

Cătălin-Silviu Săraru (ed.)

Contemporary Challenges in the Business Law



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Contemporary Challenges in the Business Law

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Contributions to the 6th International Conference
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Preface

Editor

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This volume contains the scientific papers presented at the Sixth International Conference „Perspectives of Business Law in the Third Millennium” that was held on 25-26 November 2016 at Bucharest University of Economic Studies, Romania. The conference is organized each year by the Department of Law at Bucharest University of Economic Studies together with the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: www.businesslawconference.ro.

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

- *Contemporary challenges in the regulation of international business law.* The papers in this chapter refer to the evolution and challenges of directors' duty of loyalty, the administrative contracts in the European Union law, the improvement of legal framework of the limited liability company provided by international uniform law, the international air transport of passengers and luggage from tourist industry perspective and the rights of tourists and considerations regarding the competence of the European Union external trade policy.
- *Contemporary challenges in the regulation of national business law.* This chapter includes papers on: new elements in the regulation of competition in Romania; the complexity of the litigations in the energy regulated field of activity and the necessity of the specialization of the judge panels; on the *de facto* director of a Romanian limited liability company; some aspects concerning the setting up of companies regulated in Romania by the Law no. 31/1990 republished; excise duties in European Union and relevant national case-law; the lease contract under insolvency law; considerations regarding the contract assignment in the Romanian Civil Code; consultation between social partners.

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

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

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**CONTEMPORARY CHALLENGES IN THE
REGULATION OF INTERNATIONAL BUSI-
NESS LAW**

The Evolution and Challenges of Directors' Duty of Loyalty

PhD. student **Adina PONTA**¹

Abstract

The duty of loyalty is the core of the fiduciary relationship between ownership and effective control of a company. This paper aims at identifying the contours of this heterogeneous fiduciary duty in corporate law, absent of clearly established legal limits. The objective is to highlight the pattern of this duty based on evolutionary case law, from the beginning of confluences between legal and microeconomic elements, by emphasizing the shades of current social and moral norms. The article renders both exposures of this duty, from the minimalist conception, "lack of betrayal", to the broad dimension of "active commitment". Various case law examples contribute to the identification of overlaps between loyalty and good faith, and of conflicts between applicability of the duty of care and duty of loyalty. The paper exposes a comparative analysis of the duty of loyalty among the jurisdictions of the European Union and Romania, emphasizing the influences of agency rules and traditional fiduciary values within civil law. The expansion of the duty is reflected by addressing the notions of conflict of interest and corporate opportunity doctrine. The findings reveal case law substantiated factors which facilitate the identification of duty of loyalty violations and differentiate them from good faith situations, where jurisprudence mainly facilitates the exclusion of this fiduciary duty.

Keywords: *duty of loyalty, good faith, conflict of interest, corporate opportunity doctrine, fiduciary duties, agency.*

JEL Classification: K22

1. Introduction

Modern business law inherited concepts with deep morality meanings, which show however substantial risks in their practical interpretation. The fundamental notions of duty of care, i.e. diligence and prudence, and duty of loyalty bear a profound social, philosophical and literary content, outside the corporate governance context, enriched with traditional values of fiduciary relationships of civil law essence. Despite the vastness of "loyalty", the content of this fiduciary duty is often filled or even defined by case law, which may either limit or enrich its application and scope. Recent corporate governance case law demonstrates a slight deviation from the classical meaning of this civil law concept and from common language, this duty is often overlapped or mistaken for the duty of good faith.

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In the last decade of the 20th century, the duty of loyalty enjoyed special attention in *common law* doctrine and jurisprudence due to its dynamism and to the downturn of interest in the duty of care, which monopolized doctrine and jurisprudence in the first part of the 20th century, particularly in the context of exhaustive analysis of the Business judgment rule.

This paper aims at highlighting the importance of the fiduciary duty of loyalty, which we regard as the core of directors' fiduciary duties and its magnitude by identifying and studying the composing elements. The duty of loyalty was initially viewed in respect to its meaning in everyday language, afterwards the perception shifted to the interflow of legal and micro-economical elements and acquired strong nuances of civic and social norms², which are internalized in the model conduct of corporate governance.

Further, the paper contains a review of the outline of the fiduciary duty of loyalty, in the absence of clearly established legal limits in any legal system. We will show that the pattern of this duty clearly evolves from the last half century case law and from the disparate philosophical views, from the minimalist vision of loyalty, namely the "lack of betrayal" towards the ampler extend of "active commitment"³.

Overlaps of the duty of loyalty and duty of care are inevitable in current corporate governance practice⁴. The devotion element of the duty of loyalty intersects the element of diligence within the duty of care⁵, complicating the efforts of doctrine and jurisprudence to differentiate these fundamental concepts. This hereditary interleaving of traditional fiduciary duties raises the question of necessity or actuality of the triad of fiduciary duties⁶ enshrined by Delaware case law and successfully exported to continental legal systems. The importance of this triad lies in the special significance of each of the recognized fiduciary duties, in

² Eisenberg, Melvin A.: *Corporate Law and Social Norms*, Columbia Law Review no. 99, New York, 1999, p. 1252 and Ellickson, Robert, *Law and Economics Discovers Social Norms*, Journal of Legal Studies no. 27, Chicago, 1998, p. 537.

³ Johnson, Lyman: *After Enron: Remembering Loyalty Discourse in Corporate Law*, Delaware Journal of Corporate Law no. 28, Delaware, 2003.

⁴ Due to the vastness of the topic, the overlaps of the duty of loyalty and the duty of good faith and the differences between their features and elements in corporate governance are not covered by this paper.

⁵ The duty of care in continental law jurisdictions is an export of Delaware business law jurisprudence. Delaware courts are internationally recognized as the most prominent forum for corporate governance disputes, due to their unique efficiency, their predictable judgements and their continuous exposure to business law litigation. *Delaware Court of Chancery* is an equity court and a benchmark of professionalism, which determined great *forum shopping*. Following the reform of the Companies Act in 2006, the duty of care was first analyzed in Romanian doctrine by Prof. Catană, R.N., *Dreptul Societăților Comerciale, Probleme actuale privind societățile pe acțiuni. Democrația acționarială*, Ed. Sfera, Cluj-Napoca, 2007, p. 160, and he was the first to suggest the translation of the term *duty of care* in „obligăția de diligență și prudență”.

⁶ The directors of a company owe what the Delaware Supreme Court called the "*triad of fiduciary duties*", duty of care (due diligence and prudence), good faith and duty of loyalty.

the moral values characteristic to business law and in the manner of regarding directors⁷ as mature actors with flawless morality and not as one-dimensional economic officers⁸.

Further, the paper aims at presenting a comparative analysis of the duty of loyalty within the European Union jurisdictions, of their regulations or jurisprudential application in absence of codification and at highlighting the traits of the duty of loyalty from the Romanian law perspective.

2. The importance of encompassing improper conduct and of determining the fiduciary duty violated by directors

In *common law* doctrine and jurisprudence, directors of a company owe what the Delaware Supreme Court called the "*triad of fiduciary duties*": duty of care (due diligence and prudence), good faith and duty of loyalty⁹. These duties are almost uniformly recognized by doctrine and jurisprudence as being the standard fiduciary duties identified and analyzed by shareholders and by courts when assessing corporate directors' conduct¹⁰. In most *common law* jurisdictions, consequences of fiduciary duties violations differ due to the particularities of each of them. For example, the Business judgment rule applies in situations of breach of the duty of care. Some jurisdictions allow the inclusion of statutory clauses that prevent directors' personal patrimonial liability¹¹ for breaching fiduciary duties, but only for the damage the company suffered as an effect of duty of care violations.

⁷ The use of the term "director" in the paper at hand is understood to be extended to the members of the directorate of joint stock companies that adopt the dualist management system.

⁸ *Supra* 3, p. 5.

⁹ For broader explanations of the triad of the fiduciary duties, see Ponta, A. *The Business Judgement Rule. Approach and application*, „Juridical Tribune – Tribuna Juridica”, vol. 5, issue 1, 2015, p. 25-44.

¹⁰ One of the first express mentions of the *triad of fiduciary duties* in the manner it is viewed by the majority doctrine and jurisprudence nowadays is reflected in the justifications of the Case *Aronson vs. Lewis*, 473 A.2d 805, 812 (Delaware, 1984), at 805. The description of fiduciary duties given by the court in this case is famous because it is one of the first clear expressions to enumerate the fiduciary duties in a concentrated formulation: "directors are presumed to act reasonably, in good faith and in the honest belief that the action they undertook was in the best interest of the company".

¹¹ Following the judgement in the case *Smith v. Van Gorkom* (488 A.2d, Delaware Supreme Court, 1985), where a few directors had to bear exaggerated financially consequences for the simultaneous breach of the duty of care and the duty of loyalty, Delaware legislature permitted corporations to include in their acts of incorporation statutory clauses to limit or eliminate directors' personal liability for material damages caused by violations of fiduciary duties. Up to the present date, more than 30 USA states adopted similar rules. A very important issue is the fact that these exculpatory clauses, included for the first time in Title 8, par. 102(b) 7 Delaware Code, are only applicable in situations of an alleged breach of the duty of care and not in cases of duty of loyalty violations or if the director acted in bad faith.

The result of this development is the so-called conflict between the applicability of the duty of care and the duty of loyalty, the plaintiffs being interested to prove the breach of more than one fiduciary duty by the same directorial misbehavior. At the same time, directors defend themselves by invoking honest and good faith behavior and they try to narrow the scope of the duty of loyalty and the expansion of the meaning of diligence and prudence to reap the benefits attached to this latter fiduciary duty¹².

The risk of such situations is potential subsuming of a large number of subsidiary obligations of the duty of care in the category of loyalty and even including diligence and prudence within the duty of loyalty, under the guise of the impossibility of a truly loyal director's conduct without compliance with the duty of care. In our view, these challenging philosophical approaches concerning the concept of diligence and prudence (duty of care) as an integral part of the doctrine of loyalty should remain in a rhetoric state. Furthermore, practitioners and courts should pay particular attention to analyzing the limits of loyalty in order to be able to draw a clear line between the scope of due diligence and loyalty, without losing sight of the intervention of the Business judgment rule¹³.

Substantiating the meaning of "loyalty" in contemporary business law by assimilating social and normative influences¹⁴ with consideration of historical aspects will eventually lead to the full assessment of the potential of the duty of loyalty.

2.1. The meaning of "loyalty"

The word "loyalty" is derived from the French term "loi" which means *law*. Loyal behavior is due according to the law, to morals or conscience. Loyalty is "what is supposed to be the right thing in a certain context"¹⁵, a specific need, but it is consistent with the purely theoretical standard of the expected conduct. The juridical - philosophical doctrine assesses morality as situated "from a historical point of view in the collective memory and common aspirations, from a

¹² In *Emerald Partners v. Berlin* (787 A.2d, Delaware, 2001), the court specified that any clause adopted on the grounds of the provision in art. 102(b)(7) Delaware Code „prevents the recovery of material damages from directors in case of shareholders' claims, if it is exclusively based on breach of the duty of care”.

¹³ Currently, the Business judgement rule is provided for by Romanian law under art. 144 ind. 1 of the Law no. 31/1990. Expanding the duty of care and the Business judgement rule lies outside the paper at hand. For a comparative view of the Business judgement rule within the European Union, see Prof. Dr. Catană, R. N, Ponta, A., *The Business Judgement Rule and its reception in European Countries*, The Macrotheme Review 4(7), Austin, Texas, 2015.

¹⁴ *Supra* 3, p. 13

¹⁵ The Delaware Supreme Court recognizes that the duty of loyalty is context related. In the case *McMullin v. Beran* (765 A.2d, Delaware Supreme Court, 2000), the court considers that „the fiduciary responsibilities of a corporate director based on his mandate depend upon the specific context”.

social point of view, in distinct communities and from a cultural perspective in specific moral structures of reasoning and custom”¹⁶. In everyday language, the term "loyalty" is often associated with honest and fair, even affectionate conduct. Challenges arise when courts are faced with concrete determination of loyalty in a concrete case. The duty of loyalty took shape in the wake of various referential judgements and their grounds rendered by Delaware courts.

The essence of claim regarding a duty of loyalty violation is the firm belief that the director has misused the power he was conferred, the assets or current affairs of the company to secure a benefit for himself instead of putting a premium on the goals of the company¹⁷. The duty of loyalty is the imperative of directors' abstention from pursuing transactions in their own interest or between themselves as individuals and on behalf of the company¹⁸, from bad faith actions, fraud and from taking advantage of corporate opportunities. In addition, a fair conduct requires corporate directors to refrain from concluding transactions in conflict of interest¹⁹. These substantiated characteristics of loyalty led many theorists to identify clear distinctions between the duty of care and the duty of loyalty. However, a significant part of doctrine considers that, in absence of clear boundaries between the applicability of the two fiduciary duties and in absence of personal or financial disadvantageous interests of directors, unless the issue of lack of good faith and diligence is raised, a certain situation will only involve the duty of care and not the duty of loyalty²⁰. Both a negligent and an unfair director choose in these situations the achievement of their own goals instead of the interest of another party, the first director chooses to simplify the performance of his or her duties and the second one opts for tangible benefits²¹. Although the duties are similar in this respect, we consider that each of the two fiduciary duties has a much stronger structure than merely the verification of the condition of obtaining a personal benefit or the existence of a conflict of interest.

Although premises of the fiduciary duty of loyalty are not clearly defined or differentiated from the duty of care, some already in case law substantiated factors automatically lead to identification of duty of loyalty violations. Lack of

¹⁶ Hunter, James Davison: *The death of character*, Oxford University Press, Oxford, 2000, p. 11.

¹⁷ This definition was offered in *Steiner v. Meyerson*, 857, Delaware Chancery Court, July 1995. This wording is dominant in *common law* doctrine and was exported to European business law doctrine as well.

¹⁸ McCarthy, Brian J., Wong, Wallace M. *Advising the Board: Issues for Boards of Directors*, Practising Law Institute, no. 1183, New York, 2000, p. 659.

¹⁹ Ruder, David S.: *Duty of Loyalty—A Law Professor's Status Report*, Business Law Review no. 40, 1984, p. 1383.

²⁰ Easterbrook, Frank H. Fischel, Daniel R.: *The Economic structure of Corporate Law*, Harvard University Press, 1991, p. 103 and Branson, Douglas M. *Assault On another citadel: Attempts to curtail the fiduciary standard of loyalty applicable to corporate directors*, Fordham Law Review no. 57, New York, 1988, p. 375.

²¹ Anderson, Alison, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, University of California Law Review no. 59, 1978, p. 738.

loyalty evidence includes, without being limited to, grounds of treason, lying, fraud to the detriment of the company or to the board of directors, abdicating from the own duties or selling-off the own vote²². The duty of loyalty has an open and flexible content and courts usually avoid the assertion that a simple avoidance of conflict of interest shall exclude directors' liability only based on breach of this duty.

2.2. Conditions for implementation ascertainment of the duty of loyalty

The established legal literature distinguishes between "the minimum" and "maximum conditions" for the existence of the duty of loyalty²³. The minimum condition requires a loyal actor to refuse temptations and not to betray the subject of his loyalty. Examples of the minimum condition of loyalty include social and philosophical elements that demonstrate a basic commitment not to covet the goods of others and to subordinate the private interest to the served one²⁴. This minimum requirement may be treated as a basic element of human character, namely moral discipline, "the core aspect of a person's interior ability to refrain from something, an ability to inhibit desires and habits within the limits of moral order"²⁵. The maximum condition of the duty of loyalty involves elements of devotion, affirmative duties, an attitude of continuous voluntary practical drive²⁶.

This verification of the existence of loyalty is not a mere checking of the abstention from perfecting self-interest, but attaches great importance to the beneficiary of the fiduciary relationship, to the moral attachment towards him, as a necessary ingredient for affirmatively defining loyalty and not only negatively describing it by excluding inapplicable situations.

Doctrine and jurisprudence emphasize that a material gain to the director's benefit is the grounds of the duty of loyalty breach, namely his refrain from conflict of interest transactions²⁷ in order to insure he meets this obligation. This narrow view, meaning the absence of betrayal is useful for differentiating between the duty of loyalty and the duty of care. According to this view, the duty of loyalty is an expression of directors financially interested in certain business, to trade correctly²⁸. The wording accurately expresses the minimum requirement

²² Judgement of the case *Cede & Co. v. Technicolor, Inc.*, 634 A.2d, Delaware Supreme Court, 1993.

²³ Fletcher, G.: *Loyalty: An Essay on the morality of relationships*, Oxford University Press, vol. 91, New York, 1993, p.33.

²⁴ *Idem*, p 40.

²⁵ Hunter, *Supra* n.s. 15, p. 16.

²⁶ *Supra* 21, p. 24.

²⁷ Eisenberg, Melvin A.: *Corporate Law and Social Norms*, Columbia Law Review no. 99, New York, 1999, p. 1271

²⁸ *Idem*, p. 1272.

of loyalty, but suggests that this duty would be solely expected in situations where specific temptations exist.

Current case law tends to include in the concept of loyalty situations where there is no risk of financial benefits obtained by a director, and it includes in the breach of this duty the failures to demonstrate a positive commitment to the well-being of the beneficiary of this fiduciary duty.

The reference case *Guth v. Loft, Inc.*²⁹ captures the duty of loyalty in the context of the corporate opportunity doctrine, which we shall develop in a later section. The court considers that the duty owed by a director based on the duty of loyalty is twofold, i.e. not solely to actively protect the interests of the company he or she was entrusted with, but also to refrain from any act that would harm the company or that would deprive it of profit or advantages, which the company could benefit "due to the director's skills to obtain them". Highlighting the minimum requirement of loyalty was achieved by emphasizing the interdiction of treason, namely "suppressing the impulses to serve the own interests is not in itself a loyal act". Duality of the dimension of the duty of loyalty is also underlined by the concept of fairness and equity and by emphasizing the *fairness standard*, expressed by an attitude of advancing the company's activities³⁰.

In other words, in situations of actual or potential conflicts of interest, a simple examination of substantive and procedural fairness is not sufficient. To fulfill the duty of loyalty, a director must not only display healthy and faithful interests, but he is also mandated to promote and stimulate the interests of the company³¹. The fiduciary duty of loyalty requires a party to completely subordinate his or her own interests and solely to act for the benefit of the other party³².

In the context of this affirmative devotion, it is obvious that drawing clear boundaries between the duty of loyalty and the duty of care is impossible. The identification of the dual nature of loyalty, of its linguistic, social and philosophical meaning does not clarify the delimitation of the two fiduciary duties, but it rather reveals their intersections given the competing protected moral values. We consider, however, that an elaborated analysis of each particular situation is heady necessary, in order to avoid creating a discretionary nature of the duty of loyalty and depriving directors from the exculpatory effects attached to the duty of care.

²⁹ *Guth v. Loft, Inc.*, 5 A.2d, Delaware Supreme Court, 1939.

³⁰ *Fill Bldgs. Inc. v. Alexander Hamilton Life Ins. Co.*, 241 N.W.2d, Michigan Supreme Court, 1976.

³¹ The same idea is highlighted by the *Principles of Corporate Governance*, issued by the American Law Institute -, part VII, Remedies, Cap. 1, first edition in June 1985.

³² Alexander, G.S.: *A Cognitive Theory of Fiduciary Relationships*, Cornell Law Review no. 85, New York, 2000, p. 767.

3. The corporate opportunity doctrine

This theory covers situations where a director trenches upon a business opportunity that would legitimately inhere in the beneficiary of the fiduciary relationship, by exploiting the opportunity in his or her own benefit. Although this theory does not have a stable and predictable character, case law orientates directors for the purpose of deciding whether to hold back a business opportunity or to offer it to the company³³.

The most famous case capturing this doctrine is *Meinhard vs. Salmon*³⁴, where the two had formed a joint venture to rent office spaces. Shortly before the expiration of the lease, Salmon began secret negotiations with the owner and extended in his own name the lease for the same space and for additional offices. Meinhard found out about the transaction only after the conclusion of the new lease agreements and required that they are interpreted in the sense of being concluded in the name of the *joint venture* between the two business men, which Salmon obviously refused.

If concealing information or new business opportunities is allowed between business partners, these will be tempted to eliminate the other party in order to benefit from all the advantages of the received information³⁵. The reasoning in this case outlined a standard of recognition of this phenomenon: "partners owe to one another, during performance of business, the duty of the finest loyalty. Many expressions of behavior, allowed in daily life to those who act on the basis of arm's length principle, are prohibited to those bound by a fiduciary relationship. The trustee is bound by stricter duties than public moral. It is not just about honesty, but the standard of behavior is the pedantic accuracy of the most sensitive honor"³⁶. The court emphasized the importance of analyzing the context-specific external and internal circumstances, which lead the director to make that particular decision. Salmon was not a simple "adventurer" but an "adventurer with control of exclusive powers [...] who accepted the proposal without warning his partners engaged, a cunning misconduct, lacking candor. "

The second classic case for highlighting the corporate opportunity doctrine is *Guth vs. Loft Inc*³⁷, Loft was a producer and distributor of confectionery

³³ Bainbridge, Stephen M.: *Rethinking Delaware's Corporate Opportunity Doctrine*, University of California, Los Angeles (UCLA) - School of Law, Law-Econ Research Paper No. 08-17, 2009.

³⁴ *Meinhard v. Salmon*, 249 New York Supreme Court, N.E., 1928.

³⁵ *Supra*, n.s.33, the author suggests the adoption of rules that grant the company the intellectual property rights on the obtained information, a view which we do not embrace. The author considers that this approach would be more efficient than drafting arrangements to inform various aspects or than reciprocal monitoring. Even though this rule would not discourage the production of new pieces of information, because directors would still be encouraged to acquire new opportunities which enhance the value of the company, we consider that lack of excessive codification and liberty of action based on personal belief are the essence of corporate governance.

³⁶ *Supra* n.s. 34.

³⁷ *Supra*, n.s. 29.

and beverages, which although didn't produce Coca-Cola drinks, distributed similar sodas in its stores. Charles Guth, the general manager of Loft, obtained the effective control of the company Pepsi Cola Corporation, which was at that time in financial difficulty. Guth began to develop a clandestine program to mobilize Pepsi, by using funds, facilities and employees of Loft. The company Loft sued the director Guth for violating the duty to grant the company Loft an "informed chance to acquire Pepsi before doing this for himself", namely "the right of first refusal to purchase Pepsi".

In this case, the court outlined for the first time several questions that should be considered to determine the nature of the violated duty and the scope of the corporate opportunity doctrine³⁸. The analysis largely concentrated on what is known as the "*line of business test*", namely if the concerned business involving many risks is closely linked to the current or future business of the corporation. In this regard, the court held that Pepsi is directly related to the commercial activity of the company Loft, which was both producer and distributor of soft drinks. Although the company did not have at that time the core business of producing soft drinks, the Court considered that the line of business test should also encompass possible developments or expansions of the company in the future. Loft possessed the necessary knowledge, experience and resources to exploit the "Pepsi opportunity", and the combination of need and ability integrates this opportunity in the line of business of the company Loft³⁹.

Secondly, the question was whether the company Loft had a prior interest or any expectations of this opportunity, any business needs or the possibility to identify an alternative source of refreshments, in order to demonstrate that Loft did not have any legitimate interests in the opportunity to acquire Pepsi.

Another base line case for analyzing the corporate opportunity doctrine is *Broz vs. Cellular Information Systems Inc*⁴⁰. Robert Broz was the sole shareholder and president of *RFB Cellular Inc.*, but also a member of the board of *Cellular Information Systems Inc. (CIS)*, a competitor mobile services provider. Following a tip received from the brokerage company he was working with, Broz purchased a license for mobile telephony, Michigan 2 for RFB, even though he

³⁸ This explanation is often repeated in American doctrine, due to the clarity of approach: "*If a director is presented with a business opportunity that the company is financially capable of undertaking, which is in its nature on the line of business of the company and which represents a practical advantage for which the company has an interest or a reasonable expectation and if by embracing this opportunity, the director's own interest would be in conflict with the interest of the corporation, the law will not allow him to seize the opportunity for himself.*"

³⁹ Guth used his position to terminate the distribution agreement between Loft and Coca-Cola and to conclude a similar contract with Pepsi. While such conduct may be classified as fraudulent, because a director shouldn't compete with the business of the represented company, this aspect is not covered by this chapter. It is clear however, that by having the power to control the company Loft, the director Guth managed to impose an exclusive distribution contract with Pepsi and to determine the contractual terms according to his own interests.

⁴⁰ *Broz vs. Cellular Information Systems Inc.*, 673 A.2d 148, Delaware Supreme Court, 1996.

already owned a similar license, called Michigan 4. Although Broz did not formally offer the opportunity to the company CIS, he mentioned this aspect to its CEO and to several board members, who showed lack of interest on behalf of CIS in acquiring the license for mobile services 2, due to the financial difficulties of the company and the difficult negotiations that should have been carried out with other phone service providers. Following the acquisition, the third party who lost the auction to Broz, accused him of breach of fiduciary duties towards CIS because he used the opportunity to acquire Michigan 2 in his own interest.

The Delaware Supreme Court held that Broz did not breach his fiduciary duties by failing to present the offer to CIS, because Michigan 2 did not represent a suitable business opportunity for CIS and it was more appropriate for Broz than for CIS. Furthermore, the court identified the most long-lasting test to determine if a new business prospect represents a corporate opportunity. This is based on the question whether the company has a commercial interest or expectancy, a real ability to seize the opportunity, namely „*the interest-or-expectancy*” test⁴¹. The main component of commercial interest usually refers to projects for which the company has an existing contractual right⁴². The „expectation” element includes projects which are not already owned by company through existing contracts, but which are likely to materialize in view of current assets and rights.

A final approach of corporate opportunities is the *fairness test*, i.e. the test of fairness and equity. Under this approach, a business perspective can be classified as a corporate opportunity if its acquisition by the fiduciary would not meet the ethical or fair standards for the wellbeing of the company. The lack of success of applying this test lies in the impossibility of substantially articulating the contour of fairness and equity. The doctrinal formulation of a theory of fairness and equity, as fundamental premise of fiduciary duties is fragile, but the majority opinion tends to emphasize the procedural significance of this concept⁴³.

We can see the difference between Guth, who showed clear evidence of bad faith, and Broz, whose interest for the opportunity to purchase the license did not create a conflict of interest, because he only competed with a third party. However, Broz failed to formally present the opportunity to the company and the company did not expressly refuse the offer before Broz exploited it on his own account. We assert that formal procedures, although not mandatory in all cases, are able to create in these situations an anchor of safety. Recent *common law*

⁴¹ Talley, Eric and Harshmall, Mira, *The corporate opportunity doctrine*, University of Southern California Law School - Center for Law, Economics and Organization Law Journal, 2011.

⁴² In the case *Lagarde vs. Anniston Lime & Stone Co.*, 28. So, Alabama Supreme Court, 1999, the court considered that the fiduciaries who acquired 2/3 of the exploitation rights of a quarry seized a corporate opportunity, due to a written offer if the seller of that quarry addressed to the company. The court found that the opportunity should be “necessary” and “existential” or at least extremely important for the company to be able to address the existence of the component of the interest.

⁴³ Mitchell, Lawrence E.: *Fairness and trust in corporation law*, Duke Law Journal nr. 43, Durham, USA, 1993, p. 470.

jurisprudence creates a presumption that the director usually received information about business opportunities in his capacity as representative of the company, which has the effect of reversing the burden of proof. The fiduciary is therefore required to prove that the opportunity was brought into his notice in his individual capacity.

Another relevant aspect is the financial factor, that would have prevented the company to take advantage of the business opportunity. However, given the interdependence between fiduciary duties, the question of directors' extended due diligence arises. Based on their position, directors owe the duty to contribute to the financial success of the company and to obtain the necessary financial resources for it, including the acquisition of phone licenses, if these would increase the company's future profit and accelerate its financial return. In other words, if the director could make capital out of the opportunity on his own behalf, why should we assume *a priori* that the company could not have been able to achieve the same performance? A similar question was raised in *Meinhard vs. Salmon*, the court holding that "the one who committed to a fiduciary relationship should not think of himself".

To contribute to the predictability of the scope of the corporate opportunity doctrine, literature has grouped these premises for liability⁴⁴, but practice proved the imperative to also analyze the concrete manner how directors exploit the opportunity to the detriment of the company⁴⁵.

4. Duty of loyalty in continental law jurisdiction

Continental law faithfully imported Delaware duty of loyalty, with its broad meaning and scope for situations of real or potential conflicts of interest between a director and the company. Despite the homogeneous character of the duty of care implementation within the member states of the European Union and the similarity of wordings regarding the expected corporate directors' conduct, the procedures governing conflicts of interest are manifestly different⁴⁶. The fiduciary duty of loyalty in *common law* terminology is a compilation of comparable legal instruments, which even if not homogeneous, tend towards the same objective of protecting moral and equitable values and the importance of the social component drastically increased in recent years. Continental corporate law contains a dispersed variety of fiduciary standards and normative approaches. Although the superiority of one approach over the others cannot be certified, it

⁴⁴ *Supra*, n.s. 3.

⁴⁵ *Supra*, n.s. 41.

⁴⁶ Gerner-Beuerle, C., Paech, Philipp, Schuster, Edmund P.: *Study on Directors' Duties and Liability, prepared for the European Commission*, Department of Law, London School of Economics, London, April 2013, LSE Enterprise, p. 148.

seems that the effectiveness of regulations depends on the flexibility of interpretation of the fiduciary duty of loyalty and that certain concepts allow more accurate application in cases with more sensitive features.

Most member states adopted explicit norms on transactions between directors and companies, by addressing corporate opportunities and prohibiting anti-competitive conduct⁴⁷. However, comprehensive standardization of conflict of interests is not predominant, which does not necessarily indicate shortcomings in the business law systems, because most jurisdictions are familiar with fiduciary principles derived from ordinary civil law⁴⁸ and agency law.

The jurisdictions that regulate management of companies in the dualist system, often use this structure for distribution of authority between the various corporate bodies as a mechanism for moderating conflicts of interests, which explains the absence of certain regulatory norms in the field. Two interesting examples are found in the case of The Netherlands and Finland, both countries having fragmented regulations of the duty of loyalty, whose judicial interpretation grandfathered in customary law of both states. The case law constructions on the general wording of directors' positions are joined with elements of the duty of care. The Netherlands requires directors to act in accordance with the "standards of reasonableness and fairness"⁴⁹, they are responsible for "proper performance of the duties with which they were charged"⁵⁰. We assess that this approach is indeed able to capture the values protected by the duty of loyalty, without creating confusion between the duty of loyalty and the duty of care. Finland requires directors to act with care and to promote unconditionally the interests of the company⁵¹. This wording proved to be very useful for case law determinations of the duty of loyalty, either in its individuality or in overlaps with the duty of care. Similarly, Swedish law is sufficiently flexible to address conflicts of interests where legislative gaps don't cover specific situations.

Given the options of legislatures in most member states, we consider that the prevailing approach was the avoidance of dogmatic fundamentals and comprehensive regulations, which are not decisive for the correct interpretation of conflicts of interests. Corporate governance practice shows that less exhaustive rules prove more effective for preventing violations and for ensuring the predictability of the law.

Most jurisdictions regulate corporate opportunities, even if they do not use this particular terminology, and some states which are heavily influenced by

⁴⁷ The most comprehensive rules can be found in the Spanish Corporation Act (2010) and in the UK Companies Act (2006).

⁴⁸ Not only *common law* states like Cyprus and Ireland, but also civil law jurisdictions like France, Germany, Hungary, Latvia and Poland draw the fiduciary rules to the conflict of interest from the ordinary civil law.

⁴⁹ Section 2.8 (1) from the Dutch Civil Code.

⁵⁰ Section 2.9 (1) from the Dutch Civil Code.

⁵¹ Cap. 1, art. 8 of the Finnish Company Act.

British *common law*, such as Ireland, Cyprus and Malta, but also Lithuania provide for the corporate opportunity doctrine. The most developed version is found in the United Kingdom, strongly shaped by extensive case law. It is irrelevant if the director in the British corporate system became aware of the corporate opportunity in his managerial position or in his private capacity or whether the opportunity is circumscribed to the line of business of the company, as long as the company can adjust and refocus its operations to become financially interested in that respective opportunity. Current financial or legal obstacles of the company to exploit the opportunity, which are able to be eliminated through reasonable measures, become irrelevant⁵².

Three jurisdictions from the same family law, Austria, Germany and Slovenia influenced each other in the formulation of provisions that distinguish conflicts of interest between a director who operates a competing business and the conclusion of certain transactions⁵³. Operating a competing business is expressly prohibited, regardless of the relevant market of the competing company, in order to ensure the devotion of directors' absolute attention to the represented company. The interdiction to conclude parallel transactions in the director's name applies only if he or she is actively engaged in the line of business of the represented company and these cases go back to the classical conflict of interest rules.

Malta, Spain and Italy expressly regulate the corporate opportunity doctrine and the duty not to compete with the company, the first being provided in the Companies Act of each state, and the second in the ordinary civil law. In jurisdictions which didn't adopt imperative rules on corporate opportunities, such as France, Belgium, Luxembourg, the Netherlands and Scandinavian states, practice shows that most contracts concluded between the company and a director include express non-competing clauses, with the consequence of contractual liability of directors who breach the duty of loyalty or who engage in anticompetitive behavior.

In French law, the existence of a general duty of loyalty is undisputed, but its legal basis remains unclear. Recent French doctrine regards the exploitation of a corporate opportunity by a director similar to a corporate crime, such an abuse is called *l'abus des biens sociaux*⁵⁴. Belgium⁵⁵ and Luxembourg derive fiduciary liability for management mistakes or lack of proper exercise of mandate from ordinary civil law. Other countries which do not regulate corporate opportunities are The Netherlands, Romania and the Nordic countries, in particular due

⁵² Davies, P., Worthington, Sarah: *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell, 9th edition, London, 2012, p. 164.

⁵³ Art. 79(1) of the Austrian Joint Stock Corporations Act, art. 88(1) of the German Joint Stock Corporations Act, art. 41 of the Slovenian Company Act.

⁵⁴ Cozian, M., *Droit des sociétés*, Lexis Nexis, 20th edition, Paris, 2007, p. 617.

⁵⁵ art. 527 Code des Sociétés: „*Les administrateurs . . . sont responsables, conformément au droit commun, de l'exécution du mandat qu'ils ont reçu et des fautes commises dans leur gestion*”.

to the lack of jurisprudence in this domain, but Romanian law tangentially mentions corporate opportunities in art. 153 ind. 15 of the Companies Act.

The lack of substantive rules for sanctioning infringements of fiduciary duties and structural weaknesses of enforcement are common in most member states. Although we consider that regulatory intervention in content and application of fiduciary duties is not desirable, creating a structure for judicial evaluation and for sanctioning breaches of fiduciary duties would be an important stepping stone for the efficiency of fiduciary relationships in continental law jurisdictions.

