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EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Legal Sciences in the New Millennium

Equity – Connotations in the Current Romanian Legal System

Emilian Ciongaru[1]

Abstract: The underlying principle of the law, and a source of law – equity – has been expressly or explicitly integrated in the judicial development of law, with a view to giving a meaning to the law, for which reason it is aimed at peacefully solving or preventing the social disputes in society. Therefore, equity has a hermeneutic function, strictly for making interpretations when the legislator so allows it, it is intrinsic to the law and contains all phases of good management and enforcement of justice, being a part of all stages of the legal proceedings, from the application initiating proceeding to the actual implementation of the court decision awarded, regardless of the nature or extent of jurisdiction, and of the nature of the litigation referred for judgment. According to the requirements of equity, the judges have special powers for settling specific cases, namely, they may offer resolutions they consider to be fair and conforming to the interests of the parties involved, which is to be grounded on facts, and not on the positive law.

Keywords: equity; positive law; hermeneutic function; social conflicts; society

1. Concept of Equity

One of the most complex principles of law in general, and of civil law in particular – the principle of equity – a moral and legal principle of fundamental importance – finds its application both in the law-making process (Mihai, 1999, p. 96), and in the actual activities of the institutions for the implementation and enforcement of law. An immediate effect of this concept is the concept of justice, defined as the ideal general state of a society, aimed at ensuring that each individual achieves his/her rights and legitimate interests as a way of satisfying the individual good, and embodied in the general, common good of all members of a given society, leading to a balance between honesty and tolerance towards our neighbours, way observing social and legal order rules (Voicu, 2001, p. 236). Therefore, there is an ideal connection between equity and justice (Pitulescu & Abraham, 2000, pp. 116-117), because one is explained by the other, and they are subordinated to a value hierarchy created by the society. At the same time, equity is a principle imposing equal rights and responsibilities for the members of the human community and also of the nations and states, mutual respect, and fair and unbiased resolution of any potential disputes that might arise in the relationships between them. However, the principle of legal equity is not a general abstract principle; legal equity applies only in actual cases and always operates *a posteriori* and under specific circumstances exclusively. (Deleanu, 2008, pp. 187-188)

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In ancient times, equity, which involved developing and enforcing the law, was achieved by conforming to certain principles: living honestly, not harming anybody, giving everybody what they deserve – *honeste vivere, neminem ledere, suum cuique tribuere* – principles expressed by the Roman jurist Ulpian. (Ceterchi & Craiovan, 1998, pp. 30-32)

At the same time, equity and justice are principles inherent to the concept of law, given that the legal rules involve an increasing degree of abstractness, and the legal power is required to be more effective, to resolve increasingly complex cases and even foresee subsequent trends.

The meaning awarded by Cicero (Del Vecchio, 1993, pp. 64-66) for equity continues to be relevant even today; he considered equity to be an equal right for all citizens, and Celsus approximated the meaning of equity to that of law, defining the law as *an art of good and equity* (Popa, 1998, p. 126).

Therefore, equity is a principle of law which gives meaning to the law and allows peaceful resolution or prevention of social conflicts, namely, it is an immaterial, relatively hard to grasp principle that gives substance and consistency to the legal system and converts it into a value separate from its other components. The principle of equity can be considered to be the basis of law ever since the origin of the human society and the concept making possible the organization of society and of social peace (Popa, 2002, p. 116). If equity is considered to be the basis and a ground for law, then it can be said that, on the whole, law is the way to achieve social peace.

Applied in an actual, specific juridical situation with the aim of ensuring a balance between the parties involved because of the conflicting nature of such situation (Deleanu, 2008, p. 184), equity is a fundamental principle of justice, a concept aimed at fairly distributing the goods between persons having decided to cooperate or to be in conflict with each other (Malaurie, 1997, p. 30). The issue of equity may arise when several free and equal persons, therefore, without any authority on one another, decide to engage in a common activity and jointly establish or recognize the rules governing such activity, with a view to determining the appropriate distribution of benefits and resulting obligations. Under these circumstances, an activity can be deemed to be equitable by the parties involved if no one feels that, by taking part in such activity, the concerned person or any other person will obtain an advantage from the other one or he/she will be forced to give in to requirements he/she does not consider to be legitimate. This supposes that each participant has their own notion of what is reasonable for a legitimate requirement to be accepted by other and by themselves. An activity is equitable when it meets the principles the parties involves might offer to one another for mutual acceptance purposes. The parties engaged in an equitable activity may confront each other openly and may assert their own positions if they seem likely to be illegitimate by reference to principles it is reasonable for each of them to accept.

The concept of *equity* (Rawls, 1958, pp. 167-169) becomes fundamental for justice because of the very possibility for several persons, without any authority on one another, to mutually recognize this principle. Only when such recognition is possible may there be true a community of persons as part of their common practices; otherwise, such persons will consider these relationships to be based, to a certain extent, on force.

For an activity to be equitable, it is enough for the participants therein to be knowledgeable and accept the benefits thereof. Implicitly, this obligation may be breached, namely, it may happen that, because of other considerations, the breaching thereof may be justified although other regulations should be observed. However, as a rule, no one may avoid such obligation if he/she asserts an activity is fair only when it is the case for it to be observed. When a person rejects a certain activity, to the extent possible, such person should notify this beforehand and avoid taking part to it or use the benefits

thereof. It can be said that it is a duty for *equitable behaviour*; but it must be accepted that, sometimes, such an approach involves an extension of the concept of equity. In general, acting in an inequitable manner does not involve breaking specific rules – even if illegality is difficult to detect – just enough to take advantage of the lack or ambiguity of certain rules, to capitalise on unexpected or special circumstances rendering their application impossible, to insist on the rules being applied to the benefit of a specific party, when, in fact, they should be suspended or, more generally speaking, action should be taken against the aim of a specific practice. For these reasons, there is the notion of a sense of equitable behaviour: acting equitably involves more than being able to observe rules; it can be said that what is equitable must often be felt or sensed. However, including in the duty for equitable behaviour the obligation to act according to the common practices the participants having knowledgeably accepted the benefits thereof have one to another is not an unnatural extension when it comes to this issue because, as a rule, it is deemed inequitable for someone to accept the benefits of such activities but to refuse to meet the obligations in order to maintain it. As a result, it can be said that tax evasion does not observe the duty of acting in an equitable manner: a person accepts the benefits of a government, but he/she does not want to contribute to the development of the resources thereof.

As a basic moral notion (Popescu, 2000, p. 124), the duty for equitable behaviour ranks with other duties, such as loyalty and gratitude; however, it should not be confused with these. As any other moral duty, the duty for equitable behaviour involves, in certain cases, restrictions to the personal good; sometimes, it imposes a behaviour that a selfish, strictly rational person may not choose.

Some of the forms of behaviour, by which the parties involved in a common activity express gratitude one another, as persons with similar interests and abilities, is the acceptance of such restrictions in specific cases; such acceptance supposes the need for acting in an equitable manner or for a wish to compensate for potential damages when its breach is decided. Just as, in the absence of another explanation, the criterion for recognizing the existence of loss is the assistance provide to the losing party, the duty for equitable behaviour is a necessary part of the criterion for recognizing that the other party has interests and feelings similar to the other one.

But equity is the exclusive task of the legislator as the *holder* of equity, in the sense that they are the ones granting the delegation for equity requesting, and the judge just conform to it, in the absence of appropriate legal rules or when there is ambiguity in the existing ones.

2. A Few Connotations in the New Romanian Legal System

The concept of *equity* has been integrated in the principles for creating, applying and implementing the law, either by way of express provisions contained by the new codes of laws, or implicitly, by the free appraisal possibility granted to the judges by the legislator, which is not prevented by any law to apply the rigors of the law but, on the contrary, some laws even suggest the possibility and the need for the strictness thereof.[1] Therefore, art. 1272 of the New Civil Code (art. 970 former Civil Code) assimilates the meaning of *equity* to that of law, resulting in all agreements signed between civil persons not only binding to what is expressly stipulated therein ("what is expressly provided therein" according to the former Civil Code), but also to the effects of equity over an obligation, according to the nature thereof. Therefore, *equity,* like the other sources of law established between the parties, usages or the law, is a stipulation implicitly transposed into contracts.

[1] See the new Civil Code, Art. 1221, 1222, 1328, 1329 etc.

Equity in terms of business relationships. The new Civil Code has a central role in terms of relationships between[1] professionals, whereby equity and the establishment of the right to a fair trial are deemed to be of crucial importance. In business, equity may be either in the form of the principle of reasonableness in business or in the form of the substance over form principle, and a request for equity may be seen as a return to the old realistic and equitable jurisdiction applied by the justice of the ancient medieval fairs or to the statutory, consular jurisdiction of ancient guilds. The idea of natural law, *of an eternal, unchangeable justice, existing beyond the rule of positive law* (Djuvara, 1999, p. 503) *and which should be enforce in any place and at any time,* is no longer a simple philosophic trend. The nature of the facts – that natural law that appears in itself as an ideal and a judgement determining the rule of law and is above it, transforms the law from an *a priori*, apparently irrational product, into a social product adapted to the ideas of equity and justice, ideas that simply *give meaning to the law.* The democratic and constitutional principles, which are grounded on humanity's aspiration for the good, place above the rule of law a *corpus* of ideas of force that create the law, a common judgment and the last one leading to the development of the rule of law.

Equity in case of public reward promises. The new Civil Code [art. 1326 (1)] regulates the situation of *unilateral legal deeds subject to communication,* providing for such to conform to this procedure when they "establish, change or cancel a right of the beneficiary and whenever information of the beneficiary is required under the nature of the deed." In the grounds of these regulation, the institution of the *public reward promise* [art. 1328 (1)] is defined as the unilateral deed under which the party issuing a public reward promise in exchange for a provision has the obligation to make such payment even if the provision was performed without the promise having been acknowledged. In this case, the legal regulations [art. 1329 (3) and (4)] also provide for the possibility to award *equitable compensation* (however, without exceeding the promised reward) to the parties that had incurred expenses related to the provision performance (save for the case when the promissor proves the expected result could not have been achieved) before the cancellation was published, and the right to seek compensation is to lapse within one year of cancellation publication.

Equity in case of damage as a defect in consent. The *defects in consent through damage,* according to art. 1221 of the new Civil Code, exist when one of the parties, upon contract signing, taking advantage of the need, lack of experience or lack of knowledge of the other party, provides for the benefit thereof or for that of another party a provision significantly higher than the amount of their own provision, and the damage is to be sanctioned by the cancellation of the damaging deed and also, by the decrease of the amount of the obligations thereof by the amount of the damages to which they would be entitled. Even when the party chooses to file a proceeding for cancellation, the court will be able to keep the validity of the contract if the other party offers, *in an equitable manner,* a decrease of their own receivable or an increase in their own debt, as appropriate [art. 1222 (3)].

Equity in case of the judicial limitations to the ownership right. The judicial limits provided in the new Civil Code (art. 630) are provided for private individuals and relate mainly to neighborhood relationships. In fact, the judicial limitations to the exercising of the private ownership right are established by an *equity law*, which relates applying the equal treatment principle in legal situations. As long as the Civil Code, on the one hand, sanctions the denial of justice (non-resolution of an application referred for judgment because of a lack of legal provisions) and, on the other hand,

[1] *The new Civil Code* defines professionals as all those operating an enterprise, having a scope much broader than that of *seller* provided in the current regulation. Law 71/2011 implementing Law 287/2009 on the Civil Code expressly provides that the notion *professional* shall include the categories: seller, entrepreneur, economic operator, as well as any persons authorised to conduct economic or professional activities. Therefore, the freelancer professions (lawyers, insolvency practitioners, valuators, executors) also shall be covered by the notion *professionals*.

prohibits the judges from giving normative rulings (Art. 3), in these situations, the judge may resolve a case even in the absence of express legal provisions, applying to the analogy of the law and the general principles of law, in this case, the principle of equity. Therefore, when applying this conception, the judge may appraise the inherent limitations to the ownership right, the natural or unnatural character of the neighborhood reports and may establish the judicial limitations to the exercising of the ownership right (Stoica, 2009, pp. 127-129). According to the provisions of art. 630 (1), *equity* is the basis for such interventions from judges.

Equity in the theory of imprevision in contract review. As an exception from the principle of the mandatory character of the contracts (*pacta sunt servanda*), *the provisions of* art. 1271 *of the Civil Code regulate the theory of imprevision,* which involves the parties having the possibility to review the initial contractual provisions when the circumstances initially considered change and lead to a contractual imbalance. Hence, a mere change in circumstances, having as a result only a more onerous character of the performance, will not exempt the parties from executing their obligations undertaken [art. 1271 (1)]. When the parties do no reach an agreement for contract renegotiation within a reasonable period of time, the court of law is the one that may order, upon the request thereof, the contract alteration so as to distribute *in an equitable manner,* between the parties, the losses and benefits resulting from a change in the initial circumstances, or *contract termination* under the conditions ordered by it.

Equity in victim compensation by a perpetrator void of reason Starting from the principle of equity, an equity that is attached to court decisions and also, to a range of propositions of the doctrine, the new Code enshrines the subsidiary obligation to pay damages to the victim whenever the perpetrator is void of reason, and the person who has the obligation, under the law, to supervise the former, cannot become liable. In such a case, the perpetrator is not to be exempt from paying damages to the victim; the amount of the damages is to be determined in an *equitable manner*, with due regard to the patrimonial condition of the parties. It seems obvious that, as part of the legislative enshrinement of this disposal, it is no longer about the actual civil liability, which is also proved by the law not mentioning anymore the perpetrator's obligation to compensate the victim, but to pay damages which, most often, are to be in an amount below the prejudice actually incurred; however, in our view, undoubtedly the amount of the damages cannot exceed the amount of the damage incurred by the victim.

Equity in case of compensation for self-defense excess. Self-defense (art. 1360) does not exclude, when the perpetrator's misdemeanor involves exceeding self-defense limits, the obligation to pay to the aggressor appropriate *equitable* damages; please note that, in this case also, the law does not mention compensation, so it is not about curing the prejudice; certainly, the appropriate *equitable* character of the damages is to be determined by the court of law.

Equity in terms of judge's role in truth determination. The new Civil Procedure Code, art. 22 covers the judge's role in truth determination by enshrining the principle of equity in par. 7, providing that "*Whenever the law reserves to the judge the power of appraisal or requests to him/her to take account of all circumstances of the case, the judge shall take account, among other things, of the general principles of law, the requirements for equity and good faith*."

This paragraph transposes the regulation in art. 5 (3) which, in terms of court of law competence, binds the judge, on the grounds of their role in the civil trial: "*When a case cannot be resolved on the grounds of the law or of the usages and, in the absence of the latter, nor on the grounds of legal*

provisions governing similar situations, it shall be judged on the grounds of the general principle[1] *of law*, *with due regard to the circumstances thereof and taking account of the requirements for equity*". (Popa, 1998, p. 91)

As a result, a correct application of the civil procedure rules in time and space or by reference to the beneficiaries of the rules is a pre-set objective of significant importance in order to guarantee a civil trial conforming to all current objectives imposed by the principle of the right of defense, the *Audi alteram partem* rule, the principles of directness, lawfulness, *equity* and equal trial.

Equity in the enforcement procedure. The principle of equity in the enforcement procedure implies the rule that all bodies and State authorities involved in this stage of the civil trial act in an equitable manner with the parties, so that any of them be prejudiced or damaged in relation to the other (Stoica, 2008, pp. 55-58). Therefore, since the creditor is the one that is entitled to start the enforcement procedure, at the same time, it has the obligation to act in compliance with specific terms, specifically for the enforcement not to be biasedly appraised by it. At the same time, by way of the procedural instrument of the challenge on enforcement, the parties considering that their rights have been prejudiced have the possibility to challenge before a court of law any potential irregularities during the enforcement stage.

Equity in the institution of the preliminary chamber[2]. By the institution of the preliminary chamber, the draft new Criminal Procedure Code aims at meeting the requirements for lawfulness, celerity and *equity* in the criminal trial. The aim of the institution of the preliminary chamber is to resolve matters pertaining to the lawfulness of the summons and of evidence taking, providing the prerequisites for the expedite resolution on the substance of the case.

In conclusion, in the absence of a rule of law, the court can ground their decision on equity principles and, this way, the equity rules become rules of law themselves; as a result, equity does not become a source of law, but only a ground for court decisions in the absence of a rule of law and merely a reference in the judicial proceeding that is specific to actual legal situations, with the ultimate goal of reasoning a disposal that is in line with the need for the specific case. However, it may have a certain role in order to avoid formally applying principles or rules of law that would lead to results contrary to justice. For this reason, equity can be seen if not as a source of law, at least as an important part of the process for the development and enforcement of the rules of law, which must always be based on the principles of equity. Hence equity, as a general moral value, is enshrined by the legislator specifically for being applied, which is the judge's responsibility.

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[1] The general principles of law classified as: principle ensuring the legal functioning grounds for the State; the principle of freedom and equality; principle of responsibility and principle of equity and justice.

[2] In accordance with the provisions of art. 3 (1) (c) and (6) of the new Criminal Code, as corroborated with art. 54 of the new Criminal Procedure Code, the judge in the *preliminary chamber* is the judge who, subject to his/her court of law and competence, verifies the lawfulness of the summons referred by the prosecutor, verifies the lawfulness of evidence taking, of deeds from the criminal prosecution bodies and resolves the complaints against disposals for non-prosecution or non-referral for judgment.

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*** Law 71/2011 of implementing Law 287/2009 on the Civil Code.

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Short Analysis of the Essential Elements of the Typical Employment Contract and of its Importance in Maintaining it within the Current Social and Economic Context

Carmen Constantina Nenu[1]

Abstract: Nowadays, the typical individual employment contract is the main source of individual legal labor relations, but is important to find the road of this instrument in the future. It is a result of the fact that labor market dynamics should be reflected in the new meanings of rights and obligations of the parties, which cannot be covered by legal acts, with their general and impersonal character. The purpose of the legal work relationship is a special one, connected to the personality of human beings, and, as people are different, we need individual legal acts which materialize working conditions in which each of the employees provides work. Given the ongoing flexibilization of labor relations and the emergence of new types of contracts, an essential question arises. The question is whether the classic employment contract will maintain its importance in the future, whether it will be a response to the interests of employers and employees in a world characterized by economic instability, on the one hand, and by lack of skilled labor force on the other hand. Therefore, this study aims to identify the characteristics of the typical employment contract, as they were highlighted at international and national levels and the extent to which they will be maintained in the future.

Keywords: classic work; characteristics; security; labor market; instability

1. Introduction

Both at European and national level there are significant concerns for finding new forms of regulating individual labor relations, forms that should answer the current needs of the labor market. In this social economic context, the typical employment contract, being signed for an indefinite term, with full-time work, the employee's work being carried in a location belonging to the employer, does not benefit from the attention that it has been paid for decades.

Therefore, it is important to highlight that the characteristics of the individual employment contract are specific primarily to the typical employment contract, because it responds and combines the best interests of the employer and the employee, despite the emergence of new types of contracts, which give a certain precariousness of labor relations.

The analysis of the current standard employment contract and of its destiny in the near future is absolutely necessary to identify the extent to which protection of employee rights in the work relationship suffers by adopting atypical labor contracts.

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2. Characteristics of the Individual Employment Contract f International Regulations

Internationally, the International Labor Organisation has given priority to the individual employment contract concluded for an indefinite period and full-time, as the legal instrument that responds best to the principle of protecting the employee in the relationship of subordination created in the contract. The ILO vision on the duration of the work is found for the first time in the Recommendation 166/1982, Member States being invited to establish adequate safeguards against the use of fixed-term employment contracts. Given this recommendation, but also the fact that the overwhelming majority of ILO member States circumscribe their legislation to this principle, the rule on employment contracts is employment contracts of indefinite duration. In the context of globalization and pressure of unprecedented economic development, materialized in increased competition between operators, flexible labor relations through the use of fixed-term employment contracts, part-time temporary employment agency or labor at home, appears to be a necessity. Although aware of all these transformations, the ILO continued to address in its work, mostly, the issue of individual employment contract of indefinite duration. (Popescu, 2006, pp. 227-234)

At the ILO Conference in 1998 it was tried for the first time to regulate the employment relationship of those who perform an activity or provide a service under a civil or commercial contract, but what was only obtained was keeping this problem in the attention of the organization. Thus, in 2003, the ILO Conference recommended Member States to adopt policies that prohibit the practice of concealing the employment relationship, practices that have as effect the absence or reduction of social protection for workers, which is only provided by employment law.

Within the ILO Conference in 2006 Recommendation 198 was adopted, regarding work relationships, which requires Member States to formulate and implement, after consultation with social partners, national policies that would allow the determination of the specific employment relationship, would formulate criteria to distinguish between employees and self-employed workers, namely to establish measures to combat disguised employment relationships and to adopt rules applicable to all forms of contractual arrangements. (Popescu, 2006, pp. 231-232)

Starting from the consideration that, in some cases, difficulties in establishing an employment relationship occur, either because rights and obligations of the parties are not clearly defined, because there are attempts to disguise the employment relationship, or because the law, its interpretation or application is insufficient or limited, all these making workers vulnerable, the Recommendation states that it is necessary to adopt a national policy to protect workers within employment relationships. In the second part, the Recommendation 198/2006 of ILO states the determination of the existence of an employment relationship by conditions and by specific indicators. (Popescu, 2006, p. 233)

This is the first time an international document officially defines the characteristics of the individual legal work contract and the legal relationship arising under the individual employment contract, and this paper aims to explore these very traits. In this introduction we only indicate what the ILO recommends to Member States concerning the characterization of the employment relationship.

Thus, under section 12 Member States are advised to consider clarifying the conditions that determine the existence of an employment relationship, for example, subordination or dependence. By the provisions of sections 13, Member States are recommended to consider the possibility of defining in their laws, or by other means, specific indicators of the existence of an employment relationship, indicators that could include: (Popescu, 2006, pp. 232-233)

2.1. The Fact that the Work

- is done according to the instructions and under the control of another person;
- involves the integration of worker in organizing the enterprise;
- is done only or primarily for the benefit of another person;
- must be provided personally by the worker;
- is carried out according to a schedule determined or at the specified workplace or work accepted by the applicant;
- has a specified duration and a certain continuity;
- involves the provision of tools, materials or machinery by the employer.

2.2. Other Features of the Employment Relationship

- the worker's regular pay; remuneration is the only or main source of income;
- payment in kind is made in the form of food, housing, transport etc.;
- recognition of certain labor rights as weekly rest and annual leave;
- financing professional employee travel by the person requesting the provision of work;
- no financial risks for the worker.

As noted, the198/2006 ILO Recommendation on the employment relationship, highlights the characteristics of the individual employment contract, updating them and focusing on current legal and economic subordination of the employee, as a distinguishing feature that customizes it to other civil or commercial contracts with a similar object. Obviously, all these guidelines are not legally binding, but they have their own power, stemming from the international character of the organization, for guiding the ILO Member States labor laws and not only. Undoubtedly, these guidelines concern and enactment of legal work in Romania. In this respect, the following principles contained in the ILO Recommendation (Ştefănescu, 2008, p. 76; Popescu, 2006, p. 234) have a special importance:

1. member states should, within their national policies, consider the possibility of establishing a legal presumption of existence of an employment relationship if one or more relevant indicators exist;
2. protection of employees must not conflict with civil or commercial real relations, thus ensuring that people engaged in a true working relationship benefit from the protection to which they are legally entitled.

Regarding the legal framework of the European Union, there is so far no Community act to crystallize, as does the ILO Recommendation 198/2006, the characteristics of individual employment relationship. However, such features are to be found, scattered in a number of EU regulations and directives. Moreover, the European Commission frequently called on Member States to take account of Recommendation 198/2006 of the ILO on the employment relationship. In its Communication the Commission has made to the Council, the European Parliament, the Economic and Social Committee and the Regions Committee, Communication entitled "The result of public consultation on the Commission Green Paper" - Modernizing Labor Law to meet the challenges of the 21st century" (Commission document COM (1007) 627, final) "emphasizes the following" The European Parliament called for an initiative to the convergence of national definitions of the status of workers in order to ensure more consistent implementation and effective application of the acquis communautaire. He urged Member States to promote implementation of the 2006 ILO Recommendation concerning the employment relationship. Some Member States have also suggested that the recommendation should serve as a basis for discussions between Member States and social

partners on how to best approach at European level the phenomenon of disguised employment relationships."

In conclusion, the ILO recommendation opened a perspective for a new vision of labor relations, while maintaining the foundation on which the employment contract (Popescu, 2006, p 234) is based, by highlighting characteristic features of this type of legal relationship.

3. The Elements of Typical Employment Contract

Characteristics of the individual employment contract are those features that define and customize it in relation to other civil or commercial contracts also involving the provision of work. The identification of these features was mainly a result of doctrine, but also of specific legal practice. Although not specifically outlined by the legislature, these characteristics have been the basis for legal regulation of individual employment contract. The national doctrine (Ştefănescu, 2007; Popescu, 2006; Volonciu, 2007) has characterized the individual employment contract mainly by the subordination relationship, mostly legal, but also with an economic component, that arises between the employee and the employer during the course of employment, highlighting other distinguishing features as follows: it is a legal document that is bilateral, commutative, for consideration, concluded *intuitu personae*, involving the main obligation of the parties to conclude a contract unaffected by its ways, on a continuing basis, whose content has a legal and a conventional part. Also, the employment contract is characterized by the fact that it is governed by the employee protective legislation, designed to alleviate the unequal strength relationship of its parts.

All these characteristic features, whose list is not exhaustive, results from work-itself, which is not a commodity and must have specific regulations in relation to those applicable to common law contracts. The current legislation maintains, as a rule, concluding full-time individual contracts of indefinite duration, where work is provided in locations belonging to the employer. This regulation aims to legally protect an employee to whom this type of legal work relationship provides stability. The Labor Code in force exhaustively governs the institution of the classic individual employment contract, to which it devotes 100 articles. These articles contain provisions relating to the conclusion, performance, amendment and termination of the individual employment contract. In order to clarify the various legal nuances of the typical employment contract one must consider that its elements should be reviewed, that is, the indefinite duration for which it is concluded, the full time work and the work place.

3.1. Indefinite Duration

The indefinite duration of an individual employment contract does not mean that it is completed by the appearance of old age social risk but that the duration of that contract is not known at the time concluded. As shown in the literature (Cristoforeanu, 1937), by the indefinite duration of the contract it should not be understood that the employee is required to work all his life for that employer or that the employer is required to keep the employee in service to death, but the duration is not known during the time the contract was concluded. Obviously, an individual labor contract concluded for an indefinite period may be terminated at any time whether the limiting conditions specified by the law are met. The indefinite contract may be terminated at any time by the employer or by the employee, provided that the employer is restricted in the ability to fire the employee by the fulfillment of conditions imposed by the legislature.

3.2. Full Time Employment

To qualify as typical employment contracts of indefinite duration a contract must be completed full-time, or for a full time job. The normal working hours for employees with labor contracts, according to art. 112, paragraph 1 of the Labor Code, are, on average, 8 hours per day and 40 hours a week. For young people aged up to 18 years working full time means, according to paragraph 2 of the same article, 6 hours per day and 30 hours a week. Distribution of working hours in a week, according to art. 110, paragraph 1 is usually uniform, 8 hours per day for five days, two days of rest, the parties being able to opt for an unequal distribution in days subject to the limit of 40 hours a week.

3.3. The Work Place

A typical employment contract requires that the place of work belongs to the employer, who is obliged to provide the necessary working conditions for employees, according to his own rules set out in establishing and organizing documents and in internal regulations. Also, with indefinite contracts, employees are defended against possible abuses by employers, the legal rules governing dismissal. Also, the typical individual employment contract is a legal instrument favorable to employers, who need constant work provided by individuals with certain training. Moreover, the employers are directly interested in investing further in training order to obtain benefits. Employees with an employment contract for an indefinite period demonstrate more responsibility, being stimulated, depending on the organizational culture, to contribute directly to the growth and development of the activity for an employer where they intend to work for an indefinite period of time, to be promoted professionally.

4. Conclusions

The number of typical employment contracts concluded for an indefinite period and full-time in our country and also in European labor market is overwhelming. This form of contract still responds best to the state of current social relations of work, being an incentive for employees that, in terms of a certain stability of employment, are interested in professional development and professional fulfillment of duties – a beneficial attitude towards the employer. The specifics of labor relations and of the employee rights protection principle are solid arguments in keeping the role of the typical employment contract within the sources of the legal labor relations, ensuring job security to the desired extent.

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THE 9TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

The Legal Regime of the Right to Administrate Public Property

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Abstract: The traditional institutions for administrative law, public property and the public domain have been the subject of numerous specialized papers from the interwar period. After 1990, the two institutions were discussed in light of the new legislative rules. Within this article we propose to analyze, based on the distinction between the notions of public property and public domain, the legal regime of the right to administrate assets of public property. Is this a real right appropriate for public property or just a simple competence of administration and management of public domain assets? Analyzing and comparing the opinions, the arguments expressed by specialists and the current legislation in this area, we conclude that the administrative right is a real right suitable for public property.

Keywords: public domain; public property; private property; the right to administration

1. Introduction

The New Romanian Civil Code, which entered into force in 2011, has led to changes in the sphere of public property the traditional notion for administrative law.

As shown in the specialized literature (Bălan, 2007, p. 64), the right to property has occurred at a certain stage of development of the society, when "*the economic relationship of property has received its features in legal form, the appropriation of material assets has become a right of ownership, of approaching, established and maintained by the coercive state power*."

The right to property, a fundamental right guaranteed to citizens, "*represents that real right that grants to the holder the attributes of possession, use and disposal, attributes that only it can be exercised in its plenitude, in its own power and interest*". (Pop & Harosa, 2006, pp. 78 and the next)

The right to property has two forms, the right to public property and the right to private property, as stipulated in the Constitution of Romania [article 136 par. (1)].

The existence of multiple forms of ownership is established by the constitutions of other European countries such as Italy (article 42)[2] and Spain (article 33)[3].

Between traditional institutions of administrative law, which led to controversy in the specialized literature is that of public domain (Vedinaş, 2009, p. 143). The Constitution of Romania establishes

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[2] "The property is public or private. The economic assets belong to state, institutions or legal entities." (The Constitution of the Italian Republic, 1998)

[3] "It recognized the right to private property and inheritance." And according to article 132 paragraph (1) "The law regulates the legal regime of assets belonging to public domain and villages, based on principles of inalienability, imprescriptibility and imperceptibility, as their decommissioning." (The Spanish Constitution, 1998).

only the notion of property with its two forms. This is why currently there cannot be a unitary concept of the presentation way for the notion "public domain". Moreover, many authors have considered the domain theory as a creation of the doctrine, which led to a variety of views on this matter (Adam, 2000, p. 76; Vedinaş & Ciobanu, 2001, p. 5).[1] However, most opinions conver the idea that the concepts of public domain and public property are not synonymous (Iorgovan, 2002, p. 169)[2], the scope of the public domain being higher than the sphere of public property, in the sense that it includes not only public property assets, but also some private assets that should be preserved and transmitted to future generations (Iorgovan, 1994, p. 41), whose cultural, historical, economic significance justifies the affiliation to the public domain. (Vedinaş & Ciobanu, 2001, p. 17)

But in the current civil doctrine it is believed that there is an "overlap" between the two notions. (Boroi, Anghelescu & Nazat, 2013, p. 56)

The well-known Professor Jean Vermeulen shows that all discussions "*that occur around the concept of public domain represent not only a theoretical, doctrinal interest, but also it provides practical interest, the public domain being subjected to a special regime, which removes it not only from the legal regime of individual property, but even from the legal regime of the state's private domain*." (Vermeulen, 1947, p. 181)

Property, according to the doctrine (Alexandru, Cărăuşan & Bucur, 2009, p. 360), is a legal institution, while the domain represents a totality of assets, which are the object of public property. French doctrine distinguishes between public property and the public domain, as to the public domain it belongs also certain assets of private property of public persons. (Beauregard-Berthier, 2007, p. 29)

The existence of the public domain, as specified in the specialized literature (Albu, 2008, p. 137) gets new meaning as long as the assets in this area are put into good use, by their use and exploitation, in order to meet the general interests of the national or local communities, in terms of good administration.[3]

2. Regulating the Right to Administration

The establishment of real rights based on public property right, such as the right of administration, does not represent acts of alienation, but "*specific ways of valuing and exploitation of public domain assets, established by legal administrative acts or administrative contracts subject to administrative legal regime*" (Bălan, 2007, p. 93). As mentioned in the specialized literature (Bălan, 2007, p. 101), the doctrine and the positive law have not outlined a unified and coherent view on the legal nature of the right to administration of the autonomous public institutions on the goods of the public domain, views ranging from the nature of real derived right from the public property and the mere competence of administration and management of public domain assets. (Oroveanu, 1994, p. 60)

[1] Some authors consider being the same, the public domain and public property.

[2] According to the quoted author the public domain "means those public or private assets that by their nature or express provision of the law should be preserved and transmitted to future generations, representing values which are intended to be used in the public interest, directly or through public service and subject to administrative law regime, namely a mixed regime, under which the power regime is dominant, being in the property or, where appropriate, under the security of the legal entities of public law".

