "RCL"), provides that shareholders of a joint stock company "who did not vote in favor of a decision of the general meeting may withdraw from the company and request the purchase of their shares by the company". This exit right is also applicable to all other forms of commercial companies, including LLCs, but not to civil companies.[31] It has a very broad scope and covers: (i) mergers and divisions, (ii) the change of the main activity of the company, (iii) the transfer of the company seat abroad and (iv) the modification of the legal form of the company (art. 134(1) of the RCL).

Art. 134 of the RCL applies to both listed and unlisted joint stock companies, as recently clarified by Law no. 24/2017 regarding issuers of financial instruments and market operations (RIL). In principle, the RCL applies to both listed and unlisted companies. However, for listed companies, the RCL applies only to the extent that the financial law, represented by the Romanian Law on Capital Market no. 297/2004 (RLCM) and the regulations of the ASF/CNVM (and now also the RIL), do not contain contrary provisions[32]. In a number of articles published in 2015-2016, we considered that art. 134 of the RCL was not applicable to listed companies because financial law contained opposite provisions[33]. For listed companies, we concluded that only the limited right of withdrawal provided for in art. 242 of the RLCM applied (right of withdrawal applicable in the event of a merger or division only if the shareholders of a listed company receive, during the transaction, shares of an unlisted company). This conclusion was supported by our comparative law studies, which showed that the scope of legal exit rights in the event of extraordinary corporate events should be narrower for listed companies, given the ability of shareholders to leave the

[31] Art. 187 and art. 226(a^1) of the RCL.

[32] ÎCCJ 2 civ., decision no. 1847, 25 April 2013, note Maxim G., *RRDA*, 2014, no. 7, p. 117-126.

[33] Papadima R., Gherghe M., Văleanu R., *Shareholder Exit Signs on American and European Highways. Under Construction*, *University of Pennsylvania Journal of Business Law*, 2016, vol. 18, no. 4, p. 1059 et s.; Gherghe M., Papadima R., Văleanu R., *Retrait des actionnaires en France, en Roumanie et aux États-Unis*, *RISF*, no. 2/2016, p. 37 et s.; Gherghe M., Papadima R., Văleanu R., *Retragerea acționarilor. Studiu de drept comparat*, *RRDA*, no. 11/2015, p. 33 et s. For a similar opinion, Cucu C., Gavriă M. V., Bădoiu C.-G., Haraga C., *Legea societăților comerciale nr. 31/1990*, Ed. Hamangiu, Bucharest, 2007, p. 289.

company by selling their shares on the stock market. The majority of Romanian scholars did not share this view and considered that art. 134 of the RCL applied to both listed and unlisted companies and that art. 242 of the RLCM had been implicitly repealed[34]. Case law had not settled the question, quite the contrary[35].

Finally, the legislator intervened to settle the debate through the adoption of the RIL in March 2017. This law corrected the initially faulty transposition of a number of European instruments of financial law (Admission Directive, Prospectus Directive and Transparency Directive) and company law (Takeover Directive and Shareholder Rights Directive). The transposition of these directives and their amendments had been made through the RLCM and subsequent amendments, often made to the limit of transposition deadlines. The result had often been an incomplete, incorrect or at least imprecise transposition. Now, the RIL gathers all the provisions concerning listed companies and transactions on financial instruments. One of the stated objectives of the RIL has been to optimize the transposition of the above-mentioned European directives, a goal achieved through the extraction of these provisions previously contained in the RLCM, their regrouping in this new law and their modification. The other objective of the RLCM was to transpose the 2013 amendments to the Transparency Directive and the provisions of the 2014 Market Abuse Directive.[36]

The exit right must be exercised within 30 days from the date of either the adoption or the publication of the decision of the general meeting approving the extraordinary corporate event, depending on the trigger (art. 134(2) and 134(2^1) of the RCL). It is exercised by submitting, at the registered seat of the company, a written declaration of withdrawal (art. 134(3) of the RCL). From the moment of submitting the declaration of withdrawal, the petitioner loses its shareholder rights (the right to vote and the right to receive dividends) and becomes a creditor of the company, for an amount equal to the value of the shares[37]. Art. 134 of the RCL is

[34] David S., *Commentary of article 134*, in Cărpenaru S.-D., David S., Piperea G., *Legea comentată a societăților comerciale,* 5th edition, Ed. C.H. Beck, Bucharest, 2014, par. 13, p. 453; Călin D., *Retragerea acționarilor din societățile comerciale pe acțiuni, RRDA*, no. 3/2011, par. 12, p. 78; Duțescu C., *Răscumpărarea propriilor acțiuni de către o societate comercială admisă la tranzacționare pe o piață reglementată*, *Dreptul*, no. 9/2010, p. 90-91.

[35] Cases concluding that shareholders of listed companies have an exit right in all instances set forth in art. 134 of the RCL: ÎCCJ com., decision no. 2443, 22 June 2011 and ÎCCJ 2 civ., decision no. 1761, 20 May 2014. Cases concluding that shareholders of listed companies only have an exit right in the situation set forth in art. 242 of the RCML: Appellate Court Galați, decision no. 528, 5 October 2009 and ÎCCJ 2 civ., decision no. 1847, 25 April 2013.

[36] The RIL does not transpose MiFID II or subsequent amendments to MiFID I (which will likely be done in the form of an amendment to the RCML), the new 2017 Shareholder Engagement Directive or the new 2017 Prospectus Regulation (which will be operated through an amendment of the RIL).

[37] Tec L. M., *Retragerea acționarului din societatea pe acțiuni de tip închis reglementată de Legea nr. 31/1990*, *Pandectele Române*, no. 2/2009, p. 32; Schiau I, Ionaș-Sălăgean M,

silent regarding the date by which the company must pay the price. In contrast, art. 91 of the RIL provide that the company must pay the price within 4 months following the submission of the declaration of withdrawal.

The price to be paid by the company is determined by a registered independent expert, designated, upon request of the board of directors (art. 134(4) of the RCL), by the director of the National Trade Registry (ONRC). The expert must be a member of the National Association of Certified Appraisers in Romania, *Asociația Națională a Evaluatorilor Autorizați din România* (ANEVAR). In theory, the ONRC should maintain a list of ANEVAR members willing to perform evaluations under art. 134 of the RCL and make appointments randomly from that list. In practice, it generally appoints the specific expert requested by the company. Art. 91 of the RIL contain the additional precision that the expert must be registered with the *Autoritatea de Supraveghere Financiară* (ASF).

The expert must establish the price as the "average value resulting from the application of at least two valuation methods recognized by the legislation in force as of the evaluation date" (art. 134(4) of the RCL). The valuation methods currently recognized by the Romanian legislation are those adopted by ANEVAR[38] and ANEVAR has adopted[39] as Romania's standards, in their entirety, the International Valuation Standards (IVS) developed by the International Valuation Standards Council. The relevant valuation standard is IVS 250 (Financial Instruments). According to this standard, there are three main valuation approaches: (i) the market approach (which uses the trading or other reported prices of the shares of the company or of similar companies), (ii) the income approach (which consists in a discounted cash flow analysis) and (iii) the cost approach (which typically calculates the liquidation value of the company by determining the fair market value of its assets and liabilities, and generally results in the lowest value[40]).

Art. 134 of the RCL is unnecessarily rigid in requesting that the value be determined as the (mean) average of at least two valuation methods, instead of allowing flexibility to give more weight to the most relevant method(s) or use only one method where only one is appropriate. In contrast, the IVS allows experts to use certain variations of the three main approaches (which are not the exclusive ones or required to be employed in all cases), as well as to make adjustments to reflect particular situations. For example, certain valuation approaches are not appropriate in some cases (the market approach for insolvent

Retragerea asociaților. Certitudini, dileme, soluții, RRDA, no. 6/2014, p. 29 (see in particular the two decisions cited in note 3).

[38] Art. 5(1)(c) of Government Ordinance no. 24/2011 regarding certain measures with respect to valuations of assets, as subsequently amended.

[39] ANEVAR decisions no. 2/2015 and no. 3/2014.

[40] Accordingly, ANEVAR noted that "in our opinion, the minimum price cannot be under the value resulting from the Net Liquidation Value [under the cost approach]"). See http://nou.anevar.ro/pagini/pozitia-oficiala-asociatiei containing ANEVAR's official statement dated April 15, 2015.

companies or the cost approach for well-established companies). That is presumably why art. 91 of the RIL notes only that the price is established by the expert "pursuant to international valuation standards" without the restriction set forth in art. 134 of the RCL.

Application of the exit right to the dissolution of Rasdaq. Art. 134 of the RCL received intense attention and application in 2014-2015 in the context of the dissolution of the Rasdaq market. As a result of prolonged controversy concerning the legal status of the Rasdaq market of the Romanian Stock Exchange (BVB), which was neither a "regulated market" nor a "multilateral trading facility" (MTF) in the sense of the EU definitions[41], its dissolution was decided by the Romanian legislator, through Law no. 151/2014 regarding the clarification of the legal status of shares traded on the Rasdaq market or on the market for unlisted securities[42]. Within 120 days from the date Law. 151/2014 came into effect (October 24, 2014), the boards of directors of Rasdaq companies had to convene general meetings to decide either the listing of the company's shares on a regulated market or a MTF or the delisting. An exit right was granted to shareholders in the following four situations: (i) the general meeting decides not to apply for the listing of the company's shares, (ii) the general meeting does not adopt a decision due to lack of quorum or the required majority, (iii) the general meeting is not convened within the 120 days deadline or (iv) the general meeting decides to apply for listing but the ASF rejects the application[43].

Law no. 151/2014 provided that the exit right was governed by art. 134 of the RCL, except for the express derogation that it had to be exercised within 90 days[44], as opposed to 30 days under art. 134 of the RCL. The implementing regulations adopted by ASF clarified that the expert had to finalize its report within 30 days from appointment and that, in principle, the company had to pay the price to the withdrawing shareholders within 30 days from the expert's report.

The dissolution of the Rasdaq market give rise to a significant number of cases where shareholders used their exit right (approximately 500 companies, mostly companies that decided not to apply for listing). At many of these companies, the evaluation reports were rejected by both minority and majority shareholders, for various reasons. Many shareholders requested re-verification of the report by another

[41] Court of Justice of the European Union, Second Chamber, case no. C-248/11, March 22, 2012 (Rasdaq market is not a "regulated market").

[42] The ASF was expressly mandated to adopt implementing regulations to Law no. 151/2014 (art. 9(2) of Law no. 151/2014). The regulations adopted by the ASF mainly filled gaps existing in the procedure set forth in art. 134 of the RCL and expedited the process. See Regulation no. 17/2014 of the ASF regarding the legal status of shares traded on the Rasdaq market or on the market for unlisted securities.

[43] Art. 3, 4 and 7(1) of Law no. 151/2014.

[44] Art. 3(2) of Law no. 151/2014.

expert. This led ANEVAR to undertake to verify all reports performed in connection with the exercise of the special exit right under Law no. 151/2014[45].

Application of the exit right to the merger between BVB and SIBEX. In February 2017, the Bucharest Stock Exchange (BVB) and the Sibiu Stock Exchange (SIBEX) announced their intention to merge and published their merger proposal[46]. The beginning of the negotiations was in April 2016 but a first attempt at unification of the two Romanian stock exchanges was made during the years of stock market boom (the years 2005-2006).

The proposed merger provided for an exchange ratio of 0.01200795 SIBEX shares for one BVB share (i.e. 83 SIBEX shares for one BVB share), both companies being self-listed on the respective stock exchanges. This exchange ratio was established on the basis of the valuation of the two companies by Deloitte, which assigned a value of 275.29 million lei (60.90 million euros) to the BVB and a value of 14.40 million lei (3.18 million euros) to SIBEX, based on the financial information of the two companies as of December 31, 2016.

The proposed merger provided for a vote of the general meetings of BVB (as the absorbing company) and SIBEX (as the absorbed company). In both cases, the majority of shareholders were Romanian and foreign institutional investors. The shareholders' agreement was obtained in April 2017, with the transaction being also subject to approval by the ASF. The proposed merger also provided that the exit right set forth in art. 134 of the RCL was applicable. Accordingly, even before the adoption of the RIL practice took the view (incorrect in our opinion) that art. 134 of the RCL applied to listed companies as well. The application of the exit right to shareholders who had opposed the merger (a minority) delayed the closing of the transaction by a few months. The effective date of the merger was January 1, 2018.

(ii) Squeeze-out exit rights. Pursuant to the EU Takeover Directive[47] (art. 15 and 16), following an offer made to all the holders of securities of the target for all their securities, if the offeror reaches a certain threshold (90% or 95%), it may require all the remaining holders to sell their securities to it (buy-out right) and, conversely, a holder of remaining securities may require the offeror to buy its securities (sell-out right), in both cases, "at a fair price". More specifically, the Takeover Directive provides two alternative triggers: (i) where the offeror holds securities representing not less than 90% of the capital carrying voting rights and of the voting rights in the target (but member States may set a higher threshold, not to exceed 95%) or (ii) where, following acceptance of the offer, the offeror

[45] See http://nou.anevar.ro/pagini/pozitia-oficiala-asociatiei containing ANEVAR's official statement dated April 15, 2015 and letter to ASF dated April 30, 2015.
[46] https://www.onrc.ro/documente/proiecte/fuziuni/2017.
[47] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, JOUE no. L 142, p. 12-23, April 30, 2004.

has acquired or has firmly contracted to acquire securities representing not less than 90% of the target's capital carrying voting rights and 90% of the voting rights comprised in the offer. The consideration in the offer preceding the squeeze-out is presumed to be a "fair price" in the squeeze-out. The price in the squeeze-out is paid by the offeror (the majority shareholder), not by the company.

Art. 206-207 of the RCML had implemented these provisions of the Takeover Directive. Romania had opted to increase the threshold from 90% to 95% for the first EU trigger. The provisions of the RCML regarding the squeeze-out exit rights were poorly drafted and not perfectly aligned with the Takeover Directive. They have now been moved to art. 42-44 of the RIL. The same triggers and thresholds are maintained (95% and 90% respectively). The withdrawal right may be exercised within 3 months from the closing of the offer. Some of the problems with the previous mechanism (art. 206-207 of the RCML and implementing regulations) were resolved by the RIL, while others persist and the ASF will be issuing new implementing regulations. Takeover activity is extremely limited in Romania and these provisions are not often invoked. When they are invoked, it is generally by the majority shareholder (buy-out right).

(iii) Exit right in case of delisting. A company can be delisted as a result of a public offer (potentially followed by the exercise of squeeze-out rights, discussed below), made by the controlling shareholders or by a third party. Regulations issued by the CNVM created an additional method for delisting. An (extraordinary) general meeting may decide the delisting if the shareholders are granted an exit right but only if, as an additional requirement, the company has very limited trading activity (art. 2(I)(a) of the CNVM Disposition no. 8/2006). Detailed provisions regarding the exercise of the exit right were adopted, which are similar to those adopted under art. 242 of the RCML discussed above and which, consequently, both derogate from and add to art. 134 of the RCL.

Case law held that the CNVM could create exit rights not otherwise set forth in the RCML (or the RCL)[48]. However, the delisting procedure created by the CNVM (by decision of the general meeting with an exit right, as opposed to by public offer) was judged invalid by some Romanian courts[49]. Uncertainty persists in this respect.

(iv) Mandatory offers. The Takeover Directive does not impose an obligation that any public offer (voluntary or mandatory, hostile or not) be for 100% of the shares of the target company, but imposes the initiation of an offer by significant shareholders who cross a certain ownership threshold giving them control over the company (individually or through concerted action), for 100% of the remaining

[48] Bucharest Court of Appeal, decision no. 2279, September 26, 2007 (affirmed by Romanian Supreme Court, decision no. 2535, June 18, 2008); Piteşti Court of Appeal, decision no. 1/A-C, January 7, 2009; Constanța Court of Appeal, decision no. 151, October 1, 2008.

[49] Bucharest Court of Appeal, decision no. 3807, June 6, 2012 regarding Uzuc SA Ploieşti.

shares. The relevant threshold is established by each member State (art. 5(1) and 5(3) of the Takeover Directive). However, if a shareholder reaches the relevant percentage following a voluntary public offer for 100% of the shares of the target, it is exempt from initiating a mandatory offer (art. 5(2) of the Takeover Directive). The effect is to create an incentive to make offers for 100% of the shares of the target. These legal provisions represent a protection mechanism for all shareholders of listed companies characterized by dispersed control. With respect to the price in a mandatory offer, the Takeover Directive provides that the highest price paid for the shares by the offeror over a certain period of time (of not less than 6 months and not more than 12 months prior to the mandatory offer), to be determined by each member State, is equitable. This "equitable price" may be adjusted upwards or downwards by national supervising authorities in light of certain special, pre-set, circumstances, and they may also determine the criteria to be applied in such cases, for example the average market value over a period, the break-up value of the company or other objective valuation criteria (art. 5(4) of the Takeover Directive).

Art. 202-205 of the RCML had implemented these provisions of the Takeover Directive. Romania had established the threshold for the initiation of a mandatory offer to 33% and a period of 12 months prior to the mandatory offer for purposes of calculating the "equitable price". These provisions have now been moved to art. 37-39 of the RIL, without major modifications.

(b) Legal exit rights for listed companies in France

We analyze the limited legal exit rights provided by French law in connection with certain extraordinary corporate events involving controlled listed companies (i), squeeze-out exit rights (ii), an exit right in case of delisting (iii) and an indirect exit right through mandatory offers (iv).

(i) Extraordinary corporate events. Contrary to Romania (and for good reason), there is no general and unrestricted exit right in France with respect to extraordinary corporate events. There are only provisions setting forth a limited protection mechanism in such cases, applicable only to listed companies which have a controlling shareholder.

The French Monetary and Financial Code (FMFC) and the regulations adopted by the supervising authority for capital markets, the *Autorité des Marchés Financiers* (AMF), the AMF General Regulation (RGAMF)[50], created an implied and conditional exit right, as an obligation to initiate a buy-out offer (*offre publique de retrait*), in the following three cases: (i) mergers with an affiliated company and other extraordinary corporate events (art. 236-6(2) of the RGAMF), (ii) significant modifications to the bylaws (art. 236-6(1) of the RGAMF) and (iii)

[50] Règlement général AMF, approved by Government decision, November 12, 2004, as subsequently amended.

modification of the legal form from joint stock company ("*société anonyme*") to SCA ("*société en commandite par actions*") (art. 236-5 of the RGAMF). This is similar to art. 134 of the RCL, except that, in the first two cases, the obligation to initiate a buy-out offer exists only if the company has a controlling shareholder or group of shareholders[51] and the obligation belongs to such controlling shareholder(s). In the third case, the obligation to initiate a buy-out offer belongs the controlling shareholder(s) of the company prior to the modification of the legal form or to the (future) general partners in the SCA.

With respect to the first case, the following situations might trigger a buy-out offer: (α) mergers with an affiliated company, (β) sale or contribution to another company of all or the main portion of a company's assets, (γ) reorientation of the main activity of the company or (δ) prolonged suppression of monetary rights for the shares of the company (art. 236-6(2) of the RGAMF). The first situation was included because mergers with an affiliated company are inherently subject to conflicts of interests and a special protection of the minority shareholders is therefore necessary. The scope of the provision is limited to mergers between companies controlled by the same group (parent-subsidiary mergers or mergers between sister companies). The last three situations were included because there is no shareholder vote in these cases, the decisions being made by the board of directors.

In the cases set forth in art. 236-6 of the RGAMF, the controlling shareholder(s) must inform the AMF of the envisioned operation, prior to the vote in the general meeting. The AMF then decides whether the initiation of a buy-out offer by the controlling shareholder(s) is necessary. The AMF makes its determination by analyzing the consequences of the envisioned event on the rights and interests of the holders of capital or voting rights of the company. The criteria used by the AMF depend on the specific case presented to it but it generally assesses the incidence of the event on the activity of the company, on the internal organization and governance of the company, on the liquidity of the shares, on the ability of the company to pay dividends and on the future of the company[52]. For mergers, the AMF also considers the exchange ratio and the findings of the independent expert. For sales of assets[53], in addition to the numerical criteria used to determine if the assets sold are "all or the main portion" of the company's assets, the AMF also considers the purpose of the sale and the destination of the

[51] The notion of control is defined by art. L 233-3 of the FCOC.

[52] Viandier, A., *OPA, OPE et autres offres publiques*, 5th edition, Ed. Francis Lefebvre, Paris, 2014, par. 2607, p. 444-445.

[53] For examples where the controlling shareholders sold all the assets of the company and initiated a buy-out offer voluntarily (with decisions of conformity rendered by the AMF), see AMF Decision no. 209C1198, *Jet Multimedia*, September 23, 2009; AMF Decision no. 214C1484, *Carrefour Property Development*, July 22, 2014; AMF Decision no. 214C2672, *Compagnie Foncière Internationale*, December 18, 2014.

assets, the sustainability of the company's activity after the sale, or the relationship between the parties to the sale[54].

In the case set forth in art. 236-5 of the RGAMF, the AMF has only a subsidiary role. A buy-out offer "must" be initiated *after* the vote in the general meeting. Because of the overlap between art. 236-5 and art. 236-6(1) of the RGAMF (which refers to any modifications of the legal form of the company and requires the controlling shareholder(s) to inform the AMF *prior* to the vote in the general meeting), if a buy-offer is not voluntarily initiated under art. 236-6 of the RGAMF, the AMF must impose it under art. 235-5 of the RGAMF. Another particularity is that the obligation to initiate a buy-out offer belongs to the controlling shareholder(s) of the company prior to the modification of the legal form *or* to the (future) general partners in the SCA (which will typically be the previous controlling shareholder(s), but could also be different persons). As such, this trigger would be applicable even to companies which are not controlled.[55]

In all cases, the buy-out offer cannot contain any minimal tender condition (a departure from the general rules applicable to public offers) and "must be worded such that it may be declared conforming by the AMF" (in order to avoid that the controlling shareholder(s) present a buy-out offer that would be rejected by the AMF and therefore circumvent their obligation). Except as noted above, the procedure for buy-out offers follows the general procedure applicable to any public offers. This means that the AMF assesses the proposed buy-out offer and renders a declaration of conformity. The AMF does not assess the adequacy of the price (art. 231-21-5 of the RGAMF). The price is established by the controlling shareholder(s) but, as is the case in any public offer, the buy-out offer must indicate "the price proposed […] based on objective evaluation criteria usually employed" (art. 231-18(2) of the RGAMF). The AMF and French courts have imposed the use of a "multi-criteria" approach[56] to support the price proposed[57].

[54] See, for example AMF Decision no. 204C1223, *Euro Disney SCA*, October 13, 2004 (the sale of a company's main assets does not trigger a buy-out offer if the assets sold remain in the company's sphere of control); CMF Decision no. 200C0181, *Aérospatiale Matra*, February 3, 2000 (no buy-out offer triggered where the controlling shareholders decided to dissolve the existing company and transfer all the assets to a newly-formed company in exchange for shares in the new company proportional with the value of their contribution).

[55] For examples of buy-out offers under art. 236-5 of the RGAMF, see AMF Decision no. 209C0174, *Patrimoine et Commerce*, February 4, 2009; AMF Decision no. 207C1494, *Altarea*, July 18, 2007; AMF Decision no. 207C0877, *OFI Private Equity Capital*, May 15, 2007; AMF Decision no. 205C1281, *Toaux*, July 20, 2005; AMF Decision no. 204C1529, *Foncière des Murs*, December 1, 2004; AMF Decision no. 204C664, *Socim*, May 25, 2004.

[56] For an overview of the evaluation methods in the context of buy-out offers and forced-squeeze outs, see Frison-Roche, M.-A., Nussenbaum, M., *Les méthodes d'évaluation financière dans les offres publiques de retrait et les retraits obligatoires d'Avenir-Havas-Media à Sogénal*, Revue de droit bancaire et de la bourse 48, 1995.

Although the existence of a fairness opinion from an independent expert is only required in certain limited cases (where there are conflicts of interest in the board of directors or in case of forced squeeze-outs, art. 261-1 of the RGAMF), such fairness opinions are frequently included on a voluntary basis. The buy-out offer is effected by means of purchases on the stock market for a period of at least 10 market days (art. 236-7 of the RGAMF).

(ii) Squeeze-out exit rights. If a shareholder or group of shareholders owns 95% of a listed company, two mechanisms may be used to eliminate the minority shareholders and delist the company: buy-out offers and forced squeeze-out offers.

Buy-out offers in a squeeze-out context. If 95% of the voting rights of a listed company are controlled by a shareholder or group of shareholders, the minority shareholders can request that the controlling shareholder(s) initiate a buy-out offer (sell-out right, art. 236-1 and 236-2 of the RGAMF). Conversely, the controlling shareholder(s) can also choose in this situation to initiate a buy-out offer (buy-out right, art. 236-3 and 236-4 of the RGAMF). These rights apply irrespective of the event that led to the crossing of the 95% threshold (a merger, a public offer or another corporate transaction).

The sell-out right of the minority shareholders in a squeeze-out context is very limited. The AMF has discretion to grant the request of the minority shareholders or not "in particular in light of the situation on the relevant market for the shares to which the request pertains" (art. 236-1(2) of the RGAMF). If it grants the request, the AMF then notifies the controlling shareholder(s) of the obligation to initiate a buy-out offer, within a deadline that it prescribes (art. 236-1(3) of the RGAMF). Whenever a controlling shareholder proposes a buy-out offer in a squeeze-out context (as a result of the exercise of a sell-out right or a buy-out right), the same requirements apply as for buy-out offers in connection with extraordinary corporate events, discussed above (for the cases set forth in art. 236-5 and art. 236-6 of the RGAMF).

Forced squeeze-out offers. This procedure can be used only in connection with, and following, a buy-out offer or any other public offer. It allows an offeror who, after the offer, holds securities representing not less than 95% of the capital or voting rights of the target to squeeze-out the remaining shareholders by compensating them for the value of their shares (art. 237-1 and 237-14 of the RGAMF). In case of a forced squeeze-out following a buy-out offer, the controlling shareholder must provide an evaluation of the shares of the company "pursuant to objective methods used for sales of assets, taking into consideration

[57] For all mergers and sales of assets involving listed companies, the AMF imposes a multi-criteria analysis, which takes into account the market value of the company, profitability (capitalization of normalized expected earnings, discounted cash flows, etc.), asset value and value comparisons (with similar companies or similar transactions). See AMF Recommendation no. 2011-11 (Transfers of assets and mergers), July 21, 2011, available at http://www.amf-france.org/.

the value of the assets, the benefits achieved, the market value, the existence of subsidiaries and the business prospects of the company, in each case, pursuant to the appropriate weight to be given to each of these elements" (art. 237-2 of the RGAMF). To comply with this requirement, a fairness opinion from an independent expert is mandatory (art. 261-1-II of the RGAMF). Case law has established that the list of criteria is only illustrative in the sense that additional criteria may be used (for example, comparisons with other companies from the same sector, comparisons with the price offered in a prior offer, discounted cash flows, or research analyst estimates consensus) and some criteria may not be used if they are not relevant or appropriate or may be given zero or close to zero weight. The price in the forced squeeze-out offer must be at least equal to the price in the preceding buy-out offer but the AMF may impose a higher price if such increase is justified in light of events having influenced the value of the shares since the buy-out offer (art. 237-8 of the RGAMF). Except as noted above, the procedure is that applicable to any public offers, which means that the AMF assesses the proposed forced squeeze-out offer (including as to the minimum price requirement) and renders a declaration of conformity.

In case of a forced squeeze-out following any other public offer which is not a buy-out offer, the mechanism is similar. However, there is no minimum price (art. 237-14(3) of the RGAMF does not also cross-reference art. 237-8 of the RGAMF) and, in practice, there is no declaration of conformity by the AMF in almost all cases because an exemption thereof applies if (i) the price is in cash and equal to the price in the preceding offer or (ii) the forced squeeze-out follows an offer which was subject to the normal (as opposed to the simplified) procedure applicable to public offers or which resulted in the AMF receiving an evaluation of the shares of the company (the requirements regarding this evaluation are identical to those in art. 237-2 of the RGAMF discussed above) and a fairness opinion from an independent expert[58]. However, if an exemption from the declaration of conformity is not applicable, an evaluation of the shares of the company must be provided pursuant to the multi-criteria approach applicable to any public offers (art. 237-16-II of the RGAMF).

Correlation with the Takeover Directive. Both French mechanisms (buy-out offers and squeeze-out offers) predate the Takeover Directive but have been amended to take into account art. 15 and 16 of the Takeover Directive. In both cases, France has opted for a 95% threshold, higher than the 90% default threshold for the first EU trigger. However, the provisions of art. 15 and 16 of the Takeover Directive were imperfectly transposed in French law. Art. 236-3 and 236-4 of the

[58] By a corroborated interpretation of art. 237-2, 237-16-I(2), 237-16-II and 261-1-II, a fairness opinion from an independent expert is always provided in connection with any forced squeeze-out offer (unless one was provided in the offer preceding the squeeze-out offer).

RGAMF, together with art. 237-1 to 237-19 of the RGAMF, effectively transpose art. 15 of the Takeover Directive, by granting the controlling shareholder(s) the right to offer and then to demand the acquisition of remaining shares from minority shareholders. There are no mirror provisions for the minority shareholders. They only have a right to request the AMF to order the controlling shareholder to commence a buy-out offer, pursuant to art. 236-1 and 236-2 of the RGAMF, and we have seen that the AMF has discretion whether or not to impose the initiation of a buy-out offer. As such, minority shareholders do not have the means to force the exit (as contemplated by art. 16 of the Takeover Directive) and are bound to either the will of the controlling shareholder(s) or to the discretion of the AMF.

Correlation with the Merger Directive. The Merger Directive organizes a protection for minority shareholders in case of mergers, in the form of a management report, an independent expert report on whether "the share exchange ratio is fair and reasonable", the right to inspect certain documents and the right to vote on the merger. The Merger Directive provides that EU member States will not impose the first three protection mechanisms (reports and right to inspect) to squeeze-out mergers (between a parent company and its subsidiary held at 90%) if three conditions are met: (a) "the minority shareholders of the company being acquired must be entitled to have their shares acquired by the acquiring company", (b) "if they exercise that right, they must be entitled to receive consideration corresponding to the value of their shares" and (c) "in the event of disagreement regarding such consideration, it must be possible for the value of the consideration to be determined by a court or by an administrative authority" (art. 28(1) of the Merger Directive). From the perspective of the minority shareholders being squeezed-out, the right set forth in the Merger Directive is only a *quasi* legal exit right, because it is subsidiary and unenforceable. It is subsidiary because its activation is exclusively dependent on the will of the absorbing company that does not want to establish the reports. It is unenforceable because the sanction in case of non-respect is the reactivation of the absorbing company's obligation to establish the reports.

Art. L. 236-11-1 of the FCOC[59], which implemented these provisions of the Merger Directive, states that if the absorbing company continuously owns at least 90% of the voting rights of the absorbed company (from the publication of the merger project and until the merger is effected), the management and independent expert reports are not necessary if the absorbing company has offered to the minority shareholders of the absorbed company, prior to the merger, to buy their shares for a consideration equal to the value of the shares. Such consideration is to be determined, for listed companies, in a public offer pursuant to AMF regulations. This public offer can take several forms, depending on the specific circumstances. If the absorbing company owns 95% of the voting rights of the

[59] The provisions of art. L 236-11-1 of the FCOC were introduced by the Law no. 2011-525 for the simplification and amelioration of the quality of the law (Warsmann Law).

absorbed company, it may use two specific mechanisms, buy-out offers and forced squeeze-out offers (*retrait obligatoire*), discussed above. If the absorbing company owns more than 90% but less than 95% of the voting rights, it may use a simplified public offer, governed by art. 233-1 et seq. of the RGAMF (available to controlling shareholders). To escape the constraints regarding public offers, a shareholder who owns 90% of a company may also decide to effect the squeeze-out by a merger (in which case it would have to provide the reports). The choice of the best structure might also depend on other considerations: such as the fact that the price might only be established in stock for mergers whereas, for public offers, the price can be established in cash or stock.

(iii) Exit right in case of delisting. The mechanisms of buy-out offers and squeeze-out offers discussed above effectively allow a shareholder who owns 95% of a company to effect its delisting. French law also provides for a special delisting procedure pursuant to the Euronext Rules, if, following a simplified public offer, the offerror holds at least 90% (recently lowered from 95%) of all voting rights in the company and certain other conditions are met. An exit right is granted in connection with this procedure because the offerror must guarantee, for a period of 3 months, to acquire the securities of all minority shareholders that did not respond to the simplified public offer and that demand the offerror to purchase their shares, for the same price as that proposed in the simplified public offer. The price is calculated by means of the same multi-criteria approach applicable to any public offers. Controlling shareholders rarely opt for this delisting procedure.[60]

(iv) Mandatory offers. The threshold for the initiation of a mandatory offer is 30%. Art. L 433-3 of the FMFC and art. 234-1 et seq. of the RGAMF transposed art. 5 of the Takeover Directive. They provide that a shareholder will immediately inform the AMF and initiate a mandatory offer if, directly or indirectly, individually or by means of a concerted action[61], (i) the shareholder obtains more than 30% of a company's voting rights or (ii) where it previously held between 30% and 50% of the company's voting rights, the shareholder incrases its control over voting rights or the company's capital by more than 1% in the prior 12 months. In 2010, the percentage for the first trigger was lowered (it was previously 33.33%). In 2014, the percentage for the second trigger was lowered (it was previously 2%). This second trigger (which does not exist in the Takeover Directive) was introduced in response to certain practices consisting in launching a simulated mandatory offer at an unattractive price, with the sole purpose of surpassing the first trigger threshold and then being able to freely

[60] AMF's annual rapports note that from 2012 to 2013, only 6 of 75 delisting were conducted pursuant to this procedure. See article P 1.4.2 of the Euronext Rules (amended on July 20, 2015 to lower the threshold from 95% to 90%).
[61] Defined in art. L. 233-10 of the FCOC.

accumulate floating shares on the market in order to establish full control[62].

With respect to the price of the offer, France has chosen a period of 12 months prior to the mandatory offer for purposes of calculating the "equitable price" contemplated by the Takeover Directive (art. 234-7 of the RGAMF). Furthermore, as invited by art. 5(4) of the Takeover Directive, the AMF can authorize a different price in case of significant changes to the company or its shares, such as leak of privileged information or grave financial difficulties.

(c) Legal exit rights for listed companies in the United States

As noted above, only a small minority of US States (for example, California, Florida, Minnesota and New York) grant legal exit rights to LLC shareholders[63]. However, even in US States where there is no legal exit right for LLC shareholders, courts might accept to determine "fair value" of the shares by applying the implied contractual covenant of good faith and fair dealing. With respect to corporations (which are the only ones that can be listed companies), shareholder protection is typically ensured by contractual, not legal, exit rights. Legal exit rights typically only apply to certain extraordinary corporate events (i) and US law provides for only a few other legal exit rights (ii).

(i) Extraordinary corporate events. With respect to corporations, approximately half of the US States follow the Model Business Corporation Act (MBCA), with certain national variations. Notably, California, Delaware, New Jersey, New York and Texas do not follow the MBCA. There are notable differences between MBCA States and non-MBCA States, in particular, Delaware, with respect to legal exit rights (called "appraisal rights") applicable in case of extraordinary corporate events, especially with respect to the scope of the appraisal rights and the procedure.

Legal exit rights in MBCA States for corporations. Pursuant to Section 13.02(a) of the MBCA, a shareholder is entitled to obtain payment of the "fair value" of that shareholder's shares, in the event of the following extraordinary corporate events: (i) merger to which the company is a party, if shareholder approval is required for the merger, (ii) share exchange to which the company is a party as the company whose shares will be acquired, or disposition of assets, if the shareholder is entitled to vote on the share exchange or disposition, (iii) any amendment to the articles of incorporation, including an amendment that reduces

[62] Storck, M., Rontchevsky, N., *L'impact de la loi Florange sur le droit des offres publiques d'acquisition et les sociétés cotées françaises*, Revue Trimestrielle de Droit Commercial 363, 2014, p. 366.

[63] For example, see Section 1002 (Procedures for merger or consolidation) and Section 509 (Distribution upon withdrawal) of the New York Limited Liability Company Law (providing for a right to receive "fair value of [the] membership interest in the limited liability company" in case of a merger or consolidation or in case of withdrawal). For a rare example of exercise of the legal exit right by an LLC shareholder, see Supreme Court of the State of New York, New York County, *Stulman v. John Dory LLC*, September 10, 2010 (unreported).

the number of shares of a class or series owned by the shareholder to a fraction of a share if the company has the obligation or right to repurchase the fractional share so created, (iv) domestication, if the shareholder does not receive shares in the foreign company resulting from the domestication that have terms as favorable to the shareholder in all material respects, and represent at least the same percentage interest of the total voting rights, as the shares held by the shareholder before the domestication or (v) conversion to a nonprofit or unincorporated entity. Therefore, under the MBCA, the shareholders whose vote is required to implement the extraordinary corporate event can dissent and exercise their appraisal right.

Section 13.02(b)(1) of the MBCA provides that appraisal rights are not available for holders of shares of (i) a listed company or (ii) a company that has at least 2000 shareholders and a market value of at least $20 million. This exception presumes that shareholders do not need an appraisal right if there is a public and liquid market for their shares. If they disagree with the change envisioned, they can sell their shares in the open market. When the market-out exception is triggered, appraisal rights are restored in certain circumstances (the exception to the exception). Sections 13.02(b)(3) and 13.02(b)(4) of the MBCA provide that holders of shares in a listed or widely-held company regain appraisal rights (i) if such holders must accept as consideration for their shares anything *other than* cash or shares in a listed or widely-held company or (ii) in case of interested transactions.

Legal exit rights in Delaware for corporations. Section 262(a) of the DGCL provides that "[a]ny stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing […] shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock […]".

It is readily apparent that the scope of the Delaware appraisal right is much narrower than that existing in MBCA States. It covers only mergers and consolidations. However, Section 262(c) of the DGCL allows Delaware corporations to provide in their certificate of incorporation that appraisal rights will exist for (i) any amendments of the certificate of incorporation (whether or not in connection with a merger or consolidation), (ii) any merger or consolidation (irrespective of the form of consideration) and (iii) a sale of all or substantially all of the assets of the company.

The Delaware appraisal right does not cover a sale of assets, a frequently-used deal structure as an alternative to a merger or a sale of shares. A sale of assets results in appraisal rights in MBCA States. It also results in appraisal rights in a majority of non-MBCA States. For example, in New York, a non-MBCA State, appraisal rights also exist for any "sale, lease exchange or other disposition

of all or substantially all of the assets" which requires shareholder approval, with certain exceptions[64]. In Delaware, an appraisal right exists for sales of assets only as a contractual protection.

With respect to the scope of the appraisal right in case of mergers, its availability typically depends on the existence, under the relevant provisions, of a shareholder vote. Therefore, appraisal rights do not exist for statutory mergers under Sections 251(f) and 251(g) of the DGCL. Two exceptions are however provided by the DGCL.

First, Section 251(h) of the DGCL dispenses of the requirement of a shareholder vote for acquisitions structured as an offer for all the shares of the target company followed by a merger for all remaining shares (commonly referred to as a "second-step merger"), if certain requirements are met. The target must be a listed or widely-held company, the number of shares tendered in the offer plus the shares owned by the buyer must be at least equal to that which would have been required for shareholder approval of the merger, and, most importantly, the same nature and amount of consideration must apply to both the offer and the second-step merger. Despite the lack of a shareholder vote, appraisal rights exist for such second-step mergers.

Second, Section 253 of the DGCL allows a shareholder who owns at least 90% of a company to squeeze-out the remaining minority shareholders by means of a merger (commonly referred to as a "short-form" merger), without a vote. Appraisal rights are available in such short-form mergers, whether the 90% threshold is reached as a result of a change of control transaction, such as a public offer, or independently thereof.[65]

Section 262(b)(1) of the DGCL contains a market-out exception similar to that found in the MBCA. Holders of shares of a company listed on a national securities exchange or widely-held (by more than 2000 holders of record) do not have an appraisal right. The DGCL also contains the related exception to the exception, in the sense that, pursuant to Section 262(b)(2) of the DGCL, the appraisal right becomes applicable again to such holders if they have to accept as consideration in the transaction anything *other than* stock of the surviving company or of any other listed or widely-held company. Therefore, holders of shares of a company listed on a national securities exchange or widely-held will have appraisal rights if they receive in the transaction either (i) all cash or (ii) a combination of cash and stock and, in this second case, only if they cannot make an election between cash and stock.[66] The restauration of appraisal rights in case

[64] Section 910(a)(1)(B) New York Business Corporation Law.

[65] Kraakman, R. et al., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, 2nd edition, Oxford: Oxford University Press, 2009, p. 202-204, 263-265.

[66] Delaware Court of Chancery, *Krieger v. Wesco Financial Corp.*, Civil Action no. 6176-VCL, October 13, 2011 (shareholders did not have appraisal rights because the consideration was either

cash is received in the transaction (which does not occur in MBCA States) does not make much sense because cash is by definition more liquid than stock of a listed or widely-held company.

Procedure. The procedural conditions for exercising appraisal rights are very similar in both MBCA States and non-MBCA States. In general, most US States require that the dissenting shareholder (i) give notice that it is exercising its right, before the transaction is submitted to the shareholders for approval, (ii) not vote in favor of the transactions (some States requiring the shareholder to cast a "no" vote and others allowing also an abstention from voting), (iii) submit all the shareholder's shares of the company for appraisal (not retain any shares) and (iv) be a record (registered) holder of shares of the company. A significant point where the US States differ is whether or not the company is required to make an offer to the dissenting shareholder before the court proceedings resulting in a judicial determination of "fair value" of the shares may start[67].

In Delaware, shareholders who own shares as of the record date for the vote on a merger (which is typically 60 days before the general meeting), as well as those who buy shares after the record date but prior to the general meeting, may request appraisal[68]. A shareholder who wishes to exercise its appraisal right must first deliver to the company, before the vote, a written demand for appraisal. Second, the shareholder must not vote in favor of the merger. It must vote against the merger or abstain from voting (or, as it sometimes happens, vote in favour just enough shares to get the merger approved and abstain with respect to the rest of the shares). Third, within 120 days of the effective date of the merger, the shareholder must file a petition for appraisal or join an appraisal proceeding commenced by another petitioner. Such petitions are heard in Delaware exclusively by the Court of Chancery. Fourth, the shareholder must continuously hold the shares for which appraisal is sought through the effective date of the merger and cannot, for the duration of the appraisal proceedings, vote such shares or receive dividends.

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cash or stock of the surviving company, or a mix of cash and stock, at the election of the shareholder, with cash being paid to the shareholders who failed to make an election); Delaware Court of Chancery, *Louisiana Municipal Police Employees' Retirement System v. Crawford*, Civil Action no. 2635-N and 2663-N, February 23, 2007 (shareholders did have appraisal rights because the consideration included a mix of cash and stock, the cash portion consisting of a dividend, and the shareholders could not make an election).

[67] For example, in New York, the company must make a written offer to the dissenting shareholders for an amount, in cash, that the company believes is the fair value of the shares and accompany its offer by (i) an advance payment (equal to 80% of the offer amount) and (ii) the company's balance sheet or profit and loss statement. The offer must be the same for all dissenting shareholders and the company may not negotiate different prices with different shareholders. The court proceedings are then triggered only with respect to the dissenting shareholders who did not accept the offer. See Section 623(g) New York Business Corporation Law.

[68] Delaware Court of Chancery, *In re Appraisal of Transkaryotic Therapies, Inc.*, Civil Action no. 1554-CC, May 2, 2007.

Appraisal proceedings are lengthy. They usually last 2-4 years and include extensive testimony from financial experts. Consequently, they are also expensive. Contrary to standard M&A shareholder litigation, appraisal petitioners may not proceed as a class. The remedy in appraisal proceedings is "fair value" of the shares plus interest. Pursuant to Section 262(h) of the DGCL, the Court of Chancery determines "the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest". Therefore, fair value is the going concern value of the company assuming the transaction had not occurred (excluding the value of synergies and a control premium[69]). The methodology most often used to determine the going concern value is a discounted cash flow analysis. In principle ("[u]nless the Court in its discretion determines otherwise for good cause shown"[70]), interest is added to the fair value determined, for the period between the effective date of the merger and the date of payment. The applicable interest rate is established in Section 262(h) of the DGCL as "5% over the Federal Reserve discount rate" (resulting in 5.75% interest), which is well above market.

In determining the fair value, Section 262(h) of the DGCL requires the court to "take into account all relevant factors". The Court of Chancery therefore has considerable leeway, and has demonstrated a willingness, to consider a wide variety of arguments as to fair value. A survey of post-trial appraisal decisions showed that the court's determination of fair value was higher than the merger price in 77% of the cases, with premiums ranging from approximately 9% to 150% and averaging 61% (81% for interested transactions) in transactions where there was a premium[71].

The idea that the exercise of appraisal rights by shareholders of listed companies results in a value consistently and significantly higher than the merger price is troubling in light of the theory of efficient markets. This theory stipulates that shares always trade at their fair value on capital markets because, in efficient capital markets, the trading prices always incorporate and reflect all relevant information. The merger price is typically already at a premium to the trading

[69] Delaware Supreme Court, *Weinberger v. UOP, Inc.*, February 1, 1983, 457 A.2d 701, 712-714.

[70] See Delaware Court of Chancery, *In re Appraisal of Metromedia International Group, Inc.*, Civil Action no. 3351-CC, April 16, 2009, 971 A.2d 893, 907 (refusing to exercise discretion to establish a different interest rate than the statutory rate but noting that "a different rate may be justified where it is necessary to avoid an inequitable result, such as where there has been improper delay or a bad faith assertion of valuation claims").

[71] Fried, Frank, Harris, Shiver & Jacobson LLP, *New Activist Weapon-The Rise of Delaware Appraisal Arbitrage: A Survey of Cases and Some Practical Implications*, June 18, 2014, published on the Columbia Law School Blog on Corporations and the Capital Markets, http://clsbluesky.law.columbia.edu/2014/07/09/fried-frank-discusses-delaware-appraisal-arbitrage-as-a-new-activist-weapon/. The numerical results of the survey are to be taken with a grain of salt because the study only covered post-trial appraisal decisions from 2010 to June 2014 and the sample was small (only nine decisions).

price, in order to be attractive. It is therefore counterintuitive that the "fair price" determined in appraisal proceedings would be higher than the merger price[72]. An explanation for this abnormality is that appraisal rights are often exercised in connection with interested transactions or transactions with flawed sales processes, to which the theory of efficient markets does not, by definition, apply.

Whether, and to what extent, the merger price is, can, or will be taken into account in determining fair value in appraisal litigation is still uncertain. The Delaware Supreme Court held that in determining fair value the Court of Chancery may not defer, even presumptively, to the merger price[73]. However, in two more recent decisions (one of which was affirmed by the Delaware Supreme Court), the Court of Chancery found that the merger price was the most reliable and probative indicator of fair value, and rejected each party's expert valuations[74]. The court noted that the rationale was that the sales process had been robust and had included "a full market canvas and auction".

Recent trends. Until recently, appraisal was generally perceived in the US as a useless and inefficient remedy[75] and was rarely used. In Delaware, the percentage of appraisal-eligible transactions that attracted at least one appraisal petition evolved from 5% (in 2004) to 17% (in 2013). The increase comes almost exclusively from appraisals involving listed companies.

The rational assumption would be that appraisal rights are most useful to, and, consequently, used by, shareholders of unlisted companies, because they do not have a liquid market for their shares and because the market-out exception removes appraisal rights for shareholders of listed companies in certain cases. However, the exact opposite trend can be observed: the appraisal procedure is mostly used by shareholders of listed companies. This counterintuitive result does not mean that shareholders of listed companies need better protection than shareholders of unlisted companies or that US capital markets are not sufficiently liquid. Rather, the explanation resides in the fact that certain (institutional) shareholders have recently discovered, and started to exploit, the procedural and monetary advantages of the appraisal procedure in the case of listed companies.

The main procedural advantage is that shares acquired after the public announcement of a transaction are eligible for appraisal and those who want to

[72] Hammermesch, L., Wachter, M., *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 Delaware Journal of Corporate Law 101, 2005, p. 119.
[73] Delaware Supreme Court, *Golden Telecom, Inc. v. Global GT LP*, no. 392/2010, December 29, 2010.
[74] Delaware Court of Chancery, *Huff Fund Investment Partnership v. CKx, Inc.*, Civil Action no. 6844-VCG, November 1, 2013 (affirmed by Delaware Supreme Court, *Huff Fund Investment Partnership v. CKx, Inc.*, no. 348/2014, February 12, 2015); Delaware Court of Chancery, *In re Appraisal of Ancestry.com Inc.*, Civil Action no. 8173-VCG, January 30, 2015.
[75] Manning, B., *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale Law Journal 223, 1962, p. 255; Bebchuck, L. A., *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 Harvard Law Review 1820, 1989, p. 1852-1856.

exercise appraisal rights can buy shares (on the markets) after the announcement, with the benefit of, and sufficient time to examine, public filings which contain information regarding the sale process and the valuation metrics. The main monetary advantage is that the fair value determined in the appraisal proceedings is often much higher than the merger price and, to this value, interest at a rate well above market is automatically added for the (long) duration of the proceedings.

The recent rise in appraisal litigation involving listed companies is referred to as "appraisal activism" [76]. Appraisal litigation is undoubtedly a lucrative enterprise for the petitioners (who have become increasingly specialized and sophisticated, act as a wolfpack and have important financial resources[77]), it is a nefarious outcome for (listed) companies. It has deal-threatening potential and reduces closing certainty. It leaves buyers with an unquantifiable post-closing risk that they have to take into account. Moreover, it is likely that buyers will respond by lowering the price for all shareholders and holding back some incremental value for the appraisal claims (in contrast with M&A shareholder litigation where all shareholders share in any incremental value paid by the buyer). Finally, it overloads the dockets of the Delaware judges, who have to spend a significant portion of their time playing expert[78].

(ii) Other legal exit rights. There are few other legal exit rights under US law. In particular, US law does not expressly provide for a sell-out right in connection with squeeze-out public offers. There is however an implicit buy-out right, in the sense that the offeror may use (i) in connection with the offer, a second-step merger or (ii) whether or not in connection with the offer, a squeeze-out merger (if the 90% threshold is met) to squeeze-out the remaining minority shareholders. These special types of mergers in Delaware were discussed above and most US States have similar provisions, at least for squeeze-out mergers.

Moreover, there is no mandatory offer mechanism in the US, under either federal or most state laws. A similar right (referred to as a "control share cash-out

[76] For more details regarding the rise in appraisal activism in the US and its consequences, see Korsmo, C., Myers, M., Appraisal Arbitrage and the Future of Public Company M&A, April 14, 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424935; Papadima, R., *Appraisal Activism in M&A Deals: Recent Developments in the United States and the EU*, European Company Law no. 4/2015, pp. 190-192.

[77] The most important repeat appraisal petitioners are seven funds specialized in appraisal arbitrage: Magnetar, Merlin (it has the most petitions filed), Merion (it is the largest, having reportedly raised a billion dollars for purposes of investing in appraisal claims), Patchin, Predica, Quadre and Verition. See Katz, D., McIntosh, L., *Corporate Governance Update: Shareholder Activism in the M&A Context*, March 27, 2014, published in the New York Law Journal, http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.23255.14.pdf.