A significant number of countries, including Bulgaria, Greece, Latvia, Romania, Slovakia and Slovenia provide in their corporate governance laws specific references to the agency contract to complement directors' liability. In addition, in cases where the legal provisions prove insufficient, courts and business law doctrine have resorted to general principles of law to assert the fiduciary relationships between a company and directors. Examples of interactions between legal provisions and jurisprudential influences are common in France, Germany and in several Nordic and Baltic countries, such as Denmark, Finland, Latvia and Sweden. The French Commerce Code expressly mentions legal consequences for violations of the law or of statutory provisions, but also for management mistakes, *faute de gestion*⁵⁶, without explicitly mentioning the duty of loyalty, which was exclusively developed by case law. Similarly, the German Stock Corporation Act contains a single provision on directors' liability, structured within the provision of the duty of care⁵⁷ and a number of provisions modeled for situations when the duty of loyalty applies, such as the duty not to compete with the company or the duty of confidentiality⁵⁸. However, there is an enshrined jurisprudential principle in Germany, according to which directors owe a general duty of loyalty. This principle is developed by courts and derived from the principles of good faith in contract law. It covers situations which are not explicitly regulated by the articles of association.

5. The duty of loyalty under Romanian law

The Romanian Civil Code⁵⁹ expressly mentions that its provisions represent the ordinary, common provisions⁶⁰ for companies, applicable to all organizational forms⁶¹. The usefulness of the Civil Code proves to be higher for limited

⁵⁶ Code de Commerce, L225-251.

⁵⁷ Art. 93 German Joint Stock Corporations Act.

⁵⁸ Art. 93, 88, 93 (1) 2nd thesis, German Joint Stock Corporations Act.

⁵⁹ The legal references of the Civil Code in the present paper refer to the New Romanian Civil Code, Law no. 287/2009.

⁶⁰ The Civil Code regulates the partnership agreement (art. 1881 ff.) and the agency contract (art. 2009 ff.).

⁶¹ art. 1887 Civil Code, art. 139 alin.1 Law no. 71/2011 for implementation of Law no. 287/2009.

liability companies, given that the *sui generis* legislation of joint stock companies contains specific and sufficiently exhaustive provisions⁶².

Unlike *common law*, the Romanian corporate law system lines up with the German approach and tries to reach a balance between creditors' and shareholders' rights of fulfillment of business purpose by providing directors with increased trust. They are regarded as actors whom the market expects to react as rational players⁶³. Through various legislative changes, the tendency to increase decision-making flexibility materialized by enlarging the rights of executives⁶⁴ and by expanding representativeness powers of directors. Inspired by the US model of the Business judgment rule, the legislature enriched references of fiduciary duties, both in ordinary (common) law and in the special legislation.

Traditionally, the director's position is prevalently filled with legal or statutory obligations. Statutory obligations are inherent to the management function and determines this from an organic point of view. By successive amendments, the legislature tried to regulate the concrete exercise of these theoretical duties by defining their fiduciary character.

The expanded trust which directors were granted by regulating the duty of care is doubled by the duty of loyalty. Under current legal provisions, directors cannot be incompatible⁶⁵ and they are not allowed to operate competitive business without the consent of shareholders, neither on their own account, nor for other persons.

In addition, at the time of their appointment, the absence of any doubt concerning a possible conflict of interest will be verified. The duty comprised in art. 79 and art. 144 ind. 3 of the Companies Act requires directors who are directly or indirectly interested in a given transaction to refrain not only from exercising their voting rights on that operation, but also to participate in deliberations, in order to exclude any doubt of influencing towards a decision which is contrary to the purpose for the company. By law, there is conflict of interests also if the director is aware of interests of his spouse, his relatives or other related persons up to the 4th degree of kinship.

The prohibition of using business opportunities for personal benefits, laid down in art. 144 ind. 3 par. 1 and 2 of the Companies Act also applies to members of the Supervisory Board and of the Executive Board of companies managed in

⁶² Title III of Law no. 31/1990, *Funcționarea societăților* (The functioning of companies) Chapter I contains common rules for all types of companies.

⁶³ M. Siems, *Die Konvergenz der Rechtssysteme im Recht der Aktionäre: ein Beitrag zur vergleichenden Corporate Governance in Zeiten der Globalisierung*, Mohr Siebeck, Tübingen, 2005, p. 331.

⁶⁴ The use of the term "director" in this paper is understood to be extended to members of the directorate in joint stock companies that adopt the dualist management system.

⁶⁵ art. 17 of the Ordinance no. 82/2007 modifies art. 138 ind. 2 of Law no. 31/1990.

the dualist system and to directors of joint stock companies managed in the unitary system, according to art. 152, art. 153 ind. 2 par. 6 and art. 153 ind. 8 par. 3, which provide for the appropriate application of art. 144 ind. 3.

Under national law, loyalty reflects the British business concept of personal subjective duties, which includes the performance of everything that the director reasonably believes to be in the best interests of the company, this idea being fully attached to the broad concept of good faith⁶⁶. The fiduciary duty of loyalty, provided for in art. 144 ind. 1 par. 4 of the Companies Act is called in national doctrine as the "liaison between the director's office and the interests of the company"⁶⁷. Even though there is no legal definition of the notion of the *company's best interests*, Romanian doctrine and jurisprudence does not lack a codified determination of this term. Prof. Gh. Piperea displays the magnitude of this concept in the context of loyalty, as the "*collective interest of associates, shareholders and indirect shareholders [... n.s. who] by their irreversible investment in the company became dependent, even partially, on the business of that company and, therefore, this interest is keeping them together, with or without them being aware of this 'solidarity' [...] This collective interest [...] transcends the individual or group interests of associates, shareholders and indirect shareholders, making them revolve around the business ran by the company*"⁶⁸. Thus, doubling the legal provisions of the duty of loyalty with the interdiction of perpetrating competitive acts does not only represent an interdiction of conflicts of interest in the classical sense, but also of anticompetitive actions against the commercial purpose of the company.

In addition to the express provision of the duty of loyalty, Romanian legislature doubles the prohibition of all kinds of usurpation of business opportunities with the duty not to compete with the company. According to art. 153 ind. 15 of the Companies Act, directors of a joint stock company in the unitary system and members of the directorate in the dualistic system may not fill positions of directors, managers, members of the Board or of the Supervisory Board, auditors, internal auditors or associates with unlimited liability in other competing companies or in companies with the same core business, neither in their own name, nor for other persons, without prior authorization of the Management Board or of the Supervisory Board. The same prohibition is outlined in art. 197 par. 2 of Law 31/1990, adapted to managers of limited liability companies.

⁶⁶ *Supra* n.s. 5, p. 173

⁶⁷ Todică, Carmen: *Răspunderea juridică civilă a administratorului societății comerciale. Studiu de doctrină și jurisprudență*, Ed. Universitară, Bucharest, 2012, p. 1744

⁶⁸ <http://www.juridice.ro/297547/principiile-dreptului-societatilor-la-cinci-ani-dupa-instalarea-crizei-economice-in-romania-ii.html> (accessed on 11.08.2016)

5.1. The agency contract in the Civil Code - relevant issues of directors' mandate

In the Civil Code approach, the prevailing idea is the contractual character of directors' office and mandate, and according to national doctrine and case law, the legal nature of a director's role is that of an agent⁶⁹. According to the *agency theory*, created by US economic-legal doctrine in the early 70s, owners and managers of a company conclude a contract which implies the representation of the first by the latter.

In the same manner, representation becomes an intrinsic element of administration under the agency contract, under the express provision of art. 2012 Civil Code. Under the 1864 Civil Code, the juridical mechanism of representation was explained on the doctrinal basis of effects of classic agency, which was by nature a contract that assumed representation. Among other aspects, the emphasis of representation deriving from agency law is evidenced by the fact that members of the directorate or directors of a joint stock company cannot be simultaneously employees of the same company during the performance of their mandate, the office being incompatible with the institution of mandate which, conferred "*intuitu personae*"⁷⁰.

The content of agency is regulated by Civil Code, both by imperative and by suppleness rules, the chosen legal formula aims at creating a horizontal legal relationship, mainly bolstered by fiduciary duties and encouraged by the *intuitu personae* nature of the relationship. Complementing the legal and statutory duties which the agent cannot depart from, the concrete performance of the mandate acquires flexibility and the purpose is to grant as much credit to the director's business judgment and to his decision-making capacity.

The structures of Romanian companies provide shareholders and associates sufficient possibilities to control directors, the most important leverage being the almost discretionary appointment and removal of directors from office⁷¹. The principle of *ad nutum* revocation of the mandate is maintained from the Civil Code 1864, but the discretionary manner of revocation is nuanced by art. 2031 Civil Code, which provides that revocation can occur "*at any time [...] regardless of the form in which the agency agreement was concluded and even if it was declared irrevocable*". Therefore, if trust disappears from legal relationships that originate from the agency, whose essential feature is the *intuitu personae* character, revocation retains its discretionary nature.

⁶⁹ *Supra* n.s. 49, p. 95. The report draws the conclusion that the Czech Republic, Poland and Romania present similarities, since the principles of the duty of loyalty drawn off from ordinary civil law were not amplified or adjusted to the specific circumstances of fiduciary duties in business law and do not seem to play a big role in jurisprudence.

⁷⁰ art.137 ind. 1 par. 3 of Law no.441/2006 in conjunction with Ordinance no. 82/2007.

⁷¹ art. 137 ind.1 par. 4 of Law no. 31/1990

5.2. Directors' duty of loyalty in the Civil Code and in the Companies Act

The legal fiduciary relationship is defined by British literature⁷² as the relationship in which one party acts in the name and on behalf of the other party, the foundation of this relationship is the concept of trust. Following the same rationale, the Romanian legislature chose to regulate fiduciary duties as institutions deriving from the agency contract and from the institution of „managing the assets of another person”.

The doctrinal and jurisprudential interpretation of the duty of loyalty in Romania drifts from the general duty of good faith in the execution of mandate in art. 970 Civil Code, in conjunction with the duty to „manage an asset of another person”, provided for in the Companies Act. Romanian doctrine regards the duty of loyalty as „the heart of the general duty of good faith” and as its active component, which enhances the legal value of this general civil law institution⁷³.

In the same manner, the legislature regulates the duty to duly inform and the duty of transparency, which are in an interdependent relationship with the duty of loyalty, i.e. the duty to avoid or declare conflicts of interest between directors and the company. The general duty is included in art. 2018 par. 2 Civil Code (the former art. 378 Commercial Code) and is supplemented by provisions of the special law.⁷⁴

While the Companies Act does not contain any express provisions on the performance of directors' office in good faith, the Civil Code provisions applicable to the agency contract are used to fill these gaps. Art. 803 par. 2 Civil Code, regarding the partnership agreement, provides for a general duty of loyalty and duty of the trustee to act with honesty and loyalty in order to achieve the best interests of the beneficiary or the intended purpose. In addition, art. 72 of Law no. 31/1990 states that "*directors' duties and responsibilities are regulated by the provisions of the agency contract and by the present law*". Given the remunerated nature of the corporate mandate according to the wording of the amended legal norm, directors' liability is assessed by the abstract type of fault, namely, *culpa levis in abstracto*.

Similarly, the duty of care provided for in art. 144 ind. 1 of Law no. 31/1990 was introduced in 2006. By formulation of this standard of conduct, namely, "*board members will exercise their mandate with prudence and diligence of a good manager*", the legislator maintained the essence of this fiduciary duty from *common law*. However, the legal text remains loyal to the nature and essence of the institution of „managing the assets of another person” in art. 1330 Civil

⁷² Hood., P., *Director's Duties under the Companies Act 2006: Clarity or Confusion?*, „The Journal of Corporate Law Studies”, Hart Publishing Vol. 13, London, 2013, p. 1-49.

⁷³ *Supra* n.s. 4, p. 172.

⁷⁴ Art. 117², art. 131 par. 5, art. 153⁹ of the Law no. 31/1990, art. 224 of the Law no. 297/2004 of the Stock Market.

Code. According to the legal norm, these provisions are not applicable to limited liability companies or to joint stock companies. In the same manner, par. 2 of art. 144 ind. 1 adopts the Business judgment rule by including classical components, such as the duty to be aware of relevant information on the evolution of corporate life while supervising it.

A reference Decision is *Decision no. 2907/19.05.2011 pronounced by the Administrative and Tax Law Division of the Supreme Court*, when the Supreme Court maintained the legality of the decision of the boards of directors of Romania's National Bank, ordering the withdrawal of the authorization granted to a person who was holding the position as member of the board of a commercial bank. The Court determined violations of the duty of care because the director voted in favor of granting advantageous credits to a company that owned 49% of the share capital of another company, where he was a member of the board as well.

The Supreme Court rejected the director's appeal by applying the provisions for both fiduciary duties provided in the Companies Act, the duty of care and the duty of loyalty⁷⁵. According to the *status quo* retained by the court and to the reasoning of the Decision, motivation, we consider that the marking of the duty of loyalty would have been more appropriate than the acknowledgement of the violation of the duty of care. The court acknowledged the applicability of art. 144 ind.1 of the Companies Act, but observed the conflict of interests covered by art. 144 ind. 3, which is in our view a typical breach of the duty of loyalty and not of the duty of care. As detailed in the previous section, good faith is a characteristic of due diligence and prudence, but in essence, the concept of good faith is the core of the duty of loyalty⁷⁶. Furthermore, according to doctrinal and jurisprudential establishment of the notion of "loyalty in business law, directors' personal financial interest is a classical situation of breach of the duty of loyalty. The court considers that *"the lack of objectivity and impartiality by a person having powers / qualities, both within the company and within the credit institution is obvious, because the two don't converge to a common interest."* Although the claimant's lack of good faith as a former director is obvious, we consider that the court makes a confusion between the two fiduciary duties, which according to the current legal regulation only has theoretical importance, since the effects of penalty are the same in cases of violations of either fiduciary duty.

The wording chosen by the Romanian legislature remains faithful to the classic concept of loyalty, namely in the absence of contradiction of interest, the legal text does not apply. Referential doctrine reflects directors' duty of loyalty

⁷⁵ For more details, see Ponta, A.: *The Evolution and Complexity of Directors' Duty of Care*, „Perspectives of Business Law Journal”, Vol. 4, Issue 1, November 2015, p. 38-51.

⁷⁶ *Supra* n.s. 49, p. 69. The report draws the conclusion that, according to Romanian doctrine and jurisprudence, the general duty of good faith in art. 14 Civil Code represents the essence of the duty of loyalty.

towards the company as being "*essentially the duty to treat the company's business with fairness and honesty, only pursuing the interests of the company and refraining from prevailing personal interests while in office and from entering in conflict of interests with the company*"⁷⁷. As manager of another person's interests, the director must promote exclusively corporate interests, without being tempted by the distortion of the delegated powers or by mismanaging the ultimate goal of the company.

6. Conclusion

Business law, having a distinct vocabulary, practices and applicability in specific communities, implements ordinary law rules through their institutionalization with particularities of this legal discipline. Due to its heterogeneity, the duty of loyalty was not conferred the chance of articulation of specific rules that exhaustively list the circumstances for breaching this fiduciary duty, but case law customized the expressions of loyalty from the common language of the term. Loyalty remains a social and moral norm and a legal standard that cannot be reduced to one single rule.

Through the amplitude of the concept outside the business law literature and by the unfortunate limiting of the duty of care in this context, the concept of "loyalty" can provide courts and corporate governance actors the answer to the requirement of the expansion of this duty. The expansion of the duty of loyalty in recent case law is expressed by the overcome of the negative condition of lack of betrayal and by including active elements of attention and devotion. The doctrinal, jurisprudential and customary trend in corporate governance is maintenance of the duty of loyalty as the focus of fiduciary duties and of morality of business law. Although conflicts of interests ceased to be associated with duty of care violations, the overlap of the fundamental fiduciary duties cannot be avoided. The confluence of legal and economic elements in the past three decades has begun to lose ground to the emergent theories which activate moral norms and enrich the understanding of the relationship between social norms and business law. We consider that removing these theories from the context of inter-networking of law with social norms would not be appropriate for the clarification of fiduciary duties and would harm the potential of business law to enrich the content of the generous notion of loyalty. The wider context of public morals enables literature to gain linguistic access and the gives courts the possibility of expressing and imposing social norms in business law practice.

Similarly, in continental business law, directors' duties to promote the highest interests of the company is broadly interpreted as being the legal basis of the often unwritten duty of loyalty. Directors who take advantage of corporate

⁷⁷ *Supra* n.s. 5, p. 173.

opportunities are viewed as manifesting a conduct that does not promote the highest interest of the company.

Under Romanian national law, loyalty reflects the personal subjective business concept of directors, who are required to do everything that they reasonably believe to be in the best interests of the company, the duty of loyalty being closely attached to the institution of good faith and reflecting the *intuituu personae* nature of agency law. The notion of trust is central to the concept of loyalty in business law, but by lacking rich jurisprudence in this domain, the development of this concept is currently a mission of the doctrine.

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Administrative Contracts in the European Union Law

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Abstract

The administrative contracts of procurement and concessions involving substantial funds, one of the main sources that feed the ongoing process of economic and social development of Member States. The article analyzes developments in European legislation on public contracts and concessions, purpose and action directions of these regulations. The article points out the role of EU regulations in the field of public contracts. It stresses that freedom of exchange and application of competition rules of the common law can not be sufficient to ensure a genuine internal market for public contracts in the European Union. To these must be added the harmonization of procedures in Member States through EU directives regulating: to choose the form of adjudication, advertising, conditions for participation of undertakings, conditions for awarding contracts, ways of contesting the proceedings.

Keywords: *administrative contracts, public procurement, concessions, European Union law, the Single Market.*

JEL Classification: K23, K33

1. Evolution of EU legislation on of public procurement contracts and concessions

The logic of the European Communities was right, since their creation, the economy, the single market, promoting fair competition between markets and services².

The administrative contracts of procurement and concessions involving substantial funds, one of the main sources that feed the ongoing process of economic and social development of Member States. The lack of open and effective competition in public contracts was long one of the most obvious obstacles to completing the internal market in the European communities.

First Community law which regulated this field was Directive 70/32 EEC of 17 December 1969 on public procurement. This directive only wanted to obtain a coordination of national rules not provide for the removal of inequalities in

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² See Georges Vlachos, *Droit public économique français et européen*, 2^e édition, Dalloz, Paris, 2001, p. 222.

national laws and has not implemented at the level of public contracts, the Community principles on the free circulation of goods, works and services³.

A step forward was made by Directive 71/305 of 26 July 1971 concerning the award of public works contracts and Directive 77/62 of 21 December 1976 concerning the award of public contracts. These laws have imposed certain obligations towards the establishment of a common market:

- Announcing the public invitation competitions between entrepreneurs by limiting direct agreement procedures;
- Publication in an official journal of the European public procurement contract notices;
- Inclusion in documents accompanying technical specifications of the contract, which may refer to national or European standards.

This regulation, however, was insufficient, leaving many unresolved issues⁴:

- The existence of thresholds for application of the Directives excessively high;
- Non-coercive character of the selection of procurement procedures, technical specifications and criteria for awarding contracts;
- The narrow confines for auctioning, which was detrimental to foreign bidders;
- Limitation to a specific area, given that the regulations did not include service contracts; and defense equipment contracts; public service contracts in the water, energy, transport and telecommunications;
- Contain no appeal procedure, although appeals in national systems are often inadequate and differs significantly specifics law.

Community legislation has evolved further in the following directions⁵:

- a) improving existing directives:
 - Directive 77/62 of 21 December 1976 was supplemented by Directive 88/255 of 5 March 1988 concerning the award of public contracts;
 - Directive 71/305 of 26 July 1971 Directive 89/440 was completed July 18 1989 on the awarding of public works;
- b) regulation of sectors that were not previously covered:
 - It was approved Directive 92/50 of 18 June 1992 on the coordination of procedures for the award of public service contracts;
 - Directive 90/531 was adopted on 17 September 1990 on the procurement procedures of establishments operating in the water, energy, transport and telecommunications.

³ Dumitru Cernei, *Studiu comparativ privind achizițiile publice*, Chișinău, 2002, under the auspices TACIS, p. 3.

⁴ Idem.

⁵ Ibidem, *op. cit.*, p. 4.

At June 14, 1993 were approved three basic directives for the three sectors of government procurement:

- Directive 93/36 / EEC of 14 June 1993 on the coordination of procedures for the award of public supply contracts;
- Directive 93/37 / EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts;
- Directive 93/38 / EEC of 14 June 1993 on the procurement procedures of establishments operating in the water, energy, transport and telecommunications.

These directives have been amended subsequently by other laws.

Review procedures have been regulated by Directive 89/665 / EEC of 21 December 1989 *on the coordination of laws, regulations and administrative provisions relating to enforcement proceedings for the appeal against the award of public supply contracts and public works*⁶ and Directive 92/13/EEC of 25 February 1992 *coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications*⁷. Although they have undergone many changes, Directives 89/665 / EEC and 92/13 / EEC are in effect today.

In 2004 EU legislation on public contracts has been revised and simplified. Thus the whole field of public procurement has been synthesized in two directives:

- Directive 18 / EC / 2004 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, goods and services⁸ takes over and completes the provisions of Directives 93/36 / EEC, 93/37 / EEC and 92/50 / EEC, the directives being repealed.
- Directive 17 / EC / 2004 of the European Parliament and the European Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services⁹ which repeals Directive 93/38 / EEC.

The purpose of this review it was to modernize and simplify the Directives, aiming to:

- Unification and consolidation classic directives on supplies, services and works into one with identical rules and procedures for all three sectors;
- Adapting directives to existing practices in Member States and the European Court of Justice;

⁶ Published in the Official Journal of the European Communities, series L, no. 395 of December 30, 1989, as amended and supplemented.

⁷ Published in the Official Journal of the European Communities, series L, no. 76 of 23 March 1992 with subsequent amendments.

⁸ Published in J.O. L 134 of 30 April 2004.

⁹ Published in J.O. L 134/1 of 30 April 2004.

- Allow the use of electronic communication, electronic procurement of new technologies and procedures more flexible.

In 2014 the European Union appeared November 3 directive on public contracts:

- Directive 2014/23 / EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts¹⁰;

- Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 / EC¹¹;

- Directive 2014/25 / EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services and repealing Directive 2004/17 / EC¹².

Member States have had a period of 24 months to transpose the Directive into national laws.

The new directive redefines the concept of contracting authority, referring to authorities sub-central (regional or local) which will benefit thresholds, rules of advertising and deadlines more flexible, determine the conditions under which it can change public procurement contract, shortening minimum public tender procedure and organization first established general principles to be observed in the award, performance and termination of concessions.

2. Considerations about the purpose of EU regulations in the field of administrative contracts

With regard to, EU regulations in the field of public contracts and concessions we make the following remarks¹³:

- ***European directives on public contracts establish general principles to give unity of economically European construction***¹⁴: the prohibition provisions and discriminatory practices with respect to foreigners, especially in order to benefit from the concessions or authorizations concession issued State or other public law (general programs adopted by EEC December 18, 1961); providing guarantees for fair competition through transparent tender procedures and award (Directive 93/37 / EEC); respect for the election procedure of the contractor, the

¹⁰ Published in the Official Journal of the European Union L 94 of 28.3.2014.

¹¹ Published in the Official Journal of the European Union L 94 of 28.3.2014.

¹² Published in the Official Journal of the European Union L 94 of 28.3.2014.

¹³ See Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, C.H. Beck Publishing House, Bucharest, 2009, p. 425-432.

¹⁴ For details see Cătălin-Silviu Săraru, *Contractele publice*, in Ioan Alexandru (coord.), *Dreptul administrativ în Uniunea Europeană*, Lumina Lex Publishing House, Bucharest, 2007, p. 308-314; Martin Trybus, *Public contracts in European Union internal market law: foundations and requirements*, in Rozen Noguellou, Ulrich Stelkens (coord.), „Comparative Law on Public Contracts”, Bruylant, Bruxelles, 2010, p. 81-119.

principles¹⁵ of non-discrimination, equal treatment, transparency, proportionality¹⁶ and conclusion of the contract *intuitu personae*¹⁷.

- **European legislation in this area aims at opening to competition of procedures for awarding public contracts for all enterprises across the European Union**¹⁸. The role of EU regulation from economic desire is to overcome national boundaries giving freedom of movement and economic operators, on the other hand, to prohibit discrimination between public and private operators¹⁹. According to **the mutual recognition principle**, the Member States must accept the products and services provided by operators in other EU countries, where products and services are standards set by the law of the Member State of origin²⁰. **Transparency of procedures for awarding** contracts is an underlying principle of the rules prohibiting discriminations between operators²¹. Then, of the EU regulations on public contracts are outlined clearly **the principle of equal treatment of public and private operators**²², under which EU rules apply to public and

¹⁵ According to para. (2) of the preamble to Directive no. 2004/18 / EC award of contracts concluded in the Member States of the Union on behalf of the State, local authorities and other bodies governed by public law must respect the principles of the EC Treaty and in particular the free movement of goods, freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

¹⁶ See Dumitru-Daniel Șerban, *Principiul proporționalității în domeniul achizițiilor publice*, „Dreptul” no. 9/2007, p. 77-99 where the author analyzes the concept of proportionality in Community law and public procurement law in Romania.

¹⁷ See Communication interpretation of Commission on concessions under Community law, published in OJ C 121 of 04.29.2000.

¹⁸ See also Pierre Mathijsen, *Compendiu de drept european*, 7th edition, Bucharest, Club Europa Publishing House, 2002, p. 448-451.

¹⁹ On EU policy on competition and state aid incompatible with EU internal market see Cătălin-Silviu Săraru, *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, p. 39-48 in Cătălin-Silviu Săraru, *Studies of Business Law- Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013; on the application of the principles of non-discrimination and equal treatment in the award of public procurement contracts in the EU and the EU Court of Justice to see Martin Trybus, *op. cit.*, 2010, p. 98-102.

²⁰ For a study on the principle of mutual recognition to see Mădălin Irinel Niculeasa, *Legislația achizițiilor publice. Comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2007, p. 55-80. Applying this principle in public procurement means that the Member State where the service is provided or the goods delivered must accept the technical specifications, certificates and qualifications obtained in another Member State. Thus, for example, the Member State where the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State, qualification attesting professional capacities, technical and financial (p. 55, 56).

²¹ Martin Trybus, *op. cit.*, 2010, p. 103-109.

²² Under the influence of this principle we are witnessing today an evolution marked consisting of the progressive abandonment of markets protected operating in traditionally some public enterprises managing public services (mainly in the sectors of air transport and rail, telecommunications and energy) in favor of a effective competition between public and private operators – see in this regard Jean-Philippe Colson, *Droit public économique*, 3^e édition, L.G.D.J., Paris, 2001, p. 333, 334.

private enterprises the same conditions. EU law therefore acts as a unifying factor of public and private law. We find that the model public-private partition French legal system is not in EU law²³. Interests and ideals that Europe serves nowadays it seems no longer compatible with the "royalty" of administrative law, the frenchman P. Legendre²⁴ was talking about.

Unlike the French model, EU law has its source in an opposite-sharing social roles, the promotion of private enterprise and market principles implies a significant reduction in administrative functions and public law that underpins them. French doctrine is estimated that no sector is more difficult to reconcile with freedom of movement or provision of services in the European Union as the administrative contracts, because those contracts are, by their nature, discriminatory, one of the contractors is a public authority acting in pursuit of public interest²⁵. The European Community has therefore undertaken a sustained effort to progressively towards liberalization of public contracts. This liberalization was applied successively of public works, supplies, services; concessions; certain categories of purchases in particular sectors (water, energy, transport, telecommunications);

- EU law focused on the development of the single market gave rise to living disputes at national level where he often put the question of delimitation of borders between market logic and common mode internal public of any State, or in other words, border demarcation between EU interests and interests national²⁶. So-called conflict between the logic of the single market private and public logic which was in the national sovereignty of each state was mostly solved judicially. In French jurisprudence for example emphasized that not every concession enters the field of reference of the EEC Treaty – „this being an operation for a national activity on which the hand over, and a public authority, his regime keep right internal. There will be no interference with Community law than when concession creates relationships likely to question the rules of the Common Market”²⁷, particularly competitive conditions for environmental protection in the Union. Likewise ruled the European Court of Justice judgment of 18 June 1991 on the concession of exclusive rights in broadcasting - "Community law does not preclude the award of a monopoly on television for reasons of public interest, non-economic. However, the organizational arrangements and to exercise such a monopoly must not create any damage Treaty provisions on the free movement

²³ See also Ioan Alexandru, Mihaela Cărăușan, Sorin Bucur, *Drept administrativ*, Lumina Lex Publishing House, Bucharest, 2005, p. 399-401.

²⁴ P. Legendre, *Trésor historique de l'État en France*, Fayard, 1992.

²⁵ See L. Cartou, J.-L. Clergerie, A. Gruber, P. Rambaud, *L'Union européenne*, Dalloz, 2000, 3^e éd., p. 306.

²⁶ See Iulian Avram, *Contractele de concesiune*, Rosetti Publishing House, Bucharest, 2003, p. 222, 223.

²⁷ C. Brechon-Moulenes, F. Lorens, M. Bazex; G. Guisolphé, J.-B. Auby, P. Delvolve, *La concession de service public face au droit communautaire*, Sirey, Paris, 1992, p. 59.

of goods and services, as competition rules". We have some reservations about the idea boundary between EU law and national law based primarily on Kelsen's view, widely accepted today that the Roman-Germanic law system is subordinated to the principle of hierarchy of laws and there can not be two parallel systems of law into a country. In jurisprudence and doctrine often meet reflexes of national sovereignty. Thus, we find that although the EC Treaty and ECJ case law [*causes Costa v. ENEL (1964) and Case Simmenthal II (1977)*] have stressed the principle of priority of Community law over national regulations in many Member States law has placed Community law in a position intermediate between the Constitution and other internal regulations, thus consecrating the strong imprint of national sovereignty²⁸. In this regard remained benchmark German Federal Constitutional Court ruling of May 29, 1974 *Handelsgesellschaft mbH for International against Einfuhr*, known as *Solange I* (repeated and amplified in decisions *Solange II* – 1983 and *Maastricht Decision* - 1993). The Court stated in that judgment that *as long as (solange in German) Community did not eliminate the possible conflict of rules between Community law and national constitutional rights of the German, Constitutional Court could ensure that the latter have priority*. The doctrine speaks today about *Solange spirit* in all those decisions falling European constitutional courts, in accordance with the provisions of national constitutions express or implied, limits imposed partial or absolute precedence of Community law to national constitutional provisions. The limits aimed at political and legal values of national identity established by constitutional provisions which are not accepted to be reviewed if their inconsistency with Community law. The Member States meet in two typologies of great *spirit Solange*. In a first typology is found the group of countries (Italy, Germany, Denmark, Belgium, Spain, Sweden, Ireland, UK) who have limited partly precedence of Community law to the Constitution own, assuming the right to check the courts their constitutional constitutionality of Community law only in connection with certain fundamental constitutional values related to cultural identity and political-judicial respective nations. The second typology enter states (France, Greece) have not agreed, in principle, any precedence of EU law over national constitution. But beyond these legal types, reality showed that it would be very difficult to use in a particular state standards and practices for implementing various EU and national legislation²⁹. Increasingly, national institutions have applied the same standards and the same practices used for both. This leads to the idea of a right of public administration jointly developed EU member states. This kind of "contamination" of national legislation to EU law principles contribute to establishing a European Administrative Space.

²⁸ See Manuel Guțan, *Forme pe un alt fond: transplantul juridic comunitar și cultura juridică românească*, „Pandectele Române” no. 5/2008, p. 28, 29.

²⁹ Jürgen Schwarze, *European Administrative Law, Office for official publications of the European communities*, Sweet and Maxwell, 1992.

3. Conclusions

We believe that the opening made by EU law and common principles developed by the European Court of Justice, operates in favor of the use of contractual techniques and dissipation gradations between public and private. European legislation in this area aims at opening to competition of procedures for awarding public contracts for all enterprises across the European Union³⁰.

The rules on public contracts were often subject to official interpretation made by the European Commission. Such interpretation can be referred to Commission Communication on concessions under Community law of 04/29/2000 (200 / C121 / 02). Management of the deployment of these contracts involving EU funds is controlled by the European Court of Auditors conducting some reports such as for example „*Special Report No 10/2000 on the public contracts awarded by the Joint Research Centre, together with the Commission’s replies*” (2000/C172/01).

Gradually it became clear that freedom of exchange and application of competition rules of the common law can not be sufficient to ensure a genuine internal market for public contracts in the European Union. To these must be added the harmonization of procedures across Member States by means of directives governing: choose the form of adjudication, advertising, conditions for participation of undertakings, conditions for awarding contracts, ways of contesting the proceedings³¹.

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³⁰ For details, see Pierre Mathijssen, *op. cit.*, 2002, p. 448-451.

³¹ L. Cartou, J.-L. Clergerie, A. Gruber, P. Rambaud, *op. cit.*, 2000, p. 308.

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The Improvement of Legal Framework of the Limited Liability Company Provided by International Uniform Law

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Abstract

One of the tasks assumed by the European Commission is to create a suitable legal framework for companies in order to facilitate the cross-border cooperation and to consolidate the European internal market. This article examines mainly the legal framework of Societas Privata Europaea, a supranational private limited liability company designated especially for small and medium enterprises, as one of the dimension of the harmonization process of the corporate law in the EU. In this regard, it starts by outlining the evolution of the European Private Company, and then presents the proposal for the Statute of this company. In the end, this article are analyzed other provisions regarding similar supranational structure drafted by international law-makings in order to draw the future developments. In conclusion, this form of supranational company will improve the legal framework of Limited Liability Company by eliminating a great amount of uncertainties in doing trans-border businesses into internal market, and allowing to set up the same European legal entity across the Member States.

Keywords: *European company law, European Private Company, Societas Privata Europaea, cross-border activities, articles of association.*

JEL Classification: K22, K33

1. Introduction

In order to facilitate the cross-border activities of those SMEs engaged in integrated European market, it had been developed the European Private Company (as it is known the *Societas Privata Europea*), a new supranational form of business organization.

Thus, on June 2008, the European Commission submitted a proposal for a Council Regulation (hereinafter Regulation) on the Statute for a European Private Company (EPC), „adapted to the specific needs of SMEs.”³ One year later, the European Parliament approved the proposed Regulation and it added the recommendation for the commission to amend it, stressing that this type of company

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³ Proposal for a Council Regulation on the Statute for a European Private Company, published under COM (2008) 396/3.

should have a cross-border dimension. This amendment was confirmed by the Council in the Revised Presidency Compromise Proposal. So, from 2011⁴ a revised version of the proposal of the regulation of the Council regarding European Private Company has expected to be approved by all Member States in accordance with Art.352 of TFUE.

This paper intends to analyse the specific characteristics of the European Private Company (hereinafter EPC) and to underline the extent to which this supranational form of business organization respond to Single Market needs.