[3] Good administration is defined by the Council of Europe in the Recommendation CM / Rec (2007) as being a component of good governance, adding that good administration is not restricted to the legal ways of manifestation, which is required also by the quality of organizing and managing structures and resources, in terms of efficiency, effectiveness and adaptation to the needs of society, *being necessary to ensure protection and care of public property and public interests* (http//wcd.coe.int).

Article 136 paragraph (4) of the Constitution provides that the public property assets can be given in terms of the organic law, for autonomous administrations or public institutions.

The Law no. 213/1998, article 12 paragraph (1)[1] specifies that the assets of the public domain can be granted as appropriate, to the autonomous administrations, prefectures, to the authorities of the public central and local administration, other public institutions of national, county or local interest.

At the same time, the law on local public administration no 215/2001 contains provisions on the right to administration: "*the local and county councils may decide that the assets of public or private domain, of local or county interest, as applicable, may be granted to autonomous administration and public institutions, to patent or to rent. They decide on the purchase of assets or the sale of property belonging to the private sector, of local or county interest, according to the law*" [article 123 paragraph (1)].

However, the new Civil Code, in article 868, paragraph (1) provides: "*The right to administration belongs to the autonomous administrations or, where appropriate, to the authorities of the public central and local administration and other public institutions of national, county or local interest."*

The doctrine states that autonomous administrations are considered legal entities of mixed nature, of public and private law (Iorgovan, 1994, p. 99). They act on behalf of the state or territorial administrative units, as applicable, for the provision of public services and the enhancement of public domain assets.

The public domain assets can be managed by individual administrative acts, usually between the holder of the public domain, the state and administrative-territorial units, on the one hand and the holder of the right to administration on the other; there are hierarchical subordination relationships, granting the right to administration is achieved by the holder of the public domain through a legal act of public law.

3. Holders of the Right to Administration

The subject of law, which can receive for administering a public property asset, according to article 868 paragraph (1) of the Civil Code, may be represented by: autonomous administrations or, where appropriate, authorities of public central and local administration and other public institutions of national, county or local interest.

As for the autonomous administrations, by Law no. 15/1990, the state economic units were reorganized as autonomous administrations and companies. According to article 2 of this law, autonomous administrations are organized and operate in strategic sectors of the national economy such as the arms industry, energy, mining and natural gas exploitation, post and rail transport, but also in some domains belonging to other sectors established by government.

Autonomous administrations can be established by the decision of the government for those of national interest, or by the decision of the county and the municipal councils for those of local interest, which are legal entities and they function based on economic management and financial autonomy. (Albu, 2008, p. 143)

The domains that can organize autonomous administrations of local interest are: water supply, sewerage and wastewater treatment; production, transport and distribution of thermal energy; local

[1] Article 12, paragraph (1) was repealed by section 3 of Law no 71/2011 from 01.10.2011.

public passenger transport; management and maintenance of housing, markets, stock market, fairs and community roads and green spaces, building, maintaining and modernizing roads and bridges of county interest.

The act of setting up the administration determines its activity objective, the patrimony and also the name and main headquarters.

In accordance with article 5 of the Law, autonomous administration is the owner of the assets in its patrimony, and in the exercise of the right to property it has, uses and disposes, independently of the assets that it has in its patrimony or it picks up the resulted goods, as appropriate, in order to achieve the purpose for which it was created.

According to the opinions of specialists, the formulation of Law no. 15/1990 the "*autonomous administration is the owner of the assets in its patrimony*" covers only the assets that entered in the patrimony with the owner's title, and not the assets that came into its patrimony with an administration title. (Stoica, 2004, p. 435)

The autonomous administrations are, by law, under a line ministry or a local public authority, by the act of which it was established and under the control of which it operates. The autonomous administrations' patrimony, along with the right to administration, there are identified other real rights, namely, the right to private property and rights derived from this right, and other patrimony rights.

The public institutions, subject to public law, are established by the Constitution, laws or administrative acts of the State or local government. Broadly speaking, by the notion of a public institution it is understood any public authority, i.e. authority of the public administration.

In a more restrictive sense, it is mentioned in the specialized literature (Tofan, 2008, p. 6; Petrescu, 2009, p. 23) the term public institution which *evokes only subordinated structures of some public administration authorities, operating from budget revenues, and extra-budgetary sources*.[1]

Usually the financial institutions of national interest are provided from the state budget and the financial means of local public institutions are insured by local budgets.

The scope of services provided by local public institutions is much larger than that of the autonomous administrations bodies of local or county interest (Petrescu, 2009, p. 25). Therefore, local and county public institutions are more diversified. For example, there are organized and they operate educational public institutions (kindergartens, schools, colleges, etc.), cultural public institutions (cinema, libraries, theaters, opera), public health institutions (dispensaries, clinics, hospitals). (Preda, 2002, p. 286)

4. The Content, the Legal Nature and the Enforceability of the Right to Administration

Apparently, the content of the right of administration is similar to that of property (Albu, 2008, p. 146). By law, the holder of the administration right may possess, use and dispose of its assets, given the act by which the asset was given into administration.

Between the possession of the holder's right to property and that of the holder of the administration right there is a distinction on volitional, at psychological level (Bîrsan, 2007, p. 103), the holder of the administration right may use the asset under the intention to be considered an administrator and not an

[1] For example, the Romanian Academy and its subordinate research institutes.

owner of assets (Bălan, 2007, p. 104). Possession is, in the case of the administration right, the expression of owning the asset and not its appropriation. (Albu, 2008, p. 147)

Regarding the use, the most important attribute of the administration right, its attribute grants to the holder of the right to administration the possibility of using public domain assets in order to achieve its activity object. In this respect, the autonomous administrations or public institutions can pick up the resulted goods (natural and material) produced by the public domain's assets, and, under certain conditions, the civil ones as well. (Albu, 2008, p. 147)

Since the right of administration is an inalienable right and it cannot be dismantled, the availability attribute contains only the material provision, without including the legal one (Lupulescu, 2013, p. 33)[1], the holders of the administration right having no right of property onto the assets that were assigned by the act of the public property right holder.

In the litigations regarding the right to administration, the holder of the right will be in court on its own. In the litigations regarding the right to the property, the holder of right to administration is required to show the court who is the holder of the right to property, according to the Code of Civil Procedure.

In the litigations regarding the right to administration, the state is represented by the Ministry of Public Finance and the territorial-administrative units are represented by the county councils, the General Council of Bucharest Municipality or local councils, who give written mandate, in each case, to the county council president or the mayor. It may designate another state official or a lawyer to represent him in court (article 12 paragraph (5) of Law no. 213/1998 as amended by section 4 of Law no. 71/2011).

Regarding the legal nature of the right to administration, the specialized literature has not defined a unified point of view.

Thus the opinions vary from the nature of real right divided from the right to public property, by the simple competence of administration and management of the public domain assets. (Oroveanu, 1994, p. 418). In this sense, some authors considered that the right to administrate the public property assets as a real right with a mixed legal, administrative and civil nature generates significant practical consequences (Boroi, Anghelescu & Nazat, 2013, p. 80). The administrative law feature of the real right to administration would exclude the enforceability against the holders to the right of public property and the impossibility of dismantling the right to administrate public property assets, a possibility specific to civil law.

The civil legal nature of the right to administrate public property assets, according to the civil law specialists, has resulted in the enforceability of this right to other subjects of law, the holder of the right to administration being able to use specific defense means specific to civil law (Boroi, Anghelescu & Nazat 2013, p. 80).

However, in accordance with article 866 of the New Civil Code, the right to administration is a real right appropriate for public property, along with concession rights and the right to use it free of charge.

The legal characteristics of the right to public property (inalienability, imprescriptibility and imperceptibility) are characteristics for the right to administration as well. (Bîrsan, 2013, p. 184)

[1] Under the right of material provision, the owner has the opportunity to decide upon the asset's substance, and also to abandon it, under the law. While the right to legal provision allows the owner to do acts of alienation, lease, renting, establishment documents of some main real rights and accessories in the favor of other people.

The right to administration, as any real right, has an absolute feature, being enforceable *erga omnes*.

A feature of this law refers to the unenforceability against the holder of right to public property - state or territorial-administrative unit. Thus, regardless of the method of its creation, it can be revoked by a symmetric act of the initial act. The right to administration may be revoked only if the holder does not exercise its rights and it does not perform its obligations arising from the transmission act.

The unenforceability of the right to administration compared to the right to public property, according to the theorists, is a consequence of legal relations of public law, relations in which the right to administration appears as a real right of administrative nature. (Pop & Harosa, 2006, p. 73 and the next)

The revocability is manifested only in relations between the autonomous administrations and public institution beneficiary of the right to administration and the holder of the right to property on the public asset. Therefore, any act of this nature issued by another public authority which has no legal competence in this area can be appealed, according to Law no. 554/2004, by the holder of the right to administration.

The termination of the right to administration may occur by its revoking either by the public authority which established it or by other means, such as, for example, the abolition of the autonomous administration or the beneficiary public institution or the termination of the right to public property based on which it was established.

5. Conclusions

Real right established by the right to public property, the right to administration represents a specific way to enhance the assets of public domain. To the right of administering public properties assets it is applied an administrative legal regime, which leads to practical consequences. Thus for the litigations that had as object administering public property assets will have the competence the courts of administrative contentious, and the legal defense of this right is assigned to the holder of the right, i.e. the autonomous administrations, local authorities or central public administrations or other public institutions of national county or local interest.

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THE 9TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

The Legal Regime of Public Procurement Contracts

Vasilica Negruţ[1]

Abstract: Within this paper we resume a topic widely debated in the specialized literature and always topical, by the implications that it has on the development of public administration and satisfying the general interests. The changes brought to the special legislation led, by identifying certain features, in determining the legal nature of the procurement contract, i.e. the administrative contract. In Romania, this notion is not fully established, although it is recognized by most of doctrinaires. In this paper we intend to identify by analyzing the legislation, the doctrine and jurisprudence, the elements that lead to the integration of public procurement contract in the category of administrative contract.

Keywords: administrative contract; public procurement contract; legal regime

1. Introduction. General Issues Related to Administrative Contracts

Based on the means by which the public interest is achieved, it is clear that over time, under the influence of changes in society's evolution (urbanization, industrialization and so on), the role of public administration has changed, reaching today at the level of a service provider, which it required the completion of legal management documents, which in most cases takes the form of contracts (Săraru, 2009, p. 18 and the next).

The theory of administrative contracts is nowadays more current than ever, being closely linked to the public domain, public property and public service. (Apostol Tofan, 2004, p. 81; Iorgovan, 2005, p. 103)

According to the French legal doctrine, the administrative contract is considered, after 1990, a legal document signed by the public administration bodies with the administered ones, acts comprising a will agreement generator of rights and obligations for the contracting parties. (Negoiţă, 1996, p. 173)

In the current doctrine, the administrative contract is defined as "*an agreement of will, between a public authority, which is in a position of legal superiority, on the one hand and other subjects of law, on the other hand (legal and physical entities, or other state bodies subordinate to the other party), which aims at satisfying a general interest, by providing a public service, performing a work or enhancement of a public asset, submitted to a regime of public power*" (Vedinaş, 2009, p. 125).

Still in the doctrine it is referred to two closely related concepts, namely: the contracts of public administration and administrative contracts, considering that the latter represents the first kind compared to the first, which represents a concept. (Săraru, 2009, p. 18 and the next; Rouault, 2005, p. 312; Truchet, 2010, p. 259)

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In the category of public administration contracts there are two kinds: private contracts (civil or commercial) that the public administration concludes under private law regime and the administrative contracts to which it is applied the public law regime.

In order to reflect the legal regime applicable to administrative contracts, it is necessary to identify the differences between administrative contracts and the civil or commercial contracts.[1]

As it is highlighted in the specialized literature, usually, the administrative contracts are concluded by selecting the partner by the public administration, through the means provided by the law (auction, negotiation, etc.); in the case of civil or commercial contracts the parties "choose each other freely" (Săraru, 2009, p. 33). However, unlike private law contracts, where the terms are negotiated, established with mutual consent, the administrative contracts contain settlement terms[2] and contract clauses negotiated by the parties. Meanwhile, the civil or commercial contracts serve a private interest, making them applicable to private law regime, while administrative contracts serve the public interest, the applicable legal regime being the public law.

Referring to the legal regime of the administrative contracts, Professor Negoiţă (1996, p. 173) points out that, by their nature, they are identical to the civil contracts, the difference consisting in the applicable legal regime, the administrative contracts being also submitted to some rules of public law rules, which are part of the legal administration regime.

Another author states that the legal regime of the administrative contracts is based on two essential elements: the inequality of the parties, in the sense that the public authority has a position of superiority and it acts as a holder of some public powers; public authority, part of the contract, has no free will, as it is regulated by the private law. (Popa, 2000, p. 140)

The acclaimed Professor Antonie Iorgovan identifies the following elements on the concept of administrative contract: it represents an agreement of will between an authority of public administration or another entity authorized by an authority of public administration and a private entity; it envisages the achievement of works, services and so on, by the private entity in exchange of a remuneration; it aims at ensuring the functioning of the same public service, whose organization represents a legal obligation of the contracting authority of public administration (has as purpose the public service) or, where appropriate, the enhancement of the same public asset; the parties must accept some regulatory terms, established by law or based on the law, by government decision; the authority of public administration (the authorized one) may transfer the rights, interests or obligations, only to other public administration authorities under the law, and that private entity can grant them, with the approval of the public authority to any person; the authority of public administration may unilaterally amend or terminate the contract, without resorting to the courts, under certain conditions[3]; the parties, by express provision or by simply accepting pre-established clauses to which they have understood to submit, including the solving of litigations, of a public law regime; solving litigations is of the court of administrative contentious (Iorgovan, 2005, p. 118).

The special legal regime, to which the administrative contracts are subject, is characterized by special forms required for their completion (task notes, auctions, approvals from public authorities, etc.), and special principles regarding their performance (Apostol Tofan, 2004, p. 78).

[1] In the contemporary French law, it is noted that, for the identification of administrative contracts, the legal practice uses two criteria: the presence of exorbitant clauses (derogations from the common law), on the one hand and the direct participation of contractors to achieve the same public services. See (de Laubadère, 1956, p 1, *apud* Săraru, 2009, p. 37 and the next).
[2] Settlement terms are established unilaterally by a public authority.
[3] When the public interest requires, or when a private entity has not fulfilled out of guilt the obligations of the contract or when the execution seems to be too burdensome for the private entity.

2. Regulating the Public Procurement Contract

The issue of public procurement is timeless, which is determined by the legislative changes at European and national level, designed to streamline the activity in this area.[1]

The doctrine is not unitary on this concept. So the opinions vary, ranging from the more restrictive concept according to which the public procurement represents "a situation in which a public institution obtains the goods and services that they need under a contract with another entity, which is usually a company of private sector (Arrowsmitth, Linarelli & Don Wallace, 2000, p. 6, *apud* Cătană, 2011, p. 17) and the broader view where the public procurement is "a concept broader than government procurement, since it does no relate only to purchases made by the central public administration, but also those made by institutions and bodies of public interest, such as those that have as the activity object the service delivery of public interest (electricity, public transport, postal services, telecommunications, water supply etc.) (Woolcoock, 2001, p. 3, *apud* Cătană, 2011, p. 17)

It is worth meaning also the acceptation of procedure granted to this concept "public procurement is the sum of all processes of planning, prioritizing, organizing, advertising and procedures, in order to achieve purchase by organizations that are totally or partially funded by the public budgets (European, national, central or local, international donors) (http://ro.wikipedia.org).

Public procurement contract is governed by Emergency Ordinance no. 34/2006, as amended, relating to the assigning public procurement contracts, public works concession contracts and services concession contracts. Under this legislative act, the public procurement contract is a contract for a fee, concluded in writing between one or more contracting authorities on the one hand, and one or more economic operators, on the other hand, having as their object the execution of works, providing products or services delivery. Public procurement contract includes the sectoral contract, which is assigned to carry out a relevant activity in the following public sectors: water, energy, transport, post-office.

Public procurement contracts include: works contracts, supply contracts, service contracts.

The public procurement contract has as object: a) the execution of works related to one of the activities listed in Annex. 1 G.E.O. no. 34/2006 or the execution of a building, by building it is understood the result of a series of works for buildings or civil engineering works intended to satisfy by itself an economic or technical function; b) the design and execution of works related to one of the activities listed in Annex. 1 G.E.O. no. 34/2006 or the design and execution of a construction; c) the achievement by any means of a building corresponding to the need and objectives of the contracting authority, to the extent that they do not correspond to letters a) and b).

Public procurement contract for supplying is that public contract, other than works contract, which covers the supplying of one or more products, by purchase, including in installments, hire or lease with or without the option to buy (Albu 2008, p. 102). As supply contract is considered also the public procurement contract having as main object the supply of products and as secondary operations, installation works and pitting them into use. In the same category belongs the contract which covers both the supply of products and services delivery, if the estimated value of the products is higher than the estimated value of the services provided in that contract.

[1] During the preparation of this article it was published in the Official Journal of the European Union the Directive 2014/24/UE of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

In order to have the correct classification of a public procurement contract, the priority lies in its main object (Lazar, 2009, p. 27). According to article 6, paragraph (1) G.E.O. no. 34/2006, contract for services is that public procurement contract, other than works or supply contract, which covers the delivery of one or more services, as they are provided in the Annexes 2A and 2B to this legislative act, and according to paragraph (2), the public procurement contract whose main object is the delivery of some services and as secondary operations the carrying out of activities stipulated in Annex 1 is considered a services contract. It is also considered a service contract the procurement contract which covers both the supply of products and the services delivery, if the estimated value of the services is higher than the estimated value of products included in the contract.

Features of Public Procurement Contract

In the specialized legal literature there are listed a number of features that determine the classification of public procurement contracts in the category of administrative contracts (Săraru, 2009, p. 323 and the next). Among these are:

- public procurement contract is an agreement of will between a body set up to meet the needs of general interest, as stated in article 8 G.E.O. no. 34/2006 and another, public or private entity;
- through public procurement system it is pursued the satisfaction of public interest;
- it includes unreasonable clauses of common law, established by the contracting authority by the task notebook, and other requirements specified in the documentation for granting the contract[1];
- the contract ends after the completion of granting procedures, which constitute the special formalities (Săraru, 2009, p. 325)[2];
- the competence of solving the litigations on the conclusion and execution of the public procurement contract belonging to the administrative contentious.[3]

Regarding the latter feature it should be mentioned that the entry into force of the New Code of Civil Procedure has implications on the jurisdiction of courts in public procurement domain. This

[1] The unreasonable clauses are those relating to technical specifications (requirements, directives, technical features) listed in the task notebook and they define, where appropriate, characteristics related to the technical and performance quality, requirements on the environmental impact, operational safety, dimensions, terminology, testing and test methods, packaging, labeling, use instructions, etc. The technical specifications may refer to, in the case of works contract and the designing requirements and cost calculation, verification, inspection and reception conditions for works or techniques, procedures and methods of execution, and any other conditions of technical feature that the contracting authority is able to describe, according to various legislative acts and general or specific regulations, in relation to the finalized works and to the materials or other components of these works (article 35 of G.E.O. no. 34/2006).

[2] These procedures are: a) open auction, i.e. the procedure in which any interested economic operator has the right to submit the offer; b) restricted auction, i.e. the procedure in which any economic operator has the right to submit an application, and only selected candidates will be entitled to submit the offer; c) the competitive dialogue, i.e. the procedure in which any economic operator has the right to submit its application and by which the contracting authority conducts a dialogue with the admitted candidates, in order to identify one or more suitable alternatives capable of meeting its requirements, so that based on the solution / solutions, the selected candidates would prepare their final offer; d) the negotiation, i.e. the procedure in which the contracting authority carries out consultations with the selected candidates and it negotiates the terms of the contract, including price, with one or more of them; e) request for proposals, namely the simplified procedure whereby the contracting authority requests offers from several economic operators.
The contracting authority has the right to organize a contest of, that is a special procedure by which it purchases, particularly in the field of territory arrangement, town and architecture planning, engineering or the data processing, a plan or project by selecting it on a competitive basis by a jury, with or without awards (article 18 of G.E.O. no. 34/2006).

[3] According to article 286, paragraph (1) the processes and the applications for compensation for caused damages within the granting procedure, and those concerning performance, nullity, cancellation, termination, resolution or termination of unilateral public procurement contracts are settled in the first court by the Department of administrative contentious and fiscal court in the jurisdiction of which the contracting authority is situated.

involvement is determined primarily by changing the threshold value of the administrative contentious actions (1,000,000 lei for the competence of the court) (Cotoi, 2013, p. 72).

Also, in the jurisprudence[1], there are identified some of the characteristics that determine the legal nature of the public procurement contract, namely the administrative contract: quality of the contractor (public authority or another entity authorized by it); the destination of the procurement; the existence of such regulatory clauses; the existence of clauses with special feature referring to cession, modification or termination of public procurement contract; Special procedure for contesting.

The provisions of the Emergency Ordinance no. 34/2006 does not apply for assigning contracts (articles 13-16), a fact which leads us to consider that under the mentioned circumstances, the purchase of goods, works or services shall be made either by common law contracts (sale-purchase contract, for example) or through contracts subject to special regulations. For example, in the article 13 it is shown that the legislative act to which we refer is not applicable for assigning services contract which: covers the purchase or rental, by any financial means, of land, existing buildings or other immovable property or concerning rights thereon; b) refers to the acquisition, development, production or co-production of programs intended for broadcasting by broadcasting institutions; c) refers to service delivery of arbitration and conciliation; d) relates to the delivery of financial services in connection with the issuance, sale, purchase or transfer of securities or other financial instruments, in particular operations of the contracting authority performed in order to attract financial resources and /or capital, and the delivery of services by central banks; e) refers to the employment of labor force, i.e. labor contracts; f) refers to the delivery of research and development services paid entirely by the contracting authority and whose results are not exclusively for the contracting authority for its own benefit.

These exceptions are grounded, in the doctrine, by the fact that the public procurement is part of the administrative sphere, where public contracting authorities execute the legal depositions (Săraru, 2009, p. 328)

3. Conclusions

Although the views on understanding the role of public procurement in the life of collectivities are varied in the recent years, the national legislation, adapted to the European legislation, clarifies the legal nature of the public procurement contract. Thus, by changing the Emergency Ordinance no. 34/2006 with the Emergency Ordinance no. 70/2012, it is changed the nature of the public contract in commercial contract, in the assimilated contract, according to the law, to the administrative act. This is important for determining the legal regime applicable to public procurement contract and for establishing the jurisdiction of the court.

[1] Decision no. 3044/2000 issued by the Administrative Contentious Section of the Supreme Court.

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The Transfer of State Sovereignty: Analysis of Constitutional Change in Macedonia during the EU Accession Process

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Abstract: This paper will focus on the need for constitutional changes, and what states must do as a result of their accession to the European Union (EU), according to the rules for admission. Each country has to decide for itself how to identify or create a constitutional basis for membership, limiting its own sovereignty by authorizing the application of sources of EU law within its own legal system. This means the overall preparation for accession and membership, i.e. a provision permitting the transfer of sovereign powers to the EU. So while Macedonia has been a candidate-country for EU membership since 2005, it is logical to analyze the need for the changes to be made, as well as further activities of the state in the process of euro-integration. Since EU membership requires a number of changes which the state should undertake, in this paper the provisions of the current Macedonian Constitution are analyzed, which are questionable and need revision, according to the principles of supremacy and the direct implementation of EU legislation in national legislation. Finally, I draw some conclusions and make some suggestions.

Keywords: constitutional changes; sovereignty transfer; European Union

1. Introduction

Membership in the European Union requires a series of constitutional changes. States, which adhered to the EU, made constitutional changes needed to enable the unimpeded implementation of EU law in national legal systems. In this regard states met their constitutions with new provisions intended European Union, but also changed and adapted those provisions which limited territorial sovereignty only in the framework of their state. In this regard states in their constitutions, predicted separate provisions concerning international organizations. They devoted a special attention the EU, due to the specifications, which relate to the right of the EU, while also devoted attention to the provisions relating to the procedure of ratification of the accession treaty, and provisions for organizing the referendum on EU membership. This paper analyzes the experience of member states, which harmonized their constitutions making the proper transfer of powers to the EU. Also, will be analyzed changes needed to be made in the Constitution of Macedonia, on the transfer of sovereignty to EU institutions.

2. The Transfer of Sovereignty

EU institutions, namely the European Commission during the negotiations for the different chapters, does not suggest candidate countries any concrete model for constitutional change, but suggests how to overcome certain shortcomings in the system as a condition to close any negotiating chapter.

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Transfer of part of power from member states to the EU institutions is an essential point to the existence and functioning of the EU. This transfer must be done through constitutional authorization by Member States, while, over the history of the existence of the EU, there are two ways to transfer: with constitutional provisions Member States give the right to the European Union to sign international agreements; in the absence of provisions for transfer, bringing ratifying acts by qualified majority.

Macedonian Constitution has provisions that affirm the principle of sovereignty, particularly in Article 1 stated that sovereignty is indivisible, not borrowed and non-transferable, and Article 2 states that sovereignty comes from the people, belongs to the citizens, through their representatives, or referendum and other forms of direct and indirect representation. This makes necessary the introduction of a new constitutional norm, which would authorize authorities to sign and ratify the accession agreement, namely to transfer certain rights to EU institutions. Article 121 authorizes the Parliament, by a majority vote to make decisions for membership in international organizations, at the proposal of the government or at least 40 deputies. This provision was used on the country's membership in the UN, Council of Europe, WTO etc. but without transfer of powers. Article 120 also provides the opportunity for accession in community with other states, for which required 2/3 of votes in Parliament, and this decision must be supported by a majority of voters in a referendum. So, the Constitution authorizes the Parliament but also citizens to transfer sovereign rights, to the community with other states in certain proportions for the functioning of the community of states. This step really should be completed before the act of ratification of the accession to the EU. While once ratified an agreement it becomes part of the internal legal system of the state, which means that as a technical process in the implementation of devolved powers.

3. Experience of Member States to the Sovereignty Transfer

So far, are known, some experience of the Member States relating to the transfer of sovereignty. In addition, we will devote attention to each of them.

3.1. The Constitutional Basis for the Transfer of Sovereign Rights

Some countries like France, Germany and Italy with the constitutional provisions limited their sovereignty by transferring it to the international organizations and institutions, even before they become part of the European Community. Thus, in paragraph 16 of the preamble to the French Constitution (1946) were pointed out that... based on the principle of reciprocity France will limit its sovereignty sufficiently during peacekeeping. Italian constitution (1948), Article 11 states that... Italy may agree to the same terms with other countries to limit the sovereignty to some extent to protect the peace, security and justice among nations and will support the international organizations which have such a purpose. German Constitution (1949) Article 24, entitled "Transfer of sovereign power - the system of collective security," says... federation, can legally carry sovereign rights to the international organizations. These constitutional provisions were necessary for these countries to enter the European integration process, with the Treaty of coal and steel as a simple international treaty. This formula of a transfer of sovereignty to international organizations, regardless of whether it comes to peace, or other matter was incorporated in the constitution of the Netherlands(1963)[1], Luxemburg(1956)[1],

[1] Of all the Member States of the European Communities the Netherlands has gone furthest to ensure a constitutional acknowledgement of the supremacy of Community Law. By an amendment to the Constitution of the Kingdom of the Netherlands, made in 1963, it is expressly provided that in the event of a conflict between a domestic statute and a provision in a treaty, the latter shall prevail, whether the treaty is concluded before or after the passage of the statute, provided only that

Belgium(1970)[2] etc. In most countries the international agreement for the transfer of sovereignty any international organization or institution, may be ratified by qualified majority in national parliaments, while in the case of the EU, with the referendum. The authorization for transfer of sovereign rights EU had first mentioned the Constitution of Ireland (1972) which emphasizes that Ireland can become a member of the European Communities. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State (art. 29.4.3). The Irish Constitution was amended before any ratification, future agreements the EU.

After the Maastricht Treaty, Germany and France were estimated to have made other constitutional changes, which will be concretized their participation in the EU, specifying the basis for transfer sovereign rights, and regulation of the power-sharing relationships.

Germany, except for article 24 had brought a new article entitled "European Union" which was explicitly defined authorization for the transfer of state sovereign rights in the EU, to achieve the objectives of integration. France also had specified the Constitution, after Lisbon with a new chapter XV, Article 88-1 which contains the state will to participate in the EU, which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.

Also Portugal during the Maastricht Treaty established the constitutional provision (Article 7) for clear constitutional authority of the EU sovereign rights.[3]

3.2. The Constitutional Basis for EU Accession

In the constitutions of the ordinary member state, there was no provision which differed ratification of agreements separate from any decision for membership. The transfer of sovereign power and the establishment of the ECSC were a single act of signing and ratification of international agreements without special requirements. In the stages of EU enlargement, which followed later, most member states brought special decisions for EC membership through referendum. In Ireland, accession to the European Communities (1973) and the acceptance of further changes to the founding treaties, represents a decision to change the constitution through a referendum.

Specific is that the constitution changes in a referendum on any transfer of powers, as well as membership.

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the provision binds natural or corporate persons. A similar rule is established in the case of a conflict between a statute and a rule duly established by an international organization in the exercise of legislative, administrative or judicial powers.

[1] The Constitution of Luxembourg was amended in view of the establishment of the European Communities but only after the creation of the European Coal and Steel Community. In the case of Luxembourg the amendments were made to Articles 37 and 49 of the Constitution, by a Law of 25 October 1956.

[2] The Belgian Constitution (1830) was amended in 1970, in view of Belgian membership of the European Communities, by the addition of a new provision (now Article 34, Article 25 bis in 1970). The following are provisions from the Constitution in its 1994 version.

[3] Portugal shall make every effort to reinforce the European identity and to strengthen the European states' actions in favor of democracy, peace, economic progress and justice in the relations between peoples (paragraph 5). Subject to reciprocity and to respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defense policy, Portugal may enter into agreements for the exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the EU (paragraph 6).

In other countries, the referendum decision of EU membership differs from the ratification of the agreements. In Latvia, constitutional amendments (2003) Article 68 made a distinction between the authorizations to transfer sovereign rights to international institutions through international agreement on the one hand, and on the other hand, the constitutional authorization for citizens to decide for EU membership. There is also an optional possibility that, for any other changes to the treaties, should be decided in a referendum. On the proposal of the Sejm, citizens in a referendum voted for Latvian EU membership. Similarly, in the Czech Constitution (Article 10), although the ratification of the agreement on accession, and the transfer of constitutional powers, should preliminary approval by Parliament, alternatively is required confirmation by referendum. On this basis, were approved constitutional law for referendum on EU accession? Differently, in other countries like Slovenia ratification of the EU accession treaty, was made in parliament, then the citizens decided in a referendum, while in the end, was ratified the accession treaty. The decision to join, and the ratification of the accession agreement are separate acts, therefore it enables, after any future reform of the EU, the Parliament can evaluate if it is enough just the ratification or referendum is needed. A special case is Croatia, which makes the distinction between base for the transfer of sovereign powers of the state to international organizations, and the basis for approval of the decision to join the EU. Article 133 states that "international agreements through which international organizations are granted authority under the Constitution, the Croatian Parliament confirms them with 2/3 vote of the deputies". The legal basis for EU membership and transfer of constitutional power is found in chapter VII A "European Union" where it is said that... Croatia takes part in EU affairs and gives constitutional powers to EU institutions for conducting appropriate functions. So Croatia's constitution treats the EU as a community of states, and constitutional basis for membership and the realization of the referendum, can be found in the provisions for entry into the community of states, while not in provisions for accession to international organizations. In this unique model cannot be done fusion of transfer of authority act and act for membership, nor that the referendum is a form of ratification of an international agreement, as it was in other cases. Similar provisions for entry into the community of states through referendum, has a Slovak constitution (Article 7) which also provided provisions for transfer of powers to the EU with international agreements, the ratification of which does not need a referendum.

3.3. Procedures for Transfer

Most of the member states in their constitutions provide qualified majority (2/3 or 3/5) to make ratification of EU treaties, some foresee the referendum (Ireland, Poland, Latvia, Slovenia) and some other countries (Ireland, France) require prior amendment of the constitution, to delegate authority.