[78] Norwitz, T., *Delaware Poised to Embrace Appraisal Arbitrage*, March 9, 2015, published on the Harvard Law School Forum on Corporate Governance and Financial Regulation, http://blogs.law.harvard.edu/corpgov/2015/03/09/delaware-poised-to-embrace-appraisal-arbitrage /#more-68815.

right") exists in only three US States, none of which have a significant number of companies. Specifically, if an offeror reaches a certain percentage of the voting rights in the company (20% in Pennsylvania, 25% in Maine, 50% in South Dakota), the other shareholders may demand that the offeror purchase their shares at a "fair price". No such right exists in Delaware.

Conclusion

Our analysis has revealed that the scope of legal exit rights for listed companies is correlated with the strength of the capital markets. Shareholders of listed companies in the US (especially if we take into consideration only Delaware companies) benefit from fewer legal exit rights that shareholders of Romanian or French listed companies, presumably because they have the most active and liquid capital markets. Shareholders of French listed companies benefit from a relatively broad scope of legal exit rights if there is a controlling shareholder in the company, but the exercise of these legal exit rights is generally subject to the discretion of the AMF. Shareholders of Romanian listed companies now have broad legal exit rights in connection with extraordinary corporate events as well as in other cases that lead to the delisting of the company. Lastly, while shareholders of listed companies in Romania and France can sometimes benefit from indirect legal exit rights as a result of mandatory offers, there is no mandatory offer mechanism in the US.

With respect to extraordinary corporate events that trigger legal exit rights, the categories of extraordinary corporate events that trigger legal exit rights are quite similar in all three countries. For mergers and divisions, Romania offers a broad and unrestricted legal exit right. France and the US limit the scope of the legal exit right by providing conditions regarding the corporate structure of the company (the existence of a controlling shareholder or a squeeze-out context) and the type of merger or division (a legal exit right will only exist if a shareholder approval is necessary for the transaction). Significant sales of assets (spin-offs) trigger legal exit rights in Romania and France. They also trigger exit rights in US MBCA States and in a majority of non-MBCA States (if shareholder approval is necessary), but, significantly, not in Delaware. As for other extraordinary corporate events, both France and the US offer a somewhat general legal exit right for modifications of the bylaws (articles of incorporation), while Romania lists specifically the three modifications that trigger legal exit rights (change of the main activity, transfer of the company seat abroad and modification of the legal form). This is in line with the tendency observed in Romania to strictly regulate legal exit rights.

Our analysis indicated a general convergence in the three countries analyzed with respect to both contractual and legal exit rights for listed companies. It also showed the necessary existence of a number of particularities deriving from the listed or unlisted character of the companies. Consequently, this analysis further advances our observation that there is convergence with respect to listed

companies, both within and beyond the EU, in an ever-globalizing context. The existence of this convergence can be used to further advance the long-standing debate regarding the question of a legislative recognition of a new *summa divisio* for the organization of Company Law[79], whereby the main distinction would be between listed companies and unlisted companies, instead of the traditional classifications[80]. The existence of a present and future convergence of the regulations applicable to EU listed companies and their shareholders, including as to exit rights, provides additional support to the proponents of a reorganization of the national company laws based on the new *summa divisio*.

[79] Frison-Roche M.-A., *La distinction entre sociétés cotées et non cotées*, in *Mél. AEDBF-France*, Ed. Revue Banque, Paris, 1997, p. 189; Boizard M., *La distinction entre la société cotée et la société non cotée comme summa divisio du droit des sociétés*, doctoral thesis, University Paris II, 2002; François B., *L'appel public à l'épargne, critère de distinction des sociétés de capitaux*, doctoral thesis, University Paris II, 2003; Conac P.-H., *La distinction des sociétés cotées et non cotées*, *Rev. sociétés*, 2005, p. 67 et s.

[80] In Romania and France, the distinction between civil companies and commercial companies and then further classifications within the category of commercial companies.

Valuing the identity of national legal culture in global processes at the age of 100 since the Great Union

„The true civilization of a people does not consist in adopting with derision of laws, forms, institutions, labels, foreign clothes. It consists of the natural, organic development of one's own powers, of its own faculties. There is no general human civilization accessible to all people in the same degree and in the same way, but each nation has its own civilization, though it enters it a lot of common elements and other peoples."
Mihai Eminescu

George COCA[1]
Valentin-Stelian BĂDESCU[2]

Abstract
The conduct of the International Conference "100 Years of United Romania in an International Context" of the Faculty of Legal, Political and Administrative Sciences at the "Spiru Haret" University in Bucharest is a good time to pay homage to our academic meetings, law, the organization of the conference takes into account that a massive reform of civil and criminal law, material and procedural law took place in Romania, an opportunity for rigorous analysis in the debates, important for the theory and practice of Law, for those who today officiate in the various fields of legal, for students, for graduates, but also for Justice in general. But try to discern in which direction are we going? In the direction, apparently, of the decline of national legal culture in the Homage Year of Unity of Faith and Gentile, and the Commemorative Year of the Makers of the Great Union of 1918 and aimed at reviewing national legislation, national mechanisms and institutions. I think this is a signal that is important. Declining in Romania. And I will try to argue in the few pages of this scientific research.

Keywords: *Romania, national identity, Romanian law, national jurists culture, globalization, European Union law*

1. Argumentum

The conduct of the International Conference „100 Years of United Romania in an International Context" of the Faculty of Legal, Political and Administrative Sciences at the „Spiru Haret" University in Bucharest is a good time to pay homage to our academic meetings, law, the organization of the conference considers that a

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massive reform of civil and criminal law, material and procedural law has been held in Romania, an opportunity for rigorous analysis in the subsequent debates, important for the theory and practice of Law, for those who today the different fields of law, for students, for graduates and for Justice in general. But what about the direction we are going? Towards capitalizing on national legal culture in global processes at the age of 100 since the Great Union. I think this is a very important signal. Preserving the national identity in the conditions of Europeanization and globalization, which tends to increase the state sovereignty. And there is something that starts right from the inside, from the way our law and justice are perceived as being in a dangerous decline. And I will try to argue in the few pages of this scientific research. I start by evoking a recent statistic.

This year, on 25 January, Guido Raimondi, the president of the European Court of Human Rights (ECHR), presented the review of the work done by the magistrates of the international court in 2017. This balance mentions Romania 4th among the countries with the highest number of judgments violations of the European Convention on Human Rights. According to Raimondi, last year, the states with the highest number of convictions at the ECHR were Russia - 305 judgments, Turkey - 116 judgments, Ukraine - 87 judgments, followed by Romania - 69 judgments. Something better than Bulgaria - 39 judgments and Greece - 37 judgments. A year earlier, the situation was even worse for us: Romania ranks 3rd (86 judgments), after Russia (228 judgments) and Turkey (88 judgments). Then, behind us were Ukraine (73 judgments) and Greece (45 judgments). Other statistical data shows that the Romanian State has pocketed not less than 18 million euros over the last four years to pay after tens of judgments handed down to the European Court of Human Rights in cases of human rights violations. On a larger scale, the situation is much worse: over the last two decades, this figure is approaching EUR 83 million. Romania has been on the top seats for years between the countries convicted of the ECHR. If these convictions were merely allegations in documents marked with the logo of a foreign institution, it would not do much. Besides the moral palm received by the Romanian state, the judgments of the European court also bring large sums of money.

However, despite these immense sums, no magistrate responded because he made anapoda decisions by violating fundamental human rights. So, why is losing Romania to the ECHR? For a good period, most of the judgments lost to the ECHR were linked to a violation of the right to property. Specifically, it was about restitution of buildings confiscated by the Communist regime between 1945 and 1989. Over time, complaints related to the execution of the act of justice have also begun: the right not to be subjected to inhuman and degrading treatment (especially to the conditions of detention in Romanian prisons), the right to a fair trial or the length of judicial proceedings. Judgments also concern the lack of an effective investigation, the non-enforcement of judgments, the right to an effective remedy. A

special place among these violations of human rights occupy those investigated in the files of the Revolution, particularly serious facts that became imprescriptible after being included in the category of crimes against humanity. The reason these files were reopened. The mission of the ECHR is to verify how the Member States respect the rights and guarantees provided by the European Convention on Human Rights. In order to be able to apply for help, the European Court must be heard by a complaint lodged by the applicant. The complaint may be filed only after the applicant has gone through all appeals against a sentence issued by the national courts. So, only after, at home, the sentenced sentence remained final. In order to be admitted, the complaint must be made within a maximum of six months from the final sentence. A prerequisite is also the correctness of how the form of the complaint is filled in: a single forgotten or misplaced heading automatically leads to the rejection of the complaint. In fact, along with the late registration, this is one of the reasons why about 90% of the thousands of complaints examined are declared inadmissible. Once the Court has received all the information necessary for the examination of the case, the application is assigned to a panel of judges. As the European Court has about 50,000 complaints, resolving may take even a few years. Finally, if the Court decides that it has been a violation of rights included in the European Convention, it grants the applicant „fair satisfaction", which consists of a sum of money intended to cover the „material and moral damages" suffered by the applicant. Once the ECHR has become binding, it is binding on the respondent country. These State obligations come into force only after the judgment of the ECHR has remained final. And this happens only after following some mandatory procedural steps:

- once the Grand Chamber has delivered its judgment,
- if the parties declare that they will not ask for the case to be referred back to the Grand Chamber;
- if it has not been challenged within three months of pronouncement. The same legislation provides that the payment obligations of the convicted State become due three months after the judgment has been declared final. Subject to a genuine avalanche of complaints, the Romanian State also has the opportunity to defend its interests before the European Court. According to the legislation in force (Ordinance No. 94/30 August 1999), this task rests with the MFA, which exercises it on behalf of the state, through the Government Agent for the ECHR. At the external level, he acts exactly like a lawyer of the Romanian state, in whose name he handles the acts and all the necessary defense, as well as all the procedural steps. When a final judgment of the ECHR provides for the payment to the applicant of an amount of money awarded as „just satisfaction", it is the Ministry of Foreign Affairs, through the Government Agent, who takes all necessary measures to fulfill that obligation. According to art. 10 (1) of Ordinance no. 94/1999, „the amounts necessary for the payment of the fair reparation and the other expenses established

by the Court's decision, as well as the amounts necessary for the payment established by the amicable settlement agreement shall be established by the law of the state budget and shall be entered in the budget of the Ministry of Economy and Finance. The judgment of the Court, as regards the amount of the equitable and other costs and the amicable settlement of the case, signed by the parties, constitutes an enforceable title." And when it is the case, it is still up to the Ministry of Economy and Finance to calculate and pay any late penalties.

2. ECHR files and Romanian justice

2.1. Violation of ownership

Initially, our country was convicted of the ECHR, especially for violation of the right to property, as regards the restitution of property confiscated by the communist regime between 1945 and 1989. And in this regard, the phenomenon has grown after some at least uninspired statements made once by Ion Iliescu. In a speech in the summer of 1994, Iliescu - then the president of Romania - urged the authorities not to apply the sentences by which the courts declared the acts of nationalization issued by the communist regime void. And on the basis of those statements, the late Vasile Manea Dragulin, then the General Prosecutor of Romania, asked the Supreme Court of Justice to annul such sentences on the ground that the lower courts would not have the power to review the old nationalization decrees. Seven years later, in a speech held in Focşani in January 2001, Iliescu again exposed his poignant political philosophy: „This is a matter of fright with this "holy private property." A similar position had the former president and the tenants of the nationalities. In the same year, on 27 February, after the prime minister then deposited in Brussels the list of commitments that Romania promised to fulfill for speeding up the accession process, Iliescu submitted to the Government a proposal to extend the term of eviction of tenants nationalized homes.

Romanians' complaints about the protection of property rights have begun to reach the ECHR since 1994, but the first judgments only came to light in a few years. One of the first decisions was that of October 1999, in the „Brumărescu vs Romania" file. In January 2001, the ECHR ruled that the Romanian state should return to Dan Brumărescu the villa in Cotroceni confiscated by the Communist regime, a villa that Brumărescu had earned in the domestic courts and to restitute the building in kind or to pay him 136,000 USD. Complaints to the European Court of Human Rights for the restitution of some buildings have become increasingly rare after the Romanian Parliament promulgated Law no. 165/2013, regarding the measures for completing the restitution process, in kind or equivalent, of the buildings abusively taken over during the communist regime in Romania. However, a few years later, in March 2015, the ECHR forced Romania to pay EUR 3.89 million in material damages in „Toşcuţa and Others v. Romania" and „Trofim v. Romania" cases, both pronounced following complaints submitted

before the promulgation that law. To regulate this type of problem, ANRP (National Authority for Property Restitution) was set up on April 29, 2005, which had to coordinate and control the application of the land-restitution legislation by State Administration Institutions and Fund Committees land. Shortly before, ANRP formed a real transpatonic real estate mafia, like the one in the 1989 coup.

2.2. The files of the December 1989 coup

Opened, closed and then reopened, dragged through justice for almost three decades: the files relating to the events of December 1989. Initially, there was a pile of cases that in December 2004 were reunited in a megadosar called Generally „The File of the Revolution". That, until October 23, 2015, when it was completely blocked. It was during the time of former Prosecutor General Tiberiu Nițu, when the investigators of the Military Prosecutor's Section of the General Prosecutor's Office decided „the classification of the Revolution". Subsequently, the Revolution's file was reopened, and now it is up to the Supreme Court. Until a final verdict was passed, the victims of the Revolution or their descendants complained to the Romanian state at the ECHR. And so far, the European Court has already ruled in favor of „equitable satisfaction" to the applicants amounting to about 3,200,000 euros. Many money that has been paid from the national budget. And the judges who pronounced the appeals to the European Court were not bothered by anything. On the other hand, all the „fair satisfaction" granted to the applicants was also paid out of the national budget.

2.3. Policy decision on prison conditions in prisons

Many judgments handed down to the ECHR against Romania were also based on complaints about prison conditions. At the beginning of 2017, Marius Vulpe, then general manager of the National Penitentiary Administration (ANP), declared that only in 2016, 313 ECHR convictions were issued against Romania for detention conditions. Convictions that in a single year totals 1,600,000 euros. Footer also announced that until then, Romania had to pay a total of 3,132,000 euros plus another 10,000 Swiss francs. It was a peak year. Previously, in 2015, there were 75 convictions in 2014 - 29, in 2013 - 32, and in 2012 - 10. Tot Vulpe also said: „There is no Romanian penitentiary that does not even have a cause lost to the ECHR. As far as I know, the Galați and Jilava penitentiaries have the most lost trials." Later, in April 2017, the ECHR ruled on a „Pilot Decision on the Conditions in Prison in Romania". This decision stated that the Romanian state has 6 months to present a plan of measures meant to solve the overcrowding and the conditions in the penitentiaries. A requirement that our authorities have quickly solved in Romanian style. The problem of overpopulation has been resolved since October 19, 2017, when Law 169/2017 entered into force, where, inter alia, a compensatory appeal was introduced, whereby detainees „accommodated" under inappropriate conditions

benefited from the reduction of punishments. Shortly, about three thousand detainees, including pedophiles and rapists, were released. It was a badly thought-out and even worse measure: most of those released had returned to prison after having committed other crimes similar to those for which they had been previously convicted. Despite the fact that the law states that the Romanian state „can regress through regression" against the magistrates who have delivered sentences lost to the ECHR, the Ministry of Public Finance has never asked for the opening of this procedure. Therefore, it does not take any legal action to recover damages caused by magistrates who „acted in bad faith or serious negligence" when they pronounced such a sentence. So, after all, the money that the Romanian state pays for the ECHR decisions is paid from the state budget. From our pockets, everyone. Against this background, augmented by the development of the new legal order of the EU, we have multiplied the questions, naturally, we consider, concerning the relationship between national law and European law. In the event of a conflict between a rule of national law and a rule of European law the rules of which must give priority to the Member State of the Union? Are the Treaties of the European Union treated by a „classical" type negotiated, signed, ratified, enforced according to the norms of international law or the European Union has its own regulatory norms? When do EU Member States answer international law and answer them under EU law? Is EU law a new branch of law? Or is it a component of international law? What are the limits of EU law in relation to national law? What is the relationship between international law and EU law? These, and many others, are questions that still do not have a unitary answer, accepted by most of those who have concerns in the field. In the context of the above, the present paper aims at identifying as many elements as possible to determine the outcome of the current decline. A proposal would be to reassess and capitalize on the role of the national legal culture identity in global processes.

3. Concise considerations regarding the national legal culture

3.1. Concepts and notions

The history of a national culture has at its core creative personalities, those that give it substance, expressing an era and a direction of thought, style or spiritual movement. It is the case of Cantemir, Heliade-Rădulescu, Maiorescu, Eminescu, Iorga, Blaga, Nae Ionescu or Noica, spirits who have put their mark on their age. The interwar period is approached, for example, in the diversity of his spiritual directions, signaling the original contributions by which the top personalities from Iorga and Pârvan to Rădulescu-Motru and Blaga, from Lovinescu to Gusti, were asserted without forgetting Nichifor Crainic, Mihai Ralea, Tudor Vianu or Mircea Eliade. The name of each of those mentioned (plus others) is linked to a scientific contribution, a cultural performance, or a certain

spiritual movement. Analytical surveys in significant works, as well as the monographic approaches of some authors, have the purpose of synthesizing the dominant ideas and orientations of a period. The power-ideas and the major themes that structured the evolution of this culture, in connection with the intellectual changes that have been recorded and the European culture as a whole. In the humanist, luminous and passionate movements the tensions between tradition and new rationalist horizons, as well as the theme of national re-awakening; in the nineteenth century, the emphasis was on subjects such as modernization, national specificity, relations between Romanian and Western cultures, the theory of forms without a foundation, etc. The interwar period reopens these „files", but on a different plane, where the modernization and recovery of traditions, synchronizing trends and orthodoxy, democracy and authoritarian conceptions are confronted by engaging new theoretical foundations and a wider reference device that goes from the history of religions to sociology and philosophy of culture, from anthropology to aesthetics, from collective psychology to geopolitics. The existence of the law and the existence of the state are indissolubly and irrevocably linked, mutually conditioned, evolving and regressing together. The right to property is the example appropriate to the purpose of this work because it is one of the fundamental human rights, being also one of the most controversial rights. Over time there have been and there are many ways to acquire ownership that has transformed and evolved over time. Property, both public and private, can not be developed and can only be guaranteed by law. But we can say that the law evolves in line with the evolution of society as a whole. A strong and democratic state will always have a strong legal system, whose legislation will provide a favorable environment for development and the political, economic, social, scientific and cultural affirmation of the state. This evolution will implicitly lead to scientific legal progress, thus underlining the strong intercondition and indissoluble connection between them. In other words, there can be no law without a state, and no state can survive in the absence of the law. But, as we know, human societies have experienced both decline and decay, periods that have positively affected or negatively the legal sciences. Thus, during the communist era, the law became a humble instrument of the political power represented by the single party, the Communist Party. Legal culture strongly influenced by Soviet dogmatism has declined, on the contrary. A ray of hope emerged in December 1989, when the coup hit led to the overthrow of the Communist Party. Many parliamentary and non-parliamentary parties appeared on the political stage. The Great National Assembly was replaced by the Bicameral Parliament. Numerous laws have been canceled and others have been adopted. The Romanian Constitution of 1989 promotes and protects the right to freedom of thought and expression, guaranteeing a number of other rights for the hard-won Romanian nation. Now, the law is experiencing a slight and timid

revival. Unfortunately, the same can not be said about cultural and scientific life. The research conducted so far shows a close and indissoluble link between the emergence, existence and evolution of the law and the emergence, existence and evolution of human societies. It would be very difficult, if not impossible, for a work with a limited number of pages to surprise and develop all the essential aspects that highlight the evolution of the law in Romania. This paper does not intend to be a history of Romanian law and briefly deals with the important stages of the law over time. From the perspective of our research object, we will discuss a single matter of analysis: ownership. Why Property Law? The answer is simple: because property is one of the most important and controversial themes of law (subjects) as having major, decisive importance in the evolution of human societies from ancient times to today. The struggle in human communities to acquire and then maintain property has led to the need for a legal framework for defining and regulating this important concept. Over time, scientists have tried to define the eloquently possible concept of ownership and the close link between ownership and ownership. Obviously, there can be no property without a strong guarantee from the state based on a solid national legal culture deeply rooted in the national culture of that nation.

3.2. Conservativism and Progress in Legal Culture

Some look at the forces that now face the world from the perspective of the conflict between progressism and conservatism, left and right, liberalism and authoritarianism, globalism and nationalism, federalism and sovereignty, and the list of such binomas (a fashionable term!) Could continue. The corollary of this type of approach is to identify good and evil with one or another of the terms of binomial. The positive one, of course, is one that reflects its own ideological positioning. For, in fact, all this polarization around a pair of antagonistic terms is precisely such a kind. Is there any other possible perspective? We think so. To describe it, we will expand the above list with yet another binom: rationalism versus irrationalism, to conclude that, under certain conditions, the conflict between them can be overcome by resorting to the supranational factor. In other words, the pronouncing element that has always characterized the human condition, even if it is found that the current diagnosis of the European Commission does not deepen all aspects of globalization, especially in terms of challenges and disadvantages. In this respect, it would be appreciated that the identification at EU level of the best ways of modeling the effects of globalization and wider and fair redistribution of its benefits in order to increase the visibility of the benefits of the Community project and multilateral cooperation in a broad sense draws attention to the fact that the benefits of globalization are sometimes earned by large companies favored by Community measures, to the detriment of fair redistribution to EU citizens, the risks and the welfare conditions being

entirely a matter for the Member States. In addition, as Member States diminish their national legal policy margin, they reduce their ability to intervene in the fair redistribution of the benefits of globalization through robust social and educational policies. Liberalization, deregulation and privatization of public services have also strengthened the position of the strongest economic players on the market, but the unequal distribution of results has increased the economic and social differences between the citizens of the Member States. Another factor that needs attention in this case is the use of irrelevant national indicators in the context of an internal market without borders that distorts the ability to properly analyze the current state and evolution of the Member States and the continuation of funding for Cohesion Instruments (European Social Fund, Cohesion Fund) and creating additional tools to reduce inequalities so as to achieve real cohesion within the EU in order to counteract the negative consequences of the phenomenon of globalization. A globalization without a global ethic unjustly buries all the grandiose plans of the world's decision-makers.

4. Equity and dialogue the key to capitalizing on the identity of national legal culture in global processes

The legislators have advanced the thesis that: if the law exists, it is, by definition, just. What about the lex Lexus non-lex lex? The mere existence of the law does not do so ipso facto. The reason for this is a corrective, such as equity. Referring to the connection between equity and justice, this section proposes a comparative study of Romanian law and French law, also proposing concrete modifications or adaptations to the equities standards of Romanian legislation. In this sense, it would be worth analyzing the link between the principle of equity and other fundamental principles of law, starting from the definition of equity as a corrective instrument, the balance between the right to defense and the right of the state to punish in the name of the law, and last but not least, as a fundamental principle of criminal law and criminal justice, which includes, in turn, the other fundamental principles of criminal law. We considered it very important that the fundamental principles be seen as part of equity because through this, in its sense of moral value, a balance tool or corrective tool, morality passes from its abstract meaning in concrete terms, it can be materialized and applied particular situations and criminal laws in force. It is about fairness, more precisely, the balance that must always be maintained when a sanction is applied, because equity requires maintaining the balance between the prerogative of sanctioning the state and respecting the defendant's rights of defense, nevertheless neglect the victim. In conclusion, the desideratum of equity in Romanian law can be read as follows: the right must be fair and ensure the valorisation of citizens' rights, respecting human dignity and equality before the law. Equity bases the general principles of law and, in the name of equity, these principles are required to be harnessed. Those

who find themselves in similar circumstances and are being investigated for the same offenses will be subject to the same legal safeguards ab initio. What we would like to demonstrate through our research is that equity exists and manifests itself in substantive law by applying the fundamental principles under consideration. Equity is not absolute, but adaptable, evolving in accordance with the law and the historical time governed by the criminal law, but also by the morals of society. What is equity? A corrective in the substantive right and an instrument that restores the balance where it has been infringed. By invoking equity, we can remedy gaps in the law, defective regulations, which discriminate and violate equality before the law. In keeping with these desires, we strongly support and believe that the justification of the fundamental principles of substantive law through equity is and will always be able to determine the progress of Romanian justice, which is essentially human. The act of justice will become more moral, decisions to settle cases will be richerly motivated by judges applying the laws. At the same time, law-makers, who set the conditions under which responsibility is accountable, will become more responsible in the act of legislating, as there is a principle that can lead them to reason and analyze a priori in a fair, deeper, more responsible. So, we claim that equity has the power to accountability both the legislator and the judge applying the criminal law. But what fairness can be said when the martyrs of Communist prisons were sacrificed the second time in Romania today.

5. What fairness can be mentioned when the martyrs of Communist prisons have been sacrificed the second time through the omission of the law?

Very recently, that is, on the first working day of the week, Monday, May 14, 2018 would have been the first time when the arrest of 10,000 young people on the night of 14 to 15 May 1948 would have been officially commemorated in Romania after the abolition of Communism. Last year, after the President of Romania, Klaus Iohannis promulgated the law, the request was criticized by the National Institute for the Study of the Holocaust in Romania Elie Wiesel. The reason is simple: among the martyrs in the prisons were Legionnaires. The authorities, who no longer represent the Romanians, chose to keep quiet, hoping to go unnoticed. We have chosen another way, to speak and to write, because only so will we tell the future to the future! The national commemoration day of martyrs in Communist jails was set for remembrance of the anti-communist struggle in Romania, especially since this year marks the 70th anniversary of the largest wave of political arrests in Romanian history (the night of May 14, 1948). Moreover, in the explanatory memorandum of Law 127/2017 it is mentioned that the date was inspired precisely from this historical event, the initiators, wishing to emphasize the heavy blow received by all the Romanian elites in 1948, was in a rhetorical work: “We are aware of the names such as Father Nicolae Steinhardt,

Pastor Richard Wurmbrand, Greek Catholic Bishop Iuliu Hossu, Greek Catholic Father Tertullian Langa, politician Iuliu Maniu, poet Radu Gyr and his wife Mircea Vulcănescu Aurelian Bentoiu among many others who have suffered in these prisons? "In fact, this enumeration includes names arrested in the period 1947-1958, not just those of 14-15 May 1948. All initiators use, without quoting the name of Father Justin Pârvu, a fragment from his testimony from mass arrests: "About four, five days before leaving Roman, I get a picture: somewhere in the dark, at the bottom of the room, a sc nteie light. And I actually stop, in fact, in two weeks' time, in front of Aiud's jail. I was blindfolded, and to go to the end of the hall they gave me my towel, and that light is revealing to me where the caral opens the cell: - Enter here, the bandit! And that was my spark and cell. And I've had a prelude to the jailbreak. I told my comrades: „Oh, my boys do not die. Be careful, we can resist and go ahead. The fight goes on. And indeed it was."

Thousands of young people - most students and students - were arrested that fateful night, based on a plan of the communist authorities, filling the jail and extermination camps. Then, after trial simulations, they received huge prison sentences. Law 127/2017 pays homage to all the pastors in communist jails - without specifying their political orientation, allegations brought to trial, or type of conviction. It is an opportunity to remember, but also honor the survivors. On this commemorative day, we remember all our forefathers, the Romanian brave who constituted the active resistance against the militant and aggressive atheism, but also by our forefathers who found in their faith the strength to go up to the self-sacrifice, gave life to Christ. They are more than just historical milestones of our Church, they are models of living faith. Many priests were arrested in 1948 and arrived in communist prisons, dying in these prisons or in their home. Along with the bishops, many priests and believers of the Church were imprisoned. May their testimony strengthen the faith of our everyday life. Perhaps it was an act of courage, the memory of all those who suffered in the Romanian gulag, but the silence of this year demonstrates that it was just a lack of knowledge of the tragic event and all its implications and sensitivities. This was the first year when the "National Communion Day Communist Communist Day Communion" had to be celebrated, established by a law voted by the Parliament and promulgated by the President of Romania in 2017. Even the initiators of the law did not lit a candle for the arrested martyrs 70 years ago. The event was not marked by anything by the presidential administration either. The explanation is not simple at all and is related both to events that took place immediately after the promulgation of the law and to the delicate situation in which the president is now with Israel officials and representatives of the Jewish communities in Europe. This year, silence reigned over the 70 years. Why of fear. Let us explain: In spring-summer of 2017, President Iohannis was in great ways from the point of view of external relations. He was the first European Head of State to receive on the White House lawn and

brought to the other leaders the overseas message of a Donald Trump at the start of the mandate. On June 5, during the visit to the US, the President of Romania received the „Light of Nations" award, the highest distinction awarded by the American Jewish Committee. But just before leaving for America, the president promulgated the law initiated by a group of Romanian lawmakers. On June 6th, the National Holocaust Research Institute in Romania, Elie Wiesel, issued a very acidic press release to President Iohannis. The reason is simple, in the motivation exposition used by the initiators they were listed among the names of the martyrs raised that night and members or supporters of the Legionary Movement. Among them and Mircea Vulcănescu or Radu Gyr, a name that the Institute hates with criminal complaints wherever they appear, from high schools, street to t-shirts.

But let's see the text of one of Elie Wiesel's most recent press releases after an act by the Romanian Presidency: „The National Institute for the Study of the Holocaust in Romania" Elie Wiesel „notes with concern that in the explanatory statement accompanying the law on the process of the legislative circuit is referred to as „martyrs of communist prisons" for persons convicted of war crimes. This fact, although contradicting not only the values and democratic principles, but also the Romanian legislation in force, did not stir up any public reaction. We also express our contempt for the fact that the initiators of the law chose as argument to promote this legislative project to quote from Iustin Pârvu, who in his youth worked in the Legionary Movement, and later apologized to legionaryism and had repeated anti-Semitic and denial of the Holocaust. The election of lawmakers who have initiated the law can create confusion over the direction it must have. Commemorating the victims of the Communist regime in Romania should not be a rehabilitation opportunity for those who, during the years of the previous totalitarian regimes, contributed, from multiple hypostases and with different responsibilities, to the rejection of democracy and the establishment of anti-Semitism as a state policy. „Last year, Iohannis did not formally respond to this communique, but the silence of these days shows he has mastered his criticism. In a personal opinion, I believe that the president could not have done otherwise, because he was hardly criticized by the president of the Jewish community in Europe after the unfortunate statement of „the dealings with the Jews" and the relations with Israel are delicate after refusing to move Romania's embassy from Tel Aviv to Jerusalem. A legionary commemoration message was supposed to be? Obviously not. The President kept silent on this National Day. So we honor our heroes according to their personal and foreign interests! If we want the second mandate and if the Jews allow us to commemorate! So did the thousands of Romanians who „made the supreme sacrifice on the battlefields for the conquest of the people" in the campaigns of 1916-1918, especially during the dramatic clash of Oituz, Marasesti and Marasti. Moreover, „according to the present law, the annual celebration of May 14 may be

marked by central and local authorities, as well as by the public cultural institutions in the country, by organizing official commemorations, wreaths and other events meant to honor the memory of these martyrs. At the same time, on this day, the Romanian Television Society, the Romanian Broadcasting Society and the National Press Agency AGERPRES will broadcast, as a matter of priority, programs and informative materials about the events during the communist persecution on May 14, 1948 ", writes in the text of the Law no. 127/2017. And yet, in this chorus of silence a voice was heard, the only reference on Monday to this national day was a message sent by the People's Advocate: „These people, described as enemies of the people" were, therefore, imprisoned, many killed, and their families harassed, mocked and subjected to special treatment treatment. Securitate abuses have not been limited: the country's intellectual intellectuals have been expelled from faculties because they were of unhealthy origin and sent to unskilled workers, the priests were either liquidated or deported to concentration camps, teachers, doctors, politicians or peasants woke up overnight arrested, subjected to torture and sent to prison." Are we again witnessing an act of „purification" of the unregistered Romanian intellectuals, following the typical 50s? In some concluding sentences we try to answer this troubled question.

6. Conclusions

I'm afraid I do. Romania's new political cycle, the post-December, began with a terrible marginalization operation of the so-called Labis generation, and some of them were even subjected to a particular type of purification: institutions, magazines, publishers, either abolished or with other colleges, another list of staff, other groups, which placed many outside the „institution". A special case of a dramatic celebrity was that of the writer Dinu Sararu, another of the late Mihai Ungheanu. I can not afford to remember the very dramatic situation of some of the outstanding writers such as Paul Anghel, Ion Lăncrănjan, Eugen Barbu. A second wave of ostracizations followed, culminating in the Tismaneanu Report, in which the „proscrişi" writers were re-listed, for which there were drawn out disposal lists, probably still operative. The antiprotoconist operation, a primitivism that reminds the Komintern's „primary-aggressive spirit", the crime of reinvention was reinstated, people and works were labeled, a blockade was attempted as an attempt to subject whole groups to public disapproval under the „expired generation" label, although stoned people came from different generations, from the patron saint Patriarch Teoctist to those who were just about to end their fifth decade of life. The third wave of eliminations followed on the pretext of retirement, which has cast out outstanding personalities outside the institutions, which I do not allow myself to nominate, wanting to respect their need for minimal discretion. Cominternist labels have been unearthed to stigmatize and target quasi-conspirators those suspected of a more sentimental

national or Christian-Orthodox affiliation. The labels of the nationalist, nationalist, orthodox, fundamentalist, legionnaire, securityist have added new labels such as the protocronist, dughinist-Orthodox, after the name of the Russian geologist Aleksandr Dughin, the monoculturalist, the latter label being meant to "deconspire" those who are the promoters of a single culture, and we can continue if you want. Many of these labels have been launched from the labs of prestigious faculties and universities. Probably many of those who write their memos today detail the phenomenon. In many of the social and political sciences, others have been added in order to incite a kind of war of all against all, an anarchy of great proportions, horizontally and vertically to society, and, if it could, energize a demonic man's rebellion against God. What failed in the Communist era was to succeed now: raising a majority against the Church, which would have been more than a disobedience, meaning the sowing of a religious indifference. The discussion is long because the times are terribly gloomy.

Exactly, what models will be created instead for a generation that, in principle, should revive the fiber of this nation? The goal of these times is the generation without identity. An American human psychologist has investigated the malady of this human pattern by what he called sand-box syndrome - the sandbox syndrome - that is, the induction of peoples' life-style patterns that mix the self-forgetting playful states that can cancel the realistic and serious, mature perception of things. Such living schemes "in alliance with evil can energize the disorderly rebellion of the world," prevent two American Christian sociologists. Some kind of fallen powers have mastered the moods of too many. Such powers are like the stigmata, from the spirit of money to the spirit of truffle, of boundless egoism, of unjust justification, of imagination, debilitating the world and life, making us incapable of reacting to the nihilism and anarchy of this age, to recover the positive sense of existence. The ugly spirit of money deforms the collective being after it has just emerged from another terrible deformation induced into the world by the communist doctrine. The Marxists, as a modern philosopher, Karl Popper, remarked, are lovers of violence, Lenin being legitimized by the dictatorship of execution: the bourgeoisie's execution by the proletariat.

In „State and Revolution" Lenin legitimizes collective crime, the execution of a social class by another class. For Marx, the proletariat is the "burger of the bourgeoisie," so the sepulchral discourse is the one called to explain and legitimate history. The pivotal notion of such a vision is death, not life. The spirit of playful entertainment, pleasure and pornography is one of the most terrible men's threats. A British writer, Aldous Huxley, prophesied the emergence of a different state in history that he called the„"magic state," in which „brainwashing" is done „by gentle means", such as the cultivation of a demented sexuality, life forms which „excites the senses and the imagination", cultivating the illusion of power, a "pleasure that shakes the senses and the mind to exhaustion", as a remarkable commentator of this

terrible prophets, Mr. Virgiliu Gheorghe. The dictatorship of this magical state is more terrible than the other, the grim state of ideological idolatry, as imagined by Marx and practiced by Lenin. How did the „state of magic" dictatorship come to light? By betraying the elites! Terrible is the loneliness of the peoples being lived by their elites through the conspiracy of sin, the fall, and, behold, we have this interpretation of Ezekiel's verse: „And my sheep were scattered for lack of a shepherd. On the face of the whole earth were scattered, and there was no one to seek and to return them." The ideologues of the magical state pervert and the meaning of elemental things. The peoples, say the ideologies of the magical state, are coercive, coercive majority, which oppresses minorities and individuals. Consequently, individuals and minorities of all kinds must be normalized even if they lead to the disintegration of the majority, and even more severely to the disintegration of the natural spiritual units. During the 2008 US presidential election, California, Arizona and Florida have appealed to the referendum process to restore the accuracy of a collective definition of the family. So strong were shaken frontiers etnomentale ongoing everyday life people that they had to resort to a referendum to determine the definition of the family remains the classic: freely consented union between a man and a woman. A referendum was needed for a „natural" or natural definition. The more disturbing thing is that a number of US states have had to use a referendum to restore the accuracy of a definition that derives from a whole ethnospiritual of rules, norms, patterns, patterns, patterns and social schemes that we find in in the everyday way of life of members of those majorities called the peoples. Minorities allied with a particular type of device state fail to challenge, to rewrite definitions paradigmatic peoples and impose other definitions creates confusion down common patterns of life founding a mess that recalls notional babeliană promiscuity. After all, what do these popular referenda say, like California? Referendum California shows that when the Supreme Court of the State, for example, legalized marriages anarhosexuale that State was already in the conflict logical and normative, volitional, spiritual, jurisprudential people mobilized plebiscite to fend off the effects of laws derived from the magic state paradigm. It was necessary call „gun plebiscitary" protection from actions by which a state is willing to redefine the concepts underpinning the common life in accordance not with the order created by God, but by the pleasure principle anarchist procedure definitions arbitrary minorities despotic. Popular scrutiny is in conflict with political correctness and subcultures of magical journalism. Significant segments of the ruling elites of states claim the principles of the state of magic through which they can transform some social formations into forces, activities and seductions capable of contributing to the triumph of a new Babel tower, a vain building hammered out of the joy of pleasure. This kneel displaces the ethnospiritual principle because there is nothing left to do with it, and the force that completes the process is the magical state.

A salvage solution at hand is for the people who have grown up, that is, brought back to a type of education that would make it strong enough in the face of the induction of anarchy. Only the people separated from the Church of God are at risk of error, which is also the final one, that is, the one that brings it to destruction. The same is the lesson that the teaching of the Temple raised by Solomon brings us to the call of God to His people, who is the people of God chosen by God as they are kept in the temple, that is, united in prayer, by a generic link we call it Church or Temple. On the other hand, creative manifestations in the peoples are evidence that God maintains perpetually in the world mercy towards the peoples, that his gift is never withdrawn to peoples who have this active or virtualized gift, such as soul latency, so as sum the pro-teachings, the pre-inclination towards the good, the good deed, the righteousness, the longing for truth and righteousness. Only the peoples carry in their spiritual environment, through diffused latencies, the chance of renewing energies, which explains that the peoples find the way to God, even when they lack the special schools in this sense. Their traditions and culture, as signs of their creative power, are gracious to God, that is, they are gifts of fulfillment, which shows that God has been benevolent in and through peoples; otherwise they would have been without the gift of culture. The perennial substrate of the peoples is today under multiple threats, which also threatens the twinning of the peoples. The most terrible threat is the one directed against the identity property of individuals and peoples themselves. Modernity has triggered a massive process of identity ownership, which aggravates the current global crisis. Breaking from traditions, beliefs, feelings of belonging, individuals and groups become vulnerable to this new type of threat. The doctrine launched by President Truman that material wealth is all and the essence of freedom is access to material prosperity and nothing else, like Marx and Lenin's communism, that food is all, and religion is opium for peoples, have also contributed to the ethno-historical disarmament of new postwar and post-war generations of peoples in the face of such promises. We therefore realize that salvation comes from a return to the Church, that is, from a spiritual reform of the elites and peoples alike. The solution is spiritual and NOT economic, as is commonly believed. So, at a time when the values of this people are burned with the red iron of ideologies of all sorts, a man speaks of honor, dignity, honesty, honesty. And about God. Professor Ilie Badescu also speaks of the fact that what has failed in the years of communism seems to succeed now: raising a majority against the Church. Or, as the famous sociologist says, the sowing of a religious indifference as we live in moments of a Europe under the tyranny of false values, subjected to political correctness, demagogy and populism, but also to a Romania that we want for normality, dignity and identity; about the faith, the Church, the family, and the hope of our salvation as a nation, despite the fact that the current world is driven by some types of puppets handled by current policy makers who have only one possible destiny globalization.

What is behind them and how much falsification of the human essence is put into these notions? Whether it's Romania or Europe, America's Trump also takes into consideration the position of the modern Christian, of today's Romanians who worry about the internal and international developments of the past decades, characterized by a continuous and alarming attempt to erode identity, sovereignty and national unity of Romania, with many actions placed under the sign of leveling globalism or an exaggerated „political correctness„ but also with many actions directly directed against the Romanian State and People (the tendential, lacunar or even mysterious rewriting of history, denigration of national symbols, the undermining of fundamental values and institutions, the sabotage of the future, the desolation of generations that come after us by selling land, soil and subsoil resources, through massive deforestation, the estrangement or bankruptcy of economic units, the degradation of education and systems through the excessive politicization of all the subsystems of the state and society, which has the effect of deprofessionalization, the confusion of values, corruption, lack of efficiency, the emergence of social tensions), especially concerned with the recurring attempts of „regionalization" the creation of autonomous enclaves on ethnic grounds, contrary to the Constitution of Romania and the tendencies of European integration, totally unproductive from an economic, social point of view, of the quality of life in these areas, we strongly oppose all these actions, we must strongly advocate identity, sovereignty and national unity, and to call on the competent institutions of the Romanian State at all levels to watch and act to prevent, to counteract and, when the law is broken, to punish all diversions and aggressions towards identity, sovereignty and unity of Romania and the stability of the rule of law. In this approach the whole Romanian people must join, all the inhabitants of this earth, especially the intellectuals who are the example of wisdom and patriotism, but also the political people, inviting them to work with responsibility and patriotism for the good of Romania, much as we are in the celebration of the Centenary of the Great Union, the centennial of the bringing together of all the Romanian provinces, an event the Romanian people waited for, for which he suffered, worked and fought for so many centuries and made so many sacrifices. Let us honor our heroes, to be at their height, leaving to the next generations, to all the inhabitants of Romania, a united, sovereign country, with love for the past and for its culture, with self-respect, master in its educated and prosperous land, a country of the United Europe, but with its own Romanian identity.

By the magnitude of the evolution of scientific-scientific thinking to the detriment of the spiritual-scientific one, the modern man is less inclined to sink into the mysteries of thought, which he embodies in the prospective capacity of his spiritual body. But without knowledge of the wisdom gained through permanent communication with the Divinity, a false popularization of spiritual science appears very impressive. A lot of pseudo-doctors claim to penetrate into

the depth of spiritual act. With the development of spiritual science in the world, its effect will be largely determined by the spiritual - ideological arsenal of each. That is why it is necessary to accept to think in precise, finely clad, concepts prepared in advance; First of all, we must have an inclination for the purity and clarity of the notions, let us know what we are talking about when we use a concept. We need to know what it means if we say that the notion has its basis from the formal point of view in the subject, and fundamentally in the subject; what the concept has as its own form, comes from the subject, what has content, comes from the object. The man of the present is characterized by the fact that he is given a surplus of natural forces of intelligence, which he is not able, through his own forces, to fully place them in the service of soul and spirit, and is only satisfied with the approach of the physical body; forces which, in turn, being broken by the bond with God and at the discretion of the demon, are increasingly being used by man, causing mankind to a chaos, to which man, he seems to resist absolutely impotent. But this means that if the intelligent forces, objectively rich and varied, are not transformed into knowledge forces acquired through their own effort in the study of law, they are then used for their purposes by eclipsing powers of consciousness. God is the sum of all the parts and peculiarities that make up the whole, and of the right as we shall see further on. Where did humanity go? There are some globalists who warn national states that the future of humanity will not be of communities built on a particular culture, but of total diversity. Diversity is seen as a challenge that comes with challenges. Diversity is the destiny of humanity. There will be, even in the farthest places of this planet, a nation that does not see diversity in its future. And all politicians who try to sell to voters a society composed exclusively of people of a single culture, all who try to present a future built on a past that never existed, there that future will never be. From this perspective, it appears that the main goal of the European Union is the disappearance of the National States. However, the Romanian people, by voting, can decide on the future of Romania, the provisions of the Romanian Constitution being clear, Romania is a national, sovereign and independent state, and sovereignty can not be violated by any suprastate entity. Moreover, the Constitution itself provides in Art. 1. paragraph 5 states that “in Romania compliance with the Constitution, its rule of law and its rule of law is mandatory.” It is what the force of national law can do, not the Union law.

A national right with nobility, ideal or reverie? However, I have decided to change the face of this paradigm of Godless and moral law, and to propose a Romanian matrix, a legal project designed to complement the high-ranking legal services in the native socio-cultural space and given national identity. Considered as a pole of rediscovery and revaluation of our national consciousness, but also as a bridge to the great European culture, the Romanian matrix aims at promoting the cultural identity of Romania, the values of Romanian culture and the values of

universal culture; promotion of Romanian spirituality and Christian-Orthodox values; promoting interculturality, tolerance and respect for the other cultures present in the Romanian space; protecting, preserving and supporting the Romanian cultural heritage, cultural and historical heritage; promoting Romanian art and creators; support of Romanian language and education in Romanian; increasing the visibility of culture in the Romanian public space; educating new generations in the spirit of love for culture and national identity; growth, support and promotion of Romanian elites. The Romanian Matrix is a soul project and a project of civic responsibility, in the interwar tradition of our great intellectuals, since after 60 years of living in the Romanian legal and public sphere, we have come to think, like any responsible parents, of what we leave inheritance to children, whether we are talking about our legal, entrepreneurial or biological creations. Through our modest powers we will make a humble contribution to changing the climate we all see. And what better starting point than forgetting that you are Romanian! The new identity of European citizens does not prevent us from representing Romania in faith and loyalty, thus supporting the efforts and contribution of our homeland to humanity as well as its European aspirations. And we still believe our approach is not singular! Let's say things by name in a very clear and understandable way, without hitting the plains, to be dignified representatives of our country to set up the supporters of a so-called „two-speed Europe". To fight for the regaining of the dignity of the Romanians in a so-called „two-speed Europe". In what galaxy do the unionist livelihoods exist? Is Brussels the gravitational center, the sun in the sky ?! Europe in two speeds is a medieval principle. Allow me the following syllogism: All states have equal rights in the European Union. Juncker is disconnected from Europe? Juncker's past. Europe stays in her home. Do the Union leaders know how they saved the barbarians of Rome, a capital capitulated by the stasis of a corrupt system? Does anyone else say frank, visigoth, ostrogot through Western countries? How do you allow yourself to impose this dichotomous, even segregational, principle of „two-speed Europe"? Have you forgotten how the peoples of Eastern Europe have for centuries preserved Western civilization? We have defended Vienna several times with the sacrifices of hundreds of thousands of Romanians. What gave us Vienna back then, Europe's navel? Our great-grandmothers went to the emperor for the gain of their right to life. Who instructed you to play the Russian roulette? Perhaps Europe still owes us the centuries-old shield at the eastern border of the Carpathian Mountains. Perhaps Europe should acknowledge its blame for the self-righteous surrender of the Eastern European countries to the soviet power. While the West of Europe enjoyed the Marshall Plan, and the Ducal Palace in Luxembourg and its gardens gave gallant parties to the east, Europeans abandoned in Yalta organized resistance in the mountains to keep their countries from being invaded by invaders to the East. Perhaps the silence of the ball years has passed.

But you can not go to the palaces if you are not fed, and the Honved do not defend your borders. Our parents died in the communist gulags so we could have full rights in today's Europe. Who rewards the sacrifice? Do you want to open a new fallacy between the good world, the salons and the new world of those who come with the jalba. There are too many centuries that unite us and too few ideas of partition and apply the proverb: after me, the flood! It is not only risky but also profoundly erroneous. That is why the purpose of this scientific philosophical research approach is to draw attention to the legal issues in the union environment with an impact on the economy and business.

Without being an interdisciplinary, but merely legal, work, it will raise issues relating to international legal pluralism, the multitude of applicable law sources, courts of law and courts, and diverse competences, the complexity of a thorough, or even reasonable, hierarchy, between legal norms, forum shopping and international competition, human rights and European affairs. Without diluting the academic discourse, the study wanted to be practical, analytical and problematic.

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European criminal law aspects

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Abstract

This communication is a plea for the recognition of European criminal law as a branch of law. As arguments of its existence, the existence of minimum rules for the definition of offenses and sanctions in areas of particularly serious crime of a cross-border dimension, the rules and procedures for the recognition of all categories of judicial decisions, the rules and procedures for facilitating cooperation between judicial authorities in the matter as well as the binding force of these rules and procedures.

This Communication aims to contribute to the debate on the emergence of a new branch of law and its relationship with the domestic law of the Member States. It is then clear whether European criminal law is a right of the European Union or is a right of the member states of the Council of Europe. The aspect of its content is also of no interest. It is composed only of the rules of criminal law stemming from Community acts, Community acts and the Council of Europe or its rules also encompass aspects of national law applicable to transnational crimes.

Personally, I am of the opinion that after the Treaty of Lisbon the rules of criminal law stemming from the European Convention and other normative sources of the Council of Europe are direct sources of the European Union's criminal law as in the domestic law of our country the rules of the international treaties ratified by Romania, according to art. 20 of the Constitution are part of it.

But is there a European criminal law? Already in the doctrine is the concept of European criminal law and this branch of law. Ina Raluca Tomescu, from Constantin Brâncuşi University of Târgu Jiu, in a scientific communication[3], already in 2012, made known its opinion on the existence of European criminal law, indicating its three sources, namely the provisions resulting from the activity of the Council Europe, those concerning the work of the European Union and

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[3] Ina Raluca Tomescu, Annals of "Constantin Brâncuşi" University, Târgu Jiu, *Letters and Social Sciences* series, no. 1/2012, pp. 152-173.

those of the conventions concluded within the two organizations. However, the author made a number of considerations regarding the concept of European criminal law in the context in which he states that the basic treaties of the European Union do not contain any rule of jurisdiction that would allow the establishment of a "genuine" European supranational criminal law system.

In this respect, the author cites H. Satzger[4], according to which the criminal activity of the European Union may consist only in the harmonization of the internal rules of the Member States by imposing standards which Member States must take into account when defining criminal law in order to achieve desiderata such as: the protection of the original interests, in particular the financial ones of the Union, the fight against cross-border crime, as a common interest of all Member States.

The aforementioned author's claim is well founded, but some prerequisites are required before presenting it.

In the Maastricht Treaty (1992), alongside other two pillars (the European Community and the CFSP), the Justice and Home Affairs Cooperation (JAI) pillar, including the areas of the fight against terrorism, major crime, trafficking in human beings, drugs and fraud at international level, judicial cooperation in criminal and civil matters, the creation of Europol, the fight against illegal immigration.

The European area of freedom, security and justice has been institutionalized by the Treaty of Amsterdam. The Treaty of Lisbon, amending the institutional treaties and reducing them to the two, the Treaty on European Union and the Treaty on the Functioning of the European Union, restates in the latter the European institution called the "area of freedom, security and justice", adding that this space has as its values respect for fundamental rights and the different legal systems and legal traditions of the Member States. To this end, the Union is working to ensure a high level of security through measures to prevent crime, racism and xenophobia, as well as measures to combat them through cooperation between police and judicial authorities and other competent authorities, and by mutual recognition of criminal trials and, where appropriate, approximation of criminal laws (Article 67 TFEU).