2. The main provision of the Statute of European Private Company (EPC)

From the beginning, we must emphasize that EPC is „genuinely European company,”⁵ it is governed mainly by the Council Regulation, ensuring uniformity of this company in the European Union.⁶ However, where a specific issue is not covered by the Regulation or by its Article of Association, shall be applied the law governing private limited liability companies of the Member State in which SPE sets its registered headquarter, its central administration or principal place of business, which.⁷

SPE is a closed limited liability company, subject of law from the date of its registration with the specific register according to the applicable national law.⁸ Moreover, at the moment of its formation SPE has to have a cross-border dimension, such as: intention to operate abroad; setting-up a subsidiary in different Member States; or foreign associates.⁹

a. Formation

The Regulation provides two ways of the setting-up of SPE: *ex nihilo*, or by restructuring of the already existing companies (by transforming, by dividing, or by the merger) under national law. Therefore, a SPE may be setting-up by one or more natural of legal persons, belonging to a Member State, including another SPE.

The founding shareholder shall draw up and sign the Article of Association, according to the Annex I of the Regulation. The name of the SPE has to specify the type of the company by including the abbreviation „SPE.”¹⁰

⁴ Council’s decision DRS 84 SOC 432 from May 23, 2011.

⁵ Mirosława Myszkę-Novakowska, *The European private company-dream big but cautiously?*, “Intereulaweast”, Vol.II (1) 2015, p.31

⁶ Explanatory Memorandum of the Proposal for a Council Regulation on the Statute for a European Private Company, point 7 – “Explanation of the Proposal”.

⁷ Art.4, (1) of Regulation.

⁸ Luminița Tuleasca, *Societas Privata Europaea versus Societas Europaea*, “Challenges of the Knowledge Society. Legal sciences”, 2012, p. 268.

⁹ *Idem*, 271.

¹⁰ Art.6, first paragraph of Regulation.

Taking into account that the Regulation does not contain a distinctive registration procedure, shall be applied the provisions of the First EU Directive on Company Law,¹¹ setting out some formalities of the registration, such as to file specific documents of the SPE by paper means or by electronic means, in order that third parties may be able to ascertain their contents. Aiming at ensuring an easier and cheaper procedure, Regulation provides for a single authority able to control the legality of registration of the SPE.

b. Shareholders and shares

According to the Art.2, paragraph (a) of the Regulation „shareholder means the founding shareholder and any other person whose name is entered in the list of shareholders.” Shareholders are those persons who own shares issued by SPE, in exchange or their consideration (contributions) in cash or/and in kind to the capital of that company, and are entitled to receive the distribution from the assets of the company. Shareholders shall decide upon SPE by the resolution of the shareholders adopted with majority of their votes. All the shareholders of the SPE shall be registered in the list of the shareholders drawn up and kept by the management body of the company. That list represents an evidence of shareholders and their shares, and it may be inspected by any interested person. Also, the Regulation provides both the expulsion and the withdrawal of the shareholders under well determined circumstances. Each shareholder shall not be liable for more than the amount of his/her contribution to the registered (share) capital of SPE.

The both ordinary or priority shares issued by SPE shall not be offered to the public or publicly traded. However, each class of share confers specific rights and obligations to their owners, decided by the resolution of the shareholder adopting with a majority of not less than two-third of the voting rights attached to each class of shares.¹² Also, the procedure of the transfer of the shares shall be specified in the Article of Association in accordance with the provision of the Art.16 of the Regulation. Under specific conditions, SPE may acquire its own shares in order to protect its assets, based on the balance-sheet test and, a solvency certificate, if it is required by the Article of Association.

c. The share capital

Taking into account that nowadays the amount of the registered capital of the company does not reflect its solvency anymore, the Regulation provides a minimum capital requirement at one euro, which shall be fully subscribed.¹³ Shareholder must pay the consideration in cash or in kind as they stipulated in

¹¹ Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, OJ L258, 1.10.2009.

¹² Art.14 of the Regulation.

¹³ Art.19 of the Regulation.

Article of Association. They are liable for the fulfilment of the obligation of contribution according to the applicable national law. On the basis of the proposal of the directors, SPE shall make a distribution to shareholders from assets of the SPE, according to the Article of Association. The same procedure shall be followed in case of the reduction of the share capital of the SPE.

d. Internal organization of SPE

The organization of the SPE is established by shareholders who exercise the decisional powers inside SPE through resolutions of the shareholders adopted by a majority specified in the Article of Association. It is not necessary to hold a general meeting, in this regard, the management body shall provide all shareholders with the proposal for resolutions and all information needed. Resolutions shall be recorded in writing, and disclosed. Article 27 of Regulation provides the decisional duties of the shareholders.

The management body is responsible for running the company. The Article of Association must set out the terms and conditions of the mandates of the directors, members of the management body of the SPE. The Regulation specifies the general standard and skill reasonably required from directors in the conduct of business, in acting in the best interest of the SPE. Directors must avoid any actual or potential conflicts of interests. Also, Regulation provides the liability of the director for breach of their duties.

e. Restructuring, dissolution and nullity

The Regulation contains provisions regarding the dissolution of the SPE, when the period for which it was established has expired, or the shareholder has decided it, etc. The transformation of SPE to a national company, or the restructuring, winding-up, liquidation, suspension of payments and nullity of the SPE shall be governed in accordance with applicable national law.¹⁴

3. Concluding remarks

Based on the above analysis, it can be stated that the Proposal of the Statute of SPE drafted by the Commission offers a uniform and liberal legal framework for SPE, in line with the Lisbon Strategy and recent developments of the national laws of the Member States. It is drafted taking into consideration the specific needs of SMEs, encouraging flexibility and cross-border mobility inside the Single Market as well as cutting operating costs.

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International Air Transport of Passengers and Luggage from Tourist Industry Perspective and the Rights of Tourists

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Abstract

The tourism sector represents for many countries one of the engines of economic growth and the interdependence between tourism and transport branch, especially that of the transport of passengers and luggage, is more than obvious. For this reason, at international level a greater need to develop more uniform legal regulations was felt in recent decades, along with the exponential growth of the number of tourists. Although by the adoption of the Montreal Convention in 1999 an important step was made in this direction, backed then by its taking over by the European Union law, it still remain many countries which are of great interest to tourists where this international convention or EU regulations are not applicable. Therefore, we believe that an analysis of the provisions of regulations applicable at an international, European and national level, as well as of the international jurisprudence and doctrine regarding the protection of passengers' rights, the compensation due to them in case of damages and the limitations of damages can be nothing but useful.

Keywords: *air transport, tourists, damages, the Montreal Convention, European Union law.*

JEL Classification: K10, K23, K33.

1. Introduction

Air passenger transport is one of the means of transport with the greatest development and for the tourism industry is paramount.

The extraordinary growth of international tourism over the last few decades is largely due to the development of air transport.

According to World Tourism Organization statistics, in 2012 more than half of all international tourists² arrived at destination by air.

Similarly, the increase in air transport - which is the main component of civil aviation - is intrinsically linked to the expansion of tourism. The vast majority of international air passengers travel either for tourism or recreational or professional purposes, and in many countries aviation plays a vital role for the development of domestic tourism.

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² 2012 was the year in which the total number of international tourists has exceeded 1 billion (1.035 billion). See the Annual Report of the World Tourism Organisation 2012. The document is available online at http://cf.cdn.unwto.org/sites/all/files/pdf/annual_report_2012.pdf (accessed on 20.10.2016).

Although it could be argued that tourism activity acts as a catalyst for air transport, rather than vice versa, it is recognized that air transport and tourism are in a relationship of interdependence.

But, the World Tourism Organization notes that despite this interdependence and the multiplier effect for both fields, many countries³ have separated sectoral policies on air transport and tourism, and this leads to fundamental malfunction and to the loss of an opportunity to maximize the potential that both areas have for economic and social development.⁴

Tourism is developing in a fulminant manner on account of air transport and air transport owes much of its development to tourism. Only from September 2014 to September 2015 the global passenger traffic grew by more than 6.5% as compared to the same period last year.

IATA forecasts⁵ for the year 2034 are of 7 billion passengers transported annually, which correspond to a doubling of the number as compared to 2015 and to an annual increase of 3.5%.

Therefore, for tourism, the relationship with the transport field, with the legal provisions applicable to this segment of the economy and with its peculiarities is particularly important.

In this context we propose through this paper an analysis of the provisions of regulations applicable at an international, European and national level, as well as an insight into international case law and doctrine, in order to highlight each of these three regulatory levels of the arrangements that ensure protection of passengers' rights, of the compensation due to them in case of damages and of the limits of such damage claims⁶.

2. International regulations

We begin the analysis of legal regulations specific to passenger air transport with the international ones, which have a legal force superior to the regional and national ones, so whenever European and domestic law is contrary to international law, the provisions of the latter shall prevail.

³ Unfortunately this is the case of Romania, and to the extent that there will be a real political decision of development of the tourism sector in Romania, it is inconceivable to set up national strategies in this sector without integrating in them the transport field and without ensuring a coordinated development of the two sectors of the national economy.

⁴ See for these conclusions the report "Tourism and Air Transport Policies" presented at the 20th session of the General Assembly of the World Tourism Organization, Madrid, 2013. The document is available online at http://cf.cdn.unwto.org/sites/all/files/pdf/background_paper_tourism_air_transport_policies_unwto_ga20_rev1.pdf (accessed on 05.09.2016).

⁵ The International Air Transport Association (IATA).

⁶ This analysis will be integrated and developed into a book on which we work and where we will analyze in full the issue of legal rules applicable in tourism.

Given the extremely complex issue from a legal perspective in disputes covering various forms of liability arising from international air transport of persons (applicable law/the court competent in terms of citizenship/nationality of passenger/carrier, the place of embarkation and disembarkation, place of conclusion of the contract, etc.) they tried since the beginning of civil aviation a unification of the provisions and the adoption of international rules.

In this context *Warsaw Convention* on the Unification of Certain Rules Relating to International Carriage by Air⁷, was signed on October 12, 1929, convention which, structured into 5 chapters and 41 articles, covers air transport documents, combined transports and contractual civil liability of the carrier for the damages suffered by passengers, luggage and the cargo carried.

Since the signing of the Warsaw Convention, and so far, several amendments appeared which, all together, form what is called in air transport the "Warsaw System".

The most important amendments of the Warsaw Convention are:

- *Rome Convention of 1933*⁸;
- *Hague Protocol of 1955*⁹;
- *1961 Guadalajara Convention*¹⁰;
- *Guatemala City Protocol of 1971*¹¹;
- *Montreal Protocols of 1975*¹²;

After this moment, the world's countries with a developed civil aviation realized that air transport can no longer develop significantly under the auspices and control of national authorities.

In Europe, the situation at that time assumed as a general rule, national carriers who held the monopoly in that State and airports owned by the states and which depended on them.

Even if the bilateral agreements between states multiplied, international air transport did not yet have the desired development level, especially because

⁷ Warsaw Convention of 1929 was ratified (along with other 151 countries) by Romania as well by Law no. 1213/1931 published in the Official Gazette no. 83 of April 9, 1931.

⁸ Ratified by Romania and published in the Official Gazette no. 45 of February 22, 1935.

⁹ Ratified by Romania and published in the Official Gazette no. 33 of August 21, 1958.

¹⁰ Ratified by Romania and published in the Official Gazette no. 21 of December 22, 1964.

¹¹ Not ratified by Romania.

¹² Protocols 1 and 2 have changed the currency of reference of the Warsaw Convention, introducing the Special Drawing Right (SDR) instead of the gold franc. There was also an Additional Protocol no. 3, with the purpose to take over all provisions of Protocol at Guatemala City, but it has not entered into force due to the lack of the minimum number of 30 ratifications. None of these protocols has been ratified by Romania. The Special Drawing Right (SDR or in the international codification, XDR) is a virtual currency of the International Monetary Fund, conceived as a replacement for the gold standard. Its value is calculated based on the US dollar (44%), Euro (34%), Japanese yen (11%) and British pound sterling (11%), according to the quotations on the London Stock Exchange.

of the strict control of the access to the market, and because of the property systems of carriers. The growing demand for air transport could not be met under conditions of fragmentation in national markets and of the absence of an effective competition.

In this context, in the mid-70s it was clear that civil aviation must move from a state-controlled economy to a market economy. US was the country that started this process in 1978 by adopting a law on deregulation of airlines, a that law fully liberalized the civil air transport market of the US.

Even the European Union took over this process, especially after the adoption of the Single European Act of 1986 and the completion of the internal market. Regulations that have gradually transformed the national airline protected markets in a competitive single market were adopted. Following this process, air travel became the first mode of transport - and, to a large extent still the only one - which benefits from a fully integrated single market¹³.

Given this international situation, a new international convention able to update the harmonization of the rules applicable to air transport became almost naturally necessary.

Montreal Convention for the Unification of Certain Rules Relating to International Carriage by Air¹⁴ adopted in Montreal on May 28, 1999, is one of the key international agreements for air transport of passengers.

Not all signatory states of the Warsaw Convention 1929 signed / ratified the Montreal Convention 1999, so that the two continue to produce its effects in parallel, the Warsaw Convention governing the international air transport between countries that have signed the Montreal Convention and those that have not signed it, but which are signatories to the Warsaw one.

Therefore, a flight between France and the US will be covered by the Montreal Convention provisions since both countries are signatories to this Convention. The same is true for flights to other countries, such as Spain, Greece, Turkey, Italy etc.

The situation is different if the tourist destination is a country like Thailand which, although in recent years it is becoming increasingly involved in world

¹³ The first two "packages" of regulations (1987 and 1990) began to liberalize the rules governing fares and capacities. The third "package" adopted in 1992 (consisting of Regulations (EEC) no. 2407/92, 2408/92 and 2409/92 Council, now replaced by Regulation (EC) no. 1008/2008 of the European Parliament and of the Council) eliminated the other trade restrictions remaining after previous reforms and thus creating the "single European aviation market," market which was later extended to the EEA countries (Norway, Iceland and Switzerland).

¹⁴ The Convention for the Unification of Certain Rules for International Carriage by Air adopted in Montreal on May 28, 1999 was ratified by Romania by Government Ordinance no. 107/2000, approved by Law no. 14/2001, published in the Official Gazette no. 97 of February 26, 2001. The Convention was published in the Official Gazette of the European Union L194, 2001, p.39-49. The Convention entered into force on November 4, 2003 for signatory States and on June 28, 2004 for those that have ratified it later.

tourism and attracts a considerable number of tourists, has not ratified the Montreal Convention.

Ticketing agencies, travel agencies and tour operators need to know that this circumstance has legal relevance if the air ticket purchased/provided to the tourist is for a one-way travel (one way and/or just back) to/from Thailand or other countries non-signatory of the Montreal Convention because in such a situation this Convention is inapplicable. Tourists (air transport passengers) will benefit from the protection offered by the Convention only if they benefit from a round-trip ticket and the place of departure or destination is the territory of a Member State signatory to the Convention¹⁵.

So, the 1999 Montreal Convention applies to international shipments in the following two assumptions:

- When the departure point and the destination point, whether or not there is a break in the carriage or a transshipment, are situated in the territory of two States Parties to this Convention;

- When the departure point and the destination point are located within the territory of a single State Party to the Convention, where there is an agreed point of call in another State, even if that State is not a State Party to the Convention¹⁶.

Therefore, the 1929 Warsaw Convention still applies when:

- The air transport is achieved between two non-signatory states of the Montreal Convention, and the place of departure and the destination are within the territory of member states to the Warsaw Convention;

- The air transport is achieved between a State signatory to the Montreal Convention and a non-signatory one to this convention, if the latter is a signatory of the Warsaw Convention.

Taking into account the fact that most states signatories to the Warsaw Convention also signed the Montreal Convention, we will analyze in this paper only the latter convention, especially because it essentially strengthens the system adopted in Warsaw in 1929 and puts it in line with economic realities and with the technological development at the beginning of the 3rd millennium¹⁷.

On the other hand, we point out again that tourists and travel agencies should be alert to the legal regime applicable to air transport with which they have tickets or make a booking. The provisions of these conventions on liability of the carrier in various situations are particularly important: passenger's injury, delays in case of taking off or landing, damage or loss of luggage etc.

¹⁵ See for details on this issue David Grant, Stephen Mason, *Holiday law: the law relating to travel and tourism*, 5th edition, Ed, Sweet & Maxwell, London, 2012 p.352-353.

¹⁶ See Article 1 of the Montreal Convention, quoted above.

¹⁷ For an analysis of the two Conventions on air travel, see Cristian Bogaru, Simona Marginean, *Airline liability for personal injury or death of passengers under the Montreal Convention*, in *Revista Romana de Drept Privat*, no.2 / 2011.

On the *transport of passengers and luggage*, Montreal Convention establishes the following rules¹⁸:

1. The carrier shall issue a transport document¹⁹ individually or collectively, which will contain:

a) an indication of the points of departure and destination;
 b) if the places of departure and of destination are within the territory of a single State Party, and if one or more points of call are within the territory of another State, an indication of at least one of these points of call.

2. For each piece of checked luggage (cargo luggage) the carrier will deliver to the passenger an identification tag.

3. The passenger must be informed that if the air transport is subject to the Montreal Convention, the carrier's liability for the death or injury of passengers in case of destruction, loss or damage to baggage, and for delay, can be limited²⁰.

Regarding the *liability of the carrier and the extent of compensation for damage*, the same convention has the following provisions:

1. The carrier is liable for the damage resulted in case of death or bodily injury of a passenger only if the accident which caused the injury or death occurred on board the aircraft or during the embarking or landing operations.

The carrier cannot exclude or limit its liability to less than 113,100 SDR/passenger²¹.

For damages exceeding 113,100 SDR/passenger²², the carrier may be free from liability if it proves either that the damage was not caused by its negligence or other wrongful act or omission or of its servants or agents, whether such damage was solely due to the negligence or other wrongful act or omission of a third party.

¹⁸ See Article 3 of the Convention.

¹⁹ According to section 2 of Article 3 of the Convention, the carrier is allowed to use any other means by which to record the information indicated in paragraph 1, provided they issue the passenger a written statement of the information so recorded.

²⁰ Even in the absence of such notice, or of previous ones, the validity of the transport contract is not affected, as it will be subject to the rules of the Convention, including to those relating to limitation of liability. See section 5 of Article 3 of the Convention.

²¹ On 18/10/2016, 1 SDR was worth 5.65 lei.

²² The limit established by the Convention original form was of 100,000 SDR / passenger. But the Montreal Convention included in its provisions and a mechanism for adapting these value limits based on inflation. This mechanism establishes that every 5 years if there is an inflation factor of over 10% the limits may be adjusted. In 2009, when the rate of inflation increased by 13.1% and an adjustment to these limits has been made, all amounts stated in this paper consider the values resulting from such adjustments. We also point out that for establishing the inflation rate Article 24 of the Convention provides that to this end one will calculate the weighted average of annual rates of increase or decrease in consumer price indices in countries the currencies of which influence special drawing rights.

2. Also, the carrier is liable for the damage due to the destruction, loss or damage to the checked luggage, provided that the event which caused the destruction, loss or damage occurred in the aircraft or during the period in which the carrier was in the charge with the checked luggage²³.

3. For unchecked luggage, including personal items carried by passengers, the carrier is liable only if the damage resulted from its fault, of its servants or of its agents.

4. If the carrier admits the loss of a checked luggage, or if a checked baggage has not arrived at its destination within 21 days of the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights arising from transport contract.

The carrier's liability in case of destruction, loss, damage or delay of luggage arrival is limited to the amount of 1,131 SDR/passenger. If the passenger has made to the carrier, when handing the checked luggage, a special declaration regarding the interest in delivery at destination and has paid, if necessary, an additional amount, the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

5. The air carrier is also responsible for the damage due to delay, unless he proves that it, its servants and agents took all necessary measures reasonably in order to avoid the damage or that it was impossible for them to take such measures.

For the damage due to the delay in the carriage of persons, the air carrier answers up to 4,694 SDR/passenger.

6. The air carrier shall be relieved wholly or partially from liability if he proves that the damage was caused or favoured by the negligence, by a wrongful act or omission of the person seeking such compensation or of the person from whom its rights derives.

To the compensation limits specified above we may add court costs and other expenses incurred by the plaintiff as a result of possible litigation, including interest.

The carrier may stipulate in the transport contract limits of liability higher than those provided in this Convention or no limits of liability, and on the other hand any provision tending to relieve the carrier of liability or to fix a limit lower than that fixed by convention is null and void²⁴.

Under the Montreal Convention, air carriers will respond in an absolute (unlimited) manner for the damage caused to the life and health of passengers.

²³ The carrier's liability is excluded when damage has occurred due to a defect in the luggage, quality or vice thereof.

²⁴ See Articles 25 and 26 of the Montreal Convention.

As regards *the term and the procedure of complaints registration*, the Convention has few clear provisions, which must be observed in order to have the premises for a favourable settlement of the complaint²⁵.

First, passengers (tourists) should know that the receipt (lifting) of checked luggage (cargo) at the destination or anywhere on an intermediate airport (point of call) without making a complaint is, save where it appears the contrary, the proof that it has been delivered in good condition and in accordance with the transport document. The passenger must submit to the carrier a complaint immediately after discovery of damage to the luggage, but for checked luggage, not later than 7 days of receipt date. In case the luggage arrives late at the destination, the complaint must be made not later than the 21st day after the date on which the luggage was placed at its disposal.

Any complaint must be made in writing and remitted or dispatched within the above deadline.

Failure to lodge the complaint within the deadlines mentioned above is punishable by forfeiture, as no action can be taken against the carrier unless in cases of fraud on its part.

3. Regional (European) regulations

The rules set by the Montreal Convention were taken over in European Union law.

First directly by Decision 2001/539/EC of the Council from April 5, 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)²⁶. Then, the European Union adopted Regulation (EC) no. 889/2002 amending Council Regulation (EC) no. 2027/97 on air carrier liability in case of accidents²⁷, in order to put it eventually in accordance with the provisions of the Montreal Convention and thus create a uniform system of liability for international air transport²⁸.

²⁵ See Article 31 of the Convention.

²⁶ Decision 2001/539 / EC of the Council of April 5, 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) was published in the Official Gazette no. C 337 E of 28/11/2000.

²⁷ Regulation (EC) no. 889/2002 of the European Parliament and of the Council of May 13, 2002 amending Council Regulation (EC) no. 2027/97 on air carrier liability in case of accidents has been published in the Official Gazette no. L 140 of 30/05/2002.

²⁸ Sections 12-13 in the preamble of Regulation 889/2002 noted that the uniform limits of liability in case of loss, damage or destruction of luggage and damage occasioned by delay, which applies to all transport operations carried out by Community carriers ensures simple and clear rules and it would be impractical for the Community air carriers and it would be confusing for their passengers if they were to apply different liability regimes on different routes across their networks.

Article 3 paragraph 1 stipulates that "the liability of a Community air carrier in respect of passengers and their luggage shall be governed by all the provisions of the Montreal Convention relevant to such liability."

It is no less true that Regulation 889/2002/EC added some additional rules to the Montreal Convention, including setting the fact that it also applies to air transport performed on the territory of one Member State (domestic flights). Therefore, the Regulation applies to national air transport, to the international ones with a departure or destination in the European Union when they are operated by airlines registered in one Member State.

All air carriers (not just those in the EU) are required, when selling air transport services in the Community, to ensure that a summary of the main provisions governing liability for passengers and their luggage, the deadlines for registration of a complaint or of a damage claim and the possibility of making a special declaration for their luggage, is made available to passengers at all points of sale including in case of sales by telephone or internet.

This *information notice*²⁹ contains information on the liability applied by Community air carriers as required by Community legislation and the Montreal Convention, and refers to the following:

- Compensation in case of death or injury³⁰
- Prepayments
- Passenger delays
- Luggage delays
- Destruction, loss or damage to luggage
- Conditions for the increase of the liability limits for luggage
- Complaints on luggage
- Liability of contractual carriers and of actual carriers
- The limitation of the right of action.

Another regulation relevant for air transport of persons and luggage is Regulation (EC) no. 261/2004³¹ establishing common rules in the field of compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) no. 295/91.

²⁹ The content of the information notice was introduced by point 10 of Regulation no. 889/2002/EC.

³⁰ The limit value of this compensation, as well as of all others mentioned in Regulation 889/2002/EC, are those that the Montreal Convention provide for them at that time, namely those prior to their indexation based on the inflation rate.

³¹ Regulation (EC) no. 261/2004 of the European Parliament and of the Council of February 11, 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) no. 295/91 was published in the Official Gazette no. L 46 of 17/02/2004.

This Regulation lays down the conditions under which passengers may exercise minimum rights when they are denied boarding against their will³², when their flight is cancelled or if the flight is delayed³³.

The Regulation applies, on the one hand, to passengers departing from an airport situated in the territory of a Member State and, on the other hand, to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State, unless the latter have received benefits or compensation and were granted assistance in that third country, where the air carrier of the flight is a community carrier.

To enjoy the rights stipulated in the Regulation, passengers must be in one of the following situations:

- They have a confirmed booking for the flight in relation to which they invoke rights provided by regulation and unless the cancellation of the flight occurred, they came personally for check-in;

- They have been transferred by an air carrier or tour operator from the flight for which they held a booking to another flight, for whatever reason.

The Regulation applies including to charter flights contracted by one or more tour operators, given the provisions of Article 3 paragraph 5 which includes in the scope of the Regulation the situations where an air carrier has no transport contract signed directly with the passenger. It is considered that in such a situation, the carrier acts on behalf of the person having a contract with that passenger.

The Court of Justice of the European Union has contributed by the judgments ruled, especially in the cases that were intended for a preliminary ruling for the interpretation of certain provisions of EU rules, to the clearing of the provisions of this Regulation and to its uniform application by the courts of the Member States³⁴.

In summary, the rights of the passengers under this regulation are:

a) In the event of denied boarding

Assuming that it refuses the boarding of a/some passengers³⁵ for reasons that exceed their fault (ex. for overbooking), the air carrier must first use the help

³² According to Article 2 letter j), "denied boarding" means a refusal to carry passengers on a certain flight, although they have presented themselves for boarding under the conditions laid down, unless there are reasonable grounds to deny boarding, such as health condition, safety or security or inadequate travel documentation.

³³ See Article 1 of this Regulation.

³⁴ For a summary of this jurisprudence, see Andrei Pap, *Transportul aerian și drepturile pasagerilor în legislația Uniunii Europene* (Air transport and passenger rights in EU law), Universul Juridic, Bucharest, 2016.

³⁵ In Case Case C-321/11 (Germán Rodríguez Cachafeiro and María de los Reyes Martínez-Reboredo Varela-Villamor against Iberia, Líneas Aéreas de España SA), the Court of Justice of the European Union, analyzing Article 2 (j) in conjunction with Article 3 (2) of Regulation no. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation no. 295/91, decided that these texts should be interpreted as meaning that the notion of "denied boarding"

of volunteers, namely of persons who voluntarily give up taking the travel, in exchange for a compensation freely negotiated and for one of the following options:

- Refunds of the paid amount within seven days (and if necessary, free flight to the initial point of departure), *or*

- Rerouting or onward journey in a shortest time or at a later date agreed.

Passengers who are denied boarding against their will should receive immediately from the air carrier, cumulatively the following:

- Assistance (meals, possibility of telephone and accommodation if necessary)

- One of the following options: either the refund of the price paid within seven days (and if necessary, free flight to the initial point of departure) or forwarding or onward journey in the shortest time or at a later date agreed and

- Immediate compensation determined as follows:

- For flights under 1500 km, 250 Euro (the amount is reduced by half if the carrier has offered and the passenger has accepted a rerouting, but which leads to a delay of less than two hours upon arrival, as compared to the time of arrival of the original flight);
- For all intra-Community flights longer than 1500 km and for all other flights between 1500 and 3500 kilometres, 400 Euro (200 Euro if the rerouting results in a delay of less than three hours upon arrival);
- For flights longer than 3,500 km, 600 Euro (300 Euro if rerouting results in a delay of less than four hours upon arrival).

b) In the event of flight cancellation

In such a case³⁶, the compensation to which passengers are entitled is identical to that offered when one is denied boarding, unless:

includes the situation where, under a single transport contract and which includes several bookings on immediate successive flights and recorded simultaneously, an air carrier denies the boarding of some passengers on the grounds that the first flight contained in their booking had a delay attributable to the carrier concerned, and it provided wrongly that the mentioned passengers would not arrive in time for the second flight boarding. Thus, the legislature extended the scope of notion beyond the simple case of denied boarding for overbooking, previously referred to in Article 1 of Regulation No. 295/91 establishing common rules on compensation scheme for denied boarding in scheduled air transport, and conferred it a broad meaning on the ensemble of the assumptions in which an air carrier refuses to carry a passenger. In addition, the limitation of the notion of "denied boarding" only to overbooking cases would have, in practice, the effect of a significant decrease in passenger protection granted pursuant to Regulation no. 261/2004 and therefore, it would be contrary to its objective of ensuring a high level of protection of passengers, so that the broad interpretation of the rights recognized made by the Court's judgment is justified. However, it is necessary to ascertain whether such a refusal is not justified by reasonable grounds "such as health, safety or security or inadequate travel documentation."

³⁶ In Case C-83/10, the Court of Justice of the European Union has settled a request for a preliminary ruling formulated in the dispute between Aurora Sousa Rodríguez and Others v Air France SA. The applicants requested in the dispute filed against the airline franchises to a Spanish

- Passengers were informed of the cancellation with at least 14 days in advance;

- They were informed of the cancellation within a period of between two weeks and seven days before the scheduled time of departure and they are offered re-routing enabling them to leave more than two hours before the scheduled departure time and reach the final destination in less than four hours after the scheduled arrival time;

- They were informed less than seven days before the scheduled departure time and they were granted a rerouting allowing them to depart no later than one hour before the scheduled time of departure and to reach their final destination in less than two hours after the scheduled arrival time.

The carrier will not pay compensation in accordance with Article 7 of the Regulation when it proves that the cancellation is caused by extraordinary circumstances³⁷ which could not have been avoided even if all reasonable measures were taken.

court the latter to be ordered to pay compensation under Article 7 of Regulation no. 261/2004, considering that they had concluded an air transport contract with Air France to be transported from Paris (France) to Vigo (Spain) on September 25, 2008. A few minutes after the take-off of the aircraft at the scheduled time, the pilot decided to return to the starting point, namely Paris-Charles de Gaulle airport, due to technical faults of the aircraft. The referral Court, asked to rule whether the flight in question can be classified as "canceled" within the meaning of Article 2 (l) of Regulation no. 261/2004, required the European court to establish whether the term "cancellation" refers only to the assumption of a lack of any takeoff of the aircraft in question or whether it includes the situation where the aircraft in question, although it took off, had to return to the departure airport after a technical failure of the aircraft. In its judgment, the Court held that under Article 2 letter (l) of Regulation no. 261/2004, the term "cancellation" must be interpreted as meaning that in a situation such as that at issue in the main proceedings, is not only assuming the absence of any takeoff of the aircraft in question, but also includes the situation where this aircraft took off, but it was subsequently forced, for whatever reason, to return to the departure airport and the passengers of that aircraft were transferred to other flights. The Court also held that the reason why the aircraft was forced to return to the departure airport and therefore did not reach the destination does not affect the classification as "cancellation". Thus, this ground is relevant only to determine, within the compensation for the damage suffered by passengers following the cancellation of their flight, if possibly that cancellation "is caused by extraordinary circumstances which could not have been avoided despite adopting all reasonable measures" under Article 5 (3) of Regulation no. 261/2004, in which case no compensation is due. However, it was also revealed in the judgment that the notion of "further compensation" mentioned in Article 12 of Regulation no. 261/2004 must be interpreted as allowing national courts to compensate, under the terms of the Montreal Convention or national law, the damage, including the moral damage resulting from the failure to perform the air transport contract. Instead, the term "further compensation" cannot serve the national court as a legal basis to order the air carrier to refund to passengers whose flight has been delayed or canceled, the costs which they had to incur due to the failure by that carrier to observe the obligations of assistance and service provided for in Articles 8 and 9 of this Regulation.

³⁷ On the scope and meaning of the concept of "extraordinary circumstances" within the meaning of Regulation EC no 261/2004, ruled the Court of Justice of the European Union in Case C-549/07, which dealt with an application for a preliminary ruling formulated under Article 234 EC by Handelsgericht Wien (Austria), by decision of October 30, 2007, received by the Court on December 11, 2007, in Friederike Wallentin-Hermann proceedings against Alitalia - Linee Aeree

In addition, passengers whose flight has been cancelled have the right to receive from the airline, of their choice:

- The refund of your ticket within seven days;
- The rerouting as quickly as possible in comparable transport conditions, towards the final destination³⁸.

- Re-routing, under comparable transport conditions, towards the final destination at a later date chosen by the passenger, subject to availability of seats.

Also, they have the right to telephone, refreshments, food, accommodation and transport to accommodation.

c) In case of flight delay

When the delay is of at least two hours³⁹ for flights up to 1500 km, of at least three hours for flights between 1500 and 3500 km and for the flights of the

Italiane SpA. By the decision ruled on 22/12/2008, the European Court ruled that Article 5 paragraph (3) of Regulation no. 261/2004 must be interpreted as meaning that a technical problem occurred in an aircraft which leads to the cancellation of a flight is not covered by the concept of "extraordinary circumstances" within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent to the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Montreal Convention is not decisive for the interpretation of the grounds of exemption provided under Article 5 (3) of Regulation no. 261/2004. However, it cannot be ruled out that certain technical problems can be included among these exceptional circumstances to the extent that they stem from events which are not inherent to the normal exercise of the activity of the air carrier concerned and which are beyond its actual control. This would be the case, for example, if the manufacturer of the aircraft that form the fleet of the air carrier concerned or a competent authority communicated when these devices are already in use, that they are affected by a hidden manufacturing defect affecting flight safety. The same would hold true in case of the damage caused by acts of sabotage or terrorism. But the simple solving of a technical problem caused by a failure to maintain an aircraft must be regarded as inherent to the normal exercise of the activity of the air carrier and therefore, such an event cannot be considered "exceptional" within the meaning of Article 5 (3) of Regulation no. 261/2004.

³⁸According to Article 8, paragraph 3 of the Regulation, "where a city, an urban agglomeration or region is served by several airports, the air carrier offers the passenger a flight to an airport other than that for which the initial booking was made, the air carrier shall bear the cost of transferring of the passenger from that alternative airport either to the original one or to another close-by destination agreed with the passenger."