3.4. Constitutional Transfer Limits

In some countries (Germany, Italy) in the past, the constitutional court was established principle that... in the exercise of power by national or international institutions must respect the basic values and constitutional principles. The EU could decide only on matters that are transferred through a national act of ratification of agreements, while in addition and should not endanger the Germany constitutional order. As a result of the ratification of the Maastricht Treaty, Germany had amended Article 23 of the Constitution, provides the basis for the transfer of powers (Article 24), is elaborated Germany's membership in the EU, by defining formal and material conditions for transfer and its limits... to achieve a united Europe, Germany participates in the development of the EU which is

committed to the principles of democracy, rule of law, federalism and social principles, and the principle of subsidiarity, and ensures protection of fundamental rights as does the Constitution. To this end, Germany may give the sovereign rights through law, in accordance to the Bundesrat. For future changes in the EU treaties, the law may be brought by two thirds in the Bundestag and the Bundesrat (Article 79). Anyway, are prohibited whatever changes associated with the separation of the federation in Lande, their participation in the legislative process, human dignity, rule of law, democracy, welfare state. Constitution of Portugal, insists to respect basic principles of democracy, rule of law, and the principle of subsidiarity. In Slovenia, by international agreement, can be transfer of sovereign rights to international organizations, which are established to protect human rights and fundamental freedoms, democracy and the principle of the rule of law. Sweden in Part X, Article 5 of the Constitution authorizes Rihstag, to transfers the EU the right to adopt decisions, while the EU ensures the protection of the rights and freedoms so as defined by the Constitution and the European Convention on human Rights. Czech Constitution (Article 9) prohibits the change of the essential criteria of a democratic state based on the rule of law, and thus prohibits the transfer of powers in this regard. Estonian Constitution prohibits the EU to conclude agreements which are contrary to the Constitution (Article 123) and its fundamental principles (Article 1 of the Constitutional Act for EU membership). Constitutions of Bulgaria, Romania, Latvia, Poland and Croatia have no specific restrictions on the transfer of sovereign rights to the EU.

Restrictions mentioned in some constitutions of member states of the EU regarding the transfer of sovereignty towards the EU are rather theoretical, since in practice this does not happen given that the EU is based on the rule of law and protection of effective human rights. When it comes to the EU today, most member states have the right attitude that... the EU has no position on the constitution of the state, but the constitutional limitations are intended to do with mutual adaptation of EU law with constitutions of member states. Since the constitution of Poland had not defined the borders of the transfer of powers to the EU, the constitutional court concerning the accession agreement, had estimated that the agreement must be consistent with fundamental constitutional principles, and if there are contradictions, the constitution will be amended or will be negotiated to amend the agreement, or recently Poland will withdraw from membership in the EU.

4. The Transfer of Sovereignty in the Case of Macedonia

Macedonian Constitution mentioned in a general way, the limitation of sovereignty in favor of international organizations, without mentioning the EU. Therefore, it should be specified that “has to do with the European Union” to eliminate ambiguities and misinterpretations. Regardless of the option referred to in Article 120 of the Constitution (accession in association with other countries), as a basis for EU membership, and the transfer of constitutional powers, however it needs to be envisaged in the Constitution a provision with general authorization to the competent authorities, for signing and ratification of international agreements, to transfer to the EU of certain sovereign rights.

If, be determined that EU membership should be made by decision in the referendum, then it would have to be amended Article 120 paragraph 3, to reduce the limit for the validity of the decision (whether to vote a majority of the total number of voters), to be changed as... the majority of citizens that have emerged in the referendum. While it is also possible not to change Article 120 (it can be applied to situations other than the EU), but should definitely be added to the Constitution a new article for EU membership.

5. Conclusions

No doubt that Macedonia should follow the path paved by the member states of the EU, which devoted appropriate attention to constitutional changes before they joined the EU, all this in order to accelerate the negotiations with the European Commission after it received date to start the negotiation. This will have a positive impact on the time aspect (to compensate for the time lost so far) and for the preparation of institutions to accept the obligations arising from the application of EU law and European standards.

EU has no preference for any system of constitutional changes, but states themselves must choose how you will organize their constitutions, while during this is preferable to follow the experience of member states. In this case, for Macedonia, it would be appropriate to do a combination of the special chapter for the EU and to make changes to some articles of the Constitution.

During this, it would be more appropriate, in particular the constitution to include the main issues related to EU membership, as follows:

- should change the part of "International relations", to strengthen the procedure for ratification of EU agreements, thus, would be transferred to the sovereign rights to EU institutions, by determining the two thirds majority in Parliament.
- should be provided the constitutional basis for EU membership, and the obligation to Macedonia to participate in the construction and development of the EU;
- transfer of constitutional powers from national to European ones as well and the way of Macedonia's participation in EU institutions;
- determination of specific procedures for European Affairs, where acts of the EU institutions should take priority alongside national acts which are contrary to European ones;
- determination of the rights and freedoms that citizens should have it in the territory of the EU, particularly those related to the EU Convention of Fundamental Rights, which are not provided for in the Constitution of Macedonia;
- implementation of the right of citizens of Macedonia for passive and active participation in local elections in EU member states where they live, as well as citizens from EU member states who live or stay in Macedonia;
- guaranteeing the right of movement and residence of citizens of Macedonia in the territory of all member states, as well as guaranteeing the right to consular and diplomatic protection of citizens of the country in any of the Member State of the EU;
- the right to lodge a petition from citizens of Macedonia to the European Parliament; the right of submitting complaint to the European Ombudsman; and the right to write to the EU institutions in the native language and in other official languages of the EU and takes answer in the same language, respecting the conditions and limitations established in the EU.

In this regard, it can be concluded that the transfer of power under the contemporary concept of the EU, will not threaten national sovereignty of member states, though sovereignty can no longer be seen as absolute and indivisible.

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The Constitutive Content on the Offense of Leaving Post and Working under the Influence of Alcohol or other Substances according to the New Criminal Code

Ion Rusu[1]

Abstract: Within the paper it is examined the constitutive content of the offense on leaving post and the presence to work under the influence of alcohol or other substances according to the new criminal code entered into force on 01.02.2014. The novelty consists in the examination performed in the light of the new amendments and completions to the law, and the comparative analysis with the old law, considering the transitional situations involving the more favorable application of the criminal law. The paper can be useful to law students, academics and practitioners in the field, and all those interested in the new legislative amendments occurred in the Romanian criminal law, in this area.

Keywords: offense; the objective side; the subjective side; Romanian Criminal Law

1. Introduction

The Criminal Code of 1969 included offenses against the security of railway traffic in a separate chapter under Title VI, with the marginal title "*Crimes that are detrimental to some activities of public interest or other activities regulated by law.*"

In the New Criminal Code, these offenses are contained in Chapter I with the same title, within the Title VII marginally called "Crimes against public safety".

One of the offenses specific to safety domain for traffic and rail transports provided in the mentioned chapter of the new Criminal Code it is the offense of "leaving post and the presence to work under the influence of alcohol or other substances", an incriminated offense in the content of article 331. Amid some critical observations from the Romanian doctrine in the recent years (Rusu, 2009, p. 420), the marginal title of the offense provided for in the Criminal Code of 1969 was amended.

Also, due to other critical opinions (Rusu, 2010, p. 51), in the new law there were introduced changes regarding the active and passive subjects of the offense, widening their scope, according to the regulations in this area.

In addition to the critical opinions the legislative changes were imposed also due to the significant changes that have occurred in the last years regarding the structure, the organization and functioning method of the circulation system and the railway transport as a hole.

Therefore, the new settlement brings a series of additions and significant changes in the constitutive content of the examined offense.

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2. The Constitutive Content of the Offense

As in the case of other offenses within the constitutive content of the offense we will examine the objective and subjective side.

2.1. The Objective Side

As other offenses in this group, the objective side of the offenses referred to in article 331 of the new Criminal Code has as components a material element complemented by an essential requirement, immediate result and the causation connection.

The Material element of the objective side is achieved through various actions, which consist of either leaving post during working hours or the presence to work under the influence of alcohol (with a certain concentration in the blood) or other psychoactive substances.

Regarding the offense referred to in paragraph (1) of article 331 of the new Criminal Code (leaving post), the action consist of the employee, with direct responsibilities in the safety of railway traffic, leaving his post unjustifiably in any way or form. For the existence of material element it has no importance the reasons for leaving the post, which can be diverse, namely: to rest or have fun, to run other external activities of his duties, willful abandonment of the post without cause, resignation, etc. It also does not matter the time the post was left unguarded by the employee in question, or other reasons invoked by the person. The circumstances that determined the action of the active subject of leaving the post are in their essence only general individualization criteria for deciding on the punishment provided in article 74 of the new Criminal Code, criteria that need to be considered by the court.

Our doctrine admitted that "the action of leaving the post can be committed either by an act of willingness (leaving the post at a time when the employee's presence was required) or by omission, not returning to the post in due time. (Dongoroz, 1972, p. 311)

We disagree entirely with this interpretation, since the first case cannot exist in its materiality in all circumstances, as according to the rules of organization and functioning of the transport system, there are certain posts, where the permanent presence of the employee is required. In other words you cannot infer the existence of moments in which the presence of certain employees is not required at their posts (in these circumstances). Even if for some reason, the employee concerned leaves his post, but returns, the leave, as the return to post are specific job's tasks (in the case of the signalman, who has the task of signaling the train leaving the station, his work is achieved by leaving the movement office and going on the station platform, then he returns to his office, where he performs other tasks specific to his job). In conclusion the station in question cannot be left at a time when the presence is necessary, because the presence on the job is necessary permanently, due to the tasks specific to the job, functions that are executed only by the occupant of the post and not by another person, regardless of his quality and qualifications.

We mention, however, that there are situations when leaving the station, my lead to the non-fulfillment of the essential requirement, these situations are rare, and as such the employee shall not be charged for the offense of leaving the post. But we totally agree with the interpretation according to which the employee can perform the action by omission, i.e. not returning to his post, at the place destined for the execution of tasks specific to the job. (Diaconescu & Duvac, 2009, p. 639)

In this case, we present the example of the signalman who left the movement office to give the signal of departure of a train from the station (an activity that is included in the job's responsibility), but it does not return to the office as soon as he achieved this activity, moving to another place. In this case the existence of the offense, in addition to the action of the active subject, is conditioned by the establishment of fulfilling the essential requirement.

The material element of the objective side for the offense provided in paragraph (2) thereof, is in action by the employee with specific competences and duties of traffic safety, exercise these tasks with an infiltration into the blood stream of over 0,80 g/l of pure alcohol and he exercises them by being under the influence of other psychoactive substances.

In the first case, we note that achieving material element is conditioned by the existence of the limited alcohol content of exhaled air below which there is no question of the existence of the offense. Thus, under the conditions where the employee exercises the job with an infiltration into the blood stream of over 0,80 g/l of pure alcohol or less, there is no question of the existence of this crime. At the same time, if the employee is executing his duties alcohol content of exhaled air of 0.81 g /l of pure alcohol in the blood, it will be held criminally responsible.

For the existence of the crime it is necessary that the alcohol's level of infiltration into the blood stream established by the legislator to be found at the time of the offense, the collection of biological samples to be examined in the laboratory. A possible establishment of the alcohol level of the employee by an alcohol test or other such devices that measure the alcohol concentration in the exhaled air is not likely to lead to the finding of infringement.

In the second case it is necessary to establish that the employee in question exercises his working tasks under the influence of psychoactive substances. As the legislator did not mention the substances or their quantity, it results that regardless of the consumed or injected amount, the offense will remain, the essential condition, although not mentioned by the legislator, being that the effect of these substances is much like alcohol regarding the conduct and behavior of the employee.

For the existence of the crime it is required the collection of biological samples and their analysis in the laboratory in the case of these substances as well. (Hotca, 2012, p. 753)

The essential requirements. In order to complete the material element of the objective side, it is necessary that the act of leaving the station by employee with direct responsibilities in ensuring traffic safety on the railways [referred to in article 331 paragraph (1) of the new Criminal Code] meets several essential requirements, the first of them costing in endangering traffic safety.

As supported in the literature by many authors (Kahane, 1972, p. 312; Diaconescu Duvac, 2009, p. 639; Rusu, 2009, p. 218), this requirement is a qualitative prerequisite of the act of violating the office duties, by leaving the post, i.e. a potentiality, a possibility, and not a result.

The essential requirement will be satisfied whenever the examination of the circumstances of the commission of the offense will result by the action of leaving the post which determined the endangering of the railway traffic safety.

In the situation where by the incriminated action it is found that it could have been endangered the safety of railway traffic, and in fact it did not put in danger this value protected by law, there will be no offense. It is understood that in such a case the employee concerned will bear other consequences, which in their essence exceed the criminal liability, being though particular situations as well, where the employee concerned is criminal liable for other offenses.

We will be in the above mentioned situation (lack of criminal liability), when a signalman executing his activities on a railway station located on a side section, leaves the post for a period of about 30 minutes, while the next activity circumscribed to his competence of ensuring traffic safety, will be exercised over two hours after leaving the station. In such a case, although the post is classified as being in the category of those responsible for ensuring traffic safety, the signalman will not have a criminal liability, as due the act of leaving the station did not endanger the safety of traffic, thus not fulfilled the requirement key.

For the existence of the offense provided for in the provisions of paragraph (2) of the same article, alcohol content of exhaled air of over 0.80 g /l of pure alcohol in the blood or being under the influence of other psychoactive substances, represents the conditions for the existence of the material element of the objective side, conditions that implicitly acquire the character of essential alternative requirements. In this case, it is no longer necessary finding the action that constitutes the material element of the objective side of endangering traffic safety of vehicles, intervention or maneuver on the track, as the legislator considered that the mere presence at work under the influence of alcohol (within the incriminated limits) or under the influence of other substances would endanger traffic safety.

The immediate result. For the existence of one of the two offenses (or sometimes both, in competition), it is necessary that their immediate result (incriminated actions) consist of creating a fact situation dangerous to the safety of railway traffic. (Pascu & Gorunescu, 2009, p. 483)

Finding immediate results is achieved at the same time as the finding of the offense of leaving the post or the performance of activities under the influence of alcohol (within the limits of the law) or other psychoactive substances.

For the existence of the offense provided for in article 331 paragraph (1) of the new Criminal Code, it is not sufficient to establish that by the incriminated actions it could have endanger the safety of railway traffic [as article 275 paragraph (1) of the Criminal Code in force], it is necessary that these actions effectively put into danger the traffic safety of transport means, intervention or maneuver on the railways.

It is important to establish and with direct consequences in the assessment of the immediate result the following circumstances:

- the importance of post in the railway station in question;
- the importance of the activities that need to be executed while the active subject left the station;
- activities specific to road safety that needed to be performed in the period of time that the active subject was absent from his post, the direct effect of their non-performance in the context of traffic safety in the area;
- if in the period of absence from his post, the activities that needed to be performed by the active subject were carried out by another person, were not executed and so on;
- what was the actual activity of endangering traffic safety in the area etc.

In the case of the offense provided for in article 331 paragraph (2) of the new Criminal Code it is not required finding the immediate result, the legislator considered that it exists at the moment of establishing the physical situation in which the employee is in, i.e. under the influence of alcohol (within the incriminated limits) or other psychotropic substances.

In the aggravated way provided in article 331, paragraph (3) of the new Criminal Code, the immediate result is supplemented by another special result, which becomes circumstantial element of the simple ways and it consists in producing a railway accident.

We conclude that for the existence of the crime in the aggravated way, it is not sufficient that by the incriminated action to endanger the safety of railway traffic, it is necessary to produce a material damage, that consists of bodily destruction or damage of vehicles, railway rolling stock or installations rail.

Causation connection. To complete the objective side of the offense to leave the post or the exercising of their duties under the influence of alcohol (within incriminated limits) or other psychoactive substances, it is necessary to establish a causal connection between action that constitutes the material element and immediate result. The lack of causation connection leads to the lack of the offense.

If in the case of the offense provided for in article 331 paragraph (2) of the new Criminal Code, the causation connection results in *ex re*, the offense provided for in article 331 paragraph (1) of the new Criminal Code should be investigated, following a finding of its existence.

2.2. The Subjective Side

In the case of offenses such as leaving the post or presence at work under the influence of alcohol (within the incriminated limits) or other psychoactive substances, the form of guilt, with which the active subject acts, is the intention of both forms, namely direct and indirect.

There will be direct intent when the active subject of the offense, an employee with responsibilities of ensuring traffic safety on the track, leaves his post or executes his duties under the influence of alcohol or other substances, foreseeing the result of his act that consists of endangering traffic safety of transport means, intervention or maneuver on the railways and he acts in order to produce this result.

Indirect intention will exist when the active subject of the offense, executing one of the incriminated actions (or both) foresees the result of his act that consists of endangering the safety of transport means, intervention or maneuver on the track, and although that result is not intended, he accepts the possibility of its occurrence. Also, both forms of the intent will exist each time, in the case of the offense provided for in article 331 paragraph (2) of the new Criminal Code.

In the aggravated way of the offense the active subject will act with direct intent, when he leaves the post or working under the influence of alcohol or other substances, foreseeing the result of his act which may consist of an accident on the railway and he acts in order to produce such result.

The examined offense can be committed in its aggravated way and with direct intent when leaving the post or working under the influence of alcohol or other substances, the active subject can predict the outcome of his act, which may consist in causing a railway accident, and although he does not pursue this result, he accept the possibility of its occurrence.

Besides the intent, the offense in its aggravated way may be committed also with exceeded intention (*praeter intentionem*) when the active subject intentionally leaves his post or works under the influence of alcohol or other psychoactive substances with the intent to endanger the safety of railway traffic, and the result is a railway accident; the worse result that he had foreseen, he has not accepted considering the baseless that it will not produce, or a result that he had not foreseen, even if he could have or should have foreseen it.

In conclusion, we find that under the subjective aspect, this offense can be committed with direct or indirect intent and with exceeded intent (*praeter intentionem*).

As mentioned previously, this offense can be committed by a **legal entity,** which carries out activities specific to railway, circumscribed the safety of the transport means traffic, intervention or maneuver on the railways.

In general, the guilt forms of the legal person are identical to those of physical entities, but not absolutely necessary for the existence of the crime, there are situations in which for guilt form of the active subject, the legal entity does not coincide with the form of guilt of the physical entity.

As in the case of other offenses of this kind, in the case of attracting criminal liability of the legal persons, they will be criminally charged some employed physical entities of the responsible legal entity. This applies to the rule where there will be criminal liability of two different categories of physical entities. In the first category there are included the physical entities who have actually performed the action or inaction that endangered the safety of means of transport, intervention or maneuver on the railways and it represents the material element of the objective side; in the second category are the person /the persons from the legal entity's management who gave the order against the law.

In all cases the individual active subject in the management of the legal person ordered the execution of an action by which it was performed the material element of the objective side, the form of guilt of a physical entity will be the same as a legal entity, the act being interpreted as executed in order to achieve the activity object, in the interest of or on behalf of the legal entity.

We exemplify the case where a person in an organization, responsible for the management of a carrier demands to a wagon maneuverer to leave his post in order to use him in another activity, even for the benefit of the legal entity. In that event wagon maneuverer left his post, although he foresees the result of his act, namely endangering the safety of rail traffic, it is not in his intention to have this result, but he accepts the possibility of its occurrence (the form of guilt in this case is indirect intent). Both the physical entity from the management of the legal entity, and the legal entity will be criminally liable for committing the offense provided for in article 331 paragraph (1) of the new Criminal Code, the same form of guilt, i.e. indirect intent.

The offense provided for in article 331 paragraph (2) of the new Criminal Code can be committed by a legal entity, when an individual from its management, demands the execution of service by a driver or other employee with direct responsibility in railway traffic safety (a demand that it is executed), although the employee shall inform that the person in question has used alcohol beyond the permissible limit of the law.

While there may exist in principle to determine their existence, the motive and purpose, they have no relevance to the subjective content of each of the two offenses, the importance of their establishment during criminal trial being necessary in order to individualize the criminal sanctions that will be applied to the author(s) of this offense, and in particular the sentence.

3. Conclusions

As mentioned changing the legal content of this offense was determined by the critical opinions made in the recent years in Romanian doctrine amid the reorganization of traffic system and railway, something which has considered taking activities from this segment of economic activity by the private system.

As expected, with the change of the legal content of the offense, changes have occurred in its legal content.

The main changes to which we refer in our examination cover: the introduction of a new alternative action in the content of the objective side consisting of the action to fulfill the duties under the influence of other substances with a similar effect to alcohol, the introduction of a maximum limit of alcohol of not exceeding 0.80 g /l of pure alcohol in the blood, and the need of finding another result, namely that of endangering the safety of railway traffic.

All these changes, expressly required in the doctrine, aim at contributing to improving the legislation, as well as helping to prevent crimes of this kind.

As a general conclusion we consider that the new legislation, rooted in the general socio-economic realities of the current Romanian society, is intended to make an important contribution to preventing and combating crime of this kind.

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The Employer's Obligation to Inform the Successful Candidate, Namely the Employee, on the Essential Terms of the Individual Employment Contract. National and European Normative Aspects

Carmen Constantina Nenu[1]

Abstract: In the context of a labor market with normative dimensions in constant evolution, the employee status is quite difficult. In consistence with the principle of protecting employee rights, labor law has imposed new measures that counterbalance the employer's position of authority within the employment relationship, both at European and national levels. These include the obligation to inform the employee about the essential elements of his working relationship, obligation established at European level by Council Directive 91/533/EEC of 14 October 1991, and at national level by the Labor Code.

Keywords: authority; labor legislation; balance; importance; role

1. Introduction

The individual labor contract legislation benefits from detailed regulation at labor law level, but the European Union countries do not have a unified vision of the types of employment contracts and their obligatory content. However, most states have not imposed formal requirements for typical individual employment contracts, these being validly concluded by the mere agreement of the parties. In these circumstances, given the emergence of new types of individual contracts of employment, the employee should know and have proof of the most important elements of the contract, essential for his relationship. It is therefore important to analyze which were the foundations of the adoption of European Directives in the field, on the one hand, and the extent to which it meets social needs and current national regulations, on the other hand.

2. National and European Legislation

Labor Code has adopted the provisions of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees on the conditions applicable to the contract or employment relationship. It has also established that the employer shall, prior to the conclusion or modification of the individual employment contract (JOEC, 1991, L 288), inform the person selected for employment or, where appropriate, the employee, of the terms upon which they intend to include in the contract or to modify (Pătulea, 1998, p. 75 and the next; Tinca, 2004; Ştefănescu, 2005; Ţiclea, 2003; Volonciu, 2007).

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In the preamble to Directive 91/533/EEC regarding the employer's obligation to inform the employee on the conditions applicable to the contract or to the employment relationship, its appearance is justified, given the fact that the development of new forms of employment in the Member States has multiplied the types of working relationships. Therefore, some Member States have considered necessary subjecting the employment relationship to certain formal requirements and, in general, the requirement that atypical employment relationship be formalized in writing and contain certain information depending on the type of contract. These formalities allow, at the same time, protection of the employee from possible lack of recognition of his rights and ensure greater transparency of the labor market.

However, given that national legislation had (Basuc & Nenu, 2005), prior to the adoption of this Directive, considerable differences in key issues such as the obligation to inform the employee about the essential elements of the contract of employment or employment relationship, the Council decided to adopt provisions harmonizing national laws, considering that Community action would be beneficial for improving living and working conditions of employees. Based on these considerations, and based on the provisions of section 9 of the Community Charter of Fundamental Social Rights of Workers, which recognizes the right of any employee to define working conditions established by law, by the collective agreement or contract of employment, according to each country's regulations, the Directive establishes at Community level the general requirement that each employee receive a document containing the essential elements of the employment contract or of the employment relationship.

The directive provides two alternative ways for transposing its contents into the national laws of Member States: approval of the legislative and administrative measures and /or the adoption of agreements by the social partners that would include the necessary provisions, provided that the Member State guarantees that the results sought by the Directive are fulfilled, ensuring the signing of these social pacts.

Directive 91/533/EEC does not expressly state which should be the scope of applying the right to information, but only nominates holders of the right to information, namely those who have an employment contract or an employment relationship. Defining the scope and its exceptions, is left to national laws, specifying that exceptions must meet certain limits, namely:

- the total duration of the employment contract does not exceed one month and /or weekly working time does not exceed eight hours;
- it must have a casual and /or specific character, on condition that there are objective reasons to justify failure to apply it.

In Romania, the provisions apply to all persons included in the scope of the Labor Code (Article 2 of Law 53/2003), without any explicit exclusion for applicability rules. Directive 91/533/EEC states in art. 2 para. 1 the employer's obligation to inform the employee to whom the Directive is applicable, the essential elements of the employment contract or of the employment relationship. In paragraph 2 of the same article it is stated that the essential information that the employer must provide to the employee will cover at least the following elements:

- identity of the parties;
- work place or, in the case of the lack of a fixed or predominant work place, the mention that the employee will perform work in various places such as office headquarters or home office of the employer;

- name, rank, quality or position category of the work which the employee carries out, or characterization or brief description of the activity;
- the start date of the employment contract or employment relationship;
- the expected duration of the employment contract or of the employment relationship, if it is a contract of employment or a temporary employment relationship;
- duration of paid leave to which the employee is entitled or, if this is not possible, means of providing and fixing the respective leave;
- periods of notice that the employer and employee must follow when terminating the employment contract or employment relationship, or, if this is not possible to be established at the respective time, the means of establishing the respective leave;
- the initial base salary, other key elements and periodicity of payment, to the employee is entitled.
- duration of the normal work day or work week of the employee;
- collective conventions and /or collective agreements governing the employee's conditions of employment, or in this case, the particular competent bodies, indicating the competent body or joint institution within which the respective contracts were concluded.

The Labor Code reproduces the contents of the Directive, including two new items to the minimum information to be transmitted over to the employee: information regarding work specific risks and duration of the trial period. It is to be noted that, by the amendments to the Labor Code, information refers to persons selected for employment and to employees, in case of modification of the individual employment contract. Information is considered to be fulfilled by the employer at the time of communicating his offer regarding the content of the individual employment contract or addendum, as appropriate.

The Directive contains specific information provisions for expatriate employees, who is identified with the one who has to carry out his work in one or more Member States, other than the State of the law and practice which the employment contract or employment relationship are subject to (Article four). These employees, in addition to the common information they are entitled to as any employee, are also entitled to additional information concerning the elements of the contract relating to labor deployment abroad. Thus, prior to departure, they will need to be made aware, at least, of the following information:

- duration of work performed abroad;
- the currency in which the salary will be paid;
- conditions for repatriation.

As in the case of the common law employment contract, certain items of information that the employer must provide the employee may derive from a reference to the laws or applicable collective agreements governing such matters, namely: the currency in which he will be paid and benefits in cash and in kind, related to expatriation.

The directive specifically provides its non-applicability in case that duration of work outside the country whose law and/or practice governs the contract or employment relationship does not exceed one month.

In turn, art. 18 para. 1 of the Labor Code provides additional information that the employer must provide the employee to provide services abroad. Among the information provided there is that set out in Art. 4. 1 of Directive 91/533/EEC, adding other information, namely; that related to climatic

conditions, to the main regulations of labor laws of the country where they are going to work, and to local customs whose failure to respect would endanger the life, liberty and personal security.

According to art. 17 para. 5 of the Romanian Labor Code, amendments agreed during performance of the contract and affecting the essential elements thereof, shall be evidenced by an amendment to the individual employment contract, unless the change is required by law or the applicable collective contract. Making the connection between Article 17 of the Labor Code and Article 41 of the same law that governs changes that can be made to the individual employment contract during its execution, the doctrine concluded that listing working conditions likely to be amended under Article 41 is not exhaustive but is amplified in all matters referred to in art. 17 para.3. The most important consequence of this reasoning is that any change that affects one aspect relating to art. 17 para. 5 of the Labor Code can only be achieved through an agreement between the parties, according to art. 41 para.1 unless the alteration occurs as a consequence of applying the law. In the latter case, the modification of the individual employment contract will be included in an employer's unilateral document.

3. Means and Deadlines to Fulfill the Obligation to Inform the Employee

The directive provides various means by which information requirements can be met by the employer: a written contract, a letter of employment, one or more documents or, in the absence of these documents, a written statement signed by the employer with the minimum essential elements of the employment relationship.

The deadline when the document or informative documents must be submitted generated contradictory interpretations from the beginning, because of faulty drafting of the provision of the Directive. From the original version it could be inferred that the employer had to hand over informative documents within maximum two months from the commencement of the work, while the employer's written statement, which has the character of document alternative and /or complementary to the previous ones, had to be submitted in the maximum period of one month from the commencement of the employment relationship. The directive's mistake was rectified by a correction (JOEC, 1992, L88) that replaced the one-month period provided for the individual statement submission with the general period of two months from the start of the employment relationship.

The employee must be notified about changes in elements of the employment contract or employment relationship within a maximum of one month from the date of entry into force of the change, under paragraph 1 of Article 5 of the Directive.

According to the Report of the Commission of the measures taken by Member States to implement the Directive, most countries recognize employee communication of the essential elements of the contract of employment or of the employment relationship through documents other than the employment contract.

In the Spanish legislation (Basuc & Nenu, 2005, p. 63) for example, although either party may request a written termination of the contract of employment, even during the employment relationship, there is no general obligation of written termination of all employment contracts. In fact, the typical employment relationship, that is, the indefinite and full-time contract, must adopt written form only in certain situations, agreed within programs promoting employment.

Probably that is why the Spanish regulations transposing the Directive provide the employment contract as a general document of information transmission, but at the same time offer other alternative or complementary informing means: written statements signed by the employer and other

documents containing certain minimum specifications that match those required by the Directive for this type of documents.

It is mandatory, therefore, for the employer to provide a written statement as an alternative document for the rest of the informing means, using one of these means being optional. This is a particular interpretation of a Community rule, since the Directive, as we have seen, provides written statements as replacing elements of the general outstanding elements.

The Romanian Labor Code establishes in art. 16 para. 1, as noted, an employer's obligation to conclude a written individual employment contract, and in par. 2 it is noted that if the written form is not respected, the individual employment contract is considered to be concluded indefinitely, any evidence for proving the employment relationship being admitted.

Article 17 para. 1 of the Labor Code provides a general obligation of the employer to inform the job applicant before the conclusion of the contract, on the terms which they intend to include in the employment contract. This information should include, at least, a number of claims which substantially coincide with what the directive calls "essential elements". These essential claims must also be mentioned in the contents of the contract to be concluded later, according to the express provision contained in art. 17 para. 3.

The Labor Code does not provide the existence of alternative documents other than the employment contract for providing that information to the employee, so if the obligation to conclude the contract in writing is not fulfilled, or, if the contract does not contain all the particular legal specifications, there is no default way to provide the employee a written document allowing accreditation of recognized or assigned working conditions.

4. Effects of Communicated Information and the Lack of Communication

Article 6 of the Directive states that its provisions are without prejudice to national laws and practices relating to: the type of contract or employment relationship, proof of the existence and content of the contract or employment relationship and the rules of applicable procedure.

One of the situations where the employee was prejudiced by the lack of information was addressed and resolved by the Court of Justice in its judgment of 4 December 1997 (Cases C-253 a 258, 1996, Kampelmann and others). By this judgment, the veracity of the alleged nature of communication of the essential elements.

Belonging to the employment contract or to the employment relationship, but also that the employer should be allowed to bring any evidence to the contrary and prove either that data in the communication are false, whether they were belied by the facts or not (para. 35 of sentence).

On the other hand, the consequences of the lack of communication to the employee of an essential element, were addressed in the sentence on February 8, 2001(Case C-350/99, Wolfgang Lange against Georg Schünemann GmbH). The Court of Justice determined that no provision of Directive 91/533 provides that an essential element of the contract of employment or employment relationship that was not mentioned in the document handed the employee or was not mentioned in it precisely be considered inapplicable (paragraph 29 of the sentence).

If the employee's lack of informing is absolute, the Court of Justice established in the same sentence, on February 8, 2001 the following: Directive 91/533(Sentence of the Court of Justice of the European Communities, 2001) neither requires nor prohibits the national judicial authority to apply the

principles of law that determine the burden of proof when one of the parties to the case did not meet the legal requirements of information, i.e. where an employer has not complied with the obligation to inform.

On the other hand, art. 9 para. 2 of Directive 91/533/EEC, provides that Member States have to take necessary measures to ensure that in any contract or employment relationship existing on the entry into force of the provisions adopted, pursuant to the Community act, the employer provides the employee that requests, within two months of receiving the application, the document or documents referred to in art. 3, completed, in this case, pursuant to article 4.1.

Article 8 of the Directive provides that Member States must incorporate in their legal systems the necessary measures, so that any employee who is penalized for failure to fulfill obligations resulting from enactment of the Community Act to be able to use his rights legally. Member States may determine that means of appeal be used only after the expiry of the 15 days deadline without response from the request that the employee will have to make to the employer. The formality of preliminary application is not a prerequisite for expatriate employees, or for those who have a temporary employment relationship or for those who are not covered by a collective agreement.

In the national law, art. 19 of the Labor Code provides the possibility of the employee to request the court to force to compensation the employer that has not fulfilled the required information obligation, the deadline for instituting the proceedings being 30 days from the violation of the obligation. It is to be noted that the Labor Inspectorate, the body responsible for checking compliance with labor laws and regulations for safety and health at work, may order measures to fulfill the obligation of the employer, without establishing liability offenses. Therefore, *de lege ferenda*, it is necessary to establish contravention liability of the employer not fulfilling their legal obligation to inform the employee.

5. Conclusions

The obligation to inform the employee about the essential elements of his working relationship is one of the most important obligations of the employer, having its origin in the position of authority he has in relation to his workers. Union regulations implementing the provisions in the law must be analyzed in light of the formal requirements of the individual labor contract, both the typical and the atypical forms. As individual employment contracts shall be concluded in writing as a condition of validity, the result is that the fulfillment of the obligation to conclude a written individual employment contract by the employer, also means the implementation of the obligation to inform the employee about the essential elements of their employment relationship.