As H. Satzger has shown, it is obvious that the Treaty does not contain rules to empower the European Union, through its institutions, or the European legislature, through its two institutions, the Council and the European Parliament, to give substantive or procedural criminal law. The conclusion is reinforced by art. 68 of the TFEU which provides that the strategic guidelines for legislative and operational planning within the area of freedom, security and justice are defined

[4] Apud Ina Raluca Tomescu, *op.cit.*, p. 153, H. Satzger, *Intenationales und Europäisches Strafrecht*, Editura Tanas, Baden-Baden, 2009, cap. 7, paragraph 7 et seq.

by the European Council. It should be pointed out that the institution of the European Council, on the one hand, does not have legislative powers and, on the other hand, it does not issue rules but only guidelines.

And art. Article 72 of the TFEU defines more precisely the right of Member States in criminal matters to the effect that the provisions of the chapter "Area of freedom, security and justice" do not affect the exercise of the responsibilities incumbent upon Member States for the maintenance of public order and the safeguarding of internal security and the national parliaments must ensure that legislative proposals and initiatives are done in compliance with the principle of subsidiarity (Article 69 TFEU).

In general, art. 75 of the TFEU only stipulates that the European Parliament and the Council, acting in the ordinary course of action, shall define the framework for administrative measures on capital movements and payments such as the freezing of funds, financial assets or economic benefits belonging to natural or legal persons, groups or entities stateless, owned or held by them. Instead, the Treaty provides for the possibility of the Commission applying fines in cases of breaches of rules that protect free competition. An example is the provisions of art. 103 par. 2 in reference to art. 101 and 102 of the TFEU, according to which the Commission may impose fines and periodic penalty payments for non-compliance with the competition rules. Even though the fines apparently have the nature of administrative sanctions, this aspect of their legal nature is questionable because in the interpretation of Art. 6 of the European Convention on Human Rights, given in the case law of the European Court of Human Rights, criminal prosecution is also given in cases where sanctions with significant repercussions for the person are applied. Their qualification is also based on the degree of severity of the punishment applied, as well as the repressive or deterrent nature of the legal norm.

In the field of "the area of freedom, security and justice", judicial cooperation in criminal matters (Article 82-89) of the TFEU is included.

By art. 82 of the TFEU, the Parliament and the Council are expressly empowered to issue:

1 - rules and procedures for the recognition of all categories of judgments and judicial decisions for the resolution of conflicts of jurisdiction between Member States; facilitating cooperation between judicial authorities (not others) and in criminal matters;

2- minimum rules on the definition of offenses and sanctions in areas of particularly serious crime of cross-border dimension, namely terrorism, trafficking in human beings and sexual exploitation of women and children - men, not yet - illicit drug trafficking, trafficking illicit arms, money laundering, corruption, counterfeiting of means of payment, cybercrime and cybercrime) or the need to combat them on a common basis. The Council, subject to the consent of the

European Parliament, depending on the development of crime, may also provide for other areas of crime.

Also, in the ordinary legislative procedure, taking into account the differences between the legal traditions and the legal systems of the Member States, minimum rules on the rights of individuals in criminal proceedings are laid down; the rights of victims of crime, the mutual admissibility of evidence between Member States, and other special elements of the criminal procedure. States can establish a higher level of protection for people.

It should be noted, however, that at Art. 83 TFEU provides that minimum rules for the definition of offenses and sanctions are adopted by directives.

Is the directive able to lay down mandatory rules in the domestic law of the EU Member States? Article 288 of the TFEU provides that, for the exercise of its powers, the Union shall adopt regulations, directives, decisions, recommendations and opinions. It is only on regulations that the Treaty states that they are binding and directly applicable in the Member States, whereas, for directives, they are binding only on the result to be achieved, leaving the national authorities with the form and means. It is therefore not directly applicable but mediated by the compliance of the addressees or the Member States with the limits set, which in this case are minimal, underlined also by the provision that Member States may also introduce a higher level of protection of persons (Article 82, paragraph 2, last sentence of the TFEU).

Definitions for the issue of the qualification of the European Union criminal law provisions are also the provisions of art. 83 par. 2 of the TFUE, which develops the scope of competence in the field of criminal law regulation. 1 of the same article and provides that where the approximation of the laws, regulations and administrative provisions of the Member States in criminal matters proves to be indispensable in order to ensure the effective implementation of a Union policy In a field which has been the subject harmonization measures, directives may establish minimum rules on the definition of offenses and sanctions in the area concerned.

The Union therefore intervenes through minimum standards:

- by means of directives for the definition of offenses and sanctions in areas of serious gravity crime of a cross-border dimension, listed above in this Communication:

- by decision of the Council, in the light of the development of crime to identify other areas of criminality of particular gravity of a cross-border dimension;

- by establishing directives laying down minimum rules on the definition of offenses and the determination of penalties where the approximation of the laws, regulations and administrative provisions of the Member States in criminal matters proves to be indispensable in order to ensure the effective implementation of the Union, an area that has been the subject of organizational measures.

Turning to the legal force and applicability of the Directive in national law, the rationale for their establishment, their legal syllogism, must be in line with those of the Court of Justice of the European Communities in the case of Van Duyn against the United Kingdom of Great Britain and Northern Ireland. This 1974 decision stated that a decision has a direct effect if its provisions are unconditional and sufficiently clear and precise and if the EU country has not transposed the Directive within the time-limit laid down by law.

In the Tullio Rotti vs. Italy, Case 148/78, the Court of Justice of the European Communities has decided that after the expiry of the period laid down for the implementation of the Directive a Member State can no longer apply its domestic law to a person who complied with the Directive and the requirements of the Directive. By this decision (Rotti) it was decided that the direct effect can only be vertical, the member states of U.E. having the obligation to implement the directives, but that directives can not be invoked by a European Union country against a natural person. This is another argument for establishing the mediated nature of the obligation and the application of the Directive by national law.

This would create the appearance of a lack of norm, as H. Satzger[5] says.

However, starting from the statements in the doctrine regarding the recipients of the legal norm[6], where they are classified as first-line recipients, those with the duty to observe the law and the second-line recipients, those who actually have the rights and obligations provided by law, we can conclude that we also have several recipients in this case.

The first line of recipients is the State, then the second line of recipients is the nationals of the Member States.

Some authors[7] have invoked the Van Duyn judgment in support of the idea that the directives do not have direct effect unless they result from all their provisions that they are likely to produce direct legal effects between Member States and private individuals.

Concluding on the question of the existence of a body of rules justifying one of the constituent elements of a legal branch, I consider that this condition is fulfilled. The provisions of the Treaty on the Functioning of the European Union empower the Council and the European Parliament to lay down rules, it does not matter that they are for establishing minimum standards for the definition of offenses and sanctions. As long as it establishes a set of standards according to which an act can be classified as an offense and establishes its sanction, the rule is

[5] H. Satzger, *op.cit.,* head. 7, par. 7 and following.
[6] v. Sofia Popescu, *The General Theory of Law*, Editura Lumina Lex, Bucharest, 2000
[7] Apud Nicoleta Diaconu, *Theoretical and practical aspects regarding the direct application of the European Union law in the notional legal order*, see http://www.nos.iem.ro/bitstream/handle/123456789/1135/2-Diaconu_Nicoleta.pdf?sequence=1&isAllowed=y

criminal, even if it is not directly addressed to natural or legal persons susceptible to criminal sanctions in the case of committing offenses.

I believe that the general conditions laid down in the doctrine are also met in order for a group of norms to generate a branch of law.

Regarding the origin of the rules that make up it, I appreciate that the name refers only to the rules concerning the European Union. This interpretation does not exclude the rules of the European Community stemming from the European Convention on Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that the Union shall accede to it and that fundamental rights guaranteed by the Convention shall become general principles of Union law.

Also, as an answer to the questions to which this approach is intended to address, namely that which questions the question of whether the rules of national law belong to European law, the assessment is in the sense that they are not part because national law applies only within borders of the State concerned.

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Reflections on the quality of the active subject of the offense

Roxana IFRIM[1]

Abstract

The author aims to eliminate confusion from penal doctrine on the subject of the offence. Thus, the article makes a distinction between recipients of the penal norm, social values, and some holders of the offence. All subjects of the offence are also subjects of criminal law, but not all subjects of criminal are subjects of the offence.

Keywords: *social values, recipients of criminal norm, active subjects of the crime*

I. *Persons as subjects of criminal law are the addressees of the criminal norm, in the way that they are addressed by the precept in the norm by imposing some conduct on the social values under the threat of the criminal sanction, and all persons are the one who enjoys the protection of the criminal law, since it forbids everything that can be harmful to individuals and society implicitly, protects the social values in whose conservation the whole society as well as every individual is interested.*

In this manner we have defined a limit among the subjects of criminal law, the recipients of the criminal norm and the holders of the social values protected by the criminal norm, who are the society and the natural and legal persons interested in defending the fundamental social values. Criminal law requires law enforcement recipients to mobilize their energies, psychic forces to avoid producing antisocial outcomes[2].

We also recall that the criminal norm, even as it takes effect, gives rise to legal relations (legal relation of compliance or cooperation) between the state as a representative of society together with the other holders of protected social values and the recipients of the criminal law as owners of the obligation to comply with the prescriptions of the rule.

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[2] George Antoniu and collaborators, *Preliminary Explanations of the New Criminal Code*, Universul Juridic, Publishing House, 2010, p. 161.

Also, by breaching the criminal law, legal relationships of conflict between the state and the other holders of protected social values and persons who have breached the norm and who become holders of the obligation to respond criminally for non-compliance with the obligations imposed by law are created. Thus, we can conclude that all natural or legal persons involved in one form or another in the criminal legal relations, meaning the persons to whom the criminal rule relates, assigning them either rights or obligations in relation to the prescriptions of the norm, are the subjects of criminal law. In the subject of criminal law, we must distinguish between those subjects who have these qualities hypothetically, in principle, in abstract terms, and those who acquire these qualities in a real and effective manner. The first are referred to as criminals and include individuals or legal entities likely to suffer the consequences of committing these deeds. The second category is the subject of the offense, meaning the persons who actually commit the actual deed, as well as the natural or legal persons who are actually suffering the consequences of the offense.

The subjects of the offense are only those who have committed an offense under the conditions of the criminalization rule; in this case the hypothetical subject of the inscription rule gets a real appearance, it materializes in a determined person who has made the concrete act for which the sanction stipulated in the norm of incrimination is to be applied. It can be noticed that all subjects of crime are also subjects of criminal law, but not all subjects of criminal law are also subjects of the offense[3].

As it can be seen, the scope of the subjects of criminalization is narrower than that of criminal law subjects, since it includes only those persons who may be the authors of the facts described in the norm of incrimination and the natural and legal persons liable to bear the consequences of the described act. Thus, the sphere of crime subjects is more restricted than that of criminal law subjects, as it does not cover the subjects of the legal compliance ratio. The conditions of incrimination related to the subjects could include references to the active subject described in the criminalization rule, meaning the person suspected of committing the deed described in the rule of incrimination (hypothetical, undetermined recipient of the rule of criminalization). As a rule, in the content of criminalization the active subject does not appear although he is implicitly present as an author of the described act, the active subject appears when the law requires a certain quality (Romanian citizen, official, military, mother) of the author of the deed described; in this case, the quality of the subject becomes a condition of the content of the criminalization. Incriminations in which such a condition exists are known as incriminations or qualified ones.

[3] Constantin Mitrache, Cristian Mitrache, *Romanian Criminal Law*, Universul Juridic, Publishing House, 2014, p. 147.

The subject that has the quality required by law is called *intraneus*, unlike the one that does not have the quality required by the law (*extraneus*). An active subject of incrimination is only the author of the described offense, but also the person who has committed an incriminated attempt. If the law requires that a condition of criminality is the quality of the subject, that quality does not need to exist in the person of the participants.

I. *Regarding the active subject of the crime described, the criminality rule may provide age conditions (**major active subjects**, meaning those who are 18 years of age and **minor active subjects**, those aged 14-18, or young active subjects, people aged 18 to 22 (junior youth), or to conclude that the described act can only be operated by one person (unique single subject in their own person); such incriminations are, for example, failure to disclose certain offenses, unjustified absence; some of the norms stipulate that the incriminated act can only be operated by two or more active subjects (incriminations with a plural active subject), they could be divided into bilateral crimes (when the act described is obligatory committed by two persons: bigamy etc. or collective incriminations (when the deed described is the work of more than two people, for example, the formation of a group. In the light of the above, it concludes that any incriminated act assumes the existence of a person who does the deed and also implies a person who suffers the consequences of the deed.*

Criteria for criminalization relating to the active subject only address the conditions that must be provided in the content of the criminality. The realization of these conditions into concrete facts assigns the deed a criminal character.

In addition to these conditions, the active subject must also satisfy some of the general criminal liability requirements set out in the general part of the criminal code, such as the minimum age required by the law for criminal liability, responsibility, freedom of action and freedom of action[4].

II. *As far as the age of criminal liability is concerned, it expresses that step in the person's bio-psychological development when he/she acquires the opportunity to understand the meaning of the committed facts and the exigencies of society towards his/her person and to be able to consciously conduct his or her behaviour in relation to these requirements. These bio-psychic attributes do not acquire at one and the same time, but gradually as the physical and mental maturation of the person.*

Reality shows that man is going through several stages of maturing his psycho-physical capacity: the age of childhood (when the person does not yet

[4] Bulai, *Criminal Law Handbook*, All Publishing House, Bucharest, 1997 p. 151.

have the ability to understand and judge at the level of mature people), the age of adolescence (when the person, even though he/she acquires the psycho - physical ability to understand the significance of the committed acts and to direct its actions, does not show sufficient thought and experience), the age of maturity and old age. In relation to the stages shown there is no capacity for criminal responsibility at the age of childhood (under 14 years, according to Romanian Penal Code); other legislation also provides for other lower or higher ages.

The global trend is to continuously reduce the age of criminal responsibility of minors taking into account the complexity of modern life when minors can understand the antisocial meaning of behaviour more easily. According to our criminal law, the minor who is over 14 years old to 16 years of age is, in principle, criminally liable, provided he has committed the act with judgment. The minor of this age is presumed (relatively) not to have such a bio-psychic development as to be able to respond criminally. Unless there is evidence that this minor has acted with judgment, he will be treated like the one under 14years. The period of 14-16 years is therefore an intermediate area, between the age when the juvenile is not criminally liable and the age when the criminal liability is full. After this age, the juvenile has the full capacity (16-18 years) of responsibility, just like any adult, but will apply it in a system of sanctions specific to the minority, considering that their bio-physical development is still in training.

In the case of the minor who has not reached the age of 14 as well as the minor who committed the indiscriminate act, although aged 14-16, only educational measures can be taken.

The central problem of the offender's sanctioning system is that of the age at which criminal responsibility begins. Discussions in doctrine bear on the lower limit of the age at which a minor would be considered to have the psycho-physical capacity to understand the meaning of his deeds and to direct his actions in relation to that understanding. The lowest limit of the minor's responsibility depends on the social and human realities of each state, on the particularities of the development of each nation. In all cases, it is the limit of the criminal responsibility of the mentally normal and physically developed minor and not the cases of abnormalities or illnesses that may affect the normal state.

III. *In the previous legislation it was admitted that the juvenile's liability begins from the age of 7 years in roman law, from 12 years in barbaric law, from 7 years in canon law; modern legislation provides for a lower age limit of 13, 14, 15 or 16 years.*

The Stirbey Penal Code of 1850 and the Criminal Code of 1864 provided for a minimum of eight years, and minors between 8 and 15 years of age only responded if they committed the act with judgment.

The 1936 Criminal Code provided for a minimum age of 12 years, and between 12 and 15 years of age, the minor responded if he committed the act of judgment.

As regards the upper limit of age to which the minor, although criminally liable, is subjected to a different treatment of the adult offender, this coincides with the increase. In the regulation of the criminal liability of minors, it is necessary to distinguish between minors who have criminal capacity and as such are not criminally responsible for the acts they would have committed. It is of course the criminal capacity of the mentally and physically developed normal minors, that is, the minor whose psycho-physical development has reached that stage which enables him to understand the significance of the committed deeds and to consciously conduct his activity. Only in these circumstances the juvenile becomes receptive to the general and special prevention of criminal law and therefore has the capacity to be a subject of criminal law.

The second general condition for the existence of criminal liability of the active subject is the responsibility that means the psycho-physical condition of the person to realize his deeds, their social resonance, as well as being able to determine and be fully aware of their will in relation to these facts[5]. Criminal responsibility is the essential condition for the active subject of the act described in the criminality rule to be held criminally liable. This is a normal state of every person, each individual being presumed to have the ability to understand and direct his actions; therefore, the criminal law does not define what is meant by responsibility. Instead, criminal law provides for irresponsibility provisions; as an abnormal state, irresponsibility being a cause of impunity, implicitly removes the possibility that a person is an active subject of the offense.

Irresponsible individuals remain themselves active subjects of the facts described by criminal law, so they can be submitted to the security measures provided by law if they present a state of danger that must be removed to prevent new anti-social manifestations. Persons who have criminal responsibility (criminal capacity) are called subjected to criminal law and are susceptible to punishments if they are found to have committed the offense of guilt; they may also be subjected to safety measures if they are found to be in danger. Persons who have no criminal responsibility (criminal capacity) are called invalid subjects of criminal law and can only be subjected to preventive (safety) measures if they are in a state of danger. Criminal responsibility is not confused with criminal liability, which is a form of legal liability, expressing the idea that the offender has the obligation to enforce the sanctions provided by the law; this obligation is an aspect of legal conflict relations.

Criminal liability is therefore the consequence of committing a crime, and criminal responsibility is a premise of the offense, because there is no guilt

[5] Constantin Mitrache, Cristian Mitrache, *op.cit.* p.149

without criminal responsibility. Criminal responsibility is a psychological category, while legal liability is a legal category[6].

In the criminal doctrine it was observed[7] that the term of responsibility has in the criminal law two meanings; it is often used in the sense of legal responsibility which means the legal obligation to bear the consequences of breaching criminal law; another meaning is the responsibility of the individual, that is, the psycho-physical capacity. But the term of responsibility, even if the sense of legal liability raises the question of the nature of legal liability over which there has been long discussions (the classical criminal school claimed that there was only a moral responsibility, the positivist school attributed responsibility to a social basis (social responsibility) or a legal basis (legal responsibility). Therefore, it was proposed that instead of the notion of accountability to use the incidence of criminal law. The criminal law applies whenever the conditions set by it are made, in this case we say that the criminal law The idea of criminal responsibility with the consequence of excluding the possibility of applying sanctions in the sense of psycho-physical capacity becomes unacceptable to the extension of the field of criminal law in which there are both repressive measures and preventive measures (safety measures). This last measures apply even to people who do not have the psycho-physical capacity to respond to their deeds, that is to say, irresponsible persons. Consequently, the application of criminal law sanctions can no longer be linked to the idea of responsibility, but to the incidence of criminal law[8]. It is right to point out that in order to justify the application of a criminal sanction to a particular person, there is no need to resort to the concept of liability or criminal liability enough to claim that the actual deed fulfils the conditions required by the rule of criminality and be able to reach the sanction. The need for the active subject to be a responsible person is a premise of the guilty condition of the subjective side of the criminality; the lack of the psycho-physical capacity (and responsibility) and, implicitly, the guilt will not prevent the application of a preventive measure to the one who has committed an act according to the criminal law if the state of the perpetrator is dangerous, because this case does not require the guilt. This shows that the notion of criminal responsibility in the sense of psychic-physical capacity can only be used in a limited way, in connection with the facts which imply the existence of guilt, and not with regard to the hypotheses when the deed attracts a penalty of criminal law even without being guilty. Similarly, the concept of criminal liability can be used only in relation to an active subject acting with guilt and with the obligation to bear the consequences of his deed and in relation to an active subject of a criminal law act which can be

[6] Dongoroz, *Treaty*, Romanian Academy Publishing House, 1969 pp. 380-386.
[7] *Ibidem,* p. 38.
[8] *Ibidem*, p. 532.

susceptible of a safety measure even if he did not commit the guilty act so far as it presents a state of danger.

A last general condition for the existence of an active subject of incrimination is that it has the freedom to act according to its will, that is, not to be subjected to physical or moral constraint. It is not sufficient, therefore, that the active subject has, in general, the psycho-physical capacity to understand and to self-define. In fact, the subject must belong to it, mirror the will of the subject and this is possible only if the subject is obliged to act differently than he would have wanted. If the perpetrator has acted under the physical or moral constraint, the deed is no longer imputable and therefore no longer a crime[9].

At the same time, the Romanian criminal law allows the legal person (moral person) to be an active subject of incrimination (for example, the Anglo American, French, etc.).

IV. *Regarding the legal person, theoretically two traditional theses are confronted, the thesis of the legal person's fiction and the thesis of the reality of the legal person.*

According to the fiction thesis, the legal person does not have one's own, but is a creation of the law; as a result, the legal person does not have a will, but acts according to the will of the legal person's leadership and has to answer personally for the possible offenses committed. Having no independent, individual existence, the legal person cannot be punished because it would mean striking innocent members of the company who, by hypothesis, were not consulted on what was planned by the managers of the legal person. On the other hand, punishment would be ineffective because the legal person cannot feel the effects of a sanction, and some punishments cannot even be applied to a legal person (for example, deprivation of liberty). As a result, the legal person cannot be an active subject of incrimination (*societa delinquere non potest*).

In the thesis of the reality of the legal person it is considered that it has its own existence, self-contained and independent of the existence of its members; she can have her own will and conscience and she can manifest herself by committing offenses that violate criminal law. If some acts could not be committed by legal entities (e.g., offenses against the person), there are other facts that might be committed by them (for example, fraudulent bankruptcy, unfair competition, counterfeiting of factory brands, foreign currency offenses, tax, etc.) as acts of will accepted by all members of the legal person.

The current Romanian criminal law adopted this thesis, placing itself in the position that the legal person can be an active subject of incrimination. The law in force has adopted the system of previous criminal law (which only allows for the possibility of imposing fines plus complementary punishments) permitting

[9] Constantin Mitrache, Cristian Mitrache, *op.cit.* p. 150.

individuals who have carried out illicit activities (directors, administrators, etc.) to respond personally for the act committed independently of the sanctions imposed on the legal person.

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STUDY ON THE MILITARY FRAMEWORK STATUS REPORTED TO PUBLIC FUNCTION

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Abstract

The civil servant is the person appointed, under the terms of the law, to a public office (art.2, paragraph (2) of Law No. 188/1999, with subsequent amendments and completions).

Is the military civil servant?

In the absence of an explicit legal text, practitioners and jurisprudence of courts did not give a united answer to this question.

The study aimed to find a solution based on a rigorous analysis of the military function and status of military cadres, related to the public function and status of civil servants.

The main conclusion of the research is that the military function is a public function and the military cadres are public servants with autonomous status, independent of the civil servants, established by Law no. 188/1999. Otherwise, officers, military officers and non-commissioned officers, although occupying a military public function and serving the nation, are not civil servants within the meaning of the common norm in the matter.

The autonomous character of the military cadres is given mainly by the constitutional consecration of the latter, distinct from that of the civil servants. However, the study also brings arguments of a legal nature that highlight the specificity and autonomy of the status of military cadres.

The theoretical and practical consequences, highlighted, are multiple and important: the competence to solve the cases concerning the status of military cadres, in all aspects, belongs to the courts of contentious, according to the specific procedure provided by Law no. 554/2004, the incompatibility regime is strictly stipulated by the status of military cadres, etc.

The lege ferenda proposals are designed to clarify the status of military cadres and military function in terms of legislation in line with the study's findings.

Keywords: *civil service, civil servants, civil servants with special status, military cadres, statute.*

1. Purpose of the study

The analysis of the status of military cadres, in relation to the nature and legal characteristics of the civil service, was generated by the non-uniform solutions of the jurisprudence of the courts and by the wrong interpretations of the law made by some specialists in the field.

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Simplifying, the issue in question is reduced to finding the solution to the following question: military cadres are or not civil servants[2] of special status, as defined by the provisions of art. 5 of the Law no. 188/1999 on the status of civil servants, as subsequently amended and supplemented.

Legislation in the field is not clear enough, the doctrine has not yet given a concrete answer to this issue and the practice, as I have pointed out, is unanimous.

The answer to this question has, as we shall see, important practical legal consequences.

As a consequence, we intend to find a solution based on a rigorous analysis of the military function and status of military cadres, in relation to the nature and characteristics of the civil service, to the particularities of the special statutes that may be enjoyed by civil servants operates in certain public services provided by law.

2. Preliminary considerations regarding the public office

2.1. The public function is constitutionally enshrined

If we analyze the constitutions of all the member states of the European Union, we find that in all the principles of the public function, the number of articles, the technique or the content of their regulation differ[3].

The constitutional bases of the public office in Romania are mainly found in the provisions of art.16 par. (3) and art. 73 paragraph (3) letter j) of the revised Constitution of Romania.

Thus, the provisions of art. Article 16 (3) of the Constitution enshrines the principle according to which "public and civilian or military functions and dignities may be occupied, under the law, by persons having Romanian citizenship and domicile in the country".

Two comments we have to make to this text:

a) The legislator uses terminology - public functions and dignities - in order to determine as precisely as possible the scope of the principle. The dignitary quality is something other than a public function, by way of occupation, attributions and responsibilities, termination, etc. The dignitaries are not mere civil servants, public dignity is, by and large, a category of constitutional law, public functions and dignities being in an indisputable connection without being confused[4].

b) The legislator classifies, implicitly, the public civil and military functions, thus constituting the constitutional function and military public dignity.

[2] George Gruia, *Politics and Public Administration*, Sitech Publishing House, 2018, pp. 214.

[3] Dana Apostol Tofan, *Drept administrativ*, vol.1, ed. 2, Editura C.H. Beck, Bucureşti, 2008, p. 321.

[4] Dana Apostol Tofan, *op.cit.* p. 323; Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României, revizuită-comentarii şi explicații* , Editura All Beck, colecția Legi comentate, Bucureşti, 2004, p. 20-22.

The provisions of art. 73 paragraph (3) let. j) of the Constitution state that "by an organic law the regulation of the civil servants is regulated". These provisions, referred to in p) of the same constitutional article, according to which the "general scheme on labor relations, trade unions, employers' and social protection" are governed by organic law, lead to the conclusion that the legislator sought to dedicate a statutory regime for civil servants and a contractual arrangement for the rest of the employees[5].

2.2. Law no. 188/1999 on the Statute of civil servants

Regulatory matter.

The organic law provided by the Constitution to regulate the status of civil servants is Law no. 188/1999, subsequently amended and supplemented.

According to the provisions of art. 1 par. (1) of the Act, the Statute regulates the general regime of legal relations between civil servants and the state or the local public administration, through the administrative authorities, autonomous or through public authorities and institutions of the central and local public administration, appointed according to the law, service reports.

A more comprehensive definition of the subject matter of the law is given by the doctrine[6],, according to which it is intended to determine the legal status of the civil service, the organization of the public function and the relations between the civil servants and the public authorities and public institutions of the central and local public administration

Getting

We recall from the text of the law the important notions for identifying the legal aspects that define the public function and the status of civil servants.

Public function - represents the whole of the duties and responsibilities established by the law in order to achieve the prerogatives of public power by the central public administration, the local public administration and the autonomous administrative authorities (article 2 paragraph (1) of the Statute).

Civil servant - is the person appointed, under the law, to a public office (article 2 paragraph (2) of the Statute). The quality of civil servant stems from the appointment act, which is an act of authority[7].

Based on the appointment act, a service report is generated. We quote the provisions of art. 4 paragraph (1) of the Statute: "The service relations are born and exercised on the basis of the administrative act of appointment, issued under the law".

[5] Dana Apostol Tofan, *op.cit.* p. 323.

[6] Verginia Vedinaş, *Legea nr. 188/1999 privind Statutul funcţionarilor publici cu modificările ulterioare, republicată, comentată,* ed. a III-a, revăzută şi adăugită, Editura Lumina Lex, Bucureşti, 2004, p. 10.

[7] Dana Apostol Tofan, *op.cit.* p. 324.

Exercise of service relationships is carried out indefinitely (article 4 (2) of the Statute).

From the above, the following features of the public function result:

a) the rights and obligations that form the content of the public office are exercised under a public power regime;

b) the public office is a legally regulated situation in the sense that the rights and obligations that make up its content are determined by law, the civil servants' duties are general, in the interest of the service;

c) the public function represents a complex of rights and obligations conferred on its holder in order to achieve the competences of the public administration body to which he belongs;

d) the public function is of a continuous nature, meaning that the existence of the rights and obligations that make up its content lasts as long as the competence of the public administration body that the civil servant performs without interruption;

e) the public office has a binding character, the rights and obligations that make up its content are objectively determined by law, can not be negotiated, it is not a faculty or a possibility. The civil servant is obliged to act on request or ex officio, according to his / her powers[8].

Legal considerations on special statutes

Corroborating the provisions of art. 5 with those of art. 7 of the Law no. 188/1999, as subsequently amended and supplemented, it results that the legislator implicitly recognizes that there are other civil servants other than those subject to the regulations of the Statute[9].

Thus, public servants working in the following public services can benefit from special statutes:

a) the specialized structures of the Romanian Parliament;

b) the specialized structures of the Presidential Administration;

c) the specialized structures of the Legislative Council;

d) diplomatic and consular services;

e) customs authority;

f) police and other structures of the Ministry of Internal Affairs;

g) other public services established by law (article 5 paragraph (1) of the Statute).

The legal provisions on special statutes highlight the following points of interest for our analysis:

[8] Constantin Zanfir, *Funcția publică- Suport de curs*, Editura Fundația România de Mâine, Bucureşti, 2018, p. 29-30.

[9] Verginia Vedinaş, *Considerații referitoare la raportul dintre Statutul funcționarilor publici şi statutele special aplicabile unor categorii de funcționari publici*, Dreptul nr. 4/2007, p. 149 şi urm.

a) special status may be granted only to civil servants operating in public services explicitly established by law;

b) special statutes may derogate from the general framework provided by Law no. 188/1999, only as regards:

- the regulation of specific rights, duties and incompatibilities other than those stipulated in the Civil Servants' Statute;
- establishing other specific functions.

There is also **an exception** provided by art. 5 par. (3) of the Statute, according to which the special statutes applicable to diplomatic and consular services, as well as police officers and other structures of the Ministry of Internal Affairs may regulate: rights, duties and incompatibilities; specific public functions and career requirements.

c) The provisions of Law no. 188/1999 shall apply to all civil servants, including those who have their own statutes, approved by special laws, unless otherwise provided by these laws.

The State of the Civil Servants expressly provides the categories of staff to which it is not applicable:

a) contract staff employed in their own departments of the public authorities and institutions which carry out secretarial, administrative, protocol, household, maintenance and repairs and security activities, and other personnel not exercising public powers. Those in office do not have the status of civil servants and are subject to labor law;

b) Employed personnel, based on personal confidence, at the office of the dignitary;

c) the body of magistrates;

d) teachers;

e) persons appointed or elected in positions of public dignity.

2.3. Conclusions on the public function and status of civil servants.

- The Constitution enshrines the uniqueness of the status of civil servants;
- Law no.188/1999 on the Civil Servants' Statute, as subsequently amended and supplemented, constitutes the general norm in the matter, represents the common law for all categories of civil servants, including for civil servants with special status;
- The special statutes have their source in the provisions of art. 5 of the Law no. 188/1999;
- Special statutes may derogate from the general framework only within the limits explicitly set by it;
- The body of civil servants includes “all civil servants within the autonomous administrative authorities and within the public authorities

and institutions in the central and local public administration" (Article 2 paragraph (5) of the Statute), including civil servants with special status;

- The civil service and civil servants management is carried out in a unitary manner by the National Agency of Civil Servants.

3. Military function - public function

3.1. Arguments of a constitutional nature

I have already pointed out that the provisions of Art. 16 par. (3) of the revised Constitution of Romania, classifies public functions and dignities in civil and military matters. We quote: "Public and civilian or military functions and dignities can be occupied, under the law, by persons who have Romanian citizenship and domicile in the country." It is thus established that the military public service has constitutional bases.

The status of those who occupy positions and military public dignities is regulated by organic law, according to the provisions of art. 118 par. (2) of the revised Constitution of Romania: "the structure of the national defense system, the defense economy and territory, and the status of military cadres shall be established by organic law."

As a result, on the basis of this constitutional basis, it was adopted by Law no. 80/1995, Statute of military cadres, which was subsequently amended and completed.

3.2. Legal considerations regarding the military function

The status of military cadres highlights the following features of the military function:

a) **The rights and obligations that form the content of the military function are exercised under a public power regime**.

Thus, according to the provisions of art. 1 par. (2) of the Statute, military cadres are at the service of the nation.

In the exercise of their duties, according to the law and the military regulations, the officers, the military masters and the non-commissioned officers are invested with the exercise of the public authority, enjoying protection under the criminal law (Article 6 paragraph (1) of the Statute).

The generals and the amirals have the rank of dignitaries of the Romanian state in the exercise of their functions (Article 6 paragraph (2) of the Statute).

Military cadres can be:

- In activity, when occupying a military function. There may be officers, military foremen and non-commissioned officers in the activity who have Romanian citizenship and domicile in the country. Thus, the provisions of Art. 16 paragraph (3) of the Romanian Constitution, revised.

- In reserve, when they do not occupy a military function but meet the conditions stipulated by law to be called to perform the military service.
- Retiring when, under the law, they can no longer be called to serve the military service.

b) **The military function is strictly regulated by the law**.

The rights, obligations, incompatibilities of military cadres are established by law in the interest of the public service - defense, public order and national security.

Thus, according to art. 5 of the Statute, "Officers, military masters and non-commissioned officers are professional soldiers. The profession of officer, military master or non-commissioner is an activity designed to ensure the functioning, perfection and leadership of the military body in time of peace and war."

Documents for granting officers, foremen and non-commissioned officers, as well as advancement to the next degree, are administrative acts: decree of the President of Romania, Order of the Minister of National Defense, Order of the Chief of Defense Staff or commanders appointed by the Minister of National Defense, according to the competencies provided by the law.

Military cadres are appointed to positions provided in the states of organization under the conditions established by law. The orders for the appointment, modification, and termination of military service relations are administrative acts. Thus, according to article 78 of the Statute appointment and dismissal in military units and the secondment of military personnel shall be made in peacetime and wartime according to the competences established by order of the Minister of National Defense.

Empowerment or termination of military personnel's mandate from the Ministry of National Defense shall be carried out according to the competencies established by order of the Minister of National Defense.

c) **Military functions represent a complex of rights and obligations conferred on the holders in order to fulfill the tasks of the Ministry of National Defense or of the other institutions in the defense system, public order and national security**.

We quote in this respect the provisions of art. 7 of the Statute "The duties, rights and freedoms of military personnel are those established by the Romanian Constitution, by the laws of the country and by the present statute. The profession of officer, military master or non-commissioned officer in the course of activity is subject to additional duties and prohibition or restriction of the exercise of certain rights and freedoms, according to the law ".

d) **The military function is continuous**

The conclusion can only be one, the military function has all the attributes of the civil service. Although the law does not explicitly state it, the military function is a public function - a military public function.

As a consequence, military cadres in service, occupying a military public function, are civil servants, within the meaning of the law.

Having a specific status, different from that of civil servants, established by organic law, we can conclude that officers, military masters and non-commissioned officers are civil servants of special status, according to the provisions of art. 5 of the Law no. 188/1999?.

In my opinion, the answer can only be negative for the arguments that we will present below.

d. **In-service military staff have an autonomous status**

The provisions of art. 73 par. (3) let. j) related to those of art. 118 par. (2) of the revised Constitution of Romania, unquestionably lead to the conclusion that the legislator wanted to establish constitutionally two autonomous statutes regulated by organic laws - the statute of civil servants and the status of military cadres.

Thus, it is obvious that Law no. 80/1995, organic law, does not fall under the provisions of art. 5 of the Civil Servants' Statute, provisions which allow the body of civil servants to be broken into several "sub-bodies" including civil servants with special status[10].

Military cadres, having constitutional status, are not part of such a "subgroup". The legal source of the Status of Military Staff is in the Romanian Constitution and not in the provisions of Law no. 188/1999, which gives it an autonomous character. The military cadres are Romanian citizens who have been granted the rank of officer, military master or non-commissioned officer under the law and who exercise a public office or dignity. However, officers, military foremen and non-commissioned officers are not civil servants within the meaning of the provisions of Law no.188/1999, they are ... military units with their own status.

The inherent similarities between the civil public function and the military public function do not, however, lead to a common status: a public-military civil servant. Constitutionally and legally, as we have seen, two distinct, autonomous statutes have been consecrated. Military staff perform military public functions and civil servants and civil servants with special status perform civil civil functions, the two categories of public functions having different, specific contents.

Concluding, officers, military foremen and non-commissioned officers, although they occupy military public positions and are at the service of the nation, are not civil servants within the meaning of the common rule.

This has important legal consequences.

a) Interpretation and application of the Military Staff Statute;

The application of Law 80/1995 requires, in many situations, to resort to systemic interpretation in order to determine the scope of a legal provision.

[10] Valentin Prisăcaru, *Tratat de drept administrativ român. Partea generală*, Ed. a III-a revăzută şi adaugită, Editura Lumina Lex, Bucureşti, 2002, p. 266.

The autonomous character of the Military Staff Statute obliges the interpreter to consider the following:

- Law no. 80/1995 is an organic law within the legislative system, which has a constitutional consecration. In the hierarchy of the springs of law in the matter, it is on the same normative level as the Civil Servants' Statute (Law 188/1999);
- The status of military personnel is the general norm in the matter, as the Staff Regulations are the common law for the special statutes that have their source in the provisions of art. 5 of the Law no. 188/1999. If Law no. 80/1995 has a regulatory loophole, the basic principle is the general special exception, namely the special general non-derivative. But in this situation the common law in this field is the labor law as well as the civil, administrative or criminal common law, as the case may be, insofar as they do not contravene the legislation of the military civil service, the status of the military cadres being in this case the special law .

b) The jurisdiction of the administrative litigation courts to hear the cases concerning the military service report in all respects.

In the absence of express provisions of the Military Staff Statute, a non-unitary practice of the courts has been created, with the object of having the content of service relationships of military staff (rights, material liability, disciplinary etc) being judged either by administrative (overwhelming) and by common law courts.

Taking into account the characteristics of the military public function and of the Military Staff Statute, corroborated with the provisions of art. 1 of the Law no. 554/2004 of the administrative litigation, we consider that all the cases dealing with the service relations of the military cadres, in all aspects, are the competence of the administrative courts.

c) The conflict of interests and the regime of incompatibilities provided by the Statute of the Military Staff are strictly interpreted.

To this conclusion, the special law - Status of military cadres, derogates from the common framework on conflict of interest and the regime of incompatibilities, namely Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and business environment, prevention and sanctioning of corruption.

In addition to prohibiting the exercise of certain rights and freedoms (article 28 of the Statute) and the restriction of the exercise of others (Article 29 of the Statute), the provisions of Art. 30 law conflicts of interests and incompatibilities specific to military cadres: “Officers, military masters and non-commissioned officers are obliged not to carry out activities that are contrary to the dignity, prestige and norms of behavior resulting from their military status.

Military cadres in their activity are forbidden:

a) perform functions other than those in which they are assigned, except for cumulation provided for by law, under the conditions laid down by order of the Minister of National Defense;

b) be uniquely associated or directly participate in the management or management of organizations or companies other than those appointed on the boards of directors of autonomous regies and commercial companies subordinated to or in connection with the Defense Industry ".

Other specific provisions in this area are as follows:

- When appointing in office, the principle according to which officers, military foremen and non-commissioned officers should not be subordinated to others with lower grades shall be observed. Exceptions to this principle can be made by military cadres who do not have specialized higher education and who are subordinated to those who have such training, as well as the military cadres belonging to the Ministry of Interior, the Romanian Intelligence Service and the Foreign Intelligence Service (Article 74 paragraph (2)).
- Military cadres are appointed in positions provided in organizational states equal or higher than those they have. Nomination powers are established by order of the Minister of National Defense. (article 75).
- The military staff of the Ministry of National Defense can not be appointed to positions in the organizing states with lower degrees than those they have (Article 751 paragraph (2)).

As a result of the above, we appreciate that the general regime of incompatibilities provided by Law no. 161/2003 does not apply to military personnel - the general rule does not derogate from the special rule (generalia specialibus non derogant).

We consider, however, that the application of the provisions of the Criminal Code may be applied in the matter. We take into consideration the provisions of art. 175 Cp, according to which military cadres, within the meaning of criminal law, are civil servants.

In this context, we believe that a critical reassessment of the incidence of legislation on integrity and the exercise of public functions and dignity over the military civil service and the competencies of the National Integrity Agency to investigate military cadres is necessary.

Public policies in the sphere of defense, national security and public order, including anti-corruption, should make policy makers more accountable[11], taking into account the specificity and autonomy of the military public function and the status of military cadres. In this respect, we agree with the specialists who propose

[11] For the notion, characteristics and content of public policies,George Gruia, *Politici publice,* Editura Sitech, Craiova, 2014.

the delimitation with more competence of the attributions and structures invested with tasks, in the field of fighting corruption, at the level of institutions in the field of defense, security and public order[12].

Proposals de ferenda

- Completion of the Status of Military Personnel with provisions to show its autonomous character.
- Completion of Law no. 80/1995 with a new article as follows: "the cases concerning the service report of the military cadre are within the jurisdiction of the administrative courts.

References

Legislation

- The Romanian Constitution, revised.
- Law no. 188/1999 on the Civil Servants' Statute, as amended and supplemented.
- Law no. 80/1995 on the Status of Military Staff, as amended and supplemented.
- Law no. 161/2003 on certain measures for ensuring transparency in the exercise public dignities, public functions and the business environment, preventing and sanctioning corruption.

Doctrine

1. Dana Apostol Tofan, *Drept administrativ*, vol. 1, ed. 2, Editura C.H. Beck, Bucureşti, 2008.
2. Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituţia României, revizuită-comentarii şi explicaţii*, Editura All Beck, colecţia Legi comentate, Bucureşti, 2004.
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6. Verginia Vedinaş, *Consideraţii referitoare la raportul dintre Statutul funcţionarilor publici şi statutele special aplicabile unor categorii de funcţionari publici*, Dreptul nr. 4/2007.
7. Constantin Zanfir, *Funcţia publică - Suport de curs*, Editura Fundaţia România de Mâine, Bucureşti, 2018.

[12] George Gruia, *Politici publice,* Editura Sitech, Craiova, 2014, p. 151 şi urm.

Consideratins on Submissions Admissiblity at European Court of Human Rights

Mădălina VIZITEU[1]

Abstract

One of the central measures of the Council of Europe is to promote and secure the fundamental human rights and freedoms. In the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, the aim of the Council of Europe is proclaimed to achieve a closer union among its members and that one way of achieving this goal is to defend and develop human rights and fundamental freedoms.

Apart from complying with the two criteria by the six-month deadline and the exhaustion of remedies, the Court first examines:

a) Admissibility criteria relating to the jurisdiction of the Court:

a.1. (ratione personae) and considers that the alleged violation has been committed by a subcontractor or is imputable to him in one way or another[2];

a.2. after the place of the infringement (ratione loci) which requires the alleged infringement to take place in a place under the jurisdiction of the respondent State, or effectively controlled by it[3];

a.3. the criterion of non-retroactivity of the Treaties (ratione temporis), a principle according to which no Contracting Party can be held liable for an act or fact that has occurred prior to the entry into force of the Convention[4];

a.4. the criterion of material jurisdiction of the Court (ratione materiae) according to which the right invoked by the petitioner must be part of those protected by the Convention. Article 35 par. 3 lit. of the Convention provides that any individual claim that is incompatible with the provisions of the Convention or the Protocols is inadmissible;

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[2] ECHR, Practical Guide to Admissibility Conditions, *op.cit.* p. 43.
[3] *Idem*, p. 47.
[4] *Idem*, p. 49.

b) the request is real and serious;
c) be based on a right which may be based in domestic law.

The European Court of Human Rights, through the judgments handed down, circumscribed the civil character of the disputes, defined according to art. 6 of the Convention, which can be submitted to it and set a series of exclusions taking into account the subject matter of the complaint. Thus the following were excluded:

- tax claims for which it considered it to be a matter for the public authority;
- the Presidential Ordinance on customs matters;
- on immigration, entry, exit, expulsion of foreigners, political asylum;
- disputes over civil servants;
- political rights (to choose, to be elected, the right to retire as a former Member)[5].

In criminal matters, the Court has defined the concept of criminal charge, which has a separate meaning distinct from that of the national system of law classifications[6].

Article 6 of the European Convention on Human Rights has the marginal title "Right to a fair trial" and has the following content

"1. Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will decide either on the violation of his civil rights and obligations or on the merits of any accusations in criminal matters against him. The judgment must be publicly pronounced but access to the meeting room may be forbidden to the press and the public throughout the trial or part thereof in the interests of morality, public order or national security in a democratic society, where the interests of minors or the protection of the private life of the parties to the proceedings so require or to the extent strictly necessary by the court where, in special circumstances, advertising would be likely to prejudice the interests of justice.

2. Any person charged with an offense is presumed innocent until his guilt is legally established.

3. Everyone accused has, in particular, the right:

a) to be informed, in the shortest possible time, in a language which he understands and in detail, of the nature and cause of the charge against him;
b) have the time and facilities to prepare for his defense;
c) defend himself or be assisted by a defendant of his choice and, if he does not have the means to remunerate a defense counsel, be assisted free of charge by a lawyer, when the interests of justice so require;

[5] *Idem*, p. 61-962.
[6] ECHR, Practical Guide to Admissibility Conditions, *op.cit.*

d) hear or request hearing witnesses and obtain citation and hearing of witnesses under the same conditions as witnesses of the accusation;
e) be assisted free of charge by an interpreter if he does not understand or speak the language used at the hearing. "

The notion or concept of "criminal" in the jurisprudence of the European Court of Human Rights has a broader meaning than Romanian domestic law. The "accusation", a concept used by the Convention[7], must be understood, according to the case-law of the Court, as official notification from the competent authority that there is a suspicion of a criminal offense.

In turn, the concept of criminal deed "is also wider than the offense. Qualification as a criminal act depends on the existence of significant repercussions on the situation of the suspect."[8] In the case of Brusco v. France, points 46-50, the Court ruled that a person detained by the police and obliged to take an oath before being heard as a witness , was the subject of a "criminal charge and benefited from the right to silence.[9]

As regards assessing the assessment of the criminal aspect of the allegation, the European Court of Human Rights ruled that certain criteria should be met as follows:

1. the inclusion in national law of the Court of Appeal in its analysis of the criminalization of the offense in the domestic law of the State concerned, but is not limited to such a finding, and may take into account elements beyond that examination;

2. the nature of the offense. In Jussila v. Finland, paragraph 38, the European Court of Human Rights ruled as follows:

"38. The second criterion, which refers to the nature of the offense, is the most important. The Court notes that, like those imposed in the Janosevic and Bendenoun cases, the tax increases applied in the present case can be considered as based on the general legal provisions applicable to all taxpayers. It is not convinced by the Government's argument that VAT applies only to a particular group of persons with special status, since, in the present case, as in the cases mentioned above, the applicant was subject to that tax as a taxpayer. The fact that the person concerned has chosen to pursue his professional activity in the VAT system does not change his situation in that regard. Additionally, as the Government has admitted, tax increases did not seek redress for material damage but were principally aimed at punishing the repetition of complained actions. It can therefore be concluded that the surcharges imposed were based on a standard that pursues both a preventive and a repressive one. That consideration alone is sufficient to give a criminal offense to the offense. The lack of the contested

[7] v. Attachment, Convention, Art. 6.
[8] ECHR, *Practical Guide to Admissibility Conditions*, *op.cit.* p. 63.
[9] *Idem,* p. 63. See also Bandaletov v. Ukraine.

penalty distinguishes the present case from the Janosevic and Bendenoun cases in relation to the third Engel criterion, but does not have the effect of excluding it from the scope of Article 6. This provision therefore applies, as regards its criminal aspect, without prejudice to the modest amount of the amount necessary to increase the tax. "[10]

For examining this criterion, the following factors were identified in the critique of the offense as criminal:

- the repressive or dissuasive nature of the legal norm;
- the general nature of the rule, whether it applies to a restricted or general-purpose group;
- if the procedure is initiated by a public authority with legal powers of execution,
- if a conviction depends on the finding of guilt;
- the manner in which they were classified in other States, members of the Council of Europe, comparable procedures.[11]

In Benham v. The United Kingdom, at paragraph 56, the following references are set out as follows:

"56. The case-law of the Court states that three factors must be taken into account in order to determine whether a person has been 'accused' of an offense within the meaning of Article 6 (Article 6). These are the legal classification of the procedure in national law, the nature of the proceedings and the nature and severity of the penalty (see Ravnsborg v. Sweden, 23 March 1994, Series A no 283-B).

As regards the first of these criteria, the Court agrees with the Government that, in essence, the domestic case-law shows that under English law, the proceedings in question are civil and not criminal. Relative value is, however, only a starting point (Weber v. Switzerland, May 22, 1990, Series A No. 177, page 17, paragraph 31).

The second criterion, with a larger weight, is the nature of the procedure. In that regard, the Court notes that the legislation on the obligation to pay the survey and the non-payment procedure generally applied to all citizens and that the case was initiated by a public authority by virtue of its lawful enforcement powers. It also contained some repressive elements. Thus, magistrates could order the detention only if they found a deliberate refusal to pay taxes or negligent negligence.

It should finally be remembered that the applicant was punishable by a severe punishment sufficiently rigorous - three month's imprisonment -. And, in fact, a thirty day detention was ordered against him (c. Bendenoun stopped France from February 24, 1994, Series A, No. 284, page 20, paragraph 47).

[10] Jussila v. Finland, paragraph 38.
[11] *Idem*, p. 64.

In the light of those factors, the Court concludes that Mr Benham has been 'accused' of an offense within the meaning of Article 6 (1) and (3) (Article 6-1, Article 6-3). These two paragraphs of Article 6 (Article 6-1, Article 6-3) shall apply accordingly. "[12]

3. the third criterion for assessing the criminal nature of the assessment of the criminal character envisaged by art. 6 of the Convention is that of the severity of the punishment of the person concerned.[13]

In Campell and Fell v. The United Kingdom of Great Britain (point 72), it was decided as follows:

"In the case of St. Germain, and then before the organ of the Convention, there have been many discussions about the nature of the remission and its loss. In English legislation, the reduction is discretionary (see paragraph 29 above). According to the case law, this is legally a privilege, rather than a right; However, in St Germain, the Court of Appeal noted that "if the remission could have taken the form of granting a privilege, its losses are in fact a punishment or a fall that affects the person concerned. (...) In the case of Engel and others, the Court has held that a deprivation of liberty which can be punished by law is generally a matter of "criminal matters" (ibid., Par. Indeed, even after the decision of the visitors' committee, the initial custodial sentence has left the legal basis for detention and nothing has been added (see paragraph 29 above). However, the loss of remission on which Mr Campbell could have suffered and the loss actually suffered had serious consequences during his imprisonment that he must be regarded as "criminal" within the meaning of the Convention. By prolonging the detention beyond what happened without her, the punishment was similar to deprivation of liberty, even though it was not legally; the object and purpose of the Convention require that the burden of such a severe measure be guaranteed by Article 6 (Article 6). The subsequent restitution of a large number of days to the applicant (see paragraph 16 above) does not alter this conclusion. "[14]

In Demicoli v. Malta, the European Court of Human Rights ruled:

"34. The third criterion is the severity of punishment. In that case, the Chamber applied to the applicant a fine of 250 pounds, which was not yet paid or assessed, but was imprisoned for a maximum of 60 days, with a fine of not more than 500 Maltese lira or both . The question was therefore sufficiently important to lead to the criminal classification for the purposes of the Convention of the alleged imputability to the person concerned (see the same judgment, ibid., Paragraph 18, paragraph 34). "[15]

[12] Benham v. The United Kingdom, at paragraph 56.
[13] *Idem*, p. 64.
[14] Case Campell and Fell v. The United Kingdom, point 72.
[15] The Demicoli case against Malta point 34.