³⁹ The Court of Justice of the European Union was asked by means of the request which was the object of Case C-452/13 brought by an Austrian court in the dispute between Germanwings GmbH and Mr. Henning, to determine which is the relevant time for determining the "arrival time" of the aircraft, according to Article 2, 5 and 7 of Regulation no. 261/2004. More specifically, the referral court asked the European one to determine whether those articles must be interpreted either as meaning that the "arrival time" used to set the duration of the delay suffered by the passengers on a flight, means the time at which the wheels of the aircraft touch the runway of the airport of destination or in the sense that that this term means the time the aircraft reached the parking lot and the parking brakes were coupled, brake shoes were attached respectively, either in the sense that this notion means the time when the aircraft door opens or in the sense that the same notion means a moment defined by the parties by mutual agreement. The court ruled that the term 'arrival time', used for determining the duration of the delay suffered by passengers on a flight, means the time at which at least one of the doors of the aircraft opens, provided that, in this moment, passengers are allowed to leave the machine.

community space of over 1500 km and at least four hours for flights longer than 3500 km, the carrier must provide passengers the following:

- In any of the above situations, meals, the possibility of telephone and accommodation, if necessary, and transport to the place of accommodation;
- If the delay is longer than five hours or more, the passengers shall be offered a refund within seven days (and if necessary, free flight to the initial point of departure), and compensation, as in case of cancellation.

Passengers whose flights are delayed are entitled to compensation under this Regulation in case they suffer as a result of such flights, a loss of time equal to or greater than three hours, more accurately when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. In addition, the granting of this obligation of compensation cannot be an impediment to passengers affected, if the same delay caused them individual damage conferring entitlement to compensation, to formulate separately an action by means of which to require, by way of individualized reparation, compensation under the terms of the Montreal Convention⁴⁰.

d) In the situation of upgrading or downgrading

⁴⁰ On October 23, 2012, the ECJ ruled in Joined Cases C-581/10 and C-629/10, a relevant decision on the interpretation and application of Articles 5-7 of Regulation (EC) no. 261/2004 in conjunction with Articles 19 and 29 of the Montreal Convention. The referral court asked essentially to establish whether, and if so, in which conditions, the passengers whose flights are delayed are entitled to compensation under Regulation no. 261/2004. In the judgment ruled, the ECJ after it said that neither Article 7 of the regulation nor any provision thereof expressly provide such a right, pointed out that it follows from Article 5 (1) (c) (iii) of Regulation no. 261/2004 that, under the terms of that provision, are entitled to a lump sum compensation the passengers whose flight is canceled without being forwarded or those who are informed within less than seven days before the scheduled departure time and to whom the air carrier has not proposed to be redirected by means of a flight which departs no more than one hour earlier than the scheduled time of departure and reaches their final destination with less than two hours after the scheduled arrival time. Or, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified. This means that passengers whose flights are delayed and those whose flights are canceled should be considered as being in a comparable situation as regards the compensation provided for by Regulation no. 261/2004, as these passenger go through a similar inconvenience, namely, a loss of time equal to or more than three hours of the original flight planning. In those circumstances, and bearing in mind that the purpose of Regulation no. 261/2004 is to increase protection for all air passengers, passengers whose flights have delays of three hours or more cannot be treated differently from those receiving compensation under Article 5 (1) (c) (iii) of this Regulation. Consequently, Articles 5-7 of Regulation no. 261/2004 must be interpreted as meaning that the passengers whose flights are delayed are entitled to compensation under this Regulation in case they suffer as a result of such flights, a loss of time equal to or longer than three hours, more precisely when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. However, such a delay does not confer the right to compensation for passengers if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures were taken, namely circumstances beyond the actual control of the air carrier.

The air carrier cannot ask for any extra payment when it upgrades (carries to a travel class superior to the purchase price of the ticket) a passenger.

When assuming a downgrading, the carrier reimburses within seven days:

- 30% of the ticket price for flights up to 1500 km;
- 50% for flights between 1500 and 3500 km and flights within the EU of more than 1500 km
- 75% for flights longer than 3500 km.

e) Passengers with reduced mobility

Airlines are required to give priority to carrying persons with reduced mobility and accompanying persons or certified accompanying service dogs and unaccompanied children.

Special rules for the protection and granting of assistance to disabled persons and to persons with reduced mobility travelling by air, both to protect them against discrimination and to guarantee assistance for them, are laid down in Regulation (EC) no. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air⁴¹.

According to it, the air carrier or its agent or tour operator is obliged not to refuse on the grounds of a disability of a passenger or of its reduced mobility a booking made by/for him/her on a flight departing from or arriving at an airport situated in the territory of an EU Member State and not to refuse or to embark a disabled person or a person with reduced mobility at such an airport, if that person holds a valid ticket and booking.

Exceptionally, refusal is allowed, on grounds of disability or reduced mobility, in the following situations:

- When the air carrier, its agent or tour operator must comply with applicable safety requirements established by international, Community or national law or to comply with the safety requirements established by the authority that issued the certificate of operation in air transport to the air carrier concerned;
- If the size of the aircraft or of its doors make the embarkation or the carriage of that disabled person or person with reduced mobility physically impossible.

However, when refusing such a booking, the air carrier or its agent or tour operator have the duty to endeavour to provide the person with disability or reduced mobility an acceptable alternative.

As regards the *limitation of the action for damages* against an air carrier for damage caused by denied boarding, the cancellation or delay of a flight EC Regulation no. 261/2004 provides no such term. Therefore, as the Court of Justice

⁴¹ Regulation (EC) no. 1107/2006 of the European Parliament and of the Council of July 5, 2006 concerning the rights of disabled persons and of persons with reduced mobility when traveling by air, published in the Official Gazette no. L 204 of 26/07/2006.

of the European Union decided⁴², the deadline when the actions seeking the compensation provided for in Articles 5 and 7 of this Regulation must be introduced shall be determined in accordance with the rules of each Member State in the matter of limitation of actions.

4. National regulations in Romania

Given the status of Romania of Member State of the EU since January 1, 2007 the air transport of passengers is subject to EU regulations in this area.

As developed in the previous section, at EU level a number of regulations that constitute the legal framework for air transport segment are in force and directly applicable in all Member States.

But, in Romania there were originally domestic laws that regulated this field. For example, on the liability of air carriers and operators of civil aircraft performing civil air operations in the national airspace there is Law no. 355/2003⁴³.

This law, together with other regulations⁴⁴, was expressly repealed by Law no. 234/2007⁴⁵, following the direct application of EU rules mentioned above into national law.

As a general law in the field the Romanian Air Code⁴⁶ continues to apply, which in Chapter VII, Section II contains rules on public air transport operations.

⁴² See Court judgment of November 22, 2012 in Case C-139/11 concerning a request for a preliminary ruling under Article 267 TFEU by Audiencia Provincial de Barcelona (Spain), by decision of February 14, 2011 received by the Court on March 21, 2011, in the proceedings Joan Cuadrench Moré against Koninklijke Maatschappij NV (KLM). In the action for seeking damages against it in the Spanish court, KLM defended itself arguing that the two-year deadline provided for in Article 29 by the Warsaw Convention, during which the actions for seeking damages against air carriers must be filed, had expired. The Spanish court rejected that plea of defense, considering that either the limitation period provided for in Article 29 of the Warsaw Convention, or the one set out in Article 35 of the Montreal Convention applied in question, since Regulation No. 261/2004 was applicable. Given the absence of an express provision of this regulation able to determine the period within which actions should be introduced in relation to it, the court considered that the Spanish legislation was applicable.

⁴³ Law no. 355/2003 on the liability of air carriers and operators of civil aircraft performing civil air operations in the national airspace, published in the Official Gazette no. 524 of July 21, 2003.

⁴⁴ Law 491/2004 on public service obligation on domestic air routes and the Government Ordinance no. 52/2002 on the establishment of a compensation scheme by air carriers for passengers who have been refused boarding on regular air flights were repealed.

⁴⁵ Law no. 234/2007, for the repeal of Law no. 355/2003 on the liability of air carriers and operators of civil aircraft performing civil air operations in the national airspace, of Law no. 491/2004 on public service obligation on domestic air routes and of the Government Ordinance no. 52/2002 on the establishment of a compensation scheme by air carriers for passengers who have been refused boarding on regular air flights, published in the Official Gazette no. 490 of July 23, 2007.

⁴⁶ Government Ordinance no. 29/1997 on the Civil Aviation Code, republished in the Official Gazette no. 45 of January 26, 2001 and then again amended.

According to Article 47 of this Code, the air carrier is liable for any damage caused by the death or injury to passengers' health or damage or loss of luggage. And as a general rule, it is provided that the liability regime of the air carrier that makes international public transport is the one regulated in accordance with international treaties to which Romania is a party, and for internal public air transport, in accordance with the common law, as far as not determined otherwise by a special law or by an international treaty to which Romania is a party.

5. Conclusions

From all the above, we can conclude that in the field of air transport of passengers and luggage there are no international regulations directly applicable to Romania, either in its capacity as a state party to a treaty or to an international convention or as Member State of the European Union.

Knowing all this legislation is needed not only in lawsuits caused by various events occurring during or in connection with air transport, but also in the legislative process and of drafting of the national legislative and administrative instruments, which must be linked with those of higher legal value and which, including under the provisions of the Romanian Constitution, apply preferentially when there is contradiction or regulatory differences.

A clear Romanian legislation in line with international regulations can only be auspicious for the development of both industries including: transport of passengers and luggage and tourism.

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Considerations Regarding the Competence of the European Union External Trade Policy

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Abstract

A significant component of international trade and foreign direct investment is the service. International trade has been an evolution of its rules from objects of basic characteristic of the sixties - the goods - so far, within its scope corresponds to the scope - more broadly - the World Trade Organization Agreement. This development is reflected equally in the Treaty that established the European Community in the Treaties its subsequent and now, in the Treaty of Lisbon, and not least, the Court of Justice of the European Union by jurisprudence to which he has made a considerable contribution in this regard.

Keywords: freight, services, intellectual property, GATS, TRIPS.

JEL Classification: K33

1. Considerations regarding the competence of the EU external trade policy

A significant component of international trade and foreign direct investment is the service. International trade currently includes, in addition to goods - basic object of the sixties of this activity - and services, investment, intellectual property, public procurement, competition rules. However the common commercial policy, as laid down in the Treaty that established the European Community, covered, in most of its provisions, goods, and only certain aspects referencing services and intellectual property - cross - border services without moving people and goods imposed ban on the border and put into free circulation of counterfeit goods².

This explains why only trade agreements relating to trade in goods could be concluded on the basis of art. 133 TEC. The Treaty of Nice has brought changes in the regulation of external competence of the European Community in the trade but complicated decision procedure by too many safeguards.

The procedure has been simplified by the Lisbon Treaty through art. 207 TFEU, as follows:

- The Commission shall conduct negotiations to conclude the agreement by consulting a special committee appointed by the Council; Council decides by qualified majority;

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² See Opinion 1/94 WTO on November 15, 1994, Rec. p. I-5267; Sean Van Raepenbusch, *The EU institutional Law*, Rosetti Publishing House, Bucharest, 2014, p. 337-343.

- The negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, and foreign direct investment, the Council decides unanimously (if the agreement includes provisions for which unanimity is required for adopting internal rules);

- Also to the negotiation and conclusion of agreements on trade in services and audiovisual services, the situation is similar when harm to their cultural and linguistic diversity of the Union, or trade in local services, educational and health services, when these agreements risk seriously disturbing the national organization of such services and to affect the responsibility of Member States for providing these services;

- In the negotiation and conclusion of agreements in the transport sector remain subject to the special provisions of the common transport policy;

- On the exercise of the common external trade policy will not affect the delimitation of competences between the Union and the Member States or may not lead to a harmonization of national laws, whether such harmonization is excluded from being treated.

2. Nature exclusive external competence of the European Union.

Exclusive nature of the external competence of the Union may follow either the Treaties or secondary law of evolution.

a. The exclusive external competence of the Union deriving from the Treaties. Article 3, paragraph 1 TFEU governing this character, especially in the following areas: customs union, establishment of competition rules necessary for its operation, conservation of marine biological resources under the common fisheries³ policy, the common commercial policy⁴.

> It should also be noted the Court's opinion no. WTO 1/94⁵ although it was surpassed by the Treaty of Nice and the Lisbon Treaty has introduced services, commercial aspects of intellectual property and foreign direct investment in defining common commercial policy (in art. 207 par. 1 TFEU). Requesting the opinion in question was asked as to whether the conclusion of GATS⁶ (annexed to the Agreement establishing the WTO) held the exclusive Community competence in matters of common commercial policy (according to Art. 133 TEC). Court in the above opinion⁷ includes trade in services under art. 133 TEC when

³ Case 804/72 Commission v. The United Kingdom (of Great Britain and Northern Ireland), Rec. paragraphs 17 and 18.

⁴ Regarding trade in goods, see Opinion 1/75, p. 1363-1364; and Case 41/76, because Donckerwolcke and Schou, Rec. paragraph 32.

⁵ November 15, 1994, Rec. p. I-5267.

⁶ General Agreement on Trade in Services began to exert effects on the liberalization of services markets since its establishment on 1 January 1995 both nationally and internationally. Compared to the original provisions of the original agreement, GATS has added new multilateral agreement aimed at opening global market for telecommunications services and the financial services.

⁷ November 15, 1994, Rec. p. I-5267.

it comes to providing a cross-border nature without moving the provider or recipient of services (ex. telecommunications), supply is treated as a commodity exchange⁸. While the other three modes of supply of services covered by GATS (consumption abroad, commercial presence - as a subsidiary or a branch in the country in which you have rendered service - and the presence of natural persons - thanks to which a provider of a State A) providing a state B) are not, in the Court's view, covered by the common commercial policy, according to art. 133 TEC, as there is in the Treaty, specific chapters on free movement of persons, both physical and legal entities. Since this represented special services of transport, the Court stated, in the same sense that they fall under the effect of a particular chapter of the Treaty (Title V), Title X, which is different from the common commercial policy.

> The issue of delimitation of the concept of common commercial policy, was made by the Court in relation with intellectual property. The question was whether exclusive Community competence, under Art. 133 TEC, covering rules on intellectual property rights contained in TRIPS⁹. The Commission answer to the question by invoking the close link between those rules and trade in goods and services covered by these rules. The Court rejected the Commission's position, estimating that only Section 4 of Part III of TRIPs, which contains provisions relating to border measures applying the ban and release for free circulation of counterfeit goods can substantiate the art. 133 TEC. The Court also added that intellectual property rights, trade effects, if they do not refer specifically to international trade where „affect equally, if not more, domestic trade and international trade”. The primary objective of TRIPs being to consolidate and harmonize „protection of intellectual property worldwide”. The Court stated that, to this end, the intellectual property, the Community has „competence to harmonize national laws (according to Art. 95 and 308 become art. 114, 115 and 352 TFEU), which include rules voting procedure different from those applicable under art. 133. If one community would have been recognized exclusive competence in order to conclude arrangements with third countries in order to harmonize intellectual property protection and in order to obtain the same time, the harmonization at Community level, the Community institutions should be able to evade the constraints imposed upon them internally regarding voting procedure and manner”.

⁸ Hot on 7 March 1996 in Case *Parlement v. Council*, C-360/93 Rec. p. I-1195, paragraph 29.

⁹ TRIPs is an agreement multilateral World Trade Organisation. The agreement establishes general standards in relation to each of the main areas of intellectual property accepted. Through this agreement are secured minimum standards of protection to be provided by each member. Therefore, TRIPs was defined as a minimum standards agreement, which allows Members to provide greater protection of intellectual property if they so desire. Member States are free to determine the most appropriate method of implementing the provisions, under its own legal system and its own policy on the matter (The World Bank Group, 1999); see Oana-Maria Florescu, *The TRIPs Agreement, important multilateral WTO agreement*, <http://store.ectap.ro/articole/112.pdf> (accessed on October 1, 2016).

b. The exclusive external competence of the Union arising from developments in the law derived, respectively, from the large number of acts adopted by the Union's institutions to implement treaties, thereby removing the Member States that had previously transitional basis¹⁰. In this case the powers of the Union are in competition, while Member States retain the power to legislate or to international commitments as long as and to the extent that Union authorities „land not occupied yet”¹¹.

The Court stated in this regard that, while at Union settled rules for achieving the objectives of the Treaty, Member States may not, outside the institutions, to commit conventional able to affect those rules or alter their significance¹². In context to what Member States can not discretionary „decide whether to resort to the path of intergovernmental or Community”. Therefore the Court's jurisprudence is not limited to a situation where the Union has established Community rules under a common policy, given all areas corresponding to the objectives of the Treaty¹³. Checking whether the rules of European Union law or the provisions of the Treaties are not affected by conventional ended commitment of Member States, individually or collectively, can not be reduced to a strict analysis of the compatibility of the relevant commitment and Union law.

These rules and legal force, not a right, pursuant to the Court, the adoption by countries „outside the framework of joint institutions” of international commitments „related to the field” these rules. In its case the Court stated that Community law is the system „which interfere when the Union decides to exercise concurrent jurisdiction, subscribing to a conventional international obligation necessary to fulfill a goal of the treaty, so that Member States can, with the EU, subscribe to the same obligation when the action the Member States would have adverse action taken by the Union”¹⁴. If you would maintain a parallel competence of the Member States would increase the risk of contradiction with EU law and would compromise the objectives assigned to them.

According considerations raised by the Court TFEU art. 3 par. 2 „Union has ratified its case law also has exclusive competence in respect of an international agreement when that conclusion is contained in a legislative act of the Union or is necessary to enable it to exercise internal power, or to the extent that it is capable of affecting common rules or alter their meanings”.

> Another example is the opinion of 1/94 WTO on implied powers, which even though it was surpassed by extending the scope of the common commercial policy, according to art. 207 par. 1 TFEU scientific interest, even being covered by the provisions of subsequent article. In this regard the Commission argued that in the alternative, implicit an exclusive Community competence to

¹⁰ Opinion 2/91, ERTA Hot, Hot because Kramer.

¹¹ See Sean Van Raepenbusch, *op. cit.*, p. 340.

¹² Opinion 2/91, ERTA Hot, Hot because Kramer.

¹³ *Idem*, paragraphs 10 and 11.

¹⁴ Opinion 1/76, point 4.

conclude GATS and TRIPS, both of even the EC Treaty which established its internal competence and the existence of acts of secondary legislation that complements this by implementing there, or even the need to take international commitments to fulfill a goal set for the Community internally.

- On GATS Court stated, referring to the exclusive external competence of the Community, it is not apparent from power „Community to publish internal rules”. Member States, whether acting individually or collectively, do not lose the right to contract obligations with regard to third countries but as we have been introducing common rules which could be affected by these obligations. Community external competence becomes exclusive only if common rules were established internally¹⁵.

- And on TRIPs Court rejected the existence of exclusive competence of the Community to contract international commitments, namely¹⁶:

- harmonization carried out in the field in Community framework was only partly so he could claim that acts of secondary Community were not likely to be affected (in the judgment ERTA) the participation of Member signing TRIPs;

- on the other hand „unification or harmonization of intellectual property in the EU must be accompanied not necessarily to be effective, agreements with third countries”.

Another application of the aforementioned opinion is, new Lugano Convention, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Opinion of 7 February 2006¹⁷). On the new Lugano Convention the Court stated that signing it held the exclusive competence of the European Community.

3. The power of the EU common foreign to that of Member States

In a number of areas, the Union and the Member States have joint competence to conclude international agreements with third countries or international organizations. As an example we mention the following areas: education (art. 165 par. 3 TFEU and art. 207 par. 4 para. 3 subpar. B TFEU), culture (art. 167 par. 3 and art. 207 par. 4 para. 3 subpar. A TFEU), public health (art. 168 par. 3 and 4 and art. 207 par. 4 para. 3 subpar. C TFEU), environmental protection (art. 191 par. 4 TFEU), development cooperation (art. 211 par. 2 TFEU) and technical assistance (art. 212 par. 3 TFEU).

¹⁵ AETR judgment, because Hot Kramer, paragraph 77.

¹⁶ See Sean Van Raepenbusch, *op. cit.*, p. 342, 343.

¹⁷ Rec. p. I-1145.

4. Special provisions relating to the signing of agreements on common commercial policy introduced by the Treaty of Lisbon.

Lisbon Treaty in Article 207 TFEU regulated mainly elements of evolution - which outlined, in fact, by the Court in its judgments - on coverage of international trade whose rules were extended from trade in goods, specifically sixties, currently covering equally and services, investment, intellectual property, public procurement, competition rules. These rules correspond to the scope of the WTO Agreement and its annexes.

In summary remember:

- negotiations are conducted by the Commission in consultation with a special committee appointed by the Council (para. 3); Council decides by qualified majority (par. 4);

- the negotiation and conclusion of agreements in the fields of trade in services and trade-related aspects of intellectual property, as well as in foreign direct investment, the Council shall act unanimously (par. 4 para. 2). The Council shall act unanimously for the negotiation and conclusion of agreements in the field: trade in cultural and audiovisual services (if such action would affect the cultural and linguistic diversity Union) trade in social, educational and health services (if they are unlikely to disturb seriously organization of such services at national level and affect the responsibility of Member States concerning the provision of such services (par. 4 para. 3);

- the negotiation and conclusion of agreements in the transport sector remain subject to the special provisions of the common transport policy (para. 5);

- exercising common external trade policy can not affect the delimitation of competences between the Union and the Member States or to lead to a harmonization of national legislation that such harmonization is ruled by treaties (para. 6).

However, according to the Vienna Convention of 1969 on the Law of Treaties in art. 12 is a procedure for rapid conclusion of an agreement the conclusion signature has value in itself, in which case the Council approves the Agreement by decision and designate the person empowered to sign the Agreement may engage Union. In the present case, consultations must precede the signing of the European Parliament.

5. Conclusions

The underlying rules of international trade are reflected in a first step, the external competence of the European Community, and in the second phase - present - that of the European Union to conclude an international agreement in the field of trade policy. European Union foreign jurisdiction in this matter may be exclusive or shared with Member States. Exclusive external competence of the EU arising either from the Treaty or from acts of its institutions (secondary law).

Although the common commercial policy provided for in the original Treaty that established the European Community, covering goods, and only certain aspects referencing services and intellectual property - namely, services (...), the Lisbon Treaty has not only included within the scope of regulatory scope of the WTO agreement but has simplified the procedure of negotiation and conclusion of international agreements in this field.

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**CONTEMPORARY CHALLENGES IN THE
REGULATION OF NATIONAL BUSINESS LAW**

New Elements in the Regulation of Competition in Romania

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Abstract

Taking into consideration the increased activity of the competition authority over the past few years, it was expected that the main framework in this area will suffer substantial amendments in order accurately outline the objectives and fundamentals that are the basis of Competition Council. Consequently, during the last couple of years, Competition Act no. 21/1996 suffered important amendments, in order to align its provisions with the economic reality, as well as the tendencies at the European level. The present paper, using comparative analysis and text interpretation as methods, has as purpose to outline the main amendments brought to the Competition Act no. 21/1996 over the past two years, as well as their impact in the day-to-day activity of the individual and companies in relation to the competition authority. In order to facilitate reading this paper, the conclusions have been introduced at the end of each chapter where that amendment is analyzed, whereas at the end of the paper we can find the most important changes stressed, as well as the path the competition authority should embrace in the near future, in order to give efficiency to these amendments.

Keywords: competition, anticompetitive deeds, dawn raids, sanctions, mergers, access to file, recognition.

JEL Classification: K21, K23

1. Introduction

The competition authority has become a very active player in the last decade on the Romanian market, pursuing investigations in various field of industry, which target both the big players in the business market, as well as small local entrepreneurs. Given the atypical sanctions that can be applied by this authority (i.e. up to 10% from the turnover registered by the company in the previous year to sanctioning), the interest for the competition regulations has been constantly increasing.

The last two years represented probably the most dynamic period with respect to competition regulation and as a result the main framework was republished for two times due to the amendments which were mainly focused on aligning the national framework with the European one.

The competition policy of the European Union is:

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- to prevent intervention by member governments that can distort the free market by discriminating in favour of State companies or granting other aid to certain companies in the public sector/private sector (State aids)²;

- to prevent and punish anti-competitive agreements between firms or abuse of dominant market position (the EU policy on antitrust). It may be mentioned in this category³: trade agreements collected solely between domestic producers and purchasers, agreements adjusting import prices to the price level, national agreements to share markets and sources of supply, reduction practices collective turnover of producers in the state, simultaneously increasing prices, restrictions on imports, bans or restrictions on exports, price rebates, promises not to challenge the validity of patents etc.

The present article aims to systematically analyze the most important amendments brought to the Competition Act no. 21/1996 in Romania, through a comparative approach with the old regulation, while also emphasizing the impact of these amendments and, in the final part, their consequences.

2. Amendments brought by Government Ordinance no. 12/2014

As we can see from the provisions set out in the Government Ordinance's no. 12 of 31st July, 2014 ("GO no. 12/2014")⁴, those set out in Law no. 117/2015 ("Law no. 117/2015")⁵ for the approval of the abovementioned Ordinance, as well as from the statement of reasons of the latter normative act⁶, the new amendments brought to the Competition Act no. 21/1996 ("Competition Act")⁷, had as objective: (a) an operational efficiency of the basic Competition Council's activities by improving the management of the resources allocated to the investigation and sanctioning, as well as (b) maintenance of an optimal competitive environment.

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

³ See Ovidiu-Horia Maican, *Anticompetitive Practices*, „Perspectives of Business Law Journal”, Volume 4, Issue 1, November 2015, p. 180.

⁴ The Government Ordinance no. 12 of 31st July, 2014 amending and supplementing Law no. 11/1991 against unfair competition and other normative act in the field of competition protection, published in the Romanian Official Gazette no. 586 of 6th August, 2014.

⁵ Law no. 117 of 21st May, 2015 for the approval of the Government Ordinance no. 12/2014 amending and supplementing Law no. 11/1991 against unfair competition and other normative act in the field of competition protection, published in the Romanian Official Gazette no. 355 of 22nd May, 2015.

⁶ As it can be consulted on the Deputies' Chamber at <http://www.cdep.ro/proiecte/2014/500/40/9/em768.pdf>, accessed on 14.11.2016.

⁷ Law no. 21 of 10th April, 1996 of competition, further amended and supplemented, republished in the Romanian Official Gazette no. 153 of 29th February, 2016.

One of the most important amendments brought to the Competition Act after its republishing in 2014⁸ targets the way the Competition Council works. Thus, in the version before the amendment, according to art. 19 of the Competition Act, the Competition Council's Plenum was valid gathered in the presence of at least 5 of its members and the decisions to be adopted with majority.

After the amendments brought by GO no. 12/2014, the Competition Council's Plenum was considered to be valid gathered in the presence of the majority of its members and the decisions were as well to be adopted with majority. Afterwards, through the amendments brought by the Government Emergency Ordinance no. 77/2014 ("GEO no. 77/2014")⁹, the Competition Council's Plenum will work valid in the presence of the members in function, but no less than 3, adopting decisions with majority as well. Furthermore, the GEO no. 77/2014 waives the condition of minimum 3 members for the Commissions activities, these being able to adopt decisions with the majority of their members, irrespective of the number of the people present. Finally, Law no. 117/2015 amends once more this art. 19 of the Competition Act, indicating that there are minimum 3 members in function necessary in order to have a valid gathering of the Competition Council's Plenum; the decisions will be valid if they are adopted with the majority of the votes of the present members.

As it can be easily observed, the main idea when amending the procedure regarding the valid gathering of the Competition Council's Plenum was to facilitate its gathering by reducing the number of the members required from 5 to 3 members. For clarity and elimination of any interpretation possibilities, Law no. 117/2015 introduced the phrase "*in the presence of the majority of the members in function, but no less than 3*". However, for future reference, we consider that there ought to be a return to the initial system, that were a minimum number of 5 members was required for a valid gathering of the Plenum, in order to ensure a bigger safety net over the impartiality while adopting decisions.

Another amendment brought by GO no. 12/2014 aims the assimilation of certain positions in the Competition Council with the ones of minister, state secretary, and under state secretary. If in the first republished form of the Competition Act the Competition Council's President position was assimilated with the minister's one, the vice-president's position with the state secretary's one and the

⁸ The Competition Act was republished in 2014 in the Romanian Official Gazette no. 240 of 3rd April, 2014. Afterwards, it was republished in the Romanian Official Gazette no. 153 of 29th February, 2016 as a consequence of art. III of the Law no. 347/2015 for the approval of the Government Emergency Ordinance no. 31/2015 amending and supplementing Competition Act no. 21/1996 and amending art. 1 of the Government Emergency Ordinance no. 83/2014 regarding the wages of the staff paid from public funds, as well as other measures for public spending, published in the Romanian Official Gazette no. 973 of 29th December, 2015, thus giving the articles a new numbering.

⁹ The Government Emergency Ordinance no. 77 of 3rd December, 2014, regarding the national procedures in the state aid field, as well as for amending and supplementing Competition Act no. 21/1996, published in the Romanian Official Gazette no. 893 of 9th December, 2014.

completion counsel's position with the under state secretary's one, after the enactment of GO no. 12/2014, the competition counsels will be assimilated with state secretaries and not under state secretaries.¹⁰

At the same time, GO no. 12/2014, amended by Law no. 117/2015, introduces a very important principle in the competition legislation, "*the prioritization principle*". Thus, after art. 33 par. (1) of the Competition Act, a new paragraph is introduced, "(2) *For the rational utilization of the resources for triggering and conducting the investigation, the Competition Council may prioritize the cases according to the potential impact on the effective competition, consumers' general interest or the strategic importance of the economic sector aimed*". Even though at first glance this principle comes to make more efficient the Competition Council's activity, the amendments brought by Law no. 117/2015 (which mentions that the prioritization principle applies for both the triggering as well as for conducting the investigation – before that the prioritization applied only for the latter), it remains to be seen if problems will occur in the way that the Competition Council will decide that certain complaints are not relevant at that moment for triggering an investigation, taking into consideration the industries target at the time by the competition authority, even though the complaint shows serious clues for a potential anticompetitive agreement.

Moreover, the prioritization principle, as it is written, is general and vague and does not have any express conditions, nor implies a concrete preliminary analysis by which a certain case shows interest or not at a certain moment. In this manner, one of the amendments of the competition legislation in the near future should target a clear and unambiguous method of sorting the cases, so that the prioritization principle can be applied in an adequately and transparent manner.

Another amendment brought to the Competition Act aims the cases in which, after the investigation was triggered, the competition authority finds that it did not discover sufficient evidence for breaking the law in order to justify the imposing of measures or sanctions by the Competition Council.

Until the enactment of GO no. 12/2014, the Competition Council's President had the possibility to close, by order, that investigation. After this normative act, if not enough evidence is discovered for a breach of competition legislation, the Competition Council's President is forced to close the investigation.¹¹

At the first read, we may say that we are in the presence of a pure textual amendment of the normative act, without any major implications in the institution's current activity. Going further into detail, we may observe that, before the amendment brought by Law no. 12/2014, the President *has the possibility* either to close the investigation, by order, or (*per a contrario*) to decide to continue the investigation in order to discover new evidence related to a breach in Competition

¹⁰ See art. 22 of the Competition Act.

¹¹ See art. 43 (1) of the Competition Act.

Act. This amendment establishes the President's obligation to close the investigation if there is not enough evidence of breach of competition legislation without leaving the opportunity to further decide to continue the investigation and possibly discovering new evidence.

The GO no. 12/2014 eliminates the fees charged by the Competition Council to consult the file and obtain copies of the documents of the investigation; the authority will provide electronically, at parties to the investigation's request, copies and extracts of the investigation file (most common on DVD). The explanation lies in the explanatory memorandum to Law no. 117/2015 according to which "*the revenues from the fees charged for the copies or extracts of the investigation files are insignificant, both in absolute and relative amount to total income from fees and charges in the institution*".¹²

Before the enactment of GO no. 12/2014, the Competition Council's President's order of refusing the access to the investigation file could be challenged separately, in front of the Bucharest Court of Appeal, in 15 days from the communication, the court's decision also being able to be challenged with appeal in 5 days from the communication.

Challenging this order meant that the investigation was suspended until the second appeal was rendered, which hindered the entire procedure, as there were situations where the investigations were extended even with more than a year.

Therefore, the amendment brought by GO no. 12/2014 came to simplify the procedure for carrying out investigations at the level of the competition authority The President of Competition by which the parties are denied (total or partial) access to certain documents, data and information found in the case file, can be attacked only with the decision that completed investigation by the same application for summons, not to intervene in this case suspension of production before the competition authority (the term 'same application of summons' was introduced by Law no. 117/2015 for further clarification of the appeal procedure).¹³

3. Amendments brought by Government Emergency Ordinance no. 31/2015

By far, the most spectacular and important amendments regarding Competition Act were brought by GEO no. 31/2015.¹⁴

¹² See footnote 4 above.

¹³ See art. 45 par. (1) of the Competition Act.

¹⁴ Government Emergency Ordinance no. 31/2015 amending and supplementing Competition Act no. 21/1996 and amending art. 1 of the Government Emergency Ordinance no. 83/2014 regarding the wages of the staff paid from public funds, as well as other measures for public spending, published in the Romanian Official Gazette no. 474 of 30th June, 2015.

Before the enactment of this Government Emergency Ordinance, the Competition Council published on its website, for public debate, the normative act's draft for amending and supplementing the Competition Act¹⁵. Even though GEO no. 31/2015 seriously amends Competition Act, it may be observed that many provisions from the draft project, were not adopted in the manner they were open for debate, and we will point out the differences where we consider necessary.

On a general note, most amendments target procedural aspects. One of the most important amendments aims to align the internal legislation with the European one. Thus, art. 5 (which refers to anticompetitive agreements at national level) and art. 6 (which refers to abuse of dominant position at national level) of the Competition Act have been adjusted to correspond to the structure of art. 101 (which refers to anticompetitive agreements at European level) and art. 102 (which refers to abuse of dominant position at European level) from the Treaty on the Functioning of the European Union.¹⁶

Thus, from the old art. 5 of the Competition Act letters e) and f) on bid-rigging and eliminating customers off the market are eliminated. With respect to art. 6 of the Competition Act, also letter e) and f) have been eliminated which were generically target on refusal to deal with certain suppliers or beneficiaries, practicing excessive prices or, on the contrary, ruining ones, both aimed to eliminate competition and exploit the dependency status.

The elimination of such examples from our legislation is not equal to a decriminalization of them, but will allow the Competition Council to include them in the other categories from art. 5 par. (1) and art. 6 of the Competition Act, under the illegal deeds mentioned above.

Therefore, from the entrance into force of this amendments (*n.n.* 30th June, 2015¹⁷), the investigations triggered based on art. 5 par. (1) let. f) and g) of the Competition Act are considered to have been triggered based on the general provisions of art. 5 par. (1) and the investigations triggered based on art. 6 par. (1) let. e) and f) of the same act will be considered to have been triggered based on the general provisions of art. 6 par. (1).

It remains to be seen in the future whether this literal alignment of the national provisions with the European ones will also be doubled by a factual one in this manner and if so the Competition Council will embrace from the Commission's, First Court's and European Court of Justice's recent case law.

¹⁵ Which may be consulted at http://www.consiliulconcurrentei.ro/uploads/docs/items/id10107/site_consultare_lege1v2.pdf, accessed on 14.11.2016.