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European Certificate of Succession Necessity or Opportunity?

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Abstract: This paper aims at analyzing the chosen theme to all intents and purposes, yet emphasizing the extent of harmonization between national rules and EU regulations. The paper is based on the expertise in succession field, national and European notary regulations and also on the few published works within the field. Practical appearances noticed during the succession procedure containing a foreign element and the research in this field of interest were approached. The paper draws attention upon the possibility of the European Union residents to make succession arrangements beforehand and it determines that European law efficiently guarantees the rights of the inheritors, legatees and succession creditors. The object of this paper, yet of little repute within the national professional literature, meets the requirements of either the public notaries or any interested person within the European Union. Through the presented perspectives, the discovery of certain scanty aspects of the related regulations and the resolutions for their coping, the paper shall step forward to earning the citizens' trust in the Public Notary institution, emphasizing a new perspective upon European succession.

Keywords: Member States; heirs; European regulations

1. Introduction

Notary practice has proven that the debate of a succession with an element of extraneity raises serious difficulties as the States of the European Union have extremely diverse internal laws and regulations applicable to law conflicts. Moreover, the difficulty of an international succession debate also resides in the existence of a multitude of authorities which may be notified in such cases.

Therefore, the European Commission, together with the notary offices of the Member States of the Union have outlined the need to harmonize legislation in this field, starting with the conflict regulations in the European Union and ending with the training of those who are faced with international successions, namely, notaries public. Consequently, the European Parliament and Council adopted on the 4th of July 2012, at Strasbourg, Regulation (EU) no. 650/2012 which stipulates the creation of the European Certificate of Succession, applicable as of the 17th of August 2015 (Council, 2014).

2. Practical Aspects

In order to identify the objectives of this Regulation and the new principles it introduces, we shall analyze hereinafter several practical aspects regarding the current settlement of an international succession.

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We start from the following case: the deceased is a Romanian citizen having the last residence in Italy, he holds both movable and immovable properties on the territory of Italy, as well as on the territory of Romania and did not leave a will.

If a Romanian notary is notified for the possessions in Romania, he shall enforce article 2366 of the Romanian Civil Code which stipulates the settlement of the succession through the enforcement of the Law of the State on the territory of which the deceased had the habitual residence at the date of the decease. In our case, this is the Italian law. However, the notary public is bound to take into account article 46 of Law 218/1995 regarding the Italian private international law which submits the succession to the deceased's national law at the time of the decease. In our example, the deceased, has Romanian citizenship, so that the Italian law referred to the Romanian law which shall be applied to the succession.

Given the reasoning above, the Romanian notary, being competent for the Romanian goods, shall apply the Romanian law. Thus, he shall issue a Certificate of Succession which represents a title deed and certifies both the status of the heirs and their rights to the goods, following the procedure established by Law 36/1995 on notaries public and their activity.

In the case above, if an Italian notary is notified for the properties in Italy, he shall enforce the Romanian law, as law of the citizenship. However, on grounds of referral, the Romanian law shall refer to the law of residence which is the Italian law - for the properties in Italy, therefore, the Italian law shall be applied.

Regulation (EU) no. 650/2012 regulates these situations and provides solutions at a European level for the recognition of the foreign documents issued in an international succession, so that the difficulties we have mentioned in the beginning are overcome. Furthermore, as we will see below, the regulation harmonizes the norms regarding jurisdictional competence in terms of succession within the European Union. Hereinafter we shall try to clarify the most important aspects of the European Certificate of Succession, analyzing the articles from the European Regulation it consecrates.

3. Problem Statement

3.1. What is and what the European Certificate of Succession Aims at?

It is founded on article 62, article 63 and Consideration (67) of Regulation (EU) no. 650/2012.

"Article 62: This Regulation creates a European Certificate of Succession which shall be issued for use in another Member State and shall produce the effects listed in Article 69.

1. The use of the Certificate shall not be mandatory;
2. The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter."

"Article 63:

1. The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

2. The Certificate may be used in particular, to demonstrate one or more of the following:

(a) the status and/or the rights of each heirs, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate;

(b) the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate;

(c) the powers of the person mentioned in the Certificate to execute the will or administer the estate.

Consideration (67) "In order of a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently, the heirs, legatees, executors of the will or administrators of the estate should be able to demonstrate easily their status and/or rights and powers in another Member State, for instance in a Member State in which succession property is located. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the European Certificate of Succession (hereinafter referred as "the Certificate"), to be issued for use in another Member State. In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents which may exist for similar purposes in the Member States."

Analyzing these provisions, we can define the European Certificate of Succession a uniform **document,** with probatory value, meant to be used by heirs and/or legatees, executors of the will or administrators of the estate in order to be able to prove their status, rights or competences in another Member State than the State in which the certificate was issued (Olaru, 2013, p. 23).

Seeing the effects it produces, we may state that the European Certificate of Succession is a standard form which does not represent a definitive solution for an international succession. This conclusion is also founded on the provisions of article 65 item g, which stipulates that the application for a European Certificate of Succession must also include the coordinates of the court which is in charge with the succession itself, therefore, a court can settle the succession itself and another authority can issue the certificate.

In the Romanian law, the settlement of a succession is completed with the issuance of a certificate of succession which represents a title deed and fully proves its findings until statement of forgery[1]. From the provisions of Regulation (EU) no. 650/2012[2] it results that the European Certificate of Succession does not constitute a real title as no effects are granted to it which would have turned this document into a title deed.

Still in this European Regulation, precisely, article 3 paragraph 1 letter I, we find that the European Certificate of Succession is neither an authentic document, nor a court order, legal transaction, as these terms are defined. The issuing authority checks the information provided by the applicant, however, all the data recorded in the certificates represent a mere checking of the reality of certain information provided by the applicant.

3.2. Competence in issuing the European Certificate of Succession

In establishing the competence of the authorities to issue the certificate we start from the provisions of the same Regulation (EU) no. 650/2012. Thus, article 64 states that "the Certificate shall be issued in

[1] Article 1133: The Certificate of Succession proves the status of testamentary heirs or heirs-at-law, as well as the heirs' right to the estate, in the extent each are entitled to.

[2] Article 69: […] The certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements […].

the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11. The issuing authority shall be:

a) a court as defined in Article 3(2); or

b) another authority which, under national law, has competence to deal with matters of succession."

The general rule attributes the competence of issuing the European Certificate of Succession to the authorities of the Member States where the deceased had his habitual residence.

Article 4: "*The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole*."

On the side, according to the article 10 of the European Regulation, the competence can also be granted to the authorities from the place of the properties only if the habitual residence of the deceased is not situated in a Member State, the deceased had, at the time of death, the citizenship of the Member State or had had his habitual residence in this State provided that, at the time of notifying the court, it was not more than 5 years since changing it.

The Regulation also provides solutions in the case in which no court of any Member State is competent to issue the European Certificate of Succession. Under the name of "Forum necessitatis", article 11 stipulates that, in this situation, the courts of a Member State can pronounce, in exceptional cases, on the succession, however, they must have sufficient connection with the Member State of the notified court.

The European Certificate of Succession is issued based on a request formulated by the interested party. Article 63(1) limits the category of interested parties to: heirs, legatees, with direct rights in the succession, executors of wills or administrators of the estate. We notice that the European Regulation eliminates from this category the creditors of the succession who, although would be interested by it, cannot apply for the issuance of a European Certificate of Succession.

3.3. The Issue of the European Certificate of Succession

The individual who requests the issuance of the certificate shall prepare an application using a form which is still in discussion.

By filling in this form, the applicant must provide the information required for the delivery of the European Certificate of Succession and shall attach to this form the supporting documents regarding the information included in the application, either in certified copies, or in original. The information comprised in the application concern the applicant, the deceased, the husband or wife, the beneficiaries of the succession, the beneficiaries' succession options, the will prepared by the deceased, the prenuptial agreement, if applicable.

In practice, as well as in the few papers published regarding the European Certificate of Succession, it has been discussed about the compulsoriness of submitting both the death certificate and the civil status documents which establish the relation with the deceased, here included the documents which certify name changes, if applicable. It has been considered that, regarding the death certificate, not even the issuing authority can free the applicant from the obligation to present the supporting documents and to replace the documentary evidence with other probatory means (Olaru, 2013, p. 27)

We specify that, in this context, it is highly necessary to practically concretize the right of access to the civil status registries from the States involved.

After receiving the application, the competent authority examines it, checking the information provided therein. The examination of the application is regulated by article 66 of Regulation (EU) no. 650/2012.

Regarding the succession procedure in Romania, some notaries public, whose opinion we share, suggested that this stage should be as follows (Olaru, 2013, p. 28):

- Upon the receipt of the application, the issuing authority checks its own territorial competence by applying the appropriate provisions of the Regulation;
- After finding that it is competent to deliver the certificate, the authority checks if a similar application has been submitted regarding the same deceased person in another Member State. In this case, it requires an evidence of the international succession cases at the level of the European Union so as to avoid the delivery of several European Certificates of Succession for the same deceased person, but with a different content and issued by different authorities;
- Registering the application in the Registers of the issuing authority, in the European Register of Succession Causes and preparing a file of the succession cause;
- Obtaining the evidence necessary for proving the aspects specified in the application. This stage may involve several hearings for solving the case;
- Notifying the beneficiaries by means of public announcements. We consider that a simple notification is not enough given that the beneficiaries might have the residence in different States, therefore their summoning must be regulated as this procedure is regulated by the civil procedure norms of the Member States. We support the need for an efficient evaluation procedure, both for avoiding correcting and withdrawing the certificate and for the credibility of this new uniform instrument;
- Obtaining the consent of the persons involved for the delivery of the European Certificate of Succession, as a certificate cannot be issued if there is a contestation regarding the aspects to be certified.

3.4. The Content of the European Certificate of Succession

After covering all the stages above, the issuing authority must deliver, without delay, the European Certificate of Succession.

According to article 68 of the European Regulation, the aspects which the issuing authority clarifies concern the law applicable to the succession and the basic elements on which the law was founded, the establishment of the heirs and of the shares they are entitled to, the rights and/or possessions which accrue to a certain legatee, as well as the powers of the executor of the will and/or of the administrator of the estate and their limits.

The European Regulation provides the possibility of delivering certified copies of the certificate, mentioning in article 70 paragraph 3 that these are valid for 6 months, with possibility of extension in exceptional cases or upon the certificate holder's request.

The decisions adopted by the issuing authority may be contested by any person who has the right to request a certificate and who proves a legitimate interest (Genoiu, 2013). The contestation shall be submitted to a legal authority from the Member State of the issuing authority, according to the laws of that State.

If, following the contestation, it is established that the certificate is not true to the reality, the competent legal authority corrects, amends or withdraws the certificate or sees to the correction, amendment or withdrawal of the certificate by the issuing authority.

During the settlement of the withdrawal or amendment, the European Certificate of Succession may be suspended. During its suspension, no certified copies of the certificate may be issued.

4. Solution Approach

In order to avoid the situations which affect the probatory value of the European Certificate of Succession, as well as the vitiation of its issuing procedure, we consider that the deficiencies of the European Regulation we have outlined throughout the paper could be overcome if one takes into account the proposals of the notaries public from the European Union.

Thus, we deem necessary the introduction in the European Certificate of Succession of mentions regarding the deceased's marital status, the compulsoriness of submitting the death certificate and of all the civil status documents which attest the relation with the deceased, the heir's status and, if applicable, the decease of certain heirs calling for representation.

Moreover, we consider highly important the need to set up an electronic register of the European Certificates of Succession, a unique record of all international succession causes.

Other beneficiaries of the certificate or persons who intend to engage in contractual relationships with the persons registered in the certificate are also interested in checking the truthfulness of the data recorded in the European Certificate of Succession, therefore, the obligation of the issuing authority to inform those who have been delivered copies of the certificate on its amendment or withdrawal is not sufficient.

We wish to emphasize the warnings of the French notaries concerning the succession reserve in the light of the new regulations.

Along the principles of succession reserve, the children and spouse of the deceased have a guaranteed right to a part of the heritage.

This principle is not applied solely in France, but generally the legislations of Latin law countries, among which Romania as well, safeguard descendants on this ground.

At the other end, in the countries with systems based on the Anglo-Saxon common law, the testator can make his will as he wishes, with no restriction whatsoever. This thing, as outlined by the French notaries will allow the legal disinheritance of one or several successors by settling in one of the countries of the Union which allows this.

As the European Regulations concerns all the possessions, if a person owns goods in several countries, he may choose the law applicable to his succession. Thus, a citizen of a Latin law country, if he settles, for instance, in a State of the United Kingdom, will be able to leave his properties to any persons, the surviving spouse or children being unable to contest it.

5. Conclusions

In the light of the new provisions brought by Regulation (EU) no. 650/2012, we can distinguish two general principles. Firstly, if a person dies in a Member State which is not his country of origin, the succession shall be done according to the law of the country of his last habitual residence. And, secondly, the citizen who prepares his will shall be able to decide upon the execution of the will according to the law of the country of origin, Member State of the European Union.

For instance, a Romanian man marries an Italian woman and has his habitual residence in France. According to the new provisions, he shall be able to decide whether his successors will inherit according to the Romanian or to the French law.

Given the large number of people who live in another country of the Union than their country of origin and the multitude of international successions annually taking place in Europe, we conclude, in the spirit of the Notaries of Europe, that "the new rules introduce a number of changes which represent some significant steps forward as far as European citizens' rights are concerned" (Europe, 2014), so that the European Certificate of Succession becomes a **necessity** for the citizens of the European Union to prove their status, rights and competences in the Member States of the Union, as well as an **opportunity** for the notaries public and institutions faced with international successions to eliminate the difficulties of debating these kinds of succession.

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Reflections on the Child Born with Unknown Parents and the Adoption Institution

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Abstract: After reading statistics from the adoption domain we have discovered that, in the recent years, the number of abandoned children in health care facilities has increased, therefore two questions arise: do the changes in adoption favor adopting a child born of unknown parents?; is there a link between the abandonment of children subsequently registered as born from unknown parents and adoption? In this material we will answer to these questions, based on the reality of figures and the interpretation of the legislation in the field.

Keywords: abandoned baby; birth registration; unknown parents; adoption

1. Argumentation

Ministry of Labor, Family and Social Protection and Elderly Persons site announced having posted on the site[2] the Resolution Project on the National Strategy for the Protection and Promotion of Child Rights (2014-20120) and the Operational Plan for its implementation for the period 2014-2015.

Within the strategy on page 24, at the category of "vulnerable children" there are mentioned also the "children abandoned in hospitals." Although it is mentioned within the strategy that the number of children abandoned in hospitals has decreased in the last 10 years four times, for 2010-2012, it was found that their number increased by 12 %, so the total of 1474 children abandoned in 2012 in the medical units, the increased number of 918 cases were recorded in maternity.[3]

These facts, interpreted in the light of the principle of the superior interest of the child, which governs the entire legislation on children's rights matter, led to the amendment of Law no. 273/2004 on the procedure of adoption and Law no. 272/2004 on the protection and promotion of children's rights[4], and the emergence of Order no. 359/2012 regarding the criteria for registration and declaration of the newborn.[5] Also, recently, it has been approved G.E.O. no. 11/2014 on adopting measures to reorganize at the level of central and public administration and amending and supplementing certain legal acts[6], according to which it is established the National Authority for Child Protection and Adoption, as a specialized body of the central public administration, under the Ministry of Labor, family, social Protection and the Elderly Persons, by taking the activity in the domain of protection of child's right from the Ministry of Labor and from the field of adoptions from the Romanian Office for Adoptions.

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[2] http://www.mmuncii.ro/j33/index.php/ro/transparenta/proiecte-in-dezbatere/3172-2014-02-03-proiecthg-strategiecopii.
[3] In 2009, 1400 children were abandoned in hospitals, in 2010 a total of 1315 children, and in 2011 a total of 1432 children were abandoned in medical units.
[4] It is Law no. 257/2013, published in the Official Monitor of Romania no. 607 of 30 September 2013.
[5] Published in the Official Monitor of Romania no. 237 of April 9, 2012.
[6] Published in the Official Monitor of Romania, Part I, no. 203 of 21 March 2014.

2. Some Aspects of a Child's Birth Record Born of Unknown Parents

Law no. 272/2004 establishes in the content of articles 8-49 the every child's rights in Romania, among which there are listed the following: the child has the right to establish and maintain his identity; the child shall be registered immediately after birth[1] and starting from that day he shall have the right to a name, the right to acquire a nationality and, if possible, to know his parents and to be cared for, raised and educated by them; parents choose the name and surname of the child, according to the law.

The child has the right to retain nationality, name and family relations, as provided by law without interference. According to the Romanian legislator the expression "child born of unknown parents" covers two situations: the child found and the child left by the mother in the maternity ward, whom we will call abandoned.[2]

A. The Procedure in the Case of a Found Child

Any person who has found a child whose identification data are not known is obliged to notify the nearest police station within 24 hours[3] and the preparation of the birth certificate of the found child is achieved within 30 days since its finding by the local public records of persons or, where appropriate, by the City hall of the administrative-territorial unit in whose area the child was found, based on documents provided by law:[4]

The obligation to take the necessary steps to register the birth of the child returns to the public social assistance service (SPAS) in whose administrative-territorial area it was found, meaning that it will have to obtain the decision of establishing the name and surname of the child by the mayor of the county.

B. Procedure for Abandoned Children

In the situation where the child is abandoned by the mother in the maternity, the medical unit is required to notify by telephone and in writing the General Directorate of Social Assistance and child protection and the police within 24 hours of finding the mother's disappearance. If the mother's identity was not established within the period specified in paragraph (1), the public social assistance in whose administrative-territorial jurisdiction the child was found, based on the documentation submitted by the General Directorate of Social Assistance and Child Protection is obliged within five days to get the mayor's decision for preparing the birth certificate establishing the name and surname of the child and to make the birth registration statement to the Public Community Service of Personal Records.

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[1] The law establishes different limits of birth registration in the registry office, i.e. 15 days for the child born alive, 3 days for the stillborn, and 24 hours of the date of death for the child born alive, who died in the period of 15 days; after the legal deadline up to one year, the registration is achieved with the approval of the mayor, and after a year only by final and irrevocable court decision, according to Law no. 119/1996.

[2] See article 22, paragraph 2 and article no 23 of Law no. 119/1996 and articles 33-36 in G.D. no. 64/2011.

[3] Article 22 paragraph (1) of the Act no 119/1996 republished.

[4] These documents are written statement of the person who found him or the report public social service representative within the administrative unit of the area where the child was found; minutes prepared and signed by the public social service representative, by the representative of the competent police unit and by the doctor; the deposition of establishing the name and surname, issued by the mayor, for situations that do not know the last and first name of the child; the medico-legal expertise determining the sex and the approximate age of the child, article 22 paragraph (1) of Law no. 119/1996, republished.

After recording the child's birth, found /abandoned by the mother in maternity, the public Service is required to submit the birth certificate of the child to General Directorate of Social Assistance and Child Protection.[1]

According to article 13 of Law no. 272/2004, health facilities, social protection facilities, residential care facilities, unincorporated entities, other legal entities and individuals, which receive or provide care for pregnant women or children who do not have papers based on which it can be determined the identity, are obliged to notify within 24 hours, in writing, the authority of local public administration[2] in whose jurisdiction they are established or, if applicable, the address, in order to establish their identity and to which general directorate they belong.

3. Several Aspects of the Procedure for the Adoption of a Child Born of Unknown Parents

Referring to the adopting the Civil Code[3] makes a distinction only in terms of exercise capacity, the adoption of a person with full legal capacity, representing the exception to the rule for adopting a child. From the analysis of the provisions of Law no. 273/2004, it results that, unlike other categories of children, for the child born of unknown parents, the legislator has provided special regulations, which lead us to the conclusion that the adoption procedure is shorter by at least 6 months for other children whose affiliation is established by at least one parent.

Thus, the internal adoption, as a finality of the individualized plan for the protection of a child shall be determined within 30 days of the issuance of the birth certificate of the abandoned child, born of unknown parents, according to article 26, paragraph 1, letter c) of Law no. 273/2004 and Article 48 of Government Decision no. 350/2012.[4]

Given the information, based on article 28, paragraph 1 in relation to art. 29 of Law no. 273/2004, the court, upon the notification of the directorate[5] will allow the opening of the internal adoption procedure, after a process that takes less than one hearing (we emphasize the fact that for the child born of unknown parents, the directorate has no obligation to prove those actions provided by article 26, paragraph 2, approaches for identifying and contacting the natural parents /relatives until the fourth degree of the child, informing them of the whereabouts of the child and on how they can maintain the personal relationships with the child and efforts to integrate or reintegrate the child in the extended family).

Once opened the internal adoption procedure based on matching criteria and methodology set out in the Government Decision no. 350/2012, it goes onto the competent authorities to the stage of

[1] If parents have subsequently been identified, namely the mother was identified, the directorate will provide advice and support in order to achieve its steps for the issuance of birth certificate, and the public service or, where appropriate, the city hall of the territorial-administrative unit where the birth was registered, under the position of "found child" or "mother left the hospital", she will request the court to annul the birth certificate.

[2] The notification is achieved by telephone to the public service to which is ascribed the medical unit or the social protection and the person designated within the public service record of people will check records to identify the person concerned and it may, if necessary, with the support of other competent authorities, put into legality the person by issuing the identity document.

[3] For a critical analysis of the institution of adoption, see (Hageanu, 2009, p. 86; Lupşan, 2011, pp. 61-65).

[4] Decision for approving the Methodological Norms for applying Law no. 273/2004 and Regulation of organization and functioning of the Coordination Council of the Romanian Office for Adoptions it was published in the Official Monitor of Romania, Part I, no. 268 of 23 April 2012.

[5] According to article 52 of the G.D. no. 350/2012 within 30 days of taking out the file, the legal adviser prepares action, and the Directorate notifies the court.

theoretical fit at central level (performed by the Romanian Office for Adoptions[1] by identifying and selecting from the National Registry for adoption of a number of 10 adopters and certified adoptive families that meet to a great extent the needs of the child[2]) and the *theoretical fit* at local level (achieved by the directorate of the residence of the child born of unknown parents by choosing a number of 3 adopters/adoptive families from the list sent by the Romanian Office for Adoptions within 10 days of the date of registration of the judgment opening the internal adoption), and finally at the stage of *practical fit* (after ranking the adopters /adoptive families based on their ability to meet the criteria for theoretical fit, it is designated the first place), described by the legislator in detail[3], in articles 63-70 of G.D. no 350/2012.

An observation is required in this situation: from the analysis of the priority criteria set out in article 58 paragraph 1 of this final legislative act it results that the adoption of a child born of unknown parents is applicable only the criterion related to the facts according to which the child enjoyed the family life along with the person /adoptive family for a period of at least six months.

Continuing the analysis on the adoption process, it is noted that after the preparation of the fit report between the child and the person/adoptive family, within five days, the directorate is required to submit to the Court a request *for custody of the child for adoption*, asking at the same time the revocation of special protection measure. The custody for adoption is ordered by the court for a period of 90 days, during which bi-monthly reports shall be achieved by the directorate showing the child's development, the relations between him and the person/adoptive family.

Assuming that the child born of unknown parents is for at least two years in foster care adoption facility, to one of the adoptive spouses or adoptive family or under guardianship, the custody stage is no longer required[4], thus passing onto the stage of granting internal adoption.

The stage of granting the adoption of the child starts by informing the court by the adopter /adoptive family or directorate, at least five days before the expiry of the period for which it was ordered the custody for adoption, the application is accompanied by the writings expressly provided by article 48 paragraph 2, of Law no. 273 of 2004. The speedy trial demand[5] is based on the assessment of the administrated evidence (submission of final reports on the relations between the child and adoptive parents is obligatory, as the social inquiry report on the child), summoning the directorate in whose jurisdiction is the residence of the child or the directorate which has requested the opening of the internal adoption procedure and the person /adoptive families, with the compulsory involvement of the prosecutor.

[1] According to article 5 of GEO no. 11/2014 on measures to reorganize at the level of central public administration and for amendment of some acts (published in the Official Monitor of Romania, Part I, no. 203 of 21 March 2014) is set up the National Authority for Child Protection and Adoption, as a specialized body of the central public administration, subordinated to the Ministry of Labor, Family and Social Protection for the Elderly, by taking activity in the domain and from the adoptions of Romanian Office for Adoptions. Starting with 22/12/2012, based on article 21 of G.E.O no. 96/2012, the Romanian Office for Adoptions has been subordinated to the Ministry of Labor, Family and Social Protection for the Elderly.

[2] The list of 10 persons / adoptive families is sent by the Romanian Office for Adoptions by the directorate of the area where the child resides within 10 days from the date of registration of the judgment on opening the internal adoption for the child.

[3] For example, the minimum number of encounter between the child and the person / adoptive family is of 4 and they are achieved both in the child's environment and outside of it, with the participation of the psychologist (to at least one of the meetings). Resuming the fitting procedure of the child, after the failure of the first procedure is achieved without exceeding 3 months from the time of termination of the previous fit.

[4] According to article 42, paragraph 1, letter c and d of Law no. 273/2004 and article 80 of G.D. no. 350/2012.

[5] Article 76 of Law no. 273/2004 provides that the hearings cannot be more than 10 days, drafting and communication of the decision shall be made within 10 days from their adoption, and the decision is subject only to appeal.

4. Conclusions

The adoption produces effects on filiation (set to the adopter or adopters), the adopted becoming, as appropriate, a child marriage from or out of wedlock, with the surname of the adopter or adopters, according to their agreement. Through adoption, the child born of unknown parents acquires another state, thus identifying through a family lineage, by the filiation and kinship created by the civil way. In addition, article 474 of the Civil Code states that the information on adoption is confidential. The way in which the adoptee is informed of adoption and his family of origin, and also the general legal regime of the information on adoption is regulated by the special law (for example, article 68 of Law no. 273, of 2004).

From the analysis of the legal provisions and based on the verification of practice, we can argue that the legislation on adoption favors the adoption of a child of unknown parents, by removing some barriers, stages and procedures. This leads, in our opinion, to the increase in the number of children abandoned by their mothers, shortly after birth, for their families and the society would not be aware of the fact that they gave birth to a child, on the one hand, and on the other hand, it can be stated that there is a certain superficiality in the activity of finding the mother who abandoned an unwanted child, in our opinion, a certain preference to families to adopt such a child born of unknown parents (no claims on natural parents in the birth certificate leads to impossibility, at least as facts, of a meeting between the child born of unknown parents and subsequently adopted, and his natural family.

In our opinion, this situation generates an infringement of the right of child to know his true origins[1] (article 7 of the UN Convention on the Rights of the Child) and an inapplicability of article 68 of Law no. 273/2004 regarding access to information concerning the identity of the parents, especially for medical reasons.

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The Need of the European Public Prosecutor's Office in the Context of Strengthening the Integration

Tache Bocănială[1]

Abstract: In this research we intend to have an objective analysis on the necessity of establishing within the European Union an institution with the role of tracking, investigating prosecuting criminal cases on union funds fraud. Based on the annual losses estimated to hundreds of millions of euros on which there are suspicions of fraud and the success rate of the prosecutions concerning the offenses against the EU budget, which varies considerably from one Member State to another (while the EU average is only 42.3 %), the European Commission, as the institution responsible for implementing policies and spending the EU funds proposed the establishment, starting from 1st January 2015, of the European Public Prosecutor's Office (EPPO) as union body for protecting these funds effectively and consistently in all Member States. Continuing the process of European integration requires an increased cooperation between Member States for the effective protection of the EU financial interests against fraud. Our analysis attempts to clarify to what extent the European Public Prosecutor's Office would be another step towards the completion of, along with the European Anti-Fraud Office (OLAF), Europol and Eurojust, a palette of union bodies called upon to provide the necessary protection for the proper functioning of the European Union as a whole.

Keywords: union budget; fight against fraud; criminal proceedings; national authorities

1. Premise

The problem of protecting the financial interests of the European Union against fraud occurred with the increase of the number of Member States and the volume of financial transactions, whether these frauds aimed community expenditures or revenues.

To this end, the Commission established in 1988, the Fraud Coordination Unit, which transformed its structure since 1999 in Anti-Fraud Office (OLAF), which functions as an independent administrative independent control body, with departments in each of the EU countries. OLAF together with Europol, Eurojust, the European Union Agency for Fundamental Rights and Frontex form the institutional structure for the prevention and combating of offenses, along with the national law enforcement agencies, the rule of law which concerns crimes in the European Union and Schengen Area. While all the other listed organisms have demonstrated high degree of efficacy, in most areas of competence, OLAF has often attracted criticism on the reduced efficiency in preventing and combating fraud, motivated mainly by the quality of the administrative body, with limited competences.

At the same time, as annually a growing percentage of the EU budget is diverted through fraud[2], the responsible law enforcement agencies of the Member States show a variety of thought-provoking situations. Thus, for example, if in accordance with the statistics, in Lithuania there have been sentenced to the 88 % of those investigated for fraud, Finland, 91.7%, 64.3% in Belgium, France 75%,

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[2] According to official data, fraud through various forms to the EU budget amounts between 1 and 10% of its volume.

in Germany 57%, in Romania there were only 23.4% convictions. There were recorded a lower percentage in Greece for example. The European average is of 42.3% convictions. The statistics can certainly be misleading, but the conducted analyzes cannot disregard them.

Consequently, the European Commission proposed on 17 July 2013 that from 1st January 2015 to be set up a European Public Prosecutor's Office (EPPO) to conduct investigations and prosecutions, but also to have the power to prosecute in the courts of the Member States, the persons accused of crimes affecting the EU budget. It is considered a large number of irregularities that may affect the union's budget, (Gyula, 2012, p. 222) whether it is **fraud affecting the collection of revenue**, such as the use of false documents as proof of preferential origin, forgery of union documents for goods, various forms of smuggling and evasion of VAT or the unjustified request of VAT reimbursement, or the **fraudulent increase of expenditure**, through the "carousel" method, falsifying a destination state where the amount of the subsidy is higher, forging the quality or quantity of subsidized goods, justifying the structural fund expenditures, by false documents and misappropriating the European funds from their destination by false documents, etc.

The main argument that the Commission of Brussels brings is that perpetrators or suspects of offenses with European funds are using the subterfuge made available by the national jurisdictions in order to get away unpunished and according to the EU treaties, they mainly do not allow OLAF, Europol and Eurojust to have enough competences in criminal prosecution.

According to the Commission's view, the establishment of a European Public Prosecutor's Office (EPPO) would lead to improving this situation, although the cases handled by prosecutors would be appointed to Brussels and they will be gone to trial still in national courts.

The idea of establishing a European Public Prosecutor's Office (EPPO) is not new, it dates back in 1997, when at the request of the Commission and the European Parliament, a group of experts drafted the code of rules to protect the financial interests of the European Union containing provisions both procedural and substantive, entitled *Corpus Iuris*. (Delmas–Marty, 1997)

The need for the establishment of a European Prosecutor's Office has been discussed for several years, creating multiple controversies, being finally included in the content of the Lisbon Treaty by expanding the areas in which the Commission has legislative initiative, including areas previously belonged to Pillar III - Police and Judicial Cooperation in criminal matters.

The Treaty on the Functioning of the European Union (TFEU), following the changes suffered by the Lisbon Treaty created the possibility of a European Public Prosecutor's Office.

Its aim would be combating offenses relating to grants of the European Union, but there is the possibility of the adoption by the European Council of a decision amending article 86 TFEU in the sense of expanding the competences of such office on the cross-border organized crime as well.

In turn, the European Parliament, with the participation of all Member States presume, believes that the establishment of a European Public Prosecutor's Office could provide the area of freedom, security and justice "*an added value of great importance, as the financial interests of the Union and, consequently, the European taxpayers' interests must be protected in all Member States*".[1]

[1] The Interim Report of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament on the proposal for a Council Regulation of establishing a European Prosecutor's Office. (COM(2013)0534 – 2013/0255(APP).

2. Brief Presentation of the Legislative Proposal

Under the proposal for a Council Regulation initiated by the Commission, the European Public Prosecutor's Office will have a decentralized structure, integrated into the national legal systems. The delegated European Prosecutors will conduct investigations and prosecutions in their Member State, using national staff and applying national legislation, and their actions will be coordinated by the European Public Prosecutor, in order to ensure a consistent approach across the EU's territory, a vital aspect especially in cross-border cases. The entire structure will be based on the existing resources and should therefore not involve substantial additional costs.

The European Prosecutor should have a hierarchical form to be led by a prosecutor appointed by the Commission with the approval of the European Parliament for a term of eight years with the possibility of renewal of this mandate. The Chief Prosecutor shall be assisted by deputies also appointed by the Commission and the Member States and also prosecutors' delegates whom he appoints and dismisses himself.

European Public Prosecutor's Office will have the competence that at the completion of a survey it would be able to choose the court, which will be notify the indictment, not belonging to a particular court, without taking into account the EU courts, which do not yet have jurisdiction in criminal matters.

This form is considered that it could favor a better integration of the new institution into the national systems enabling them to be more readily accepted by the practitioners of Member States.