The European Court of Human Rights, in application of Art. Article 6 of the Convention highlighted in its judgments a number of other criteria according to which its judges decide on the admissibility of the applications addressed to it as follows:

a) Military discipline claims, in which it ruled that they were not competent even if the sentences applied were deprived of their liberty if they were of a lengthy duration. Instead, those consisting in sending to a disciplinary unit for a period of several months fall within the scope of criminal law;

b) Penalties imposed in the disciplinary regime in prisons, depending on the nature and severity of the punishments, may be subject to trial or may be declared inadmissible. Usually, however, the penitentiary contentious does not fall within the criminal accusation but rather is investigated from a civil perspective.

c) regarding the violation of the secrecy of the investigation, the Court has distinguished itself by the quality of the person, between persons who have, in principle, the obligation to keep the investigation secret, as is the case for judges, lawyers and other persons heavily involved in the investigation experts, police officers, clerks, secretaries of the prosecutor) and the parties concerned, who do not fall within the disciplinary scope of this system.[16]

d) the measures ordered by a court to discipline the court hearing were deemed not to fall within the scope of the criminal charge of art. 6 of the Convention, because it rather resembles the exercise of the disciplinary sanction.[17]

In the case of Putz v. Austria, the Court ruled that the rules which provide for the measures that the courts can order to discipline the trial go closer to the exercise of disciplinary prerogatives than the sanctions applied for offenses (paragraph 33), but that , despite the non-criminal nature, it is necessary to check in the light of the third criterion, that of the nature and severity of the person concerned (paragraph 34);

e) The measures applied for acts of out-of-court violence against Parliament by a person who is not a member of the Parliament outside of the Parliament, depending on their nature and gravity, could be assessed by the Court in the Demicoli case against Malta as criminal, the fine applied could be changed in case of non-execution in 60 days of imprisonment (paragraph 32);

f) although in the Lutz v. Germany judgments, Schmautzer v. Austria, Malige v. France, it was decided that the sanctions on road traffic offenses, restrictions on driving licenses, penalty points, suspension or cancellation of driving license fall within the scope of the criminal to art. 6, later some aspects were tinted. Thus, in Decision 7034/07 Marius Haiducu v. Romania, the European Court of Human Rights recalled that due to the preventive, punitive and deterrent

[16] *Idem*, p. 66.
[17] *Idem*, p. 65.

nature of the sanction applied for the infringement of the road code, the guarantees provided by art. 6 in criminal matters, including the right to respect the presumption of innocence, the procedures provided for in the contesting of the minutes by which the offenders have been subject to sanctions with fine, penalty points and / or suspension of the driving license are applicable.

In the case of Albert v. Romania (application 31911/03 of 16 February 2010), the Court had to examine the complaint by Albert Almos, mayor of Sfântu Gheorghe at the time of the facts concerning the lack of fairness of the process of cancelling a contravention report a fine was imposed. The Court has examined and determined that the three criteria must be met in order to determine a criminal charge:

- the legal classification of the litigious measure in national law;
- the nature;
- the severity of the damage.

These three criteria are alternative and not cumulative for the qualification of the offense as a criminal charge. The applicant was sanctioned.

g) However, the Court has decided that a cumulative approach can also be taken if an analysis of each individual criterion does not allow a conclusion to be drawn regarding the existence of a criminal charge.

Regarding the criteria of the nature and severity of the sanction, the Court considered that although the fine was not one that could be replaced by imprisonment in the event of non-payment, however, the applicant received the maximum of each sanction with the total sum of ROL 100,000,000.

Given the large amount of the fine, the Court found that its gravity was part of the criminal matter and declared admissible;

h) The Court ruled that art. Article 6 of the Treaty does not treat as a "criminal charge" procedures only "a tax rectification or late payment penalties. These measures are reparatory and not punitive.

In the case of Mieg de Boofzheim v. France, which was the cause of the French taxpayer's application as late payment, the French Government argued that there was no criminal charge. Although it was originally decided to increase 40%, it was abandoned after filing the application to the Court. Thus, the Court ruled that the abandonment of the increase after registration with the administrative court is not such as to change the nature of the litigation filed with the court. "It is about bringing the court that gives the litigation the quasi-criminal character and not the final outcome of the procedure"

The Court considered that although the issue of sanctions for bad faith constituted an element of the remedies, the exemptions granted to the applicants by the French tax authorities constituted a qualification in good faith and were such as to deprive the applicability of Article 6 § 1 of the Convention under the aspect of criminal charge.

The Court ruled that it is under the effects of Art. 6 of the Convention:

- contraventions to road traffic rules;
- contraventions in neighborhood disputes. Thus, in the case of Nicoleta Gheorghe v. Romania, the Court held that there can be no criminal charge since at the date of the facts, 1 May 2004, following the legislative changes, the applicant's deed was penalized with a fine and the sanction of the contravention prison, already abrogated at the time of the act, or replaced by the contravention jail in case of non-execution: case analysis.

The court found that although the fine is a modest one, the case must be considered in terms of respect for human rights, also referring to Juhas Durić's case against Serbia and Finger against Bulgaria. This was the first case when the Court analyzed the incidence of art. 6 of the Convention in criminal matters, in a case of applying a sanction for contravention in the matter of public order disorder.

i) The Court has also decided on the admissibility of applications, depending on the subject of the application, that art. 6 defining the criminal charges does not apply to procedures for a tax adjustment to those relating to late payment penalties in so far as they have the sole purpose of compensating the damage to the tax authorities rather than preventing the recurrence of the offense.

In the Bendenoun v. France case[18], it was decided that there were criminal charges from those under Art. 6 of the Convention, which meet the following criteria:

- provided penalties that apply to citizens as their taxpayers;
- the increase was aimed at applying a penalty to prevent / discourage the repetition of the offense and not the reparation of the prejudice;
- application of the increase based on a general rule;
- the increase is substantial.

j) The Court, in its practice, has held that the provisions of Art. 6 of the Convention are not applicable to electoral sanctions, the dissolution of political parties, parliamentary committees of inquiry and impeachment[19] procedures aimed at the head of state;

k) The lustration procedures[20] were judged by the Court as falling within the scope of art. 6 of the Convention.

l) Expulsion and extradition procedures are, in principle, outside the scope of criminal charges. The Court noted that the ban on the territory is generally not criminal in the member states of the Council of Europe, the measures being taken in most states by an administrative authority and by their nature are special

[18] The Bendenoun case against France.
[19] Indictment.
[20] Prevent, restrict, prohibit certain functions, professions, dignities.

preventive measures taken by the police for foreigners. Decisions regarding the entry, stay and deportation of aliens concern rights or obligations of the applicant and do not refer to the substance of a criminal charge[21]. In a consistent opinion given by Judge Rozakis in the same decision[22], he considers that the measure of expulsion is not a criminal one because, although it is entering the stage of the decision on a criminal charge, it still belongs to the execution phase.

In the opposite opinion formulated by the judges Hedigan and Panțâru, it has been argued that the prohibition of presence on French territory (expulsion) is an ancillary punishment for a custodial sentence pronounced by a criminal court and therefore falls within the scope of criminal law.

The Court made a whole series of other considerations as to the existence of a charge, but the analyzes concerned the same three criteria as set out above:

- the nature of the proceedings in the national law of the opposing Member State in which the complaint is dealt with;
- the material nature of the offense;
- the type and severity of the penalty.

Article 35 of the European Convention on Human Rights establishes a number of conditions for admissibility:

- Exhaustion of internal remedies;
- Compliance within 6 months from the date of the final internal decision;
- the request is not anonymous;
- the request is not essentially the same as a request previously examined by the Court or already filed with another international investigative or regulatory body and if it does not contain new facts;
- the individual application is not incompatible with the provisions of the Convention or its Protocols, manifestly unfounded or abusive;
- the applicant had suffered material injury. Except for the condition of material injury, the cases in which an examination of the merits of the application is necessary to assess whether there has been a violation of human rights under the Convention and its Protocols and provided that it does not reject for that reason any cause not has been properly examined by a national court.

[21] Maaouia v. France case of 05.10.2000 (application No 39652/98, points 37-39)
[22] *Idem*

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Application of the Charter of Fundamental Rights of the European Union in Constitutionality Review

Maria POPESCU[1]

Abstract

Charter of Fundamental Rights is a summary document from the constitutional traditions common to the Member States, the international commitments of the state and the practice of the European Court of Justice in the field of human rights, by selecting the essential ideas and the maximum generalization, and by that the general principles of European law. In principle the EU Charter of Fundamental Rights, is applicable in the constitutionality review as it provides guarantees and develop constitutional provisions regarding fundamental rights. Regarding the Member States, the Court of Justice in Luxembourg follows that they are obliged to respect fundamental human rights as defined in the EU if they are implementing Union law. Invoking the provisions of the Charter in the constitutional review in Romania must be done in relation to Article 148 of the Constitution and not in relation to Article 20 of the Constitution which refer to international human rights treaties. The main objective of the paper is to analyze the manner in which the provisions of the European Union Charter of Fundamental Rights are applied to the Romanian national legal framework in direct connection with the constitutionality review

Keywords: *European Union, human rights, constitutionality review*
JEL code: *K30, K42*

Human rights, in all their plenitude, represent a central mission of many modern constitutions, occupying an important place within the European constitutional system.

Ever since its adoption, the Charter of fundamental rights of the European Union had as a central mission the solving of problems such as ensuring a more active role of the European Union in the world, as human rights defender, fact which committed the European Union as a unitary entity. It aimed to codify the existing fundamental rights and not to create new ones. It brings together, in a single document, the entire area of civil, political, economic and social rights, which are systematized in a new, original manner.

The role of the Charter of fundamental rights is to make it a synthesis document from the common constitutional traditions of the member states, from

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the international commitments undertaken by the states, namely the European Convention for the protection of human rights and fundamental liberties, and from the practice of the European Court of Justice in the field of human rights, selecting the essential ideas, of maximum generalization, in other words the general principles of European law[2].

The Charter collects in a single document, for the first time in the history of Europe, the entire area of the civil, political, economic and social rights, which are systematized in a new, original manner: Title I Dignity – includes human dignity, the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour; Title II Freedoms – includes the right to liberty and security, respect of the private and family life, the protection of personal data, the right to marry and the right to found a family, the right to education, the right to engage in work, the right to property, the right to asylum, the protection in the event of removal, expulsion or extradition, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, freedom to choose and occupation and the freedom to conduct a business; Title III Equality – contains provisions regarding the equality of rights, non-discrimination, cultural, religious and linguistic diversity, the rights of the child, equality between women and men, the rights of the elderly, integration of persons with disabilities; Title IV Solidarity – contains the workers' right to information and consultation within the undertaking, the right to collective bargaining and action, the right of access to placement services, the right to protection in the event of unjustified dismissal, the right to fair and just working conditions, the prohibition of child labour and the protection of young people at work, the family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection; Title V Citizens' rights - contains articles that establish the right to vote and to stand as candidate to the European Parliament, in the local elections, the right to good administration, the right of access to documents, the right to notify the European Ombudsman, the right to petition, freedom of movement and of residence, diplomatic and consular protection; Title VI Justice – establishes the right to an effective remedy, the presumption of innocence and the right of defense, the principles of legality and proportionality of criminal offences and penalties, the right not be tried and punished twice for the same criminal offence; Title VII General provisions – contains provisions regarding the scope, field and interpretation of the rights and principles, the level of protection and the prohibition of abuse of rights.

[2] Popescu Maria, "Reflectarea problematicii drepturilor omului în Tratatul de la Lisabona", in *Romanian Review of European Law*, 2013, No 10, p 145-151.

The Charter Preamble mentions that the Union is founded on the indivisible and universal values of human dignity, freedom, equality and solidarity[3].

By placing the principles of the state of law and of democracy as the fundament of the European Union, the Charter understands to place the person at the core of the Union action, by establishing a European citizenship and by creating a space of liberty, security and justice. Thus, the Union contributes to the preservation and development of those common values and understands to consolidate the issue of fundamental rights, offering them increased visibility.

In what concerns the application field, article 51 of the Charter states: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

Generally, human rights cannot be considered as being absolute because this depends on the credibility of the protection system. Limitations are inevitable, without them their effective character would suffer. Human rights may be restricted in order to guarantee the general interest. These limitations are expressly indicated for each constitutional right.

Article 52 indicates: "Any limitation (…) must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others"[4].

In what concerns the level of protection, article 53 of the Charter established that "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective field of application, by Union law and international law and by internal agreements to which the Union, the Community or all Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions"[5].

Article 54 established the prohibition of the abuse of right. "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein"[6].

Human rights protection is a central mission of the European Constitution, document in which human rights are given the statute of fundament. The European

[3] Buşoi Cristian, *Ghid pentru Tratatul de la Lisabona*, 2010, on-line www.cristianbusoi.eu.
[4] Duculescu Victor, "Carta drepturilor fundamentale de la Nisa, un prim pas către Constituția EuropeiȚ, in Revista *Juridica*, 2001, no 7-8, p. 316-320.
[5] *Idem.*
[6] *Ibidem.*

Union did not reserve a place for human rights, but developed three catalogues of rights. The declaration of unwritten rights is derived from the Union's general principles. The Charter of fundamental rights adds a written catalogue of rights for the Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms offered an external declaration of rights[7].

The relationship between the Charter, the Treaties and the European Convention for Human Rights is specifically regulated by article 52. In paragraph 2 is indicated: "Rights recognized by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties". In paragraph 3 it is mentioned that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. These provisions shall not prevent Union law providing more extensive protection"[8].

If at the moment of its proclaiming in 2000 the Charter did not have a binding legal force, its statute being similar to that of the European Convention for the Protection of Human Rights and Fundamental Freedoms, through the Treaty of Lisbon it gained the same legal value as that of the Treaties.

Article 6.1 of the Treaty on the European Union shows that "the Union recognizes the rights, liberties and principles listed in the Charter of fundamental rights, which have the same legal value as the Treaties"[9].

Assigning the Charter the same legal value as that of the Treaties, it becomes primary, origin law of the Union, having the same constitutional value as the Treaties. The Constitutional Treaty was distinctive from the European treaties, mainly by the fact that it contained, embedded in its body, the catalogue of fundamental rights. This was one of the main elements which allowed the consideration of the treaty's material nature of a constitution. The Treaty of Lisbon returns to the logic of the traditional treaties, by not including in its body the Charter of Fundamental Rights, even though it preserves the legal compulsoriness. Through the Treaty of Lisbon both the Charter and the legal compulsoriness are saved[10].

Even though it exists in the content of the Treaty of Lisbon only in the form of an article referring to its text and its dispositions, the Charter directly

[7] Robert Schutze, *Dreptul constituțional al Uniunii Europene*, Bucharest, Universitară Publishing House, 2013, p. 492.
[8] Buşoi Cristian, *Ghid pentru Tratatul de la Lisabona*, 2010, on-line www.cristianbusoi.eu.
[9] Tratatul de la Lisbona pe înțelesul tuturor, on-line, http://www.euractiv.ro/uniunea-europeana/articles%7CdisplayArticle/articleID_14154/tratatul-de-la-lisabona-pe-intelesul-tuturor.html
[10] Luzarraga Aldecoa Francisco, Lorente Guinea Mercedes, *Etapa viitorului. Tratatul de la Lisabona*, Iaşi, Polirom Publishing House, 2011, p. 145.

contributes to the consolidation of the European Union's policy in the matter of the protection of fundamental rights[11].

The existence and compulsoriness of a catalogue of rights brings visibility to the European commitment to the fundamental rights and to their legal security, at the same time offering increased protection to the European citizens, by regulating new rights, not included in the international legislations[12].

The Charter represents a point of support, its integration in the Treaty of Lisbon guaranteeing the full and unlimited recognition of the fundamental rights comprised within. It presupposes in addition an important contribution to the European identity because it makes visible the shared values of the European project. The Charter gains major importance in the evolution of the European Union, having an increasingly significant impact on all institutions, including on the European courts, and which referred to it on more and more occasions.

It interferes in the central sphere of Member State responsibility when we talk about recognizing the right to social assistance or to housing, to the providing of decent conditions for the elderly and for other unfortunate social categories.

The document represents the most current declaration regarding fundamental rights in the world, promoting human dignity, clarifying the rights of the European citizens, emphasizing the principles of the European Union, presenting the Union's legal bases and guaranteeing the observance of the fundamental rights by all European institutions. As a consequence, European citizenship is consolidated and gains more coherence, which derives from the recognition of rights, from the equality of citizens and their non-discrimination, from the functioning of the European Union on the principle of representative democracy, but also from ensuring dialogue between the European institutions and the citizens.

The Treaty of Lisbon allowed the transformation of the Charter from a document with a moral value into one with a legal value and the fact that it is no longer part of a complicated treaty makes the fundamental rights contained within to be better known by the European citizen[13].

The Treaty of Lisbon takes without changes the disposition of the Constitutional treaty, which assigned to the Union the competence to accede to the European Convention of Human Right. The accession will not be easy, since there are already several problems related to the possibility that the European Union would be part of the Council of Europe.

[11] Popescu Maria, "Reflectarea problematicii drepturilor omului în Tratatul de la Lisabona", in *Romanian Review of European Law*, 2013, No 10, p 145-151.

[12] Luzarraga Aldecoa Francisco, Lorente Guinea Mercedes, *Etapa viitorului. Tratatul de la Lisabona*, Iaşi, Polirom Publishing House, 2011, p. 146.

[13] Popescu Maria, "Reflectarea problematicii drepturilor omului în Tratatul de la Lisabona", in *Romanian Review of European Law*, 2013, No 10, p 145-151.

This treaty represents a step forward in what concerns the democratization of the union's structure, by improving the protection and guaranteeing of the fundamental rights. All this progress was possible due to the establishment of a compulsory value of the Charter and by means of clauses allowing the accession of the European Union to the European Convention of Human Rights.

At present, one of the most interesting debates, both from the jurisprudence and from the doctrine point of view, targets the cooperation mechanisms between the Court of Justice of the European Union and the constitutional tribunals of the Member States.

The application by the Court of Justice of the European Union of the Charter of Fundamental Rights of the European Union represents an additional guarantee to the benefit of the European citizens, but may lead to the limitation of the effects of the decisions taken by the constitutional tribunals, through the effects of European law.

With respect to this subject there are several opinions, one arguing the supremacy of constitutions, including in relation to the law of the European Union, even though it accepts the principle of priority in the application of the latter, and another opinion supporting the unconditional priority application of all dispositions of the European Union law, in relation to all domestic law regulations, including the national constitutions.

The Constitutional Court of Romania considers that it is neither a positive lawmaker, nor a competent court of law, to interpret and apply European law in the litigations pertaining to the fundamental rights of citizens.

The use of a European law regulation within the constitutionality control implies, on the grounds of article 148, paragraphs 2 and 4 of the Romanian Constitution, a cumulative conditionality:

- On the one hand, this regulation must be sufficiently clear, precise and non-equivocal in itself or its meaning must have been established clearly, precisely and without doubt by the Court of Justice of the European Union, and
- On the other hand, the regulation must relate to a certain level of constitutional relevance, such as its normative content to support the possible infringement by the national law of the Constitution, the single direct reference regulation within the constitutionality control[14].

From the jurisprudence of the Court of Justice in Luxembourg it is derived that all European Union Member States must observe the fundament rights of the person defined within the Union, if they apply Union law[15].

[14] Decision no. 688 of 18 May 2011 of the Constitutional Court, published in the Official Gazette no. 487 of 8 July 2011.

[15] Decision of 24 March 1994, given in the matter C-2/92, The Queen and Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock, paragraph 16.

In what concerns the invocation of the provisions comprised in the Charter of Fundamental Rights of the European Union, in the constitutionality control, they are applicable to the extent to which they ensure, guarantee and develop the constitutional provisions in the matter of fundamental rights, in other words, to the extent to which the level of the right to protection is at least at the level of the constitutional regulations in the field of human rights[16].

What happens in the situation when a Member State applies European law, observes the European standard, but breaches the higher national standard? The problem is solved by article 53 of the Charter, which states that a higher national standard in the field of human rights will not be subjected to the priority of a lower European standard. In this sense ruled also the Constitutional Court of Romania, on several occasions.

As long as a higher national fundamental right clashes with a different European right, the higher national standard is accepted. The general rules governing the relation between the Charter and the Member States are restricted for Poland and the United Kingdom of Great Britain and Norther Ireland. The protocol imposes, explicitly, that the Charter application and interpretation are executed by the courts of Poland and the United Kingdom.

Within the constitutionality control, the referring to the provisions of the Charter of Fundamental Rights, act having the same legal force as the European Union constitutive Treaties, must be done in relation to the dispositions of article 148 of the Romanian Constitution, not to those comprised in article 20 of the fundamental law, which refers to international treaties.[17]

The Constitutional Court of Romania was notified by the Bucharest Tribunal, Section V Civil, regarding the unconstitutionality exception of article 1, point $1^{1,}$ and of article 299, point 1^{1}, of the Civil Procedure Code, exception invoked by a party in a file pending before this court.

The Constitutional Court allowed the unconstitutionality exception invoked in the file, indicating that, in what concerns the regulation of the challenge (contestation) possibilities against court decisions, the lawmaker has exclusive competence to institute, in particular situations, special procedural rules, as well as special manners of exercising the process rights, the significance of the free access to justice not being that of access, in all cases, to all court structures and to all manners of challenge. It was also indicated that the lawmaker is bound to observe the reference constitutional regulations and principles and the possible limitations brought to the conditions of exercising the challenge possibilities must not infringe on the right in its substance.

[16] Decision no. 1479/8 November 2011, published in the Official Gazette no. 59 of 25 January 2012.

[17] Decision no. 967/20 November 2012 of the Constitutional Court, published in the Official Gazette no. 853 of 18 December 2012.

In this matter, the Court established that, through the dispositions of article 1, point 1 and point 28 of Law no. 202/2010, any challenge possibility against the decisions given by judges on the base matter was eliminated for cases whose object is the obligation to pay an amount of money of up to 2000 lei inclusively, which is equivalent to the impossibility of a judicial control court to examine the matter in a higher jurisdiction rank.

Thus, the Court establishes that the elimination of the judicial control over the decision given by the first court in matters and petitions regarding liabilities having as objects amount of money of up to 2000 lei inclusively, infringes on the constitutional principle regarding equality before the law, as regulated by article 16 of the Constitution.

In what concerns the invoking of article 47 – the right to an efficient challenge possibility and to a fair trial – comprised in the Charter of Fundamental Rights of the European Union, the Court establishes that the relating to these provisions comprised in a document having the same legal force as the European Union constitutive Treaties must be made to the dispositions of article 148 of the Constitution and not to those included in article 20 of the fundamental law.

With respect to this unconstitutionality criticism, the Court indicates that the provisions of the Charter of Fundamental Rights of the European Union are applicable in the constitutionality control to the extent to which they provide, guarantee and develop the constitutional provisions in the matter of fundamental rights. Or, in the conditions in which the provisions of article 47 of the Charter refer, among other things, to the person's possibility to address a court of law, in examining a complaint grounded on the breaching of rights and liberties guaranteed by the Union law, the Court establishes that in the present matter the criticized legal texts do not contravene these European dispositions, analyzed through the viewpoint of the dispositions of article 148 of the Constitution.

In a different matter, the Constitutional Court was notified with the unconstitutionality exception of the dispositions of article 86, paragraph 6, of Law no. 85/2006, in the sense that the criticized legal dispositions are unconstitutional because they remove, in case of the employer in insolvency, the employees' right to consultation and information when collective dismissals are performed, right generally recognized to the employees and regulated by article 69 of the Labour Code, instituting a derogation with respect to the prior notice term which must be respected in this situation.

Examining the exception, the Court proceeded to analyze and configure the fundamental rights invoked in the matter, according to the reference European and international regulations, thus proceeding, on a jurisprudential way, to the constitutionalization of the labour social protection measures regulated by international treaties.

Indicating with respect to the applicability of the Charter of Fundamental Rights of the European Union in the constitutionality control, the Court reiterated its jurisprudence in the sense that it is a document distinct, as legal nature, from the other international treaties to which article 20 of the Constitution refers, such as the constitutional text relating to it is article 148 of the Constitution and, in principle, its dispositions are applicable in the constitutionality control to the extent to which they provide, guarantee and develop the constitutional provisions in the matter of fundamental rights, in other words, to the extent to which their level of protection is at least at the level of the constitutional regulations in the field of human rights.

The conclusion rendered by the Court in this matter was that there is no reason to estrange from this jurisprudence and to apply it mutatis mutandis also in what concerns the exigencies derived both from the constitutive Treaties of the European Union and from its secondary acts, namely the directives[18].

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[18] Decision no.64 of 24 February 2015 of the Constitutional Court, published in the Official Gazette no. 28 of 28 April 2015

Public incomes, the importance of establishing the litigation nature consequences om the stamp duty

Gheorghe MOROIANU

Abstract

As a result os some (on staff renumeration) carrid out by the Court of Accounts of Romania at the public institutions and authorities and the measures oredered by it, various litigations were registered before the courts, which, depending on the action brought by the controlled person, have made them be the subject of trial either labor disputies or administrative litigation, or civil litigation. Obviously, in relation to the nature of the dispute, the first problem to solve was the payment of stamp duty. It has been ruled that if they are in the matter of labor litigation and administrative litigation, they benefit from exemption from the stamp duty, in the case of civilians the exemption is nolonger operating.

Keywords: *public incomes, litigation nature, the court of Accounts, stamp duty, public institutions, control.*

As a result of some controls made by the Romania's Court of Accounts[19] at public institutions and authorities concerning the staff renumeration and the measures taken in orer to become legal, different litigations were recorded at the courts, which according to the action introduced (the chosen way) by the controlled autority institution had as a subject either labour or administrative litigations, or civil litigations.

It is necessary to mention that the control body have generally, in the acts drawn up, to signaling the law breakings and asking to observe the law without indicating the way which is to be imposed in order to meet the requirements of these acts[20], so that the law suits of the controlled entities have been left to theitr appreciation.

[19] Romania's Court of Accounts is regulated according to the Law no. 94/1992, and its activity subject is *„the control on the way of forming, administrating and using the financial resources of the state and of the public sector"*(art. 1 in the Law no. 94/1992 republished).

[20] In the **measures** it was requested:

- establishing the salary and hiring the employees according to the regulations in force;

Or, evidently, compared to the introduced actions, reported to the legislation nature where what was judged was the recovery of the prejudice signaled by the Court of Accounts, a first issue to solve was the pay or not the stamp duty, too.

In the cases, whose subject were the work litigations the litigation parties made no objection, being known that they benefit from the provisions in article 270 in the Labour Code according to which „*they are exempted from the stamp duty and the necessary stamp*", a law text which is coroborated with the provisions in article 20 paragraph 4 in the Government's Urgent Decree no. 80/2013[21] which generally regulates the stamp duties.

The same conditions, as above mentioned, were applied to the actions and requests concerning the working relationships of the public clerks and of the public clerks with a special statute, these being assimilated, under the aspect of the stamp duty to the labour conflicts[22].

The civil causes do not have the same treatment of exemption from the duty stamp except for those situations when are applicable in the discussion the provisions in art. 30 from the Gouvernment's Urgent Decree (OUG) no. 80/2013 accaccording to which:

„(1) The actions and requests, including the attack ways formulated, according to the law by the Senate, the Chamber of Deputies, Romania's Government, the Constitutional Court, the Legislative Council, the People's Barrister, the Public Ministry and the Public Finace Ministry, irrespective of their subject, as well as those formulated by other public institutions, irrespective of their legal quality, when they have public incomes as a subject.

(2) In the meaning of this urgent decree in the category of public incomes are included the incomes of the state budget, of the welfare budget, of the local bugets, of the special fund budget including of the health welfare Fund, of the State's Treasury budget, the incomes from external credits paid back and from interests and fees paid through The State Treasury as well as from the budget of the public institutions, totally or partly financed from the state budget,the local budget, the State Welfare budgets and the bugets of the special funds, as the case may be the incomes of the budget of the funds resulted from external credits contracted or guaranteed by the State and whose redemption, interests and other costs are assured from public funds, as well as the budget of the irredeemable external funds."

- establishing the extent of the prejudice caused by hiring without a legal reason and paying some amounts improper to the institution's stuff during December 2011- April 2015, registering in the accountancy and its recovery;
- regulation with the state bugets of the income taxes and of the welfare due to these salaries given witout a given basis during April 2011-April 2015.

[21] Art 29. The actions and requests, including those for carrying out the attack ways, ordinary and extraordinary, referring to... are exempted from the stamp duty.

[22] The actions and requests concerning the work relationships of the public clerks and of the public clerks with a special statute are assimilated,under the stamp aspect to the labour conflicts.

Or, refering to such civil causes, where the accomplishment of the measures taken by the Accounts Court was based on the invocation of the punishable civil responsibility if initially in the first instance the public institution (in its quality as a claimant) was exonerated frompaying the stamp duty, in the attack way of the appeal, the solving of this matter was done differently, the public institution (in its quality of appealing party) being forced to pay for the stamp duty, referred to what its appeal aimed, a fact which caused, from its part, a request for the reexamination of the stamp duty[23].

The provisions in art. 30 indented line 1 in the Government's Urgent Decree no. 80/ 2013 were appealed to in order to motivate this request claiming that thelitigation even if it is of civil nature and it focuses on the invocation of the punishable civil responsibility, it aims at the quality of public institution and concerns mainly the recovery of „public incomes", as well, a characteristic which results even from the subject of the control action of the Accounts Court and of the measures taken by this court.

The public institution has also invoked, in the argumentation of its request, the provisions of article 3 point 2 in the Law no. 69/2010 for the fiscal-bugetary responsibility, where the term of „**consolidated general budget**" is defined as *„the assembly of the bugets composing the bugetary system, including the state budget, the welfare budget, the bugets of the special funds. The centralized general budget of the territorial-administrative units, the budget of the State's Treasury, the budgets of the autonomous public institutions totlly or partial financed from the state budget, from the state welfare budget and from the special funds bugets, as the case may be, the bugets of the public institutions totally or partially finaced from their own incomes, the budget of the funds resulted from external credits contracted or guaranteed by the state and whose reimbursement, interests and other costs are assured from public funds, the budget of the*

[23] Art. 39
(1) The claimant may request a reexamination against he way the stamp duty was established, at the same instance within 3 days from the announcement of the duty owed. The reexamination request is exempted from stamp duty payment.
(2) The request is solved in the council chamber by other parel, without the parties' summoning, by total completition. The disposition in art. 200 indented line (2) thesis I in the Code for civil procedure remain applicable as regards the completition of the other lacks in the summoning request. The instance will procede to communicate
The summoning request under the requirements in art.201 indented line (1) in the code for civil procedure, only offer solving the reexamination request.
(3) In case of totally or partially admitting the reexamination request the instance will dispose the refunding of the duty stamp totally, or, as the case may be proportionately to the reduction of the contested amount.
(4) In case of duties, due to as a result of the requests adressed to the Ministry of Justice and the Persecutor's office near the High Court of Cassation and Justice, the solving of the reexamination request is under the compitence of the Law Court in district 5, Bucharest.

irredeemable external funds, as well as of other entities classified in the public administration, aggregated, consolidated and adjusted according to the Regulation (EU) no.549/2013 in order to form a whole."

Also, according to art. 137 indented line (1) in Romania's Constitution, *„the forming administration, use and control of the public financial resources of the state, of the territorial-administrative units and of the public institutions are established by law."*

At its turn the updated Law 500/2002 concerning the public finances, at art. 2 indented line (1) point 27 defines the notion „***public funds***" as being - amounts allocated from the budgets stipulated at art. 1 indented line (2) where it is mentioned that „*The dispositions of this law are applied in the field of drawing up approving, carrying out and reporting:*

a) The state budget;
b) The state welfare;
c) The special funs budgets;
d) The state's treasury budget;
e) The autonomous public distitution budget;
f) The budgets of the public institutions totally or partly finaced from the state budget, the welfare budget and the special funs budgets, as the case may be;
g) The budgets of the public insitutions totally or partlyy financed from their own incomes;
h) The budget of the funds resulted from external credits contracted or guaranteed by the state and whose reimbursement, interests and other costs are aassured from public funds;
i) The budget of the irredeemable external funds."

In art. 2 indented line (1) point 30 in Law no. 500/2002 the legislation defines the notion of *„**public institutions** - a generic name, which includes the Parliament, the Presidential Administration, the ministries, the other specialty bodies of the public administation, other public authorities, the autonomous public institutions, as well as the institutions subordinated to/coordinated by these, fifnanced from the budgets mentioned in art. 1 indented line (2)".*

Therefore, the „public incomes" being under discussion, it results the exemption from any stamp duty.

By solving the request, the appeal instance rejected it as being unfounded, with the motivation that *„the applicant adds illegally to the special provisions in art. 30 rom the Government's urgent Decree no. 80/2013, other different provisions from other laws with other regulation fields, from Law no. 500/2002 concerning the public finances and from Law no. 69/2002 for the fiscal-budgetary responsibility respectively, contrary to the „**specialia generalibus derogant**"* (the special starts from the general*) principle.*

In the requests having as an object the punishable civil responsibility as it is the one where the reexamination request was made, there are not stamp duty exemption applicable provisions, the exemption provisions being strictly and limitedly provided by art. 30 in the Government's Urgent Decree no. 80/2013 concerning the stamp duties"...

Therefore, concerning the public institutions, art. 30 indented line from the Govenrment's Urgent Decree no. 80/2013 establishes the strict requirement that they should be totally or partly financed from the staate budget, a requirement which the applicant legally tries to elude by applying some provisions which have other regulation subjects, instead of the stamp duties which are the subject of this analysis[24]*."*

The solution of species, although final, in our opinion is a subject of discussions.

The question is further asked, concerning the stamp duty, if what prevails in such situations is the ***nature of litigation***, or, if in solving this matter, as a priority, it should not be started from what the notion of „***public incomes***" means, an analysis from which the **activity subject** of the Accounts Court should not be excluded.

In the author's opinion, if by the law which regulates the duty stamp it was chosen the exemption of some entities totally among which the actions of the Accounts Court, as well, it was natural for us and in the law spirit, that the exemption should also act according to the requirements asked to be met by this institution's control acts, being known that its actually subject concerns the control of the „public money" whose source is, undoubtedly, the sum of the „public incomes".

It is known that, by law, the Accounts Court has the control „*over the way of the forming administering and using the financial resources of the state and of the public sector*", mainly „financial resources" cannot be exempted in any way.

It is also speciied in Law no. 84/1992 republished, the significance of the term „**control**": *„the activity by which one checks and watches the way the law is observed concerning the forming, administering and using the* ***public funds****"*;

At its turn, the term of „**public funds**" is deined as: *„the* ***amounts allocated*** *rfom the state budget, the local budgets, the state welfare budgets, the special funds budgets, the State Treasury budgets,* ***the budgets of the public insitutions totally or partially financed from the state, as the case may be****, the budgets of the public institutions totally financed from their own incomes, the budget of the funds resulted from external credits contracted or guaranteed by the authorities of the local public administration, as well as from the budgets of the public institutions totally or partly financed from the local budgets"* and regarding the „**public**

[24] The conclusion from 7.03.2018 pronounced at the Bucharest Appeal Court – civil section III for causes with under-aged children in the family, as well, file 12148/3/2016/a1, non-published species.

authority" it is specified: „*a generic name which includes the Parliament, the Presidential Administration, the Government, the ministries, the other specialty bodies of the public administration, other public authorities, the autonomous administative authorities, the authorities of the local public administration and the institutions under their subordination, irrespective of their financing way"*.

All these explanations converge to the idea that the notion of public income must not be regarded in its strict meaning to which the appeal instance referred, but by reference to the intrinsec nature of the amounts that are to be recovered, as **part of the amount allocated** from „*the budgets of the public institutions totally financed from their own incomes*", therefore public **incomes** which are mentioned expressly in defining „the public funds".

In this meaning was the release of the Court of first Instance[25], a solution which, referring to stamping, we consider right and well justified.

[25] The civil sentence np. 1719/2016 of Bucharest Court – the Civil section file 12148/3/2016, non-final, non-published concrete case.

The appel to the preliminary camera stage

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Denisa BARBU[2]

Abstract

The analysis realized by the preliminary chamber judge has as an effect either the return of the cause in criminal prosecution phase through the disposal of the return of the cause to the prosecution department with or without the continuation of the criminal prosecution, or the passing of the cause in judicial phase through the disposition for the commencement of the judgment.

Even if the preliminary chamber judge doesn't check the reliability of evidence or of the indictment, however his role is as important as the role of the court, since the solutions pronounced by the last one regarding the legality of the criminal prosecution can have a significant reflex in respect to the settlement of the criminal action.

The provisions of the art. 425[1] paragraph 7 point 2 letter b Criminal Procedure Code are objectionable under the aspect of the formulation because it limits the hypothesis of the abolishment of the decision and the referral to retrial only if it would be found irregularities regarding the summoning of the preliminary chamber on the merits. We consider that the preliminary chamber judge vested with the judgment of the appeal cannot override and cannot ignore other illegality causes invoked and disputed, having the obligation to find the nullity of the resolution contested in the cases provided by the art. 281 Criminal Procedure Code and, therefore, to find the admissibility of the appeal, the abolishment of the resolution disputed and the referral of the cause to the preliminary chamber judge who pronounced it, for retrial.

We consider that through the regulation of the double degree of jurisdiction in this matters, the Romanian legislator provided a superior standard to that stipulated by the art. 2 from the Additional Protocol no. 7 to the European Convention and, therefore, it shall be effectively given the right to two degrees of jurisdiction to the trial parties and subjects. Or, the vices presented above lead, in the absence of a solution for the referral of the cause for retrial, to a settlement of requests and exceptions regarding the legality and the loyalty of the criminal prosecution for the first and for the last time by the judicial control court, whose function of hierarchical control is voided of substance in the absence of an effective court in the first instance.

Keywords: *appeal, solutions, preliminary chamber, retrial, abolishment*

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Conclusion of the preliminary chamber judge shall be communicated to the prosecutor, the parties and the injured person, regardless of whether the court has been ordered to start the trial or to return the case to the prosecutor's office.

The appeal procedure may be filed within 3 days from the minute of the closing of the preliminary chamber (not from the reasoned decision in the extenso)[3].

According to the provisions of art. 425 ind. 1 par. (2) The NCPP institution of the repayment in due time shall also apply accordingly in the matter of appeal. Thus, the appeal declared after the expiry of the time-limit prescribed by law is considered to have been made within the timeframe if the competent judge hearing the case determines that the delay was caused by a serious cause of impediment and the contestation was made within 3 days at most upon its termination.[4]

The claimants are the prosecutor, the parties (the defendant, the civil party, the civilly responsible party) and the injured person (either personally or through a lawyer or a legal or conventional representative).

The contestation may have as its object[5]:

a) the way of solving the requests and exceptions formulated by the parties or the injured party or ex officio invoked by the judge in the procedure provided by art. 345 NPC, that is, the judge's assessment of the preliminary hearing, the lawfulness of the evidence or the acts of criminal prosecution (for example, the error of exclusion / non-inclusion of evidence, the wrong finding of the notice, etc.);

b) the decision to start the trial, namely the restitution of the case to the prosecutor's office.

- the contestation may concern either the objects in points a) and b) above or only one of them;

In the event that the court first ordered the rejection of the plea of incompetence by a ruling and then, by another conclusion, the other parties' claims and exceptions rejected, the appeal may be brought against both terminations from the date of the last and not separately for each individual ending. However, we appreciate that it is preferable that the Preliminary Chamber judge rule on all the applications and exceptions formulated in a single sentence, but in the hypothesis described above, I believe that a distinct complaint concerning only the conclusion by which the plea of incompetence is inadmissible[6].

[3] As-per art. 347 c.p.p.

[4] By Decision no. 631/2015 The Constitutional Court has held that the provisions of Art. 347 par. (1) The NCrPs are unconstitutional, contrary to the constitutional provisions on free access to justice, as long as they do not entitle the injured party, the civil party and the civilly responsible party to lodge an appeal on how to deal with claims and exceptions, such as and against the solutions provided by art. 346 par. (3) - (5) NCPP.

[5] As-per art. 347 alin. 4 C.p.p.

[6] M. Udroiu, *op.cit., p.*173-174.

It is inadmissible to lodge a complaint against the conclusion by which the notification was found to be irregular, or some of the evidence was excluded or the acts of criminal prosecution were declared null and void, as long as the preliminary judge did not pronounce in the procedure provided by art. 346 NCrPC on the return of the case to the prosecutor's office or the commencement of the trial.

Compared to the provisions of art. 347 par. (1) PSCs as amended by Law no. 75/2016, in the absence of requests or exceptions and the judge of the preliminary chamber has not invoked them ex officio, the conclusion ordering the commencement of the trial is not final and may be challenged by an appeal by a prosecutor, parties and the injured person.

The appeal shall be lodged with the Preliminary Chamber judge who pronounced the appealed decision and shall be motivated within 3 days from the communication of the conclusion of the preliminary chamber judge.

The provisions relating to waiving the appeal are not applicable in the appeal procedure of art. 425[1] par. (2) The NCrC does not make reference to the provisions of art. 414 of the NCPP, but the ones related to the withdrawal of the appeal are applicable, under Art. 415 NCPP.

Declaring the appeal has the following effects[7]:

a) the suspensive effect, the return of the case to the prosecutor or the commencement of the trial taking place after the final decision on the conclusion of the preliminary chamber judge has ceased;

b) devolutive effect, limited to the object of the preliminary chamber procedure provided by art. 341 NCPPs;

c) non reformatio in peius applies with regard to the solutions that the judge of the preliminary chamber may order when deciding the appeal formulated only by the defendant.

The competence of resolving the appeal belongs to the preliminary chamber judge from the hierarchically superior court (the court, the court of appeal, the High Court of Cassation and Justice) and a panel consisting of two preliminary chamber judges, if the conclusion was pronounced by a Judge of the Preliminary Chamber of the High Court of Cassation and Justice. prosecutor. The term (referral) to resolve the appeal is 60 days. Failure to present legally-quoted persons does not prevent the appeal from being settled. The participation of the prosecutor in the settlement of the appeal is mandatory under the sanction of absolute nullity. When the presence of the defendant is mandatory before the court in the cases provided by art. 364 of the CPMR, the judge of the preliminary chamber will order his / her bringing within the prescribed time limit[8].

[7] M. Udroiu, grille. *Procedura Sinteze si penala.Partea speciala*, Editia 4, Editura C.H. Beck, p. 206-207.
[8] *Ibidem.*

The judge hearing the case, who was randomly assigned to the complaint, communicates it to the respondent (the prosecutor who performed or supervised the criminal prosecution in question and not to the prosecutor's office for the court in which the judge of the preliminary chamber or the defendant belongs), as well as to the communication the term in which he can hire a lawyer. If the defense is mandatory.

The appeal shall be settled in the council chamber, quoting the parties and the injured party and acknowledging the Preliminary Chamber Judge who resolves the appeal proceeds to the appointment of a lawyer ex officio.

Within the time-limit set in the contradictory procedure, the preliminary hearing judge shall settle the appeal, analyzing the grounds on which it is based, as well as the claims or exceptions invoked in the procedure provided by art. 345 NCPP. According to art. 347 par. (4) The CPC introduced by Law no. 75/2016, other claims or exceptions than those invoked or raised ex officio before the judge hearing a preliminary ruling in the proceedings before the court seised of the indictment may not be relied on or raised ex officio except in cases of absolute nullity[9].

The Preliminary Chamber Judge who can resolve the appeal may order, through a reasoned decision pronounced in the council chamber, one of the following solutions[10]:

a) dismisses the appeal as late or inadmissible or, as the case may be, as unfounded;

b) admits the appeal, abolishes the provisions by which the preliminary chamber judge unlawfully found the irregularity of the referral or by ordering the exclusion of evidence and ordered the commencement of the trial[11].

If the preliminary judge of the first instance court ordered the case to be returned to the Prosecutor's Office, the preliminary judge of the judicial control court, reassessing the situation in the case, can judge that the court was legally notified, that the evidence was legally administered and that the criminal prosecution was legally performed and ordered the commencement of the trial. The decision to start the trial is ordered by the preliminary chamber judge from the judicial control court following the abolition of the solution of the first instance ordering the restitution of the case to the Prosecutor's Office.

The preliminary chamber judge from the judicial control court who ordered the commencement of the trial will not also exercise the judicial function in question according to art. 346 par. (7) NCPP, which is to be exercised by the judge at first instance.

If the first-instance judge at the first instance ordered the commencement of the trial, but excluded a number of evidence considered to be unlawfully administered or found nullity of a criminal prosecution, the court's preliminary chamber judge.

[9] As-per art. 347 alin. 4 C.p.p.
[10] M. Udroiu, *op.cit.*, p. 210.
[11] *Ibidem.*

The judicial control, maintaining the decision to start the trial, may consider that the evidence was legally administered and that the acts of criminal prosecution were legally carried out, removing or restricting the provisions of the first instance of the exclusion of evidence or the annulment of the criminal prosecution.

c) Admits the appeal, abolishes the provisions by which the preliminary chamber judge unlawfully rejected the exceptions concerning the unlawfulness of the referral or the unlawfulness of the administration of the evidence and order the return of the case to the prosecutor;

d) Allow the appeal and refer the case back to the judge of the first instance court in the event that the disposition of the indictment has not been complied with, or if some of the parties have not been legally cited and thus could not participate in the proceedings before the court of first instance or if the judge hearing the application failed to consider the applications and the exceptions relied on in the time-limit, or did not unlawfully dismiss the applications and the exceptions as being late, or if in the first instance the judge dismissed applications and exceptions made by the injured party or parties without ruling on the lawfulness of the referral of the court to the taking of evidence and the criminal proceedings and without ordering the commencement of the trial.[12]

e) Notes withdrawal of appeal.

The minute is mandatory.

The final appeal to the appeal is final, can not be appealed with any appeal and communicated to the prosecutor and the defendant.

With the final closure of the Preliminary Chamber Judge, the preliminary chamber phase is closed; in the event that the final conclusion was to begin the trial, the first instance sets a time limit and orders the parties and the main trial subjects to be summoned.

Compared to the provisions of art. 346 par. (7) The NCPP[13], the court of first instance judge who ordered the commencement of the trial, will also exercise the judicial function in question.

[12] *Ibidem.*

[13] The Constitutional Court has established the constitutionality of the provisions of art. 346 par. (7) NCPP [Decision no. 663 of 11 November 2014, par. 19 (Decree No. 52 of January 22, 2015) and Decision no. 353 of May 7, 2015, par. 12 of 29 June 2015), holding that it is in the interest of the act of justice that the same judge who checked both the jurisdiction and the lawfulness of the referral, as well as the lawfulness of the taking of evidence and the execution of acts by the prosecution to adjudicate on the merits of the case. The Constitutional Court has shown that the mere fact that the judge has made a decision before the trial can not always be considered as justifying in itself a suspicion of partiality in his case. What is to be considered is the extent and importance of this decision. The preliminary assessment of the data in the file does not mean that it is capable of influencing the final assessment, which seeks to make that assessment at the time of the decision and to rely on the evidence of the case and the debates in the hearing.

The preliminary judge of the first instance court who ordered the case to be resigned to the Prosecutor's Office is not incompatible with the exercise of the judicial function in question in the event that after the admission of the appeal the preliminary chamber judge from the judicial control court orders the commencement of the trial, of the cases provided by art. 64 NCPP.

The incompatibility in the exercise of the judicial function of the judge who ordered both the commencement of the trial and the exclusion of some evidence or the annulment of some procedural / procedural acts, shall be forbidden, in the event that the decision pronounced in the appeal keeps the order of commencement of the judgment, indifferent the solution to the lawfulness of the prosecution.

Conclusions

We consider that the preliminary chamber judge invested with the judgment of the appeal will not be able to overcome and will not be able to ignore the other cases of illegality invoked and found, having the obligation to declare the nullity of the contested conviction in the cases provided by art. 281 C.p.p. and, as a consequence, to declare the admission of the appeal, the annulment of the contested judgment and the referral of the case to the judge hearing the application for a retrial.

We appreciate that by regulating the double degree of jurisdiction in this matter, the Romanian legislature provided a superior standard to that stipulated by art. 2 of the Additional Protocol no. 7 to the European Convention and therefore procedural parties and subjects must be effectively granted the right to two degrees of jurisdiction. However, the above-mentioned deficiencies lead, in the absence of a referral case, to resolving requests and exceptions regarding the legality and loyalty of the first and last criminal investigation by the judicial control court, whose hierarchical control function is devoid of substance in the absence of an effective judgment at first instance.

Considerarion regarding the termination of the legal employment relationship during the probationary period – requirements and limitations regarding the preganant employees

Dimitrie-Dan RAICIU[1]
Anca RAICIU[2]

Abstract
This approach adresses the legal provisions concerning the termination of the legal employment relationship during the probationary period, mainly from the perspective of legal conditions and limitations, providing legal practitioners with considerations and arguments in order to correct legal conduct, correct application of the rules in the field.

Keywords: *indivdual labour contract, probation period, notification, dismissal, termination of employment legal relationship, employer, employee, court*

By making the analysis, which we suggest, the identification of the applicable legal field is imposed. In this sense, we point out that the probatory period is regulated in art. 31-33 from Law nr 53/2003 – The Labour Code[3] with the further changes and completions. Mainly, from the perspective of this action, are of interest the provisions in art. 31 from Law no. 53/2003, according to which in order to check the employee's skills, when concluding the individual labour contract parties may agree to establish a probationary period of at most 90 calendar days for the execution positions, and of at most 120 calendar days for the management positions. During the probtionary period, or at its end, the individual labour contract may terminate by a notification exclusively, without prior notice, at the initiative of any party without its motivation being necessary. During the probationary period the employee benefits of all the rights, and has all the duties stipulated in the labour legislation, in the applicable collective contract, in the internal regulation and as well as in the individual labour contract.

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[3] Republished in Romania's official Journal no. 345 from 18.05.2011, further changed and completed.

Starting from the legal provisions previously mentione, a first matter to be examined is the legal nature of the written notification by which any part of the individual labour contract may cause the termination of this contract during probationary period.

The first conclusion, which results, concerning the written notification to terminate the individual labour contract, during the probationary period, is that, evidently, in essence, it represents a unilateral act of willingness of the party from whom it comes, just like in case of firing – if the notification is made by the employer, as in case of resignation, if the notification is made by the employee who is durng the probationary period, rspectively, what individualises it, differentiates it from other ways of terminating the individual labour contract, as a unilateral act of willingness of one of the contracts parties, are: form aspects, aiming the procedure to initiate the written notification, and essence aspects, the look of the motivation necessity and of the written notice.

At a first evaluation of the legal provisions concerning the notifications to terminate the individual labour contract, issued by the employer, during the probationary period, this action seems to be a unilateral act of willingness with an absolute character, the employer being empowered by how to dispose the termination of the individual labour contract without being restricted by any requirements. A systematic analysis of the women eomployees' situation, who are during the probationary period, however, leads, in a non-equivocal way, we think, to the conclusion that there are situations when the unilateral willingness act of the employer to issue the notification to terminate the individual labour contract during the probationary period, is submitted to some legal limitations, as in case of pregant employees.