¹⁶ Treaty on the Functioning of the European Union (consolidated version), published in OJ C326/47 on 26.10.2012.

¹⁷ According to art. 12 of Law no. 24/2000 regarding technical legislative norms for elaborating normative act "Government Emergency Ordinances enter into force on the day they are published in the Romanian Official Gazette".

With respect to merger control, GEO no. 31/2015 allows the Competition Council to modify the Competition Act's thresholds (*i.e.* the aggregate turnover of the companies involved to be bigger than 10 mill. euro and at least two of the companies involved to have a turnover bigger than 4 mill. euro in Romanian territory), by Plenum's decision. The new thresholds will be approved by the Competition Council's President's order, after the clearance from the Ministry of Economy, Trade and Tourism is obtained and will come into force in 6 months' time after they are published in the Romanian Official Gazette.

The reason for such changes lies most likely in a procedure for a legislative simplification, making it easier for the Competition Council to obtain a clearance from the Ministry of Economy, Trade and Tourism to amend these values, rather than to make use of the classical procedure of modifying the legal framework (*i.e.* modification of the Competition Act through a new law, ordinance or emergency ordinance, which involves lengthy procedures of adoption).

Another novelty concerns the possibility that an investigation into a particular sector can be finalized by *identifying market dysfunctions* affecting the competitive process. In this regard, the Competition Council will adopt one of the following measures: (a) issue recommendations to business environment, public authorities and consumers to facilitate market development and competition, (b) promotion of specific regulations, if it is discovered that the market's malfunctions were generated by normative acts and (c) impose, by decision, the necessary, appropriate and proportionate measures to remedy market dysfunctions. The novelty also comes from the fact that the measures in paragraph (c) are subject to public consultation before they are to be taken by the Competition Council by decision.

Another important change aims the extension of the inspection's powers. Thus, the new regulation allows unannounced inspections at any premises in which businesses operate (we refer to any premises, land and means of transportation that the company legally owns or where it operates). The reason for this measure comes as a solution to limit the attempts to obstruct the unannounced inspection by using the argument that the space in which the company operates is not legally owned by it.

Also, the deadline for appealing the authorization served by the President of the Court of Appeal or a delegated judge regarding the application for authorization of an inspection is extended. Following the coming into force of the New Code of Criminal Procedure¹⁸ in 2014, the provisions relating to conditions to initiate and perform unannounced inspections by inspectors appointed by the Competition Council in this respect (except junior inspectors) were amended.

¹⁸ Law no. 135/2010 on the New Code of Criminal Procedure, published in the Romanian Official Gazette no. 486 of 15th July, 2010 and enforced by Law no. 255/2013, published in the Romanian Official Gazette no. 515 of 14th August, 2013.

Thus, as of 02.01.2014, the Competition Council cannot conduct unannounced inspections only based on the order of the President of the Competition Council (as previously stipulated), a judicial authorization given by the President of the Court of Appeal or by a delegated judge being mandatory. This authorization can be challenged (both the Competition Council and by the person who is subject to inspection) within 48 hours, which starts from the moment of its communication. After the entry into force of GEO no. 31/2015, the deadline in which that decision may be challenged was increased to 72 hours, enabling parties to better analyze and prepare pertinent observations on it.

In addition, still talking on inspections, new ways of communicating the inspection order and judicial authorization are introduced. Thus, if the communication cannot be physically transmitted to the legal representative of the company or, in his absence, to any other employee of that company, the communication will be performed by: (a) fax, (b) mail or (c) any other text transmission methods ensuring the transmittance of the order and judicial authorization and also the confirmation of dispatch (but not confirmation of its receipt by the investigated party).

In these situations, the communication of the inspection order and its related documents will be considered to have been made at the date and time listed on the printed copy of the confirmation of transmission. In such cases, the party subject to inspection remains to prove - by any means - that the documents did not come in the possession of the legal representative or employee of the company. In the exceptional case where communication cannot be achieved by any of the means set out above, the competition inspectors will proceed to display: (a) the order of the inspection, (b) the judicial authorization and (c) the order triggering the investigation all at the premises for inspection. Communication will be considered to be made at the date and time from the report prepared by the competition inspectors in this respect and displayed.

GEO no. 31/2015 brings new limitations regarding access to the file. After the entry into force of GO no. 12/2014 by which, as we mentioned in the previous section, the order of the President of the Competition Council refusing (totally or partially) the access to information and documents from the case file can be challenged only with the final decision, GEO no. 31/2015 comes and limits file access requests.

The confidential documents, data and information from the Competition Council's file may be required, usually once, after the communication of the investigation report. In the absence of new element, there cannot be made successive access requests to confidential documents, data and information. Basically, in such case, if the party was not granted access on the first request, they are no longer able to make a new request for access. The only way remaining is to wait the finalization of the investigation in order to challenge the order along with the application for summons by which the decision is appealed.

Although the intention of the legislator by introducing these changes was to make more efficient the work of the investigation team and to defend them from possible abuses by some companies (which could make repeated requests for access to the file, thus making investigation procedure harder and time consuming) it remains to be seen how practical this amendment will be, if it will lead or not to abuse, only this time from the competition authority.

Regarding the complaints submitted by a person to the Competition Council on possible anticompetitive actions, the deadline for communicating a decision rejecting a complaint regarding an anticompetitive practice, where no sufficient grounds and facts are presented in order to open investigation is extended from 60 calendar days to 60 working days from the date on which the complainant confirmed that his complaint is complete and meets all the requirements of the law.

GEO no. 31/2015 makes important changes in terms of acknowledgment procedure. Before the changes, the acknowledgment could be done after receiving the investigation report and by the time the hearings took place. The new regulation extends the period during which the undertakings under investigation can apply for the acknowledgment procedure, for the entire period of investigation. The reduction in the fine imposed remains the same as in the previous regulation, namely between 10% and 30% of the fine imposed, without taking into consideration mitigating circumstance on acknowledgment.

In order to qualify for such a fine reduction, the company must submit a specific application in this regard, which includes: (a) clearly and unequivocal acknowledging the responsibility for the infringement and (b) a statement of acceptance of the maximum amount of fine that the company will pay.

What is very interesting is that, according to the new regulation, if the company that chose the mitigating circumstance of acknowledging decides to challenge in court the decision issued by the Competition Council, with regard to the facts subject to acknowledgment, the company will not benefit from the reduced fine paid as a results of the acknowledgment, and the Competition Council is free to use that acknowledgment and any other evidence supplied by that undertaking.

When adopting the GEO no. 31/2015, the procedure for applying fines if the company that acknowledges decides to challenge the Competition Council's decision in courts was unclear and therefore there were two possibilities that might give efficiency to that provision.

First, whether the decision issued by the Competition Council were to have calculated two thresholds fines, namely: (a) a threshold retaining mitigating circumstance of the acknowledgment, under the conditions of not challenging the decision in court and (b) a threshold without retaining the circumstance mitigating, in case the company decides to challenge that decision in court.

Secondly, there is the possibility, less likely, for the competition authority to issue a decision to retain the mitigating circumstance of acknowledgment,

and if the company decides to challenge in court that decision, the Competition Council will reconsider the decision and partially revoke it for that undertaking, and thus issuing a new decision with the new amount of the fine (without a deduction of the mitigating circumstance of acknowledgment).

On these dilemmas, the legislator considered it appropriate to respond with a further amendment of the Competition Act at the end of 2015, which we will detail in the following sections.

However, given that the rules GEO no. 31/2015 shall be applicable forthwith, we can legitimately question: *what will happen with the decisions issued by the Competition Council on 30 June and up to the approval of the new instructions?*

In addition, regarding the leniency policy and upholding the mitigating circumstance of acknowledgment, the new regulation stipulates that companies which benefited from the leniency policy will also be able to apply for the acknowledgment procedure, in which case the reduction of fine as a result of acknowledgment will be further added to the reduction applied for leniency. However, even by summing these two procedures of punishment individualization, their level may not exceed 60% of the level determined in accordance with the instructions on the individualization of sanctions.

Another novelty concerns the motivation and communication of the decisions issued by the Competition Council when applying sanctions. Thus, according to the new provisions, when applying sanctions, the Competition Council has the obligation to motivate and communicate to the parties the decisions in maximum 120 days after the deliberation took place. Up to this moment, the only provisions with respect to adopting decisions were found in the Regulation on hearing procedures in the Competition Council and adopting decisions¹⁹ in which it was stated that the deadline for deliberation can be postponed with 15 working days after the closing of the debates, and in serious justified cases (*i.e.* the outstanding complexity of the case or other causes related to institution's activity), this deadline can be prolonged by another 15 working days. Subsequently, the decision will be communicated to the parties in a maximum period of 30 days from the day the deliberation took place, resulting in a maximum period of time of 72 days (by corroborating those two period of time stated by the Regulation) from the moment the deliberations took place until the communication of the decision adopted by the Competition Council.

Some clarifications upon this aspect are still required: in the project for the amendment of the Competition Act, as it was published on the authority's website, the provision was set out like this: "*The decisions adopted by the Competition Council based on art. 8, 13, 44 and 45 will be communicated to the parties, usually, in maximum 120 days after the deliberation*". As it may be observed,

¹⁹ Regulation on hearing procedures in the Competition Council and adopting decisions, published in the Romanian Official Gazette no. 792 of 8th November, 2011.

the text from the project allowed a bigger margin of discretion on behalf of the Competition Council with respect to this deadline, as in justified cases the authority might have exceeded these 120 days. GEO no. 31/2015 thus states the obligation of to motivate and communicated the decision to the party in 120 days after the deliberation took place, but without specifying the sanction to be applied in case. However, we consider that even if there is no sanction expressly mentioned by the act, the parties are entitled to ask for damages in court if such a deadline has not been respected, provided they prove an injury under common law.

Regarding the penalties imposed by the Competition Council, the company which is sanctioned did not achieve in the previous financial year sanction a turnover, or where this turnover cannot be determined, the Competition Council will take into account the turnover for the financial year in which the company registered a turnover, year that is immediately preceding the year of reference for the calculation of turnover in order to apply the fine.

Prior to the amendment, this mechanism was provided only if the undertaking's turnover in the financial year previous to sanctioning could not be determined. Currently, according to the new provisions, if neither in year previous to the reference year for calculating the turnover the company did not register a turnover, the last turnover registered by the company will be taken into account.

The draft project to the Competition Act the legislator intended to introduce a much tougher sanctioning regime than currently exists. Thus, for the companies who are part of the same economic unit and form a single undertaking in the purposes of the Competition Act, the Competition Council recommended that the determination of the turnover in the financial year prior to sanctioning should be based on the worldwide turnover for all companies considered part of the same economic unit.

Such a principle would have resulted in the existence of a more severe sanctioning regime than the pattern laid down in law and practiced in the European Union and other countries with a long tradition in the application of competition rules. Moreover, it would have even led to a breach of the principle of state sovereignty as it would have allowed a fine to be based on the turnover outside Romania. The fact that several companies belong to the same group, which has operations in several countries, does not mean that we should lose sight of the fact that the anticompetitive deed established by a decision of the Competition Council took place in one state, respectively Romania. Imposing a fine on the worldwide turnover of all companies in the group would have meant that we have to consider that an act anticompetitive deed sanctioned on Romanian territory occurred in other states.

4. Novelty amendments brought by Law no. 347/2015

After in 2015 the competition legislation was substantially amended, the final of the year booked huge surprises for us, the enactment of Law no. 347/2015²⁰ bringing significant amendments starting of 1st January, 2016.

The Competition Act states that, starting this year, the following decisions are considered enforceable titles: (a) Competition Council's decisions for applying sanctions and (b) the authorization taxes in merger control. Before this amendment, the secondary regulation²¹ only mentioned that the sanctioning decision issued by the Competition Council are enforceable titles, without expressly mentioning the time for this enforceability, excluding tax authorizations above mentioned.

Currently, these become enforceable titles without any other procedure, in 30 days-time from the communication to the interested parties.

Thus, if after the tax authorization decision in case of merger control is issued by the Competition Council and the amount is not paid, the competition authority will be able to proceed to the enforceability of this amount, without needing to conduct any other procedures.

Very interesting in this case is the Report sent by the Commission for industry and services with respect to the explanatory memorandum to Law no. 347/2015 on 15.12.2015.²² This provides, in relation to this newly introduced article 24 par. 3¹, the following reasoning: "*In most cases sanctioned companies requests in court the suspension of the fine. Even if the parties are not successful on suspending the fine, locally, tax administrations are often not demand payment of the fine on the grounds that there is an action for annulment of the decision pending.*"

Therefore, the reason to include this new article was to set an effective way of means to the tax administrations so that they can proceed with the enforcement of fines and authorization fees that the company did not pay, whether or not an action for annulment of the decision was brought before the courts. Most likely, tax administrations showed a more relaxed regime regarding enforcement of the fines established by decision of the Competition Council, precisely because there are many cases where the fine set by the competition authority was significantly diminished by the courts.

²⁰ Law no. 347/2015 for the approval of the Government Emergency Ordinance no. 31/2015 amending and supplementing Competition Act no. 21/1996 and amending art. 1 of the Government Emergency Ordinance no. 83/2014 regarding the wages of the staff paid from public funds, as well as other measures for public spending, published in the Romanian Official Gazette no. 973 of 29th December, 2015.

²¹ Art. 17 of the Regulation from 19 August 2011 on discovering contraventions and applying sanctions by the Competition Council, published in the Romanian Official Gazette no. 631 of 5th September 2011, as further amended.

²² Which may be consulted at <http://www.cdep.ro/comisii/munca/pdf/2015/rp741.pdf>, accessed on 14.11.2016.

In such a situation, the procedure for recovering the amounts already paid to the tax administrations would have been extremely difficult, and therefore tax authorities preferred to wait for the moment when the fine remained permanently settled by the courts in order to proceed with the execution of a clear and determined amount, which could no longer be subject of change.

Before the amendments brought by Law no. 347/2015, the Competition Act mentioned, in art. 26 par. (4) that the authority's decisions by which: (a) there is stated a breach of the law and appropriate sanctions are applied, (b) necessary measures to restore the competitive environment are applied, (c) is granted access to confidential information, (d) complaints are settled as well as the requests and notifications on merger control are unilateral administrative acts with individual character.

With the implementation of new regulations, granting access to confidential information is no longer made by decision, but by order of the President of the Competition Council and, although it preserves the character of unilateral administrative acts with an individual character, it cannot be challenged separately in an administrative court, but just among with the final decision. The rationale for this provision is that the investigation time will be reduced - such an action could have extended the investigation procedure for over a year, which considerably complicated the work of the institution.

The legislator's intention was to fix a existing legislative mismatch²³, art. 45 par. (4)²⁴ of the Competition Act expressly mentioning that the access to file is granted only by order of the Competition Council's President (and not by decision!), which may be challenged only with the decision through which the investigation is finalized and through the same statements of claims.

In case of a merger control, there are two kind of fees that need to be paid by the companies involved:

- (a) a fixed fee, which is the tariff from the notification of a merger control and consists of RON 4.775²⁵ which needs to be paid before addressing the notification to the competition authority *and*
- (b) a variable fee for authorizing the merger control, paid after the analysis made by the competition authority in that notification.

Before 1st of January, 2016 the authorization tax for merger control was between EUR 10.000 and EUR 25.000, taking into consideration the value of the turnover of the company involved²⁶, irrespective if the clearance decision was

²³ See footnote 4 above.

²⁴ Art. 43 par. (4) prior to the republishing of 2016.

²⁵ According to the schedule of the Regulation from 4th March, 2011 on establishing and charging the taxes for the procedures settled out in Competition Act no. 21/1996 and the regulations issues for applying it, published in the Romanian Official Gazette no. 186 as of 17th March, 2011, as further amended.

²⁶ The method of calculation can be found in the Schedule to the Instructions from 11 August, 2010 for the application of art. 32 of the Competition Act no. 21/1996, republished, as further amended

issued in Phase I (without a deep analysis) or in Phase II (after a deep analysis of the notification, when the operations presents serious doubts regarding the compatibility with a normal competitive environment.

Starting this year, the authorization fees will be as following:

- (a) **between EUR 10.000 and EUR 25.000** when the clearance decision is issued based on art. 47 par. (2)²⁷ of the Competition Act – when there are no serious doubts regarding the compatibility with a normal competitive environment or when the doubts were eliminated by the commitments proposed by the parties and accepted by the Competition Council;
- (b) **between EUR 25.001 and EUR 50.000** when the clearance decision is issued based on art. 47 par. (4) let. b) and c)²⁸ of the Competition Act – when, during Phase II, the competition authority authorizes the mentioned notification as follows:
 - i. *Unconditional*, because, after the analysis, it results that the merger control operation does not raise significant barriers in competition *or*
 - ii. *Conditional*, establishing the obligations and/or conditions that the parties need to respect so that they do not alter the competition.

In July 2016, the Competition Council adopted the Instructions on calculating the authorization taxes in merger control operations²⁹, in which is stated that the tax will be related to the company's turnover, as it was before, split according to the Phases mentioned above.

At the same time, compared to the previous provisions, the taxes to which we referred to above (both the fix one as well as the variable one) will no longer go to the state budget, but to the Competition Council's one³⁰. Art. 31 par. (5) of the Competition Act shows that these revenues will be used by the competition authority for personnel training, consulting and expertise, performance bonus granted to the personnel with outstanding results, editing and printing the Romanian Competition Magazine etc.

Having more resources at hand now than before, this can only mean one thing: that the competition authority will increase in independence and will invest in the development and training of the personnel in various industry's fields,

and supplemented, with respect to the method of calculation of the authorization tax in case of merger control, published in the Romanian Official Gazette no. 591 as of 20th August, 2010.

²⁷ Art. 45 par. (2) prior to the republishing of 2016.

²⁸ Art. 45 par. (4) let. b) and c) prior to the republishing of 2016.

²⁹ Instructions from 21st June, 2016 on calculating the authorization taxes in merger control operations, approved by the order of the Competition Council's President no. 439 from 21st June, 2016 for the approval of the Instructions on calculating the authorization taxes in merger control operations, published in the Romanian Official Gazette no. 529 as of 14th July, 2016.

³⁰ Art. 31 par. (3) of the Competition Act.

which will lead to an intensification of the activities performed by this institution, as well as to a implementation of a higher degree of professionalism, thus making the competition authority an attractive work place for professionals, who are rewarded according to their performance.

Under a critical point of view, it remains to be seen whether this amendment may lead to abuses on behalf of the competition inspector who, under the stimulation of performance bonuses, will try to cover a bigger number of investigations that will end with sanctioning proposal (more especially without retaining any mitigating circumstances).

Art. 34 par. (3)³¹ comes and regulates the possibility of the competition authority to use, according to the law, the information and documents collected by other authorities and public institutions while carrying out their specific activities.

The argument for this text aims at those situations in which there is the possibility that certain documents or information collected by other authorities and public institutions while carrying out their specific activities to be destroyed before the competition authority can proceed to dawn raids. In such case, there might exist the impossibility of the Competition Council to restore those documents from other sources, and as a result, the legislator introduced the possibility to use the documents and information that other authorities had access to.

The problem which arises is that this amendment also takes into account documents and information that were collected during criminal proceedings. In the criminal law area, the parties' rights and guarantees are more restrictive than the ones from the Competition Act (we are referring here specially to warrants for premises, which are total absent from the competition legislation). Therefore, there exist the possibility that, through this cooperation, the competition authority will have access to documents and information that otherwise it would not have access to, thus existing the possibility to harm the right of defense of the investigated persons.

Starting with 2015, the Competition Council launched the whistleblower's website³², where the employees or ex-employees can inform the Competition Council regarding a possible anticompetitive deed of the company. By implementing this platform, the competition authority wished to encourage persons who have knowledge about anticompetitive deeds to bring them in the attention on the competition authority. The Competition Council's President, Mr. Bogdan Chiritoiu declared that this platform was a real success ever since it was launched, 50 complaints regarding possible anticompetitive deeds being registered in the first two months.³³

³¹ Art. 34 par. (2¹) prior to the republishing of 2016.

³² Which can be accessed at <https://secure.secway.info/ro/start.php>, accessed on 14.11.2016.

³³ For further details, see article "*How much you win in Romania if you "blame" your competition*", published on 24.03.2015 at [http://www.gandul.info/gandul-live/cat-castigi-in-romania-daca-iti-](http://www.gandul.info/gandul-live/cat-castigi-in-romania-daca-iti)

However, until 2016, there was no legal definition of the “whistle-blower”. Law no. 347/2015 takes a step forward and defines the whistleblower as being those “*individuals that provide the Competition Council, on their own initiative, information regarding possible breaches of Competition Law*”.³⁴

It is also mentioned that the identity of the whistleblower is protected and that submitting such information is not considered a breach of Work Code or the labour agreement between the employee and the employer. This measure comes to serve as a protection for the employee, the employer having no right to consider such actions a breach of the confidentiality agreement taken by the employee towards the company and whose breach might have led to a contract termination.

According to art. 36³⁵ of the Competition Act, “the Competition Council may take *statements from any natural or legal representative of the legal person who consents to give such statements.*”

Art. 37 para. (1)³⁶ comes to detail this procedure, the persons who can interview people mentioned above being the competition inspectors, with the *exception* of junior inspectors.

Thus, to achieve this interview procedure, the Competition Council sends a written request to the person concerned, indicating the legal basis, purpose, date and place the interview shall take place, and the sanctions provided by law; the interview can be done by any means, including electronic ones and may be recorded audiovisual and written in a report signed by all participants.

It also introduced a new offense in this case, as the individuals or legal representatives of the company are liable of a fine between 0.1 and 1% of the company’s total turnover of the in the previous financial year when providing inaccurate or misleading information.³⁷

In 2011 it was introduced a new paragraph in the Competition Act at the time by which, in essence, in situations where an operation to take control of undertakings or assets poses a risk to national security, the Government, at the proposal of the Supreme Council of National Defense (SCND) will issue a decision by which that operation is prohibited. It is also established an obligation for the Competition Council to inform the Supreme Council of National Defense with respect to economic concentrations which are notified thereof, which may be analyzed from the national security’s point of view³⁸.

torni-concurrenta-bogdan-chiritoiu-in-doua-luni-avem-deja-50-de-sesizari-de-la-persoanele-fizice-14049452, accessed on 14.11.2016.

³⁴ Art. 35 par. (1) of the Competition Act.

³⁵ Art. 35 prior to the republishing of 2016.

³⁶ Art. 35¹ prior to the republishing of 2016.

³⁷ Art. 53 let. c) of the Competition Act.

³⁸ For further details, see Justin Captariu, *The operation of taking control subject to SCND’s notification and the applicable procedure*, published in „the Notes and Juridical Studies’ Magazine” on 17th September, 2013 which can be accessed at <http://www.juridice.ro/282823/operatiunile-de-preluare-a-controlului-supuse-notificarii-csat-si-procedura-aplicabila.html>, accessed on 14.11.2016.

By Law no. 347/2015 it is provided that, if the SCND notifies the Competition Council that an operation of merger control is likely to present a risk to national security, the deadlines set out in the Competition Act in the authorization procedure of a merger are suspended from the moment the SCND informs the Competition Council on this issue.

The suspension of these deadlines will cease in the following cases: (a) where the SCND notifies the Competition Council that the operation is prohibited or (b) where the SCND notifies the competition authority that the transaction presents no risk to national security.

This change is very important because there was a risk that, after the analysis of the economic operation by SCND, the deadlines laid down by the Competition Act to adopt a decision in the case of concentrations would have been exceeded and thus the economic concentration operation can take place (art. 45 par. (5) of the Competition Act).

Under the new regulations, the Competition Council may, in case of a dawn raid, lift and use as evidence the preparatory documents prepared by the investigated company for the sole purpose of exercising its right of defense.

The restriction to lift documents is maintained regarding the communications between the company and its lawyer (client-attorney privilege), drafted in and for the sole purpose of exercising the company's right of defense *after* the opening of the administrative procedure under the Competition Act or even *before* it provided that it is related to the investigation.

It remains to be seen if this articles will be the subject of a complaint of unconstitutionality or not - basically, in such a case, the competition authority could use the preparatory documents of the company against it, which is contrary to protecting the rights of defense.

According to the new provisions, the mandate of the Competition Council's member of the Plenum is 5 years, subject to a one-time renewal, irrespective of the previous duration.³⁹

This amendment must be analyzed in accordance to art. 15 par. (11) of the Competition Act with regulated the procedure in case a place in the Competition Council's Plenum is vacant, other than by fulfilling the deadline. Therefore, in case a position becomes vacant, a new member will be chosen and named, but this time for a 5-year period, and not until the expiration of the term the person before was entitled to.

Until now, if the person whose term was ceased has 3 more years until the expiration of the 5-year period, the persons that will have taken its place would have been appointment only for that 3-year period and not for an entire 5-year term.

Therefore, the one-time mandate renewal, irrespective of the previous period, covers both of the following situations: (a) when, according to the old

³⁹ Art. 15 par. (2) of the Competition Act.

regulation, the new member will have been appointment only for the remaining period of time of the previous persons and (b) when that previous person had a full 5-year term.

Art. 70⁴⁰ of the Competition Act, newly introduced, states that: “*the person who had exercised a public dignity function or a specialized public function in the Competition Council, wishing to pursue a professional activity in the private sector, whether paid or not, within three years of terminating the work relations, will notify the Competition Council about it, requiring a prior favorable approval of the competition authority, in case the work to be done in the private sector is related to the economic activity pursued at the Competition Council during the last three years and may be incompatible with the authority’s legitimate interests*”.

Based on the interested party’s request, the Competition Council may deliver the following types of approvals:

- (a) A positive approval *or*
- (b) A positive approval that also includes the condition ought to be respected by the interested party.

In case the interested party does not request such approval or, in case it does, the person does not respect the obligations set thereof, the Competition Council may address the court and claim:

- (a) To obligate that person to respect the approval;
- (b) To stop the activities that are incompatible with the legitimate interest of the competition authority;
- (c) To obligate that persons to pay for the damages caused by not request or not respecting the approval.

The procedural competence in this case is granted exclusively in the favor of Bucharest’ 2nd degree court, Administrative Section, as the first court.

This new provisions comes as a result of the last years’ significant personnel migration from the public sector in the private one, shaped especially in collaboration agreements with competition lawyers who represent clients in front of the Competition Council or with private companies investigated by the competition authority.

Taking into consideration that the Competition Council’s staff has access to confidential and sensitive information, a regulation for the protection of the authority’s interests was necessary. This amendment also takes into account that competition inspector and other members of the Competition Council have access, in their daily activity, to documents and information that may offer an unjustified advantage to some individual or companies in the private sector (*i.e.* documents and information from the file, the activity plan of the competition authority, investigation that will be triggered etc.).

⁴⁰ Art. 68 prior to the republishing of 2016.

The most important amendment brought to the Competition Act targets the institution of the acknowledgment of the anticompetitive deed by the investigated party. This amendment is the natural result of the politics the Competition Council adopted a years ago, which is, on one hand, focusing of the prevention principle and remedies proposal in order to eliminate the harm done to the competition environment and, on the other hand, to shorten the investigations and to strain court's activities for the annulment of sanctioning decisions issued by the competition authority. Next, we will analyze, punctually, the most important amendments brought to this institution.

A new timeline for the acknowledgment procedure. Starting with 1st January 2016, the acknowledgment procedure can be done only *prior* to hearings. Before that, the undertaking could have recognized the anticompetitive deed at the most during the hearings.

Fine amount. In case the company also benefits from the mitigating circumstance of acknowledgment (for which a reduction between 10% and 30% from the basic amount is applied), the fine amount can be diminished including in those situations where it is settled to the minimum provided by law, *without the fine being less than 0.2% of the turnover achieved by the company in the previous year.*

The acknowledgment benefit can be granted only after a specific request on behalf of the company, that needs to include:

- i. a clear and unequivocal acknowledgment of the liability for the infringement *and*
- ii. a statement of the maximum fine that the company is willing to pay,

In the decision the Competition Council will adopt it will be specified:

- i. the amount of fine without taking into consideration the acknowledgment *and*
- ii. the amount of fine without taking into consideration the mitigating circumstance of acknowledgment.

Action for the annulment in case the mitigating circumstance of acknowledgment is applied. Before the amendment brought by Law no. 375/2015 it was only mentioned that, if the company decides to challenge in court the sanctioning decisions issued by the Competition Council, it will no longer benefit from the fine reduction as a result of the applying the mitigating circumstance of acknowledgment, without detailing the procedure in such case.

The new provisions come to regulate these shortages; therefore, in case the company decides to challenge in court the competition authority's decision with respect to *aspects that were subject to acknowledgment*, the company will lose the benefit granted as a result of applying the mitigating circumstance of acknowledgment.

Such modification can only please us, as it allows the companies to challenge the Competition Council's decision in court with respect to other aspects

that were not part of the acknowledgment procedure, like, for example, an incorrect fine individualization, not withholding certain mitigating circumstances etc.

Moreover, the removal of the benefit granted regarding fine reduction will not be automatically, but, at the competition authority's request, the court will analyze the annulment action and will remove this benefit, establishing the fine accordingly.

Another very important benefit towards this amendment brought by OUG no. 31/2015 is that, when the company which decided to acknowledge the anticompetitive deed challenges the decisions in court, the competition authority can no longer use that recognition towards other companies that did not resort to such procedure.

In case there are companies that benefit from the leniency procedure, but that are not acquitted from the pecuniary liability, the reduction as a result of acknowledgment will be added to the reduction as a result of leniency procedure, without exceeding 60% of the level determined according to the individualization instructions.

With respect to the enforcement of the new individualization regulations, meant to detail this framework, the Competition Council adopted on 3rd November, 2016 the new Instructions, aligned with the provisions set out in Competition Act⁴¹.

5. Conclusions

As we may observe, the competition legislation faced significant amendments in the last couple of years, meant to align the national provisions with the European ones and to adapt the legislative text to the existing reality. The fact that the Competition Council intends to implement a clearer procedure for its daily activities can only bring us joy, as in the end this will reduce the duration of the investigations.

The fact that the deadline for challenging the judicial authorization rises from 48 hours to 72 hours is meant to settle the almost "pure formal" control of the courts in emitting these authorizations and therefore in the future the objectives of the dawn raids will be more clearly set out, given that at the present time these objectives are still general.

Moreover, the lobby carried out by the Competition Council lately and the subsequent amendment of legislation on the acknowledgment rules open the road to success of the acknowledgment procedure started by the Competition

⁴¹ Instructions from 2016 regarding the individualization of the sanctions set out in art. 55 of the Competition Act no. 21/1996, published in the Romanian Official Gazette no. 882 as of 3rd November, 2016.

Council a few years ago. Thus, the final scope pursued by the Competition Council on one hand, to prevent and, when this is no longer possible, to reestablish as soon as possible a normal competitive environment.

Lastly, the possibility of the competition authority to use the revenues obtained from the tax authorizations in merger control in order to develop activities fully financed by own funds will lead, on one hand, to a bigger independence of the Competition Council, in line with the request that came from the European Commission and World Bank, and, on the other hand, to attract qualified personnel in this field of expertise.

In such conditions, is it most likely that the Competition Council's activity in the next year to become more diversified, with an accent on the sophistication of the used methods, all these pursuing to align this authority with the collative institutions from other state members of the European Union. Therefore, the presence of the Competition Council will be more and more stressed in the companies' current activities, which will lead to a bigger opening of the persons involved in this area and, eventually, to a harmonization with the European provisions in order to implement a normal competitive environment.

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11. Regulation on hearing procedures in the Competition Council and adopting decisions, published in the Romanian Official Gazette no. 792 of 8th November, 2011;
12. Law no. 347/2015 for the approval of the Government Emergency Ordinance no. 31/2015 amending and supplementing Competition Act no. 21/1996 and amending art. 1 of the Government Emergency Ordinance no. 83/2014 regarding the wages of the staff paid from public funds, as well as other measures for public spending, published in the Romanian Official Gazette no. 973 of 29th December, 2015;
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The Complexity of the Litigations in the Energy Regulated Field of Activity. The Necessity of the Specialization of the Judge Panels

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Abstract

In Romania, a whole series of scopes of business are currently regulated, and the level of detail, technicality and high number of specific normative acts related thereto make it extremely difficult to understand and apply them, both for technical experts, and particularly for jurists. Such a business scope is the regulated field of electrical power (energy). Primarily regulated by the Parliament, though the laws outlining the general implementation framework, the trading activities in the field of electrical power are mainly performed through the provisions stipulated by the secondary regulations, namely by the ones elaborated, approved, implemented and supervised by the National Regulatory Authority for Energy (Autoritatea Națională de Reglementare în Domeniul Energiei – ANRE). The legal professions which are currently most often confronted with issues arising from the wrongful implementation of the provisions mentioned hereinabove are the ones of attorney-at-law and magistrate. Therefore, this paper aims at analysing the necessity of training certain categories of professionals in the legal field specialising in this activity sector, so that they may have a basic training level offering them the opportunity to represent or assist the players on the regulated market, namely to correctly settle the litigations occurring between such players or between the players and the Regulatory Authority.

Keywords: *regulated field, regulatory authority, renewable sources, specialised panels*

JEL Classification: K49, K23

1. Introduction

In Romania, a whole series of scopes of business are currently regulated, and the level of detail, technicality and high number of specific normative acts related thereto make it extremely difficult to understand and apply them, both for technical experts, and particularly for jurists.

Such a business scope is the regulated field of electrical power (energy).

Primarily regulated by the Parliament, though the laws outlining the general implementation framework, the trading activities in the field of electrical power are mainly performed through the provisions stipulated by the secondary regulations, namely by the ones elaborated, approved, implemented and

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supervised by the National Regulatory Authority for Energy (*Autoritatea Națională de Reglementare în Domeniul Energiei* – ANRE).

The legal professions which are currently most often confronted with issues arising from the wrongful implementation of the provisions mentioned hereinabove are the ones of attorney-at-law and magistrate. Therefore, this paper aims at analysing the necessity of training certain categories of professionals in the legal field specialising in this activity sector, so that they may have a basic training level offering them the opportunity to represent or assist the players on the regulated market, namely to correctly settle the litigations occurring between such players or between the players and the Regulatory Authority.

For better understanding the need to have certain panels at the level of the Courts-of-Law, as well as the profession of attorney-at-law specialised, this paper was structured into three parts, namely: 1) The European Tendency in the field of energy; 2) The technicity and specificity of the regulations adopted in the field of electrical power at national and European level; 3) Conclusions.

2. The European tendency in the field of energy

The electricity sector is essential and holds a paramount importance to the economy of a state, which is why it was particularly regulated both at European, and national level.

Energy efficiency, increased collaboration in the field of energy and strong energy markets have been described as essential factors to achieve sustainable development and economic growth².

The current tendency in the field subject to analysis in this study is that of analysing the importance of having a European Energy Union tending to put first the electrical power consumers, in their capacity of representatives of the electricity market engine.