Along with the discussions and procedures for the establishment of such bodies of the Union with the officials with investigating and prosecuting tasks appeared also the need to create the necessary framework to guarantee the procedural rights and appeal of the investigation, in accordance with the national law of each State, but also with the jurisprudence in the domain of human rights.

The main procedural rights of the persons that might be covered by the European Public Prosecutor's Office investigations may constitute themselves a distinct research topic, which is why we will mention only the most important ones:

- the right to remain silent and to be presumed innocent;
- the right to interpretation and translation;
- the right to information and access to the file;
- the right to counseling, the right to a lawyer, in case of arrest;
- the right to present evidence and the right to examine witnesses.

In order to ensure the minimum legal framework necessary for the functioning of the European Public Prosecutor's Office, the EU legislative institutions will need to adopt a package of legislative acts such as the proposal for a Directive on combating fraud against the Union's financial interests through criminal law, the proposal for a Regulation on European Union Agency Cooperation in criminal justice matters (Eurojust) and other relevant instruments in the field from the criminal justice domain and procedural rights.

3. The Advantages of Establishing the European Public Prosecutor's Office

Renouncing at the bureaucratic and cumbersome procedure of rogatory commissions by creating the possibility for the European prosecutors to carry out investigation of fraud to the Union budget directly in several EU member states territory would be a great asset for the rapid accountability of the guilty persons of such offenses.

It is undeniable that under these circumstances, new European body proposed to be established with exclusive jurisdiction and with effective operative attributions could prosecute more effectively cases of cross-border crimes.

According to the depositions from the proposal for a Council Regulation, the European Prosecutor's Office should receive full independence, both from national governments and from EU institutions and it should be protected from any political pressure.

According to the Parliament which agreed upon the draft of Council Regulation proposed by the Commission in its meeting of 03.12.2014, the establishment of a European Public Prosecutor could bring the area of freedom, security and justice "*an added value of great importance, as the financial interests of the Union and, consequently, the European taxpayers' interests must be protected in all Member States*", as previously mentioned.

The practical integration of the European Public Prosecutor's Office in the decentralized structures, by participating, as "special adviser" of national prosecutors delegates can also be an advantage in favor of maintaining an efficient cooperation, the new institution and the authorities in the field of Member States.

The organization model proposed by the Public Prosecutor's Office can provide training, at central level, skills, experience and knowledge at an appropriate level of the legal systems of the Member States while preparing European prosecutors' delegates and their staff in the EU criminal law in a uniform and effective way.

Also the Public Prosecutor's Office can transmit the cross-border admissibility of the evidence, which could contribute to increasing the efficiency of the criminal proceedings, without prejudice to the national sovereignty on this issue.

To the national courts it would be given the task of carrying out the judicial control, which means that the European Public Prosecutor's actions could be challenged in national courts. At the same time, the proposal strengthens significantly the procedural rights of the suspected persons, which shall be subject to the investigations carried out by the European Public Prosecutor's Office.

4. Some Critical Remarks

Pros and cons assessments made by experts vary from designating the European Prosecutor as the "most objective institution of the world" (Gyula, 2012, p. 229) to the denial of its necessity altogether.

It is obvious that, in order to achieve the goal, it should be set clear rules on the functioning of the European Public Prosecutor's Office, as the current wording of the Regulation proposed by the Commission, it would be assigned as an "excessive freedom" in terms of the various criteria of jurisdiction. Thus the competence area of the European Public Prosecutor's Office should be defined precisely, enabling *ex ante* the identification of the criminal acts which they will investigate.

In this regard, there is a significant need to define evenly the entire area of the EU jurisdiction of the criminal actions which fall within the competence of the European Public Prosecutor's Office investigation which actually would mean the birth of a substantiate law of the European Union.[1]

In turn, the investigating instruments and measures available to the European Public Prosecutor's Office should be "uniform, clearly identified and consistent with the laws of the Member States in which they are implemented", which in turn foreshadows the need for procedural criminal law of the EU. Besides, the problem of criminal law that will have to apply the court, especially the admissibility of certain types of evidence, such as telephone records, but others as well, it highlights the need for a concrete systematization of rules of inquiry, different from the current legal order of the Member States.

A serious criticism, which otherwise calls into question whether the Commission's initiative to establish a European Public Prosecutor's Office will have the expected outcome, is that the proposed regulation is not according to the "principle of subsidiarity". On this position was also the Chamber of Deputies of Romania who gave a "motivated notification" to the draft regulation.[2] The reasoning behind the criticism, the Chamber of Deputies sustains that the Commission's proposal is insufficiently grounded regarding the added value that it would bring the new criminal jurisdiction in the European Union. In other words, there are not sufficiently convincing arguments that the European Public Prosecutor's Office will be able to give a better response to union budget fraud than the national prosecutor currently does. Also it was argued that since "a fraud is committed at national or local level, the adequate combat of this fraud depends primarily on the measures taken to this level", and that an "exclusive competence" of the European Public Prosecutor's Office in criminal investigation and prosecution of offenders against the financial interests of the EU raises "doubts on complying the principle of legal security, since it is not subject to any form of appeal."

In the academic doctrine there were expressed opinions including criticism according to which there will be spent more money for the organization and functioning of the European Public Prosecutor's Office than the benefits it would bring from the crime reduction which it brings prejudices to the union budget. This question arises more acutely especially in the entrepreneurial approach to certain categories of investigation in many EU Member States, namely the timeliness analysis through the benefit-cost binomial.

5. Brief Conclusions

The objective of proposing for a Council Regulation on the establishment of the European Public Prosecutor's office initiated by the Commission is a step towards the achievement of a European area of criminal justice and strengthening the fight against fraud affecting the financial interests of the Union, thus increasing the confidence in the EU taxpayers, amid a more manifested Euro-skepticism.

The establishment of the European Public Prosecutor's Office institution could be a first concrete step towards a European criminal justice, simultaneously or immediately followed by the adoption of a

[1] Currently, the European Parliament and the Council, deciding only directives in accordance with the ordinary legislative procedure; it may establish only minimum rules concerning the definition of criminal offenses and sanctions in the areas of serious cross-border crime such as: terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, cybercrime, counterfeiting of means of payment and organized crime.

[2] Several Member States Parliaments among which: Sweden, UK, Netherlands, Cyprus, Hungary, Ireland and Slovenia have submitted such motivated notifications.

European Criminal Code and a Code of European Criminal Procedure. This action must obey all the rights guaranteed by the Charter of fundamental rights of the European Union, the European Convention for the Protection of Human Rights and the Jurisprudence of the European Court of Human Rights.

The European Public Prosecutor's Office could play a crucial role in terms of how to conduct the internal investigations within the EU institutions, in cases of suspected fraud.

The European Anti-Fraud Office (OLAF) will continue to conduct major activities in combating fraud in areas falling within the competence of the new prosecutor's office. It is the case of the facts affecting the financial interests of the EU, but do not meet the constitutive elements of an offense, and serious disciplinary transgressions and crimes committed by the EU staff, but which do not have a financial impact.

In accordance with article 86 TFEU, the establishment of the European Public Prosecutor's Office can be achieved by regulation, by unanimous vote of the Council and the approval of the European Parliament. In the case where unanimity cannot be achieved, there may be applied the consolidated cooperation rules (a minimum of nine Member States may establish the European Public Prosecutor's Office). These states must notify the European Parliament, the Commission and Council in order to take into consideration the consolidated cooperation as being authorized according to article 20 paragraph 2 of the TEU and article 329 TFEU. However it is highlighted the fact that a European Public Prosecutor's Office that would operate on the basis of consolidated cooperation, only for some of the Member States, in a union formed currently of 28 countries, will not be effective. The final decision will be taken by the Council.

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Elements of Comparative Law on Extended Confiscation

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Abstract: Comparing the special seizure and extended confiscation measures, we consider that Romania, although later than the deadline indicated in the text of article 6, paragraph 3 of Decision 2005/212/JAI, has responded positively to the requirements of harmonization of national legislation with EU legislation. We believe, however, that this regulation on extended seizure has the effect of limiting the requirements of seizure of goods through crime, practically limiting the application of seizure in respect of goods originating from committing offenses.

Keywords: cross-border crime; safety measures; special confiscation; extended confiscation; goods subject to confiscation

Considering that other existing tools in the area, have not contributed effectively to ensure cross-border cooperation in the matter of seizure, and a number of Member States are not yet able to effectively confiscate the product of the offenses, the EU Council has adopted Framework Decision 2005 /212/JAI[2] on seizure of products, instruments and other goods in connection with the crime.

In the conclusions of the European Council in Vienna in December 1998, were requested greater efforts at EU level to combat international organized crime in accordance with an action plan detailing the best way to implement the existing provisions in the Treaty of Amsterdam on an area of freedom, security and justice[3].

According to the Recommendation no. 19 of the Action Plan 2000, entitled "Prevention and control of organized crime: a European Union strategy for the beginning of the new millennium"[4], it required a careful assessment to determine the need for a tool that, given the positive experiences of Member States and respecting their fundamental principles, to introduce the possibility of easing rules on the burden of proof in criminal, civil or tax area, on the source property owned by a person convicted for the membership in an organized criminal group (Hoffman, 2008, p. 80). Also, according to Article 12 of the United Nations Convention of December 12, 2000 against Transnational Organized Crime, states should adopt in their domestic legal systems, the measures necessary to allow seizure of proceeds of crime[5].

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[2] Council's Framework Decision 2005/212/JHA of February 24, 2005, J.O. no. 68, March 15, 2005, pp. 49-51.
[3] J.O. number C19 of January 23, 1999, page 1.
[4] J.O. number C 124 of May 3, 2000, page 1.
[5] Law no. 565/2002 ratifying the United Nations Convention against Transnational Organized Crime, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime, adopted at New York in November 15, 2000, published in Official Gazette No. 813 of 8 November 2002.

In this respect, at European level, the legal instruments of the Council of Europe, against cross-border crimes, contain rules and establish effective standards in the fight against organized crime, with seizure of goods and tools for perpetrating these crimes.

The provisions of the Framework Decision no. 2001/500/JHA laying down provisions on money laundering, identification, tracing, freezing, seizing and confiscation of instruments and products of crime. To this end, Member States undertake not to introduce or maintain reserves in connection with the Council of Europe Convention on laundering, search, seizure and confiscation of proceeds of crime (Hoffman, 2008, p. 82) in terms of seizure, to the extent that punishment provided for the offense is a custodial punishment over one year.

The current EU legislative framework on the freezing and confiscation of proceeds of crime also contains Framework Decision 2003/577/JAI[1] which provides for mutual recognition of freezing; Framework Decision 2006/783/JAI[2], which contains provisions on mutual recognition of confiscation orders and Council Decision 2007/845/JAI[3] on the exchange of information and cooperation between assets recovery offices, which obliges Member States to establish or designate national assets recovery offices as contact points to facilitate, through enhanced cooperation, identification as quickly as possible, at EU level, of goods coming from criminal activities.

Seeing that existing legal instruments in this area have not reached a sufficient cross-border cooperation regarding confiscation of proceeds and that there are still member states that have not implemented the provisions on confiscation, to the extent that the penalty provided by law for the offense is imprisonment more than one year, were introduced provisions of Framework Decision no. 2005/212/JHA in order to ensure the application of regulations on confiscation of crime and provisions on the burden of proof in relation to assets owned by a person convicted for an offense in connection with organized crime.

For the purposes of article 1 of the Framework Decision no. 2005/212/JHA through proceeds of crime means any economic advantage coming from committing the crime, may consist of any good. Tool of the offense means any property used or intended to serve, in any way, in whole or in part, to commit a crime. According to article 2 of the Framework Decision, each Member State shall take the necessary measures to confiscate, in whole or in part, instruments or proceeds of offense for which the penalty provided by law is imprisonment exceeding one year or other goods of an equivalent value to them. In terms of tax offenses, Member States may use procedures other than those criminal to confiscate the proceeds of the offense.

In article 3 are provided extensive powers in relation to allowing Member States to seize, in compliance with the requirements of paragraph 2, in whole or in part, goods belonging to persons convicted of certain offenses expressly provided. It is about crime committed by an organized criminal group, as it is defined in Joint Action no. 98/733/JHA of 21 December 1998, concerning the criminalization of participation in an organized criminal group, established for the purpose of committing certain offenses. There is, also, this obligation, where terrorism offenses, as defined in the Framework Decision no. 2002/475/JHA3, to the extent that such offenses are of such a nature that it can generate financial returns, and the punishment provided by law for the offenses is imprisonment with a maximum between 5 and 10 years, except for money laundering that come from terrorism, the maximum of which should be at least 4 years.

[1] Document published in JO L 196, 2.8.2003, p 45, available online at www.europa.eu.
[2] Document published in JO L 196, 2.8.2003, p 59, available online at www.europa.eu.
[3] Document published in JO L 196, 2.8.2003, p 103, available online at www.europa.eu.

The effective application of these provisions, in paragraph 3 of article 3, is provided that Member States must take into account the possibility to set the power to confiscate, according to the provisions of paragraph 1, item 2, in whole or in part, property acquired by close relatives of the convicted person or a legal entity controlled by the convicted person or its close relatives.

Also, achieving proposed by this Framework Decision, Member States may use other procedures than criminal ones for confiscation of goods, all measures to comply with this Framework Decision, will be taken by Member States by March, 15 2007, according to article 6 on the implementation of the provisions of framework Decision no. 2005/212/JHA[1]. In all cases in which it is necessary to apply the provisions of the Framework Decision is necessary to respect fundamental rights and principles set out in article 6 of the Treaty establishing of the European Community.

In **France**, the principle of legality is the arrangement governing the safety measures, not being involved the existence of guilt, along with the principle of protecting human dignity, with respect for equality before the law of criminal offenders (Pradel, 1991, p. 224). General sanction of forfeiture, applies to all goods whose origin cannot be justified by a person convicted of an offense or an offense punishable by at least five years in prison and had made a profit directly or indirectly. Thus, the Circular of December 22, 2010 concerning disclosure of the specific provisions of Law no. 2010 - 768 of July 9, 2010[2], aimed at cross-border enforceability criminal seizures, were carried out a series of specifications including the provisions applicable in France following the transposition of Council Framework Decision 2005/212/JAI on Confiscation of Crime instruments and property related with the crime through Law no. 2007-297 of March 5, 2007[3] on the prevention of delinquency.

This law amended and supplemented the legislative provisions relating to confiscation, provided in articles 131-21[4] of the French Criminal Code so that French legislation in the matter of confiscation, to be in perfect agreement with this decision. Thus, according to these provisions are applied to all movable and immovable property, irrespective of their nature, divided or undivided, who served in the offense or were intended to commit the crime, sentenced the owner or owner subject to the rights of bona fide on which is available free[5].

In Book V - enforcement procedure, Title I - About criminal judgments performance, in Chapter III - International cooperation on enforcement of confiscation orders, in article 713-1, paragraph 3 of the French Procedure Code[6] are listed goods subject to confiscation extended, as provided in the

[1] By Commission report made under Article 6 of the Framework Decision 2005/212/JHA (COM/2007/0805 final), it was determined that 16 Member States have sent their texts (Belgium, Bulgaria, Czech Republic, Germany, Denmark, Estonia, Finland, France, Hungary, Ireland, Lithuania, Malta, Netherlands, Poland, Romania, Sweden), 10 of which were almost fully transposed the Framework Decision (Belgium, Czech Republic, Germany, Denmark, Estonia, Finland, France, Hungary, the Netherlands, Poland), except, in many cases, Article 1 and sometimes minor provisions compared with the general spirit of the Framework Decision and six Member States have transposed the Framework Decision in part (Bulgaria, Ireland, Lithuania, Malta, Romania, Serbia). Five Member States (Estonia, Italy, Latvia, Luxembourg, and Portugal) said that their legislative acts are under development. Finally, six Member States (Austria, Cyprus, Spain, Slovakia, Slovenia, the United Kingdom) have not yet communicated their national measures to the Commission, according to data available online in www.eur-law.eu.

[2] Document available online at www.legitrance.gouv.fr.

[3] *Ibidem*.

[4] Amended by the provisions of Articles 16 and 17 of Law 2012 -409 of March 27, 2012, available online at www.legifrance.gouv.fr.

[5] Article 131-21, paragraph 2, of the asset seizure occurs that served or were intended to commit the offense or the asset that is the product resulting from it except objects that can be returned. Among other things, it can occur on any movable object defined by law or regulation that punishes crime "available online www.legifrance.gouv.fr.

[6] Article 713-1 of the Code of Criminal Procedure -„Decisions confiscation can take the transmission or delivery enforcement in another state are subject to confiscation by movable or immovable, tangible or intangible, and all legal documents or instruments evidencing title to or interest in a good, product or instrument constituting a crime; goods that are the product of a crime or that correspond to all or part of the value of the product; goods can be confiscated under the

provisions of the Framework Decision. Consequently, in case of committing the following crimes (counterfeiting currency, or transit stay supporting illegal, human trafficking, sexual exploitation of children and child pornography, drug trafficking and money laundering, as well as what constitutes an act of terrorism), a general confiscation which allows in all or part of the property of the author of these crimes, confiscation is broader than the three mechanisms provided by the framework decision of which at least one must be implemented.

Instead, press offenses can result in confiscation measures[1].

In **Belgium**, the criminal (Hennau & Verhaegen, 1995, p. 355) doctrine distinguishes between seizure and confiscation as punishment as a safety measure, as it relates to hazardous items to be withdrawn from circulation, even does not belong to the perpetrator.

The provisions of articles 42-43 quarter of the Sub - section III, entitled "Special confiscation", the Belgian Criminal Code[2] replied largely to requirements arranged by the provisions of the Framework Decision in the matter of extended confiscation, but to complement its requirements and ensure a perfect line, these provisions were supplemented with article 390 of Law 2006-12-27/32 Law, which introduces paragraph 1 bis in article 43 quarter, which lists all the offenses covered by extended confiscation[3].

The Criminal Code[4] of the **Netherlands** changed article 36 of the first section (Seizure, raising benefits they illegally acquired and compensation of damages) of Title IIA, meaning a partial reversal of the burden of proof regarding the origin of goods from illegal crimes. Besides that it is allowed confiscation of offenses for which a person was convicted, is permitted confiscation "probably from other criminal activities".

In **Germany**, according to the provisions §73 of the Criminal Code[5], confiscation may be ordered in connection with the assets acquired in the case of an offense or resulted in an offense while taking the goods ordered by §74, refers to the passage of state property goods that have been produced or have been used in committing the offense. It can also take one of these measures in the form of cash equivalent, if the goods can not be seized or taken because they are not found (Otto, 1982, p. 4). Regarding the German legislature, we can say that the current provisions of the Criminal Code have been fully completed in accordance with the Framework Decision, besides special seizure measure, existing also provisions on extended confiscation.

Thus, the provisions of article **§73 d, "The seizure in the recovery of broad scope",** when is committed an offense provided by a law (so here is about also a special law to criminalize offenses), the court orders the seizure to recover things from the perpetrator or participant, and where they were obtained for or through crime. Provision in sentence 1 shall also apply in the case of a thing that lies not or does not belong to the perpetrator or participant only because the work that was produced for or

provisions of the legislation of other states which are instrumental goods which are not subject to or the product of a crime", available online at www.legifrance.gouv.fr.

[1] COM (2007) 0805 final, document available at www.eur-lex.

[2] Document available online at www.droitbelge.be.

[3] Article 43 four - without prejudicial article 43 bis, paragraphs 3 and 4, the advantages of property referred to in §2, the goods and values have been substituted and revenue from vested benefits found in possession of assets or persons may, at the request of the prosecutor of the King, to be seized or this person may be sentenced to pay a sum that the judge considers the corresponding value of the goods if this has been found guilty of committing crimes in the state of criminal participation, traffic poisonous substances, narcotic, drugs, disinfectants and antiseptics to the extent that refers to the import, export, manufacture, sale or offering for sale of the substances listed in this article ", available online at www. droitbelge.be

[4] Document available online at www.lexadin.nl.

[5] Document available online at www.gasetze-im-internet.de.

by committing a crime. This can be done if certain conditions are met (referred to in Article §74 Conditions of confiscation): those things are, at the final decision in the hands of the perpetrator or participant or things belonging to or concerned in terms of their characteristics and circumstances, constitute a danger to society or can be used to commit other crimes. Also, confiscation may be ordered when the offender committed the offense of misconduct[1].

In **Finland**, the Criminal Code[2] in Chapter 10, in addition to the provisions relating to special confiscation, in Section 3 "Extended confiscation of proceeds of crime from the commission of offenses" is provided that the total or partial confiscation of property by the State will then have when a person is found guilty of an offense for which the law provides a possible sentence of at least four years in prison for the attempted to such a crime is punishable, in the case of committing any of the offenses referred to in Chapter 32, sections 1 or 6, Chapter 46, Section 4, Chapter 4, Chapter 50, sections 1 and 4 of this Code, or Section 82 of the Law on alcohol consumption (459/1968), and on a person involved in committing to any offenses referred to in paragraph (1) above and on a person's behalf or that the offense was committed above, provided that the nature of the offense will produce financial benefits and there are reasons to believe that the goods originate partly or all of criminal activity, is not considered to be insignificant. The measure may also be applied against a legal person (private enterprise, company, corporation or foundation), but will not be ordered if the property was transferred before more than five years before the crime[3].

In **Italy**, Legislative Decree 306/1992[4], amended and supplemented by the law no. 501/1994, burden of proving the legal origin of the goods belonging to the defendant if the prosecution (prosecutor) states that the value of goods is manifestly disproportionate to the economic and financial resources of the defendant. In this case, the presumption is applied on all the assets of the defendant and only the proceeds of or related to the offense for which a person was convicted (Padovani, 1995, p. 445). During preliminary investigations, these assets can be seized as a preventive measure.

In relation to extended confiscation, provisions of article 322 of the Italian Criminal Code[5], apply to a conviction or sentence, at the request of the parties, in accordance with Article 444 of the Criminal Procedure Code, the offenses referred to in articles 314-320, situation in which, the confiscated property belonging to a person who has committed a crime, including property or money given or received by a public official to perform duties[6].

In **Spain**, for an easier application of confiscation, shall be a presumption that the property is derived from criminal activity if the property value is disproportionate in relation to the revenues lawfully on every person convicted of committing crimes within an organization or criminal groups. However, judges and courts may approve the seizure where it is a crime of negligence for which the law provides for a prison sentence of at least one year, may also have extended confiscation of offenses of

[1] § 74, "Seizure conditions. 1. If a crime was committed intentionally will be confiscated things which were obtained by the offense or who have served, or were intended to serve or prepare to commit a crime. 2. Forfeiture may be ordered only if: 1. those things are, at the moment of the final decision, in the hands of the perpetrator or participant or belonging to them or 2. those things, depending on their characteristics and circumstances, are a danger to society or can be used to commit other crimes. Available online at www.Gesetze-im-internet.de.
[2] Document available online at www.finlex.fi.
[3] *Ibidem*.
[4] Document available online at www.altalex.com.
[5] Document available online at www.leggeonline.info.
[6] *Ibidem.*

organized crime and terrorism, according to Article 127 paragraph 2[1] of Title VI, "Special confiscation" of the Criminal Code[2].

In **Romania**, pursuant to the provisions of Title II - Fundamental rights and duties of citizens in the Constitution of 1965, the provisions of article 1 paragraph 1 of Law no. 18/1968[3] on the control of the origin of goods of individuals who have not been legally obtained, establishing the principle that "The acquisition of property otherwise than by lawful purpose is a violation of the principles of socialist ethics and equity and is prohibited" the law stated in paragraph 2 of the same article, that property acquired in violation of those provisions, or their cash value "will be passed into state ownership". According to article 2 of the law, may be subject to control of the "origin of goods of any individual, whether data or indications that there is a clear disparity between the value of its assets and income lawful and justified legally acquired property. By justifying the wealth means the obligation of the person concerned to prove the legality of the means used for acquiring or developing property. The control was on the assets acquired in the last 15 years before referral, both existing assets of the person concerned and the alienated consideration or free of charge. If there were clear evidence that goods acquired before this period have illicit origin, was to be extended control over them.

After 1989, when the drafting of the Constitution in 1991 wanted a democratic legal framework based on respect for fundamental principles of the rule of law, in terms of ownership (Boroi, 2008, p. 377; Bulai, 1997, p. 629) as a result of experience gained as a result of the regulations adopted during the communist period, when private ownership was almost devoid of content, one of the main points of debate in the Constituent Assembly on the Thesis of the project of Constitution was to guarantee this fundamental regulation, mainly presumption of lawful acquisition of wealth (Safta, 2012). Thus, according to article 44, paragraph 8 of the Constitution, "*Legally acquired assets cannot be confiscated. Legality of acquirement shall be presumed*". In order to eliminate the second thesis of paragraph 8 content of article 44 of the Constitution, there have been several initiatives[4] in a constant jurisprudence, delivered in the exercise of its supervisory initiatives to revise the Constitution, the Constitutional Court ruled that the presumption of lawful acquisition of wealth is one of the constitutional guarantees of the right to property, and the conclusion of the three decisions was the same, namely unconstitutional initiatives to revise on the removing text which regulates the

[1] Article 127 paragraph 2, "If for any reason it is not possible confiscation mentioned in the previous paragraph, will be confiscation of an equivalent amount of other goods belonging to parties criminally liable for the act committed" available online at www.juridicas.com.

[2] Organic Law 10/1995, of 23 November, published in the Official Bulletin of the State no. 281 of November 24, 1995, available online at www.juridicas.com.

[3] Published in the Official Bulletin no. 81 in June 24, 1968.

[4] By Decision no. 85/1996, published in Official Gazette No. 211 of 6 September 1996, the Court held that the "presumption of lawful acquisition of wealth is one of the constitutional guarantees of the right to property, in accordance with paragraph 1 of Article 41 of the Constitution (now paragraph 1 of article 44), according to which ownership is guaranteed. This presumption is based on the general principle that any act or fact is legal until proven otherwise requires, in the estate of a person, unlawful acquisition should be proven. Therefore removing this assumption signifies suppression of constitutional guarantees of the right to property. "Decision no. 148/2003, published in Official Gazette No. 317 of April 16, 2003, ruling on the proposed text to be inserted in the Constitution text circumstance presumption in question, stating that it does not apply "to property acquired as a result of drawing income from crime", the Court held that the this way of writing that seeks the overthrow of the burden of proof on the legality of the property, providing for the unlawful nature of the property acquired by capitalizing proceeds of crime. In these circumstances, the Court found unconstitutional the proposed revision that cover essentially the same objective, namely the removal of the presumption of lawful acquisition of property, as it signifies the suppression of a constitutional guarantee of the right to property. By Decision no. 799/2011, published in Official Gazette No. 440 of 23 June 2011, the Constitutional Court stated that "in the absence of such a presumption, the owner of property should be subject to ongoing insecurity whereas whenever they would invoke the illicit acquisition of that right, the burden would not return the making the statement, but the holder of the asset". Since, according to article 152 paragraph (2) of the Constitution, "No review cannot be made if it results in the suppression of the rights and freedoms of citizens and their guarantees", and the presumption of lawful acquisition of property constituting, according to the interpretation of the Constitutional Court, a guarantee of private ownership.

resumption referred. However, in decision no. 799/2011[1], the Court notes that[2] the regulation of this assumption does not preclude investigation of the illegal acquisition of wealth, and expressly stated that it does not prevent the legislature to adopt regulations in accordance with EU legislation in the field of fight against crime, in particular with reference to the framework Decision 2005/212/JAI[3].

Thus, the Romanian legislator noting that, compared to the European requirements in the legislation has some gaps[4], has introduced in the provisions of Law no. 286/2009[5] Article 3 of Framework Decision 2005/212/JAI, additions that should be provided in the national law by June 15, 2007 as required text of article 6 paragraph 2 of this decision. Basically, the measure can be arranged according to Article 118² paragraph 2 of the Penal Code, under certain conditions to be met. The first condition implies the existence of the analyzed quality of offender the person against whom is going to be taken extensive forfeiture, criminal who has committed certain offenses[6]. Another prerequisite to extended confiscation measure is the existence of a final judgment of conviction thereof. Another condition to be applied is that the value of extended confiscation of assets acquired by the convicted person, within a period of five years before and, if appropriate, by time of the offense, until the date when the document instituting the proceedings, beyond manifestly revenue it lawfully. For a proper appreciation of the value of property acquired by the person convicted, the legislature considered necessary to take into account the value of the goods (goods are considered and fees) transferred by the convicted person or a third of a family member or a legal person on which the sentenced person has control, according to paragraph 3, and in distinguishing between legitimate income and value of assets acquired will consider the value of the property at the date of acquisition and expenses incurred by the convicted person, his family members.

Also, according to paragraph 7, the confiscated property and money derived from the operation or use of confiscation and the goods they produce. On the other hand, may not exceed the confiscation of assets acquired during the period referred to in paragraph 2, which exceeds the level of the lawful income of the convicted person.

[1] Published in the Official Monitor no. 440 on June 23, 2011.
[2] Document available at www.ccr.ro.
[3] Council Framework Decision 2005/212/JAI of February 24, 2005, J.O No. 68, March 15, 2005, pp. 49-51.
[4] Reason at Law no. 63/2012, available at www.cdep.ro.
[5] Published in the Official Monitor no. 510 on July 24, 2009.
[6] Article 1182 paragraph 1 Criminal Code, states that are subject to seizure and goods other than those referred to in article 118, if the person is convicted of any of the following offenses, if the offense is likely to procure a material benefit and penalty provided by law is imprisonment for five years or more: a. pimping; b. traffic in drugs and precursors; c. offense of trafficking in persons; d. offenses Romanian state border; e. the offense of money laundering; f. crimes legislation on preventing and combating pornography; g. crimes law on preventing and combating terrorism; h. combination for offenses; i. offense of initiation or establishment of an organized criminal group or accession, or support in any form such a group; j. crimes against property; k. offenses relating to breach the regime of weapons and ammunition, nuclear or other radioactive materials and explosives; l. counterfeit currency or other valuables; m. economic disclosing secrets, unfair competition, breach of the provisions on import and export operations, embezzlement, breach of the provisions regarding the import of wastes and residues; n. offense on the organization and operation of gambling; o. trafficking of migrants; p. corruption offenses, offenses assimilated to corruption, offenses related to corruption, offenses against the financial interests of the European Union; q. offenses of tax evasion; r. offenses related arrangements; s. crime of fraudulent bankruptcy; and others offenses committed through computer systems and electronic payment means; t. trafficking in organs, tissues or cells of human origin.

Conclusions

The escalation of the phenomenon of organized crime required legislative measures to be in line with European Union legislation, specifically, if extended confiscation, in accordance with Decision 2005/212/JAI.

Even though with some omissions in the original text of the decision (missing and transposition of article 4 of Decision, according to which "each Member State shall take the necessary measures to ensure that parties affected by the measures laid down in Articles 2 and 3, provide effective remedies for their rights "), the implementation of these measures should be carried out in compliance with the Constitution, which establishes the necessary safeguards to ensure compliance with fundamental rights and freedoms, including the right to the peaceful enjoyment of all acquired assets. But as long as there are no procedures for implementation and guarantees of the right to defense, this law can lead to misinterpretation and improper application.

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THE 9TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Rights and Restrictions of EU Citizens within the Freedom of Movement of Persons

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Abstract: This Paper aims at presenting the risks and advantages of being a citizen of the European Union Member State/s, with respect to the Freedom of Movement of Persons, with focus on the Principle of Equality and Anti- Discrimination, as enshrined by the Treaties and other incident legislative acts, at first, and then as applied by the European Court of Justice via its established case law. Moreover, the two indicated Principles are quintessential when it comes to the rights pertaining to EU citizens, and therefore other Freedoms are interpreted in the light of Equality and Anti- Discrimination, e.g. Services, Capital etc. Regardless if one is a worker, a student or just someone who wishes to exercise his/her rights as an EU citizen in other capacities, it is highly desirable to understand the rationale behind those rights/freedoms.

Keywords: EU Law; students; workers; EU citizenship; equality; discrimination *on grounds of nationality;* ECJ Case- Law

1. Preliminary Remarks

When an EU citizen wishes to study/work abroad, awareness must be provided in relation to the conditions imposed by the National Authorities of the host Member State. As a consequence of the shared competences between Member States and European Union, except for the areas where the European Union has exclusiveness, National Authorities may impose different conditions which are to be met when a citizen of the EU wants to access another EU Member State territory. In this regard, this article will present two of the Landmark ECJ Cases, in order to have a peer outlook on the rights and obligations conferred by the EU citizenship. The Author trusts that having examples that explain the admission process and the residence criteria, along with the correspondent restrictions, the Reader, will better understand why it is beneficial, or not, to be a part of the European Union.

2. Ruling of the European Court of Justice (Grand Chamber), of March 15, 2005 in Case C-209/03, The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills, ECR *I-02119*[3]

A. Facts

In August 1998 Mr Bidar, a French national, entered the territory of the United Kingdom, accompanying his mother who was to undergo medical treatment there. Of course, they lived together,

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as her dependant, and pursued and completed his secondary education without ever having recourse to social assistance.