To sustain this conclusion, we present a first legal provision in art. 60 indented line (1) letter c) from the Labour Code, according to which the employees' firing cannot be made during the period when the woman employee is pregnant, to the extent in which the employer was informed about this fact before issuing the firing decision.

In a first opinion, under the incidence of these legal provisions come, as well, the termination of the individual labour contract during the probationary period, became the legal nature of the two forms to terminate the contract (firing versus notification to terminate the contract during the probationary period) is similar – a unilateral act of willingness of the employer, respectively, which has the same legal consequences – the termination of the individual labour contract.

In the same sense, according to the provisions in art. 10, indented line (6) from *the Law no. 202/2002 concerning the equality of chances and treatment between women and men*[4], the firing is forbidden during the period „*the woman employee is*

[4] Published in Romania's official Journal, no 301 from 08.05.2002, with further changes and completitions.

pregnant or is during the maternity leave", being exempted from this interdiction only the firing because of reasons which appear as a result of the legal reorganisation, of bankrupcy or of the rempoyer's dissolving, under the law's requirements.

As concerns the termination of the individual labour contract, as an expression of the employer's unilateral willingness, by the Decision no. 319/29.03.2007[5] pronunced by the Constitutional Court it was retained that „*the application of the disciplinary penalties, and especially the termination of the labour contract from theemployer's unilateral willingness are allowed by meeting some essence and form requirements strictly regulated by the labour legislation, with the view of preventing some possible abusive acts from the part of the employer*". What is to be pointed out, according to the decision of the „constitutional court, is the fact that it refers to *all the forms of employer's unilateral willingness, until the notification during the probationary period*.

By appreciating right and clear the decision of the constitutional court, we point out the fact it totally agrees, both with the legislation and with the European Union's jurisprudence. In this sense we show that according to art. 10 from the Directive no. 92/85/EEC the minister states have to take the necessary measures to forbid the firing of pregnant employees, who have recently given birth, and of the maternity leave, except for the special cases, which have no connection with their condition, admitted by legslation and/or national practice and, if the case may be, for which the competent autority gave its approval (n.n. that is those cases in Law no. 202/2002 – the legal reorganization, bankrupcy or employer's dissolving.

In the cause C-239/09 Dita Danass against LKB Lizinga SIA, by the Decision from November 11,2010, the European Justice Court retain that, as concerns the sphere of firing interdiction provided in art. 10 from The Directive 92/85, it must be mentioned, with an introductory title, that the subject of the Directive is to promote the improvement of safety and health at the labour place in case of pregnant employees who have recently given birth or who suckle.

Before the Directive no 92/85/ EEC come into force, the Court had already appreciated that, on basis of non-discrimination principle and especially of the Dispositions in Directive no. 76/207, the women must have a protection against their firing not only during the maternity leave, but also during all the pregnancy period. According to the Court, a firing during these periods can concern only the woman and it, consequently represents a direct discrimination on sex criteria (to see in this sense the Dicision from November 8,1990-Handels-og Kontorfunktionaerernes Forbund, C-179/88,Rec. P. I-3979, point 13, the Decision from June 30, 1998, Brown C-394/96, Rec. P I-4185, points 24-27, the Decision from October 11,2007, Paquay, C-460/06, Rep., p I-8511, point 29). Just considering the risk that a possible firing may affect the physical and psychical condition of pregnant employees, who

[5] Published in Romania's Official Journal, no. 292 from 03.05.2007.

have recently given birth or who suckle, including the very dangerous risk of urging the pregnant employee to voluntary stop the pregnancy, the Union's legislator stipulated, on basis of article 10 from the Directive 92/85, a form of special protection for women, mentioning the interdiction to fire them in the period from the beginning of pregnancy to the end of the maternity leave (to see the Paquai decision previously cited, point 30 and the cited jurisprudence).

During the mentioned period, article 10 from the Directive 92/85 does not mention any exception or deviation from the interdiction to fire the pregnant employees, except for the exceptional cases which have no connection with their condition and on condition the employer justifies in written the reasons for such a firing (the Decision from July 14, 1994, Webb, C-32/93, Rec., p.I-3567, point 22, Brown Decision previously cited, point 18, the Decision, from October 4,2001, Tele Denmark, C-109/00, Rec., I-6993, point 27 and Paquay Decision, previously cited, point 30 and the cited jurisprudence).

It is also mentioned in the Court's Decision, that a concellation decision taken in the period from the beginning of pregnancy to the end of the maternity leave, for reasons which have no connection from the main action would not be contrary to the article 10 mentioned, on condition the employer submits in writing well founded reasons for firing, and the respective firing is allowed by the legislation and/or by the national practice in subject, according to article 10 points (1) and (2) in this directive.

In conclusion, we think that the pregnant employees are preotected as a rule, including during the probationary period, because a decision to terminate the individual labour contract on basis of the national law dispositions (art.31 Labour Code) which allow the termination of the labour relationships without restrictions, only by a written notification are incompatible with the firing interdiction mentioned in art. 10 from Directive no.92/85/EEC, and the dispositions in art 60. indented line (1) letter c) from the Labour Code and of art 10. Indented line (6) from Law no. 202/2002, can be interpreted only in the sense that they offer also protection to the pregnant employees, who are during the probationary period, such an interpretation leading to breaking the interdiciton to fire stipulated in art. 10 from the Directive 92/85/EEC .

From this rule, on an exception way, we consider that the labour contract can terminate, for the pregnant employees, only for well founded reasons, the type of those mentioned in art. 10 indented line (6) from Law no. 262/2002- legal reorganisation, bankrupcy or employer's dissolving under the law's requirements. In this sense was also the decision of the Court of First Instance in a litigation concerning the termination of the labour relationship of a pregnant employee during the probationary period, a solution which we consider right and well justified[6].

[6] The civil sentence no. 3789/2017 of Bucharest Court – the section for the causes concerning labour conflicts and welfare,non-final, unpublished concrete case.

In another opinion, than the one presented it is appreciated that the provisions of art 10 from the Directive 92/85/EEC cannot be considered as concerning any form of terminating the individual labour contract of the women employee, but only those subordinated to the concept legally determined and limited of „*firing*". In a contrary case it would mean that the pregnancy condition did not represent a lomit of „firing". In a contrary case it would mean that the pregnancy condition did not represent a limit of firing the women employee, because she is pregnant, even of during the probationary period it is noticed that she does not meet the job requirements. To sustain this opinion it is also shown that art. 21 indented line (1) letter a) from the Government's *Urgent Decree no. 96/2003 concerning the protection of maternity at the labour place*[7], although it mentions the „*termination*" of the labour relationship without a limitation of the „*firing*" cases, it conditions the interdiction to terminate the labour relationships to the existance of the reasons which are connected directly to the pregnancy condition of the employe. As a result, it is appreciated that the lack of the need to motivate does not exclude the checking, in essence, of the reasons of the employer, who notifis the termination, if the woman employee invokes the fact that these reasons are prohibited by law6. In the authors' opinion this conclusion is criticizable at least under the aspect of the probationary duty. Taking into consideration the saying/principle according to which „*onus probandi incest actori*[8]" weconsider that the probationary duty comes to the employer who notifies the termination of the labour relationship during the probationary period. In other words, in case of pregnant employees, due to the legal protection they benefit, both in a European and a national plan, on an exception way from the rule of lack of necessity to motivate the notification by the employer, the notification motivation is imposed, just to show that the refuse to considerate the labour relationship after the expiry of the probationary period, has no connection with the employee's pregnancy condition, but it is exclusively of a professional nature.

[7] Approved with changes and completitions by Law no. 25/2005, further changed and completed.
[8] In the sense of the second opinion was pronounced the Civil Decision no. 6028/2017 og Bucharest Appeal Court- the section for labour conflicts and welfare, a non-published concrete case.

References

I. Legislation

1. Law no. 52/2003 concerning the Labour Code with further changes and completitions;
2. Law no. 202/2002 concerning the equality of changes and treatment between men and womne, with further changes and completitions;
3. The Government's Urgent Decree no. 96/2003 concerning the maternity protection at the labour place, approved with further changes and completitions by Law no. 25.2005, withfurther changes and compltitions;
4. Directive no. 92/85/EEC/19.10.2007;

II. Jurisprudence

1. Decision of the Constitutional Court no. 319/29.03.2007;
2. Civil Decision no. 6028/08.12.2017 pronounced by Bucharest Appeal Court ;
3. Civil Sentence no. 3798/25.05.2017 pronounced by Boucharest Court;

Centenary union. An action theory and a Sociological aproach

Gabriel ILIESCU

Abstract

The article expresses a double aproach on the moment of the Great Union: an actionist and an other is a sociological one. The first perspective is the formal theory of action applied at the hystorical mentioned time. We distinguished between territorial unity, as a state of fact and a part of an event, and union as an event. Over this we added the idea of union act. We highlighted the idea that: from the point of view of formal theory of action, The Great Union is an event of appearence, and the territorial unity is the final state of it. Then we built alternative events on Union. They complete the table of logical events with the ones that are only logically possible. The second perspective goes to the sociological study entitled "The perception of the Romanians about the centenary of the Great Union". The study is conducted by The Romanian Institute for Evaluation and Strategy (I.R.E.S). We have analysed just some of the answers to the study questions. Responses contain percentages. We have highlighted two variants of percent expressions in predicate logic. The first variant refers to those predicate logic formulas that are equivalent to natural numbers. The second variant consists in the expression of the percentages by atoms of the form $t_1 = t_2$. Same second variant allows the construction of inferences that can be splitted according to syntactic and chronological dimensions. Some of them combine the two perspectives. Their conclusion is a pseudo prediction. Some questions in the interview also offer the answer "Do not know, do not answer ". Starting from here, some opened issues could be if „know"and "believe"operators, present in the answer are subordinated to one another, if so then what is the order of this subordination or if they are different variants of response, if the supposed known answers by the subject are known in the implicit rather then explicite sense of knowledge. A very light but fertile for different research directions conclusion is at least some sociological studies can benefit from logical analyses of the response variants

Keywords: *Great Union, unity, appearance, final state, percentage, symbolic language, action agent*

1. Interest, purpose

The Great Union in 1918 is an important hystorical fact as long as belonging to an ethnicity is still a strong identity element for some of us. The Centenary of Great Union, the sociological survey on this theme, and the formal theory of action are so different areas of knowledge and operate with so different entities. That constitutes the challenge to prove opposite, namely that:

There is a link between the 1918 Union event, the percentages of a sociological survey on the subject and the formal theory of action.

Using the tools of logic, we approach the moment of Great Union fragmented in two moments: yesterday and today. "Yesterday" means descending at that historical time. For this we use a first category of logic tools: those for the formal theory of action. "Today" means the perception of Romanians today, over that moment, reflected in a sociological survey. For this we used a second category of logic tools: the ones of the first order predicate logic.

2. The Great Union yesterday: the perspective of theory of action

The purpose of this section is to apply some concepts of formal theory of action to the content of Union hystorical moment. This concepts are: state of things, event, act, but also the conditions that make the action possible[1].

2.1. The fact of unity of the seven territories. Successive fragments

We start by introducing some notations. Historians consider seven romanian territories. For this we propose the notations: Kingdom of Romania, b_1; Transilvania b_2; Banat b_3; Crişana b_4; Maramureş b_5; Basarabia b_6; Bucovina b_7. For now, we consider only the "united" predicate symbolized by U. The letter one signifies a *state of fact*. We consider the natural language expression bellow. We give it a symbol:

b_i is united with the Kingdom of Romania at the temporal moment t.
$U(b_i, b_1, t)$

We can treat The Great Unity including by fragments. Thus, Bessarabia (b_6) is the first romanian territory that unites with The Kingdom of Romania (b_1) on 27th of March/9th April 1918[2]. What we render through the following predicative atom:

Bessarabia is united with The Kingdom of Romania at the moment of 27th of March/9th April 1918[3].
$U(b_6, b_1, t_{27march/9aprili1918})$

Strictly logical, the relationship *x is united with y* is symmetric. However, the hystorical context also includes an affective element. It is Bessarabia that

[1] von Wright, Georg, Henrik, *Normă şi acţiune*, Ştiinţifică şi Enciclopedică Pub. House, Bucharest, 1982, p. 59-60.
[2] Giurăscu, C. Constantin (coordinator), *Istoria României în date*, Enciclopedică Română Pub. House, Bucharest, 1971, p. 308.
[3] Giurăscu, *op.cit.*, p. 308.

united with Romania not the other way round[4]. What is explicitly mentioned[5] that Romania is called *mother*[6]. We agree that the territory so formed should be called The Kingdom of Romania$_1$, respectivley $b_{1.1}$. At $b_{1.1}$, Bucovina is added on 15/28 November 1918[7]. We symbolize such that to preserve this fact:

Bucovina is united with The Kingdom of Romania$_1$ on15/28 november 1918.
$U(b_7, b_{1.1}, t_{15/28nov1918})$

We agree to call the territory thus formed The Kingdom of Romania$_2$, respectivley $b_{1.2}$. At $b_{1.2}$ we add Transilvania on 18 November/1december 1918[8]. We symbolize such that to preserve also this fact:

Transilvania is united with The Kingdom of Romania[2] on 18 November/ 1december 1918.
$U(b_2, b_{1.2,} t_{18nov/1dec1918})$

Historically, the summit in Arad is of special importance. The Hungarian delegation proposed to the Romanians limited autonomy[9] in the Hungarian borders. The romanian side demanded the recognition of Transilvania's independence. As a result, the negotiation failed[10]. Until now we considered the unity between some romanian territory and the Kingdom of Romania. That is just a state of things. Namely, it is just the final state of things of an *event.* And the *Union* is an event. We are going to build events that are compound of such state of things.

2.2. Union event

The moment of reference is that of the Union between the Kindom of Romania and other territories. This moment is also important from the point of view of the change theory. Suppose it stands for the time 18nov/1dec1918. That means "first and then", that is what happens before 1st December 1918 and after that. The event is: the transition from the absence of the actual state of unity to its presence. So it is an event of appearance. Let it be the event of the union between Transilvania and Romania:

[4] Cojocaru, Gheorghe, *Republica Democratică Moldovenească dintre Prut şi Nistru* în *Hisotria special*, An VII, Nr.22. Martie, 2018, Adevărul Holding Pub. House, Bucharest, 2018, p. 36.
[5] Cojocaru, *op.cit.*, p. 36, p. 53.
[6] *Idem*.
[7] Giurăscu, C.C., *Istoria României în date*, Enciclopedică Română Pub. House, Bucharest, 1971, p. 311.
[8] *Idem*.
[9] Bulboacă, Sorin, *Tratativele Româno-Maghiare de la Arad (13-14 noiembrie, 1918)*, în *95 de ani de la Marea Unire (Culegere de studii),* Coordinator, Grec, Marius, Ioan, „Vasile Goldiş *"*University Press Pub. House, Arad, 2013, p. 154.
[10] *Idem*, p. 155.

Transylvania is not united with the Kingdom of Romania$_2$ *first and then* Transylvania is united with the Kingdom of Romania$_2$.

$\sim U(b_2, b_{1.2})$ T $U(b_2, b_{1.2})$

We can compose events where the initial and the final state are also events. Thus we can show that events themselves can succeed each other.

$\sim U(b_7, b_{1.1}) T U(b_7, b_{1.1})$ **T** $\sim U(b_2, b_{1.2}) T U(b_2, b_{1.2})$

Bukovina unites the Romanian Kingdom$_1$ *first and then* Transylvania unites the Romanian Kingdom$_2$.

2.2.1. Four events related to the Great Union

In relation to one and the same state of facts, be it p, four generic events are possible. In the table below these are left side, along with their names. These are mapped with the ones on the right side, and instantiated by the fact of territorial unity.

Table no. 1

Generic events			*Events instantiated by the fact of Unity*	
Event name	*Abbrev*	*Expression*	*Abbrev*	*Expression*
Conservation presence	e_1	p T p	e_{1U}	U(y, z) T U(y, z)
Disappearence	e_2	p T ~p	e_{2U}	U(y, z) T ~ U(y, z)
Appearance	e_3	~p T p	e_{3U}	~U(y, z) T U(y, z)
Conservation absence	e_4	~p T ~p	e_{4U}	~U(y, z) T ~U(y, z)

The Union event is in the third position, e_{3U}. The three events, different from the real history express whay is only possible. That is not a desire that things should have been other way.

2.2.2. The formal logical conditions of the Great Union act

These add an operator of action, rendered by *do,* abbreviated *d;* an agent that may be a collective one, designated by the individual variable x. It is about a lot of agents who had this role. Here we are interested to formulate the expression of this elementary act, both symbolic and in natural language:

$d(x, e_{3U})$.

x does so that y and z_1 and z_2 are not united first and then they are united.

As the event is an appearance, the act is a particular case of provocation of an appearance. First we present a short preamble of the formal logical conditions. The source is von Wright. They make logical, actionally possible such an act. We have some theorems in which we apply appropriate substitutions. Thus we obtain that: the territories were not united in fact, is equivalent to the disjunction that they become united or remain un united (T13); the absence of territorial union is

equivalent with their remaining in territorial unity or disappearance of this unity or remaining in territorial non-unity (T4 and next ones); maintaining territories in non unity is equivalent with: not maintaining them into unity, non-disappearance and non-appaance of this unity (T16 - T21[11]). Then we unify this ideas with the conditions that make the act possible. We present directly the result applied to the Union act:

(i) *The first condition* starts fom the fact that *~U(y, z)*. Which means that: *territories are not united in fact*[12]. According to T13 we obtain that a disjunctive extended form of the first formal condition of the action is:

(i_a). e_{3U} v $e_{4U.}$ The seven territories unite or remain non united.

(ii) *The second condition* starts from the event ~e_{3U}: *the event of union of the romanian territories does not happen on its own*[13]. By joining it with the second idea in the preamble, *the second condition* is:

(ii) e_{1U} v e_{2U} v $e_{4U.}$ The territories remain united or their unity disappears or they maintain ununited.

(iii) *The third condition* is: *~d(x, e_{3U}) ⊃ e_{4U}*. If x does not such as to occur the territorial union then the unity keeps absent[14].

Accordindg to the last ideea in the preamble, the condition (iii) decomposes into three conditions:

(iii_a) ~d(x, e_{3U}) ⊃ ~e_{1U}. If x does not the union of the seven territories to happen then the territorial unity does not happen.

(iii_b) ~d(x, e_{3U}) ⊃ ~e_{2U}. If x does not the union of the seven territories to happen then the territorial unity does not disappear.

(iii_c) ~d(x, e_{3U}) ⊃ ~e_{3U}. If x does not the union of the seven territories to happen then the territorial unity does not appear.

[11] Popa, Cornel, *Teoria acţiunii şi logică formală*, Ştiinţifică şi Enciclopedică Pub. House, Bucharest, 1984, pp. 152-156.
[12] von Wright, *op.cit.,* p. 54, p. 60.
[13] *Idem*.
[14] von Wright, Georg, Henrik, *Logica deontică şi teoria generală a acţiunii*, in *Norme, valori, acţiune*, Politică Pub. House, Bucharest, 1979, p. 146.

3. The Great Union today: a predicate logic perspective on a sociological survey

The purpose of this section is divided into two subsections: a) to express the percentage in the mentioned sociological survey in predicate logic language; b) to build inferences based on atoms with identity starting from the same percentages. That is why we introduce a second category of tools: those of predicate logic. For both purposes, divide the tool set in appropriate subsets. We apply this tools to the answers in to the study[15] entitled *Romanian's perception on the Great Union*. The author is The Romanian Institute for Evaluation and Strategy. The degree credibility is appreciated as being a high one[16].

Investigation is the first but not the only used method. The essential tool is the *questionnaire*[17]. Generally speaking, variants of the the investigation are: the *interview* and the *questionnaire*[18]. It is mentioned that the dates were collected on the subject's residence[19]. The operators and the interviwees interacted directly[20], neither by phone[21] nor other way. According to the manner it was carried out, this investigation is extensive[22], mainly quantitative[23], individual[24] and direct[25]. Generaly in such research one can look for informations about: facts, opinions, knowledges[26]. The same idea is accepted by both Romanian[27] and Anglo Saxon authors[28]. In the present case, by the *content,* it is obvious that the questions are predominantly of public opinion[29]. I.R.E.S aims to find out only the last three kinds of mentioned informations. An exception is the question concerning ancestors participating on the Great Union[30]. This could be a question about knowledge.

[15] Institutul Român pentru Evaluare şi Strategie, *Percepţia românilor despre centenarul Marii Uniri*, http://www.probasarabiasibucovina.ro/Eveniment-Centenarul-Marii-Uniri-1918-2018.html?gclid=EAIaIQobChMIuoHDm4qy2QIVhoKyCh2pkw7kEAAYASAAEgKdePD_BwE, Bucharest, 2017, p. 2, p. 17.
[16] *Ibidem*., p. 17.
[17] *Idem*.
[18] Mihăilescu, Ioan, *Sociologie generală, Concepte fundamentale şi studio de caz*, Polirom Pub. House, Iaşi, 2003, p. 40.
[19] IRES, *idem*, p. 17.
[20] Cauc, Ion, Manu Beatrice, Pârlea Daniela, Goran Laura, *Metodologia cercetării sociologice,* Fundaţia România de Mâine Pub. House, Bucharest, 2001, pp. 69-70.
[21] Grosu, Nicolae, *Tratat de Sociologie, abordarea teoretică,* Expert Pub. House, Bucharest, 1999, p. 12.
[22] Cauc, Manu, Pârlea şi Goran, *op.cit.*, p. 47.
[23] *Idem.*
[24] *Idem,* pp. 47-48.
[25] *Idem,* p. 48.
[26] Mihăilescu, *op.cit.*, pp. 40-41.
[27] *Idem*., p. 40.
[28] Johnson, G. Allan, *Dicţionarul Blackwell de Sociologie*, Humanitas Pub. House, Bucharest, 2007, p. 195.
[29] Cauc, Manu, Pârlea şi Goran, *op.cit.,* p. 48.
[30] IRES, *idem,* p. 7.

However, it is difficult to measure the level of knowledge, here, about family and history of the subject[31]. As a result, the present investigation is an *interview*.

In different variants, the subject is asked *what does he believe*. The subject accepts the wording of the questions. Which means the answer signifies: "*x believes that*". An alternative response is that *x does not answer.* That can be interpreted that *x does not assert that.* But the investigator knows his opinion because *x asserts it*. So, what happens in fact, during the interview is that *x asserts what he believes*. Another answer is "*x does not know*". By contrast, the given answers would mean that *x knows that....* And in this case: the investigator finds out that the subject does not know to answer, from the fact that the subject himself asserts this. What happens during the interview is that *x asserts what he knows*.

3.1. Numbers and percentages expressed in predicate logic

3.1.1. Numbers

A first subscale is to express the percentages in the cited sociological survey, in predicate logic. For this we need to achieve an onother previous purpose: to express numbers in the same language.

We assume as known the predicate logic[32]. Two atomic expressions are: $R(t_1, ..., t_n)$ şi $t_1 = t_2$[33]. The first means that between the denotations of the terms $t_1, ..., t_n$ is the relation R. We use a particular case in which n = 1. So R is a characteristic[34]. Therefore we agree to note it $R(t_i)$. This means that the denotation of t_i has the characteristic R. We also add quantifiers rendered by the words: "all", $\forall$ and "some" $\exists$[35]. Suppose we know that: "$\sim$" is read "no", "&" is read "and", "v" means "or" and "$\supset$" stands instead of the words "if … then…". And $t_1 = t_2$ means that t_1 and t_2 denote the same object.

The quantifiers do not express the amount of individuals that have a characteristic. However numbers can be expressed by means of quantifiers[36]. The number outlines a set of objects that have at least one common feature, be it F. The first sided number stands for a set composed of a single object. Suppose it has the feature F. What we note 1(F)[37] or $\exists!xF(x)$[38]. We have the *uniqueness*

[31] Cauc, Manu, Pârlea şi Goran, *Ibidem*, p. 59.
[32] Iliescu, Gabriel, *Logică şi teleologie cu referire la Mircea Florian*, în Analele USH, Seria Studii de Filosofie, Nr 2, Fundația România de Mâine Pub. House, Bucharest, 2000, pp. 48-49.
[33] *Idem*.
[34] *Idem*.
[35] *Idem*.
[36] Enescu, Gheorghe, *Câteva probleme ale logicii moderne* in *Direcții în logica Contemporană*, Ştiințifică Pub. House, Bucharest, 1974, p. 171.
[37] Enescu, Gheorghe, *Logică şi adevăr*, Politică Pub. House, Bucharest, 1967, p. 19.
[38] Enescu, *Câteva probleme ale logicii modern,* Ştiințifică Pub. House, Bucharest, 1974, p. 171.

quantifier[39]. Number 2 is a set of two objects that have F as a common feature: 2(F)[40] or ∃! 2xF(x)[41]. Generalise for n objects: n(F) or ∃! nxF(x)[42]. Accordingly, the number is a feature of a logical predicate[43]. But the attributes are already logical predicates. Therefore the numbers are predicates of the predicates[44]. Associate this expressions with definitions[45]. Which means the expression "equal by definition"($=_{df}$). But this is treated as equivalence ≡[46].

"Exactly one object has the F feature" iff there is such an object that has the F feature and any other one, if it has the same feature then it is the same as the first.

$1(F)^{47} \equiv \exists!\ xF(x)^{48} \equiv \exists x\ (F(x)\ \&\ \forall y(F(y) \supset y = x))^{49}$

A simpler form is based on two ideas: both that $F(y) \equiv y = x$[50], and that *F(x)* can simply eliminated. As a result the expression for something that is unique is this:

$\exists x \forall y(F(y) \equiv y = x))^{51}$

We introduce the idea that *exactly two objects have the F feature.*

"exactly two objects have the F feature" iff there are two such distinct objects that have the feature F and any third, if it has the same feature then it is the same as the first or the second.

$2(F)^{52} \equiv \exists x \exists y\ (F(x)\ \&\ F(y)\ \&\ x \neq y)\ \&\ \forall z(F(z) \supset (z = x\ v\ z = y)))^{53}$

Different from "exactly two objects", we can express "at least two objects". In the second case the subformula $\forall z(F(z) \supset (z = x\ v\ z = y))$ is missing[54]. Now we jump to a set of *n* objects: n(F):

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[39] *Idem*.
[40] Enescu, *Logică şi adevăr*, Politică Pub. House, Bucharest, 1967, p. 19.
[41] Enescu, *Câteva probleme ale logicii moderne* Ştiinţifică Pub. House, Bucharest, 1974, p. 171.
[42] *Ibidem*, p. 172.
[43] David Hilbert şi Ackermann, *Bazele logicii Teoretice*, according to Enescu, Gheorghe, *Logică şi adevăr*, Politică Pub. House, Bucharest, 1967, p. 19.
[44] *Idem*.
[45] *Idem*.
[46] Enescu, Gheorghe, *Dicţionar de Logică*, Ştiinţifică şi Enciclopedică Pub. House, Bucharest, 1985, p. 65.
[47] Enescu, *Logică şi adevăr*, Politică Pub. House, Bucharest, 1967, p. 19.
[48] Enescu, *Câteva probleme ale logicii modern,* Ştiinţifică Pub. House, Bucharest, 1974, p. 171.
[49] Enescu, *Logică şi adevăr*, Politică Pub. House, Bucharest, 1967, p. 19.
[50] Iago, Mark, *Formal Logic*, Pub. House Humanities-Ebooks, LLP, Tirril Hall, Tirril, Penrith, CA102, 2007, p. 73.
[51] *Idem*.
[52] Enescu, *op.cit.,* p. 19.
[53] *Idem*.

"exactly two objects have the F feature" iff there are n such distinct objects that have the F feature and any n+1, if it has the same feature then it is the same as the first or …or as the n^{th} object.

$n(F) \equiv \exists x_1,\ldots, x_n(F(x_1) \&\ldots\& F(x_n) \& x_1 \neq\ldots\neq x_n) \& \forall y(F(y) \supset (y = x_1 \vee\ldots\vee y = x_n)))$

The results of the invoked sociological survey contain numbers. It is assumed that *n* has values in the whole natural numbers range. Their equivalents are well formed formulas in the predicate logic language (fbf_{LP}). We end with this ideas:

Any sentence of the form n(F) has as an equivalent a $wff_{PL}n(F)$

Therefore the sentence 1(F) has as an equivalent a $wff_{PL}1(F)$

We hypothesize that "Those who have this feature are 1, 2, n". Follows there is one $wff_{PL\ (n(F))}$ equivalent to this sentences. Summarizing, numbers are understood to be sets of objects that share same feature, let this be F. And the sentences that describe it have, as an equivalent, some wff_{PL}.

3.1.2. Percentage and numbers

We understand that percentages are countable as numbers. We have already shown that numbers have equivalent expressions in predicate logic. It follows that also the percentages can be expressed in predicate logic language. That is what we intend to render a little more detailed. We use primitive notions such as: frequency (f)[55] the sample (E)[56] and the numerical constant 100. The sample *E* can be considered as a whole or more genraly, *n*[57]. *Frequency* is the number of individuals having the reference feature[58].

Generally speaking the percentage may occur in two situations: as a start point and as the point of arrival. As a start point the percent is supposed to be *known*. Percentages can be converted into *number*: *in themselves* and relative to a *sample*. As an *arrival* point the percentage is supposed *unknown*. The number of individuals is converted into percentage[59]. Thus, the fraction between a *frequency* and a whole or a total, or *n,* etc. is multiplied by 100[60]. If it is defined as a special kind of proportion, it is multiplied by 100[61].

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[54] Iago, *idem*.

[55] Gheorghiu, Dumitru, *Statistică aplicată în Psihologie*, Universității Titu Maiorescu Pub. House, Bucharest, 2003, pp. 17-18.

[56] *Ibidem*., p16, p. 18.

[57] *Ibidem,* p16, pp. 17-18.

[58] Rumsey, Deborah, *Statistics, Esentials for Dummies,* Wiley Publishing House, Indianapolis, 2010, p. 14.

[59] *Idem*.

[60] Gheorghiu, D, *op.cit.,* p. 16, p. 18.

[61] Glossary of statistic terms, 2007, p582. http://ec.europa.eu/eurostat/ramon/coded_files/OECD_glossary_stat_terms.pdf#page=1&zoom=auto,-82,843

Percentages are equivalent with *numbers*. We consider the percentages as being known per se: *p%*. By *p%* we understand: *p÷100,* that is *p per every hundred of individuals*[62]. And this is equal to *n*. That is *p% = p÷100 = n*.

The percentages applied on the samples are ecquivalent with numbers. Also in Sociology, the percentages can be applied to a sample *p%(E)* that is equal with n_E i.e. a number of individuals in that sample: *p%(E) = (p÷100) × E = (p× E) ÷100 = n_E*. Numbers express sets of individuals that have at least one common feature. In the case of Sociology, the things are the same. In essence, above, we have shown that:

n(F) ≡ wff_{PL}n(F), *n(F),is equivalent to a* wff_{PL}n(F).
p%E = n_E, *p% in E is equal to n_E*.

Therefore the percentages are computable as numbers, both directly and by applying to a sample. We have already shown that *numbers* have equivalent expressions in predicate logic.

3.1.3. Percentages in predicate logic language

We introduce the above equivalences in the table below. We also add the assumption that *n_E is equal to n* (i, ii, iii, below, left). From (ii) and (iii) we conclude that: *p% of E is equal to n* (iv). Then from (i) and (iv) conclude that *p% of sample E have the F feature* is equal with the same wwf in predicate logic as n(F) in (i).

Table no. 2. Procente exprimate în logica predicatelor

(i) n(F) ≡ wwf_{PL}n(F)	"Those who have the feature *F are n"* is equivalent with wwf_{PL}n(F).
(ii) p%E = n_E	"*p% of E*" is equal to n_E.
(iii) n_E = n (assumption)	n_E is equal to *n*. (assumption)
(iv) p%E = n (ii, iii)	"p% of E" is equal to n. (ii, iii)
(v) p%E(F) ≡ $wwf_{PL\ p\%E}$(F); (i, iv)	*"p% of E have the feature F are n"* is equivalent with wwf_{PL}p%E(F). n/p%(E)

In (v), p%E(F) seems to have its own wwf_{PL} indicated by p%E(F), and not by n(F). But, this results by substitution of *n* of (i), by *p%E* from the equivalence (iv): *n/p%E(F)*. Below, we replace the generic expression wwf_{PL}n(F) by the predicate logic expression associated to n(F), i.e. $wwf_{PL\ p\%E}$(F).

(vi) n(F) ≡ $\exists x_1,\ldots, x_n(F(x_1) \&\ldots\& F(x_n) \& x_1 \neq\ldots\neq x_n) \& \forall y(F(y) \supset (y = x_1 \vee\ldots\vee y = x_n)))$

[62] Cramer, Duncan & Howitt, Dennis, *The sage of Dictionary of Statistics*, Sage publication, London, 2004, p. 124.

(vii) $p\%(E) = n_{E,}$

(viii) $n_E = n$; (assumption)

(ix) $p\%(E) = n$; (ivi, viii)

(x) $p\%E(F) \equiv \exists x_1, \ldots x_m(F(x_1) \&\ldots\& F(x_m) \& x_1 \neq \ldots \neq x_m) \& \forall y(F(y) \supset (y = x_1 \vee \ldots \vee y = x_m)))$

The premise (i) becomes explicitely (vi). Conclusion (v) becomes (x): the individuals composing "*the percentage on the sample E have the feature F*" is equivalent with the idea that *there are exactly m individuals with this feature.*

3.1.4. The second variant of percent expression. The answers as atomic expressions of the type $t_1 = t_2$

The second subscale is to construct inferences with atomic expressions of the type $t_1 = t_2$, starting from the percentages of sociological survey. For this, we first build terms and atomic expressions of the type mentioned. We have previously shown that the interviewed subject assertsă/does not assert anything. We assimilate the assertions into the form $t_1 = t_2$. We are progressively building the general shape and the notations for t_1. Temporary consider a variable q. Over this we add: a) x believes that *q, B(x, q)*; b) *x asserts* that B(x, q), *Ass(x, B(x, q))*; c) those x such that *Ass(x, B(x, q))*, $\{x \mid Ass(x, B(x, q))\}$. Thus we built t_1. The general form of t_2 is *p% of the sample*, *p%(E)*. Based on t_1 and t_2 we build the general form of identity atomic expression. We briefly revive the steps:

$t_1 = t_2$

$\{x \mid Ass(x, B(x, q))\} = p\%\ (E)$

Those individuals who assert they believe q are an equal number to p% of the sample.

The q variable has as a value subdomain the response-sentences. And p% has as a value subdomain the bellow *percentages*:

Table no. 3. The value domain of q and of p%

We substitute q with şi associated symbols	*We substitute p% with values*
The Great Union is a positive event, $Poz(e_{3U})$.	84% (E)
The Great Union is a negative event, $Neg(e_{3U})$.	3% (E)
The Great Union is neither a negative nor a positive event, $\sim Poz(e_{3U}) \& \sim Neg(e_{3U})$.	7%(E)

In the table above, we substitute the variables and get atomic expressions of the type $t_1 = t_2$. The terms are instantiated trough sociological interview responses.

$t_1 = t_2$

$\{x \mid Ass(x, B(x, Poz(e_{3U}))\} = 84\%\ (E)$

Those individuals who assert they believe that Great Union is a positive event are equal, as a number, to 84% of the sample.

$\{x \mid Ass(x, B(x, Neg(e_{3U}))\} = 3\%$ (E)

Those individuals who assert they believe that Great Union is a negative event are equal, as a number, to 3% of the sample.

$\{x \mid Ass(x, B(x, \sim Poz(e_{3U}) \& \sim Neg(e_{3U}))\} = 7\%$(E),

Those individuals who Assert they believe that Great Union is neither positive nor negative event are equal, as a number, to 7% of the sample.

3.1.5. Inferences with atomic expressions $t_1 = t_2$ with sociological content

In the atomic expressions above t_1 is a *quantitative variable*. And t_2 is a number, let it be *n,* which attests this. The general form is $t_1 = t_2$. Two particular cases are $y = n$ and $z = m$. Both are possible preses of an inference. Both have variable-number as a *syntactic composition*. The third premise can show for example, that $n < m$. So the conclusion is: $y < z$. It has the variable-variable *syntactic composition*. Besides *syntactic composition*, all of these have a *temporal dimension*. Thus, $y = n$ and $z = m$ are supposed to have simultaneously the shown values. In this case, the temporal dimension is a *synchronous* one. It is also possible that $y_{t0} = n$ and $y_{t1} = m$. In this case the temporal dimension is a *diachronic one*. Depending on *syntactic composition* şi temporal dimension, we distinguish some types of inferences. There names are mentioned in the tables bellow:

Table no. 4. Variable-number synchronic inference

Overall form	The form applyed by substitution
$y = n$	$\{x \mid Ass(x, B(x, Neg(e_{3U}))\} = 3\%$(E)
$z = m$	$\{x \mid Ass(x, B(x, Poz(e_{3U}))\} = 84\%$(E)
$\underline{n < m}$	$\underline{3\%(E) < 84\%(E)}$
$y < z$	$\{x \mid Ass(x, B(x, Neg(e_{3U}))\} < \{x \mid Ass(x, B(x, Poz(e_{3U}))\}$

Table no. 5. Variable-number diachronic and fictitious informations inference

Overall form	The form applyed by substitution
$y_{t0} = n$	$\{x \mid Ass(x, B(x, Poz(e_{3U}), t_0)\} = 3\%$
$y_{t1} = m$	$\{x \mid Ass(x, B(x, Poz(e_{3U})), t_1\} = 84\%$
$\underline{n < m}$	$\underline{3\%(E) < 84\%(E)}$
$y_{t0} < y_{t1}$	$\{x \mid Ass(x, B(x, Poz(e_{3U}), t_0)\} < \{x \mid Ass(x, B(x, Poz(e_{3U})), t_1\}$

The first table contains the *synchronic* dimension, the second one contains the *diachronic one*. The second one contains fictitious dates as concerns the invoked inteview. It is not investigated changing of the percentages over the time. Inside *variable - number* inferences type, the conclusions contain only *variables*, not *numbers*. Thus, they make possible the inferences with variable-variable premises. Follows the inferences with this type of inferences.

Table no. 6. Variable-variable synchronic inference

Overall form	The form applyed by substitution
$y > z$	$\{x \mid Ass(x, B(x, Poz(e_{3U}))\} > \{x \mid Ass(x, B(x, \sim Poz(e_{3U}) \& \sim Neg(e_{3U}))\}$
$z > s$	$\{x \mid Ass(x, B(x, \sim Poz(e_{3U}) \& \sim Neg(e_{3U}))\} > \{x \mid Ass(x, B(x, Neg(e_{3U}))\}$
$\underline{s > u}$	$\underline{\{x \mid Ass(x, B(x, Neg(e_{3U}))\} > \{x \mid \sim Ass(x, (x, Poz(e_{3U}) \& \sim Ass(x, (x, Neg(e_{3U}))\}}$
$y > u$	$\{x \mid Ass(x, B(x, Poz(e_{3U}))\} > \{x \mid \sim Ass(x, (x, Poz(e_{3U}) \& \sim Ass(x, (x, Neg(e_{3U}))\}$

Table no. 7. Variable-variable diachronic inference

Overall form	The form applyed by substitution
$y_{t0} > y_{t1}$	$\{x \mid Ass(x, B(x, Poz(e_{3U}), t_0)\} > \{x \mid Ass(x, B(x, Poz(e_{3U}), t_1)\}$
$y_{t1} > y_{t2}$	$\{x \mid Ass(x, B(x, Poz(e_{3U}), t_1)\} > \{x \mid Ass(x, B(x, Poz(e_{3U}), t_2)\}$
$\underline{y_{t2} > y_{t3}}$	$\underline{\{x \mid Ass(x, B(x, Poz(e_{3U}), t_2)\} > \{x \mid Ass(x, B(x, Poz(e_{3U}), t_3)\}}$
$y_{t0} > y_{t3}$	$\{x \mid Ass(x, B(x, Poz(e_{3U}), t_0)\} > \{x \mid Ass(x, B(x, Poz(e_{3U}), t_3)\}$

And these two tables differ from in *chronological dimension*. Also, the one containing diachronic dimension, expresses an only possible situation. The invoked survey does not track any of the variables over the time. In both cases, both the premisses and the conclusion are composed only of variables.

It is also possible to mix the two temporal dimensions. Thus, form two diachronic premisses and an other synchronic one we can conclude a synchronic sentence, as well. However, between the synchronic premise and the conclusion is a diachronic relationship.

Table no. 8. Synchronic- diachronic and fictitious information inference

Overall form	The form applyed by substitution
$y_{t0} < y_{t1}$	$\{x \mid Ass(x, B(x, Poz(e_{3U}), t_0)\} < \{x \mid Ass(x, B(x, Poz(e_{3U}), t_1)\}$
$z_{t0} > z_{t1}$	$\{y \mid Ass(x, B(y, Neg(e_{3U}), t_0)\} > \{y \mid Ass(y, B(x, Neg(e_{3U}), t_1)\}$
$\underline{y_{t0} = z_{t0}}$	$\underline{\{x \mid Ass(x, B(x, Poz(e_{3U}), t_0)\} = \{y \mid Ass(y, B(y, Neg(e_{3U}), t_0)\}}$
$y_{t1} > z_{t1}$	$\{x \mid Ass(x, B(x, Poz(e_{3U}), t_1)\} > \{y \mid Ass(y, B(x, Neg(e_{3U}), t_1)\}$

The conclusion could not pass as a prediction. Apparently, the two premises refer to the future. But they are known. The moment formulation is at least contemporaneous or after t_1. And t_1 is the final moment of the movement of both variables. Rather we have a pseudo prediction.

3.1.6. The agent of the action is heterogenous

Previously we did not mention what is the one we can replace x with in expression *d(x, e_{3U})*. We did not mention who made the seven territories unite. The interview in question suggests several variants of response[63]. Their

[63] IRES, *op.cit.*, p. 6.

succession is random: king Ferdinand, the citizen in popular ansamblies[64], the soldiers who died on the batlefield, politicians, generals[65]. At the theoretical level, interview demands opinioins, attitudes, not necessary facts in itself[66]. In relation to different romanian territories these agents are splitable in clases such as: *internal* or *external*[67], but also *unipersonall* or sau *pluripersonall.* In one case the agent is Country Counselor. This is composed of 125 voters[68]. As the agent of the action may be certainly qualified as *heterogeneous*.

4. Final remarks

4.1. History. For the Arad area, a less known role had the Romanian national guard and Transilvanian intellingence officers. Their activity was always clandestine and sometimes their lives were jeopardized[69]. They thus constributed to stopping the Magyarisation process of both Romanian and minorities[70]. A Romanian-Hungarian meeting took place in Arad. The Hungarian delegation proposed a limited autonomy of Transylvania, within the Hungary[71]. The Romanian side demanded the recognition of Transylvania's independecy. Interests were incompatible. As a result, the negotiantions failed[72]. And the Alba Iulia Proclamation did not automatically translated into the fact of Territorial Union. Hungary allied with Soviet Russia attaked Transylvania. In August, Romania counterattaks and reaches Budapest. This eliminates bolshevism for both countries. The Treaty with Hungary was closed at Trianon. The Hungarians pleaded for Great Hungary. Which meant the inclusion of Transylvania. Their argument was demographic: the population was mostly hungarian[73]. But the counterargument was that: invoked population was composed of romanian and minorities forced to become maghyars[74].

[64] *Idem*.
[65] I.C. Brătianu, Regina Maria, Iuliu Maniu, Vasile Goldiş, Mareşalul Alexandru Averescu, Generalul Berthelot, Pamfil Şeicaru, according to IRES, *op.cit.*, p. 6.
[66] Mihăilescu, *op.cit.*, p. 40.
[67] Țicu, Octavian, *Unirea Basarabiei cu România-polemici după 100 de ani*, în *Historia special*, An VII, Nr.22. Martie, 2018,, Adevărul Holding Pub. House, Bucharest, p. 45.
[68] Scurtu, Ioan, *România şi Marile Puteri (1918-1933) – Documente*, Fundația România de Mâine Pub. House, Bucharest, 1999, p. 18.
[69] Can be mentioned: Slt. George Patachi Văleanu, Slt. Ion Lia, Lt Radu Ion, Bulboacă, Sorin, some of them are unidentified, Slt Mihai Dragoş, Lt Corneliu Bojincă, Lt.col George Bereşteanu, according to Bulboacă, Sorin, *op.cit.*, pp. 226 -233.
[70] Georgescu, Titu, *Istoria Românilor*, Fundația România de Mâine Pub. House, Bucharest, 1991, p. 127.
[71] Bulboacă, Sorin, *op.cit.,* p. 154.
[72] *Idem*., p. 155.
[73] Georgescu, T, *op.cit.,* p. 138.
[74] *Idem.*

At Paris Peace Conference negociations Romania does not receive equal rights[75]. It is only recognised as secundary allied and beligerant state[76]. It does not receive full war compensation from Germany and şi Austria-Hungary[77].

The consequences of the Great Union were beneficial for Romania. As a surface it becomes a medium size country in Europe[78]. *The population* of 7, 9 milions in 1915 almost doubles in 1919. Under this criterion being ranked 8th in Europe[79]. *Politically*, it was introduced the public, directly, secretly and proportionaly and for both sexes vote[80]. *Everyday life* became from traditionaly to modernity and *diversification of occupations* due to the dismantling of industry. *Politics* enters everyday life due to the electoral campaigns[81]. Three important aspects under which *tradiționalism persists* are: *food*, excluding wealthy families, *famiy* as a good for live environment and healthcare that remain poor[82]. On a *scientific* level, it has became possible increasing of the number of those who knew to write and read from 57% in 1930, to 65% in 1940[83]. One of the aims of the Paris Peace Conference was to create countries with fewer ethnic minorities. But the population mix has proved that this is an impossible end[84].

4.2. Logic and sociology. p%E(F) is reducible to a $wff_{LP}n(F)$ if n is an integer. The percentages on the sample are reducible to predicate logic expressions. These are equivalent with integers. Because for each individual is considered a different variable or at least a distinct indicated variable. Therefore *n* has values in the whole natural numbers range. At least this interview, mainly deals with a logic of assertion. The *believe* operator is a subordinated one. The subject asserts that he believes something. It can be an opened question if: *knows* and *believes* are subordinated each other and if yes, then what is the order of this subordination or if thre are different variants of the answer. An other issue is if the answers supposed to be known by the subjects, are known in a implicite rather then explicite sense of the knowledge.

Two hypothesses would be if the values of I.R.E.S approach is to know romanian opinions on Great Union theme rather than warning the subjects, that, in fact, 1918 is the year of the Centenary Union of the Romanian territories.

[75] *Idem*., p. 127.
[76] *Idem*., pp. 134-135.
[77] *Idem*., p. 133.
[78] Scurtu, I, *op.cit.,* p. 9.
[79] *Idem.*
[80] *Ibidem.,* pp. 14-15.
[81] *Idem*.
[82] *Idem,* p. 15.
[83] *Idem*. p. 15.
[84] *Idem*. p. 10.

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Romanian contributions to the general theory of law and the philosophy of law in the first half of the XXth century

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Abstract

It is of utmost importance that the evolution of the general theory and philosophy of law in the first half of the XXth century establishes their scientific and philosophical foundation within the framework of the juridical culture and practice of the epoch, bringing a valuable contribution to the field of the national and European legal doctrine which is valid even nowadays. Moreover, we can also state that the evolution of the general theory and philosophy of law during this interval coincided with the realization of the ideals of national unity and of a modern, democratic society in Romania. Outstanding personalities such as Nicolae Titulescu, Mircea Djuvara, Dumitru Drăghicescu a.s.o. contributed to the fulfilment of these ideals both through their scientific work and their juridical, political or diplomatic activity.

Keywords: *general theory of law, philosophy of law, national unity, democratic society, European, scientific.*

The beginnings of the philosophy of law in Romania coincide, in Giorgio Del Vecchio's opinion, with "the awakening of the national feeling of unity, based on the idea of the Romanian origin of the nation,"[2], some of the chroniclers of the XVIIth and XVIIIth centuries being "genuine public law philosophers." At the same time, the codification work done by some XIXth century jurists (C. Flechtenmacher, C. Bosianu, V. Boerescu) is highly appreciated. During this epoch of spiritual revival an important role was played by Simion Bărnuțiu, a philosophy of law professor in Iaşi, the founder of a natural and private law system.

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[2] Giorgio Del Vecchio, *Lecții de filosofie juridică (A Few Juridical Philosophy Lessons),* Europa Nova Publishing House, 1995. p. 165.

It is of utmost importance that the evolution of the general theory and philosophy of law in the first half of the XXth century establishes their scientific and philosophical foundation within the framework of the juridical culture and practice of the epoch, bringing a valuable contribution to the field of the national and European legal doctrine which is valid even nowadays. Moreover, we can also state that the evolution of the general theory and philosophy of law during this interval coincided with the realization of the ideals of national unity and of a modern, democratic society in Romania. Outstanding personalities such as Nicolae Titulescu, Mircea Djuvara, Dumitru Drăghicescu a.s.o. contributed to the fulfilment of these ideals both through their scientific work and their juridical, political or diplomatic activity.

The interests of the jurists in the general theory and philosophy of law can be noticed as early as the first decades of the XXth century. In the Romanian academic world such a subject as *Juridical Encyclopedia* or *The Encyclopedia of Law* was taught by Professors George Plastara, Constantin G. Dissescu, G.G. Mironescu, Al. Vălimărescu or Mircea Djuvara who used this syntagm as a subtitle for their course: *The General Theory of Law (A Juridical Encyclopedia)*. Professor Traian Ionaşcu combined these formulas, the resulting title being: *An Introduction to the Study of Law (A Juridical Encyclopedia)*.

The encyclopedia of law subject was taught in Romania starting from 1913, Professors Basilescu and Longinescu being the pioneers in this field. A historical landmark is represented by the four-volume *Juridical Encyclopedia* published by F. Ciorapciu in 1905-1906.[3]

Etymologically, the term comes from the Greek *enkyklios paideia* which described the perimeter of knowledge gained by instruction or the "circular learning process," that is, the complete one. [4]

The designation *Encyclopedia of Law* (the second half of the XIXth century) originally seemed appropriate for an academic field the goal of which was to study the general arguments and perspectives of law. Some authors referred to this subject as "The General Theory of Law" or "General Law".[5]

There have been several approaches to the general theory of law some of them being formulated at an early stage. Thus, according to Edmond Picard, the *encyclopedia of law* is the same as "the pure law," namely, the totality of the law constants. [6]

[3] F. Ciorapciu, *Enciclopedia juridică (The Juridical Encyclopedia)*, Aurora Press, Bucureşti, 1905-1906.
[4] *apud* Mircea Duțu, *Dreptul: între ipostaze teoretice şi avatarurile mondializării (Law: Between Theoretical Positions and the Avatars of Globalization)*, The Romanian Academy Publishing House and The Juridical Universe Publishing House, Bucureşti, 2014. p.190.
[5] *apud* Nicolae Popa, *Teoria generală a dreptului (The General Theory of Law),* CH. BECK Publishing House, Bucureşti, 2012. p. 16.
[6] E. Picard, *Le droit pur: encyclopedie du droit alias premiers principes juridique,* Bruxelles, 1900, *apud* Mircea Duțu, *op.cit.,* p. 199.