However, the main participants on the market are multiple, each of them attempting to perform their activity fairly and in compliance with the rules imposed by the relevant legislation. Amongst them, mention can be made of the electricity producers, distribution operators, transport and system operators, as well as suppliers.

In this respect, by focusing on the main image of the end-customers, so of any natural or legal persons purchasing electricity for their own consumption³, one of the main pillars of the energy union is the fully integrated European energy

² Iuliana-Gabriela Iacob, Ramona-Elisabeta Cirlig, *The Energy Charter Treaty and settlement of disputes – current challenges*, „Juridical Tribune – Tribuna Juridica”, vol. 6, issue 1, June 2016, p. 71.

³ Definition given by the provisions of article 3 item 13 of the Law no. 123/2012 on electricity and natural gas, as published in the Official Journal, Part I, no. 485/16.07.2012, in force as of July 19, 2012. According to the legal provisions, the notions of “end customer” and “consumer” are equivalent in it.

market, absolutely necessary to create more competition, allowing for a more effective use of resources at European level and, at the same time, offering affordable prices to the end-customers.

A major advantage of the integrated market is the fact that the energy produced in any of the European Union states can be provided to the consumers in any other EU Member State. Or, for this to happen, common rules and regulations shall be required, namely, an infrastructure appropriate for the network inter-connection, all the more so that the 28 heterogeneous and unsynchronised national regulatory frameworks are currently considered to be ineffective.

The European Union thus proposes to fundamentally change the energy field, although it faces extremely high-importance challenges, particularly in terms of security, as well as of climate change.⁴

Therefore, the European Union currently proposes to fundamentally change the electricity market. This decision arises as a result of an excessive burdening of an economy sector - energy - which should actually be an industry engine for every Member State.

From the energy point of view, Romania should capitalise on its country advantage, since it is essential that it focus on the export to the areas with energy shortages in the region. In this respect, the National Regulatory Authority for Energy has generally constantly supported the development of the energy market in Romania, concentrating on mainly three directions, namely: the updating and harmonisation of the national regulations with the ones elaborated and entered into force at European level, the study of the need for legislative interconnections and how the existing one's work, as well as the electricity production structuring.

3. The technicity and specificity of the regulations adopted in the field of electrical power at national and European level

The regulations adopted at national level in the energy field must fully comply with the European provisions in the matter or with their indications; otherwise, the Romanian state would be severely sanctioned for failure to implement the EU legislation.⁵

⁴ In this sense, for instance, the latest legislative document of high commitment was published in the Official Journal, Part I, no. 837 as on November 10, 2015, namely the Agreement between the European Union and its Member States therein, of the one part, and Iceland, of the other part, concerning Iceland's participation in the joint fulfilment of the commitments of the European Union, its Member States and Iceland for the second commitment period of the Kyoto Protocol to the United Nations Framework Convention on Climate Change as on April 01, 2015. According to article 2 letter a) in this normative act, the Kyoto Protocol refers to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), as amended by the Doha Amendment, as agreed upon on December 8, 2012 in Doha.

⁵ This was the case of Slovakia, which was brought to court to justify its position on the non-compliance with the its obligations based on Directive 2003/54/EC of the European Parliament and of

The main normative acts adopted at the European Union level in the field include:

- Commission Implementing Regulation (EU) No. 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) no. 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency;
- Commission Regulation (EU) no. 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) no. 714/2009 of the European Parliament and of the Council;
- Commission Regulation (EU) no. 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging;
- Commission Regulation (EU) no. 774/2010 of 2 September 2010 on laying down guidelines relating to inter-transmission system operator compensation and a common regulatory approach to transmission charging;
- Regulation (EC) no. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) no. 1228/2003;
- Regulation (EC) no. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators;
- Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;

the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC. The Court action filed by the European Commission before the Court of Justice concerned the failure of Slovakia to fulfil its obligation to ensure non-discriminatory access to the energy transport network, whereas “the preferential right of transmission granted by Aare-Tessin AG fur Elektrizitat (“ATEL”, a Swiss company) to Slovenska elektrizacna prenosova sustava (“SEPS”, the Administrator of the Slovak transport network) until September 30, 2014 placed ATEL in a privileged position in relation to other users of the system”. However, despite the arguments brought forth by the Commission, the Court considered that the preferential access granted to the Swiss company could be perceived as “an investment protected by agreement”. Thus, the established rule was that the Member States had the freedom to choose the measures they want to adopt for removing the incompatibilities existing between a community convention and the provisions of the EC Treaty, except for the case when a Member State encountered difficulties leading to the impossibility to amend a bilateral agreement concluded prior to the accession of the respective state to the EU. For further details, see *Judgement of the Court (First Chamber) of September 15, 2011, Case C-264/09, European Commission vs. Slovak Republic, Failure of a Member State to fulfill obligations. Energy. Internal market in electricity. Directive 2003/54/EC. Investment contract. Bilateral agreement on the protection of investments concluded prior to accession to the European Union. Article 307 EC.* in “Revista Română de Drept European” no. 5/2012, p. 116-118.

- Commission Decision 2006/770/EC of 9 November 2006 amending the Annex to Regulation (EC) no. 1228/2003 on conditions for access to the network for cross-border exchanges in electricity;
- Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment;
- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC;
- Regulation (EU) no. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (REMIT).

Thus, the main problem regarding the existing regulations at national level consists of both their failure to comply with the European directions, and the understanding and interpretation given to the documents in the current application by the market players, and, not least of all, the consequences of the failure to comply with such provisions.

The problems in applying the national energy regulated law can be multiple, generated by various causes, starting from the way transactions are concluded only on the centralised platforms, up to aspects related to the green certificate market or even to the financial clauses provided for in the internal procedures of the system operators.

Thus, according to the provisions of article 23 paragraphs 1 and 2 of the Law no. 123/2012, “the electricity transactions are made on the competitive market in a transparent, public, centralised and non-discriminatory way. On the competitive market, the commercial transactions are made wholesale or retail, according to the regulations of the National Regulatory Authority for Energy, and the pricing is created based on the demand and offer, as a result of competitive mechanisms.”

Therefore, in compliance with the provisions of the law, the participants on the electricity market can only conclude transactions through the centralised platforms organised by OPCOM S.A. (the operator of the electrical power and natural gas market in Romania). The role of the latter is to manage the electricity market, ensuring an organised and effective framework for the commercial transactions to be performed within the wholesale electricity market, in compliance with the principles of independence, transparency and non-discrimination. Furthermore, it also performs management activities for the centralised markets in the natural gas sector.

A highly complex topic in the energy sector is that of the green certificate market. Given the general tendency towards encouraging the production of electricity from renewable energy sources, Law no. 220/2008 on establishing the

system for the promotion of energy production from renewable energy sources entered into force in 2008.⁶

The Romanian state has strongly supported the renewable energy production during the past years, by attracting major investments in this direction. Thus, Romania set forth that 24% of the end energy consumption should result from renewable energy by the end of 2020.⁷ In this sense, Romania has conformed the provisions of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, encouraging the continuous development of renewable energy producing technologies of any kind (wind; solar; aerothermal;⁸ geothermal;⁹ hydrothermal¹⁰ and ocean energy; hydroelectric energy;¹¹ biomass, waste fermentation gas, gas coming from the waste water treatment installations and biogas¹²).¹³

The system of renewable energy promotion through green certificates aimed at providing the investors in such units of energy production from renewable sources with the possibility to recover their investments. Thus, the green certificates are granted for the energy produced from renewable energy sources which was delivered to the consumers. This way, the investors shall recover the money they invested both by selling the energy, and by trading the green certificates on the market, the suppliers being bound to buy green certificates according to the regulated annual quotas. The green certificates are

⁶ Entered into force on November 06, 2008, as republished in the Official Journal, Part I, no. 577/13.08.2010 (r1).

⁷ According to the provisions of article 5 of the Law no. 220/2008, providing that “the level of the national objective regarding the weight of the energy produced from renewable sources in the final gross consumption of energy of 2020 amounts to 24%”.

⁸ The energy stored in the form of heat in the ambient air.

⁹ The geothermal energy is the “capture of the heat stored in the rocks and fluids located inside the Earth crust in order to produce heat or electricity”. For further details, see: Ilie Adrian-Barbu, *Considerații generale privind statutul energiilor regenerabile în Uniunea Europeană și România (General Considerations regarding the renewable energy status in the European Union and Romania)*, in “Pandectele Române” no. 11/2012, p. 79-80.

¹⁰ The energy stored in the form of heat in the surface waters.

¹¹ The energy production using the water motive power.

¹² All these resources, namely: biomass, waste fermentation gas, gas coming from the waste water treatment installations and biogas must be regarded and analysed together. According to the provisions of article 2 letter e) in Directive 2009/28/EC, the biomass is the biodegradable fraction of the products, wastes and residues of biological origin from agriculture (including vegetal and animal substances), forestry and related industries, including fishery and aquaculture, as well as the biodegradable fraction of the industrial and municipal wastes.

¹³ The listing is compliant with the provisions of article 2 letter a) of Directive 2009/28/EC on the promotion of the use of energy from renewable sources.

also traded separately from the renewable energy quantity they represent, on a specially organised and regulated market.¹⁴

The law-maker's will to improve and amend Law no. 220/2008 is currently manifested in the form of a Draft Government Emergency Ordinance amending the Law on establishing the system for the promotion of energy production from renewable energy sources, which is now undergoing public debate. The initiated draft bill proposes to postpone the green certificate trading until December 31, 2017, for the wind and micro-hydro-generation technologies and to extend the postponing period, until December 31, 2024, for the solar-generation technologies.

Or, from the producers' point of view, yet another postponing cannot be necessarily beneficial for them. This way, in 2025 there will be a surplus of certificates on the green certificate market, so the price shall be set at their minimum level. As a consequence of this reality, the purpose of promoting the green energies shall no longer subsist, since it can no longer be reached.

Nevertheless, despite the tendency Romania has to regulate this sector, Germany, in 2013, and the UK, in 2011, faced similar problems. While Germany, as a result of a thorough analysis on the effects of such regulation, gave up on the draft bill, in the UK, the companies whose main scope of business was solar power sued the British state. They won both the first-level court legal action, and the appeal by supporting their point of view and proving that the measures imposed by the state would lead to losses to the patrimonies of such companies, thus causing serious damages to them.¹⁵

Another constant problem worth mentioning in the field, amongst all the other specific regulated matters, which can affect any one of us-citizens, is the application to the letter of the rules and procedures in the Order no. 121/2015¹⁶ approving the Procedure regarding the determination of the electricity consumption in case of incorrect meter readings and of registration on a flat-rate basis and amending article 80 of the Regulation on the supply to the end-customers, as approved by the Order of the President of the National Regulatory Authority for Energy no. 64/2014. The consequences of applying the provisions of this order can be complex and of various degrees of gravity. All the acquired information and findings resulting from the correct application of the provisions in the said normative act can be used as evidence and help in finding the reason for the incorrect meter reading, be it technical or otherwise. Thus, by applying

¹⁴ Bogaru Cristian, Sandu Mariana, *Protecția investițiilor în domeniul surselor regenerabile de energie (Protecting investments in the fields of the energy renewable sources)*, in "Revista de Drept Comercial" no. 7-8/2013, p. 34-37.

¹⁵ Dobrev Dumitru, *Piața energiei regenerabile în România. Diferența dintre socoteala de acasă și cea din târg (The Romanian Renewable Energy Market. Difference between the egg count and the hatched chicken)*, in "Revista româna de drept al afacerilor" no. 5/2013, p. 11.

¹⁶ In force as on February 27, 2015, as published in the Official Journal, Part I no. 148 as on February 27, 2015.

the procedure consecrated through the said Order, in case the consumer intended to steal electricity the case can be brought before the Criminal Sections of the Courts-of-Law.¹⁷

4. The magnitude of investments in electrical power production from renewable sources

As mentioned hereinabove, one of the major objectives of the national energy strategy is the promotion of the electricity production from renewable energy sources, as it results from the provisions of article 2 letter i) of the Law no. 123/2012, as well as from the entire legislative framework in the field.

The main normative act adopted as primary legislation in the matter of electricity production from renewable energy sources is the Law no. 220/2008 on establishing the system for the promotion of energy production from renewable energy sources.

The purpose of the regulation, according to the provisions of article 1 therein, is to establish the system for the promotion of energy production from renewable energy sources, as well as to create the necessary legal framework for extending the use of the renewable energy sources by:

- “attracting into the national energy balance the renewable energy resources necessary for increasing the energy supply security and reducing the imports of primary energy resources;
- stimulating the sustainable development at local and regional level and creating new jobs in relation to the processes of renewable energy source capitalization;
- reducing the environment pollution by cutting the production of pollutant emissions and greenhouse gases;
- ensuring the necessary co-funding for attracting external financial sources aimed at promoting the renewable energy sources, within the limits of the annually set sources by the State Budget Law and exclusively in favour of the local public authorities;
- defining the norms concerning the origin warranties, the applicable administrative procedures and the connection to the electrical network as regards the energy produced from renewable sources;
- establishing the sustainability criteria for bio-fuels and bio-liquids.”¹⁸

In our country, the energy produced from renewable sources involves, most commonly: photo-voltaic sources, wind-mills or hydrology sources, all of them involving a production characterized by an atypical profile, completely

¹⁷ For further details, see: Corlătean Sorin, Iuga Calin, *Furtul de energie electrică (Electricity Theft)*, in “Revista de drept penal” no. 3/2005, p. 64-66.

¹⁸ Article 1 paragraph 1 of the Law no. 220/2008 for the establishment of the system promoting the energy production from renewable energy sources.

dependent on factors which cannot be controlled by the producer (solar light, wind or water debit). Therefore, due to technical, objective reasons, these producers do not have the possibility to produce electrical power at a constant hourly rate, which does not give them the possibility to control their production, and they are also limited by certain provisions of the regulations currently in force, starting from the possibility to conclude certain types of specific agreements on the market.¹⁹

It is of paramount importance to understand the regulation methods in the electricity activity sector both for a proper and fair settlement of the litigations by the Courts-of-Law, and for the interpretation and application of the norms regarding the provision of legal assistance in business law. The energy sector is extremely vast and highly technical. Its expansion into various aspects of the economic and social life of a state is unquestionable. Thus, although it may seem paradoxical, given the level of specialisation of the ones choosing to perform their activity in such a field, the regulations in force and especially their consequences regard us all.

For instance, the installation of photo-voltaic panels on the roofs of people's houses is becoming increasingly popular in our country. In such conditions, everyone who chooses such a technique implicitly becomes an electricity producer who will have to comply with certain technical standards.

Thus, although Romania does not yet benefit of a clear regulation regarding the electricity production in such ways (in the matter of personal photo-voltaic units, and particularly of roof-mounted panels), the importance of correctly adapting the fixed tariff for the power injection into the network cannot be overlooked, since it will impact both the suppliers, and the distribution operator, in case more and more citizens will opt for producing their own electricity through the described method.

Therefore, we consider that the National Regulatory Authority for Energy will have to elaborate a very clear methodology, in the near future, imposing a tariff for such a producer, as well.²⁰

The practice of other states²¹ showed that, on the long run, such an activity by which the citizens mount their own photovoltaic panel production units has negative results. The conclusion reached was that the ones enjoying a prosperous material situation who install such photo-voltaic panels cease to buy electricity from the network and thus to pay the network tariff; consequently, this cost is cascaded to the poorer population segment who, by taking more electricity from the network, end up by paying more, leading to a cost imbalance.

¹⁹ See, for example, Order no. 78/2014 for the approval of the Regulation on the manners of concluding the bilateral electricity agreements by extended call-for-tenders, and continuous negotiation and by Processing contracts, in force as of January 01, 2015, as published in the Official Journal, Part I no. 621 as of August 25, 2014.

²⁰ For example, in Spain, the tariff amounts to Euro10/MWh for the ones mounting such panels.

²¹ Austria, Germany, Spain or Norway.

However, the electricity production from photo-voltaic sources by the large renewable energy producers does not lack problems either. In this case, if the photo-voltaic system fails to provide enough energy, the power needed to ensure the normal operation of the connected electrical devices is taken from the public distribution network. On the other hand, if additional energy is produced, it is injected directly into the network, thus becoming available for other consumers. Consequently, in accordance with the national regulations, the produced power can be sold to the distribution network or saved for future consumption, thus determining financial savings.

Through the provided examples, we intended to highlight the importance of training legal specialists in the electricity regulated sector since, given its degree of technicality and specificity, it plays an important role not only regarding the players on the market – state-owned or private-owned companies, but especially regarding the citizens.

While the attorneys-at-law have welcomed into their ranks professionals specialised in various branches of the regulated fields, both as a result of their participation in specialised training courses, and especially due to their direct activity with their clients, consisting mainly of companies whose personnel is made of specialists and technicians in the respective fields, not the same can be stated about the staff of the Courts-of-Law.

Therefore, the litigations in the field of electricity are extremely complex, with a high degree of technicity, which required a high level of legal and niche knowledge, for a proper understanding of the *de facto* situation in relation to the market operation.

The existing case law has revealed that even the provision of the legal technical expertise evidence can cause problems, given the very few existing expert witnesses in the field. Thus, most of the times, based on the provisions of article 330 paragraph 3 of the Civil Procedural Code, we get to the situations when the experts reports are made by notable professionals or specialists in the respective fields.²² It is therefore required that the judges hold an average level of knowledge in the field in order to have the capacity to accurately understand the litigations they are called upon to settle.

5. Conclusions

As concerns the currently existing legal professions, it is well-known how highly burdened the Courts-of-Law are with numerous various litigations from a number of fields. It is therefore too much to ask one single person to be

²² Article 330 paragraph 3 in the Civil Procedural Code provides as follows: “In the strictly specialised fields, where no authorised experts are registered, the Judge can request, *ex officio* or upon the request of either Party, to receive the point of view of one or several notable persons or specialists in the respective field”.

knowledgeable in all aspects of the economic and social life, especially when some of these activities are of high national, economic, and international interest.

Consequently, these rules on the electricity regulated field are extremely vast and technical. The multitude of normative acts entering into force on an annual basis, and especially the way the market is understood and the economic aspects such acts involve at state level, unmistakably requires that the people called-upon to issue judgments on the lawfulness of a normative act, the compliance with the basic principles imposed by the Law no. 123/2012, the compliance with the non-discriminatory character and the activity performance on a competitive market should have the ability to understand the case-files they were called-upon to issue judgments and, more particularly, the consequences of such judgments on all the market participants, should such judgments be erroneous.

The role the jurists (particularly attorneys-at-law and magistrates) can play, and should play in the field of energy is extremely important, and the matters they can provide solutions to are as variate and diverse as they get, starting from the uncertainty regarding the recovery of investments made in producing electricity from renewable sources, up to the identification, together with other specialists, of steps Romania, as well as other European states should take in order to have an operational interior market.

Romania currently has approximately 8 million end-consumers of electricity and approximately 4 million end-consumers of natural gas. It is therefore essential to ensure a harmonised regulatory framework compliant with the European energy norms. This being a sectoral approach, the main objectives in the new energy policies must be defined by security, solidarity and confidence.

Therefore, as stated in the beginning of this study, the European goal is to have a union of the investment forces in the field, continuously having the consumer in its centre, as the key player on the new market. The absence of a priority order in regulating and granting the possibility to finance large infrastructure projects²³ given the lack of cooperation of the authorities with both the specialists in the field, and the jurists, will render the achievement of this European idea impossible. Romania, as a participant on the single energy market, must come up with regional infrastructure projects funded from European Union sources, thus taking advantage of its high energy potential. Romania must try to better capitalise on the renewable resources, biomass, biogas and natural gas. Thus, an easy mechanism can be created to obtain funding and invest the European Union funds in the Eastern and South-Eastern European region.

In conclusion, the electricity regulated field is very complex, and extremely technical, but at the same time essential for the national economy of a state. Its impact on the economic strength of a state should not be minimised

²³ For example, the Iberian area remains isolated, and the Baltic region is not concretely supported through a unique funding.

under any circumstance, and the support provided to every market participant should certainly not be ignored for it to properly operate. Since, in Romania, the transactions are made on centralised platforms organised by OPCOM, the cases brought for settlement before the Courts-of-Law have a highly complex technical level exceeding the normal level of legal knowledge, both of the magistrates, and of the attorneys-at-law, for the latter ones to provide their clients with appropriate counselling.

While for the attorneys-at-law, representatives of a liberal profession, it is easier to specialise in a certain field alone, in the Courts-of-Law the changes imply certain reforms to be made in the judicial system. Therefore, given the case-file complexity level, as well as the increasing number of litigations related to the energy framework, a thorough analysis should be performed at central level and decisions should be taken regarding the internal reorganisation of the Courts-of-Law, in the near future.

Thus, not only would the creation of a special section or panel specialised in the energy field ease the magistrates' burden regarding certain extremely difficult and highly technical cases, but this would also lead to the creation of specialised magistrates in a very ample and continuously developing field, which would be nothing but beneficial to the judicial field, by increasing the efficiency and correctness of the given judgments.

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On the *de Facto* Director of a Romanian Limited Liability Company

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Abstract

The study is focused on the existence of the de facto director of a limited liability company. The matter is analysed starting from a case from the recent judiciary practice, in which the courts of law issued different decisions on the lack of capacity to stand trial invoked by the shareholder who, at the time, exercised only in fact the management of the company. In order to establish the consequences of the existence of a de facto director for the company and for third parties, the article provides an overview on the appointment of the director, his duties and on the implications related to his responsibility.

Keywords: *director, de facto director, limited liability company, management body.*

JEL Classification: K22

1. Introduction

The article brings forward a problem frequently encountered among companies, namely the *de facto* director of a company. Regardless of the type of the company, the existence of such a director constantly brings before the courts of law a series of situations that requires settlement. The court is often required to analyse any detail that may lead to a *de facto* activity of a person as director, the will of the shareholders and, last but not least, the person responsible for the prejudice created as a result of carrying out an activity that involves strategy, the execution of a contract, obtaining a bank loan, etc.

The matter is of interest particularly from a practical standpoint, considering the numerous and extended relationships identified in the business environment. Without claiming to analyse exhaustively this subject matter, the article proposes to underline the significance of understanding these concepts and their correct application and in good faith in practice, in the performance of business relationships.

A recent case² from the judicial practice raises the issue of identifying the *de facto* director of a limited liability company. Starting from the matter of the admissibility or inadmissibility of the lack of capacity to stand trial of the person who carried out only in fact administrative acts, the courts of law have

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² See Decision No. 46/2016 of the High Court of Cassation and Justice, Second Civil Section.

different views on the capacity of a person who is not a statutory director but who carried out administrative acts.

It is therefore required to correctly classify the director as management body of the company, to identify the duties of a director and the consequences of the existence of a *de facto* director and, implicitly, of the responsibility thereof.

2. The director, management body of the company

Companies' Law No. 31/1990³(hereinafter referred to as the "Law") provides for the existence of the director in all types of companies provided by this law⁴.

The law does not give a definition of the director, but the doctrine provides that "the will of any company, expressed by the general shareholders meeting is fulfilled by the acts of the persons or bodies authorised in this respect, who carry out the administration and management of the company"⁵.The characterisation is exhaustive because it underlines both the significance of authorising such a body, and the activity carried out.

A first aspect is that of establishing the person having the capacity as director. The law provides that the director may be a natural person, as well as a legal person – only in the case of joint stock companies⁶. The legal person appointed as director shall appoint an individual representative who, in his turn, must meet the same conditions as the natural person director, and his liability is joint with that of the legal person he represents.

As regards the appointment of the director, he is appointed either upon the establishment of the company, by the articles of incorporation, or subsequently, by the general shareholders' meeting – as the supreme management body of the company, in accordance with the rules applicable to each type of company.

In the case of a limited liability company, the Law provides that the director is chosen by the general shareholders' meeting, with the vote of the shareholders representing the majority of shareholders and of the shares. The law also

³ Published in the Official Journal No. 1066 of 17.11.2004, republished.

⁴ We remind you that the types of companies provided by the Law are general partnerships, limited partnerships, joint-stock companies (SA), partnership limited by shares and limited liability companies (SRL).

⁵ St. Cârpenaru, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2012, p. 205.

⁶ Art. 153¹³ para. (2) of the Law provides that "A legal person may be appointed as director or member of the supervisory board of a joint-stock company. At the time of such appointment, the legal person has the obligation to appoint a natural person permanent representative. He shall be subject to the same conditions and obligations and shall have the same civil and criminal liability as a natural person director or member of the supervisory board, acting in his own name; however, the legal person he represents will not be exonerated from liability and its joint liability will not be reduced. When the person revokes its representative, it has the obligation to appoint, at the same time, a replacement."

provides that the director may be appointed from among the company's shareholders⁷.

In the case of this type of company, when the company has a sole shareholder, the capacity of director may be held by the sole shareholder; he may also be an employee of the company whose sole shareholder he is or even the director or he may hold another position.⁸

An extremely important aspect regarding the director is that of the publicity related to his/her appointment, formalities⁹ which aim at informing third parties of the person or persons managing, administering and, last but not least, representing the company.

Thus, even the registration of the company depends on the publication of the director and of the powers conferred to him/her. Also, the director vested with the power of the company has the obligation to submit to the Trade Registry Office the signature specimen, either together with the submission of the application for registration if he was appointed through the articles of incorporation, or within 15 days from being elected, if he was elected during the operation of the company¹⁰.

The fulfilment of the publicity requirements prevents the company from invoking to third parties any irregularity with the appointment of the director, unless it is proved that the third party was aware of the irregularity¹¹.

While the *de jure* director of the company is legally authorised and made known to third parties, the *de facto* director carries out administration acts without being appointed or in excess of the limits of the mandate.

⁷ Art. 197 para. (1) of the Law provides that "The company shall be administered by one or more directors, who may or may not be shareholders, appointed by the constitutive act or by the general meeting." See also Fl. C. Stoica, C. Ene, *Business Law: business organisations*, A.S.E. Publishing House, Bucharest, 2012, p. 102.

⁸ See I.T.Ştefănescu, S. Beligrădeanu, *Natura raportului juridic dintre societăţile comerciale şi administratorii sau directorii acestora*, in „Dreptul”, Issue No. 8/2008, p. 57.

⁹ Law No. 26/1990 on the trade registry and the formalities to be fulfilled for the authorisation of the registration and for the registration of specifications in the Trade Registry Office.

¹⁰ Art. 45 of the Law.

¹¹ Art. 54 provides that: "(1) After the fulfilment of the publicity formalities in connection with the persons who, as management bodies of the company, are authorised to represent it, the company may not invoke to third parties any irregularity regarding their appointment, unless the company proves that such third parties were aware of the irregularity. (2) The company may not invoke before third parties the appointments in the positions referred to in para. (1) or the termination of such positions if they were not published in accordance with law."

3. The duties of the statutory director

As management body of the company, the director is permitted, by law¹², to carry out any act of administration in the interest of the company. Thus, he has the right and the obligation¹³ to carry out the operations necessary to achieve the object of activity of the company and the decisions of the shareholders, within the limits of the Law and of the company's articles of incorporation. Also, he represents the company in the relationship with third parties, if this right of representation was conferred by the shareholders. In this case, the director is the legal representative of the company¹⁴.

The law allows for the operation of the company while having several directors, if the shareholders decide so.

In the case of limited liability companies if, however, the articles of incorporation does not establish which director has the power to represent the company, in accordance with Art. 197 para. (3) and Art. 75 of the Law, "the right to represent the company lies with each director¹⁵, unless as otherwise provided by the articles of incorporation". Please note that third parties become aware of the person of the director by the fulfilment of the publicity formalities mentioned above.

If several directors are appointed, the shareholders shall decide if they work together or individually. The Law provides that "if the articles of incorporation provides that the directors work jointly, the decision must be unanimous; in case of a dispute among the directors, the shareholders representing the absolute majority of the share capital shall decide."¹⁶

The law also lays down a series of obligations regarding the director's activity, such as the obligation to fulfil the formalities necessary for the establishment of the company - Art. 36 of the Law, the obligation to monitor the payment

¹²Art. 1914 of the Civil Code provides that: "(1) Unless the shareholders oppose it, the director may perform any act of administration in the interest of the company. (2) The director may be revoked in accordance with the rules of the mandate contract, unless the articles of association provide otherwise. (3) The clauses limiting the administration powers conferred by law are not binding against good faith third parties".

¹³ Art. 70 of the Law.

¹⁴We must specify that the director benefitting from such a right cannot transfer it unless he has the express consent of the shareholders. If there is no such consent, the company may redress against the director to obtain the benefits resulting from the operation. Also, the director shall be jointly liable with this person for the damages caused to the company. (Art. 71 of the Law).

¹⁵ Art. 197 para. (2) provides that "The directors cannot receive, without the authorisation of the shareholders' meeting, the mandate of director in other competing companies or in companies having the same object of activity, or to carry out the same type of trade or a competing trade on its own account or on account of another natural or legal person, on penalty of revocation and being held liable for the damages."

¹⁶Art. 76 para. (1) of the Law. The same article provides, at para. (2): "For urgent acts, whose failure to carry out would cause significant prejudice to the company, only one director may decide in the absence of the others, who are unable, even momentarily, of taking part in the administration act."

by the shareholders of the amounts owed - Art. 70 of the Law, or the obligation to prepare the annual financial statements, to comply with the law in the distribution of the profit and dividends - Art. 73 of the Law¹⁷ - obligations whose fulfilment incurs the liability of the director.

With regard to the limited liability company, the Law establishes an obligation for the directors, namely to keep the shareholders' registry¹⁸.

4. The director's liability

As a general rule, the Romanian Civil Code establishes, in Art. 1915, that the director is personally liable before the company for the prejudice produced by the breach of the law, of the mandate entrusted or by default in the administration of the company.

According to the special legal provisions, the liability of the director is regulated by the provisions regarding the mandate and by those specifically provided by the Law¹⁹.

Thus, the director is liable before the company first based on the mandate received. As it is based on a mandate contract, the liability for the failure to comply with the obligations arising from such contract is a civil contractual liability.

As regards the failure to comply with the obligations provided by law, depending on the legal provision, the director's liability shall be a civil or even criminal tort liability.

In addition, the legal provisions²⁰ provide that the director is liable before the company— jointly if there are several directors – for the reality of the payments made by the shareholders, the actual existence of the dividends paid, the existence of the registries required by law and their correct keeping, the due fulfilment of the decisions of the general shareholders' meeting and the strict fulfilment of the duties imposed by the law and the articles of incorporation. Also, the action to incur the liability of the directors may also be filed by the company's creditors, but they benefit from this right only if the insolvency proceedings were initiated against the company.

¹⁷ St. Cârpenaru, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2012, p. 215.

¹⁸ Art. 198 of the Law provides that: "(1) The company must keep, by the diligence of the directors, a shareholders' registry which shall include, as the case may be, the name and surname, the designation, the domicile or the headquarters of each shareholder, its share in the share capital, the transfer of shares or any other change regarding the shares. (2) The directors are personally and jointly liable for any prejudice caused by their failure to comply with the provisions of para. (1). (3) The registry may be reviewed by the shareholders and by the creditors."

¹⁹ Art. 72 of the Law.

²⁰ Art. 73 of the Law.

Thus, the *de facto* director has the same civil liability as the *de jure* director and, moreover, even before third parties for covering the debts of the company whose insolvency and, implicitly whose assets' insolvency, he caused²¹.

In the case referred to above, the dispute was initiated between plaintiff A. and defendants the company B. SRL and C. The court found that the plaintiff was constantly recorded as a director in the Trade Registry Office. The defendant acquired the capacity as shareholder of company B. SRL on 9 December 2009, by acquiring 10000 shares, representing 50% of the company's share capital. According to the revised articles of incorporation of 9 December 2009, after defendant C became a shareholder of the company, plaintiff A. was appointed sole director until 31 December 2010, on the condition "unless expressly revoked by the decision of the general shareholders' meeting".

By the decision of the Extraordinary General Shareholders' Meeting of 18 February 2010, the two shareholders of B. SRL agreed that, starting from 1 January 2011, they shall administer the company jointly. It was noted however, that by this decision, shareholder C. acquired certain duties similar to those of a director: he received an access key to the room where the fiscal archives of the company and of Hotel E. were stored; both shareholders agreed on the establishment of the instalments for the loan granted by C. to the company, any bank loan contract or non-bank loan contract, from the shareholders or from third parties shall only be concluded with the consent of both of them. The plaintiff did not invoke specific breaches of these duties entrusted with the defendant. After 31 December 2010, when the plaintiff's director mandate expired, the two shareholders did not reach an agreement on the appointment of the new director, the plaintiff requesting either for his mandate to be extended or for both shareholders to be appointed as director, while the defendant only agreed for him to be appointed as sole director.

Therefore, it was found that the defendant never fulfilled the capacity as director of the company based on the decision of the general meeting, that, on the contrary, the capacity as statutory director was held by plaintiff A. until 31 December 2010, and subsequently neither shareholder held such capacity, as there were disagreements and even persisting disputes.

By Judgment No. 225 of 14 June 2012, Prahova Tribunal admitted the exception of the lack of capacity to stand trial of defendant C. and rejected the action filed by plaintiff A. as filed against a person without the capacity to stand trial.

By Decision No. 16 of 27 February 2013, Ploiesti Court of Appeal admitted the appeal filed by the plaintiff and sent the case back to be re-judged by the same first instance court.

²¹Gh. Piperea, *Drept comercial. Întreprinderea în NCC*, C.H. Beck Publishing House, Bucharest, 2012 p. 232.

The judicial control court of law acknowledged, in essence, that respondent defendant C., does not have the capacity as director of the company but he cannot invoke this fact in order to invoke the lack of capacity to stand trial in the case at hand, so long as it was proved that he performed acts of administration, even though he did not have the right to do so.

By the response to the cross examination, the respondent defendant admitted that he carried out acts of administration of the company, although he does not have the capacity as director established by the statutes.

Thus, the first instance court admitted the exception of the lack of capacity to stand trial of defendant C. and rejected the action filed by plaintiff A. as filed against a person without the legal capacity to stand trial, thus considering the provisions of the articles of incorporation and the records of the Trade Registry Office.

The judicial control court, however, draws the attention on the existence of a *de facto* director in this company, which has a series of consequences, among which his liability for his deeds. Thus, the court establishes that a *de facto* director has the legal capacity to stand trial. Consequently, he is liable or he may be held liable for his acts, just like a statutory director.

In another decision issued in a case²², the court highlights that the *de facto* director is liable as a *de jure* director and under the commercial law, their liability is actually joint (according to Art. 73 of the Law). Also, since Art. 137 of the former Law No. 64/1995 on the reorganisation proceedings and bankruptcy²³ refers to the liability of all persons who contributed to the insolvency of the debtor, the *de facto* director does in fact have legal capacity to stand trial.