In 2001 he started a course in economics at the University College London. While Mr Bidar received assistance with respect to tuition fees, his application for financial assistance to cover his maintenance costs, in the form of a student loan, was refused on the ground that he was not settled in the United Kingdom. Against this refusal he brought an action before the British Court claiming that he should be granted the requested maintenance costs as he is an EU National and by making the grant of a student loan to a National of a Member State conditional on his being settled in the United Kingdom, the Student Support Regulations (National British Rules) introduced discrimination prohibited under Article 12 TEC, now Article 18 TFEU.

The Preliminary ruling was asked by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), which decided to stay the proceedings and refer questions to European Court of Justice on the interpretation of TEC, Articles12 and 18, now Articles 18 and 21 TFEU, and Directive 90/364/EEC in relation to the UK legislation which provided a three years residence criteria for accessing assistance to cover foreign students' maintenance costs. The National Court asked in essence whether that criteria is discriminatory or not.

B. Assessment of the Court

The Court dealt with the nationality discrimination prohibition (Article 18 TFEU) related to the citizenship provisions, as enshrined by Article 21 TFEU. In respect to nationality, the Court stated that when a situation falls within the scope *rationae materiae* of EU law, including the exercise of the freedom conferred by Article 21, to move and reside within the European Union, one can rely on those provisions.

The Court asserted that there is a difference of treatment of the non-resident students, based on the *residence criteria* contained in the UK legislation and this constitutes indirect discrimination. As a consequence, the defendant (UK Government) in the main proceeding tried to justify the contested rules by the need to ensure that the contribution made by parents or students through taxation is or will be sufficient to justify the provision of subsidised loans and by the need of the existence of a *a genuine link between the student claiming assistance to cover maintenance costs and the employment market of the host Member State*.

The Court found that it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State, but that Member State cannot require that the students concerned to establish a link with its employment market[1]. However, the Court asserted that a certain degree of integration can be reflected by the fact that the respective student has resided in the host Member State for a certain length of time. Still, the rules in question create a treatment that prevents a student who is a national of a Member State and who is lawfully resident and has received a substantial part of his secondary education in the host Member State, and has consequently established a genuine link with the society of the latter State, from being able to pursue his studies under the same conditions as a student who is a national of that State and is in the same situation. As a consequence, *this justification was not upheld by the Court*, which considered that the prior residence condition of three years (that the student resided in the UK territory on the first day of the first academic year and that of having resided in the United Kingdom for the

[1] Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 58.

three years preceding that day) is precluded by the application of the first paragraph of Article 18 TFEU (e.g. Article 12 TEC).

As this Ruling was meant to provide guidance, the next case, which was based on the latter, will be more expanded in its analysis, as it reflects an opposite view of the interpretation of the EU treaties, regarding EU citizenship, Anti- Discrimination and Equality in the context of Freedom of Movement of Persons within EU.

3. Ruling of 18 November 2008, of the Court (Grand Chamber) in Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008], ECR *I-08507*, Referred by Centrale Raad van Beroep (Netherlands)[1]

A. Facts

On 5 March 2000, Jacqueline Förster, a German national aged 20, settled in the Netherlands, where she enrolled for training as a primary school teacher and, from 1 September 2001, for a course in educational theory leading to a bachelor's degree at the Hogeschool van Amsterdam. During her studies, Ms Förster had various kinds of paid employment. The IB-Groep, the competent authority as regards the financing of higher education, granted her a maintenance grant from September 2000. That authority took the view that Ms Förster was to be regarded as a 'worker' and, consequently, should be treated in the same way as a student of Netherlands nationality as regards maintenance grants.

Following a check, the IB-Groep however ascertained that between July 2003 and December 2003 Ms Förster had not been gainfully employed. Holding that she could therefore no longer be regarded as a worker, the IB-Groep annulled the decision concerning the maintenance grant paid in respect of the period between July and December 2003. Ms Förster was requested to repay the excess sums.

In her appeal against that decision, Ms Förster claimed, inter alia, that she was already sufficiently integrated into the Dutch society during the period at issue to be able to claim a maintenance grant as a student under Community law. In this respect, she relies on the judgment of the Court of Justice in *Bidar*[2], in which it was held that the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.

Following that judgment, the IB-Groep adopted a policy rule which provided that a student from the European Union must have been lawfully resident in the Netherlands for an uninterrupted period of at least five years before claiming a maintenance grant. The Centrale Raad van Beroep, which had to rule, in appeal, on the action brought by Ms Förster, made a reference to the Court of Justice.

B. Issues/Questions

Freedom of movement for persons – Student who is a national of one Member State and goes to another Member State to follow a training course – Student maintenance grant – Citizenship of the Union – Article 12 EC – Legal certainty/Under what conditions a student from another Member State may be entitled to a maintenance grant under article 12 TEC, which prohibits any discrimination on grounds of nationality? Is there a compatibility of the application to nationals of other Member States

[1] www.duca-llm.ro.
[2] Case C-209/03 *Bidar* [2005] ECR I-2119.

of a prior residence requirement of five years, with the first paragraph of Article 12? In the affirmative, then it is necessary, on a case by case analysis, to take into account other criteria pointing to a substantial degree of integration into the society of the host Member State? Does EU law, especially the principle of legal certainty, precludes the retroactive application of a residence requirement, which at the time of the facts in the main proceedings, could not have been foreseen by the applicant?

C. Answer of the Court

Community/Union law, in particular the principle of legal certainty, does not preclude the application to students of a requirement of five years' prior residence.

D. Reasoning of the Court

The Court points out that a student who is lawfully resident in another Member State can rely, for the purposes of obtaining a maintenance grant, on the prohibition of any discrimination on grounds of nationality[1].

Since the requirement concerning the duration of residence is not applicable to students of Netherlands nationality, the issue is raised of what restrictions may be imposed on the right of students who are nationals of other Member States to a maintenance grant without the different treatment which may result being considered discriminatory. In this connection, the Court observes that it is legitimate for a Member State to grant assistance covering students' maintenance costs only to those students who have demonstrated a certain degree of integration into the society of that State and that the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.

The Court holds that, in the present case, a condition of five years' uninterrupted residence is appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated into the society of the host Member State. Furthermore, that condition cannot be held to be excessive.

By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the residence requirement laid down by the IB-Groep's policy rule is, by its very existence, such as to guarantee a significant level of legal certainty and transparency in the context of the award of maintenance grants to students. As regards the retroactivity application of the Dutch rules in relation to the principle of legal certainty, the Court found that the national rules can be applied although the applicant could not foresee them.

E. Comments

It is obvious that the Court did not apply the Bidar "formula". In Bidar the Court found that the residence criteria imposed by the British rules constitutes a discriminatory measure on grounds of nationality, so that a foreign student could not obtain the status of "established person" and as a consequence could not benefit from the study maintenance assistance. In this respect the Court found that three years of residence can prove that the individual is integrated into the host society of the Member State. The applicant in the main proceedings, Ms. Forster, based her action on the Judgment

[1] Case [C-158/07], Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, [2008], ECR I- 08507, paragraph 35

of Bidar, as regards the integration issue, namely the link between the individual and the host society, the so called financial solidarity.

The discrimination issue was not dealt with as much as it should have been. The Court found that this case differs from Bidar, by the status of "established person", the requirement of the UK rules for granting studies finances, which was in fact the discrimination criteria, and was applicable regardless of the degree of integration into the host society of the respective Member State[1]. Unlike in "Bidar", in this one the Court accepted a national rule stipulating that the only way of proving integration would be a prior five years legal residence condition, a requirement which most non-national students will not be able meet at all. The individual situation of Mrs. Forster, the genuine nature of any link with the host society, did not make any difference. Before the time prescribed by the residence requirement elapsed, no integration can be legally obtained, so that no legal effects are attached to the actual integration of non-nationals into the host society of the Member State.

In "Bidar", it was exactly the same factual situation of the individual, which triggered the Courts' finding that there was a genuine link with the British society and that he was integrated at a certain degree.

Moreover, by its reasoning, the proportionality test seems rather shallow and incomplete. There was no inquiry as to whether the means put in place do not go beyond what is necessary or whether a blanket residence requirement is the least harmful measure to reach the objective of integration. The Court merely stated that the residence requirement is indeed proportionate[2]. The arguments referred first, to the provisions of the five years requirement for permanent residence provided by the Dutch rules, which is also contained in Directive 2004/38/EC (which was applicable in Bidar and not here)[3] and second, legal certainty. It is difficult for one to understand the reason why the Court made reference to that Directive, although it was not applicable to the Case. Maybe because it wanted to justify its reasoning by suggesting that EU law as regards freedom of movement of persons contains a similar provision with the Dutch one, so that it makes it compatible not only with the specific EU provisions, but also with the principle of non-discrimination?

Even if Advocate General Mazák, presented "alternatives", less harmful that would have worked with less rigidity, they were not explored. In this respect, AG Mazak suggested that the five year requirement can be considered disproportionate as long as one can provide enough evidence to prove that that he or she is already substantially integrated into the society of the host Member State. Moreover, he opined that the answer regarding the compatibility with the principle of non-discrimination, should be that the Dutch rules are to be precluded.

The principle of legal certainty is a fundamental principle of Community law which requires, in areas covered by Union law that Member States' rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are. It aims to ensure that situations and legal relationships governed by Union law remain foreseeable. The referring court asked whether he principle of legal certainty, precludes the retroactive application of a residence requirement which, at the time of the facts in the main proceedings, could not have been known to the applicant. The answer of the Court, which was in the negative, was based on two arguments, namely, first, that the residence requirement introduced by the Dutch rules, was introduced in order to cover the transitional period between the judgment in *Bidar* and the transposition of Directive 2004/38.

[1] Idem, paragraph 47.
[2] Case [C-158/07], Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, paragraph 52.
[3] Idem, paragraph 55.

Secondly, the Court noted that the contested Dutch rules give greater rights to the students concerned than those to which they were entitled under the former national rules. Regardless, of the amount of rights provided by the new Dutch rules, one has to ask: Is there not a general principle of law which states that the law is applicable since its entry into force, unless the new law explains somehow the meaning of the former one? This is the principle of non-retroactivity. Moreover, Advocate General stated in his Opinion that the principle of legal certainty and the protection of the individual do not preclude a rule from being applied retroactively in so far as such application puts the individual concerned in a more favorable legal position. There is derogation from the principle of non-retroactivity, i.e. the criminal law which is more favorable. Is that what the AG made reference to? Even if so, the Court ruled that it is possible, regardless.

As a direct result of this ruling, facts pointing towards "actual" integration into the host Members' State society become legally irrelevant. Although this will be the case only if the national law contains a formal definition of "integration", like the Dutch one.

3. Concluding Remarks

As one may think that the first case, i.e. Bidar, gives reason to the provisions contained in EU Law with respect to the benefits of being a EU citizen, one must be aware that the ECJ case law is not, *de facto*, so well established as presumed, given the second case, hereby presented...In the end, it remains to be seen how the Right to move, work and reside within EU will further on be applied, e.g. related to the restrictions imposed by Spain regarding employment of Romanians. For sustaining the ongoing development of the Single Market, which represents the core purpose of the European Union, all players must act in good faith by providing compliance with the Principles enshrined by the Treaties and other concluded Agreements, inter alia the Principles of Equality and Anti-Discrimination, the grounds of European citizenship. In the absence of the foregoing, one can gather that the European mechanism will disseminate inequity, along with opportunities.

4. References

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Case C-209/03 Bidar [2005] ECR I-2119.

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REALITIES AND PERSPECTIVES

Judicial Functions in the Criminal Trial

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Abstract: The separation of judicial functions falls, indisputably, in the news gallery of the Romanian criminal trial current rules. The previous Criminal Procedure Code, namely that of 1968, as well as the older ones, hadn't enrolled in their content such a principle. However, the doctrine identified, under mentioned legal regulations, the existence of distinct procedural functions and their need to separate, in the idea of genuine criminal justice accomplishment. These procedural functions were: the indictment function (or charges), the defense function the trial function. In the new code, this principle proclaims the existence of four judicial functions that aim the efficiency and speed of the criminal trial, but also guarantee the presumption of innocence, equal opportunity of parties, protection of rights and fundamental freedoms. This research try to explain this principle and its connections with other institutions of the criminal trial.

Keywords: judicial functions; basic principle; connections with other institutions

1. Introduction

Le nouveau Code de procédure pénale[2] montre dans „l'exposé de motifs" que dans la réglementation récente du procès pénal ont été introduits, à côté des principes classiques, des principes nouveaux, parmi lesquels celui de la séparation des fonctions juridiques. Par cela, les rédacteurs du nouveau code ont visé „*l'amélioration considérable de la qualité de l'acte de justice*".

Le principe, prévu à l'art. 3 du C.pr.pén., „proclame et garantit" que dans le procès pénal on exerce quatre fonctions judiciaires, à savoir: la fonction de poursuite pénale; la fonction de disposition des droits et des libertés fondamentales de la personne dans la phase de poursuite pénale; la fonction de vérification de la légalité de la saisine de juridiction ou de l'arrêt de la saisine et la fonction de jugement. Le Code antérieur (1968) ne contenait pas une telle réglementation et ne faisait aucune référence expresse à la notion de *fonction judiciaire*. En échange la doctrine, après avoir analysé diverses institutions du procès pénal, a utilisé ce concept soit sous le nom de *fonction procédurale* (Dongoroz, 1975, p. 15; Theodoru, 2007, p. 72; Antoniu, 1988, p. 112), soit de *fonction de juridiction* (Theodoru & Moldovan, 1979, p. 47). En général, on a apprécié que, faute de réglementation expresse, l'existence réelle de ces fonctions découlait de l'ensemble des normes concernant l'entier procès pénal (Boureanu, A., 1999, p. 101) et représentait les directions importantes de l'activité procédurale (Antoniu, G., 1988, p. 112). On a admis presqu'à l'unanimité trois fonctions dans le procès pénal: la fonction d'accusation, la fonction de défense et la fonction de jugement, fonctions qui devaient être *séparées*, comme une condition *sine qua non* pour réaliser un procès équitable et pour assurer l'objectivité de la responsabilité pénale des personnes qui ont commis des infractions.

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[2] Le site de la Chambre des Députés - http://www.cdep.ro/proiecte/2009/400/10/2/em412.pdf.

Autrement dit, celui qui enquête les circonstances d'une infraction et saisit l'instance ne peut être en aucun cas le juge d'une cause (Amariei, 2001, p. 139). Si l'on ignore le principe de la séparation des fonctions judiciaires, dit la doctrine, on peut arriver à des situations inacceptables, à un cumul de deux ou trois de ces fonctions. La jurisprudence, elle aussi, faute d'une réglementation expresse, a accepté le point de vue exprimé dans la doctrine et a décidé que „le partage" des fonctions d'accusation et de jugement dans le procès pénal est une conséquence du principe de la contradiction et une entrave dans l'exercice cumulatif des deux attributions que la loi, dans le but d'une justice objective, les veut séparées[1]. D'autres auteurs ont considéré que la loi avait institué les fonctions judiciares de déroulement de la poursuite, de jugement des causes pénales et de mise en exécution des sentences juridiques pénales, chacune ayant une certaine finalité respectivement – la recherche des preuves nécessaires à établir les faits, à identifier les infracteurs, la responsabilité de ceux-ci, la découverte de la vérité, l'exécution des sentences pénales. (Neagu, 2013, p. 25)

Par conséquent, en étroite liaison avec les fonctions judiciaires, une partie de la doctrine, antérieure à l'actuel Code de procédure pénale, a situé *les phases* du procès pénal, en les considérant comme divisions de celui-ci dans le cadre desquelles une certaine catégorie d'organes judiciaires déroule son activité. A la fonction d'accusation correspond, en principal, la phase de poursuite pénale et appartient au procureur, mais elle continue aussi à s'exercer d'une certaine forme dans la phase de jugement où la solution de la cause appartient en exclusivité à l'instance. La fonction de défense s'exerce dans une certaine mesure dans la phase de la poursuite pénale et dans sa plénitude entière dans la phase de jugement.

Quant à la séparation des fonctions judiciaires, il y a eu aussi des opinions conformément auxquelles celles-ci se manifestaient surtout pendant la phase de jugement qui finit par la solution de la cause, à la différence de la phase de poursuite pénale où, en principe, on ne prononce pas de solutions suite à des débats dans des séances publiques.

2. La notion de Fonctions Judiciaires

Comme nous avons démontré, le Code de procédure pénale actuel contient des réglementations concernant la séparation des fonctions judiciaires comme principe du procès pénal, dénomme chaque fonction et décrit leur contenu. Ainsi, conformément aux dispositions de l'art. 3 alinéa (1) C.pr.pén. dans le procès pénal on exerce les fonctions judiciaires suivantes:

a) la fonction de poursuite pénale;
b) la fonction de disposition des droits et des libertés fondamentales de la personne dans la phase de poursuite pénale;
c) la fonction de vérification de la légalité de la saisine de juridiction ou de l'arrêt de la saisine et
d) la fonction de jugement.

Conformément au texte cité, dans le procès pénal on exerce quatre fonctions judiciaires et non seulement deux ou trois, comme en jugeait la doctrine antérieure au présent code et que parmi ces fonctions on ne retrouve pas la fonction de défense fixée par la même doctrine. Une explication pourrait être que la doctrine ancienne utilisait la notion de *fonction procédurale*, tandis que le texte de loi actuel utilise la syntagme de *fonction judiciaire*. Entre ces deux concepts on pourrait identifier certaines différences: les fonctions procédurales sont exercées par les participants au procès pénal, y

[1] Le Tribunal Suprême, Section pénale, la décision no.1964/1956, dans le Recueil de décisions de l'année 1956, vol.III, p. 250.

compris les parties, tandis que les fonctions judiciaires, telles qu'elles sont régies par la loi, sont exercées uniquement par les organes judiciaires. Il s'en faut de peu qu'on les déclare des catégories différentes.

Malgré tout cela, ayant en vue les analyses et les opinions de la doctrine antérieure au code actuel, on peut apprécier que *les fonctions procédurales* ou *les fonctions de juridiction* correspondent en grande partie aux *fonctions judiciaires*.

Conformément à la loi, les fonctions s'exercent d'office, sauf les cas quand la loi dispose autrement. Dans le cadre du même procès pénal, l'exercice d'une fonction est incompatible avec l'exercice d'une autre. Exception à cette règle fait la fonction de vérification de la légalité de la saisine de juridiction ou de l'arrêt de la saisine dont on admet la compatibilité avec la fonction de jugement.

Pour formuler une définition de la fonction judiciaire on aura en vue le contenu de chacune de ces fonctions tel qu'il est établi par les dispositions légales (art. 3 al. (4)-(7) C.pr.pén.). Ainsi, le nouveau code prévoit que *la fonction de poursuite pénale* est exercée par le procureur et par les organes d'enquête criminelle, ayant comme but la recherche de preuves nécessaires pour constater si celles-ci sont suffisantes pour justifier la comparution de l'inculpé devant une juridiction de jugement. Donc, la fonction judiciaire de poursuite pénale a en vue l'activité de recherche de preuves dont la pertinence et la suffisance décident la saisine de l'instance ou l'arrêt de celle-ci. La loi dispose aussi que l'activité de recherche de preuves revient au procureur et aux organes d'enquête criminelle.

La fonction de disposition des droits et des libertés fondamentales de la personne dans la phase de poursuite pénale s'exerce par le juge ayant des attributions dans ce sens. Dans l'exercice de ses attributions, le juge désigné dispose des actes et des mesures dans la poursuite pénale qui restreignent les droits et les libertés fondamentales de la personne.

La fonction judiciaire de vérification de la légalité de la saisine ou de l'arrêt de la saisine s'exerce par le juge de chambre préliminaire. Dans l'exercice de celle-ci, le juge se prononce sur la légalité de la saisine de juridiction et sur les preuves qui la justifient, de même que sur la légalité de la renonciation à la saisine.

Enfin, *la fonction judiciaire de jugement* se réalise par l'instance, par des formations collégiales constituées en vertu de la loi[1].

Par conséquent, conformément aux textes légaux, les fonctions judiciaires supposent certaines activités qui se développent dans le cadre du procès pénal, chacune ayant un objet et une finalité bien déterminées. En même temps, ces activités sont placées sous la charge de certains organes qui assurent le déroulement progressif et coordonné du procès. (Antoniu, G., în Dongoroz, V., 1975, p. 34)

Le caractère *judiciaire* des fonctions en question est donné du fait qu'elles s'exercent lors de la solution d'un conflit de droit (dans notre cas – de nature pénale), ce qui assure, en égale mesure le caractère judiciare des organes censés les exercer. (Antoniu, G., 1988, p. 163.)

Cela dit, les fonctions judiciaires peuvent être définies comme *des activités procédurales, avec objet et finalité propres, prises en charge par des organes spécialisés ayant le rôle d'assurer le déroulement du procès pénal conformément aux dispositions légales* (Boureanu, 1999, p. 102; Amariei, 2001, p. 139). L'objet et la finalité des fonctions judiciaires se trouvent dans un rapport direct avec les phases du procès pénal, celles-ci étant finalement configurées par les fonctions judiciaires. La poursuite pénale est ainsi configurée par la fonction judiciaire correspondante (la fonction de poursuite pénale)

[1] La loi no.304/2004 concernant l'organisation judiciare, publiée de nouveau dans le Moniteur Officiel no.827/13.09.2005.

et par la fonction de disposition des droits et des libertés fondamentales de la personne dans la phase de poursuite pénale, les deux autres fonctions judiciaires (de vérification de la légalité de la saisine ou de l'arrêt de la saisine et la fonction de jugement) constituant la phase de jugement. Dans ce sens on peut apprécier que les fonctions judiciaires et, implicitement le principe de la séparation, détermine et constituent les phases du procès pénal. Faute de la fonction judiciaire de poursuite pénale, par exemple, on ne pourrait pas discuter de la phase de poursuite pénale et ainsi de suite.

3. L'importance et le Rôle des Fonctions Judiciaires

Le bon déroulement du procès pénal comme activité progressive et coordonnée et l'appréciation objective de la responsabilité pénale des personnes qui commettent des infractions constituent le fondement de la séparation des fonctions judiciaires. Par l'introduction de ce principe dans le nouveau Code de procédure pénale on a reconnu *de jure* un fait qui fonctionnait déjà sans que le précepte soit expressément mentionné dans le texte de la loi procédurale. D'où il résulte l'importance des fonctions judiciaires et la nécessité de leur séparation. La pratique judiciaire l'a démontré constamment, et la doctrine a expliqué l'importance et la place des fonctions judiciaires comme éléments dynamiques du procès pénal.

La première fonction judiciaire, par ordre chronologique, celle de *poursuite pénale*, a comme objet la recherche des preuves nécessaires concernant l'existence des infractions, l'identification des personnes qui ont commis une infraction et l'engagement de la responsabilité pénale de celles-ci, pour constater s'il y a ou non le lieu de saisir une juridiction [art. 285 al. (1) C.pr.pén.].

La nécessité de cette phase du procès pénal, configurée par la fonction judiciaire correspondante, antérieure au jugement, a été reconnue par les législations modernes qui l'ont adoptée comme une activité sur laquelle est fondé le déroulement ultérieur du procès pénal. (Volonciu, 1972, p. 239)[1]. En l'absence de cette phase, la victime de l'infraction et même l'État, comme titulaire de l'action pénale, se trouverait dans une situation désavantagée et précaire dans la confrontation avec le phénomène criminel („comme les criminels améliorent leurs systèmes d'attaque, la société, elle-aussi, doit perfectionner ses systèmes de défense" – Tanoviceanu, 1924-1927, vol. IV, pp. 414-515). De même, la complexité de l'engagement de la responsabilité pénale des personnes qui ont commis des infractions, en respectant tous les principes du procès pénal, impose nécessairement une phase antérieure au jugement où tous les aspects liés à la cause en question soient clarifiés. „Sans une préparation antérieure rigoureuse, le procès pénal arrivé dans la phase de jugement serait chaotique" (Florian, 1939, p. 380), car „Dans la matière respective, les causes ne peuvent pas comparaître devant la justice" (Stefani & Levasseur, 1968, vol. II, p. 225).

Enfin, un système procédural où la poursuite pénale constitue une phase distincte est fondé sur l'idée que celui qui juge ne peut pas poursuivre ou vice-versa. (Volonciu, 1972, p. 240).

Dans la même phase, les actes et les mesures qui restreignent les droits et les libertés fondamentales de la personne constituent l'objet de la fonction judiciaire de disposition de ces droits et libertés, fonction dont la compétence est accordée à un juge désigné ayant des attributions à cet égard (art. 3 al. (5) C.pr.pén.). Autrement dit, celui ou ceux qui sont chargés par la loi de rechercher les preuves pour constater la commission d'une infraction, d'établir l'identité du criminel, sa culpabilité etc., ne peuvent pas limiter certains droits ou libertés des personnes impliquées. C'est pour cela, les mesures

[1] L'auteur cite l'aphorisme d'Ayrault de l'ouvrage «*L'ordre, formalité et instruction judiciaire»* – Lyon, 1624, selon lequel la poursuite est l'âme et le fondement du procès.

de sûreté les plus sévères (la résidence surveillée et l'arrestation préventive) peuvent être disposées pendant la phase de poursuite pénale seulement par le juge de droits et de libertés.

Après l'achèvement de la poursuite pénale et la saisine de la juridiction, la vérification de la compétence et de la légalité de la saisine a lieu dans le cadre de la procédure de chambre préliminaire. C'est dans le cadre de la même procédure qu'on vérifie la légalité des preuves et des actes par les organes de poursuite pénale. (art. 342 C.pr.pén.). La compétence revient, conformément à la loi, à un juge de chambre préliminaire. Ce juge résout aussi les plaintes contre les décisions d'arrêt de la poursuite pénale ou de la saisine de juridiction, conformément aux dispositions des art. 340 et 341 C.pr.pén.

Vu la durée de la procédure dans la chambre préliminaire (60 jours au maximum - art. 343 C.pr.pén.) et la complexité des activités déroulées, on se demande si celle-ci représente une nouvelle phase du procès pénal, une étape procédurale ou un stade procédural. En tout cas, des dispositions légales concernant cette procédure, on en déduit qu'elle représente un ensemble d'actes et de mesures procéduraux, effectués dans un certain ordre prévu par la loi, par une autorité judiciaire et dans une certaine mesure avec la participation des parties, pour atteindre un objectif limité dans la réalisation du but du procès pénal (Theodoru, 2007, p. 522). La procédure de chambre préliminaire a une physionomie propre et ne peut être considérée comme une sous-division d'une phase procédurale (par exemple du jugement, car elle se situe avant celle-ci et sur une position bien déterminée) et d'autant moins – une sous-division d'une étape procédurale. Dans cette procédure, les parties peuvent formuler et lever des exceptions, celles-ci sont analysées et à la fin, le juge de chambre préliminaire peut renvoyer le dossier au parquet dans les cas prévus par la loi ou peut disposer le début du procès. D'où il résulte clairement que la procédure en question ne peut être considérée comme partie composante de la phase de jugement.

Le juge de chambre préliminaire se prononce par conclusion motivée, celle-ci étant soumise à la voie de recours de la contestation. La contestation se résout par le juge de chambre préliminaire de l'instance hiérarchiquement supérieure. Vu cette réglementation on peut apprécier que la procédure de chambre préliminaire est séparée et autonome de la phase de jugement.

Enfin, la fonction judiciaire de jugement se réalise par l'instance, dans des formations collégiales légalement constituées [art. 3 al. (7) C.pr.pén.]. Dans cette phase du procès pénal, par l'exercice de la fonction de jugement, la cause est jugée avec la garantie du respect des droits des sujets impliqués dans le procès et avec l'assurance de l'obtention des preuves pour éclaircir complètement les circonstances de la cause dans le but de découvrir la vérité, avec le plein respect de la loi [art. 349 al. (1) C.pr.pén.].

Même si l'instance résout la cause seulement sur la base des preuves administrées dans la phase de poursuite pénale, à la demande de l'inculpé et en vertu des dispositions prévues par la loi, cette compétence lui est propre et ne peut pas la décliner à un autre organe judiciaire, respectivement celui de poursuite pénale, au juge de droits et de libertés ou au juge de chambre préliminaire, ces organes ne pouvant non plus se l'arroger.

Dans la phase de jugement se déroulent des activités procédurales qui se conduisent selon d'autres principes, différents de ceux guident la poursuite pénale, le juge de droits et de libertés ou le juge de chambre préliminaire. Dans cette phase, le procureur, l'avocat, les parties, les autres sujets procéduraux doivent se présenter devant l'instance pour dérouler les activités que la loi leur attribue. (Theodoru, 2007, p. 631)

4. Conclusions

Bien qu'introduites dans le Code de procédure pénale sous la forme d'un principe nouveau du procès pénal, les fonctions judiciaires et leur séparation ont existé aussi dans la période antérieure, étant connues, d'habitude, sous le nom de *fonctions procédurales* ou *fonctions de juridictions*. Le progrès réalisé par le nouveau code consiste dans le fait qu'il proclame l'existence des fonctions judiciaires et, surtout, le principe de leur séparation.

Dans la jurisprudence et la doctrine pénale roumaine, on a admis, avant l'entrée en vigueur du Code de procédure pénale actuel, que dans le cadre du procès pénal étaient exercées la fonction d'accusation, la fonction de défense et la fonction de jugement, incontestablement – des fonctions judiciaires. La réglementation actuelle contribuera, certainement, en grande partie à l'élimination de certaines inadvertances qui se manifestaient dans l'activité des organes ayant des fonctions judiciaires, des aspects saisis par la littérature de spécialité, comme en témoigne la bibliographie citée.

Malgré tout cela, la formulation d'une conclusion plus substantielle et des appréciations basées sur des décisions de la pratique judiciaire dans la matière dont nous avons parlé, et d'ailleurs sur les autres institutions du procès pénal roumain, sera possible, certainement, après une certaine période „de rodage", c'est-à-dire après la confrontation des nouvelles dispositions avec la réalité.

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THE 9TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

European Union as a Unique Foundation

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Abstract: European Union is not a state and is becoming more than just one intergovernmental actor. Its formal commitment to promote democracy has grown. European Union has had a strong dynamic of its own; the increase in membership potentially helped it to become a more powerful actor. Democracy is a core European Union value and through our analysis we will try to find out how much of this value is promoted by its institutions. The hypothesis that led us to this research was that 'European Union is not a state'. In order to find what it is, if not a state, we reviewed the development of the European Union, its basic principles and values and analyzed them thorough the confederate state lens. The aim of this paper is to discuss arguments that may develop into a study answering a haunting question: "Is European Union a state, a federation, a confederation or what?" The answer seems to be spinning round the concept of "sovereignty" and since European Union is in a dynamic evolution we will not use labels but only discuss arguments. By summing up the comparative studies and based on qualitative methods we tried to establish what kind of foundation European Union has and if democracy is really its core value. And the conclusion is that result, European Union is a political system which cannot (yet) be analyzed as a state, but rather as a distinctive hybrid.

Keywords: political system; state; confederation; democracy

1. Not a State – because of the Impact of its Formation

European Union is built on political values that demonstrate and share democracy in a process defined by 'partnership' and ideological acceptance. European Union (EU) managed alone to pass over a century marked by two 'world wars' and one 'cold war'. It had a distinctive contribution to democratization of the Central and Eastern Europe, an effective proof of how democracy can be peacefully established when the will of the people exists. That it is why we consider European Union as a model of political harmony both within and among its states.

Even if modern social science (M. Weber) emphasized that only a state can have a democratic and effective government EU proved that the power can be split between different actors and levels of governments. EU has a constitutional framework with a balance of powers between EU and the Member States (MS) and its policies have significant implications on the economy and in the European society. Based on voluntary cooperation of the MS and without any force of coercion on them, but with 'incentives of compliance', EU should be understood and analysed as a distinctive political system. EU is a political system, as we will see, with a unique foundation and which was not tailored by any known type of state.

The atmosphere that governed post-war Europe in the early 50's proved favourable to start the reconstruction of Europe on a new foundation. In the spring of 1950, Europe was on the edge of an abyss: although five years had passed since the end of World War II, reconciling former enemies

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seemed far. The crucial problem facing the European continent was that it was trying to avoid the mistakes of the past and laying the basis for a lasting peace among the emerging nations from the war. The key problem seems to represent the forwarding relations between France and Germany. The closer links between the two countries would be given to other countries in Europe, free to build a common destiny.

Federalist euphoria that marked the end of the Second World War, captured the interest of more and more leading politicians: from the famous 'United States of Europe' (Winston Churchill, 1946) to the pseudo-vote organized by Altiero Spinelli (the Union of a European Hyper-centralized Federation). This effervescence created a favourable climate for integration. In the given context, the emphasis was on the political integration called to solve the security of the area, to avoid the emergence of a new European conflagration. Because of the failure of the political integration, the attempts focused on the economic integration.

The initial steps belonged to Jean Monnet, who, with a rich experience as a negotiator and peacemaker, suggested an ambitious plan to the French Foreign Minister, Robert Schuman and the German Chancellor, Konrad Adenauer. His idea was to put the coal and steel market under an independent authority, creating a common sphere of interests between the two countries. So, by removing the two industries from the weapon production, a new war between them will be impossible. France agreed and thus, by his foreign minister's statement made on 9 May 1950, proposed that the coal and steel production of France and Germany would be administered by a supranational authority.