Being of the opinion that this subject is interconnected with the philosophy of law, being based upon it, C.G. Dissescu submits that "the encyclopedia of law" represents "the synthesis of law in connection with all the sciences exploring the human being," that is, an introduction to the study of law in addition to something else. It does not exist by itself. It is different from law, it is not the history of law, nor is it the philosophy of law. It is a mosaic. It is all of these at the same time. Natural and positive law together. All of them organized methodically to show what law is or should be. [7]

The philosophy of law began to be taught in Romania starting from the academic year 1909-1910. Professor Virgil Arion taught this subject in Iaşi while Professors Felix Solmo, Iorgu Radu, Cassin Maniu and Eugeniu Speranţia taught it in Cluj.[8]

Far from being a mere deductive application to the juridical field or a speculative elevation of law to the status of philosophy, the philosophy of law "entails direct and unmediated complex relationships between philosophy and law, areas of confluence and interference as well as of conflict, general elements and specific contours, imperative philosophical questions addressed to the legal science, on the one hand and challenging answers for philosophy coming from the juridical sphere, on the other hand, genesis, success, failure and specific horizons."[9]

The attention paid to the general theory of law and to the philosophy of law ever since the beginning of the XXth century is materialized in the publication of various works both in Romania and abroad: Gh. Nicolaescu Bolintin, *Confecţionarea şi interpretarea legilor (The Creation and Interpretation of Laws)* (Minerva Publishing House, Bucureşti, 1901), Petre Misir, *Filosofia dreptului şi dreptul natural* (*The Philosophy of Law and Natural Law*) (Bucureşti, 1904), Nicolae Titulescu, *Essai sur une théorie générale des droits eventuels* (Paris, 1907), C. Dissescu, *Introducere în studiul dreptului consitituţional: ideea de drept şi fundamentul ei (An Introduction to the Study of Constitutional Law: The Idea of Law and Its Foundation)*(Cartea Românească, 1911), G.G. Mironescu, *Noţiunea dreptului* (*The Notion of Law*)(Cartea Românească Publishing House, 1912) şi *Curs de enciclopedia dreptului* (*An Encyclopedia of Law Course*) (Bucureşti, 1915).

Ever since the interwar period an upward trend in the field of the theory and philosophy of law has been noticed, the result of which being represented by the

[7] C.G. Dissescu, *Ce este encyclopedia dreptului (What is the Encyclopedia of Law)*, F. Goble Busti Publishing House, 1915. p. 2

[8] Sofia Popescu, „Teoria generală a dreptului şi filosofia dreptului în România în prima jumătate a secolului al XX-lea" ("The General Theory of Law and the Philosophy of Law in Romania in the First Half of the XXth Century"), in *Dinamica dreptului românesc după aderarea la Uniunea Europeană (The Dynamics of the Romanian Law after Romania's Accesion to the European Union)*, Editura Universul Juridic (The Juridical Universe Publishing House), Bucureşti, 2011. p. 335.

[9] Paul Mircea Cosmovici, *Foreword* to Ion Craiovan, *Introducere în filosofia dreptului (An Introduction to the Philosophy of Law)*, All Beck Publishing House, Bucureşti, 1998.

publication of a large number of valuable works, including academic courses and other works of specialist literature related to: the theory of scientific knowledge in the sphere of law, the creation and application of law, the interpretation of the juridical norms, the philosophy of law, the juridical logic and juridical conceptualism, a.s.o.

The following works testify to the significant progress made during this period: G. Drăgănescu, *Însemnătatea Enciclopediei Dreptului şi raporturile ei cu Filosofia dreptului* (*The Importance of the Encyclopedia of Law and Its Relationships with the Philosophy of Law*)(1920), *Valoarea cunoştinţelor ştiinţifice aplicate în drept* (1939) (*The Value of the Scientific Knowledge Applied to Law*), Andrei Rădulescu, *Câteva noţiuni despre interpretarea legilor* (*A Few Law Interpretation Elements*) (Bucureşti, 1937), Radu Goruneanu*, Ideea de drept şi procesul ei de formaţiune* (1931) (*The Idea of Law and Its Formation Process*), C.C. Damian, *Sisteme de filosofie juridică* (*Systems of Juridical Philosophy*) (Bucureşti, 1937) and *Transformarea concepţiei dreptului* (*The Transformation of the Conception of Law*) (Bucureşti, 1930), Matei B. Cantacuzino, *Despre libertatea individuală şi persoanele juridice* (*On Individual Freedom and Juridical Persons*) (1924), Traian Broşteanu, *Le syllogisme judiciare-logique, institution et volonté dans le jugement* (1932), Justin Lupu, *Definiţiunea legală* (*The Legal Definition)* (Bucureşti, 1939), Eugeniu Speranţia, *Principiul raţiunii suficiente în logica juridică* (*The Principle of Sufficient Reason in the Juridical Logic)* (Bucureşti, 1946) and many others.[10]

Special mention should be made of some remarkable academic courses published during this period: George G. Mironescu, *Enciclopedia dreptului* (*The Law Encyclopedia*) (1922 and 1939), Traian Ionaşcu, *Curs de introducere în studiul dreptului* („*Enciclopedie juridică*") *(An Introductory Course to the Study of Law: A Juridical Encyclopedia)* (Iaşi, the academic year 1929-1930), Ion Rosetti Bălănescu, *Dreptul în general şi noţiunile sale fundamentale. Expunere introductivă în studiul dreptului* (*The General Law and Its Fundamental Notions. An Introductory Exposition to the Study of Law*) (The "Universul" Newspaper Publishing House, Bucureşti, 1937), Gheorghe Băileanu, *Teoria generală a dreptului* (*The General Theory of Law*) (Iaşi, 1940 and 1948) and *Obiectul şi evoluţia enciclopediei dreptului* (*The Object and Evolution of the Encyclopedia of Law*) (Bucureşti, 1940).

The fourth decade of the XXth century was marked by an effervescent scientific activity if the field of law, especially within the framework of the Law Faculty of the University of Bucharest. Thus, several institutes were set up as forms of organized juridical research, involving the participation of both faculty members and students. Mention should be made of the Encyclopedia of Law Institute, coordinated by G.G. Mironescu, the Dean of the Faculty at the time.[11]

[10] *apud* Sofia Popescu, *op.cit.*, pp. 334-335.

[11] Mircea Duţu, *Tradiţiile academice ale ştiinţelor Juridice în România (The Academic Traditions of the Legal Sciences in Romania)*, The Juridical Universe Publishing House, Bucureşti, 2015. p. 10.

Along the same lines of thinking, the Academy of Moral and Political Sciences was founded in 1939, the axis of which was represented by the juridical sciences, to which other subjects were added, subjects which, historically speaking, were generated within the large sphere of the legal science but either gradually detached themselves from it in order to gain an autonomous scientific identity, such as (political) economics, sociology (juridical sociology too) or witnessed a significant development within the juridical field (such as the philosophy of law). As a matter of fact, one of the branches of this institution, the forerunner of the Romanian Academy of Juridical Sciences (RAJS), was the Sociology and Philosophy of Law section.[12]

Chronologically and axiologically, Mircea Djuvara is part of the plenary system which was represented in Romania by the interwar period. For the first time in its history, our country had realized the ideal of the union of all the Romanians, had set up a modern, democratic regime (from 1918 to 1938) while in the field of foreign policy it was involved in the peace maintaining process and the beginnings of the European construction.

In a substantial monographic study devoted to Mircea Djuvara published in 1995, his former disciple, the distinguished jurist Barbu Berceanu stated that nobody before Mircea Djuvara had been able to direct the philosophers' attention to the juridical phenomenon nor had anyone offered such a vast horizon to the practising jurists although the history of Romanian law was rich in outstanding personalities endowed with a keen juridical spirit, such as Mihai Eminescu and Nicolae Iorga, in people with a juridical background who turned their research interests to studies of history[13], such as B.P. Haşdeu, to the type of thinking generated by the historical science, such as A.D. Xenopol, the philosophy of history, such as Mihail Kogălniceanu or to synthesis and generalization, such as Simion Bărnuțiu, Titu Maiorescu şi Dumitru Drăghicescu.[14]

This kind of horizon was deemed necessary by Mircea Djuvara himself: "The philosophy of law represents one of the defining coordinates of a genuine culture"[15] he said, addressing both the jurists and the philosophers at the same time.

In not so many words, Nicolae Bagdasar had already stated that "it was not until the XXth century that the philosophical approach to law, which had existed in the Romanian philosophy ever since the XIXth century, gained momentum

[12] *Idem*, pp. 9-10.
[13] George Gruia, Politics and Public Administration, Sitech Publishing House, 2018, pp.13
[14] Barbu Berceanu, *Universul juristului Mircea Djuvara (The Universe of the Jurist Mircea Djuvara),* The Romanian Academy Publishing House, Bucureşti, 1995. p. 34.
[15] Mircea Djuvara, „Precis de filosofie juridică (Tezele fundamentale ale unei filosofii juridice)" ("A Precis of Juridical Philosophy. The Fundamental Theses of a Juridical Philosophy") in *Analele Facultății de Drept (The Annals of Law Faculty)*, Bucureşti, No. 2/1941. p. 6.

thanks to the works of Mircea Djuvara and Eugeniu Speranția."[16] Likewise, in the preface to an important work devoted to the great thinker, Professor Gheorghe Mihai wrote that "before Djuvara, as far as the Romanian thinking is concerned, there had never been works in the field of the philosophy of law, in the Hegelian or Kantian acceptation of the term, and after Djuvara there have been short-lived, feeble attempts."[17] The historian Neagu Djuvara, a descendant of the same family of distinguished intellectuals, who, after meeting him, declared that "his thinking was so rich and refined in every context that it required a high level of instruction and a large amount of intellectual effort to be able to follow it," [18] declared that "Mircea Djuvara is and continues to be the greatest Romanian thinker in the philosophy of law field."[19].

Furthermore, we should highlight the contemporary relevance of his view, materialized in two directions at least, according to some researchers:[20]On the one hand, what stands out is the theoretical contemporary relevance of his conception, the Romanian thinker realizing a vast philosophical synthesis in conformity with a number of achievements and approaches in the field of contemporary philosophy. On the other hand, Mircea Djuvara's theory and philosophy of law constitute a concrete solution with a view to improving the current tendency towards excessive relativity manifested on the level of the juridical practice and contemporary society.[21]

Mircea Djuvara's entire work represents an ample analysis combining both elements of general or law philosophy and elements of law theory and juridical sociology. However, Mircea Djuvara's vast project of identifying some solid fundaments for the entire juridical research is based on complex epistemological and axiological research which implies a certain prevalence of the general theory and philosophical analysis relative to his work as a whole. Starting from the exploration of the juridical phenomena, he perpetually strives to transcend the limits imposed by the rigorously determined thematic framework of general philosophy. "What generally chracterizes Djuvara's philosophical attitude is that whenever he focuses upon questions related to the philosophy of law he expresses the conviction that they cannot be approached without an epistemological and philosophical integrating view. For, in Djuvara's opinion, the philosophy of law

[16] Bagdasar, Nicolae, „Filosofia dreptului" ("The Philososphy of Law") în *Istoria filosofiei moderne* (*The History of Modern Philosophy*) University Press, Bucureşti, 1941. p 289.
[17] Gheorghe Mihai, *Mircea Djuvara, a Law Philosopher and Theoretician. Foreword to* Dumitru-Viorel Piuitu, *(Mircea Djuvara's Juridical Philosophy)*, Sitech Publishing House, Craiova, 2010. p. 11.
[18] Neagu Djuvara, „*Portretul unui senior al culturii române în perioada interbelică*" (*The Portrait of a Senior of Romanian Culture*), *Foreword* to Dumitru-Viorel Piuitu, *op.cit.*, p. 9.
[19] *Idem*, p. 10
[20] Dumitru-Viorel Piuitu, *op.cit.,* p. 253.
[21] *Ibidem*.

matters are not isolated from the great philosophical questions, but the two branches are closely interconnected, the philosophy of law being organically intertwined with general philosophy."[22]

An outstanding personality of the Romanian culture of the XXth century, Eugeniu Speranția had a special contribution to the development of juridical sciences,[23] especially in the field of the philosophy of law and the general theory of law, areas of research somehow neglected during certain stages of our contemporary history.

The work of Eugeniu Speranția (1888-1972) – a writer and sociologist – is characterized by a large thematic area and an essentially humanistic vision.

In the field of the philosophy of law, his main works are the following: *Les fondements méthaphysiques du droit positif* (1931), *Lecțiuni de enciclopedie juridică (Juridical Encylopedia Lectures)* (Cluj, 1936), *Introducere în filosofia dreptului (An Introduction to the Philosophy of Law)*(Cluj, 1946), *Viață, spirit, drept şi stat (Life, Spirit, Law and State)*(„Gând Românesc", March-April 1938), *Il diritto come mezezo tecnico dello spirito* („Rivista internazionale di filosofia del Diritto", Roma, 1936). These works prove that Speranția was a complex thinker, his view of law being integral to his general world outlook, which, as we are about to see, is of a biological nature.

Mention should also be made of the fact that Eugeniu Speranția is one of the few Romanian thinkers who participated in international philosophy congresses and contributed to philosophical publications abroad.

We could highlight the following landmarks of the scientific heritage he bequeathed to present-day research: his contribution to the scientific status of law; his progressive views on legal encoding and law authority; the counteraction of racist theories in the legal domain; the analysis of the relationship between the objective and the subjective law, besides his interest in establishing the objective rules of the evolution of law.

Eugeniu Speranția attempted to define the object of the philosophy of law and juridical encyclopedia. He was of the opinion that the former ultimately consisted in establishing the moral justification and finality, the foundation of good legislation, the essence and determining factors of law while the latter was concerned with an introduction to juridical philosophy.

These matters can be organized as follows:

1. The definition of law as a social reality;
2. The classification of law;
3. The historical origin and evolution and law and the rules of this evolution;

[22] Nicolae Bagdasar, *op.cit.*, p. 387.

[23] Sofia Popescu, „Eugeniu Speranția", in *Studii de Drept Românesc (Studies in Romanian Law)*, Nos. 1-2/1991, The Romanian Academy Publishing House.

4. The ideological principles justifying the authority or the mandatory quality of law;
5. The history of the general and philosophical doctrines in law. [24]

Starting from the premise that law is a social reality, he stated that general sociology and social sciences, particularly ethnography, demography, political economy and political sciences provide a vast informative material indispensable to acquiring knowledge of the juridical life.

Alexandru Vällimărescu, (1899-1984) besides Mircea Djuvara and Eugeniu Speranția, held a special place in the academic and scientific life of the interwar period, having a special contribution in the field of the general theory of law and the philosophy of law.

He was born in Craiova. His father, Constantin Vällimărescu, was one of the first Romanian jurists to obtain a doctoral degree in France (Toulouse, 1874). He was the President of the Craiova Court of Appeal, the supreme office in the magistracy in Oltenia.

Alexandru Vällimărescu held a doctor's degree in law received in Paris as well, his doctoral thesis - *La justice privée en droit moderne* - being awarded the "French State Distinction," the highest form of recognition granted by the French university.

Before turning thirty he passed an examination at the Law Faculty of the University of Bucharest and occupied the position of lecturer in *Juridical Encyclopedia* and taught the course which was materialized in a treatise on the same subject.

He became an Associate Professor in 1932 and Full Professor in 1942 in which capacities he taught courses on the philosophy of law, civil law and the general introduction to private law, at the same time publishing valuable works both at home and abroad.

In the second volume, the second part of *The History of Romanian Law Treatise,* published by the Romanian Academy Publishing House in 1987, Alexandru Vällimărescu is mentioned among the prominent authors in the field of juridical encyclopedia, with three titles: „*La justice en droit moderne*" (1926), „*Pragmatismul juridic*" (*Juridical Pragmatism*) (1927) şi „*Tratat de enciclopedia dreptului*" (*A Treatise on the Encyclopedia of Law)*, vol. 1 (1932).

Another two of his works should be mentioned: „*Studii asupra raporturilor dreptului cu celelalte discipline*" (*Studies in the Relationships between Law and the Other Subjects),* published in 1929 and „*Teoria dreptului natural, în lumina istoriei şi a doctrinelor filosofice*" (*The Theory of Natural Law in the Light of History and of the Philosophical Doctrines*), published in 1930.

[24] Eugeniu Speranția, *Introducere în Filosofia Dreptului (An Introduction to the Philosophy of Law)*, „Cartea Românească" Press, Cluj, 1946. pp. 192, 194, 198, 299.

In his landmark monography on the subject of jusnaturalism, he analyzed in detail this remarkable and long lasting trend in the juridical thinking, for which he had already expressed a preference in his previous work on juridical pragmatism, in 1927.[25]

The author focused his attention upon the evolution of the school, its ascending phases, apogee, crisis and revival, and particularly upon its essential individualism.

"Natural law" - he wrote - "is the absolutism of the ideas in relation to the absolutism of people in general and of those who govern being in a position to impose the rules of law. Or, these rules of law should not be the expression of the force of those who govern, but the reflex of a set of superior principles which should be imposed to the law makers themselves. This is where the problem of natural law lies."

The school of natural law is characterized as an expression of the individual's rights, of the human rights which should be respected by the state, the following conclusion being reached: the stronger the absolute character of a state is and the less it respects the individual rights, the more prevalent the individualistic feature of natural law becomes.

In his attempt to find an answer to the questions: *What is the Encyclopedia of Law?What is its Importance and How Has It Evolved?* Vällimărescu undertakes a scientific exploration of the theories which provide an analysis of this subject.[26]

Five of these theories stand out:[27]

a) the theory which regards the encyclopedia of law as a summarizing study of the various branches of law, a purely dogmatic study, not involving any critical element;

b) the second theory considers the encyclopedia of law to be an introduction to the legal science;

c) the third view foregrounds the idea that the encyclopedia of law is identical with the philosophy of law;

d) the fourth system is based on the idea that the encyclopedia of law, seen as a unifying study of all the branches of law, and the philosophy of law, regarded as a science which tries to identify the foundations of law in *a priori* notions, will be combined into a third one, a new subject, namely, the general theory of law, taking over some of the methods pertaining to both of the original fields.

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[25] Sofia Popescu, „Alexandru Vällimărescu despre dreptul natural" ("Alexandru Vällimărescu on Natural Law"), in *Dreptul comunitar şi dreptul intern. Aspecte privind legislaşia şi practica judiciară (Acquis Communautaire and Internal Law. Aspects of Legislation and Juridical Practice)*, Hamangiu Publishing House, 2008, The Romanian Academy, The Juridical Research Institute. p. 166.

[26] Cf. Mihai Bădescu, *Filosofia dreptului în perioada interbelică* (*The Philosophy of Law during the Interwar Period*), Sitech Publishing House, Craiova, 2015. pp. 155-177.

[27] A. Vällimărescu, *Tratat de Enciclopedia Dreptului (A Treatise on the Encyclopedia of Law),* Lumina Lex Publishing House, Bucureşti, 1999. p. 18.

e) the fifth theory – the organic theory – looks upon the encyclopedia of law as a special, autonomous science.

Few have been the Romanian jurists who reached high levels of philosophical thinking just as few have been the philosophers who focused on the juridical phenomenon in their theoretical constructions. Without operating a distinction between these two categories, the ones who started from the juridical science to get to the sphere of philosophy or the ones who proceeded in reverse (such a distinction would be impossible to set up most of the times), we consider that Dumitru Drăghicescu is one of these rare thinkers. He is chronologically situated after Simion Bărnuțiu and Titu Maiorescu but before Mircea Djuvara and Eugen Speranția. [28]

We will not highlight his juridical activity, entailed by the official positions he held at state level, this activity consisting in the mere implementation of positive law, in his capacity as minister plenipotentiary – in this respect it suffices to mention his attending the Romanian-Soviet Conference in Vienna in 1924 – or, on the contrary, in the invocation of that *iusgentium* in the modern formulation of the principle of national self-determination, for Drăghicescu played an active role in that diplomatic action of the entire country the conclusion of which was the Paris Peace Conference in 1919-1920. Nor will we emphasize his juridical activity emerging from his participation in the Romanian political life. What we will bring into relief will be the new interpretation of the juridical life he put forth in his works, which exceed the boundaries of only one domain, their titles offering no indication of their juridical content[29].

Dumitru Drăghicescu (1872-1943) was a sociologist, diplomat and professor at the University of Bucharest. Although the titles of his works do not reveal any interest in the fields of the general theory of law or the philosophy of law, their content offers ample evidence in support of this preoccupation. A selection of his works comprises the following: „Raporturile dintre drept şi sociologie" (*The Relationships between Law and Sociology*), Gutenberg Printing House, J.Gőbl, 1904; „Droit, morale et religion", in Archives de Philosophie du Droit et Sociologie Juridique" Nos. 1-2/1932; „Philosophie du Droit et Droit Naturel", 1935; „Droit et droit naturel" in Archives de Philosophie du droit et sociologie juridique, 1938.

Dumitru Drăghicescu started from the premise that there can be only one relationship between law, which was becoming a social science, and the science about society, namely, that obtaining between an abstract science and its object of study. As he saw it, the material being made up of juridical laws, which represent the

[28] Apud Barbu B. Berceanu, *Aspecte juridice din opera lui Dumitru Drăghicescu*, St. de Drept Rom., „Aspecte juridice din opera lui Dumitru Drăghicescu" ("Juridical Aspects of Dumitru Drăghicescu's Work"), *Studii de Drept Românesc (Studies in Romanian Law)*, 6(39), nos. 403-412, Bucureşti, October-December, 1994.
[29] *Ibidem*.

crystallization of social life, provides the only means for the scientific exploration of society.

He regarded the juridical facet of life as a true "sociometer" accurately registering the variations of the social evolution. Dumitru Drăghicescu considered that the collaboration between the experts in the fields of law and social sciences is necessary in order to adjust the laws in various countries to the actual conditions of social development existing at a certain point in time. In the the recent Romanian specialist literature ample analyses have been devoted to Dumitru Drăghicescu's ideas related to the legal field. Under this heading can be subsumed, for instance, his theory that the psycho-social evolution represents the rational foundation of the juridical laws and the science of social psychology will ultimately identify with the science of law. Dumitru Drăghicescu primarily focused upon the relationship between law as a science, on the one hand and sociology, on the other hand. Moreover, he was interested in the relationship between law and economy. [30]

Special mention should be made of the particular attention he paid to the relationship between law, ethics and religion. He observed that: "Religion is the basis of ethics, which, in turn, is the basis of law." Drăghicescu underlined that ethics and law share a common essence and pointed out their interdependence and complementarity concluding that the law cannot be separated from ethics to such an extent as to become immoral. Should the law cease to remain just, as a consequence of losing its moral character, he identified the intervention of jurisprudence as a remedy, since jurisprudence may be relied upon to renew and forward not only the philosophy of law but the moral philosophy itself.

What stands out as particularly original in Drăghicescu's work from a juridical point of view is the identity which he establishes between the social and juridical laws. Being aware that he departed from the vast majority of authors, from the other sociologists who were trying to discover the laws underlying the juridical activity (materialized in legislation and positive law in general), these sociologists regarding the positive law as the object of study of sociology, Drăghicescu stated that "the positive juridical laws are the true laws of society, for there are no natural laws governing society apart from them";[31] "sciences are nature's codes just as our legal codes are the sciences of our society." [32]

[30] Barbu B. Berceanu, „Aspecte juridice din opera lui Dumitru Drăghicescu" ("Juridical Aspects of Dumitru Drăghicescu's Work"), *Studii de Drept Românesc (Studies in Romanian Law)*, No. 4/1994, *op.cit.*

[31] D. Drăghicescu, *Raporturile dintre drept şi sociologie (The Relationships between Law and Sociology),* Bucureşti, Gutenberg Press, J. Gobl, 1904.

[32] Id. (D. Drăghicesco), „Droit, morale et religion", in: *Archives de Philosophie du Droit et de Sociologie juridique*, Nos. 1-2, 1932, p. 243.

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Actual tendencies concerning the unconventional forms of the judicial charge

Adela Maria CERCHEZ[1]

Abstract

A review of the legislative evolution realized in order to offer a new direction to the objectives, principles and functions of the judicial charge comprises the publication of new forms of this judicial charge. From this perspective, through a comparative analysis of the legislative transformations, the following unconventional forms of manifestation of the judicial charge can be identified: medical liability, financial liability, judicial liability for the environmental damages or for the ecological damages, the liability for the prejudices caused by the deficiencies of the products, professional liability, through their publication, evolution and function, of the place and the purpose of those forms in the law normative designing of the judicial charge.

Analyzing the characteristics of the unconventional form of the judicial charge, we can state that the financial law, the medical law, the environmental law, the professional law, the consumer law represent different fields which gradually separated themselves from other conventional fields due to legislation specialization. The delimitation of the unconventional forms of judicial charge imposed itself from the perspective of the social relations and legislation development.

Keywords: *judicial charge, legislative evolution, unconventional forms of judicial charge*

In the dynamics of the contemporary society realities, the law and its institutions are inevitably challenged to change through the adaptation of the old institutions, concepts and principles of the new society's requirements. In the circumstances of a continuous evolution of the society, the forms of the judicial charge are asked to evolve and rediscover themselves once with the society, the study of the forms of judicial charge being actually important and challenging.[2]

The fast evolution of the actual society, the progressive transformations of the social reality imprints an actual character to the judicial charge, the new legal regular social relations generating, under the hypothesis of their misconsidering, the sanction of the judicial charge in one of its forms. Thus, the progress obliges us to reevaluation, especially as far as the subject of the judicial charge is concerned.

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A developed research concerning the forms of the judicial charge under the leading of the new regulations, established in the national law, is actual and also important for the general theory of law, making possible the highlighting of the perspectives as far as the judicial charge is concerned. The analysis of the normative documents that appeared in different fields of the judicial charge allows us to conclude that the process of emphasizing the forms of the judicial charge is submitted to a continuous evolution, from the perspective of the reconfiguration of the social reality, under the administration of the legislative modifications.

A review of the legislative evolution realized in order to offer a new direction to the objectives, principles and functions of the judicial charge comprises the publication of new forms of this judicial charge, such as financial liability, professional liability, etc.[3] From this perspective, through a comparative analysis of the transformations, we can identify the following untraditional forms of manifestation of the judicial charge: medical liability, financial liability, judicial liability for the environmental damages or for the ecological damages, the liability for the prejudices caused by the deficiencies of the products, professional liability, through their publication, evolution and function, of the place and the purpose of those forms in the law normative designing of the judicial charge.

In the actual judicial doctrine, once with the application of the Law no.95/2006 concerning the reform the health area, being known as an authentic Code of health, it was established the idea of highlighting a new field of the law, the medical law, being situated at the border between the public and the private law. In the context of the relative controversies for the existence of this different law field, once with the publication of the law concerning the reform in the health field, created in order to offer answers to most of the problems from the medical area, the balance goes in favour of the advocates that a new different law field exists.

In the judicial doctrine it was asserted that the judicial system of the medical civil liability transcends the classical distinction between the delictual or extracontractual responsibility or the contractual responsibility as well as the distinction between civil responsibility and any other patrimonial responsibility. The medical civil responsibility is, from this perspective, a special responsibility for the patients' damages.[4]

In the judicial doctrine, it was asserted that the majority of the obligations established for the doctor are submitted to a process of„decontractualisation", a phenomenon present also in the case of the obligations of other categories such as lawyers, public notaries, officers of the court, merchants, etc.[5] From this perspective,

[3] Baltag, D., *The theory of the judicial responsibility: doctrinaire aspects, methodology and practice. Doctoral dissertation of a person specialized in law*, Chisinau, 2008.
[4] Boilă, L.R., Boilă, A.C., *The judicial nature of the medical employees in the Romanian law*, Lae Magazine, no.5, Bucharest, 2009.
[5] Pop L., Pop F.I., Vidu S.T., *Elementary discourse of the civil law. The obligations*. The Judicial Universe Publishing, Bucharest, 2012.

we are in the presence of some obligations imposed by the law to different categories of professionals, such as doctors or providers of medical services, defined obligations, by ignoring the extracontractual or contractual nature of the judicial report created between the above mentioned professionals and the beneficiaries of the goods or the provided services that it is justified to be defended in a special way.

In the context of the legislative evolutions, doctrinaire and jurisprudential, as far as the medical responsibility is concerned, we appreciate that the medical civil responsibility is a special one, no matter if the judicial report that appeared between the patient and the doctor, who is a provider of the medical services, have a contractual or extracontractual origin, I mean legal.

The judicial responsibility presents multiple particularities in the area of the protection of the environment. Even if the attempts of creating a real offence from the damaging of the environment, created to repress, at a global level, the ecological illicit did not lead to a concrete result, in the judicial doctrine it is constantly admitted that the sources of a reform appeared, from an ecological perspective, relatively to the main forms of responsibilities. The environment law outlined and developed itself in accordance with the exigencies of the protection of the elements of the environment subjected to serious threats, in the context of diversification and development of industry and agriculture, of the modernization without any precedent that surrounded all the social areas, of the demographic development, of the amplification of the pollution's sources and, implicitly, of the level of danger. Thus, we have an evolution from the simple protection of the environment to its emphasis, and the compulsory and efficient involvement of the man in solving the environmental issues, determined the endorsement of a special law that was gradually transformed in an own judicial system.[6]

The attempts to outline principles and rules for the environment starting from the rules of the common law in order to create an offence for the damaging of the environment in order to repress at a global level the ecological illicit did not lead to a concrete result. In the judicial doctrine is constantly admitted that the source of a reform, from an ecological perspective, related to the main forms of responsibility, appeared.[7]

At present, in the special judicial literature is asserted the configuration of a true law of the consumers and the consumption, a hybrid, complex judicial institution, composed by rules from the civil, criminal, administrative law, etc. As far as we are concerned, the judicial regime of the responsibility for the damages that are generated by the products with flaws, regulated through obligatory rules, of a public order presents a list of particularities and signs created to offer the status of a different judicial responsibility.

[6] Marinescu D., *Discourse of the environmental law*, 3rd edition, revised, The Judicial Universe Publishing, Bucharest, 2008.
[7] Duțu M, Duțu A., *The environmental law*. 4th edition, C.H. Beck Publishing, Bucharest, 2014.

In the Occidental law systems the liability of the professionals is already introduced, being governed by traditional and relatively stable principles. In the recent judicial doctrine, it was asserted that the majority of the obligations introduced in the responsibilities of different categories of professionals are submitted to a process o f„decontractualisation". From this perspective, we are exposed to some obligations imposed by law to different categories of professionals, defined obligations, by ignoring the extracontractual or contractual nature of the judicial report that appeared between the professionals and the beneficiaries of the provided services, who are legitimate to be defended in a special way.[8]

We appreciate that the judicial regime of the civil liability of different categories or professionals overtakes the classical distinction between the delictual liability and extracontractual or contractual liability as well as the distinction between the civil responsibility and any other patrimonial liability. The civil responsibility of different categories of professionals is, in our opinion, o special responsibility for the caused prejudices, circumcised to the professional responsibility of the professionals.[9]

Actually, in the judicial literature, new theories concerning the place of the financial liability in the law system of the judicial responsibility was outlined. The financial responsibility was approached as a variant of the administrative liability or as a different form of responsibility. In our country, the financial liability is not approached as a distinct form of judicial liability. The Romanian pedants, treating the tax evasion, the financial control, but also the role of the Court of Auditors in the financial domain, analyses the infringement from this domain as being contravention or offences. Researchers of the financial la identify in this area different form of the judicial liability. In the aboriginal judicial doctrine, authors as D.D. Saguna and D. Sova identify the following forms of responsibility in the area of the financial law: criminal responsibility and punishment for minor offences.[10] Also, E. Balan considers as forms of judicial liability in the financial law the criminal responsibility, the administrative-disciplinary liability, the administrative-punishment for minor offences liability, the administrative-patrimonial liability, the civil and the materialist liability.[11]

We consider that the financial law represents a distinct area of the law which gradually separated itself from the administrative law under the conditions of the specialization of the law. Obviously, the delimitation did not interfere partially

[8] Tourneau Ph. Le., *Responsabilite civile professionnelle*. Édition: 2e édition revue et augmentée, Dalloz-Sirey, Paris, 2005.
[9] Boilă, L.R., *The responsibility of the professionals in the medical domain- a new hypothesis of civil responsibility*, Romanian Documents Publishing, no.7, Bucharest, 2009.
[10] Şaguna D.D, Şova D., *Public Financial Law*, 2nd edition, C.H. Beck Publishing, Bucharest, 2007.
Şaguna D.D., Rațiu M.A., *Bank Law*, C.H. Beck Publishing, Bucharest, 2007.
Şaguna D.D, Şova D., *Fiscal law*, 3rd edition, C.H. Beck Publishing, Bucharest, 2009.
[11] Bălan E., *Financial Law*, All Beck Publishing, Bucharest, 2003.

through the maintenance of the judicial liability in the area of the administrative law, the existence of the responsibility represents a sign of the regulation of the social relations method from a judicial perspective, but also as an argument in supporting the independence of this field. The financial liability can be as well divided by taking into consideration the origin of the social relations that it governs and protects in the fiscal or budget responsibility, foreign currency responsibility and public-banking responsibility, analyzed as ways of the financial responsibilities.

By analyzing, the characteristic of the untraditional forms of the judicial liability, we can conclude that the financial law, the medical law, the environmental law, the professional law, the consumer law represents different parts of the law that gradually divided themselves in other traditional law areas due to the laws specialization. The delimitation of the untraditional forms of the judicial liability imposed itself from the perspective of the development of the social relations, but also of the law. In the judicial doctrine, the specialization of the law is discussed. As far as we are concerned, the purpose of the law specialization consists in the fact that in the law system, but also in the legislation system the "work sharing" among limitations is highlighted, with the effect of the specialization of rules in order to realize different operations. They reflect originality and the specialization of social relations, the features of concrete situations that, as a whole, represent the purpose of the law specialization. The process of this specialization is characteristic to the financial law, the medical law, the environmental law, the professional law or the consumer's law that that is divided in different areas of the law, through the delimitation from the traditional law fields.

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Rule of law, after 100 years of unified Romania - guarantor of individual rights and liberties!??

Florin MACIU

Abstract

In present times, millions of Romanians spread in the entire world are celebrating the century of The Great Unification and, naturally, the situation is different to that of 1918: Romania has been member of the European Union for 11 years and of NATO for 14 years. Almost three decades ago, Romanians started, again, to hope in democracy and occidental values, having as strategic aim welfare, prosperity and stability. Was the target reached? Were the hopes of Romanians fulfilled?

The rule of law means, among others, the absolute supremacy of law in order to defend individual rights and liberties.

The rule of law is the social entity where the law is the supreme authority and each person must obey equally.

Passing other principles regarding the rule of law like independence of justice and a predictable, just and not bias legislation, we recall that one cannot speak about rule of law, generally, when the protection of human rights lacks.

The supremacy of law is not enough. Very important is also to respect and protect collective and individual rights. The rule of law needs respect of the citizen, but, in its turn, it has to respect the citizen. A society where human rights are neglected is an error, when we talk about the rule of law.

This article has as concern to describe and analyze, only from the juridical point of view, some situation happened nowadays when bodies of the state did not act in harmony, for this aim. The outcome - conclusions which must be considered in the future.

Keywords: *NATO, European Union, Government*

The present work describes and analyzes, from the juridical point of view, some contemporary situations when the state institutions don't act in harmony, with a single voice, when we speak about the protection of individual rights and liberties of the citizens.

Below, we have a few of fundamental principles belonging to rule of law: the law supremacy; universal vote, secret and direct, on the political pluralism basis; democratic alternance in governing; the separation of the state powers; justice independence; just, not bias, predictable legislation; and, also, **respect and protection for individual and collective rights (mutual respect between the state and the citizen).**

Easily, maybe, someone could add another principle, too, like democratic control of civil society over the armed forces.

We will examine, sometimes deeply, sometimes at the surface, the way the protection of individual rights is respected, by the analysis of the following cases which generated countless litigations brought in the courts: teacher salary in 2008 - 2009; public employees vacation bonus; pension over 400 RON ta; PhD bonus; and retired military allowance.

For instance**, the payment of the teachers**, in a period situated after 2008, has been the object of a long line of legislative events, which caused plenty of lawsuits, solved in four ways, pronounced in courts, for the same specific cases. In a nutshell, the Parliament adopted a law[1] to increase the salaries of the teachers, but the Government didn't agree that, and invoked the lack of money.

Under these circumstances, the Government issued an emergency ordinance[2] which was supposed to annihilate the law and by it to come back to the old salaries. At its turn, the Constitutional Court stated[3] that the emergency ordinance of the Government was not constitutional, but, at the proper time, the Government issued another ordinance[4] with a similar content that reiterated what the first one said. And the situation repeated two or three times. In the meantime, the Parliament played its part complicating things by approving or rejecting the texts of the ordinances. Finally, the initial law was abrogated by the Parliament[5]. It remained for the courts to decide what will happen with the teacher salaries in that period consisting in a couple of years, approximately.

We learnt from the above situation that the Government, issuing an emergency ordinance, is not allowed to oppose openly and frankly to a law already adopted by the Parliament. Besides, it was a good example where a category of citizens didn't benefit from the protection of their rights.

Let's see what happened with the **vacation bonus** for the public employee in the period between 2001 and 2006.

By law[6], in 1999, it was established that the public employees would benefit from a vacation bonus besides the vacation indemnity. From 2001 on, the Government or the Parliament issued, each year, until 2007, an emergency ordinance[7] or a law[8], respectively, to postpone the exercise of this right. The term used was "it is suspended".

Of course, the public employees claimed their right in courts, and, again, there were more than one way to solve similar specific cases. Eventually, it was

[1] See Law no. 221/2008.
[2] See Emergency Ordinance no. 136/2008.
[3] See Decision no. 1221/2008.
[4] See Emergency Ordinance no. 151/2008.
[5] See Law no. 330/2009.
[6] See Law no. 118/1999.
[7] See Emergency Ordinance no. 33/2001.
[8] See Law no. 744/2001, no. 631/2002, no. 507/2003, no. 511/2004, no. 379/2006.

decided[9] by the High Court of Cassation and Justice called from now on the Supreme Court that the vacation bonus was due to the public employees.

We understood that suspension is not equivalent to suppression or termination. Also, we saw another important case where the rights of citizens were not protected effectively.

Briefly, we go to another kind of litigation, where, practically, the state has invited its citizens to sue it in the court to obtain their rights, instead of respecting and protecting these rights. We talk about **the way of taxation of over 400 RON pensions,** when below 400 RON pensions were not taxed.

People solicited diminishing the bigger pension with 400 RON, and, only after that, to tax the remained sum. As far as we remember, **it needed a radical change of the majority in the Parliament and, also, the change of the Government, to make justice, after a long line of lawsuits on this theme.**

PhD bonus is another situation, happened during the last years, when the state has not been in a hurry to protect the right of the people. **Hundreds and hundreds of litigations were brought in the courts, and the solutions were different, until the case was solved by the Supreme Court, after an action in the interest of law had been inserted.**

Retired military allowance has been a right provided by law[10], given to the military at the moment of the retirement. Some years the provision was applied, but starting with 2010 the exercise of the right has been suspended by laws or emergency ordinances[11], similar to the case of vacation bonus. The words used were "it is not applied this year" or "it is not given this year".

Later, in 2017, the provision of law was abrogated[12] and the right finished being in force. In spite of this, the Government adopted, for 2018, an emergency ordinance[13] to keep on the idea that the allowances are still not given to those who were supposed to benefit from them in the period 2010 - 2017. So, on one hand, the right vanished, but, on the other hand, it has been still suspended. Obviously, people claimed their rights in front of the courts. There were taken different solutions, evidently. An action in the interest of the law was brought to the Supreme Court.

More than a decade ago, in another case[14], in 2005, the Supreme Court said that it was necessary to limit the suspension or postponement to the period when the act has been in force. With other words, it was told that is unconceivable and inadmissible the extension of the suspension of a provision after its abrogation. So, what was done by the last-mentioned ordinance of the Government is not admissible.

[9] See Decision no. 77/2007.
[10] See Law no. 284/2010 and others before.
[11] See Law no. 118/2010, no. 285/2010, no. 283/2011, Emergency Ordinance no. 84/2012, no. 103/2013, no. 83/2014, no. 57/201599/2016.
[12] See Law no. 153/2017.
[13] See Emergency Ordinance no. 90/2017.
[14] See Decision no. 23/2005.

But, surprise. The court says[15] that the effects of this ordinance cannot be examined because this act is so recent so the action in the interest the law couldn't refer to it. The action talked only about pre-2018 cases. Bottom line: the claims of the people were premature. In those cases, the right was not actual; it was suspended.

And now, at the ending of 2018, when we deal with a non-suspended right, because that right was abrogated, we don't have different solutions given by the courts in order to have a new action in the interest of the law. Beautiful! We will see what will happen. Only one thing is sure: **Government has had the opportunity to solve this litigation even by regulating a payment in stages of these allowances. In lieu of that, they adopted a new suspension despite the fact that the right was abrogated. Is that protection and respect to the individual rights**?

Well, let's draw some conclusions.

Some rules underlined above or only mentioned or not, related to these cases were established by the Constitutional Court or the Supreme Court. Therefore, they have a certain value equivalent to the force of a law or even the fundamental law. They must be always considered:

- The Parliament doesn't have to indicate the financial source when it adopts a law;
- The Government cannot oppose openly and frankly to a law already adopted by the Parliament;
- A non-constitutional emergency ordinance issued by the Government cannot be covered through the approval by the law adopted by the Parliament;
- The suspension of a right exercise is not its suppression or termination;
- The legislator has the right to create supplementary rights regarding salary, to modify or terminate them, as well as to establish the period these rights can exist;
- It is unconceivable and inadmissible the extension of the suspension of a provision after its abrogation;
- The suspension year after year of a right exercise, cannot be repeated sine die, because this could affect the proportionality of the measure.

We noticed also:

- A bizarre lack of co-ordination between Parliament and Government. The Parliament adopts laws that cannot be applied by the Government or delays too much the passing of other laws necessary to Government. At its turn, the Government opposes sometimes the will of Parliament. The majority of the Parliament provides the members of Government. So, what's the reason why they

[15] See Decision no. 5/2018.

don't co-operate[16]? Obviously, the Romanian Parliament has some specific elements: opportunists, dissatisfied, rivals, traitors, infiltrators etc.;

- A normal lack of coordination among courts. The fact is unanimously accepted by specialists. That could be explained through principles that govern this field;
- The tendency of Administration to ignore especially for the future the Constitutional Court Decisions. They issue normative acts hoping that they will escape the control. It looks like regulating is synonymous to gambling;
- The lack of trust of the citizen in state. Citizens are rather suspicious regarding the state;
- The state errors are fixed, but many times this is difficult and /or late. We noticed thousands of lawsuits, material, financial, personal and nervous loses, huge loses of time. A lot of disgusted, disappointed, cheated people, some of them apathic while others are mad at authorities.

[16] To see Gustave Le Bon, *The psychology of the crowds*, Publishing House Antet XX Press, 97-104: "Parliamentary gatherings hypnotized and excited enough have the same features as crowds. They become a docile flock easily responding to the impulses…"

Several pivotal aspects concerning the reaction to the great union on 1 December 1918 in the contemporary theological publications

Vasile MIHĂILĂ[1]

Motto:
„The Romanian people was born Christian. Since its genesis, Church of Christ has been not only a place for prayer but also a locale for ethnic unity. A national solidarity was built within the Church, a national site itself. Church belonged to the people and was serving the people. Church has played a historic role in the preparation of the Romanian triumph. The priests were preaching the Gospel of freedom and union. Down from the pulpit, their voice was turning into a sublime symphony of the victory, in full harmony with the feelings coming from the soul chords of the faithful. The Romanian apostleship of the priests aimed at clearing up for the people the means of fulfilling its wish. The idea of freedom and union started from the people and the Church, along with the nation leaders, supported and assisted the actions of the population to reach their goals'
(Aurel COSMA)[2].

Abstract

The great national event in Alba Iulia on 1 December 1918 surely aroused the interest from both the context of historic and theological studies, while considering that the Great Union truly relied on historic and theological fundaments, known to be the contribution of the Orthodox Church to designing this golden page in the Romanian history. The study herein looks at three aspects, namely the description of the day of 1 December 1918 in the theological conscience, the fundaments of the Great Union or the common elements of the Romanian provinces and their unstoppable desire for the Union and the reception of the Union in the western countries and the various contributions of the clergy and theological elite in the Romanian area. All these three sub-divisions have been completed by a philological and theological analysis of the forms of national renascence through the divine adjuration.

Keywords: *Great Union, 1 December 1918, national history, Church contribution, Church history*

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[2] Aurel COSMA, „*Biserica Română din Banat şi Unirea de la Alba Iulia*", in: *Mitropolia Banatului*, XVIII (1968), 10-12, pp. 594-611 (here, p. 595).

Prolegomena

The great national event in Alba Iulia on 1 December 1918 surely aroused the interest from both the context of historic research[3] and theological studies, while considering that the Great Union truly relied on historic and theological fundaments, known to be the contribution of the Orthodox Church to designing this golden page in the Romanian history. In this context of having the Orthodox Church involved, the Romanian Patriarchate has already published two volumes called *Biserica Ortodoxă Română şi Marea Unire*[4], which feature certain studies printed in various journals, national theological periodicals[5] or publications emerged after the Great

[3] Here are the following works (in the chronological order): Ştefan PASCU, *Marea Adunare națională de la Alba Iulia: Încununarea ideii, a tendințelor şi a luptelor de unitate a poporului român*, Cluj, 1968; IDEM, „Adunarea de la Alba Iulia, 1 decembrie 1918", in: Dumitru BERCIU (ed.), *Unitate şi continuitate în istoria poporului român*, Socialist Romanian Republica Academy Publishing House, Bucharest, 1968, pp. 395-416; Miron CONSTANTINESCU, „Actul Unirii, 1 decembrie 1918", in: Miron CONSTANTINESCU et alii (ed.), *Desăvârşirea unificării Statului național român. Unirea Transilvaniei cu vechea Românie*, coll. „Bibliotheca Historica Romaniae", 5, Socialist Romanian Republica Academy Publishing House, Bucharest, 1968, pp. 353-425; Vasile NETEA, *O zi din istoria Transilvaniei – 1 decembrie 1918*, Albatros Publishing House, Bucharest, 1970; Ştefan PASCU, *Făurirea statului național unitar român – 1918*, vol. I-II, Socialist Romanian Republic Academy Publishing House, Bucharest, 1983.

[4] *Biserica Ortodoxă Română şi Marea Unire*, vol. I-II, *Basilica* Publishing House, Bucharest, 2018.

[5] We include herein all the studies in the chronological order and not in the order they are listed in the volumes mentioned in the previous note: [Pr. Dumitru STĂNILOAE], „Cuvântul Părintelui rector Dr. D. Stăniloae, în catedrala din Sibiu, la aniversarea a două decenii de la Unirea națională", n: *Telegraful Român*, LXXXVI (1938), 49, December 4, p. 1 [republishing: Ion-Dragoş VLĂDESCU (ed.), *Preotul profesor Dumitru Stăniloae. Opere complete II*, Cultură şi duhovnicie. Articles published in *Telegraful Român*, vol. II (1937-1941), *Basilica* Publishing House of the Romanian Patriarchate, Bucharest, 2012, pp. 344-346]; IDEM, „Valoarea zilei de 1 decembrie 1918", in: *Telegraful Român*, XCI (1943), 48, November 28, p. 2 [republishing: Ion-Dragoş VLĂDESCU (ed.), *Preotul profesor Dumitru Stăniloae. Opere complete III*, vol. III (1942-1993), pp. 496-498]; Sabin EVUȚIANU, „Alba Iulia în amintirea generației din 1918", in: *Mitropolia Banatului*, XVIII (1968), 10-12, pp. 585-593; Aurel COSMA, „Biserica Română din Banat...", pp. 594-611; Teodor NADABAN, „Evenimentele din anul 1918 oglindite în presa religioasă din Banat", in: *Mitropolia Banatului*, XVIII (1968), 10-12, pp. 678-682; Pr. Gheorghe LIȚIU, „Rugăciunea de la Alba Iulia", in: *Mitropolia Banatului*, XVIII (1968), 10-12, pp. 683-688; ***, „Cincizeci de ani de la unirea Transilvaniei cu România. Contribuția clerului român la luptele poporului român pentru libertate națională şi unitate", in: *Biserica Ortodoxă Română*, LXXXVI (1968), 11-12, pp. 1289-1342 (reference error in vol. I in: ***, *Biserica Ortodoxă Română şi Marea Unire*, p. 74, note 1. On the other hand, the same footnote mentions the authors of this study, namely Pr. Dumitru Stăniloae, Pr. Ion Ionescu, Asist. Mircea Păcurariu, Pr. Ilie Georgescu, Prof. Alexandru Elian, Diac. Emilian Vasilescu, Pr. Al.I. Ciurea, Pr. Mircea Chialda, Pr. Scarlat Porcescu, Pr. Ioan Rămureanu and Arhim. Nestor Vornicescu); † NICOLAE, Mitropolitul Ardealului, „Unirea Transilvaniei cu România", in: *Mitropolia Ardealului*, XIII (1968), 11-12, pp. 810-814; ***, „Transilvania – pământ străbun izbăvit", in: *Mitropolia Ardealului*, XIII (1968), 11-12, pp. 815-829; Pr. Milan ŞESAN, „Unificarea bisericească din 1918 ca act de întărire a unității politice a Statului român", in:

Mitropolia Ardealului, XIII (1968), 11-12, pp. 830-843; ***, „Cinci decenii de la unirea Transilvaniei cu ţara 1 decembrie 1918-1 decembrie 1968”, in: *Mitropolia Moldovei şi Sucevei*, XLIV (1968), 11-12, pp. 609-616; Pr. I. IONESCU, „Semicentenarul Unirii Transilvaniei cu România”, in: *Mitropolia Olteniei*, XX (1968), 11-12, pp. 889-904; Dumitru-Gh. RADU, „1 decembrie 1918 – temei al împlinirii unităţii politice a poporului român”, in: *Mitropolia Olteniei*, XX (1968), 11-12, pp. 905-918; Pr. Niculae ŞERBĂNESCU, „Promovarea ideii despre unitatea neamului românesc în predosloviile cărţilor bisericeşti”, in: *Mitropolia Olteniei*, XX (1968), 11-12, pp. 918-928; † EFTIMIE Bârlădeanul, „Din însemnările preotului Petru Popa, duhovnicul regimentului 54 infanterie în timpul primului Război mondial”, in: *Mitropolia Moldovei şi Sucevei*, LII (1976), 9-12, pp. 752-757; † NESTOR Vornicescu, „Făurirea Statului naţional unitar român la 1 decembrie 1918”, in: *Mitropolia Olteniei*, XXX (1978), 10-12, pp. 748-759; † ANTONIE Plămădeală, „Marian Hociotă – maica Mina de la Săliştea-Sibiului, «o nouă Ecaterina Teodoroiu*”* în războiul din 1916-1918”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1274-1283; Pr. Mircea PĂCURARIU, „Contribuţia Bisericii la realizarea actului Unirii de la 1 decembrie 1918”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1250-1263; † EFTIMIE Luca, „Clerici ortodocşi din Eparhia Romanului şi Huşilor în războiul din 1916-1918”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1264-1273; Ioan TOACĂ, „Aportul slujitorilor Bisericii Ortodoxe Române la lupta contra regimului de ocupaţie pentru eliberarea pământului străbun (1916-1918)”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1284-1290 (reference error in vol. II in ***, *Biserica Ortodoxă Română şi Marea Unire*, p. 5, note 1); Gheorghe VASILESCU, „Din suferinţele Bisericii noastre în teritoriul vremelnic ocupat (1916-1918)”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1291-1301; † ANTONIE Plămădeală,, „Românii americani anticipează Unirea din 1918”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1302-1305 (reference error in vol. I in ***, *Biserica Ortodoxă Română şi Marea Unire*, p. 299, note 1); Nicolae GHINEA, „Preotul Avram Imbroane, un luptător bănăţean pentru unirea de la 1 decembrie 1918”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1314-1316; Pr. Ştefan TOSCIANU, „Amintiri sub arcul unirii Transilvaniei cu patria-mamă”, in: *Biserica Ortodoxă Română*, XCVI (1978), 11-12, pp. 1335-1337; † TEOCTIST, Arhiepiscop al Iaşilor şi Mitropolit al Moldovei şi Sucevei, „Măreaţă zi, înălţătoare zi”, in: *Mitropolia Moldovei şi Sucevei*, LIV (1978), 9-12, pp. 655-660; † EFTIMIE, „Referiri ale episcopului Melchisedec la unitatea şi unirea românilor”, in: *Mitropolia Moldovei şi Sucevei*, LIV (1978), 9-12, pp. 661-667; Gh. BUZATU, „Marea Unire a românilor”, in: *Mitropolia Moldovei şi Sucevei*, LIV (1978), 9-12, pp. 668-675; I.D. LĂUDAT, „Unirea românilor de peste munţi cu patria mamă (1 decembrie 1918) în amintirea contemporanilor şi a presei vremii”, in: *Mitropolia Moldovei şi Sucevei*, LIV (1978), 9-12, pp. 676-684; Pr. Scarlat PORCESCU, „Contribuţii aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor, în anii 1916-1918, pentru făurirea Statului naţional unitar român”, in: *Mitropolia Moldovei şi Sucevei*, LIV (1978), 9-12, pp. 685-714; Pr. C. CAZAN, „Slujitori ortodocşi din eparhia Romanului şi Huşilor în lupta pentru reîntregirea pământului străbun”, in: *Mitropolia Moldovei şi Sucevei*, LIV (1978), 9-12, pp. 715-721; Pr. Al. I. CIUREA, „Transilvania, străvechi pământ românesc, unirea ei cu România, 1918 – 1 decembrie – 1978”, in: *Studii Teologice*, XXX (1978), 9-10, pp. 597-610; † NICOLAE, Mitropolitul Ardealului, „La aniversarea a 60 de ani de la unirea Transilvaniei cu România”, in: *Mitropolia Ardealului*, XXII (1978), 10-12, pp. 700-710; Prot. Marcu BĂNESCU, „«Graniţa bănăţeană*”* şi Unirea din 1918”, in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 586-601; C. RĂILEANU, „Reprezentanţii Bisericii Ortodoxe Române din Banat la Alba Iulia”, in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 613-618; Ioan Mircea BOGDAN, „Participarea preoţilor ortodocşi din Arad la pregătirea şi realizarea Unirii din 1918”, in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 627-634; Victor ŞUIAGA, „Hunedoara la Marea Unire”, in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 635-639; Aurel COSMA JR.,

Union[6], which covers the interval between 1927 and 2003. Since we have noticed that certain valuable studies were excluded, these remaining studies - after our revision and extension - accounted for the references in the study herein that looks at three aspects, namely the description of the day of 1 December 1918 in the theological conscience, the fundaments of the Great Union or the common elements of the Romanian provinces and their unstoppable desire for the Union and the reception of the Union in the western countries and the various contributions of the clergy and theological elite in the Romanian area. All these three sub-divisions have been completed by a philological and theological analysis of the forms of national renascence through the divine adjuration, namely „Rugăciunea românului", „Rugăciunea de la Alba Iulia" and „Rugăciunea de îngenunchiere". (The Romanian' Prayer, Prayer in Alba-Iulia and Kneeling Prayer, n.tr.).