5. Conclusion

The identification of a *de facto* director and the analysis of the duties carried out by him are done starting from the concept of statutory director. In fact, it cannot be different since, without having a mandate from the shareholders or, even while having a mandate, by exceeding the limits of such mandate, the *de facto* director assumes the duties of a statutory director. In this respect, there are several final decisions of the Supreme Court, among which the case analysed above.

Also, in another case, the court highlights that, as regards the capacity of *de facto* director, it is not presumed, it is proved by analysing the conduct, the

²²The High Court of Cassation and Justice, the Criminal Section, Decision No. 196/2014; for other reasons, see also Decision No. 935/2013 of the High Court of Cassation and Justice, Second Civil Section.

²³Repealed by Law No. 85/2006 on the insolvency proceedings, currently also repealed by Law No. 85/2014 on the insolvency and the prevention thereof, published in the Official Journal No. 466 of 25.06.2014.

behaviour of the *de jure* director and of that assumed to have led in fact the company. The capacity of *de facto* director is characterised by the immixture in the duties conferred to the legal representative²⁴. Although he was not appointed by the shareholders – the company’s supreme management body, by his deeds, the *de facto* director acts as if he were appointed by the shareholders. Therefore, his liability must be analysed under the same terms as the *de jure* director.

Moreover, the existence of the *de facto* director is also analysed by the court in the field of economic criminal offences.

Thus, in the case of the criminal offence of fiscal evasion provided by Art. 9 para. (1) letter c) of Law No. 241/2005, consisting in registering, in the accounting records or in other legal documents, of expenses that are not based on real operations or registering other fictitious operations, in order to avoid fulfilling the fiscal obligations, the supreme court decided that an active subject may be the *de jure* director of the company, as well as the *de facto* director or any other person within the company – a director, an accountant, seller – if, by their actions and/or lack of action, they intend to avoid the payment by the company of the taxes and duties owed. The law does not condition this criminal offence on the existence of an express authorisation for the person in charge of organising and keeping of the accounting records having the capacity as director, or of a legal or contractual obligation to manage the company’s activity, if the evidence submitted reveal that, in fact, the perpetrator exercised the actual management of the company’s accounting activity²⁵.

Also, the Guideline for Investigating the Criminal Offences of Fiscal Evasion, prepared by the Supreme Council of Magistracy in 2015²⁶, provides that the criminal liability for deeds of fiscal evasion may lie with the person who has no legal capacity in the company but who manages the company, namely the *de facto* director either individually or together with the *de jure* director of the company.

In conclusion, as proved by practice, the existence of a *de facto* director does not exclude the liability of the *de jure* director, and the excess of his duties does not exempt the *de facto* director from his liability – before the company, before third parties, either under civil or under criminal law. Therefore, the assumption of duties in the management of a company must be made in full awareness, with the intention to comply with the legal provisions and having a well-

²⁴Cluj Court of Appeal, Second Civil Section, of administrative and fiscal disputes, Decision No. 388 of 17 January 2014, <http://taxnews.ro/wp/2014/09/01/procedura-insolventei-angajarea-raspunderii-patrimoniale-director-de-fapt-deturnarea-activului/>, consulted on October 5, 2016.

²⁵The High Court of Cassation and Justice, Criminal Section, Decision No. 272/2013, <http://www.juridice.ro/286888/iccj-director-de-drept-vs-director-de-fapt.html> consulted on October 5, 2016; <http://codfiscal.net/38772/iccj-infractiunea-de-evaziune-fiscala-reducerea-pedepsei-de-la-6-ani-in-chisoare-la-4-ani-inchisoare>, consulted on October 5, 2016.

²⁶http://www.inm-lex.ro/fisiere/d_1443/Ghid%20investigare%20infractiuni%20de%20evaziune%20fiscala.pdf, p. 14, consulted on October 5, 2016.

established and determined framework of duties and liabilities, both to protect the company and third parties, and to protect the person carrying out administration operations.

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Some Aspects Concerning the Setting up of Companies Regulated in Romania by the Law no. 31/1990 Republished

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Abstract

The setting up of a company regulated by Law no. 31/1990 republished does not imply only the mere conclusion of a company contract as an expression of the agreement reached between associates, but in every situation requires a period of time, of variable length, for completing the steps and formalities imposed by the law in order to obtain the legal personality. Moreover, during the setting up period, until the incorporation in the Register of Trade, the company has a specific legal regime, because, although it does not have legal personality yet, it must conclude certain juridical preparatory acts, precisely for the purpose of its valid setting up as a distinct subject of law. In these circumstances, we consider that an analysis of the legal regulation on the setting up of companies with legal personality, contained mainly in the Law no. 31/1990 republished, but also in the Civil Code, may appear particularly useful, both for analysts in law and practitioners, especially since this analysis highlights certain aspects that present a particular importance in this process.

Keywords: *setting up, legal personality, constitutive act, incorporation, the company under setting up.*

JEL Classification: K22

1. Introduction

The Civil Code presents primarily the company as a contract, granting therefore prevalence to the contractual approach in order to define its legal nature (art. 1881 paragraph 1 of the Civil Code). Nevertheless, the companies regulated by Law no. 31/1990² are equally legal persons, having thus a more complex juridical nature, which exceeds the contractual approach, especially due to their institutional dimension. This quality of distinct subject of law of the companies with legal personality does not result solely from the will of the associates expressed in the contract, but also from the provisions of the law.

As a consequence, the setting up of a company regulated by Law no. 31/1990 republished does not imply only the mere conclusion of a company contract as an expression of the agreement reached between associates, but in every situation requires a period of time, of variable length, for completing the steps

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² Republished in the Official Journal of Romania, Part I, no. 1066 of 17 November 2004.

and formalities imposed by the law in order to obtain the legal personality. Moreover, during the setting up period, until the incorporation in the Register of Trade, the company has a specific legal regime, because, although it does not have legal personality yet, it must conclude certain juridical preparatory acts, precisely for the purpose of its valid setting up as a distinct subject of law.

In these circumstances, we consider that an analysis of the legal regulation on the setting up of companies with legal personality, contained mainly in the Law no. 31/1990 republished, but also in the Civil Code, may appear particularly useful, both for analysts in law and practitioners, especially since this analysis highlights certain aspects that present a particular importance in this process.

2. The conclusion of the constitutive act

The starting moment of the process of setting up a company regulated by Law no. 31/1990 republished is the conclusion, by the associates, of its constitutive act³.

Although the Civil Code regulates, in a general manner, the company contract as an instrument that creates a company, with or without legal personality, the special legislation, namely the Law no. 31/1990 republished, refers quasi-permanently to its constitutive act, which may generate a certain terminological confusion. Actually, the inconsistency between the two regulations is only apparent, because every company, except the company having sole associate, is the result of the conclusion of the company contract, juridical act governing essentially the relations between the associates, parties to it⁴. Moreover, in the case of companies of persons, having less complex and less formalized functioning rules, the associates conclude only the company contract which, pursuant to the provisions of Law no. 31/1990 republished, will be designated as its constitutive act.

Instead, in case of companies of capitals, as well as the limited liability company, the legislator has considered as necessary, justifiably, that at the moment of setting up the company, in addition to clauses concerning the relations between parties, contained in the company contract, the associates also reach an agreement on the rules concerning the organization and functioning of the future legal person, which constitute its memorandum of association. This approach, which gives expression to the institutional dimension, more obvious for the above-mentioned legal forms of company, is perfectly justified by the complexity

³ In French jurisprudence, a much more nuanced opinion has even been adopted, meaning that it is considered as indicating the beginning of the setting up of a company having legal personality any concrete act that is concluded for the purpose of creating or incorporating it, such as the beginning of negotiations between the associates or the common acquisition of goods, in order to exploit them in the same manner – see P. Le Cannu, B. Dondero, *Droit des sociétés*, 6ème édition, LGDJ, Paris, 2014, p. 210 and the jurisprudence cited therein.

⁴ In this regard are the provisions of art. 5 paragraphs 1 and 2 of Law no. 31/1990 republished.

of social activity carried out within them, as well as the formalism of their functioning, with better designed rules of organization and bodies having specific powers, those rules being imposed by law in order to protect third parties, but also the associates themselves. Therefore, for the setting up of these legal forms of company, the law requires the conclusion of the company contract and the memorandum of association, two separate juridical acts – *negotium*, designated together as the constitutive act, either within a single instrument or as two separate instruments.

Finally, in case of the limited liability company with sole associate that results from the expression of the will of a single person, the contractual approach is not possible, and therefore at the setting up of this form of company the sole associate draws up only the memorandum of association, which represents its constitutive act.

2.1. The company contract

Concerning its juridical characters, the company contract is a bilateral or multilateral contract, made by onerous title and commutative, with successive performance and formal.

The formal character results clearly from the provisions of art. 1884 paragraph 2 Civil Code, which prescribes that, for setting up a company having legal personality, the written form of the company contract is required by law for its validity, under the sanction of absolute nullity. In addition, within the meaning of the provisions of Law no. 31/1990 republished (art. 5 paragraph 6), to the extent that the requirement of written form is observed, the associates may choose, freely as a principle, to conclude the company contract as a document under private signature, signed by all the associates, or in authentic form. As an exception, the authentic form is compulsory for the setting up of companies of persons, of companies by shares by public subscription and in case of contributions having as object immovable goods.

Equally, in the case of companies of persons, the company contract is a contract concluded *intuitu personae*, as the personal qualities and the confidence between partners are essential to its conclusion. Concerning the limited liability company, it also has an *intuitu personae* character, similar to companies of persons, its setting up being based on the trust between associates, and this character is emphasized by the legal limitation of the number of associates to a maximum of 50 (art. 12 of Law no. 31/1990 republished).

Concerning its valid conclusion, the company contract must fulfill the general conditions of validity required by law for any contract, namely the full concrete capacity of the associates, a genuine consent, a determined and lawful object and a legal and moral consideration. From the point of view of the formal

conditions, as mentioned above, the written form is required by law for the validity of the contract whenever a company with legal personality is set up.

In addition to the general conditions of validity applicable to any juridical act, the company contract must also fulfill the specific conditions of validity applicable to all companies, respectively *affectio societatis*, the existence of contributions of the associates at the setting up of the company, sharing the profits and the losses arising from the common activity. Although these specific elements of validity of the company contract are essential, since the juridical nature of the contract and of the form of association provided by it depend on them⁵, the present approach does not propose a detailed analysis in this respect, which would exceed the purpose taken into account when preparing this paper.

Regarding the content of the company contract, both article 1884 paragraph 2 Civil Code and articles 7 and 8 of Law no. 31/1990 republished⁶ require the existence of several compulsory mentions, which refer to distinctive elements of the company that is set up and which must be provided at the moment of incorporation in the Register of Trade⁷ in order to be mentioned in this register, namely the associates, the contributions, the registered capital, the juridical form, the duration, the object of activity, the denomination and headquarters of the company. Depending on the legal form of the company concerned, the law imposes certain specific references, such as a separate indication of the active partners, in the case of the limited partnership, the number and nominal value of social parts and the number of social parts allocated to each associate in exchange of his contribution, in case of the limited liability company and so on. In this context, it should be mentioned that the general provision contained in the Civil Code, although referring to companies with legal personality, does not address aspects concerning the organization and functioning of the company, its duration or its registered capital. However, the mandatory provision of these elements in the constitutive act unquestionably results from the legal regulation contained in Law no. 31/1990 republished, including in the case of companies of persons, when the constitutive act coincides with the company contract.

⁵ Actually, the fulfillment of these specific conditions, and especially *affectio societatis*, determines a specific position of the associates within the company contract, based on the idea of cooperation in order to reach a common objective, and which is distinct from the opposing interests of contractual parties that generally characterize bilateral contracts. See, for more details on the conditions of validity of the company contract, St. D. Cârpenaru, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2009, p. 196 and the following.

⁶ The legal provisions contained in Law no. 31/1990 republished refer to the constitutive act, and therefore some mentions, related to its organization and functioning, reflect the content of the memorandum of association and not of the company contract, especially in case of companies of capitals and limited liability company.

⁷ In accordance with art. 7 paragraph 2 of the Methodological Rules concerning the manner of keeping the registers of trade, making records and release of information, approved by the Order of the Minister of Justice no. 2594/2008, published in the Official Journal, Part I, no. 704 of 16 October 2008.

2.2. The founders of the company

The concept of founder is particularly important in the setting up of companies with legal personality. In this respect, art. 6 paragraph 1 of Law no. 31/1990 republished provides: „The signatories of the constitutive act, as well as the persons who play a decisive role in the formation of the company are considered founders“. Also, paragraph 2 of the same article contains the legal requirements in order for a person to participate in setting up a company as a founder, namely the full concrete capacity and lack of criminal convictions for criminal offenses related to economic activity, such as corruption, forgery, tax evasion etc.

Equally, the law provides a particular liability of the founders, whenever damages are caused to third parties by not fulfilling the formalities required by law or failure to comply with the legal provisions during the setting up of the company (article 49 of Law no. 31/1990 republished). The founders are also liable towards third parties for the juridical acts concluded with them during the setting up of the company and in its behalf, to the extent that the company has not assumed these acts, after obtaining the legal personality (art. 53 paragraph 1 of Law no. 31/1990 republished). These aspects, regarding the liability of the founders for the activity performed during the setting up of the company, in conjunction with the absence of a legal definition similar to that contained in the Romanian law, have determined most authors from French doctrine, along with the French jurisprudence, to consider that the founders are only those persons who participate, actively, in the setting up of the company and in its incorporation, expressing a personal interest and a particular will in this respect⁸. Conceived in this way, the notion of founder does not necessarily coincide with that of the first associates of the company. We believe that this approach of the concept of founder is correct, especially if only some of the first associates of the company, signatories of the constitutive act, have an active and personal involvement in the setting up of the company and its incorporation in the Register of Trade. In this way, it would also be possible to achieve the correlation between the quality of founder and the liability for irregularities of the setting up of the company or acts concluded in its behalf before obtaining the legal personality. However, the legal definition contained in art. 6 paragraph 1 of Law no. 31/1990 republished preclude such an interpretation, meaning that it would require the intervention of the legislator to eliminate the first part of the said legal text.

3. The legal regime of the company during its setting up

As mentioned before, the setting up of companies having legal personality, under the conditions provided by Law no. 31/1990 republished, is a multiple-

⁸ See P. Le Cannu, B. Dondero, *op. cit.*, p. 215-216 and the jurisprudence cited therein.

stage process achieved through the effects of the juridical acts required by law, process that ends with the formality of incorporation in the Register of Trade. For the purposes of art. 41 paragraph 1 of Law no. 31/1990 republished, the fulfillment of this formality has constitutive effect because only from the date of incorporation in the Register of Trade the company becomes a subject of law.

Therefore, during the period between the conclusion of the constitutive act and the incorporation in the Register of Trade, the company has no legal personality, it has not yet acquired the status of a distinct subject of law. However, its legal regime during this period is not fully comparable to that of companies without legal personality, which are created solely as a result of the conclusion of the company contract, precisely due to the legal personality that will be obtained by fulfilling all necessary steps for its setting up, culminating with the formality of incorporation in the Register of Trade. In this respect, a renowned author within the French doctrine has legitimately remarked: „a company during its setting up lacks legal personality, but it hopes to obtain it. A joint venture and a company of fact also lack legal personality, but they did not want it“⁹.

Thus, as an exception to the provisions of article 205 paragraph 1 Civil Code, corroborated with article 1889 paragraph 3 Civil Code, according to which companies with legal personality acquire the legal personality and therefore the abstract capacity from the date of their incorporation in the Register of Trade, article 205 paragraph 3 Civil Code states that „legal persons mentioned in paragraph 1 are allowed, from the date of conclusion of the constitutive act, to acquire rights and assume obligations, but only to the extent that is necessary for the legal person to be validly set up“. Also known in the juridical literature as the anticipated abstract capacity, the recognition of this capacity was determined by the need to allow the legal person to acquire rights and obligations, as well as to take any other steps necessary to its valid setting up. However, this capacity is limited because, as expressly provided by the law, rights and obligations may be acquired or assumed „only to the extent necessary for the legal person to be validly set up“.

The specific legal regime of the company during its setting up refers to the relations between the associates, as well as the relations with third parties.

Regarding the relations between the associates during the setting up period, after the conclusion of the constitutive act, according to art. 1889 paragraph 4 Civil Code, until the moment of obtaining legal personality, these relations are governed by the rules applicable to the simple company. We believe however that this legislative solution is not totally accurate, since it cannot be applicable in all cases¹⁰.

⁹ P. Le Cannu, B. Dondero, *op. cit.*, p. 210-211.

¹⁰ Perhaps the intervention of the legislator would be necessary in order to circumstantiate this solution, at least in order to apply it unless the constitutive act or the law provide otherwise, as we will emphasize further.

Thus, firstly, the concrete application of the rule contained in art. 1889 paragraph 4 Civil Code seems to disregard, in some cases, the will of the associates expressed in the constitutive act of the company, already concluded¹¹, which regulates precisely, in a specific manner, the relations between the associates, the organization and functioning of the company, in accordance with the rules applicable to the juridical form of company concerned. Nevertheless, even the provisions of the Civil Code governing the simple company (articles 1890 to 1948 Civil Code) make reference repeatedly to the will expressed by the associates in the company contract, the legal rules governing the matter having a disposal character¹². It is true however that art. 1889 paragraph 4 Civil Code has a particular utility and applicability in situations of adopting decisions by the associates regarding the functioning of the company - less frequent in practice - or the amendment of the constitutive act itself. In these situations, we consider that the specific rules to each juridical form of company cannot be applicable to decision-making, as they may become applicable after the incorporation in the Register of Trade. As a consequence, according to the art. 1889 paragraph 4 Civil Code, the provisions contained in the Civil Code on making decisions within the simple company will be applicable¹³.

On the other hand, regarding the contributions at the setting up of the company it is not necessary to apply the legal rules provided in relation to the simple company¹⁴, because the company, during its setting up, has an anticipated abstract capacity to the extent necessary to its valid creation. For this reason, the contributions of the associates can belong to the company being set up, even though they are paid before its incorporation in the Register of Trade, more so as, in case of certain legal forms of company (such as the companies of persons and

¹¹ In this respect, it should be noted that, within French law, according to art. 1842 paragraph 2 of the French Civil Code, until the incorporation of the company, the relations between the associates are governed by the company contract and the general principles of law applicable to contracts and obligations. This solution may also be criticized, as pointed out in the French literature - see in this respect, for more details, P. Le Cannu, B. Dondero, *op. cit.*, p. 219-220.

¹² Thus, for example, art. 1911 paragraph 1 Civil Code states: „The decisions are taken by the associates in the general meeting. The contract may stipulate the way of convening and holding it, and in the absence of such provisions, the decision may also be adopted by their written consultation“.

¹³ In this regard, according to article 1910 paragraph 2 Civil Code, „The decisions concerning the company are taken by the majority of the associates, unless the contract or the law provides otherwise“, while the decisions on the amendment of the company contract or the appointment of a sole administrator require a unanimous vote of all the associates (paragraph 3 of article 1910 of the Civil Code).

¹⁴ In case of the simple company, taking into account the absence of legal personality, the contributions cannot be transferred to the company and cannot become its property. For this reason, the legislator has provided, in article 1883 paragraph 1 Civil Code, the solution according to which the contributed goods are to be subject to the common ownership right of the associates, and upon the dissolution and liquidation of the company, the partition will occur, leading thus to the termination of the co-ownership status.

the limited liability company), the special law requires full payment of the subscribed capital at the time of setting up (art. 9¹ of Law no. 31/1990 republished). Certainly the transfer of goods to the company will be definitively consolidated by the incorporation in the Register of Trade and the acquisition of legal personality¹⁵.

The inapplicability of the rules on the simple company in relation to the contributions is also underlined by article 65 paragraph 1 of Law no. 31/1990 republished, according to which the goods contributed by the associates become the property of the company at the moment of incorporation, unless agreed otherwise within the constitutive act. It follows therefore that the associates may agree in the constitutive act that the contributed goods are transferred to the company before or after its incorporation, with the restrictions provided by law, and the company may acquire them even prior to incorporation, due to its anticipated abstract capacity. In the absence of clauses to this effect, the contributions become the property of the company at the date of incorporation, and until this date they remain the property of the associate who has made the contribution.

Concerning the relations of the company during its setting up with third parties, they are mainly determined by the legal recognition of the anticipated abstract capacity. Therefore, due to this capacity, despite the absence of legal personality, the company under setting up may validly conclude all juridical acts required for its creation under the conditions of the law. Moreover, these acts are the acts of the company from the moment of their conclusion, and therefore they are not subject to confirmation by it, after obtaining legal personality, in accordance with article 205 paragraph 4 Civil Code and article 53 paragraph 1 of Law no. 31/1990 republished. The conclusion is expressly provided by article 205 paragraph 4 of the Civil Code¹⁶, but it does not result with the same clarity from the similar provision contained in the special law (namely article 53 paragraph 1 of Law no. 31/1990 republished).

However, corroborating all the above-mentioned legal provisions, it can be concluded that other juridical acts pertaining to its object of activity may also be concluded in behalf of the company during its setting up, and not only those required for its valid creation. The regime of these juridical acts that are not concluded in the exercise of the anticipated abstract capacity depends on their confirmation by the company, after the incorporation in the Register of Trade and thus the acquisition of the legal personality. If the company confirms and assumes these acts, they are considered retroactively as concluded by it and produce the legal effects envisaged by the parties from the moment of their conclusion. Otherwise, in order to protect the interests of third parties who have contracted under

¹⁵ We believe that this is the sense envisaged by the legislator in the article 1883 paragraph 3 of the Civil Code, although that text seems to refer only to goods subject to certain forms of publicity, for constitutive reasons or enforceability against third parties.

¹⁶ In this respect, the text refers expressly to juridical acts concluded in violation of the provisions on the anticipated abstract capacity, contained in article 205 paragraph 3 of the Civil Code.

such circumstances, the law provides the unlimited and joint liability towards third parties of the founders, associates, representatives and any other persons who had acted in behalf of the legal person during its setting up and who had concluded those juridical acts in its account (art. 205 paragraph 4 of the Civil Code and article 53 paragraph 1 of Law no. 31/1990 republished). Although the law does not expressly provide it, we consider that the confirmation of the juridical acts concluded in behalf of the company during the setting up period should be done explicitly and in any case, by a unanimous decision of the associates. The proposed solution results to some extent from the provisions of article 1911 paragraph 2 of the Civil Code and is imposed by the fact that the confirmation of some juridical acts cannot be left solely to the discretion of those who will be liable, according to the law, in the absence of the expression of will, namely those who have concluded the acts in question – the founders, some associates or the legal representative¹⁷.

4. Conclusions

Finally, we consider it necessary to add some clarifications of a terminological nature, in the context of certain inconsistencies of the legislator. Thus, in a narrow sense, the setting up of companies with legal personality is accomplished through the conclusion, by the associates, of their constitutive act. In this sense are the provisions of article 5 paragraph 1 of Law no. 31/1990 republished, according to which „The general partnership or the limited partnership is set up by the company contract, and the company by shares, the limited partnership by shares or the limited liability company is set up by company contract and memorandum of association“ or those of article 46 paragraph 1 of the same law, which stipulate that the incorporation application will be rejected if the legal requirements of the setting up of the company were not complied with.

On the contrary, the expression „company under setting up“, also used by the legislator, leads to the idea that companies with legal personality are not completely set up until the incorporation in the Register of Trade and therefore the acquisition of the legal personality. The same conclusion can be drawn from the text of article 202 paragraph 1 Civil Code, which states „If the registration of the legal person has constitutive character, it is not considered legally set up while the registration has not been made“. However, the special law in the field of companies having legal personality, Law no. 31/1990 republished, regulates this aspect within Title II, entitled Setting up of companies, which contains several chapters dedicated to the conclusion of the constitutive act (Chapter I), specific

¹⁷ For a presentation of different methods of conforming and assuming the juridical acts concluded in behalf of the company during its setting up provided by French law, under some more explicit legal regulations, see also G. Ripert, R. Roblot (sous la direction de M. Germain) *Traité de droit commercial*, tome 1 – volume 2, *Les sociétés commerciales*, LGDJ, Paris, 2002, p. 48-50.

formalities for the setting up of a company by shares through public subscription (Chapter II), incorporation of the company (Chapter III) etc., and the structure of this legal regulation supports the same conclusion, according to which the setting up of companies having legal personality necessarily includes their incorporation in the Register of Trade.

Therefore, as it appears from the entire approach which is the object of this paper, we consider that in cases of companies with legal personality, their setting up should be addressed in a broader sense, as comprising not only the conclusion of the constitutive act by the associates, but also all the formalities required by law for the valid creation of the legal person, including its incorporation in the Register of Trade.

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Excise Duties in European Union. Relevant National Case-Law

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Abstract

Excise duty is an indirect tax category, particularly important due to the economic impact it has on the public budget. EU harmonized excise duties represent special consumption fees that are due to the state budget for certain products, derived from domestic production or imported. In the area of regulation concerning substantive law on excise duties, EU law contains harmonized rules, mainly through directives. Accordingly to the transposition right into national law, each Member State has its own regulations in the field, resulting a very diverse legal framework. Especially in the rules of procedure, we notice considerable differences on the perception and payment of these tax liabilities, as demonstrated by the consistent jurisprudence. This paper shows the influence of the jurisprudence of the EUCJ on the interpretation of the rules of law applicable in the field.

Keywords: *excise duty, harmonized rules, national case-law, EUCJ influence.*

JEL Classification: K34, K41

1. The notion of excise duty in the European Union

Excises are special consumption fees that are due to the state budget for the production, importation or sale of certain product categories.² Typically, amounts collected during the procedure of collecting excise duty constitute revenue to the state budget, situations likewise regulated by the Fiscal Code in Romania.

The adoption of uniform rules on excise duties and excise goods in the EU is made relatively difficult. The impediments came from the significant differences that exist among the regulation of these indirect taxes in the Member States and because of the particular position that those taxes hold in the domestic taxation. In general, the government program of each state includes the view of the central administration on the amount of excise duty and the excise goods, a claim that partly motivates the vote of confidence of the electorate. When regulating a uniform tax, the legislative must consider and meet the needs related to the program of measures of the government and the short term interest of the leading local and central public administration.

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² D. Drosu Șaguna, M. Tofan, *Drept financiar și fiscal european*, Ed. C.H. Beck, Bucharest, 2010, p. 203 ff.

The greatest progress is being made on the tobacco and tobacco products tax, the compromise that must be made by accepting the uniform rules of European Union member states being justified by reasons of public health.

The following categories of excise benefit of regulators at EU level:

excise duty on alcoholic beverages	excise on beer excise on wine excise on fermented beverages other than wine or beer excise on intermediate products excise on alcohol	Directive 92/83/EEC of 19 October 1992 on the harmonization of excise duties structures on alcohol and alcoholic beverages Directive 92/84/EEC on the approximation of excise duty on alcohol and alcoholic beverages
excise duty on energy products and electricity	excise tax on gasoline excise on natural gas for housing heater excise on electricity	Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity European Council (December 2009) decided to considerably reduce carbon emissions across the economy of each Member State ³ .
excise duty for manufactured tobacco	The level of such duty was negotiated separately by each state (especially for cigarettes), and minimum level varies by type (cigarette, cigars, other tobacco products etc.) from 14 to 60 euro / kg or pieces.	Directive 95/59/EC, as amended by: - Directive 1999/81 / EC of 29 July 1999 (OJ L 211 of 11 August 1999, p. 39-41) - Directive 2002/10 / EC of 12 February 2002 (OJ L 46 of 16 February 2002, p. 78-80) and - Directive 2010/12 / EU of 16 February 2010 (OJ L 50 of 27 February 2010, p. 1-7)
excise duty on petroleum products		Directive 95/60 / EC of 27 November 1995 on fiscal marking of gas and kerosene, as amended by EU Commission Decision 2006/428 / EC of 22 June 2006 establishing a common fiscal marker for gas oils and kerosene

Table. 1 Harmonized excise in EU

³ The document is available on-line at <http://www.consilium.europa.eu/uedocs/cmsUpload/st00006.en09.pdf>, retrieved in 02.11.2016.

Some Member States may establish national excise products in the same category:

excise tax (special tax) for energy products and electricity	Belgium, Netherlands, Sweden	Germany, Finland,
additional fee for mixed drinks (alcoholic beverages mixed with soft drinks)	France	
additional charge for alcoholic beverage sold in packaging that can not be reused	Belgium	
special excise duty on mineral oils, coffee, natural fur apparel, crystal items, gold jewelery, perfumery	Romania	

2. Settlement, calculation and imputation of excise duty

Excise duties were traditionally considered indirect taxation, due - in principle – for selling certain consumer goods, usually considered luxury. Now, excise duties are applied on a limited number of products and/or services, and most of them are considered consumer products duties, ie for those commonly used by final consumers. Excise duty may be established on the manufactured products under the monopoly regulation and also on some of the imported goods.⁴

Economic theory recommends excise duties on goods with inelastic demand. In these circumstances, taxes price increases on excise goods does not cause significant reductions in the consumption of these goods, so budget revenues from excise duties are relatively stable. The scope of these special charges of consumption is particularly vast and it varies from country to country and includes mainly: alcohol and soft drinks, wine, tobacco products, gasoline, diesel, tea, coffee, soft drinks, cars, furs, jewelry, cosmetics etc.⁵

Due to the particularities of the Single European Market, the harmonization of excise duties is imperative, although states tend to preserve their means to influence the economy and commerce. These taxes have a dual purpose: tax revenue collection and targeting consumption. Even if these two intertwined interests of the state are not always harmonious and complementary, they provide a guarantee to achieve the pursued amounts of tax revenue.⁶

The products mentioned are excisable when they arise within the EU or their importation into that territory. Excise duty becomes chargeable at the time of release for consumption or when there are losses or shortages of excisable products. The release for consumption shall be considered:

⁴ M.Ș. Minea, L.T. Chiriac, C.F. Costas, *Dreptul finanțelor publice*, Ed. Accent, Cluj-Napoca, 2005, p. 366.

⁵ L. Țătu, C. Șerbănescu, D. Ștefan, D. Cataramă, A. Nica, *Fiscalitate. De la lege la practică*, Ed. All Beck, Bucharest, 2005, p. 51.

⁶ M.Ș. Minea, L.T. Chiriac, C.F. Costas, *op. cit.*, p. 374.

- a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
- b) holding of excise goods outside a duty suspension arrangement where excise duty has not been levied in accordance with this the law in force;
- c) production of excise goods, including irregular production, outside a duty suspension arrangement;
- d) importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement;
- e) use of excisable products within a fiscal warehouse other than as feed-stock.

Release for consumption are considered the possession for profit by a person of excise goods which have been released for consumption in another Member State and for which duty has not been levied in Romania.⁷

The time of release for consumption shall be written:

- a) receipt of excise goods by the registered consignee;
- b) upon receipt by the beneficiary of the exemption of excise goods;
- c) receipt of excise goods at the place of direct delivery.

If an excisable product entitled to exempt or exempt from excise duty is used for any purpose that is not in accordance with the exemption procedure, the excise duty is attract. An energy product, for which duty had not been previously due, shall be considered released for consumption when energy product is offered for sale or used as motor fuel or heating fuel.

An excisable product, for which the excise duty was not previously chargeable, is considered a release for consumption when the product is held in an excise tax warehouse for which the authorization was revoked or cancelled. Excise tax becomes payable on the day the decision to revoke the authorization of tax warehouse was issued or the date of issuing the decision to cancel the authorization of tax warehouse for excise goods that may be released for consumption.

If an excisable product for which the excise duty was not previously chargeable, it is considered a release for consumption when the product is held in an excise tax warehouse for which the authorization has expired and there was not issued a new permit. It is not considered a release for consumption the movement of excise goods from the tax warehouse to another tax warehouse in Romania or in another Member State; a registered consignee in another Member State; a territory outside the European Union.

The total destruction or irretrievable loss of excise goods under duty suspension arrangement, including a pertaining to the nature of the product or as a result of unforeseeable circumstances or force majeure, or as a consequence of

⁷ M. Tofan, *Drept fiscal*, Ed. CH Beck, Bucharest, 2016, p. 305.

authorization by the competent authority is not considered released for consumption. Products are considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods. The total destruction or irretrievable loss of excise goods must be proven to the fiscal competent authority. It is not considered moving energy products released for consumption in the tax warehouse for the supply of ships or aircraft bound for a territory outside the European Union, being assimilated to an export operation. Also supply energy products operation of ships or aircraft bound for a territory outside the European Union is treated as an export operation.

The persons obliged to paying excise duty are:⁸

in relation to the departure of excise goods from a duty suspension warehouse	authorized warehouse keeper, registered consignee or any other person releasing the excise goods out off the duty suspension regyme or on whose behalf it performs this release and in the case of irregular departure from the tax warehouse, any other person involved in that departure
	in case of an irregularity during movement of excise goods under suspension of excise duty: the authorized ware housekeeper, the registered consignor or any other person who guaranteed the payment and any person who participated in the irregular departure and who was aware or should be aware of the irregular nature of the departure
in relation to holding of excise goods	the person holding the excise goods and any other person involved in their possession;
regarding the production of excise goods	the person producing the excise goods and, in the case of irregular production, any other person involved in their production
regarding the import of excise goods	the person who declares the excise goods or on whose behalf they are declared upon importation or, in the case of irregular importation, any other person involved in their import

When more people are required to pay the same excise duty debt, they shall be jointly liable for such debts, each of these persons can be held liable for the entire debt.

The excise duty is set out in Annexes of the Romanian Tax Code, separately for the year 2016 and 2017. The excise duty shall be updated annually with the consumer price increase in the last 12 months, calculated in September of the year preceding the application, compared to the period October - September, officially communicated by the National Statistics Institute until 15 October. Excise

⁸ Art. 341 Fiscal Code.

payers are required to register with the competent authority. Any excise responsible for the correct calculation and payment of the legal term of excise duty to the state budget and for respecting the legal deadline to fill the statements of excise duty to the competent authority. The deadline for paying the excise duty is up to 25th of the month following that in which the duty becomes payable, except where expressly provided for another term of payment.⁹

Current legislation includes rules for the authorization of economic operators carrying out activities with excise goods under suspension of excise duty. Authorization of tax warehouse, the registered consignees, consignors and registered importers authorized by the competent authority shall be made by the Commission to authorize operators with excisable products, instituted by the Ministry of Finance. As an exception, authorization of fiscal warehouses for exclusive production of wines made by taxpayers, other than large and medium taxpayers established according to regulations, small distilleries, and small independent breweries, can be done by committees constituted in the territorial structures of National Authority of Fiscal Administration, called regional committees.