The Treaty establishing the European Economic Community (EEC) was the beginning of a new phase in the European integration process. Once the two communities were created, the institutions and the decision-making process were guided to common goals raised from the national interests of the MS. The EEC treaty stated: the free movement of goods and persons between MS, the free movement of labor force, services and capital, the legislative harmonization, the development of common policies for agriculture, transport, regional development etc.

A new era in the history of the Community was inaugurated in 1970, when the financial contributions from Member States were replaced by the Community's own resources. The community has become, to some extent, financially independent and through certain budgetary provisions the Parliament got budgetary powers.

European Communities have shown that the economic cooperation is possible and the MS are committed to invest in order to achieve it. As a result, economic integration has strengthened the common market, which has become a project in itself, and starting with the 80's, the European states have adopted an action program (the so-called 'The White Paper, Completing the Internal Market', June 1985) that established a single European market.

On September 20, 1976, the representatives of MS in the Council agreed on the conditions for direct elections and signed the Act concerning the election of the Assembly by direct universal suffrage. The act was later ratified by the national parliaments of that time. The first elections were held in June 1979, giving the European Communities their own democratic legitimacy.

In April 1977, the Community's institutions have developed a joint Declaration on Fundamental Rights, a document that has been associated by the heads of states and governments with its Declaration on Democracy. They declared that the principles of representative democracy, the rule of law, social justice and respect for human rights are the characteristics of a political system specific to pluralistic democracy.

The Single Act constituted a bridge between the single market and economy and social solidarity, treating them as independent objectives. Structural policy measures were introduced to help poor regions and weak areas in technological change as well as industrial restructuring.

Although the term *union* appeared in the Preamble of the Treaty of Rome, it was first officially used by the Maastricht Treaty. Member States aim was to grow together and form, after all, the European Union.

The challenge of the European Constitution, rose since the conclusion of the Treaty of Maastricht, which was often called a "Constitution". But it became a reality for the Union and the Member States with the "observer" status. At the Intergovernmental Conference, held in Thessaloniki (Porto Caras) - Greece, Valerie Giscard d'Estaing presented to the heads of state and government the draft of the European Constitution which on 25th October 2004 was adopted as the EU future Basic Treaty. Unfortunately, the failure in accepting the unifying treaty in France (May 29, 2005) and in the Netherlands (June 1st, 2005) led to new regulations outlining the social reality of the Union and not the need of a constitutional sovereignty.

The new reforming treaty was signed on 13 December 2007 in Lisbon (ToL) and brought several new elements among which the legal personality of the European Union and its powers. The new Treaty changes previous EU treaties and the European Community, and also the Treaty establishing the European Community of Atomic Energy. This "reforming" treaty enshrines the general framework of collaboration and citizen participation in European affairs, confirming, among other mechanisms, the role of national parliaments in EU decision-making process. Moreover, the Charter of Fundamental Rights received a higher legal force, equal to a treaty. Once inside the EU legal order, the new treaty supersedes the European Union to the European Communities.

Now, we can affirm that European Union holds all four characteristics of all democratic political systems, as they were identified by Almond in 1956:

1. there is a clearly defined set of institutions (European Council, European Parliament, EU Council, the Commission, the European Central Bank, the EU Court of Justice, the Court of Auditors);
2. the citizens are participating in the existence of the EU political system (e.g. directly through European Citizens Initiative and Parliamentary elections or indirectly in the European Council and EU Council);
3. the decisions on the economic resources (and other resources, see art. 2-6 of Treaty on the Functioning of the European Union) are collective and politically taken. The EU decision-making process is one of the most formalized and complete among the other international organizations processes.
4. there are continuous interactions with the political, administrative, and social life of the member states/nations.

Even if, on paper, EU is a democratic political system, the declining public support for the EU project is a key problem which EU is facing and on which we will pay attention in further analyses.

All things considered, it is obvious that EU cannot be considered "a state" in the traditional meaning of the words.

2. Not a Federation – because of the Intergovernmental Elements

The concept of integration assigns a vertical dimension to the relations between EU member states, thus exceeding the traditional concept of national state holder of an indivisible sovereignty. An integrated union assigns new values to sovereignty, which does not belong only to the state, but also to a supranational entity. Each member state of this entity retains its identity and national peculiarities and takes part in the European unification process by harmonizing their national interests.

After a long process, subject to continuing reforms, the EU is recognized to be the result of integration. Even so, the MS have not given up the fight for recognition of the indivisibility of sovereignty. A negative example was given by the two referendums (France and the Netherlands) which rejected the Treaty establishing a Constitution for Europe.

The Member States have agreed on a temporary cede of sovereignty to the EU, which gave the latter a more con-federal character than a federal one. Abandoning the national solitude of states in the economic arena - through the establishment of the European Communities - and later in the political arena led ultimately to the abandonment, even if only temporary, of the dogma of sovereignty.

The process of European integration has gradually evolved. Thus initially specific competences were attributed in areas such as coal mining and steel or atomic energy; subsequently this lead to the establishment of an economic community and a common market. We can observe that, in fact, the transfer of sovereignty is only a transfer of competence, so the states, by integration, actually agree on a 'joint exercise of powers'.

EU thesis 'unity in diversity' recognizes the pluralism of the countries, regions and European cultures, and that it is why the Union is a viable project to the extent that this diversity is conserved. Cornerstone of this thesis is the principle of subsidiarity, according to which the EU has exclusive competence to act out only when solutions at EU level are superior in efficiency to those of the Member States (article 5 TEU par. 3).

European integration is not and should not be understood as a process that, once started, would undermine state sovereignty. This, as the theory of neo-functionalism mentions, offers the MS' governments the possibility to interact and establish, through a pluralistic process, transnational common interests. The states were maintained in this process as fundamental units, because the state actors' preferences have been established at national level and after that were used as basis in the EU intergovernmental negotiations. With the supranational governance approach, the need to create a European identity was emphasized, an identity in which the EU action should find support as a global actor. EU complexity is given by integrative elements, intergovernmental and supranational elements, even federal ones; therefore, the European integration process is characterized, mostly, by the federal - intergovernmental debate.

The European construction which exists today is a synthesis of the two extremes, the federal and the intergovernmental one. From a theoretical perspective, many formulas were imagined and most of them combined these extremes, such as intergovernmental federalism of Croisat and Quemonne (Criosat, 1999 *apud* Bărbulescu, 2005, p. 38) or Federation of Nation States of Jacques Delors (Delors, 1992 *apud* Bărbulescu, 2005, p. 38). It is the intergovernmental element which makes analysts decide against a federation.

3. A Possible Confederation after the Lisbon Treaty

The confederation is the most common form of a union in the states' history. It is known since antiquity (Athenian League, Macedonian League), although now it has fallen into disuse.

A *confederation* of states is virtually a permanent state association established by a treaty, which has a common body - diplomatic assembly, that takes decisions unanimously and exercise sovereignty on the behalf of the confederation at international level.

Amendments to the constitution of the confederation entail revision of the Treaty by all signatories. Each confederate state retains its sovereignty over domestic constitutional framework. Although they are pursuing the same objectives, particularly in the matters of international relations and defense, and there are reciprocal arrangements, the confederation powers are limited on the states, but not on their citizens.

The representatives of States are united in intergovernmental structures to make important decisions unanimously by consensus, but they are not the representative body of the people of the MS. These decisions are not directly applicable in the territories of the confederation; they must first be ratified by them to be applied. Given the subsequent ratification of the confederation and that these decisions must be approved unanimously by the MS, the confederation is, to some extent, unstable, which emphasizes the exercise of the right of withdrawal from the confederation. Once it is abolished, the component states resume their sovereignty.

Great confederations, like the German Confederation - which was born at the Congress of Vienna in 1815 by the association of 40 states, no longer exists. Also, the Swiss Confederation is actually from 1848, a federal state. Thus, we see how a confederation turns or evolves into a federal state, as did the United States, Germany and Switzerland.

With the adoption of the Lisbon Treaty, the doctrine discusses (Hazak, 2012: 63 and Sbragia, 2004) accentuated the transformation of the European Union into a confederation. The European constitutional road is still subject to debate, although the EU has entered into the next chapter of its evolutionary process. Understanding the EU after the Lisbon reform cannot be done without understanding the process of transforming it into a confederacy with federation's valences. Arguments that support the existence of confederation could be: the possibility to change the treaties regressively, the so-called negative integration possibility (art. 48 par. 2 TEU), the express regulation of the right of Member States to withdraw unilaterally from the EU (art. 50 TEU) and the introduction of the states' rights to initiate negative legislative activity about secondary legislation (Declaration no. 18 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon), all are leading to the establishment of national mechanisms of control over the EU's ambition to become a federation.

David McKay (2001) in one of its articles assumed that the post-Maastricht European Union has developed into a kind of federal state. The federalist vision of the EU is often seen in opposition to the 'intergovernmental' perspective institutionalized by the European Council and the Council of ministers. The intergovernmental concept is supported by the intergovernmental conferences for the revision of the EU treaties, by the EU institutions which represent the Member States or their dismemberments (e.g. regions), by the role of the MS in decision-making, and the by policy issues that are falling under justice and home affairs and foreign and security policy. A confederation? Probably? A hybrid? Most certainly.

4. Instead of Conclusion

Due to its dynamism which always takes into account the needs and requirements of the Members States, due to the fact that EU building is in full swing, we cannot really limit it to an old, well known state matrix. For what we may know EU may be the model of a future way of organization in which democracy, flexibility and people's welfare may reign supreme.

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Restriction of Certain Rights and Freedoms in the Romanian Constitution

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Abstract: When we speak of human rights and fundamental freedoms essential to the existence of individuals, the first thing that comes into mind is "what we must do more to protect these rights?", "What to do to for our freedoms not be violated?". For this reason the mere mention of the phrase "the restriction of certain rights and freedoms" makes us rebel against this idea and wonder if it is legally possible that such an event may happen. Thus, in this paper we propose to analyze the possibility and legality[2] of restricting certain fundamental rights and specific conditions in which this restriction can be achieved according to the provisions in the Constitution of Romania.

Keywords: fundamental rights, restriction of rights, the Romanian Constitution

The concept of human rights has its origins from ancient times, the concept of that time being very different from today. Throughout its evolution, the concept was influenced by ancient thinkers (Plato, Pericles, Aristotle, Cicero) through their works, by Christian philosophy (Thomas Aquinas) in the Middle Ages, by the Renaissance masters (John Locke) and Enlightenment masters (Montesquieu, JJ Rousseau) and not least, by the innovative ideas of independence revolutions, ideas enshrined in legal documents such as the Declaration of Independence of the United States (1776) or Declaration of the Rights of Man and of the Citizen from France (1789).

Fundamental rights have been defined as "subjective rights which are essential for physical and mental existence of individuals, physical and intellectual development, as well as to ensure their active participation in state governance enshrined and guaranteed by the Constitution and other laws of the state" (Deaconu, 2011, p.191).

Increasingly frequent and sustained concerns for protection of fundamental human rights have emerged in the twentieth century, which led to a wide-ranging European and international codification of human rights, being able today to talk about Europeanization and internationalization of these rights as a reality. Of the most important European and international documents, which establish in their text fundamental human rights, we include: the Universal Declaration of Human Rights[3], the International Covenant on Economic, Social and Cultural Rights[4], the International Covenant on Civil and Political

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[2] Legality assumes respecting of the prescribed conduct by complying with the rule of law, providing a climate of respect for values and of the social rules. (Maftei, & Coman, 2011).
[3] Adopted and proclaimed by General Assembly of UNO by the Resolution no. 217 A (III) of 10 December 1948.
[4] Adopted by General Assembly of UNO, 16 December 1966, ratified by Romania on 9 December 1974.

Rights[1], the European Convention of Protection of Human rights and Fundamental Freedoms[2] and the Charter of Fundamental Rights of the European Union.

Fundamental rights and freedoms covered by these international documents have found over time correspondent also in national legislation of our country, the most representative document in this respect being the Romanian Constitution[3]. The notions of "right" and "freedom" have the same legal value; they differ only in terms of terminology.

In the constitution of our country, in addition to the fact that the fundamental rights and freedoms are enshrined (see detail Maftei, 2010, pp. 137-139), it is provided the possibility of restricting certain rights and freedoms, conditions in which this restriction is making the subject of this paper.

Thus, in art. 53 paragraph (1) it is provided that *the exercise of certain rights or certain freedoms may only be restricted by law and only if necessary, as appropriate, for: the defense of national security, of public order, of health or morals, of rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely serious disaster. Also paragraph (2) states that the restriction may be ordered only if necessary in a democratic society and the measure must be proportionate to the situation that caused it, to be applied without discrimination and without prejudice to the existence of the right or freedom.*

In other words, the law makes it possible the restriction of certain rights and freedoms in certain circumstances and under strict conditions. This principle established by the Romanian Constitution is not a singular event but a "perception of international rules on human rights" (Selejan-Guţan, 2008, p.132). Thus, there are several important international documents on human rights that include provisions similar to those in the Constitution of Romania.

The Universal Declaration of Human Rights provides in art. 29 that *"in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law, only for the sole purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, of public order and of the general welfare in a democratic society "*. We note that this international document mentions the possibility of restrictions on the exercise of human rights and freedoms, stating explicitly that this restriction shall be established by law, and only in special circumstances (the rights of others, meeting the requirements of morality, of public order and of the general welfare).

Also, the Convention for the Protection of Human Rights and Fundamental Freedoms states (Article 15 - Derogation in time of emergency) that *"in case of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention, to the extent strictly necessary in that situation, provided that such measures are not inconsistent with other obligations under international law."* This article allows states to derogate from the provisions of the Convention in time of war or other public hazards, but only if the situation requires. Parties exercising this right of derogation shall inform the Council of Europe on the measures they have taken, the reasons that led to taking those measures and when these measures cease.

[1] Adopted by General Assembly of UNO by Resolution no. 2200 A (XXI) of 16 December 1966, ratified by Romania on 9 December 1974.
[2] Signed by the Member States of the Council of Europe on 4 November 1950 and enforced on 3 September 1953.
[3] Amended and completed by revising the Constitution Act no. 429/2003, published in Official Gazette of Romania, Part I, no. 758 of 29 October 2003, republished by the Legislative Council under Art. 152 of the Constitution, by updating the names and renumbering the texts (Article 152 became, as republished, art. 156).

Article 4 of the International Covenant on Civil and Political Rights provides that *"where an exceptional public danger threatening the existence of the nation and proclaimed by an official act, the States Parties to the present Covenant may, within strict requirements of the situation, take measures derogating from their obligations under the present Covenant, provided that such measures are not inconsistent with their other obligations under international law they have and that they do not result in discrimination based solely on race, color, sex, language, religion, or social origin."* This protocol allows taking measures derogating from their obligations to situations that endanger the life of the nation, and one-off measures should not conflict with international law and do not give rise to discrimination.

Under the provisions of art. 52 of the Charter of Fundamental Rights of the European *Union "Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided by law and must respect the essence of those rights and freedoms. By the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives only if the general interest recognized by the Union or the need to protect the rights and freedoms of others."* The analysis of the text mentioned shows that in the European Union it is possible to restrict the exercise of certain rights and freedoms under conditions similar to those provided in the Romanian Constitution, which confirms the compatibility of Romanian legislation with that of European human rights (Deaconu, 2011, p.231).

The analysis of the international acts above shows that all allow restriction of certain rights or liberties but under conditions such as: restriction may be provided by law, be made for a fixed period and only in certain expressly provided cases, conditions similar or even identical with the Romanian legislation.

In literature (Iancu, 2011, p. 246) it has been presented two categories of reasons that may restrict the exercise of certain rights and freedoms of the general reasons (applicable to all the rights and freedoms) and specific reasons (for one or the other of them). General grounds are those provided by art. 53 of the Constitution and the specific content covered in each fundamental right under the Constitution.

The Romanian Constitution does not expressly mention whether "the restriction" only refers to the fundamental rights and freedoms or to any other rights and freedoms. However, through a consistent jurisprudence the Constitutional Court defined the scope of art. 53 of the Constitution stating that it only concerns fundamental rights and freedoms and no any rights and freedoms, even if they arise from normative acts or consensual acts (Muraru & Tanasescu, 2008, p. 531).

As mentioned previously, for the restriction of certain rights and freedoms it is necessary to be fulfilled several conditions as follows:

a) restriction of the exercise should be done by law;
b) restriction is made only if necessary and only in certain situations;
c) restriction is possible only if necessary in a democratic society;
d) restriction must be proportionate to the cause;
e) restriction should be applied without discrimination;
f) restriction does not affect the existence of rights.

a) To analyze this condition - *restriction of the exercise should be done by law* – we note at the outset that it is one of the conditions set by international laws and human rights. It is also important to specify what is meant by the term "law". Doctrine (Muraru, & Tanasescu, 2011, p. 164) interpreted this term as referring to the narrow sense of the term, namely the law as normative act of Parliament. Practice of the Constitutional Court revealed that the restriction of certain rights and freedoms is

possible also by legal acts with a force equivalent to law (Ordinance of the Government or Government Emergency Ordinance). As for us, we share the view (Deaconu, 2011, p. 231) that after the revision of the 2003 Constitution, Article 53 must be interpreted in conjunction with Article 115 of the Constitution (legislative delegation), interpretation which states that "*the restriction of certain rights and freedoms cannot be done but by the law as a legal act of Parliament*". However, there are at present opinions (Safta, 2014, p. 181) according to which the concept of law envisages substantive law, which has the consequence that such a restriction can be achieved through Government Ordinance.

b) Regarding the second condition - *restriction is made only if necessary and only in certain situations* - it should be noted that the legislator constituent explicitly stated circumstances which may restrict the exercise of certain rights and freedoms. Thus, restriction on the exercise is made by the law and is necessary for: the defense of national security, of public order, of health or morals, the rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely serious disaster. We note that some of these cases are mentioned in international law. Also, another important aspect is that this list is exhaustive and not descriptive. Expressly, there are listed the exceptional cases which may interfere the restriction of certain rights and freedoms: national security, public order, public morality, natural disasters, etc..

c) The third condition - *restriction is possible only if necessary in a democratic society* - requires that the restriction of certain rights and freedoms to be made for a limited period of time and not indefinitely. "Restriction should be temporary because only a temporary restriction would be in line with the democratic nature of a society" (Deaconu, 2011, p. 232).

d) Restriction must be proportionate to the cause - proportionality is used in the appreciation of necessity in a democratic society. Restriction of certain rights and freedoms "cannot exceed the limits imposed by the circumstances that led to the protection and by the legitimate aim pursued" (Selejan-Guţan, 2008, p. 133). In other words, it is mandatory to take such measures restricting the exercise, where provided by the legislature, but this measure must be proportionate to the cause of it and not exceed its limits. (eg: the emergence of bird flu or other contagious disease in a town can lead to the restriction of right of free movement only in that area and does not lead to restriction on the exercise this right across the country).

e) Restriction should be applied without discrimination - "*The constituent established an obligation not only to refrain from arbitrary legislator in establishing the restriction of certain rights in proportion to the social reality, but also the authorities responsible for the enforcement of legal norms, by establishing the obligation not to discriminate on the implementation of the restrictive measure*" (Muraru & Tănăsescu, 2008, p. 545). Restriction of certain rights cannot be applied only to certain people, regardless of the criteria used in this shootout; we must apply the general principle of non-discrimination.

f) Restriction does not affect the existence of rights - If this measure of restriction might affect the existence of the right, it would be violated the provisions of the international treaties to which Romania is a party and also, in this case, we could not talk about the existence a democratic society. Thus, "*we must make a distinction between the legal concept of "restriction" and "reduction" since they are not the same legally, because if the restriction of certain rights is allowed, their reduction is not. The reduction is the decrease of the material content, the volume of goods and guarantees, it is illegal and unsubstantiated limitation of rights namely limiting amount of action in time and space on people, suppressing or reducing their protection safeguards*" (Aramă & George, 2009, p. 42).

Restrictions should aim exercise of the rights and freedoms and never existence of the right or freedom.

Restriction or limitation on the exercise of certain fundamental rights is possible only if a fundamental right is not absolute. (Right to life is an absolute; its exercise can be neither limited nor restricted) (Iancu, 2011, p. 246). There are also conflicting views (Deaconu, 2011, pp. 233-234) considering that the right to life, as any fundamental right, is not an absolute right, and they bring as evidence the legal and natural limits of such a right (an example of the legal limit of the right to life is the decriminalization of abortion in the Romanian criminal law; an example of a natural limit is suicide).

Restriction of certain rights and freedoms is of course unpleasant, yet necessary. The article 53 of the Constitution enables us to guarantee all citizens respecting the rights and fundamental freedoms in the context of a complex social and political life, which is constantly changing. Restriction of certain rights and freedoms is a measure that can be applied as a last resort, after having exhausted all other means of action and only in compliance with all conditions above.

The main reason for establishing the extent of restriction is to protect the rights of those around us, "my right extends up to the point where someone else's right begins" and it is a measure which can only have exceptional and temporary feature.

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REALITIES AND PERSPECTIVES

Dignity in Employment – the Protection of a Fundamental Right

Radu Răzvan Popescu[1]

Abstract: The new Criminal Code brought a series of important changes also in respect to those offences that can be committed by employees. Both at the European and at the national level, the concept of dignity in employment suffered transformations. This change of perspective at the national level makes the object of this article. The regulation of sexual harassment in the work place was first introduced in the domestic legislation in 2001, undergoing, since then, a series of modifications which we shall analyze in depth. Sexual harassment in the work place is one of the most difficult problems to solve, at the European level because in the majority of situations there is a subordination relation between the two parties – the employer having the upper hand over the employee who is, in many cases, afraid of endangering his/her job by reporting the harassment offence. We think this article is an important step in the disclosure of the problem erased by the sexual harassment concept.

Keywords: sexual advances; performance; intimidation; hostile; dignity

1. European Regulations Concerning Harassment

At the European level, *Directive no. 2000/78/EC regarding the establishment of a general framework for equal treatment in employment and the occupation of the workforce on the criterion of religion or belief, disability, age or sexual orientation* (Published in JO L 303, 2 December 2000) defined **harassment** as being a form of discrimination when there is an unwanted conduct related to the sexual orientation, religion, beliefs, handicap or age, which has as aim or effect the violating the dignity of a person or the creation of an intimidating, hostile, degrading, humiliating or offensive environment(Popescu, 2013, p.215).

Subsequently, through the *Framework Directive no. 2006/54/EC* ***on the implementation of the principle of equal opportunities of men and women in matters of employment and*** *work conditions,* the notions were redefined, as follows:

- by *harassment* is understood that unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- by *sexual harassment* is understood that situation in which an unwanted conduct has a sexual nature and manifests physically, verbally or nonverbally, having as effect or aim the violating the dignity of a person and the creation of an intimidating, hostile, degrading, humiliating or offensive environment.

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In domestic law, the concept was first introduced in the Criminal Code in year 2001, the act being regulated through art. 203^1 which established that the *harassment of a person by threats or constraint, for the purpose of obtaining satisfaction of a sexual nature, by a person abusing the authority or influence conferred by the position held at the work place is punished with imprisonment between 3 months and 2 years or with a fine.*

2. Definitions and Scope

The same notion can be found defined in art. 4 letter c of Law no. 202/2002 regarding the equality of opportunities between women and men (Republished in the Official Gazette of Romania no. 326 of 5 June 2013. In this sense, broader, there is a definition of harassment also in Directive 2000/78/EC regarding the general framework for the equality of treatment in matters of occupation and employment), which states that by *sexual harassment* is understood any *unwanted conducts – verbal, nonverbal or physical – of a sexual nature which has as aim or effect the violating the dignity of a person or the creation of an intimidating, hostile, degrading, humiliating or offensive environment.*

Thus, we must note the fact that harassment represents, on the one hand, a form of discriminating the person and, on the other hand, a modality for violating a fundament right of the person – the right to human dignity, respectively the right to dignity in employment.

Law no. 286/2009 regarding the Criminal Code (brought a series of material modifications in this matter, changing the perspective on certain crimes regulated in the old Criminal Code. (adopted through Law no. 15/1968, published in the Official Gazette of Romania no.79-79bis of 21 June 1968)

According to art. 223 of the new Criminal Code, sexual harassment represents the *repeated request of favors of a sexual nature within an employment or a similar relationship, if, through this act, the victim was intimidated or placed in a humiliating situation, and it is punished by imprisonment between 3 months and 1 year or with a fine.*

3. Solution Approach

Hereinafter we shall analyze, point by point, the changes occurred in the substance of this offence, both from the perspective of criminal law and from the point of view of labor law.

a. The crime of sexual harassment is found in chapter VIII, called *Crimes against sexual liberty and integrity*; previously, it was found in the chapter called Crimes regarding the sexual life. Through the changing of the name under which are reunited the crimes targeting the sexual life of the individual can be seen the fact that the lawmaker aimed to broaden the specter of protected social values, respectively: sexual freedom, the respect for the individual's sexual integrity, the respect for the person's dignity, the protection of the minor child's physical and psychological development.

b. Through the act of sexual harassment a violation is made against the dignity of the person in an employment or similar relationship. In all cases, the act *has no material object*; hence it will be more difficult to prove its existence. In certain situations, in reality, the crime of sexual harassment is joined in the constitutive content of other crimes, respectively *rape*, when the request of favors of a sexual nature is followed by sexual relations against the wish of the individual, or *striking or other violence*, when the act is performed through acts of threat or constraint, followed by striking or other acts of physical violence against the individual.

c. In the form in which it is regulated, the *active subject* is, usually, qualified, being part of the employment legal relation, respectively, both the employee and the employer.

In the specialty literature (Stefănescu, 2012, p. 810) it was considered that the employment legal relations have two forms:

- *the typical ones*, grounded on the individual employment contract, but also the employment (work) relations of public servants, military personnel, cooperative members;
- *the atypical ones*, respectively the employment relations of attorneys with wages within the profession.

The question raised is if the work performed outside employment legal relations can be seen as part of the constitutive content of this crime, respectively, the work on the basis of a volunteering contract, the work on the basis of a civil legal relation or the work within society relations. We consider the answer to be affirmative because the lawmaker did not aim, by incriminating this act, to sanction sexual harassment only within typical employment relations or as they are defined in labor law, but in all relations that presuppose an activity (a labor), regardless of the manner of legally regulating it (Ticlea, 2012, p. 941).

The gender or the sexual orientation of the perpetrator, as well as that of the victim, have no relevance with respect to noting this crime.

d. *The passive subject* can be any person in an employment or similar relationship with the active subject. Thus, the passive subject is, usually, either hierarchically subordinated, or dependent on the services of the active subject, but it is not excluded that he/she is on the same hierarchical level as the active subject or even hierarchically superior to him/her. The victim may be both a man and a woman. Also, the harassed person may have the same gender as the individual harassing him/her, the legal text making no distinction in this sense.

e. *The criminal participation* is possible in the form of instigation and complicity. Instigator or accomplice can be any person. Co-authorship is not possible because the obligation to restrain from any harassment act is an obligation with personal character (Popescu, 2008, p. 174).

f. Under the aspect of the *material element*, the crime is performed through an *action* of harassment of a person, by means of repeated requesting of favors of a sexual nature. Sexual harassment can be performed through several means:

- *verbal* – when the passive subject is exposed to comments with obscene, out-of-line character;
- *visual* – when the passive subject is shown different drawings, images with sexual allusions;
- *physical* – when advances of sexual nature are made to the passive subject.

In order to achieve the constitutive content of the crime, the following conditions must be fulfilled, cumulatively:

- there must be an action through which favors of a sexual nature to be requested; by *favors of a sexual nature* must be understood any acts of a sexual nature or connotation, especially simple physical contacts meant to fulfill certain fantasies of sexual character or to provoke or enhance physical desire;
- the action must have a repeated character; the legal text does not clarify the expression *repeatedly,* such as we consider that the act exists if the perpetrator requests at least twice, from the same person, favors of a sexual nature, regardless of the manner in which he/she acts each time;

- between the two persons there must be an employment or similar relationship;
- through the action the victim must be intimidated or placed in an embarrassing situation; in this case also, the legal text does not bring supplementary explanations regarding the terms *intimidated* or *embarrassing situation*. We believe that these terms must be interpreted according to DEX (Explanatory Dictionary of the Romanian language), as follows: to intimidate presupposes *to inspire fear, to scare, to puzzle, to confuse* and embarrassing means *which prevents, which bothers, with hinders, inopportune.* In other words, any situation with sexual connotation, through which a violation is brought to the dignity of the individual in the work place or related to employment, is punished, falling under the incidence of art. 223 of the Criminal Code. (Coeuret & Fortis, 2000, p. 347)

The immediate consequence is represented by the state of danger for the normal development of the social relations regarding the individual's inviolability and dignity.

The causal link between the action and the dangerous consequence must be proven, on a case by case scenario.

g. Under the aspect of guilt, the act of sexual harassment is performed only with *direct intent.*

h. Sexual harassment is a committing and intentional crime, being dependent on the *repeating of actions* that constitute the material element of the objective side. Hence, the crime cannot have a tentative, and the performing of the crime occurs when the socially dangerous consequence occurred (Filipas, 2008, p. 296).

4. Conclusion

The criminal prosecution will start at the prior complaint of the injured party, by this ensuring the protection of the victim's interests, individual who does not wish to be exposed to publicity through the criminal trial. The magnitude of the punishment was changed; at present, the act is sanctioned with imprisonment between 3 months and 1 year or with a fine, thus diminishing the maximum punishment from 2 years to 1 year. We believe that, *as lex ferenda*, due to the importance of this act by means of which a violation is brought against a fundamental right – the right to dignity in employment – the criminal prosecution should start, in certain situation, ex officio, given the fact that between the perpetrator and the victim there is, in many cases, a hierarchical (or economic) subordination relation which, practically, prevents the victim from submitting a criminal complaint. Also, we consider that in the conditions of the present society the sexual harassment of a person should be incriminated in the same modalities and conditions as those already regulated by art. 223 of the Criminal Code, when the goal will be explicitly, *the obtaining of advantages of a sexual nature of a third party*.

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Causes of Supporting. Causes of Non-Imputability. Delimitations

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Abstract: The new Criminal Code adopted by Law no. 286/2009, which entered into force on 01.02.2014, introduce regulation supporting causes and causes of non - imputability, unlike the Criminal Code of 1969, as a natural result of the changes the concept offense (art. 15 NCP). Implications knowledge of this concept, which characterizes the essential features of great importance for the activity of judicial enforcement of criminal law, criminal law and for recipients who are subject to its knowledge. This paper presents an analysis of newly introduced institutions Romanian criminal law, revealing the foundation concepts, the innovations and their justification based on legislative experience, doctrine and jurisprudence of other states, and the Romanian state. Result of these experiences is introduced into Romanian Criminal Code provisions designed to achieve a settlement of the concept of crime, its content, in agreement with the appropriate vision on offense. Study of the causes of justification and causes of non-imputability, based on analysis of the legal texts and authors analysis presents possible implications, the entry into force of these provisions. Also, the paper, making a presentation of the concepts may be of interest to both theoreticians and practitioners, but also for those involved in knowledge and reasoning criminal legal institutions (doctoral, masters, students etc.).

Keywords: causes of supporting; causes of non-imputability; anti-juridical; typicality; criminal nature of the act

I. Text art. 18 NPC establishes a new institution in relation to the previous regulation (Penal Code 1969), therefore supporting causes, stating that the act is not an offense under the criminal law committed under any of the cases provided by law supporting (self-defense, necessity exercise any right or performance of an obligation, and the injured person's consent).

The offense cannot exist unless there is missing one of the key features defining the existence of the crime, but when the facts, although it has all these features, be committed in circumstances which give a legitimate purpose, that is allowed in the light of higher requirements the legal system, being removed unlawful nature of the act. (Antoniu, 2010) The evidence system gives expression of needs regulatory objectives.

The doctrine of penal laws as experience has shown that, with the specific requirements of each area (branches) of legal regulation in relation to their social relations in these fields, there are requirements of the legal system as a whole, independent of the specificities of each branch of law.

These common requirements imposed by necessity legislature obliged to protect not only domain - specific social values, and social values common to all branches of law, an expression of the identity of interests of members of a social group.

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Thus, for instance, is common interest of the whole legal system to ensure prompt restoration of the rule of law, with the purpose of any person subject to aggression, the right to respond immediately, with force, to neutralize the aggressor, if the authority is not able to intervene and stop it. Respond, in such conditions, is also a manifestation of the instinct of preservation of any being subjected to aggression, not threatened, by the nature of things, will fight back and try to remove aggression. (Antoniu, 2004)

By recognizing self-defense as a reason supporting, operating *in rem*, the new Criminal Code Criminal Code of 1969 abandoned the concept that warrants self-defense on the idea of the impossibility of determining the free will of the retort. (Antoniu, 2010)

For this reason, the new Penal Code, unlike the Criminal Code of 1969, not assimilate excess due to disorder or fear defense (self-defense improper - art. 26 par. 1 NPC) own self-defense (Art. 19 NPC) considering that in the first case we are in the presence of non imputability causes, and in the second case in the presence of supporting causes. (Voicu, 2014)

Likewise, the person who is in a state of imminent danger, unavoidable and which threatens the life, limb, health or property is entitled to save, even illegal acts. In regulating the state of emergency in the new Criminal Code, which is not significantly different from the previous one is provided, as a novelty, provided the result that is not obviously worse than those that would have occurred if the danger was not removed (art. 20 par. 2 NPC).