The study herein does not clearly assume a task of completeness, since a part of the references required to settle different opinions are still unknown to us[7].

„Amintiri şi mărturii de la Unirea din Alba Iulia", in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 642-650; Pr. Mircea PĂCURARIU, „Unirea cea mare", in: *Biserica Ortodoxă Română*, CI (1983), 11-12, pp. 847-858; Pr. Ştefan ALEXE, „Marea Adunare naţională de la Alba Iulia – 1 decembrie 1918", in: *Biserica Ortodoxă Română*, CI (1983), 11-12, pp. 859-867; † NIFON Ploieşteanul, „Aniversarea a 70 de ani de la unirea Transilvaniei cu patria-mamă. Contribuţia Bisericii Ortodoxe Române la realizarea Marii Uniri", in: *Biserica Ortodoxă Română*, CVI (1988), 11-12, pp. 6-12; Pr. Alexandru M. IONIŢĂ, „Marea Unire de la 1 decembrie 1918 – 70 de ani de la făurirea Statului naţional unitar român", in: *Biserica Ortodoxă Română*, CVI (1988), 11-12, pp. 124-137; Ioan LEB, „O relatare mai puţin cunoscută despre Marea Adunare naţională de la Alba Iulia – 1 decembrie 1918", in: *Biserica Ortodoxă Română*, CVI (1988), 11-12, pp. 138-142; Pr. C. BUZDUGAN, „Decembrie – luna împlinirilor româneşti", in: *Mitropolia Moldovei şi Sucevei*, LXIV (1988), 6, pp. 3-4; D. IVĂNESCU, „Marea Unire", in: *Mitropolia Moldovei şi Sucevei*, LXIV (1988), 6, pp. 5-15; Petru ABRUDAN, „Momente şi evenimente istorice pregătitoare şi împlinitoare ale Marii Uniri a românilor oglindite în muzeele ieşene", in: *Mitropolia Moldovei şi Sucevei*, LXIV (1988), 6, pp. 16-29; Ioachim GIOSANU, „Patria din zi în zi pe noi trepte de dezvoltare şi bunăstare", in: *Mitropolia Moldovei şi Sucevei*, LXIV (1988), 6, pp. 30-34; Diac. Petru DAVID, „75 de ani de la Marea Unire de la 1 decembrie 1918: participarea Prea Fericitului Părinte Patriarh Teoctist la festivităţile de la Alba Iulia", in: *Biserica Ortodoxă Română*, CXI (1993), 10-12, pp. 8-33; Pr. Nicolae ŞERBĂNESCU, „1 decembrie – sărbătoarea naţională a României", in: *Biserica Ortodoxă Română*, CXI (1993), 10-12, pp. 72-84; Gheorghe VASILESCU, „Marea Unire din 1918", in: *Biserica Ortodoxă Română*, CXXI (2003), 7-12, pp. 196-208.

[6] See Arhim. Meletie NICUŢĂ, *Istoria Sfintei Mănăstiri Neamţ în timpul războiului pentru întregirea neamului (1916-1918)*, Neamţ, 1927; Arhid. Constantin VOICU, „Despre contribuţia preoţimii române la înfăurirea unităţii naţionale", in: IDEM, *Biserica strămoşească din Transilvania în lupta pentru unitate spirituală şi naţională a poporului român*, Patriarchal Printing House, Sibiu, 1989, pp. 149-172.

[7] Due to the short time limit for drafting the study herein, certain references in the studies of the Romanian theological publications are still unknown to us. Nevertheless, we provide a list of them in the chronological order: Pr. Al. I. CIUREA, „Transilvania, străvechi pământ românesc, unirea ei cu România, 1918 – 1 decembrie – 1978", in: *Studii Teologice*, XXX (1978), 9-10, pp. 597-610; † NICOLAE, Mitropolitul Ardealului, „La aniversarea a 60 de ani de la unirea Transilvaniei cu România", in: *Mitropolia Ardealului*, XXII (1978), 10-12, pp. 700-710; Prot. Marcu BĂNESCU,

Our hope is that this brief paper, which gives a rough portrayal of the Great Union, will provide an overall image of the manner in which the Romanian theological press grasped and benefitted from the glorious historic moment at the onset of the 20th century.

1. Description of the day of 1 December 1918 in the Romanian theological publications in those days

It is a sure thing that the echo of the deep significance of the day of 1 December 1918 can still be heard today. That day itself equated national unity and solidarity „beyond everything through all and above all"[8], „the reading of the testament left by those who had fought and sacrificed themselves for the freedom of the Romanian nation and for the union of all Romanians in the national state within the emancipated ancestral land"[9], „the beloved dream of the Romanian spirit on either side of the Carpathians came true then, an idea that was embroiling the entire pathos and the worries of the Romanian soul; the divine justice was done for a nation too ardent for it; the times of slavery ended for some groups of the nation under the barbarous regime of foreign states"[10], „the day when the apotheosis of the Romanian people in Ardeal and Banat was reached, the day when the conscience of a nation spoke clearly and loudly"[11], „the act of a full grandeur"[12], „the celebration of the resurgence of the Romanian people"[13], „an occasion of great elation"[14], „that

„«Granița bănățeană"și Unirea din 1918", in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 586-601; C. RĂILEANU, „Reprezentanții Bisericii Ortodoxe Române din Banat la Alba Iulia", in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 613-618; Ioan Mircea BOGDAN, „Participarea preoților ortodocşi din Arad la pregătirea şi realizarea Unirii din 1918", in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 627-634; Victor ŞUIAGA, „Hunedoara la Marea Unire", in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 635-639; Aurel COSMA JR., „Amintiri şi mărturii de la Unirea din Alba Iulia", in: *Mitropolia Banatului*, XXVIII (1978), 10-12, pp. 642-650. Similarly, the articles published in the daily *Ziarul Lumina* were left outside of our research studies.

[8] [Pr. Dumitru STĂNILOAE], „Valoarea zilei de 1 decembrie 1918", p. 2 [republishing: Ion-Dragoş VLĂDESCU (ed.), *Preotul profesor Dumitru Stăniloae. Opere complete III*, vol. III (1942-1993), p. 497; ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 22].

[9] [Pr. Dumitru STĂNILOAE], „Valoarea zilei de 1 decembrie 1918", p. 2 [republishing: Ion-Dragoş VLĂDESCU (ed.), *Preotul profesor Dumitru Stăniloae. Opere complete III*, vol. III (1942-1993), p. 497; ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 22].

[10] [Pr. Dumitru STĂNILOAE], „Cuvântul Părintelui rector Dr. D. Stăniloae...", p. 1 [republishing: Ion-Dragoş VLĂDESCU (ed.), *Preotul profesor Dumitru Stăniloae. Opere complete II*, vol. II (1937-1941), p. 344; ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 18].

[11] Sabin EVUȚIANU, „Alba Iulia în amintirea generației din 1918", p. 585 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 24).

[12] Sabin EVUȚIANU, „Alba Iulia în amintirea generației din 1918", p. 586 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 25).

[13] Teodor NADABAN, „Evenimentele din anul 1918...", p. 679 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 41).

glorious sunny day, that wonderful festivity"[15], „a landmark in the history of the Romanian nation"[16], „beautiful twinning"[17], „the grandiose historic moment"[18], „an event of a paramount significance in teh life of our people, which brought to the Romanian unitary state and opened the way to the unified development of our nation"[19], „a high tide time in the history of the Romanian people and of the Romanian Orthodox Church, a step even higher taken into the growth of the Romanian nation"[20], „the historical day... [a day] of silence, solemnity, enthusiasm"[21], „the outcome of the centuries-old fight of the Romanian people for independence and national unity"[22], „a constant remembrance of what an entire nation did for its 2000-year unity"[23], „a memorable day"[24], „a monument of laudation and light"[25], „the most beautiful day in Transylvania turbulent history"[26], „the glorious event"[27], „a magnificent day, an uplifting day"[28], „one of the most inspirative moments of renewal of the major ideas of national unity, freedom and progress, which animated the fight of the Romanian people during all these

[14] Pr. Gheorghe LIȚIU, „Rugăciunea de la Alba Iulia", p. 683 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 43).
[15] Superior metropolitan Miron Cristea, cited by Aurel COSMA, „Biserica Română din Banat...", p. 595 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 61).
[16] ***, „Cincizeci de ani de la unirea Transilvaniei cu România...", p. 1292 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 160).
[17] † NICOLAE, Mitropolitul Ardealului, „Unirea Transilvaniei cu România", p. 814 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 166).
[18] ***, „Transilvania – pământ străbun izbăvit", p. 828 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 184); ***, „Cinci decenii de la unirea Transilvaniei cu țara...", p. 616 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 184, 217)
[19] Dumitru-Gheorghe RADU, „1 decembrie 1918 – temei al împlinirii unității...", p. 905 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 236).
[20] Dumitru-Gheorghe RADU, „1 decembrie 1918 – temei al împlinirii unității...", p. 917 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 254).
[21] After Alexandru Borza cited by NESTOR Vornicescu in the study „Făurirea Statului național unitar român...", p. 748 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 273).
[22] Pr. Mircea PĂCURARIU, „Contribuția Bisericii la realizarea actului Unirii...", p. 1250 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 305).
[23] † EFTIMIE Luca, „Clerici ortodocşi din Eparhia Romanului şi Huşilor...", p. 1264 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 22).
[24] † EFTIMIE Luca, „Clerici ortodocşi din Eparhia Romanului şi Huşilor...", p. 1264 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 23).
[25] Pr. Ştefan TOSCIANU, „Amintiri sub arcul unirii...", p. 1335 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 56).
[26] I.D. LĂUDAT, „Unirea românilor de peste munți cu patria mamă...", p. 676 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 82).
[27] Pr. Scarlat PORCESCU, „Contribuții aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor...", p. 685 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 157).
[28] † TEOCTIST, Arhiepiscop al Iaşilor şi Mitropolit al Moldovei şi Sucevei, „Măreață zi, înălțătoare zi", p. 655 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 160).

centuries"[29], „a crucial time of crowning of the struggles to preserve the national essence and of the divine desires to re-establish the state unity"[30], „the moment of completing the unity of the Romanian nation"[31], „the sublime manifestation of the Romanian people's wish"[32], „the epoch-making event of the Great Assembly in Alba Iulia"[33], „one of those events that was imprinted in the conscience of the Romanians everywhere as an integrant part in the national essence of our nation"[34], „a decisive moment... a time of devout remembrance and of an exemplary awakening"[35], „the dream of a legit and multisecular desire"[36], „a cardinal moment"[37], „the day of fulfilling of a searing dream"[38], „[the event] that started a new era in the history of Romania"[39], „the centuries-old dream of our people, a fundamental and permanent coordinate in the history of Romania"[40], „the secular dream of the Romanians"[41], „the corollary of the sacrifice made by our soldiers on the battlefields, of the unity of nation and faith"[42], „a crucial moment in our history"[43], „a central historic act that marked the ralization of the Romanian Unitary National State, the fulfillment of the centennial fight of our people for national and state unity, of its desire for freedom and independence, closely related to the vocation for peace, friendship and alliance with the neighbors and other nations"[44].

[29] † TEOCTIST, Arhiepiscop al Iaşilor şi Mitropolit al Moldovei şi Sucevei, „Măreaţă zi, înălţătoare zi", p. 655 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 160).
[30] Pr. Ştefan ALEXE, „Marea Adunare naţională de la Alba Iulia...", p. 859 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 187).
[31] Pr. Ştefan ALEXE, „Marea Adunare naţională de la Alba Iulia...", p. 859 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 188).
[32] Pr. Ştefan ALEXE, „Marea Adunare naţională de la Alba Iulia...", p. 866 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 200).
[33] Ioan LEB, „O relatare mai puţin cunoscută despre Marea Adunare naţională...", p. 138 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 201).
[34] † NIFON Ploieşteanul, „Aniversarea a 70 de ani de la unirea Transilvaniei cu patria-mamă...", p. 6 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 208).
[35] Pr. Alexandru M. IONIŢĂ, „Marea Unire de la 1 decembrie 1918...", pp. 124-125 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 219).
[36] Pr. Alexandru M. IONIŢĂ, „Marea Unire de la 1 decembrie 1918...", p. 125 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 219).
[37] Pr. Alexandru M. IONIŢĂ, „Marea Unire de la 1 decembrie 1918...", p. 135 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 237).
[38] Pr. C. BUZDUGAN, „Decembrie – luna împlinirilor româneşti", p. 3.
[39] D. IVĂNESCU, „Marea Unire", p. 15 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 258).
[40] Petru ABRUDAN, „Momente şi evenimente istorice pregătitoare...", p. 29.
[41] Ioachim GIOSANU, „Patria din zi în zi...", p. 30.
[42] Diac. Petru DAVID, „75 de ani de la Marea Unire de la 1 decembrie 1918...", p. 17.
[43] Pr. Nicolae ŞERBĂNESCU, „1 decembrie – sărbătoarea naţională a României", p. 72 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 282).
[44] Gheorghe VASILESCU, „Marea Unire din 1918", p. 196 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 300).

It is quite obvious that all these examples confirm a compelling enthusiasm among the theologists. The Union was perceived as the ‚outcome of all the initiatives and efforts put in for centuries in a row by the entire Romanian nation"[45] and „the pricey earning of the Romanian people"[46]. Of all the examples cited from the studies and articles in the Orthodox Theology publications, we notice that the Great Union is understood as a „dream come true", in other words that „equation" over the centuries that found its solution in the great event on 1 December 1918.

2. The fundamentals of the Great Union on 1 December 1918 or the common elements of the Romanian provinces: from the unitary nature of the historic development to the geographical issue

In the materials under study, the authors did not waver in pointing out, either through ample or lapidary presentations, at the fundamentals of the Great Union in 1918 or better to say the preliminary stages and the common elements of the three distinct provinces that led to the necessity for the national unity, as follows:

a) the unitary nature of the historic development[47]. The Romanian nation has always had the Latin conscience of its spoken language and origin, which turned into a national conscience in the Middle Ages and reached its peak in 1918, thanks to the Great Union[48].

b) the common heritage from the ancestors of the same geographical space, on the unity of genesis, language, (religious) faith, practices and customs[49]. All these mean that the Romanian nation was born in the carpathian-danubian-pontic space and it never had the sense of being born somewhere else and migrated to the carpathian-danubian-pontic area. The people are from ‚around here', on this land,

[45] † TEOCTIST, Arhiepiscop al Iaşilor şi Mitropolit al Moldovei şi Sucevei, „Măreaţă zi, înălţătoare zi", p. 656 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 165).

[46] † TEOCTIST, Arhiepiscop al Iaşilor şi Mitropolit al Moldovei şi Sucevei, „Măreaţă zi, înălţătoare zi", p. 656 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 165).

[47] Vezi: Gh. BUZATU, „Marea Unire a românilor", pp. 668-670 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, pp. 72-75).

[48] Vezi: Gh. BUZATU, „Marea Unire a românilor", p. 669 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 73).

[49] ***, „Transilvania – pământ străbun izbăvit", pp. 815-816 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 167-168); ***, „Cinci decenii de la unirea Transilvaniei cu ţara...", p. 609 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 206-207); Dumitru-Gheorghe RADU, „1 decembrie 1918 – temei al împlinirii unităţii...", p. 905 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 236-237); Pr. Milan ŞESAN, „Unificarea bisericească din 1918...", p. 830 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 186); † NIFON Ploieşteanul, „Aniversarea a 70 de ani de la unirea Transilvaniei cu patria-mamă...", pp. 6-7 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, pp. 208-210); Pr. Nicolae ŞERBĂNESCU, „1 decembrie – sărbătoarea naţională a României", pp. 73-74 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, pp. 283-284).

protected with sacrifice and labor. In this process of defense and the feeling of constancy, the Romanians built that spiritual alliance with the land of the country, with the ancestral homeland[50]. The Romanian nation „deeply lived in a full intimacy inherited from their forefathers, which cannot have any explanation other that it has been here all the time"[51].

c) the union of the three Romanian provinces in the year of 1600 under the leadership of Michael the Brave[52]. Despite that this remarkable union during his time did not last due to the fact that the new Romanian state, unified under a central authority, was perceived by the Great Powers as a barrier or rather a danger in the way of their expansionist interests[53], even though this Union has remained over centuries as a landmark event of asserting the Romanian nationality[54].

d) the language issues and the Romanian publications[55]. These have to be understood in the context of the contribution brought by the Orthodox Church to accomplish the national goal. The translations of the Holy Scripture, publication of the liturgical books and sermons into the Romanian language, various Romanian scholars and clerics, namely deacon Coresi, metropolitans Simion Ştefan in Alba Iulia, Dosoftei in Iasi, Saint Antim Ivireanul in Bucharest, Damaschin in Râmnicu Vâlcea etc., gave a direct validation to the church and national unity of the Romanian nation[56]. It cannot be denied that the first Romanian schools were

[50] † NICOLAE, Mitropolitul Ardealului, „Unirea Transilvaniei cu România", p. 810 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 163).

[51] ***, „Cincizeci de ani de la unirea Transilvaniei cu România...", pp. 1128-1129 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 75).

[52] See***, „Cinci decenii de la unirea Transilvaniei cu ţara...", pp. 613-614 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 212-213); Pr. Mircea PĂCURARIU, „Unirea cea mare", pp. 847-848 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 171); Pr. Alexandru M. IONIŢĂ, „Marea Unire de la 1 decembrie 1918...", p. 125 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 220); D. IVĂNESCU, „Marea Unire", pp. 5-6 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 242); Petru ABRUDAN, „Momente şi evenimente istorice pregătitoare...", p. 19; Diac. Petru DAVID, „75 de ani de la Marea Unire de la 1 decembrie 1918...", pp. 11-12; Pr. Nicolae ŞERBĂNESCU, „1 decembrie – sărbătoarea naţională a României", pp. 73-74 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 284); Gheorghe VASILESCU, „Marea Unire din 1918", p. 196 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 301).

[53] Pr. Scarlat PORCESCU, „Contribuţii aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor...", p. 685 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 110).

[54] Pr. Scarlat PORCESCU, „Contribuţii aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor...", p. 685 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 110).

[55] See Pr. Niculae ŞERBĂNESCU, „Promovarea ideii despre unitatea neamului românesc...", pp. 918-928 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 218-235); Pr. Scarlat PORCESCU, „Contribuţii aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor...", p. 688 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, pp. 115-117); Pr. Mircea PĂCURARIU, „Unirea cea mare", p. 847 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 172).

[56] See: ***, „Cinci decenii de la unirea Transilvaniei cu ţara...", p. 611 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 209): „The conscience of unity has been always underlined

affiliated with the large monasteries in the Romanian space, which is a sure sign for the desire of emancipation of the people and of cultural, national, economic progress and dynamism for the cause of freedom and national unity[57].

3. Forms of the national revival through divine adjuration: The Romanian's Prayer', ‚Prayer in Alba-Iulia' and ‚Kneeling Prayer"

The „Prayer in Alba-Iulia"[58] was inserted in the *Românul* newspaper published in Arad, the day before the National Great Union, which has the following text:

> „You who conquered death and struck the devil, and gave life to Your Romanian people, may pour Your heavenly peace and blessing upon the thousands not counted who are together saying today the prayer in front of Your Altar with their lips shaking - in the citadel of Michael the Brave - and for the suffering and humiliation over centuries, crown this nation with the gift of Your Holy Spirit so that all in one breath and move be His sons in one thought, breaking forever the chains of slavery and darkness. Oh God, shake the ashes of the martyrs in the past and from their divine relics ignite the fire of love in the hearts of everyone. And the tears of orphans and grieving mothers, use Your power to turn them all into stars of joy in the sky, under which today the Romanian people from all the four corners in the world pledge again on their knees to have faith in our fathers"[59].

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in the church books, either handwritten or printed. In the preface of *Cazaniei lui Varlaam*, addressed to Vasile Lupu, it was clearly mentioned that the book has been printed for ‚the entire Romanian nation everywhere that calls itself Orthodox in this language». Metropolitan Varlaam, in the introduction to this book *Răspuns la Catehismul calvinesc*, speaks to the «kindred people [...], everyone who is in Ardeal province and other countries sharing the same faith with us». Beside Metropolitan Varlaam of Moldova and Metropolitan Simion Ştefan, aware of the unity of our nation, was writing almost of the same time in the preface to the New Testament in Alba Iulia (Bălgrad): «This is for you as a reminder that the Romanians are spread to other nations, which made their words mixed with other languages»". With the insertion of this fragment it becomes obvious that the Orthodox metropolitans not only considered the expression of the national feeling in the eparchies under their administration but also its extension and coverage of the entire Romanian space. In other words, a book published in Transylvania intended to become known everywhere in Romania, even though that cognomen was not yet used for the carpathian-danubian-pontic space. See also the compedious ideas in the study of Pr. Niculae ŞERBĂNESCU, „Promovarea ideii despre unitatea neamului românesc...", pp. 918-928 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 218-235).

[57] † NICOLAE, Mitropolitul Ardealului, „Unirea Transilvaniei cu România", p. 812 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 164-165).

[58] See***, „Rugăciunea de la Alba Iulia", in: *Românul*, nr. 18, on 17/30 November 1918. For further information regarding this prayer and its historic context, see the study of Pr. Gheorghe LIŢIU, „Rugăciunea de la Alba Iulia", pp. 683-688 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 43-51).

[59] My option here was to typographically correct the prayer and transcribing it into the language of today.

The prayer itself had surely its inspiration in ‚The Romanian's Prayer', published in the *Tribuna* Arad daily in 1904. Besides this primary source, we can also identify certain liturgic phrases or with Scripture nuances, as in the saying ‚You who conquered death and struck the devil, and gave life...", cited from the memorial service prayer said during the Divine Liturgy[60].

A second form of national revival, expressed through worship, is the ‚keeling prayer'. This prayer was included in the correspodence sent to the priests after the Synod Assembly of the Romanian Orthodox Mitropoly in Hungary and Transylvania, an assembly led by bishop Ioan Ignatie Papp al Aradului[61]. Here it is transcribed[62], with the footnotes including the Biblical references, which we extended in some parts[63], and typographically corrected to match the contemporary variants:

> „And now, O Lord, our God![64]. We have sinned[65]; strayed off the path of truth and the light of justice did not shine for us and the sun did not rise for us[66]. Behold, we *are* servants this day, and *for* the land that Thou gavest unto our Fathers to eat the fruit thereof and the good thereof, behold, we *are* servants in it[67]. Righteous are You, o Lord, and upright are Your judgments[68]. You are just, O Lord, and just are all your works. All your ways are grace and truth, and you are the Judge of the world.[69]. You have shaken the land, Lord![70] Who among the gods is like you, o Lord? Who is like you - majestic in holiness, revered with praises, performing wonders?[71]
>
> Behold, we come unto thee; for thou *art* the LORD our God[72]. For thus saith the LORD, Thy bruise *is* incurable, *and* thy wound *is* grievous[73];

[60] ***, *Liturghier*, including the divine Liturgies of our Holy Fathers: Ioan Gură de Aur, Vasile cel Mare and the Proscomidiar Liturgy, such as the practice of the Evening service, Matins, the divine Proscomidias, the Liturgy with the Bishop, as well as other necessary routines in the Holy Church Service, Publishing House of the Biblical and Mission Institute of the Romanian Orthodox Church, Bucharest, 1995, p. 132.

[61] See Aurel COSMA, „Biserica Română din Banat...", p. 597 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 63).

[62] Inserted in Pr. Gheorghe LIȚIU, „Rugăciunea de la Alba Iulia", pp. 685-686 (republishing: ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 47-49). Pr. Gh. Lițiu will also work in the Biblical references.

[63] The Biblical references come from the synodal edition from 2008. See ***, *Biblia sau Sfânta Scriptură*, Biblical and Mission Institute of the Romanian Orthodox Church, Bucharest, 2008.

[64] Dan. 9, 15.

[65] Dan. 9.

[66] Song. 5, 6.

[67] Neh. 9, 36.

[68] Ps. 118, 137.

[69] Tob. 3, 2.

[70] Ps. 59, 2.

[71] Jer. 15, 11.

[72] Jer. 3, 22.

[73] Mich. 6, 3; Jer. 30, 12.

punishment for your transgression has come[74], Arise, shine[75], I *am* the LORD your God[76]; For I *am* with thee, saith the LORD, to save thee: though I make a full end of all nations whither I have scattered thee, yet will I not make a full end of thee: but I will correct thee in measure, and will not leave thee altogether unpunished[77]. I will break the yoke off your necks and tear off your bonds[78]; For I will enlarge thy borders[79]. I will even gather you from the people, and assemble you out of the countries where ye have been scattered[80]; And I will restore thy judges as at the first, and thy counsellors as at the beginning[81].

And now, O Lord our God[82], the great, the mighty, and the terrible God, who keepest covenant and mercy[83]; Great in counsel, and mighty in work: for thine eyes *are* open upon all the ways of the sons of men[84]; To set up on high those that be low; that those which mourn may be exalted to safety, He disappointeth the devices of the crafty, so that their hands cannot perform *their* enterprise[85] let not all the trouble seem little before thee, that hath come upon us, on our kings, on our princes, and on our priests, and on our prophets, and on our fathers, and on all thy people[86].

Lord, you reign over life and death and descend to the gates of hell and rise again[87]; for we do not present our supplications before thee for our righteousness, but for thy great mercies.[88] Rise up, be our help and redeem us for the sake of Your loving kindness[89]. Then they cried unto the LORD in their trouble, *and* he saved them out of their distresses[90], Help us, God our Savior, for the glory of Your name[91], and deliver us and purge away our sins for Thy name sake[92], now and forever and to the ages of ages. Amen".

[74] Lam, Jer. 4, 22.
[75] Isa. 60, 1.
[76] Ezek. 20, 19.
[77] Jer. 30, 11.
[78] Nah 1, 13.
[79] Ex. 34, 24.
[80] Ezek. 11, 16.
[81] Is. 1, 26.
[82] Dan. 9, 15.
[83] Neh. 9, 32.
[84] Jer. 32, 19.
[85] Job 5, 11-12.
[86] Neh. 9, 32.
[87] Song. 16, 13.
[88] Dan. 9, 18.
[89] Ps. 34, 2.
[90] Ps. 107, 13.
[91] Ps. 78, 9.
[92] Ps. 84, 10.

At first sight, the prayer seems to be ordinary[93], yet in its composition there is a concern for *remembering* the history of the Jewish nation who lived in Babylon. The Romanian nation has the Jews as their model, who are bemoaning their fate through their prophets and the living far away from Jerusalem but who are called to a new revival by their return within the borders that will have from now on to unite us into a single thought and pathos. Similarly, the Bible quotes have an indirect reference to the events leading to the Great Union, namely the fall of the Habsburgic Empire and the deliverance of the enslaved people[94].

Even from the perspective of the liturgic content, the great event in 1918 resulted in multiple changes. During the Synodal Assembly of the Romanian Orthodox Mitropoly in Hungary and Transylvania, under the leadership of bishop Ioan Ignatie Papp al Aradului, the clergy and the faithful will pray for ‚our high spiritual national authority and for the great state of the Romanian nation, for enlightenment, betterment, peace, health, deliverance and forgiveness of their sins and for the God the Lord to give them abundance and help in anything of their doing, to the greater good"[95], instead of the prayer for the emperor.

The national feeling might have embraced everyone at that time, which is easily noticed and examined in the last part of the Liturgy in Alba Iulia, on the day of the Great Union. To the words said by bishop of Arad, Ioan Papp, „He who raised from the dead, Christ, our true God, *and returned from the dead our Romanian nation and gave us this great day of the Union of the Nation. Our God, help our country, the Great Romania be prosper and stronger so as to eternally exalt Your name*"[96], words that evidently *altered* the original form of this last part of the Liturgy[97], the people did not reply with the simple „Amen", but with Andrei Muresanu's poem, the ‚Awaken, thee Romanian...'anthem. When the words,

[93] Pr. Gheorghe LIȚIU, „Rugăciunea de la Alba Iulia", p. 686 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 49).

[94] Pr. Gheorghe LIȚIU, „Rugăciunea de la Alba Iulia", p. 687 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 50).

[95] Aurel COSMA, „Biserica Română din Banat...", p. 598 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 62-63).

[96] Coriolan BARAN, „Am fost la Alba Iulia", p. 640; Pr. Alexandru M. IONIȚĂ, „Marea Unire de la 1 decembrie 1918...", p. 131 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 230); Gheorghe VASILESCU, „Marea Unire din 1918", p. 203 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 313). Our italics.

[97] ***, *Liturghier*, p. 175: „Cel ce a înviat din morți, Hristos, Adevăratul Dumnezeul nostru, pentru rugăciunile Preacuratei Maicii Sale..."(see the Greek original ***, *Ἱερατικόν*, περιέχον τὰ τῷ ἱερεῖ ἀνήκοντα ἐν ταὶς ἀκολουθίαις τοῦ νυχθημέρου, τὰς θείας καὶ ἱερὰς Λειτουργίας Ἰωάννου τοῦ Χρισοστόμου, Βασιλείου τοῦ Μεγάλου καὶ των προηγιασμένων καί τινας ἄλλας ἀκολουθίας καὶ εὐχάς, Ἐγκρίσει τῆς Ἱερᾶς Συνόδου τῆς Ἐκκλησίας τῆς Ἑλλάδος, Ἔκδοσις τῆς Ἀποστολικῆς Διακονίας τῆς Ἐκκλησίας τῆς Ἑλλάδος, Ἀθήνα, [8]2015, p. 146: „Χριστος ὁ ἀληθινὸς Θεὸς ἡμῶν, ταῖς πρεσβείας τῆς παναχράντου και παναμώμου ἁγίας αὐτοῦ Μητρός...").

We'd better die while fighting", which was the last but one line in the final stanza, the people in attendance raised their right hand as a pledge[98].

4. The support of the Great Union abroad: from the „American voice" to the Western Europe

After Romania entered the First World War, the *Romanian National Committee* was summoned in the American space, with a twofold purpose - to collect funds for the assistance of the Romanian injured soldiers and to promote the national cause of the Great Union[99], in various ways. The Romanian Orthodox Church sent a group of priests, led by Dr. Vasile Lucaci(u)[100], with the mission to ‚work for the brotherly unity of the Romanians, for their adhesion to the divine cause of our people, namely the national union and creation of the unitary Romanian state"[101]. This sending-off of the clergy had obviously the *approval* of the Romanian Orthodox Church, has the intention to strenghten more the national feeling for the Romanians in the United States and Canada, and their high regard to the national cause, as seen in the letter from metropolitan Pimen (Georgescu) of Moldova, addressed to the Romanian priests and people in America: „almost all nations are part of this bloody battle and millions of people dressed in the military uniform are today on the battlefield, bravely fighting to defense justice and us, the Romanians, to unite the nation into a Romanian state that will be only accomplished by labor and sacrifice from everyone"[102].

The action from America was also supplemented by other missions in the Western Europe, such as the publication of volume and brochures by the Romanian scholars in Paris, along with the papers *La Roumanie* and *La Transylvanie*, as media channels that were advocating for the Union[103]; still in Paris, the *National Council of the Romanian Unity* was established, led by Take

[98] Aurel COSMA, „Biserica Română din Banat...", p. 600 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, pp. 70-71); Pr. Alexandru M. IONIŢĂ, „Marea Unire de la 1 decembrie 1918...", p. 131 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 230); Pr. Nicolae ŞERBĂNESCU, „1 decembrie – sărbătoarea naţională a României", p. 79 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, pp. 291-292).

[99] Pr. Scarlat PORCESCU, „Contribuţii aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor...", p. 697 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 131).

[100] For further information about the life and work of Pr. Vasile Lucaci(u), see Pr. Corneliu SÎRBU, „Preotul Vasile Lucaciu", in: *Mitropolia Ardealului*, XIII (1968), 11-12, pp. 870-873.

[101] Pr. Scarlat PORCESCU, „Contribuţii aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor...", p. 697 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, pp. 131-132); *cf*. Pr. Mircea PĂCURARIU, „Unirea cea mare", p. 856 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 184).

[102] Quoted in the study of Pr. Scarlat PORCESCU, „Contribuţii aduse de slujitorii bisericeşti din Arhiepiscopia Iaşilor...", p. 697 (republishing***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 132).

[103] Pr. Mircea PĂCURARIU, „Unirea cea mare", p. 856 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 183).

Ionescu[104]. Likewise, the same Take Ionescu, together with Nicolae Titulescu, Octavian Goga, George Moroianu and others conducted propaganda and diplomatic activities for the Great Union in London, while the *Congress of the Exploited Nations* in the Habsburgic space was organized in Rome in April 1918, being attended by a large number of Romanian University Professors coming from Paris who signed a motion to recorgnize the rights of each nation to form itself into an independent state or to confederate with its national state where already existent[105]. The *Action Committee of the Romanians in Transylvania, Banat and Bucovina* was set up in Rome, on 19 June 1918, under the leadership of Simeon Mândrescu. This *Committee* worked at a later date for instituting units of Romanian volunteers in Italy, from the prisoners in the Austro-Hungarian army[106].

Conclusions

The paper herein has intended to reflect, as most possible, upon the event of the Great Union. As noticed, this major event in the history of our nation has been debated by the contemporary Romanian theologists, who pointed out at different aspects, from ‚definitions' or descriptions of this event to the manner in which the Western Romanian groups tried to support this golden page in the national history. As a theologist, I will refer to a less dealt with issue, namely the forms of national prayers, written and pronounced in the context of the year 1918.

The prayers said by the Romanian clergy, animated by the idea of Great Union, certainly have a liturgic and Scripture substratum, a fact seen in the inspiration sources. Even though these prayers had a national nature, they were mentioned for a short time, since they included the idea of the national unity effected in December 1918. In many situations, the Scriptural texts being referred to in terms of composition reminded of the fall of the Jewish nation into the Babylon slavery and of the necessity to return to the ‚homeland.' With this Scripture-based language, which was fully identifying the feelings at the onset of the 20th century[107], the Romanian nation desired unity and cohabitation in a single state entity.

[104] Pr. Mircea PĂCURARIU, „Unirea cea mare", p. 856 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 183).
[105] Pr. Mircea PĂCURARIU, „Unirea cea mare", p. 856 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, p. 183).
[106] Pr. Mircea PĂCURARIU, „Unirea cea mare", p. 856 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 2, pp. 183-184).
[107] Pr. Gheorghe LIȚIU, „Rugăciunea de la Alba Iulia", p. 687 (republishing ***, *Biserica Ortodoxă Română şi marea Unire*, vol. 1, p. 50).

Migration - national security problem

Şerban Adrian COSMIN[1]

Abstract

Migration is a complex global phenomenon that affects all countries whether they are of origin, transit or destination. Free movement is a defining principle of the European Union, recognized worldwide for more than half a century by the adoption of the Universal Declaration of Human Rights.

Migration may be the result of certain threats to the security of individuals such as human rights violations, ethnic conflicts, civil war, etc. But at the same time, migration itself can be a source of risks, dangers and threats when it is not controlled, causing the accentuation of organized crime, xenophobic and racial violence.

Analysing the phenomenon of international migration, its triggering factors, the effects on donor and recipient countries, we conclude that international migration is a global security factor and its consequence, migration contributing both positively and negatively to ensuring national security.

Keywords: *migration, triggering factors, threats to the security, national security*

The idea of migration (a term derived from the Latin "migratio, onis") does not have a clearly definition. According to the International Organization for Migration, it is defined as "the movement of a person or a group of persons either crossing an international border or within a state". Migration is a complex global phenomenon that affects all countries whether they are of origin, transit or destination. Free movement is a defining principle of the European Union, recognized worldwide for more than half a century by the adoption of the Universal Declaration of Human Rights. The Declaration stipulates in Article 13 that "Everyone has the right to move freely and to reside in the territory of any state" and "Everyone has the right to leave a country, including his or her home, and to return to his country." For citizens of the Member States of the European Union, the free movement of workers was one of the first rights recognized within the Community framework. If the original rules (Regulation No 1612/1968 on the free movement of workers and Directive 360/1968 on the right of residence of

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workers and their family members) concerned only those who pursued an economic activity, the Single European Act extended the right of residence to all citizens of the Member States, irrespective of the conduct of an economic activity. International migration is a reality that will continue to exist as long as the discrepancies between different regions of the world increase.

Today, migration must be seen as a result of the interaction between individual decisions and social restrains. For migrants, emigration may be due to the following factors:

1) Economic - Different living and salary standards between countries (pull factor);
2) Political - political refugees due to persecution in their country (push factor);
3) Security - especially in case of war in the country of origin - more than 10 million refugees (2012), more than 28.8 million internally displaced persons (2013);
4) Family - family reunion;
5) Fiscal - installation in a country that offers a lower tax rate.

Analyzing the phenomenon of international migration, its triggering factors, the effects on donor and recipient countries, we conclude that international migration is a global security factor and a consequence as well, migration contributing both positively and negatively to ensuring national security. In order to assess the impact of migration on national security, it is necessary to analyze the influence of migration on each dimension of security.

1. Identifying a theoretical model of the impact of migration on national security.

The concept of "national security" was first exposed at the beginning of the twentieth century by US President Theodore Roosevelt. The concept of security means the situation where a person, a group of people, a state or some alliances, following specific measures taken individually or in agreement with other actors, gains the certainty that their existence, integrity and fundamental interests are not jeopardized. Security takes place at all levels of the society - organization-individual-group-state-alliances and manifests itself in all areas of social life - political, economic, social, military, demographic, ecological, cultural, etc. National security is determined, to a large extent, by political stability in the country, social situation, socio-cultural relations and economic potential. These factors in turn lead to the emergence of migratory labour practises, which can become direct threats to the security of the countries participating in these international flows.

In our opinion, the correlation of migration with security is bilateral, because this problem contains two important aspects: the security of the communities and states that are included in the migration circuit, and the security of the people, which form the migration flows.

Starting from this approach, we are trying to create a theoretical model that, to a certain level, can provide a justification for restrictive migration measures at European level.

The impact of migration on states and societies in terms of security can be analyzed taking into account three major interests that characterize the two actors, interests that seek to ensure the security environment characteristics necessary for their existence and development. Therefore, military interests will be taken into account, which relate to the territorial integrity and political sovereignty, as well as the material aspects relating to the the economic production, while the social interests relate to the national and cultural identity.

In fact, threats are those that put the security mechanisms in motion resulting in the fact that "the balance between security interests is a product of perception of threats."[2]

Based on SWOT analysis, threats can be grouped into two broad categories - external (political-military) and internal (society). The military dimension refers to the "mutual influence between the offensive and defensive military capabilities of states and their perceptions towards the intentions of the other."[3] Among the military threats faced by the states, we would like to mention: weapons of mass destruction, Middle East conflicts, organized crime, nuclear weapons, military disputes, all issues that demonstrate that military power continues to have meaning. The most important military problem faced by humanity at the present time is terrorism. The political dimension of security refers to "both the relationship between the State and its citizens and the international relations of that State"[4]

When external threats become more acute, balance tends to material aspects and military. Economic output is required both for defense and to reduce social risks, so the state's ability to maintain a predominantly economic balance in society depends on the pressure exerted by external threats on social cohesion. As long as this pressure does not lead to an increase in economic interests on either side of the economic balance, social pressures that place emphasis on the social aspect of security are reduced. "When external threats decrease, social cohesion is no longer under pressure, which leads to an increase in the importance of social sensitivity."[5]

From a social point of view, "security assumes the protection of collective identity, national specificity and national cohesion"[6]. Social issues include migration, the degradation of the educational environment and poverty. In general, internal threats focus on traditional characteristics of national identity,

[2] Cămărășan V.A. – Migration and European policies, Ed. CA Publishing, 2013, p. 142
[3] Frunzeti T. - Globalization of security, Ed. Militară, București, 2006, p.99
[4] Sarcinschi. A. - Non-Military Dimensions of Security, Ed. Universității Naționale de Apărare "Carol I", *2005, p.13*
[5] Cămărășan V.A. – *op.cit.*, p. 143
[6] Frunzeti T. - *op.cit.*, p.102

including race, ethnicity, culture, religion and language, although there is internal tension between the Western democracies and the ethno-cultural and ideological dimension of national identity.

Therefore, international migration leads to the appearance of new minorities within a society, groups that have different racial, cultural or religious specificities, likely to generate a potential threat to social stability, national identity, culture or way of life.

V. Associated factors that determine the perception that the migratory phenomenon poses a threat to the destination society.

1. Migrants' attitude towards assimilation - A cleavage in the society that needs to assimilate migrants and the migratory wave occurs due to the cultural specificity, usually assessed in terms of race, ethnicity, language, religion and culture, including political ideology.

Society's perception of assimilation is largely affected by migrant attitudes toward assimilation. Migrant preference for "segmented assimilation" to the disadvantage of the traditional concept of "assimilation through absorption" leads to a growing belief that these groups are more difficult to assimilate[7].

Another factor that needs to be considered from the point of view of the relationship between the impact of migration on security is to concentrate migratory flows in time and space in the conditions where the visibility of these flows increases exponentially when they occur at a certain moment and place. Migration flows are generally geographically concentrated targeting not only certain states or regions but also certain parts of cities where ethnic enclaves are created. The above-mentioned factors should be seen in correlation with the migration flow input channel and the effects of public migration policies. As for the entry channel, it considers how to access the country - as legal or illegal migrants. The latent effects of policies in destination countries can also lead to the emergence of threats. The October / November 2005 riots in France caused the destruction of about 9,200 vehicles, an accidental death, 2888 arrests and a loss of about 200 million euros[8].

The riots revealed France's inability to assimilate young non-integrated people coming from some generations of immigrants. According to interpretations from the German and American press, the root of the revolt was not found in Islamic religion, but rather in the interconnected phenomena of socio-economic and ethnic exclusion.

[7] Porters A., Min Z. – The New Second Generation: Segmented Assimilation and Its Variants, The New Immigration: An Interdisciplinary Reader, Taylor&Francis Group, New York, 2005, p.100
[8] Castles S., Miller J. M The Age of Migration International, Population Movements in the Modern World, 4th Edition, PALGRAVE MACMILLAN, 2014, p.282

In fact, the depth analysis of the long-term causes of the riots should make a distinction in relation to the immediate causes that precipitated the events. Long-term factors include feelings of anxiety and frustration among many of the above mentioned about their lives and uncertain future. French young people from immigrant parents, mainly North Africans, Maghrebians and Turkish, faced endemic forms of discrimination on the labor market, with an unemployment rate that reached 40 percent, almost 4 times higher than the national average.

Police officers doing routine checks focused on racial profiles, while club owners and bars refused access for these young people. Such practices have reinforced hostility, creating a cleavage within society. Moreover, episodes of police violence tended to aggravate the relationship between young migrants and state authorities, leading to an even deeper alignment with state institutions.

Following the ghettoization process, exclusion areas were born within the metropolis where poverty, high unemployment and the absence of social mobility were complemented by increasing crime and delinquency.

Isolated from the city centre due to the high costs and relative lack of public transport, such environments have generated the development of a distinct urban culture. Gangs offered to many young people a sense of belonging, giving sense to their life.

The immediate causes of the riots were several incidents that took place over a relatively short period of time. The first was the fire at the Paris-Opera Hotel near the Lafayette Galleries in April 2005, which resulted in the deaths of 20 people, including ten children, and nearly 60 were injured, 12 of which were very serious, mostly migrant Africans[9].

The incident has exposed the poor living conditions of several immigrant families. Various associates whose members were largely represented by persons with African descent, similar to the victims of the fire, organized demonstrations.

The second trigger for the riots was the social policy of the French Government that suspended several Community assistance programs that had been in place since 1990.

To all of this, a virulent press campaign of the French interior minister was added, demanding strong interventions against the criminal phenomenon in the suburbs. Subsequently, this position of the Minister was considered the cause of the death of two teenagers, electrocuted accidentally, while trying to hide from the police.

All three reported incidents are considered as triggering factors of revolt.

These street movements did not have religious connotation, and the participants ignored the calls made by the leaders of the Muslim organizations to end the revolt. Most participants did not have a criminal record at the time of the revolt.

[9] https://www.hotnews.ro 2005

Social revolt was a spontaneous movement of nonintegrated youth through which they demonstrated their frustrations against the policies of the French Government and society as a whole, a society that had failed to assimilate them.

The revolts of 2005 raised the problem of migrants' assimilation to security issues in France.

In 2007, very few things had changed, the suburban breaking out in revolt still.

In 2008, French President Nicolas Sarkozy announced a plan to implement social policies to raise the living standards of suburban residents.

2. The use of the host territory by migrants as a basis for separatist political operations

Between 1960 and 1970, the Federal Republic of Germany (RFG) recruited thousands of Turkish citizens to work in the industry and the service area, many of them having a Kurdish origin. During the recruitment period, this factor was not given special attention, it was not considered a real threat to the internal security of the state, but it became a relevant political issue as the Kurdish aspirations for independence or autonomy towards Turkey have intensified in the 1980s.

In this context, the Kurdistan Workers' Party (PKK) has detached itself as an important separatist organization fighting for the territorial independence of the Kurds in Turkey in order to create an independent Kurdistan.

Up to one-third of the two million Turkish citizens residing in Germany in 1990 were Kurdish. Statistics show that about 50,000 of these residents were sympathetic to the PKK and up to 12,000 became active members of the party or other related organizations. Looking at Turkish consulates, airlines and businesses, the PKK has transformed Germany and other Western European territories into the second front. Moreover, Turkish repressive actions on the PKK insurgency have complicated diplomatic ties within European countries[10].

By the mid-1990s, the PKK had become an important security issue for Germany, especially after PKK leader Abdullah Ocalan threatened to send suicide bombers against targets in Germany as retaliation for the state's support Turkey's struggle with members of the separatist group.

Despite Germany's decision to move beyond the PKK law, it had an extensive organizational infrastructure in Germany and in the countries close to it. PKK tactics involved protest marches and hunger strikes. Street demonstrations related to Kurdish and Turkish problems, though constantly forbidden by the German authorities, had become commonplace and frequently transformed into violent confrontations with law enforcement.

In 1996, the German government attempted to control this phenomenon by criminalizing participation in such events as serious deed. A number of Kurdish

[10] Castles S., Miller J. M.- *op.cit.*, p.208

protesters were arrested and the measure of their deportation was ordered. On the other hand, the Turkish authorities' behaviour with the PKK prisoners raised important legal issues regarding respect for human rights in the context of the deportation of Kurdish activists.

3. Terrorist actions of migrants in host territories

In 1992, a movement originating from the Islamic Rescue Front (FIS), the Islamic Armed Group (GIA), initiated an insurgent action against the Algerian government, with many victims. France has provided economic and military support to the Algerian government, which has become the pretext of expanding GIA operations on French territory.

A network of militants has launched a bombing campaign, especially in the Paris region, in 1995, before being destroyed. A theory circulated by a part of French journalists and the academic community, felt that the Islamic Armed Group had been penetrated by Algerian intelligence agents who produced diversionary acts, manipulating the militants, causing them to attack targets from France in order to obtain so support the Algerian Government for the French. The French authorities have taken many steps to prevent attacks and capture bombers, often overwhelmingly zealous against North African people[11].

Such fears resurfaced and intensified after September 11, 2001. Individuals linked to the Islamic Armed Group and Al Qaida, French citizens of North African origin, were detained as suspects in various plots, including the one linked to the USA embassy USA in Paris. The anti-Western resentments of some of those arrested were attributed to the injustices of immigrants and their families.