This is in agreement with the separate regulation of excess justified by a curfew, which is included in the category of cases non imputability (art. 26 par. 2 NPC). (Voicu, 2014)

As in the case of self-defense, and if the state of emergency, exceeding their limits (excess excusable) is maintained as a statutory mitigating circumstance (art. 75 par. 1 lit. b and c NPC). (Udroiu, 2014)

Similar considerations underlying causes and other evidence; thus, the order of the law expressed interest legal order as a whole, ensuring order and discipline in every way throughout social relations, strengthen respect for the law and to legitimate authority and consent of the victim is justified in the interest of society to respect the will of the recipient law when he consents to personal interests strict action against the individual.

The exercise of any right or performance of an obligation has been settled and the criminal codes of 1864 and 1936 being addressed as the doctrine, law and order hierarchical order.

Criminal Code of 1969 has not provided law and order authority regime order among the causes which exclude the offense, considering that the ordering activity by law cannot be regarded as unlawful and execution of an order in the form prescribed by law has the same effect as law enforcement if illegal orders are incidental provisions relating to abuse, if the person executing the order, and on the instigation, on the person who gave the order.

The conflict between the rule of criminality and the rule allows or even requires committing the crime under the criminal law cannot be solved only by legal means, by law (I. Molnar, *apud* C. Voicu, 2014). Therefore, the new Criminal Code expressly regulates a cause justifying exercise of a right or performance of an obligation (art. 21 NPC).

The anti-legality in such situations is special (Antoniu, *apud* Molnar, 2010). The doctrine was raised incidence case as evidence of the exercise of the law criminalizing the act without legal or illegal (for example, the offense of violation of the regime of weapons and ammunition provided by art. 342 NPC or the offense of deprivation of liberty unlawfully provided by art. 205 NPC) and the offense is

committed in the exercise of a legal right of an obligation imposed by law or by the competent authority will be removed typicality offense.

Also, because supporting operating and if it is satisfied an obligation imposed by law (for example, if police work to maintain public order) and an obligation imposed by the competent authority (eg enforcement of an arrest warrant issued by the court). (M. Udroiu, 2014)

Cause supporting the consent of the person injured is intended to reconcile the conflict that can arise between a rule criminalizing an act, on the one hand, and another legal rule, belonging to another branch of law under which a person may have a good, its right, even assuming that his right would be under the protection of a criminal-law rules (I. Molnar, *apud* C. Voicu, 2014)

Existence is one of the reasons supporting evidence that the offense charged is contrary to the right simultaneously. By contrariety law means not determined a position contrary to a branch of the law, but a contradiction with the law as a whole, all branches of law (*anti legality*).

Supporting causes, expressing requirements legal order as a whole unit requirements essentially could not conceive of an act to be considered permissible in an area of the legal system (the right branch) and disallowed in another, it would be inconsistent with interests unit that expresses the whole law, and liable to cause unrest in society.

Supporting reasons are based on the right to perform certain actions and are called objective causes of non-responsibility or removes the illegality or unlawfulness of the act, unlike the cases of non imputability, called non-culpability causes or causes non responsibility subjective - based on lack guilt.

In such a view, the contradiction between the facts and the rule of law, overall, also called anti legality becomes an essential feature of the offense. It exists only to the extent that facts whose features correspond to the facts described in the indictment norm does not entail applying a permissive rules (those supporting) that would remove criminal offense of the offense, although it corresponds to the norm of criminality. (Antoniu, 2010)

Consistency facts incrimination norm is called the doctrine typicity.

Supporting causes are considered: self-defense, necessity, to exercise a right or fulfilling an obligation and consent of the victim. The last two cases are institutions supporting newly introduced in the current criminal law, while the state of emergency self-defense and were regulated by the Criminal Code of 1969 as the causes that removes the criminal nature of the act.

Supporting causes ceases anti legal of action or inaction. The fact remains typical, but given the circumstances in which it was committed, is removed illegal nature, non being offense.

The legislature has provided supporting causes effects *in rem*, they will be extended to all participants. (Udroiu, 2014)

If the incidence of supporting causes is excluded as a sentence or educational measures, since the act is not a crime, and application of security measures to the express provisions of art. 107 par. 2 NPC.

In addition to the cases provided for in the general overall supporting the new Criminal Code, there are certain special cases evidence provided in the special part of the new Criminal Code, for example, the provisions of art. 272 par. 2 NPC, that the offense is not influencing asset declarations understanding of the offender and the injured party, which took the offenses for which criminal proceedings are initiated upon prior complaint or who comes reconciliation. (Udroiu, 2014)

The new Criminal Procedure Code does not distinguish between the solutions given in criminal proceedings as a result of supporting causes or non imputability causes - art. 16 letter d) NPPC, in both cases the court acquittal and the prosecution has the ranking.

Cases eliminating the criminal nature of the offense and consequently removes criminal liability which cannot be other grounds than an offense (art. 15 par. 2 NPC).

II. Unlike the causes supporting the non imputability causes (art. 23-31 NPC) are circumstances that exist in principle, the person of the offender, if their incidence deed, though under the criminal law and constituted an unlawful activity, no offense.

Imputability is a condition of guilt involves the ability to understand and you, and guilt is a prerequisite for criminal liability (Antoniu, 2010). Thus, you could be guilty of the breach; the offender must be able to understand the significance of his actions or inactions and to be master them. Also, it must be known at the time of committing the crime, states, situations, or circumstances on which the unlawful nature of his business and to be able to comply with the rule of conduct imposed by criminality.

Causes of non imputability remove the third essential feature of the offense, imputability. (Voicu, 2014)

The Criminal Code was previously provided as causes eliminating the criminal nature of the act. These are physical coercion, moral constraint, excess imputable minority perpetrator, irresponsibility, intoxication, mistake, fortuitous.

Cases eliminating the chargeability of the act removes the guilt, including fortuitous, but this, with objective causality operates *in rem*, while the other cases relate closely related conditions or circumstances of the person of the offender, so that effect in personam (Paşca, *apud* Voicu, 2014).

If a situation causes are currently supporting two conflicting social values or interests, of which only one can be saved, if the grounds for exclusion of guilt are an exceptional situation which excludes a reproach to the author for the act typical and anti-legal.

The novelty is the introduction into this category, excess justified as self-defense of exceeding the limits and boundaries of the state of emergency, if such excess is the result of fear or disorder (art. 26 NPC). Unlike supporting causes, permits, the non imputability causes not preclude the safety measures they not put any conviction of the perpetrator. In some cases, the perpetrators are civilly responsible as well. (Paşca, 2010)

III. Supporting reasons and causes of non imputability should not be confused with the general causes which removes criminal liability (amnesty, prescription criminal, no prior complaint withdrawal prior complaint and reconciliation), where the only crime is a crime and its consequences - criminal liability is removed, criminal policy reasons. They are always subsequent time offense, unlike in supporting and non imputability, on which the act is committed by the criminal law in terms of such cases. (G. Antoniu, 2010)

Also supporting reasons and causes of non imputability not confused with punishment cases (with impunity) are special cases, subjective considering offender behavior during and after committing the crime and punishment remove, the act is a crime, but criminal liability is removed.

Causes of impunity may be general and the largest effects are provided in the general penal code (e.g.: divestment and prevention of the result - art. 34 NPC, the crime prevention - art. 51 NPC and special provisions for certain offenses e.g: termination offense (art. 410 par. 3 NPC), withdrawal perjury (art.

273 par. 3 NPC), denouncing bribery (art. 290 par. 3 NPC), denouncing purchase influence (art. 292 par. 2 NPC).

Therefore, the intervention of a supporting causes, we are in front of an act permitted by society against a lawful act, no longer raises any question of guilt. (Antoniu, 2010). In the cases that removes chargeability of fact, it removes the guilt, as noted, imputability is a condition of guilt, and guilt is a condition of criminal responsibility, understood as an obligation of a person to be responsible for the consequences his acts. (Paşca, 2010)

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The Restorative Justice System - An Alternative to the Official Criminal System

Monica Pocora[1]

Abstract: The victims' discontent regarding the retributive justice system, the failure to achieve the punishment's goal aiming to decrease the risk to repeat the offence, the increasing role of the victim in the criminal trial, the high cost that the criminal procedures imply, the courts' overload have determined the evolution of the restorative justice ideas. Therefore, the victim received an active role in the process of solving the conflicts submitted to the court, while the offender's role is to assume the responsibility and to repair the harm he caused. While the classic justice system is based on the idea that any felony brings harm to the state itself, the restorative justice model is based on the idea that any offence is firstly a conflict between individuals, causing damage and harm to the victim, to the community, and to the offender himself.

Keywords: alternative; early prevention; damage repair; restitution

1. Introduction

The restorative justice concept has various meanings, thus it can be considered even an umbrella-concept, covering many practices, models and programs.

The restorative justice is frequently perceived as a return to the traditional practices, but sometimes is considered to be a new structure, a viable strategy which may contribute to modern justice system improvement. Within the retributive criminal trial, applying a sentence, a penalty, does not mean that the offender is aware of the harm he produced, nor does he assume the responsibility for his crime. Considering the need to identify some adequate answers to prevent and control the crime, some countries have looked for adequate solutions to reduce it. A possible answer came from the introduction in some states' law systems of the restorative justice concept, as an alternate way to solve conflicts.

2. Traditional Meaning, Trends, Main Targets

The restorative justice reassertion has been proved by the increasing number of the restorative justice programs in various countries. Therefore, this program became an integrating component of those systems (in Romania for instance, the unpaid community work doesn't have its own legal provision, but it is governed a supervision obligation – see the Romanian Penal Code, art. 103 (3). In other countries, the restorative justice system has already gained a position as an alternative to the official criminal system.

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The retributive justice system follows the concept according to which the most important part of the justice act is to establish the offender's guilt and to punish him according to the seriousness of his crime, to the damage brought to the victim and community. The illicit act is a violation of a legal and social standard, thus being directed against the state.

The restorative justice is based on the traditional concept which states that those who victimize someone must accept the responsibility of his doing, re-establish the balance, and cover the losses or damage he brought to his victim and to whole community (Ashworth & Redmayne, 2005). The greatest attention is given to the type of the affected social relations, and to what must be done in order to repair them.

The restorative justice aims to heal the affective wounds and to compensate the damage. The punishment as element of the retributive justice system is translated here as the offender's work to realize that he broke the social standard, by assuming the accountability for his act. Unlike the retributive justice, where the offender's punishment and isolation are emphasized, through the penalty regarding the. This type of justice focuses on the damage repair and restitution by the offender, so that he might assume the responsibility for his crime. It emphasizes the increasing role of the victim and the community members, making the offender accountable, repairing the material and affective damage suffered by the victim, and offering new opportunities for discussion, negotiation and solving the conflict.

The discussion above suggests that the restorative justice bases itself on responsibility, self-involvement, straightness, community view, damage repair, avoiding the discrimination, restitution and early prevention. These concepts, which define the restorative justice, emphasize the functionality principles of this institution, namely:

- the crime is a interpersonal conflict, which affects the victim, the community, and even the offender;
- the restorative justice implies a free-content agreement regarding the nature, the amount of the damage, and the way to repair it;
- the restorative justice system allows to victim, to offender and to community to take part to the procedures, at the expense of the role of the state authority.

Through its implementation procedure, the restorative justice guarantees the repair of the damage caused to the victim, as the offender contact to the community. This contact allows him to see the consequences of his acts through the view of those who affected. Putting him face to face to his victim (both directly and indirectly – the family members, for instance) is a real social therapy, which awakes the sense of accountability.

On the other hand, it's precisely this conflict victim-offender which gave birth to a sum of judgments, including the questioning of its effectiveness, by comparison to the retributive system. Also, it has been considered that the victim-offender relation might lead the offender to acknowledge his mistake and to assume the responsibility only superficially, trying to avoid the impact of the severe legal provisions. Moreover, although the offender expressed his willing to participate to a restorative justice program, he might actually try to expose his own motivation leading him to perpetrate. This situation might lead to a secondary victimization of the victim. Last but not least, there are other objections regarding the lack of balance between the penalty and the gravity of the crime, and the fact that these restorative practices do not intimidate the offender. For instance, in some cases – severe crimes as rape – the restorative justice can't repair almost anything, as the victim continues dealing with negative feelings as fear, depression and anxiety.

One of the restorative justice definitions, that has become largely known in comparison to the others, was stated by Tony Marshall (1997). It has been adopted as a work instrument for the 10th UN Congress Resolution for the Crime Prevention and Criminal Justice System, and it states the following: „The restorative justice represent an approach to solve the problems that crime started, by involving all those affected by it, and with an active participation of the state organisms who are responsible of dealing the crime". Marshall thinks that the restorative justice is not a practice, but a set of principles which might guide the groups dealing with crime practices (Marshall, 2001). The restorative justice has the following main targets:

- to answer to any need – financial, emotional or social – the victim might have (both directly and indirectly, including the persons close to the victim, which might be also affected), need which has a causality relation with the crime;
- to seek to reinstate the offender in the community, thus preventing the relapse;
- to determine the offender to assume responsibility for his acts;
- to reduce the costs generated by the traditional justice system, to avoid overloading the courts, and to guarantee swiftness to the process.

John Braithwaite specifies that the purpose of the restorative justice is to involve the victim, the offender, and largely all the community members in the process of restoring the affected social relations. He calls this process the reinstatement ceremony (Braithwaite, 2001). He also considers that we can't speak of restorative justice if the material restitution of the damage caused to victim, the emotional and affective recovery, and the restore of his feelings of security, dignity and self-esteem are not accomplished. But the reinstatement of the offender into community is equally important. Does the retributive justice system ensure the offender's reintegration into community?

Daniel van Ness defines the restorative justice as a „justice theory, focused on repairing the harm produced or revealed by the criminal behaviour; the best way to accomplish it is through cooperation and involvement processes" (Van Ness & Heetderks, 1997).

In Howard Zehr and Harry Mika opinion, "*the restorative justice tries to heal and to repair the harm brought to the victim*". The crime appears as a "*damage produced to people and personal relations, which creates obligations and responsibilities*" (Zehr, 2002).

Also, the restorative justice is considered as „*a social and political authority offering an alternate resolution for conflicts, focused on restoring the micro-social relations affected by this conflict, through some participative practices, and some concepts and values meant to enlarge the tolerance into the pluralist micro-social area*" (Mika, 1992).

The common feature of the various definitions developed for the restorative justice concept is the fact that the restorative justice relies on programs following the reconciliation between victim and offender and the search of adequate solutions, in order to repair the damage the crime produced. The restorative justice suggests a change of view as against the classical justice system, starting from the idea of a participative approach in resolving the conflict and repairing the damage. The new criminal philosophy starts from the idea that all the parties should be involved to the response to crime: the victim, the offender and the community. Inside this criminal philosophy, the responsibility is based on the offender's acknowledgement of the harm he produced, on the accountability acceptance, and on the repair of the damage produced. This system encourages the direct involvement from the victim and the offender to resolve the conflict, through discussion and negotiation, in the presence and assisted by a third party (Redekop, 2008).

3. Restorative Justice Programs Applied to Minors

Family group conferencing – has developed in New Zeeland as a criminal penalty for minors. Persons who are mediating the process are, in general, public officials – police officer, probation officer, representative of the school (unlike of mediation, where may also be specialized volunteers). Although it is similar to the mediation, this program presents a series of advantages:

- at conference participate persons who have been affected through the crime – directly or indirectly; by involving a large number of persons, the community healing as a whole occurs;
- recognizes the existence of a large number of people affected by the crime;
- it is recognized and emphasized the role of family in life of juvenile offender.

Victim impact panels – are forums (organized in the U.S.) where a particular type of crime victims tell to some groups of offenders about the impact that the crime has had on them. Offenders are not the persons who have been victimized them, but only persons who have committed the same type of crime the victim suffered. The offender is not judged, but it is tried to make him responsible and to decrease, in future, the risk of relapse. Offender's participation of those panels is a condition of the probation placement.

4. Sentencing Circles – Also Called Peacemaking Circles

The name comes from the old custom of the Indians of North America to organize talking circles for resolving disputes within the community. During these circles participates victim with support staff, offender with the support group, representatives of the formal justice system (police, judges, prosecutors, probation officers) and any interested member of the community. People sit in a circle and each expressed his opinion on what happened, the final goal being to achieve to a consensus on sanctions to be applied of the offender.

This program involves several steps:

- offender's request to participate in this program;
- to organize a healing circle for the victim;
- to organize a sentencing circles, for establishing the penalty for offender;
- to organize future circles to monitor the progress of the offender.

If the offender is not satisfied with the decision taken within the sentencing circle, then it is returned to the formal justice system.

5. The Restorative Justice in Romania

The restorative justice became a real strategy in the frame of improvement policies of the justice systems of everywhere, including the Romanian justice system.

Although in most of the probation systems, the unpaid community work appears as an independent penalty, in the present Romanian regulation it appears only as a „supervision duty", which court may impose to the juvenile offenders, both inside the educational measure of supervised probation, or, for those under 18, inside the suspended penalty, under supervision or control.

Within the new Penal Code, the unpaid community work appears:

- as a possibility to replace the penal fine applied for committing a crime;

- as a supervision obligation when the sentence execution is delayed, or when the supervised execution is suspended.

When the new code will take effect, these alternative solutions might be applied not only to juvenile offenders, within the obligations generated by the supervised liberty measure, but to the adults too.

Although still timorously and selective, the Romanian criminal courts have already begun to create a case law into the community work area, as it is regulated for the juveniles, taking usually into consideration the conclusion of the evaluation report elaborated by the probation officers, when they evaluate the amount of the community work.

6. Conclusions

Therefore, one of the features of the restorative justice concept resides precisely in the idea to encourage both the victim and the offender to involve themselves directly into the conflict settlement, through dialogue and negotiation. Although there are a number of different practices, depending on the country and the law provisions, all the restorative justice programs are based on the victim-offender mediation. Whether they are called mediation or reconciliation, whether they are imposed or not to the offenders, whether they conclude or not with an agreement or a contract between the two parties, the action taken to this end forms the content of the restorative justice notion.

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Victim's Rights - Comparative Approach within EU Legislation

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Abstract: Usually is talking about offender rights and rarely about victim's rights. This study aims to analyse victim's rights especially in Romanian legislation from all points of view. Having involuntary fallen victim to crime, the person is often unaware of what information is available. It is therefore important that the onus is not put on the victim to request a certain piece of information. Victims of crimes need to have their important role in the criminal proceedings and he or she has to know about the extension of them rights. Not least, the study is focus on the right of the victim to *receive* information, not to be made responsible for the practicalities surrounding its delivery.

Keywords: interpretation; hearing; assistance; support; advice

1. Introduction

Victims need information on what their rights are and what services they can access, in order to participate in the criminal justice process or access any other rights. Victims' right to information is therefore one of the most important rights in the aftermath of crime.

The costs for initiating criminal proceedings against a person who has committed a crime represent an obstacle for the victim of that offense, so it is necessary to provide free legal assistance to victims if it meets certain conditions stated by national or international law (in the case of cross border crime).

In some circumstances the legal systems of the EU Member States provides exemption from all or some of the costs or support costs for benefits and providing a public defendant who will provide legal assistance in the prosecuting phase or in front of a court, or paying a modest fee for legal counsel.

2. Legislation

Art. 6 paragraph 3 letter c from the European Convention of Human Rights regulated *the right to legal counsel*, that guarantees the right of the accused to be assisted without charge by a lawyer if he does not have the means to pay a defense counsel when the justice interests requires it (Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA).

In all of the EU Member States there is a legal assistance system, but if there is a dispute between two or more parties and at least one of them lacks sufficient financial resources to promote a lawsuit or has insufficient financial resources to benefit from the services of counsel during the trial, the party may apply for legal aid under national regulations.

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A comparative analysis of national legal assistance status highlights the existence of fundamental differences in structure of legal assistance systems in the Member States.

Regarding the organization of systems in some states the overall goal seems to be to ensure in general legal services and access to justice, while in other countries only the poor can apply for legal aid [Council Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA), 15 March 2001].

2.1. Legal Assistance in Criminal Trials

Juridical cooperation in criminal matters between the Member States should be organized in order to encourage public specialist awareness, as well as to simplify and accelerate the passing of requests for assistance between Member States. Member States have their own legislation that establishes how it provides legal assistance in criminal trials (Ashworth & Redmayne, 2005).

3. The Procedure Regulated by Romanian Law

The free legal assistance is provided until the end of trial, regardless of the stage of the trial in which is the person benefiting from this right. Individuals involved in criminal proceedings can benefit from the free legal assistance under the following conditions:

a) If the person is a murder victim or attempted murder, grievous bodily injury, rape, child abuse and human trafficking.

b) If he or she is a civil party, injured party or civilly liable responsible party and the judicial authority considers that for some reason, he/she cannot make his/her defense, then the judicial authority may, ex officio or at the request of the person concerned, take measures for the appointment of a public defendant.

c) If a police report was filed within 60 days from the date of the offense and if the person is unable to claim offense, the 60 day period begins on the cessation of the impossibility.

d) If he or she is the spouse, the child or other dependent person of the victim who died as result of a crime of murder.

e) If he or she filed the police report within 60 days from the date of the offense and is unable to claim offense, the 60 day period begins on the cessation of impossibility.

f) If the gross monthly income per family member does not exceed the minimum wage.

g) The services that can be provided to the victim of a crime of murder or attempted murder, grievous bodily harm, rape, child abuse and human trafficking are: free counselling, free medical care and free legal aid (if the above conditions are met).

Romanian legislation provides for several forms of free legal assistance in criminal matters, namely:

a) Art. 89 Criminal Procedure Code - free legal assistance approved by the courts, the prosecution authorities or local public administration authorities, where the assistance of the accused or defendant is required and mandatory, and he does not have a chosen defense counsel.

b) Art. 90 Criminal Procedure Code - free legal assistance granted by the court to the injured person, civil party and civilly responsible, ex officio or upon request, when it is considered that he/she would not be able to make one's defense.

The disadvantage of this regulation from the Criminal Procedure Code is that the injured person receives free legal assistance to trial, but the appointment of the public defendant is at the discretion of the judge and there are no criteria to establish this right.

Experience has shown that such a measure is very rarely disposed in favour of a victim, even if, theoretically, there are no specific obstacles that prevent the appointment of a counsel in such cases.

c) Art. 18 of Law no. 211/2004 regarding the protection of the crimes victims - free legal assistance granted at the request of a crime victim or civil party, provided that the person be a victim of a very serious crime - respectively the injured person be the victim of an attempted homicide, murder or aggravated murder; an offense of grievous bodily harm, an intentional offense that resulted in a grievous bodily injury of the victim; rape, sexual intercourse with a minor and sexual perversion - or to have a low income (monthly income per family member of the victim to be at best equal to the minimum gross salary per economy set the year the victim applied for free legal assistance) (Law no. 211 2004 regarding the protection of the crimes victims).

According to Law no. 211/2004, legal assistance request submitted by the victim benefits from special treatment, meaning that the victim may state that he has a lawyer, whose fees will be covered entirely or part of the amounts allocated to this purpose, unlike other cases under the Criminal Procedure Code - article 173 paragraph. 3 of the Criminal Procedure Code - when the victim does not have this possibility, the lawyer is appointed by the Bar Association. The amount of the legal assistance for these people is equivalent to two minimum gross salaries per economy, higher than the fees allocated to lawyers appointed by the Bar Association in accordance with article 173 of the Code of Criminal Procedure, and the requests for free legal assistance for the enforcement of judgments are exempt from stamp duty.

Providing free legal assistance is conditioned, for all categories of crimes victims, by committing the offense in Romania or in the case of crimes committed outside Romania, by the victim's quality of Romanian citizen or foreign citizen legally residing in Romania, and by the development of criminal proceedings in Romania, meaning there must be a link between the Romanian state and the victim of a crime as for psychological counseling (Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ 16.12.2008, L 3).

d) Art. 68 of Law no. 51/1995 on the organization and the lawyer profession practice - free of charge legal assistance approved by the Dean of the Bar Association at the request of the injured party, civil party or civilly responsible party, if the rights of the indigent party would be prejudiced by the delay.

Law no. 51/1995 regarding the organization and the lawyer profession practice may be applied where judicial assistance would be sought directly the Bar Association by an injured party, civil party and civilly liable responsible party under the following circumstances: if the rights of the indigent party would be affected by the delay or in cases where the local Bar Association of considers that those persons are unable to pay the fee.

4. Conclusions

The legislative framework in place ensures the right of person's defense within vulnerable situations, in which the case defense deprivation would have serious consequences.

We think that in certain crimes, the victim rights should be extended even in post- enforceability period of offender as follows:

- the victim must be notified by judicial when the offender is put on probation.
- in case of violence crimes, the measure of victim protection should be granted even in post-enforceability period (e.g. the interdiction of offender to stay close the victim).
- to announce the victim about any changes within the conviction decision.

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Mediation, Mandatory Information and Facultative Applicability

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Abstract: Considering that mediation is a facilitating way to access the alternative solving of litigations in conciliatory terms, the study is encouraging using the mediation and providing a balanced relationship between mediation and judiciary procedures. As an aftermath of summary definition, we can say that role of mediation is to overcome the communicative barriers in order to solve the conflict and save the fact situation on both parts. The study aims to analyze objectively all consequences of both solving ways of litigations: traditional one, through the law court and mediation, with the advantages derived from them (celerity vs. time consuming, expensive judiciary proceedings vs. low costs, etc.)

Keywords: alternative justice; conciliation; celerity; advantages

1. Introduction

The multitude of juridical rapports issued due to the existence of free circulation of people and goods in the EU lead to a growth of the litigations between people with residence in the different EU member states, therefore of cross border litigations. Carrying on a lawsuit in another member states than that of the residence state can be rather discouraging because of the high costs, linguistic differences and uncertainty related to recovering claims. This is the reason why the first step in putting an end to the conflict is the attempt to solve it in a conciliatory manner.

An efficient instrument of solving the conflicts in such a manner is the cross-border mediation as a type of mediation. The mediation, besides other alternative methods of solving conflicts (conciliation, negotiation, arbitration), can outweigh the disadvantages of a trial.

Due to its specific characteristic, not only does mediation solve the conflict but it also eliminates it, causing both parts to respect willingly, the agreements as a result of the mediation and hence to maintain the relationship between them. It means a major progress of civilization mainly because it allows both parts to adopt willingly, their own decisions, also assisted by a third independent impartial neutral part when two of them failed in their attempt to find a solution themselves to put an end to the argument they are involved in (Mitroi, 2010). This trial can be initiated by both parts, on court recommendation or given by the right of a member state.

2. Legislation

As regard the legislation, Directive no. 2008/52/CE was issued by the European Parliament and the Council of May 21st 2008 concerning certain aspects of mediation in civil law and commercial law

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(the Mediation Directive). The Directive also provided the role of the magistrate in mediation that emphasizes both in terms of judiciary and conventional mediation (2008/CE/52 Directive of the European Parliament and Council).

Thus, the Art. 5 of the Directive, the law court- the magistrate - considering the case circumstances, can invite the parts to mediation or participate in an informative session concerning the mediation procedure, if such sessions are organized and easily accessible in any stage of the lawsuit (Robaru, 2009).

3. Applicability

The Directive is applicable to cross border conflicts of civil and commercial/trade matter, as well as criminal law but the most frequent litigations concerning family conflicts or those issued between traders (Dragne, 2011). It is applicable in pre-contractual negotiations and quasi-judicial procedures, as well as certain conciliation systems of customer complaints, the arbitration and experts decisions, or procedures when persons or those who are in charge of the procedure issue an official recommendation which can be mandatory or not concerning the litigation.

4. The Mediation Procedure in Romania

From 1st of August 2013, **the information** about mediation is mandatory**,** but **the mediation itself** is still optional. Who conduct the information sessions within the information meetings implemented by changes made through the Law no. 192/2006 concerning mediation and the organization of the mediator position.

In accordance to the art. 29 indent 1, Law no. 192/2006 concerning the mediation and organization of the mediator profession, the mediator has to offer explanations to the parts involved in mediation activity so that these should understand the aim, the limits and the effects of the mediation especially on the rapports that make the object of the conflict (Law no. 192/2006 on mediation and the profession of the mediator, as amended by Law no. 370/2009). The mediator has to inform both parts on the mediation procedure about their rights, before the beginning of the mediation so that the parts should get to know the mediation principles, all the details about the procedure within the meeting and the way of unfolding it.

What information must contain this procedure?

The parts must know the mediation principles, the rights deriving from the principles of this procedure- that they benefit within the mediation procedure- the advantages of the mediation, details about the procedure within the mediation meeting and the way of unfolding it.

5. Principles Applicable

a) The voluntary character concerning the participation to the mediation procedure- represents the basic principles of this procedure which results from Art. 1 Law no. 192/2006 regarding the mediation and the organization of the profession of a mediator altered and further revised. This principle is based on the free approval of the parts to resort on this procedure (Pancescu, 2008). Consequently, any part has the right to withdraw from this procedure, any time the mediation may occur - if he/she reaches

the conclusion that he/she cannot come to terms – the same way as he/she cannot be forced to take part to such a procedure, by another person or authority.

b) The self-determination of the parties – a principle according to which the agreement of the parties pertains to them, and the mediator will not be able to decide or influence the terms settlement where the common solution of the parts is assessed.

c) The confidential character of mediation procedure – the confidential character is applicable to all the information conveyed within the mediation procedure, where, both the mediator and the present parties or their lawyers must keep confidential character of the mediation meeting by signing a confidential agreement before the beginning of the procedure.

d) The neutral aspect of the mediation/the neutrality of the mediator-concerns the mediator as an outsider of the conflict, his lack of involvement in this conflict, except within the limits imposed by the procedure. Therefore arise following rights that the parts involved in a conflict can benefit, as a result of the mediation procedure:

- the right to dignity and non-discrimination;
- the right to benefit from a neutral, fair and impartial treatment, of the mediator;
- the right to assign third parts, including a lawyer to represents the interests within the hearing and to negotiate an agreement on their behalf and at their account (within the limits of the mandate issued);
- the right to be informed concerning the mediation process, the effects of the mediation, the effects of signing a mediation agreement;
- the right of legal assistance or by any third party considered by the parts desirable or advisable.

The mediator tasks within the information meetings is to give thorough explanatory accounts to the parts concerning the mediation activity, so these should understand the aim, the limits and the effects of the mediation and nevertheless, the benefits that derive for them by using this alternative solving the conflicts (Vlad, 2009).

Among the advantages of the mediation for the parts that can be established by the mediator within the information meetings, we can mention:

a) The possibility of the reimbursement of the stamp duty- when such a duty has been charged and the cause is tried in the law court- there must be stated that as a result of the article rescission 23(1) form Law no. 146/1997 concerning the stamp duty, that stipulated the reimbursement of the stamp duty in case the parts made a deal, *actually, the retrieval of the paid amounts as stamp duty can occur only if the conflict is solved through mediation by mediation agreement.*

b) The procedure of the mediation is an informal, confidential civilized procedure that means the meeting between the parts *should takes place in a private environment by respecting the well behaviour code*; that any information that is conveyed to the mediator or any document presented cannot be unveiled/revealed to the law court.

c) By means of mediation, the people involved in the conflict are actively and directly involved in order to get to a solution that satisfies the needs of anyone and doesn't passively expect an imposed solution of a third part (the court).

d) The conflict between the parts can be solved in a shorter period of time because the formal and hard procedure that is under the jurisdiction of the Civil Procedure Code or Criminal

Procedure Code is ruled out (and the assigning of terms to notify the procedural papers, the witnesses hearing, statement making of the parts, or interrogation of the parts in civil matter).

e) There must be stated to the parts during the information meetings that certain judiciary procedures may last long in the case of solving certain types of litigations, because *the evidence valuation is necessary* which can last for months - the complexity of such evidence, or as a result of a counter expertise - so that an agreement settlement through mediation would definitely make the litigation period shorter and would bring benefits to all parts.

f) The *costs implied will be diminished*, as a consequence of reduction of time consuming procedures necessary for solving the conflict and the stress caused during traditional proceedings.

g) The mediation procedure helps the parts involved in the conflict to find the solution that satisfies their interests and real needs and to become aware of that appealing to such judiciary procedure has its own risks. It is time consuming, expensive, it can cause energy loss without any palpable goal or the unsatisfactory solution of his/her real interests or needs.

6. Conclusions

In order to encourage the parts to resort on mediation and ensure the compatibility of the mediation with the proceedings as they are closely interrelated, we think *the most important obligation assigned to the member states, is to offer the parts choosing the mediation*, the reinforcement that they will not be hampered to initiate a judiciary or arbitrary procedure regarding the litigation under discussion as a result of fulfilling of terms of incapacity or limitation as long as the mediation process takes place.

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