But the most serious attacks in Europe in recent years were the two Paris attacks of 2015, the January 7 attacks from the editorial of the French satire publication Charlie Hebdo, the one on the Jewish shop that led to 17 deaths, and the 13th-14th November night bombings in central Paris, where 130 people died and 352 others were injured, including two Romanians, attacks claimed by the Islamic State Organization. 1,500 soldiers have been deployed on the streets of Paris and the Alpha Red Plan, which decrees in the case of multiple attacks, was established. Meanwhile in hospitals was applied the White Plan for crisis situations. The French state declared the state of emergency and reintroduced the border controls (although the president had originally declared that the borders were completely closed). Citizens were advised not to leave the homes for their own safety[12].

On March 22, 2016, three explosions occurred in Brussels, two at Zaventem Airport in the north-east of the capital, and the third, one hour away, at Maelbeek

[11] Castles S., Miller J. M.- *op.cit.*, p.210
[12] https://www.hotnews.ro 2005

Metro Station, near the headquarters of the European Union. The federal prosecutor confirmed that it was a suicide attempt by brothers Khalid and Brahim El Bakraoui, both Belgian citizens and Najim Lacchraoui. The provisional report submitted by the authorities indicated 34 deaths - 14 at the airport and 20 at the metro station - and 198 injured - 92 at the airport and 106 at the Maelbeek station[13].

In the case of these attacks, the terrorists came from within the European area, being born and raised in EU Member States and already radicalized before going to the Middle East terrorist training camps. This European peculiarity of radicalized immigrant groups willing to attack their native country in the name of a foreign ideology poses major security challenges.

Conclusions

Starting from the above analysis we can note that the relations between security and migration are indisputable and complex, as well as the fact that the two mutually condition each other, the complexity of the relationship requiring careful and efficient management in order to maximize the benefits and positive aspects of migration and maintenance at the same time, the security not only of the host countries but also of the countries of origin of immigrants.

Migration may be the result of certain threats to the security of individuals, such as human rights violations, ethnic conflict, civil war, but at the same time, migration itself can be a source of risks, dangers and threats when it is not controlled, organized crime, xenophobic and racial violence. In this respect, the idea that citizens of the destination country make about migrants largely determines the measures they take to support or to be against them. It also determines attitudes that can create tensions, crises and even conflicts between the two sides involved. In this psychosocial climate, migrants are a source of benefits, but also economic, social, political, military and environmental issues for both the destination country and the country of origin.

The role of immigrants as security factors, especially in the economic field, should not be underestimated. There are few European countries which, following the legal or illegal engagement of foreigners, have experienced a substantial increase in gross domestic product and, as a result, a significant rise in the standard of living of their citizens. In this context, ensuring security is possible by developing a set of effective policies to facilitate the social integration of migrants, to provide adequate humanitarian assistance and support.

[13] https://www.hotnews.ro 2016

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White collar crime - concept and ways of fighting

Mihaela-Sorina DUMITRESCU[1]

Abstract

White collar crime involves the binding of the offender's activity with the crime. This type of crime is committed in business in order to obtain profit, being non-violent offenses. It is based on the fact that profits can also be obtained illegally, and the risk of offenders being discovered is quite low. Fighting corruption must be achieved through public support. If economic reforms are not properly designed and implemented, they can encourage corruption. Anti-corruption programs must be based on two strategic components. The first component involves financial, economic and administrative reforms that should reduce this kind of crime, and the second component involves strengthening anti-corruption institutions.

Keywords: *white collars, corruption, fraud, economic reform*

Introduction

The phrase *"white-collar crime"* was used for the first time in 1939 by Edwin Sutherland in a speech within the American Society of Sociology. This term defines offenses committed by a respectable person having a high social status on his activity[2].

The conflict arises as a result of the differences between business community interests and politicians' interests. It happens when the business community goes beyond the law and the political community is less powerful. Thereby, illegal business practices continued until the political community could readjust against them.

Interestingly, in China, where the business community is not too influential, capital punishment can be applied to white collars, while in America, this type of crime is punished easier[3].

White collar crime is the act of breaking the company rules by person who has a respectable social status, relating to his activity. The act is cleverly made, excluding discovery.

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[2] Lavinia Vlădilă, *Suport electronic de curs. Criminologie*, p. 36.

[3] *Jurnal de studii juridice*, p. 15.

Through this concept, it can be noticed that this type of crimes can often occur in business and is not often incriminated. The offenders are not prosecuted, not being considered criminals in the classic sense of the term because the amount of proof required is difficult to obtain.

Although offenses are culpable, they are people who are not suspected due to their social status.

They commit criminal acts that are related to business, being aware of the illicit nature of their behaviour, but they consider themselves superior to the law and having a personal right to violate the law, given the social status they have acquired.

It is found that such behavior is learned in interaction with other business people and the specific directions for the crime are learned from the contents of the laws[4].

This kind of crime occurs when the category called "white collars" is built. We can include in this category public servants, managers, intellectuals or entrepreneurs. Not any crime committed by these people can be considered white collar crime. It is mandatory the link of the offender's career to the offense[5].

Examples of white collar crimes are internet frauds, violations of environmental laws, of insurance laws, tax evasion, bribery, corruption, money laundering, breach of trust, unfair competition, as well as other categories of offenses related to the copyrights, customs or banks[6]. Only in the United States, recent studies that the Federal Bureau of Investigations conducted estimate costs of this kind of criminality of $ 300 billion annually.

This typology of crime is not a classical case. It is located at the boundary between conventional and illegal. When conventional or legal ways are difficult or pose impossible goals, business people, as decision-makers in a company, apply illegal methods. Given the big profits that can be obtained and the fact that the risk of being discovered is minimal, why would the offenders choose the "irrationally economic" way of respecting the law? Thus, economic actors use their social status for earning profit.

Depending on the opportunities, white collars may use a wide range of criminal acts, or a very refined delinquency. These crimes are based on complex and technical actions. It is difficult to prove that these facts were committed; to show that they have actually occurred is not as easy as other types of crime.

This type of criminals does not acquire "criminal identities" and remanding in custody is rarely ordered. The attitude of society and its reaction to this kind of crime often encourages white collars. Social and financial success is the primary goal pursued by criminals. This goal can also be fulfilled through legal means, but the illegal ones are not excluded, applying the old machiavellian principle "the purpose excused the means".

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[4] Costică Voicu, Florin Sandu, Alexandru Boroi şi Ioan Molnar, *Drept penal al afacerilor,* p. 362.
[5] Kristy Holtfreter, *General theory, gender-specific theory, and white-collar crime,* Journal of Financial Crime, Vol. 22 Issue: 4, p. 429.
[6] *Ibidem.*

Research methods

In this article I propose that effective anti-corruption programs focusing both on economic, fiscal, and budgetary reforms, as well as on strengthening of anti-corruption institutions, are crucial in the fight against white collar crime. Using these two components leads to decreasing of this type of crime by at least 20% in the long term.

For identifying the level of corruption, the Corruption Perception Index from Transparency International is considered as a de-facto standard for many. This organization measures the level of corruption found in nations around the world and how they fight against corruption[7].

The index is based on data coming from surveys of the institutions directly interested in fighting against corruption – e.g. World Bank.

We specifically focus on the Corruption Perception Index in the public sector for the purposes of this work. Scores are assigned according to parameters 0 - extremely corrupt and 100 - not corrupted.

As white collar crime is becoming an ever-more popular activity, research around it has begun emerging. In this field, there is a variety of researches identified by specialists.

Corruption is included in the concept of white collar crime, but this concept is much broader. For exemple, it can be considered white collar crime offenses committed against the corporation, price fixing, illicit agreements, fake advertising, abuse of power[8].

The research methods used are based on both empirical and qualitative metrics in order to provide an overview of the concept and adequate strategies to fight against this type of crime.

Findings

Error! Reference source not found. shows the countries of the European Union, ranked by the Corruption Perceptions Index. The country index is an average for 2005-2015. According to this data chart, during the specified period, Romania recorded the highest level of corruption among EU countries. On the top of the corrupt countries are also Bulgaria, Greece and Croatia.The lowest level of corruption is recorded in Nordic countries - Denmark, Finland, Sweden and the Netherlands.

[7] Bogdan Teodorescu, *The Global Corruption Parameter*, p. 20.
[8] Stănoiu Rodica Mihaela, *Criminologie*, p. 87.

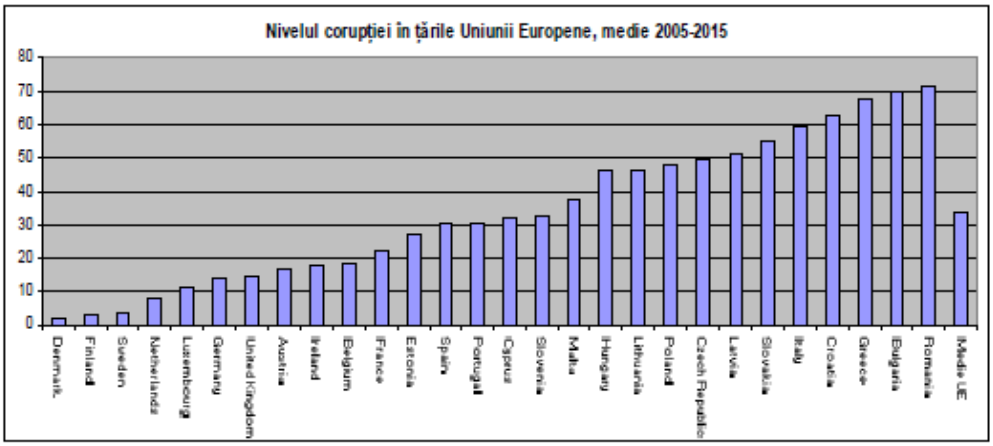

Figure 1. Corruption level in the EU countries
Source: Achim M., Corupția şi economia subterană. Teorii şi studii.

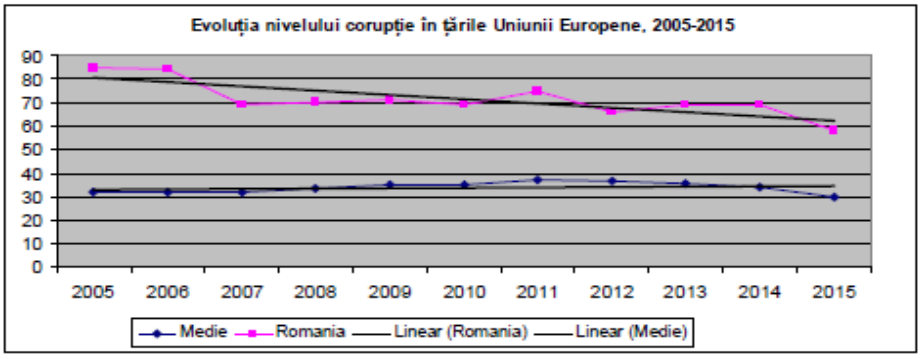

Figure 2 Evolution of the CPI in the EU countries
Source: Achim M., Corupția şi economia subterană. Teorii şi studii

Based on data visualized in **Error! Reference source not found.**, there is an ascending trend of corruption, for 2005-2011, the buffer point being reached in 2011. Since 2011, anti-corruption measures have had a positive effect, seeing the downward trend in the EU.

The European Commission notes that anti-corruption measures concerning the assessment of declarations of wealth for civil servants (where the E.U. Court of Audits bore the burden of proof), regulation of the legal framework on conflicts of interest, liability for corruption offenses and the financing of political parties have had a positive effect.

Romania's accession to the EU implies the adequate adaptation to the goals of the Cooperation and Verification Mechanism (CVM). CVM is designed to

make the legislative, judicial and administrative system more efficient in combating corruption and conforming the law enforcement[9].

In Romania, the Corruption Perception Index decreased during 2005-2015 from 85 to 60, according to **Error! Reference source not found.**. However, the average EU level of corruption is exceeded by Romania.

Maintaining the anti-corruption measures implemented at EU level and managing properly the anti-corruption fight, Romania could reach at a similar EU average of the Corruption Perceptions Index within 10 years.

Analyzing the data from **Error! Reference source not found.**, it can be noticed the decrease of the corruption perception index, from 80 to 60, due to the reform of the judiciary frame, required by the European Union, which involved the foundation and the promotion of anti-corruption institutions, fact that confirms my hypothesis.

I believe that effective anti-corruption programs combine several strategies. Anti-corruption programs must be based on two strategic components.

The first component involves financial, economic and administrative reforms that should reduce this kind of crime, and the second component involves strengthening anti-corruption institutions.

Economic reforms must assess economic restructuring - speeding up the privatization process, stability of the national currency and of the balance of payments, reducing inflation and unemployment, re-engineering the industry, all of these raising the standard of living.

The level of economic development contributes to the efficient performance of structures which ensure integrity and fight against corruption.

Maximum caution is recommended in introducing economic reforms, especially if legal institutions are not well developed. If economic reforms are not properly designed and implemented, they will stimulate corruption. The simple reform of macroeconomic policies is inadequate in fight against crime and corruption[10].

Tax reform must involve the creation of a simple and transparent fiscal service and transparent mechanisms for revenue and expenditure.

Direct taxes do not encourage economic growth. A tax system with the main purpose of reducing fiscal frauds has to be implemented. It is necessary for the authorities to interfere in increasing the internal revenue, a first step being to reduce fiscal limits.

A complex institutional reform - administrative, legal and customs is necessary. Administrative reform should focus on developing and supporting an

[9] Bogdan Teodorescu, *The Global Corruption Parameter*, p. 22.

[10] Anwar Shah, Mark Schacter, *Combating Corruption: Look Before You Leap*, Finance & Development, pp. 40-43, p. 42.

administrative system that protects decision-making and regulates conflict of interest in the public sector.

Conclusions

Fighting against white-collar crime and corruption can only be effective by improving the economic, political and moral environment in order to ensure law enforcement.

It has been demonstrated that there is not only one effective approach to fight corruption. Efficiency implies a variety of strategies. They should include measures to mitigate the proliferation of corruption, should contribute to the detection of corrupt practices and the punishment of those guilty.

The role of civil society is an important element in the development of national integrity. State cannot carry out its activities without citizens' support. Civil society provides the necessary networks to address issues of common concerns, including corruption. Citizens need to get involved, as civil society is the main victim of these crimes.

The fight against corruption cannot be successful without public support. If citizens and companies consider bribe to be "a necessary evil," a change of mentality is essential before any reform.

Stephan Parmentier said in an interview with that "white collar crimes, money laundering, and fraud are too little talked about. All of this has a huge negative impact on society".

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17. Tudor Amza, *Criminologie, Tratat de teorie şi politică criminologică*, Editura Lumina Lex, Bucureşti, 2002.
18. *** *Criminalitatea gulerelor albe: De ce fură managerii?*, 2014, https://www.avocatnet.ro/articol_37402/Criminalitatea-gulerelor-albe-De-ce-fura-managerii.html
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The medicine of United Romania – evolutions and perspectives

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Abstract

The Romanian medicine of the last century has evolved due to prodigious doctors, such as: Sofia Ionescu-Ogrezeanu, Ştefan Odobleja and Ioan Puşcaş. The medical researches, honored with Nobel Prize in Physiology or Medicine, spurred awareness on our country. Some medical fields progressed, for instance: endocrinology and neurology, while other specialties were brought in the medical area of interest, concurrently, amongst others medical jurisprudence and cybernetic psychiatry.

Keywords: *neurology, endocrinology, discoveries*

1. INTRODUCTION

"For us, World War I means, taking into account the way it ended, towards the end of 1918, the Romanian national unity. After World War I Great Romania was created ... "[2] said historian Lucian Boia in an interview with "Adevărul" newspaper. Although the outcome was happy, the Romanian health system was put to a heavy test by confronting some epidemic diseases such as exanthema typhus, cholera or typhoid fever. After this hard try, United Romanian medicine has evolved out of academic performances of some figures like Gheorghe Marinescu (1863-1938), Constantin Ion Parhon (1874-1969), Stephen Odobleja (1902-1978), George Emil Palade (1912- 2008), Sofia Ionescu-Ogrezeanu (1920-2008), Ioan Puşcaş (1932-2015), Virgil Ernătescu (1940-) and many others. This paper aims to present some of the most important innovations brought to the Romanian medical world and not only by those named above from the Great Union to the present. The criteria applied to gather information for the present work is the period in which those events took place, with no relation to the socio-political situation of the time.

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[2] https://adevarul.ro/cultura/istorie/interviu-lucian-boia-romania-intrat-razboi-mondial-optat-transilvania-nu-basarabia-1_57caaaf95ab6550cb854f6fc/index.html

2. MEDICINE BEFORE UNITED ROMANIA

In the first half of the 19th century, the plague affected the Romanian Principalities after it had ravaged in almost the whole of Europe. This contagious disease encompasses Muntenia in 1800 and Moldova in 1804. The victims' peak is reached during Caragea plague (from 1813-1814) in Muntenia, and Moldavia's Plague of Calimach (between 1816-1818)[3].

To protect the Romanian population against the epidemics that spread from the southern part of the Danube (Turkish border), sanitary cords and quarantine areas guarded by the Romanian soldiers were organized on the border with the Ottoman Empire. This measure could be adopted after the peace of Adrianople in 1829, which gave the Romanian Countries an increase in administrative autonomy[4].

After 1830, plague epidemics are reduced to disappearance, but cholera epidemics occur. In the years to come, epidemics - venereal diseases, syphilis, ganglionic or pulmonary (octal) tuberculosis - which are grasped and spread with alarming power, wars, foreign occupations, insufficient health care does not prevent demographic growth[5].

The "organic regulation" (a quasi-constitutional organic law promulgated in 1831-1832 by the Russian imperial authorities in Wallachia and Moldavia[6]) functioned in both Principalities from 1830 until its promulgation in 1832, including ant epidemic measures, health care measures already existing, and measures for more severe situation[7].

The organization of the Romanian medical system was based on the "medical body". It was made up of a proton (a primary physician, a director), and several "giarahi" (also called "surgeons", schooled in "academics or surgical schools - mostly in Germany or Austria - who could exercise under certain conditions free practice, but not at the doctor's level[8] ") dealing with the surgical side. The doctor's job was considered a despicable, degrading one, the opinion of the boyars being that the fellas were necessary (the term synonym is a medical barber surgeon), as for doctors "enough wonderers in the world that would gladly come on to our lands."[9]

The Romanian medical school did not exist at that time, most of the doctors in

[3] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, pp. 18-19.
[4] Pantelimon Milosescu, *Carol Davila and Romanian Medicine*, "Carol Davila" University Publishing House, Bucharest, 2007, p. 4.
[5] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, p. 19.
[6] https://ro.wikipedia.org/wiki/Regulamentul_organic
[7] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, pp. 22-23.
[8] *Ibidem*, p. 26.
[9] Pantelimon Milosescu, *Carol Davila and Romanian Medicine*, University Publishing House "Carol Davila", Bucharest, 2007, pp. 9-10.

hospitals being trained outside the country, activating on the basis of provisional commitments. In this respect, Carol Davila, doctor of medicine in Paris, a chemist, pharmacy and natural history trainer in Angers, was brought to the country at the initiative of the ruler of Wallachia, Barbu Ştirbei. Upon arrival in the country in 1853, the young doctor is awarded the rank of major, the position of Chief Medical Officer of the army and the hospital of Mihai Voda and the mission to set up a Romanian medical school. Thus, under the leadership of Davila, a series of reforms will begin: 1855 - Mihai Voda's "Little Surgery School" (for the training of fellas), 1856 - "Surgery School" (adopts a complex program similar to French schools for officers with medical education), 1857-1859 - "National School of Medicine and Pharmacy" (corresponds to the French School for Health Officers and includes the French baccalaureate program in Physics and Natural Sciences). The latter was recognized in 1857 by the French government[10].

The 1859 (Unification of the Principalities) and 1877 (proclaiming Romania's independence) events also had repercussions on the medical system: organizational changes in institutions and in medical aid. The reduced number of physicians and auxiliary staff, along with significant demographic growth and population spreading in small agglomerations, some of which were difficult to address, have created hefty conditions of assistance[11]. "In 1866, ... the ratio between health professionals and residents was: 1 physician to 11,000 inhabitants, 1 surgeon to 23,000, 1 dentist to 400,000, 1 midwife to 15,000; 1 hospital to 70 000 inhabitants, 1 pharmacist to 12 000 inhabitants and a pharmacy to 35 000.[12]"

The medical school was growing every year, because in addition to the military students civilians were admitted, creating a tendency for the study of medicine, the young people realizing that they can become doctors even if they did not have any material possibilities. "Young people from all corners of the country, from needy families with incomplete studies, have completed their studies, have mastered 1-2 languages, honored in the universities where they studied and became practitioners, some became teachers, integrated in the medical culture circuit of the century"[13]

The National School of Medicine will close its doors in 1870 to let the Faculty of Medicine in Bucharest operate, a structure that will begin its activity in the academic year 1869-1870.

[10] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, pp. 42-43.
[11] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, pp. 53-54.
[12] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, pp. 53-54.
[13] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, p. 68.

In 1858 the National Pharmacy School was established, with a cycle of 5 years, and in September 1859 the first pharmacopoeia (pharmacy manual) was started, which will be ready only in 1862.

Another aspect is the Society of Medical Students in Bucharest; the student N. Manolescu (future ophthalmologist) united a group of colleagues, collecting in a common fund of money for subscriptions to the magazines they were spinning. The company's programs were very various, the papers being presented by the students working in different clinics[14]. "A session in 1880 has the following content: urinary infections, multiple fractures of the thigh and throat, pleurisy to the patient with melanoma cancer of the left leg.[15]"

Prior to 1859 there are no specialists in one field. Physicians practiced the area closest to personal preferences or places available in the region. "... the number of specialists with appropriate studies was limited. N. Turnescu held two papers in Paris, one in medicine and one in surgery; L. Kugel had a specialty in ophthalmology, acquired in Vienna and Berlin[16]. "After 1859, through the perspective of the National School of Medicine, the specialization of doctors became more accessible to our country.

Progress in medicine has been made on the basis of the experimental researches that took shape in 1880-1890, allowing the access of Romanian medicine to the international market.

3. GHEORGHE MARINESCU AND NEUROLOGY

After reviewing the evolution of Romanian medicine until 1918, let us turn our attention to a field of specialization common to the two centuries - the 19th and 20th century. Neurology, unlike other specializations, showed interest from the beginning of the medical education in Romania, being established as a discipline both in the Romanian School of Medicine and in the Faculty of Medicine[17]. "Observations and studies of neurology are found in the first publications: cerebral abscess (A. Marcovici, 1864), histology of some brain tumors, vascular cerebral accidents, plaque sclerosis (G. Stoicescu, 1888), migraine, cerebellar tumors V. Negel, Iaşi, 1894), the clinic of intracranial tumors and cerebral abscesses (Kalinderu, in 1895 and 1896), polyneurians (A. Bratescu, in Iaşi, 1895)"[18]

[14] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, p. 139.
[15] D. Setlacec, *Romanian Medicine - European Medicin*e, Medical Publishing House, Bucharest 1995, p. 139.
[16] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, p. 186.
[17] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, p.206
[18] D. Setlacec, Romanian Medicine - European Medicine, Medical Publishing House, Bucharest 1995, p. 206.

Through his scientific work in neurology and neuropathology, both before and after the Great Union, Gheorghe Marinescu is the founder of the neurology school in Romania. His genius has led to progress in this area worldwide, not just national.

He studied medicine at the newly founded Faculty of Medicine in Bucharest, starting with 1882. In 1889, at the recommendation of Victor Babeş and other Romanian teachers, he will continue his studies in France at the Salpêtrière Clinic, under the supervision of the modern neurologist, J.M. Carcot. About the latter Marinescu wrote in 1925: "I had the opportunity to personally know not only the most famous contemporary neurologists, but also the great scientists, such as R. Virchow, R. Koch, P. Ehrlich. None of them made such a profound impression as Carchot, an impression that always lives in my soul. [19]"

He will work alongside neuroscientists such as Pierre Marie and Blocq, discovering "senile plaques" - the first signs in senile diseases (e.g. Alzheimer's). He will publish the first nerve system histology atlas in the medical literature using the microphotography method. Marinescu remains a follower of the new, using modern techniques for that period in order to elucidate the mysteries of the nervous system. German physicist Wilhelm Conrad Röntgen discovers X-rays at the end of 1895, and in early 1896, with the help of Romanian Physicist D. Hurmuzescu at the Sorbonne, he will make the first radiographs of acromegalic hands. Also, in 1899, Marinescu made the first scientific film in Bucharest, at the Neurological Clinic of Pantelimon Hospital, titled "Walking Disorders in Organic Hemiplegia". The cinematographic method in neurology engages C. Popescu as preparatory operator, C.I. Parhon as internal assistants and M. Goldstein, the drawings being designed by Jean Neylies[20].

In a relatively short period, without any neurologists or specialized laboratories in our country, Gheorghe Marinescu manages to establish one of the first neurology schools in the world. Starting with 1897, Gh. Marinescu is appointed chief physician at Pantelimon Hospital, where the neurology clinic is located, and will remain in this position for 22 years until the neurology clinic will be moved to Colentina Hospital. At the second location, the nucleus of the Romanian neurology school will be formed[21], among the first collaborators of the great neurologist reminding Ion Minea (neuro - infectious), Anghel Radovici (with whom he described the palmo - menton reflex) and Nicoale Ionescu-Siseşti (who, in 1938, wished to lead the clinic)[22].

[19] http://webbut.unitbv.ro/JMB/JMB%202008%20nr.2%20supliment%20ist%20med/CD/articole%20extenso/ist%20med%20pdf/17%20Radu_Ioan_%20Marinescu.pdf
[20] https://adevarul.ro/sanatate/medicina/descoperirea-bolii-alzheimer-datoreaza-unui-roman-neurologul-gheorghe-marinescu-1_51a9e52fc7b855ff5649114d/index.html
[21] http://webbut.unitbv.ro/JMB/JMB%202008%20nr.2%20supliment%20ist%20med/CD/articole%20extenso/ist%20med%20pdf/17%20Radu_Ioan_%20Marinescu.pdf
[22] https://ro.wikipedia.org/wiki/%C8%98coala_Rom%C3%A2neasc%C4%83_de_Neurologie

During the 50 years of scientific activity (1887-1938), Gheorghe Marinescu published more than a thousand papers in the fields of normal and pathological neuroanatomy, neurology, neurophysiology, histology and cytochrome, tissue culture, gerontology, and so on[23]. Huston Merrit, president of the US Neurology Society, wrote about a quarter century after Marinescu's death: "Marinescu did much not only for Romanian neurology, not only for American neurology but also for the progress of neurology around the world.[24] "

4. C.I. PARHON AND ENDOCRINOLOGY

Regarding another field of specialization, "Endocrinology as a science, specialty and discipline is a creation of Romanian medicine and Professor C.I. Parhon.[25]" Endocrinologist and Romanian neuropsychiatrist, professor at the Faculty of Medicine in Bucharest, member of the Romanian Academy and of several academies and scientific societies in the country and abroad, is known today through the renowned medical unit that bears its name - the National Institute of Endocrinology C.I. Parhon.

Constantin Ion Parhon graduated from the Faculty of Medicine in Bucharest and became a doctor in medicine in 1900 with the work "Contributions to the Study of Vasomorphic Disorders in Hemiplegia". Endocrinology research over time is fundamental. He is the author of the world's first endocrinology book, written in collaboration with M. Goldstein and published in 1909, about glands with internal secretion. Thus, it is the third, after Victor Babes and Gheorghe Marinescu, who contributes with a synthesis treaty to the patrimony of the basic treaties of medical sciences[26]. In 1933, at his suggestion, the endocrinology department of the Faculty of Medicine in Bucharest will be born[27].

The Institute of Endocrinology "Professor Dr. C.I. Parhon" was founded on 8 November 1946 by Decree-Law No. 895 issued by King Mihai I approving the report of the Minister of Health at that time, Prof. Dr. Bagdasar (neurosurgeon). Initially, the medical unit worked at the Dermatology Clinic of Colentina Hospital, for 2 years later to occupy the Saint Vincent de Paul Sanatorium building, where it operated until now[28]. "The need for the institute was strongly motivated by the existence of a high endocrine morbidity, massive goiter endemic

[23] https://adevarul.ro/sanatate/medicina/descoperirea-bolii-alzheimer-datoreaza-unui-roman-neurologul-gheorghe-marinescu-1_51a9e52fc7b855ff5649114d/index.html
[24] http://webbut.unitbv.ro/JMB/JMB%202008%20nr.2%20supliment%20ist%20med/CD/articole%20extenso/ist%20med%20pdf/17%20Radu_Ioan_%20Marinescu.pdf
[25] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, p. 210.
[26] http://www.medicalstudent.ro/personalitati/ciparhon-intre-endocrinologie-comunism-si-natura.html
[27] http://www.medicalstudent.ro/personalitati/ciparhon-intre-endocrinologie-comunism-si-natura.html
[28] http://www.instparhon.ro/component/content/category/8-despre-noi

- Iodine deficiency affecting 25-30% of the population - reflected in the endocrine system and the pathology of other organs, but also by the existence of a strong endocrinology school[29]". In an interview with the Galenus Magazine about the evolution of the C.I. Parhon Institute led by Professor Constantin Dumitrache, President of the Clinical Endocrinology Association for 18 years, the latter said: "The Institute had the first nuclear medicine department in the South East Europe, and was the first place to make isotope therapy in all socialist countries, with the first endocrine surgery section coordinated by Dr. Eugen Angelescu."[30]

About a century after the description of the internal secretion glands by Dr. C.I. Parhon, Romanian endocrinology goes beyond other limits. The themes presented at the Congress of the Association of Clinical Endocrinology in Romania (AECR) vary as complex submitting the problems of a growing range of pathologies and treatments.

5. ŞTEFAN ODOBLEJA AND CIBERNETICS

Another personality of Romanian medicine, Ştefan Odobleja, was a Romanian military doctor, a philosopher and a writer whose scientific heritage consists of the first theoretical foundation of generalized cybernetics.

He studied at the Faculty of Medicine in Bucharest between 1922 and 1928 as a military-medical scholar, in the following years practicing in different garrisons in the country such as: Braila, Turnu Severin, Lugoj, Lipcani, Dorohoi, Turda, Targoviste, Cernavoda, Bucharest, Dej. During the Second World War, he worked as a regimental physician and later as an ambulance chief[31].

Besides the professional achievements, the publishing activity of Dr. Ştefan Odobleja is remarkable. In 1928, he obtained a doctorate presenting the work "Car Accidents" in order to later publish the study "The Chest Transonic Method" in the "Medical-Therapeutic Bulletin" of May 1, 1929, in which the law of reversibility is formulated (generalized retroactivity - processing of information and issuing a reply)[32].

In 1935, he was awarded the prize "General Doctor Papiu Alexandru" for the work "La phonoscopie", published by Gaston Doin, in Paris. On the occasion of attending the International Military Medicine Congress in Bucharest in 1937 - where he presented the theme "Demonstration of Phonoscopy" - he announced that he is working on a comprehensive book in which: "Starting from the idea of studying a phenomenon (like the state of the animal body) and other phenomena

[29] http://www.instparhon.ro/component/content/category/8-despre-noi
[30] https://www.revistagalenus.ro/interviuri/prof-dr-constantin-dumitrache-stresul-ca-atare-nu-conduce-la-boala-dar-intretine-si-agraveaza-afectiunile/
[31] https://www.philologica-jassyensia.ro/upload/X_1supl_Blaj.pdf
[32] https://www.philologica-jassyensia.ro/upload/X_1supl_Blaj.pdf

(such as the phonic), it can be concluded that, in fact, among all the phenomena and, respectively, all the corresponding sciences there are consonant aspects."[33]

Stefan Odobleja has devoted most of his work to the problems of knowledge in general, namely the knowledge of human nature. Thus, the following work is "Consonant Psychology" appearing in 2 volumes in 1938 and 1939 respectively (Librairie Maloine Publishing House, Paris). The idea of a unitary cybernetics on psychological, biological, social and economic phenomena[34] has an impact diminished by World War II events[35], which have led to restrictions, then disrupted relations with Western countries. That's why "Cybernetics: Or the Control and Communication in the Animal and the Machine" published in Paris in 1948, by the philosopher and mathematician Norbert Wiener, has taken the public's attention more easily and was given the role of inventor of cybernetics[36]. The difference between the two writings is that, apart from the period of time that separates them, Stefan Odobleja's theories were directed more towards the academic environment, while Nrobert Wiener presents more of the practical part of cybernetics, the results obtained during the war, when was he commissioned to create an automatic system to regulate artillery shooting on planes.[37]

At the Third International Congress of Cybernetics and Systems in 1975 he presented the paper "Cybernetics and Consonant Psychology".

Stefan Odobleja died on September 4, 1978, at the age of 76, and barely a month after his death, the book that made him appreciated "Consonant Psychology and Cybernetics" will also appear in Romanian language.

6. THE ROMANIAN AND THE NOBEL PRIZE (GEORGE EMIL PALADE)

We are now focusing on a topic discussed internationally.

Alfred Nobel was a known chemist, inventor and Swedish businessman for the invention of the dynamite and the famous Nobel prizes. The foundation that bears its name was formed only after the death of the scientist, according to his will[38]. The organization has the mission to award annually "prizes to those who, during the preceding year, have given the greatest benefit to mankind"[39], as the investigator has mentioned in his will. There are five areas for which Nobel Prizes are awarded - Physics, Chemistry, Literature, Peace, Medicine or Physiology -

[33] http://www.observatorul.com/articles_main.asp?action=articleviewdetail&ID=8852
[34] https://www.philologica-jassyensia.ro/upload/X_1supl_Blaj.pdf
[35] http://www.observatorul.com/articles_main.asp?action=articleviewdetail&ID=8852
[36] https://www.giz.ro/stiinta/stefan-odobleja-inventatorul-ciberneticii-43826/
[37] https://stirileprotv.ro/techschool/stefan-odobleja-povestea-romanului-sarac-care-a-pus-bazele-unei-noi-stiinte.html
[38] https://ro.wikipedia.org/wiki/Alfred_Nobel
[39] https://www.nobelprize.org/alfred-nobel/alfred-nobels-will/

and from the first prize awards in 1901[40] until today, Romania had four winners: George Emil Palade (Nobel Prize in Medicine or Physiology, 1974), Elie Wiesel (Nobel Peace Prize, 1986), Herta Mueller (Nobel Prize for Literature, 2009), Stephen Hell (Nobel Prize for Chemistry, 2014). There is, however, a controversial story that Dr Ioan Moraru was awarded the Nobel Peace Prize in 1985 along with Bernhard Lown and Evgeny Chazov for the founding of the organization "International Physicians for the Prevention of Nuclear War (IPPNW)" (World Doctors to Prevent Nuclear War)[41]. The argument against this statement is that the name of Romanian doctor Ioan Moraru is not mentioned[42] on the official website nobelprize.org.

But to return to the Nobel Prize for Medicine or Physiology and to the man behind him: George Emil Palade - born in 1912 in Iasi. He studied medicine at the University of Medicine and Pharmacy in Bucharest since 1930, graduating in 1940 as a doctor of medicine with PhD thesis on: "the nephron of the cetacean Delphinus Delphi. It was an attempt to understand its structure in terms of the functional adaptation of a mammal to marine life."[43]

After graduation, he will practice medicine for a while, returning to the anatomy lab, the cause being, as he declares: "the discrepancy between knowledge possessed by, and expected from, the medical practitioners of that time made me rather uneasy"[44]

In 1946, he will leave Romania in favor of the United States to pursue his theoretical studies. He works first in the Robert Chambers Biology Laboratory at the University of New York. At the request of Albert Claude, he will go work with him at The Rockefeller Institute for Medical Research. Among the researcher's achievements in the 27 years he spent here are: improving the microtomic methods and fixing the tissues to obtain the formulas, describing the structure of the mitochondria, and discovering the ribosomes (also called Palade's corpuscles), collaborating with Keith Porter for differentiation the endoplasmic reticulum and Sanford Palay in the definition of chemical synapses, studies the function of the endoplasmic reticulum and the attached ribosomes; the study of the secretory process, led by researchers such as Philip Siekevitz, Lewis Greene, Colvin Redman, David Sabatini, Yutaka Tashiro, Lucien Caro and James Jamieson, led to the characterization of the zymogen granules, the segregation of secretion products in the endoplasmic reticulum tanks outlining ideas on synthesis and intracellular processing of export proteins. In addition, he focused his

[40] https://www.nobelprize.org/alfred-nobel/alfred-nobels-will/
[41] https://adevarul.ro/cultura/istorie/cum-si-au-insusit-romanii-premiu-nobel-pace-controversat-1_51ea864dc7b855ff5658d2c0/index.html
[42] https://www.nobelprize.org/prizes/peace/1985/physicians/facts/
[43] https://www.nobelprize.org/prizes/medicine/1974/palade/auto-biography/
[44] https://www.nobelprize.org/prizes/medicine/1974/palade/auto-biography/

attention on the structural aspect of glomerular capillary permeability. In collaboration with his colleagues, he investigated the biogenesis of the eukaryotic cell membrane in mammalian hepatocytes - the study brought new information about the function of the endoplasmic reticulum.[45]

In 1974, George Emil Palade, alongside Albert Claude and Christian de Duve, received the Nobel Prize for Medicine for their findings on "the structural and functional organization of the cell."[46] At the award ceremony, Palade's work was described by the Nobel Committee as follows: "He added significant methodological improvements to both differential centrifugation and electron microscopy. In particular, it has become instrumental in combining the two techniques, often in combination, in order to obtain biologically basic information."[47]

Among the titles of the American researcher of Romanian origin are: member of the US Academy of Sciences, honorary member of the Romanian Academy in 1975, received the National Medal of Science from US President Ronald Reagan, and in 2007 he was awarded the National Order "Star of Romania "in the rank of Colan.

In his autobiography, the scientist says that in high school, he was passionate about Roman history, he learned Latin, which helped him generate new terms for cell biology.[48]

George Emil Palade ceased to live on Oct. 8, 2008, in the American state of California. It was incinerated and the ashes were thrown by its children - Filip Palade and Georgia Palade van Dusen in the Bucegi Massif on the Peak "cu Dor"[49].

7. WORLD'S FIRST FEMALE NEUROSURGEON (SOFIA IONESCU-OGREZEANU)

Neurosurgery is a vast specialty with a lot of subspecialties, and the technology available to treat such diseases is evolving rapidly.

In Romania, it appears in the middle of the nineteenth century, with the first interventions and first publications on, for example, treatment of hydrocephalus by transcranial puncture or extraction of CSF - articles belonging to N. Turnescu and published in the Official Journal "In 1856[50].

As an independent specialty it has differentiated itself in our country since 1935 and has a double origin. It develops in two major centers - Iasi and

[45] https://www.thefamouspeople.com/profiles/george-e-palade-7439.php
[46] https://www.nobelprize.org/prizes/medicine/1974/press-release/
[47] https://www.nobelprize.org/prizes/medicine/1974/press-release/
[48] https://www.nobelprize.org/prizes/medicine/1974/palade/auto-biography/
[49] https://adevarul.ro/cultura/istorie/fabuloasa-poveste-primului-nobel-romanesc-viata-geniului-emil-palade-1_510bd39b4b62ed5875c57818/index.html
[50] D. Setlacec, *Romanian Medicine - European Medicine*, Medical Publishing House, Bucharest 1995, p. 224.

Bucharest - under the guidance of 2 titans of the time: Prof. Dr. Al. Moruzzi (who studied medicine in Paris, being the student of Prof. Thierry De Martel) and Prof. D. Bagdasar (who studied from personalities such as Gh. Marinescu and later Prof Harvey W. Cushing).[51]

A student of the Romanian school is Sofia Ionescu-Ogrezeanu, the first neurosurgeon woman in the world, who was formed in the neurosurgery school in Bucharest, in the team of Prof. D. Bagdasar. He completed his studies at the Faculty of Medicine in Bucharest in 1945; as this period bears the mark of the Second World War, much of the trainees made it among the soldiers and civilians injured in bombings. By conducting an internship at the Neurosurgery Service of Hospital no. 9 in Bucharest, he enters the "gold team" of Romanian neurosurgery, together with Prof. Dr. D. Bagdasar, Dr. Constantin Arseni and Dr. Ionel Ionescu - who will become her husband[52]. In the fifth year of college, in 1944, he made his first brain surgery to a child who had been the victim of a bombing[53]. "This operation - will confess Sofia Ionescu - decided my life for the next 47 years, while I was in neurosurgery, and brought it to 180 degrees from what I had proposed, a quiet life of doctor internist in my hometown of Fălticeni".[54]The intervention was recognized as the world premiere by the World Congress of Neurosurgeons held in Marrakech, Morocco in 2005.

"Every morning, Sofia Ionescu performed brain operations, and in the afternoon, on the column, some operations being done for the first time with unique techniques, invented on spot but saving hundreds of lives", writes in the Encyclopedia of the Feminine Personalities from Romania.[55]

In 1990, after a career of 47 years, when she was noted through his wide range of neurosurgical techniques and work, she would retire, continuing to write, with a frequency of 2-3 articles per year for medical publications Romanian.

8. IOAN PUŞCAŞ AND GASTROENTEROLOGY

Another branch of medicine, which studies the physiology and pathology of the digestive tract, has been developed through technological and drug discoveries that have allowed diagnosis and treatment with greater accuracy. In Romania, in the second half of the 20th century there were internal medicine clinics in which the concern for this specialty was brought by the specific apparatus (especially

[51] http://www.acad.ro/sectii2002/proceedingsChemistry/doc2015-1/Art09Mohan.pdf
[52]https://adevarul.ro/locale/suceava/povestea-sofiei-ionescu-ogrezeanu-femeie-neurochirurg-lume-1_527c9a6ac7b855ff56cee2d1/index.html
[53] http://orientromanesc.ro/2018/01/28/prof-dr-sofia-ionescu-ogrezeanu-doamna-neurochirurgiei-romanesti/
[54] http://orientromanesc.ro/2018/01/28/prof-dr-sofia-ionescu-ogrezeanu-doamna-neurochirurgiei-romanesti/
[55] orientromanesc.ro/2018/01/28/prof-dr-sofia-ionescu-ogrezeanu-doamna-neurochirurgiei-romanesti/

endoscopy) and the interest for education and research[56]. In Bucharest, Nanu - Muscel and Ionel Pavel published and studied jaundice, while in Cluj, for the first time in a treaty, the operative stomach syndrome and operative liver syndrome (Iuliu Hațieganu) were introduced and the first monograph about the operated stomach was published (Octavian Fodor).[57]

One of the great personalities of gastroenterology after the First World War was Ioan Puşcaş (1932 -2015). He studied medicine in Timisoara between 1952 and 1958, becoming a doctor of medicine in 1972. He started his career as a secondary doctor in Oradea for later transfer to the hospital in Şimleu Silvaniei (Salaj County, Transylvania, Romania) which he will not leave until the end of his career. Here he will continue his work - being appointed as chief intern of internal diseases (1972), chief physician of the Department of Internal Diseases (1973-1987), primary gastroenterologist (since 1977), director of the City Hospital (1987-1989) of the Center for Research and Medical Assistance (1990-2004).[58]

Throughout her career, the doctor earned two gold medals for his medical discoveries as well as for his 42 patents. Among these are: the discovery of Ulcosilvanil, the world's first drug for ulcer treatment[59], and the discovery of the early diagnosis method of cancer.[60]

Prior to Ulcosivlanil, patented in 1972, the ulcer was treated only surgically. The doctor tells in an interview that this discovery has gone from a simple occurrence while applying to some patients' treatment for water elimination with sulfonamide-based substances.[61] "One of his patients had an ulcer, and one day she confessed that since taking the prescription drugs, her stomach aches had disappeared. The doctor then performed tests on a wider group of patients with stomach pain, finding that the drugs completely blocked their acidic gastric secretion. "[62]

New York's Cyanamid Pharmaceutical Company offered to buy the patent for $ 2 million[63]. He refused this offer, declaring in a report of the Country Report (broadcast on DIGI24 Channel on 07.06.2013[64]): "The fact that I was not impress

[56] http://www.srgh.ro/istoric/
[57] http://www.srgh.ro/istoric/
[58]http://www.magazinsalajean.ro/eveniment/in-memoriam-doctorul-ioan-puscas-o-viata-dedicata-medicinii-si-sportului
[59]http://www.magazinsalajean.ro/eveniment/in-memoriam-doctorul-ioan-puscas-o-viata-dedicata-medicinii-si-sportului
[60] https://patents.justia.com/patent/6326161
[61]http://sanatateabuzoiana.ro/doliu-in-lumea-medicala-academica-a-murit-dr-ioan-puscas-creatorul-primului-medicament-pentru-ulcer/#.W5OcmegzZPZ
[62] http://sanatateabuzoiana.ro/doliu-in-lumea-medicala-academica-a-murit-dr-ioan-puscas-creatorul-primului-medicament-pentru-ulcer/#.W5OcmegzZPZ
[63]https://adevarul.ro/locale/zalau/a-murit-mare-roman-medicul-inventat-ulcosilvanilul-tratat-ulcer-mari-personalitati-lumii-pierdut-marea-batalie-foto-1_551fb827448e03c0fd350570/index.html
[64]https://www.digi24.ro/special/reportaje/reportaj/cum-l-a-tratat-doctorul-ioan-puscas-pe-fidel-castro-si-pe-gheorghe-ceausescu-79874

(by the offer) I owe it to Salaj ... and Zalau ... and, of course, my parents who lived in a village named Treznea (common in Salaj County, Transylvania, Romania, where Ioan Puşcaş was born) ". But the company did not give up, "The representatives of the company stayed for three months in Şimleu, while they stole my recipe," said Ioan Puşcaş[65]. Thus, the active substance underlying Ulcosilvanil is today the base of Omeprazole, essentially used in esophageal and gastroduodenal pathology. Among the patients of Dr. Ioan Puşcaş who are treated with this drug are: Fidel Castro (Cuban Revolutionary who participated in the transformation of Cuba into the first Communist state in the Western Hemisphere), Ilie Ceausescu (Nicolae Ceausescu's brother) and counselor John Fitzgerald Kennedy United States of America between 1961 and 1963).[66]

Another patented invention in 87-88, according to Dr. Ioan Puşcaş[67], is the diagnosis of cancer in the symptomatic phase or incipient stages. This is possible through a purified carbonic anhydrase II activator, an activator found only in the serum of cancer patients. The reaction between purified carbonic anhydrase II and the serum of healthy patients or patients with other conditions does not have the same result, so cancers can be diagnosed in early stages.[68]

The introduction of optical and electronic video endoscopy in Romanian medicine is also related to his name. In 1975, for the first time in Romania, at the hospital in Şimleu Silvaniei, optic digestive endoscopy is used; In 1980, Ioan Puşcaş is the first Romanian physician to use optical video endoscopy, and later, in 1985, the electronic video endoscopy.[69]

It passes eternally in April 2015, in a room arranged for him in the Şimleu Silvaniei hospital.

9. VIRGIL ENĂTESCU AND CYBERNETIC PSYCHIATRY

Apparently, psychiatry and cybernetics, looking at their definitions, seem to have nothing to do with it. The first is the science that deals with the study of psychiatric illnesses and their treatment, and the second exposes from a mathematical point of view the connections, orders and control of both technical systems and living organisms. However, since 1971, these two sciences have tangential points - the inventions of academic doctor Dr. Virgil Enătescu, who measures different behaviors and translates them into mathematical equations.

[65]https://adevarul.ro/locale/zalau/a-murit-mare-roman-medicul-inventat-ulcosilvanilul-tratat-ulcer-mari-personalitati-lumii-pierdut-marea-batalie-foto-1_551fb827448e03c0fd350570/index.html
[66]https://adevarul.ro/locale/zalau/medicul-descoperit-ulcosilvanilul-medicamentul-l-a-vindecat-ulcer-fidel-castro-fratele-nicolae-ceausescu-1_54e5acb5448e03c0fdc4a3ea/index.html
[67]https://www.digi24.ro/special/reportaje/reportaj/cum-l-a-tratat-doctorul-ioan-puscas-pe-fidel-castro-si-pe-gheorghe-ceausescu-79874
[68] https://patents.justia.com/patent/6326161
[69]http://sanatateabuzoiana.ro/doliu-in-lumea-medicala-academica-a-murit-dr-ioan-puscas-creatorul-primului-medicament-pentru-ulcer/#.W5OcmegzZPZ

Acad. Virgil Enătescu is the author of seven books and monographs, over 350 scientific articles and participated in 140 national and international medical conferences; owns eight patents and two innovator certificates.[70]

The future physician was formed both at the Faculty of Medicine in Cluj and at the Faculty of Electronics; this second faculty followed to better understand the cybernetic bases of biological and medical phenomena. In an interview he admitted that "Thus, I had another perspective, another vision of the living phenomena."[71] The obligatory traineeship that followed the study of medicine made it in a village in southern Oltenia, where he said that "true medicine ... I had to do it myself."[72] Driven by the desire to research, she will leave that village for the Clinical Laboratory of "Buziaş" Spa Resort and then for the" Emergency Hospital for Children "Louis Ţurcanu" from Timiş County. The field on which he will evolve is was not chosen by chance; according to the scientist, in psychiatry you do not depend on equipment and lab, but you rely on your own thinking[73]. However, the inventor says he has tried to look at the cyber psychiatrist from the beginning. What he did, at the expense of being a pioneer in the connection between medicine and cybernetics, had no bibliography, no basis, no term for comparison.[74]

The inventions proposed by the scientist have the role of analyzing writing, walking, voice, gestures in order to mathematicise human behavior. Thus he managed to penetrate into the labyrinth of human thought, behaviorism (the theory that underpins psychology's external behavior, eliminating consciousness), determining endogenous and exogenous factors that can affect the inner balance of the human being.[75]

In his work, besides the interpenetration between cybernetics and psychiatry, he approached the physician-patient relationship in a novel way: he starts from the idea that communication emptiness is a defining element of proper treatment[76]. He himself says: "Dialogue makes us more human. It helps us to share our experiences, ideas, teachings. It helps us to progress."

In 2015, he received the distinction of the Romanian Military Order in honor of the Commander. He is a member of the Romanian Academy and

[70] https://adevarul.ro/locale/satu-mare/academician-dr-virgil-enatescu-inventatorul-psihiatriei-cibernetice-fost-inclus-cele-500-genii-secolului-xx-1_54e4e6f3448e03c0fdbfe1f4/index.html
[71] https://www.satmareanul.net/2011/07/27/acad-dr-virgil-enatescu-%E2%80%93-o-viata-inchinata-stiintei/
[72] https://www.satmareanul.net/2011/07/27/acad-dr-virgil-enatescu-%E2%80%93-o-viata-inchinata-stiintei/
[73] https://www.satmareanul.net/2011/07/27/acad-dr-virgil-enatescu-%E2%80%93-o-viata-inchinata-stiintei/
[74] https://www.satmareanul.net/2011/07/27/acad-dr-virgil-enatescu-%E2%80%93-o-viata-inchinata-stiintei/
[75] http://piatasm.ro/wp-content/uploads/2014/06/nr349.pdf
[76] http://piatasm.ro/wp-content/uploads/2014/06/nr349.pdf

member of numerous national and international scientific committees. As a recognition of his scientific contribution, the Americans included him among the 500 geniuses of the 20th century.

CONCLUSIONS

Medicine is one of the areas that have suffered the least from the political changes that took place in the last century - especially after 1945, when the censorship imposed by the communist regime prevented some of the above-mentioned researchers from presenting their work on international congresses.

Through this paper, I wanted to point out a small fragment of the long list of methods through which Romanian medicine evolved. We will never know exactly the number of prodigious ideas that have been born in our lands in the last century of United Romania, but I hope we could bring together some less known information about this aspect of Romanian science. As Hippocrates said, “Let us examine what has happened, let us know the present, let us show what we have learned.”