3. The analyze of the excise duty jurisprudence of the Romanian national courts

In the field of jurisprudence, the analyze of the most recent case solutions did not show any relevant case law in the field of excise duties in which the current provisions of the Tax Code are incident. However, based on harmonized EU regulations and respecting the priority of norms of European Union law, we have retained to discuss the following solutions:

Romanian Constitutional Court	Decision no. 34/24 June 1993	art. 20 para. 2 and art. 22 para. 2 of the law regarding the excise for imported and domestic products and the excise for oil and natural gas
	Decision no. 189/31 March 2005	title VII concerning the excise duties in the Law no. 6571/2003 –Fiscal Code and art. 190 from the Govern Ordinance no. 92/2003 regarding the Fiscal Procedure Code
	Decision 39/2013	unconstitutionality of art. 3 ind. 1 of GEO 77/2011 on the application of clawback tax on the price of medicines (including VAT)
	The competent panel for interpreting the rule	Decision no 11/2015 – the hypothesis of smuggling, the offender will have

⁹ Art. 345 Fiscal Code.

The High Court of Cassation and Justice	of law in criminal matters	both the seizure of goods, and compelling of customs duties, excise tax and VAT related.
	The appeal for uniformization of interpreting the law	Decision no. 17/18 November 2013 to criminalize the situation of possession of excisable products out of warehouse, knowing that they come from smuggling
	The section for administrative and tax litigation	Decision no. 108/2015, the cancellation of the decision establishing the obligation to pay the excise duty on alcohol and accessory products
		Decision no. 412/2015, annulment of the decision establishing additional corporate tax due to deductible expenses fit into the excise paid for leases for cars
		Decision no. 780/2015, annulment of the decision which established main duties and accessories excise duty on diesel and biodiesel;
		Decision no. 839/2015, annulment of the decision to impose the obligation to pay additional excise duty for alcohol;
		Decision no. 1603/2015; the revocation of the tax warehouse authorization
		Decision no. 1877/2015, annulment of the tax decision establishing corporate tax of unrealized gains accounting for the difference in price
Relevant jurisprudence of the national regional courts	Decision no. 2484/30.09.2011 of the Court of Appeal Alba	the annulment of the imposing decision on the establishment of additional amounts due as excise duty for products classified in alcoholic category and not in the spirits intermediate category
	Brasov Court - civil sentence no. 1634 / CA from March 12, 2013	the annulment of the imposing decision on the accessories calculated for unpaid excise duty on ethyl alcohol found in the possession on the grounds that, in fact, the excise duty was paid as soon as the tax authority issued an imposing decision on setting sums due in respect of excise duty.

	Suceava Court	the annulment of the decision to impose excise duty on alcohol on the grounds that the 2 conditions are not fulfilled (alcohol concentration above 1.2% and compliance with the Combined Nomenclature).
	Decision no. 4502/2014 of Court of Appeal Alba	the annulment of the imposing decision establishing the obligation to pay additional excise for oils used as fuel for heating.

Table. 4 Synthesis of the national analyzed jurisprudence

In the spirit of the field analyzed, three decisions of the Constitutional Court stands, namely:

- Decision no. 34/24 June 1993 on the unconstitutionality of art. 20 para. 2 and art. 22 para. 2 of the Law on excise taxes on imported products and the country, as well as tax on crude oil and natural gas from domestic production.¹⁰

In this case, the Court was invested to decide the unconstitutionality of the statute of limitation of five years set for establishing excise duties and their forced execution, as opposed to the general term of 3 years in common law, considering that this provision contravenes Article. 41 para. 2 of the Constitution which provides equal protection to property by law, irrespective of its owner. The Constitutional Court held as the establishment of the limitation period of 5 years, in synthesis for these arguments: the 3 years' term does not benefit of regulation in constitutional order and according the art. 137 par. 1 state budget revenues is not the private property of the state. According to art. 138 of the constitution, taxes and fees are be set only by law and the establishment of a limitation period greater than in common law is not against the constitution.

- Decision no. 189/31 March 2005 on the unconstitutionality of the provisions of Title VII of Law excise duties. 571/2003 regarding the Fiscal Code and Art. 190 of Ordinance no. 92/2003 regarding the Fiscal Procedure Code¹¹.

The exception invoked the unconstitutionality of the provisions of the Tax Code aimed at targeting the criminalization of offenses related to failure of harmonization of excise duties, because, in essence, in the Romanian systems of law criminalizing acts is the competence of organic laws and tax code is an ordinary law. The request was rejected as inadmissible, the court identifying incidents of procedural who stopped to go further with the investigation on the precise matter of the investiture.

¹⁰ The document is available on-line at <http://lege5.ro/Gratuit/gu3timzw/decizia-nr-34-1993-cu-privire-la-constitutionalitatea-art-20-alin-2-si-art-22-alin-2-din-legea-privind-accizele-la-produse-le-din-import-si-din-tara-precum-si-impozitul-la-titeiul-din-productia-interna?pid=&d=2016-11-19>, retrieved on the 25.10.2016.

¹¹ The document is available on-line at <http://www.lexex.ro/Decizia-189-31.03.2005-50326.aspx>, retrieved on the 25.10.2016.

- Decision 39/2013 regarding the unconstitutionality of art. 3 ind. 1 of GEO 77/2011 on the application of clawback tax on the price of medicines, which include VAT¹²

The Court held that, under the general principle applicable in fiscal field, taxes and fees apply over taxable income matter or assets and not on other taxes, which is why the application of clawback tax on another tax is unconstitutional; *mutatis mutandis*, the same solution will be applied regarding the calculation of excise duty.

4. The analysis of recent HCCJ jurisprudence on excise duties

In Decision No 11/2015,¹³ the competent panel for interpreting the rule of law in criminal matters was invested to unravel the question whether, in the hypothesis of smuggling, the authors will have both the seizure of goods and the payment of customs duties, excises and VAT related. The Court gave priority to relevant EU jurisprudence in this matter, namely two decisions of the ECJ C459/07 *Veli Elshani v Hauptzollamt Linz* and C230/08, *Dansk Transport og Logistik against Skatteministeriet*. HCCJ admitted the request and determined that, in case of smuggling, the seizure will be accompanied by compelling the authors to pay taxes owed, including the excise duties.

Settling the appeal on uniforming the interpretation of the law by Decision No. 17/18 November 2013¹⁴, ICCJ decided to criminalize the possession of products off tax warehouse, if these products are subject to excise marking and knowing that they come from smuggling.

ICCJ recent decisions rendered by the The section for administrative and tax litigation, which holds the material competence to rule in disputes related to the subject of the analysis, we note:¹⁵

- Decision no. 108/2015 - the annulment of the decision establishing the obligation to pay the excise duty on alcohol products and accessories, with accessories (increases); The appeal court found that, although it was not introduced in the case, the sentence was pronounced by the court of first instance in contradiction with the author of the act, so the case was sent for retrial for informing the emitent about the litigation; in law, art. 129 CPC and art. 16 ind. 1 Law no. 554/2004 were invoked.

¹² The document is available on-line at <http://www.juridice.ro/475454/piata-farmaceutica-si-taxa-de-clawback-argumente-din-jurisprudenta-recenta-evolutiva.html>, retrieved on the 25.10.2016.

¹³ The document is available on-line at http://www.cdep.ro/pls/legis/legis_pck.lista_anuala?an=2015&emi=240&tip=17&rep=0, retrieved on the 30.10.2016.

¹⁴ The document is available on-line at <http://www.scj.ro/1093/Detailii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=86231>, retrieved on the 30.10.2016.

¹⁵ The documents are available on-line at <http://www.scj.ro/736/Cautare-jurisprudenta?customQuery%5B0%5D.Key=Department&customQuery%5B0%5D.Value=158>, retrieved on the 30.10.2016.

- Decision no. 412/2015 - the annulment of the decision establishing additional corporate tax due to deductible expenses fit into the excise paid for leases of cars; the fiscal authority considered that excise duties were not included in the sale price of the goods in question, they do not represent expenditures in order to achieve income and thus they are not deductible tax. The court held that the duty could not have been register in accounting earlier than the closing date of import operations, respectively at the end of the lease. As the cars were imported in order to sell them, the expenses incurred in order to do the selling, including excise duty, shall be deemed tax deductible.
- Decision no. 780/2015 - the annulment of the decision which established main duties and accessories excise duty on diesel and biodiesel; first court removed the conclusions of accounting expertise concerned, retaining as relevant to the existence of the obligation to pay excise the date of releasing the goods for consumption, understanding here any output from a suspension regime, including occasional or any possession of excisable goods, except inside the tax warehouse. HCCJ upheld the court of first instance, considering art. 178 para 4 of the Fiscal Code, according to which the holding of excise goods outside the tax warehouse, for which no proof of payment of excise duty exists, can attract the obligation to pay the excise. The appellant must be diligent when a commercial circuit of energy products engages in tax warehouses, especially in light of art. 2.2.1 of Govern decision no 44/2004, according to which the consumption of energy products in release of tax warehouses is made only when the buyer shows payment document stating transferring to the State the value of the excise duties amount to be billed. The company recurred, as consumers finally had to ask the invoice issued by companies providing warehouse, the payment bill, confirmed by the bank with stamp and signature for the payer's account debited. Regarding the obligation to pay excise duty, the accounting expertise in the case attesting the reality of accounting records of operations with the 6 suppliers of excise goods was not relevant.
- Decision no. 839/2015 – the annulment of the imposing decision on the obligation to pay additional excise duty for alcohol. The appeal court ordered the case to be sent for retrial, showing that, under Art. 129 and Art. 261 pt. 5 CPC, the judge must find the truth and he has to insist to reveal the reasons of fact and to explain the law under which the conviction of the solution was formed. In this case, the calculation of losses considered acceptable from a stock of excise goods placed under suspension was discussed the court is bound to rekindle the correct way to calculate these losses. After a new trial, the court presented the legality of the calculation methods used by the parties for establishing losses, supplementing the rules of evidence.

- Decision no. 1603/2015; the court of appeal concluded that the revocation of the authorization for tax warehouse is possible when only one incidence is proven out of the situation provided by law for this sanction; the company has not complied with the terms provided in the authorization to notify the fiscal authority about the change in the technology for manufacturing the products, by including diesel in the recipe of production, an excisable product which was not included among the raw materials used for finished products before.
- Decision no. 1877/2015 – the annulment of the imposing decision on the establishment of corporate tax for unrealized gains which represent the difference in price between the price of contracts concluded with counterparties and price established by Order of the National Agency for Mineral Resources. Also, this case raised the issue of an amount paid as excise duty, by a procedure of enforcement of the final beneficiary, and the taxpayer may be liable to pay a new excise duty, as a double payment. HCCJ appreciated that it must pay the excise duties for the difference in price, as long as the beneficiary of a concession activity of exploitation.

5. Relevant jurisprudence in other national regional courts

Analysis of the practice of the panel of the HCCJ proved to be so diverse but still it may not provide an accurate representation of jurisprudential direction in the field of excise duties in our country, unless they are complemented by a review of the jurisprudence of regional courts.

Thus, we documented and analyze these solutions recently pronounced by the domestic competent courts:

- Decision no. 2485/30.09.2011 pronounced by the Court of Appeal Alba;¹⁶ the annulment of the imposing decision on the establishment of additional amounts due for products classified in a different category than intermediate drink spirits. The applicant submitted to the tax authorities the list of products that are realized in the tax warehouse and recipes for preparing these products, but no response was received from the fiscal authority. A year and a half later, the applicant received a very complicated answer that could not be deciphered by staff with no specialist training. According to art. 172 para. 1 Tax Code, intermediate products must meet certain conditions. The court of appeal has revealed however that it is relevant that the applicant made no framing modules for its products and had requested time to bring it up in tariff categories, by the competent authority in terms of taxation. Checking the legal applicable provisions, the court of appeal concluded that the applicant can not be required to pay further excise duty for mission-critical period that was

¹⁶ The document is available on-line at <http://infodosar.ro/speta.php?id=736>, retrieved on 10.11.2016.

still within the period to seek tariff classification under the rules in force to the particular products, but after the expiry of the legal term.

- Brasov Court pronounced the civil sentence no. 1634/CA of 12 March 2013¹⁷, expressing a unique point of view in the matter of interest due to excise duty calculated by the tax authority. In essence, the applicants sought annulment of the decision imposing the accessories calculated for unpaid excise duty on ethyl alcohol found in their possession on the grounds that, in fact, the excise duty has been paid as soon as the tax authority issued a decision imposing the amounts due as the excise duty. Art. 192 par. 1 and 2 of the Fiscal Code refer to the time of chargeability of excise duty, and art. 166 par. 1, letter e refers to the time of release for consumption. Art. 120 para 1 of GEO 92/2003 provides that the additional interest is calculated from the day following the payment deadline until the date of settlement of the debt. Instead, the court finds culpable the attitude of the control bodies which compiled the assessment decision after 4 years and 2 months from the start of fiscal control, which determined the calculation of interest for a long period. According to the proportionality principle in EU law, the court held that the measure taken by a public authority affecting the rights of individuals must be appropriate and necessary to achieve that legitimate aim and, at the same time, reasonable. The proportionality principle is generally invoked in European case law in legal proceedings in which the question of the prevalence of the legal claims against any law or in dispute when the prevalence of a private law is opposing the public interest. The following cases are invoked C210/91 *Commission v Greece*, C 286/82 and 26/83 *Luisi and Carbone Ministry against del Tesoro*, C203/80 *Casati*. Thus, administrative measures or penalties must not go beyond what is strictly necessary, so that monitoring procedures should not impede the freedoms that Treaty protects and should not be accompanied by a penalty disproportionate to the gravity of the infringement, because that becomes an obstacle to the exercise of that freedom. Case C188/09 *Profaktor Kulesza, Frankowski, Józwiak Orłowski* argues that in the absence of harmonization of legislation about the communication of penalties applicable to infringements of the conditions stipulated by a regime established by legislation, Member States are free to choose the penalties they consider relevant. They are however obliged to exercise their powers in compliance with EU law and its general principles, thus respecting the principle of proportionality. In the case, the tax authority's right to establish the obligation to pay excise duty is undeniable, but also the right of the person to be protected against abuse of rights of the authorities. This conflict between the protection of private law and the public interest is under the direct impact of the principle of

¹⁷ The document is available on-line at <http://legeaz.net/spete-civil-2/inlaturare-dobanzi-pentru-accize-calculat-1634-2013>, retrieved on 10.11.2016.

proportionality, which is why interest on arrears for payment in this case has been removed.

- Suceava Court pronounced sentence no. 1954/3 June 2010¹⁸ on the annulment of the decision to impose excise duty on alcohol, on the grounds that the two legal conditions are met: alcohol concentration above 1.2% and compliance with the Combined Nomenclature. The applicant possession of a quantity of industrial ethyl alcohol is not, in the court opinion, subject to duty. From the audit report in the file, the alcohol used was a technical product, nor alcohol ethyl. First the court agreed to the applicant but, on appeal, the sentence was quashed and referred back with an order from the superior court to take account of objections to the expert report submitted to the case after closing the debate, in consideration of the rights of defense of the tax authority. The court granted applicant exclusively on expert decisive role, but it was its duty to respect equally the right to defence on both parties. The case was again before the court of first instance, which dismissed the applicant's action, saying that all the alcohol is an excisable product. On appeal, the case received a large settlement in favor of the obligation to pay excise duty.
- By Decision no. 4502/2014,¹⁹ Alba Court of Appeal held on the cancellation of the tax decision establishing the obligation to pay additional excise due to situation of using oils as fuel for heating. The legislature provided a preliminary procedure for changing the tax regime for goods returned to the economic cycle, when oils are used as fuel for heating. Thus, the court of appeal explained that, as long as the destination of waste oil as fuel is not denied, excise duty is imperative.

6. Conclusions

Scope of excise duties generates litigation both in relation to specific national regulations, and in the field of harmonization. EUCJ case law is faithful to the fundamental principles which characterize the European Union legal order, of which the principle of proportionality is invoked and used mainly in motivating handed solutions.

At the national legal system, the relevant case law on excise duties is not as consistent as in case of other taxes, such as VAT and income tax. In national court jurisprudence, the EUCJ case law influence is present and tends to standardize the interpretation of the rules of law rather than the central courts. The tax authorities of the Member States opt for the procedure of request for EUCJ preliminary ruling, but not the national courts in our country.

¹⁸ The document is available on-line at <http://legeaz.net/spete-contencios/contestatie-act-administrativ-fiscal-produs-supus-3598-2011>, retrieved on 10.11.2016.

¹⁹ The document is available on-line at <http://www.jurisprudenta.com/jurisprudenta/speta-zv8c14d>, retrieved on 10.11.2016.

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The Lease Contract under Insolvency Law

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Abstract

The reason for the promulgation of the current insolvency law, Law 85/2014, was that of creating a legal framework effective and proper for the collective enforcement of debtors who are insolvent to ensure the recovery of claims that they owed and implicitly to protect business environment by saving viable enterprises and eliminating those that no longer have any chance of recovery. Starting from the different opinions drawn from the doctrine, and from the examples given by the inconsistent judicial practice, in case of the lease contract, when the debtor user enters insolvency proceedings, serious practical problems have been raised both in terms of the fate of this contract after the date of declaring the insolvency procedure open, but especially in terms of the registration of the claim arising from this contract on the list of creditors. Thus, the completion of the legislation with specific regulations for these operations was imposed. Through the institutional arrangements that aimed at enhancing the doctrinal and jurisprudential opinions, they managed to codify the status of the lease contract subject to insolvency proceedings, the situation of this contract being treated especially by the current Code of Insolvency, the new legislative framework offering principles that certainly will lead to the substantiation of a predictable and fair jurisprudence.

Keywords: lease; insolvency; financier; user; financial leasing

JEL Classification: K12, K22

1. Preliminary issues

Representing a complex juridical institution of commercial law, the central element of the insolvency proceeding is the debtor, that subject of law that, by assuming the risk of a business, failed, so if the business is an adventure, the insolvency is the consequence of the adventure that ended badly².

Without being considered a creation of the modern world, the insolvency proceeding, by the evolution of the legislative policies that have influenced the legal regime, perpetuated in time, the same common feature, namely of reconciling the interests of the debtor with that of its creditors.

The origins of this procedure are found in Roman law, but being restricted only to bankruptcy proceedings which sought to liquidate debtor's property in order to pay off the debts accumulated by it. It is noteworthy that Roman

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² Gheorghe Piperea, *Drept comercial (Commercial Law)*, C.H. Beck Publishing House, Bucharest, 2009, p. 177.

law did not make any distinction between traders and non-traders in terms of applying this procedure, of enforcement, directed against the person of the debtor.

In the initial phase of *missio in bona*, the creditor became the holder of the entire property of the debtor, by order of the magistrate, so it is assumed that the debtor was not dispossessed, but was only supervised by the creditor in order to avoid increasing insolvency, the debtor still remaining the owner and keeper of its whole fortune. Subsequently, if the debt was not paid by the debtor, the second phase followed, the *venditio bonorum* itself, which consists in the forced execution of its assets³. By order of the prosecutor, where there were several creditors, he called a *magister bonorum*⁴ (master of goods), who after the fulfilment of the formalities started to sale the debtor's assets in bulk (*per universitatem*). The buyer of goods, *bonorum emptor*, replaced the debtor, cashing its receivables, and later moved to the process of recognition or disproof of the alleged debts. After establishing the founded receivables, the fulfilment of the claims of the acknowledged creditors was achieved, within the limits of the amounts provided by *bonorum emptor*. After attaining the insolvency proceedings purpose by *venditio bonorum*, the debtor remained dishonoured⁵.

If the insolvent debtor was a personality part of a senate⁶, a minor aged under 14 or a person lacking discernment, then the procedure for the sale of assets was replaced with *distractio bonorum*, which represented a retail sale destined to satisfy the claims of all creditors. After applying this form of execution of assets, the infamy on the debtor was no longer attracted⁷.

The bankruptcy procedure was regulated for the first time in 1673 in France by the Trade Order promulgated by Louis XIV, having been inspired by the Italian law at that time. The same source of inspiration underlies the concepts found in the Romanian Commercial Code of 1887, which by moving away from the origins of the actual Roman law distinguishes between traders and non-traders, the procedure being applied exclusively only to people who developed commercial activities⁸.

The evolution of the commercial relations was influenced, over time by various events (wars, global economic crisis, etc.) that caused insolvency, freed from the disreputable character connotation, to be seen from a different perspective. So, in the context of current economic realities, they try as much as possible to remove the stigma of failure of the business, giving the insolvent debtor the

³ Teodor Sâmbrian, *The sale-purchase procedure applied to the debtors' goods in the Roman Antiquity*, „Revista de Științe Juridice” no.1/2009, p. 9,10.

⁴ Ulpian, libro (abreviat lib.) 59 ad Edictum; Digests of Justinian (abbreviated Dig.), 42, 4, 5; Code of Justinian (abbreviated Code.), 7, 72.

⁵ W.W. Buckland, *Manual of Roman Private Law*, Cambridge University Press, 1954, p. 387.

⁶ *Idem*, p. 387.

⁷ George Mousourakis, *A Legal History of Rome*, Routledge Taylor&Francis Group, 2007, p. 74.

⁸ Book III of the Code., Article 695 provides that it is bankrupt the "trader who ceases payments for its commercial debts".

chance of recovery by establishing the principle of priority of judicial reorganization, reintegration and continuation of its activity and not least by keeping the business relationships between the parties involved in the procedure. In the new conception, the insolvency proceeding appears as a procedure that allows the entrepreneur in difficulty to fail in an organized manner⁹.

2. The lease contract under insolvency law

The insolvency procedure is based on social and economic justification assumed by its function of recovery of the activity of insolvent debtors who can be saved and by eliminating those whose rescue is no longer possible.

In the congruence with international rules in the matter, the reason of promulgation of the current insolvency Law no. 85/2014 is apodictically emphasized, which tries to create an effective and proper legal framework for the collective enforcement of debtors who are insolvent so as to ensure concurrently the recovery of debts that they owed and therefore the protection of the economic environment, by saving viable enterprises and eliminating those that no longer have any chance of recovery, because the negative influence that such companies have in the business environment by not paying obligations on maturity, causing difficulty to co-participants in economic activity based on the domino principle is certain.

The doctrine stated as a main substantive condition for the declaration of the state of insolvency, the cessation of payments of the debtor resulting from the inability to pay certain, liquid and exigible debts, due to the rupture of the balance between the assets and liabilities, which would enable its creditors to ask it to declare a state of bankruptcy¹⁰.

The opening of the insolvency procedure will generate significant effects, patrimonial or non-patrimonial, with major consequences reflected in the debtor's activity, but also with specific implications on third parties. In French legal literature they support the view that the effects of the opening of the proceedings would include all the consequences that the new situation of the debtor would produce¹¹.

The moment of opening the insolvency proceedings will produce specific effects on the contracts concluded by the debtor and still in progress on the opening date of the proceedings, as these are subject to special regulations. Taking inspiration from the French legislation¹², the notion of *contract in progress* was

⁹ Gheorghe Piperea, *op. cit.*, 2009, p.181.

¹⁰ Csaba Bela Nasz, *Declansarea procedurii insolventei (Triggering the insolvency procedure)*, Hamangiu Publishing House, Bucharest, 2014, p. 5; Angela Miff, *Jurisprudential aspects regarding the action in annulment of the debtor's patrimonial transfers, the debtor being in insolvency procedure*, „Juridical Tribune – Tribuna Juridica”, vol. 5, issue 1, June 2015, p. 24-27.

¹¹ M.Jeantin, P. le Cannu, *Entreprises en difficulté*, Dalloz, Paris, 2006, p. 210.

¹² The concept of contract in progress is used in the French Commercial Code, Article L622-13.

first introduced in insolvency law in Romania by Law no. 277/ 2009, and the importance of maintaining it, as it was expressed in the doctrine "*is necessary for economic reasons, the termination of contracts being likely to jeopardize any chance of reorganization of the debtor*"¹³.

In terms of the term *contract in progress* we bear in mind that the insolvency law does not provide a definition of this notion, but only outlines its limits. The identification of the scope of the concept of contracts in progress is achieved, however, by interpreting and correlating legal terms, which undoubtedly shows that this is assimilated to the acts in the course of execution, such as non-expired leases or other long-term contracts, not executed entirely or substantially by the co-contractors (Article 123, Paragraph 1).

In the doctrine, the *contract in progress* was defined as "the contract concluded before the opening of the procedure and which is not exhausted before this date"¹⁴, so it is the contract with successive execution or enforcement *uno actu*, which was concluded before the opening of the proceedings, but which up to the date of its declaration it was not executed wholly or substantially by its parties¹⁵.

Under the provisions of the current regulation¹⁶, by exception to the norm of common law (namely Article 1417 Civil Code¹⁷) for contracts in progress on the opening date of the proceedings, the legislature has provided imperatively that these, if they are beneficial to the interest of the debtor, are to be maintained.

This concept intends that by ensuring the continuation of the insolvent enterprise activity, to achieve the main objective of the current regulation, namely to protect the debtor's assets¹⁸ and also they consider the exploitation of all the chances of recovery¹⁹ and the reintegration into the economic circuit. The legis-

¹³ L. Retegan, S. Târnoveanu, *Termination by convenience of the contracts within the procedure - assumptions and effects, advantages and disadvantages in calling for the institution of termination by convenience of contracts*, „Phoenix Magazine” no. 30, October-December 2009, p. 14.

¹⁴ Ion Turcu, *Legea procedurii insolvenței (Insolvency proceedings law). Comment on articles*, 2nd edition, C.H. Beck Publishing House, Bucharest 2009, p.467.

¹⁵ Florin Motiu, *Some considerations regarding contracts in progress regime in the insolvency proceedings*, „The Annals of Universitatea de Vest Timisoara. Law series” no. 2/2014, p.120.

¹⁶ The governing rules: Law no. 85/2014 on the procedures to prevent insolvency and of insolvency, published in the Official Gazette of Romania, Part I, no. 466/06.25.2014, Title II, Insolvency procedure Chapter I, Common provisions, Section 5, The situation of certain legal acts of the debtor, subsection Situation of contracts in progress, respectively Articles 123-131.

¹⁷ Under the common law rule the debtor commits a failure to meet deadlines (acceleration of maturity) if it is in a state of insolvency or declared insolvent under legal regulations. (Article 1417 paragraph 1 Civil Code) Failure to meet deadlines "(1) *The debtor fails to meet deadlines if it is insolvent or, where appropriate, the insolvency declared under the law, and when, with intent or due to a serious misconduct, diminishes by its action the securities established in favour of the creditor or fails to constitute the promised securities*".

¹⁸ Stanciu Carpenaru, *Tratat de drept comercial roman (Treaty of Romanian Commercial Law)*, Universul Juridic Publishing House, Bucharest, 2016, p.761.

¹⁹ Radu Bufan, Florin Motiu, Andreea Deli Diaconescu (coord.), *Tratat practic de insolventa (Practical Treaty of Insolvency)*, Hamangiu Publishing House, 2014, p. 553.

lature has expressly provided that any contractual clause that would lead to cancellation of contracts in progress, of failure to meet deadline or of declaration of the anticipated eligibility due to the opening of the insolvency procedure, shall be considered void²⁰.

As a novelty, the Insolvency Code regulates, in this matter, a number of conceptual clarifications achieved by using certain doctrinal and jurisprudential opinions expressed on the legal regime applicable to certain categories of contracts in progress at the time of opening the proceedings²¹.

Under the empire of the Principle of World Bank, of the Legislative Guide UNCITRAL, and of the provisions of the Civil Code, through institutional steps likely to contribute to the uniformity of interpretation in order to implement consistently and effectively the legislation in the field, new regulations had been introduced, such as and those relating to the management and registration of receivables resulting from a lease contract in progress on the opening date of the insolvency procedure.

The user/lessee is that party of the leasing transaction, which receives the right to use the property in exchange for performing periodic payments to the financier/lessor and according to the ordinance regulating leasing operations, the capacity of user/lessee is not in any way limited "Article 3. (2) *Any natural or legal person, Romanian or foreign, can have the capacity of lessee/user, under Romanian law*"²². So, as a beneficiary of leasing operations, we can find both natural persons, public or private institutions, professionals under various forms of registration, autonomous administrations or national companies.

Under the consideration that in general, leasing represents an opportunity to finance the technological advances of the industrial enterprises, the insolvency law limits the application of the norm strictly to categories of professionals (as they are defined by the Civil Code) their scope including this time, autonomous administrations as well, exempting from its application professionals who exercise free professions, schools, universities and entities listed in Article 7 of Ordinance no. 57/2002.

²⁰ Article 123 "(1) *Contracts in progress are deemed maintained on the opening date of the proceedings, Article 1.417 of the Civil Code not being applicable. Any contractual clauses for the dissolution of contracts in progress, of failure to meet deadlines or of declaring early exigibility for the reason of opening of proceedings are void.*"

²¹ See Stanciu Carpenaru, *op. cit.*, 2016, p.783.

²² Government Ordinance no. 51/1997 on leasing operations and companies, published in the Official Gazette no. 9 of January 12, 2000 updated by Law 383/2009 - to amend Article 6 paragraph (1) letter c) of GO 51/1997 on leasing operations and leasing companies Official Gazette 870/2009, Law 93/2009 - on NFIs Official Gazette 259/2009; Law 241/2007 – for the repeal of regulations by means of which partial or total exemption from customs duties of certain goods are granted Official Gazette 496/2007; Law 287/2006 - amending and supplementing GO 51/1997 on leasing operations and leasing companies Official Gazette 606/2006; v Law 533/2004 - amending and supplementing G.O.51/1997 on leasing operations and leasing companies Official Gazette 1135/2004; Law 571/2003 – on the Tax Code Official Gazette 927/2003.

It follows from Article 1 paragraph (2) of Law 85/2014, that some categories, which include professionals, individuals acting individually or through family associations can have the capacity of debtors only in the simplified procedure.

Insofar as at maturity, the debtor fails to fulfil its obligation incumbent upon it, namely the leasing rate assumed by contract, the creditor shall have more legal ways to use and fulfil the right of claim. Of course it is necessary to specify the disapplication of certain and liquid debts that became due, the debtor's obligations having a nature other than money debts because to these, common law rules shall be applied and not the insolvency proceedings²³.

The new regulation has succeeded coding the status of the lease contract subject to insolvency proceedings, by individualizing the treatment applicable to this contract, thus putting an end to previous differences of opinion. It remains to note in the current regulation, as a novelty, through the provisions inserted in Article 123, paragraph 11 correlated with Article 105, the importance that the legislature attaches to the registration in the statement of assets and liabilities of the claims resulting from the termination or cancellation of the lease contracts, simultaneously instituting the special regime of termination thereof. So, in case of the lease contract in progress on the date of initiation of the insolvency proceedings, by exception to the rule established by Article 123 paragraph 1, thesis 1, in this case, if the financier does not clearly agree to maintain the contract within a period of 3 months from the opening date of the proceedings, it shall be deemed terminated by convenience from the date when the term expires (Article 123, paragraph 12, L85/2014).

Current regulations stipulate the situation in which the financier/lessor, however, will transmit in the interval provided as imperative by the legal norm, namely 3 months from the opening date of the proceedings, a notice on its express intention to terminate the contract by convenience to the official receiver²⁴. In this case the contract is considered legally cancelled after the expiration of a 30-day legal term from the receipt by the official receiver of the financier's notification.

Also, the insolvency practitioner may require the termination by convenience of any financial lease contract with the aim of maximizing the debtor's property, being empowered to evaluate from an economic perspective the profitability of the contract. But it will also have to perform a legal assessment of the contract and of the effects of its termination, in terms of the perspective damage claims that can subsequently intervene, following the request of the co-contractor whose

²³ Stanciu Carpenaru, *op. cit.*, 2016, p. 632.

²⁴ "The notice of termination by convenience given to the co-contractor to the official receiver must be unequivocal within the meaning to request termination by convenience of the contract, being unable to give the extinctive effect provided by law for such notification only on the grounds that from its content the intention of the co-contracting party to terminate the contract can be inferred" (Bucharest Court of Appeal, Civil VI Department, Civil decision no. 1657/ 11.09. 2012).

contract was terminated by convenience and who, by termination of the contract by convenience, may suffer damage²⁵. The decision of the practitioner will be oriented towards the version that brings along added value to the debtor's assets and will also have to consider the real possibility of the debtor to perform or not the obligations under the contracts. The date of termination of the contract by convenience shall be deemed to be the date of notification of the termination by convenience from the official receiver/judicial liquidator.

In accordance with paragraph 12 of Article 123, it is showed that the termination by convenience of a lease contract in progress on the date of initiation of the insolvency proceedings, can intervene:

- if the financier does not agree expressly on maintaining the lease contract within a period of 3 months from the opening date of the proceedings it will be considered abolished as of right;
- prior to the expiration of 3-month term stipulated by law, following the notification of the financier asking the official receiver to terminate the contract, being considered terminated at the expiration of a 30-day term from the date of receipt of the notification;
- at the initiative of the insolvency practitioner under the privilege of termination of any contract in progress²⁶, the date of the termination being the date of the notification coming from the official receiver/liquidator.

In the event of termination, the financier is entitled to introduce a legal action, which will be under the jurisdiction of the syndic judge (Article 123, paragraph 4)²⁷. The rights acquired by the creditor, following such request shall be paid, in case of bankruptcy, according to the order stated by Article 161 of the Insolvency Act.

But according to the doctrine, it is necessary to highlight the difference between the situation of termination for convenience of the lease contract and the situation of termination of the lease contract.

Thus, we notice that in the event of termination for convenience one shall not apply the rules of registration of the claim in the statement of assets and liabilities, expressly provided for the case of termination of the contract (in which case there must be *de plano* a fault of the debtor, born after the opening of the proceedings). When the termination of the lease contract occurs under the current legal regulation we bear in mind that it offers to the financier/lessor the option to choose between:

²⁵ Ștefan Ioana Roxana, *The debtor in the insolvency proceedings* – PhD thesis – PhD coordinator: PhD Univ. Prof. Ion Turcu, 2011, p. 28.

²⁶ Godîncă-Herlea Vasile, *Contractele de leasing conform Legii nr. 85/2014 – probleme teoretice și practice (Lease contracts according to Law no. 85/2014 – theoretical and practical issues)*, „Revista Romana de Drept al Afacerilor” no. 7/2015, p. 79-94.

²⁷ Radu Bufan, Florin Motiu, Andreea Deli Diaconescu, *op. cit.*, 2014, p. 576.

- the transfer of ownership of the asset that is the object of the lease contract. In this case the financier/lessor will acquire a legal mortgage on that property, of equal rank with the leasing operation, being registered in the statement of assets and liabilities according to the order established by Article 159, Paragraph 1 item 3 of the Act. The amount of the claim that will be registered in the list of debts, consists of the equivalent of outstanding rates and accessories invoiced and unpaid on the opening date of the procedure, plus the remaining amount owed by the insolvent debtor under the lease contract, but without exceeding the market value of the asset, which will be determined by an independent valuator. In this situation, the debtor will continue to make regular payments until the full payment of the value of the lease contract.

- the recovery of the asset subject to the lease contract, offering the creditor in this situation the opportunity to register in the statement of assets and liabilities according to Article 161, section 8 of the Insolvency Code, with the equivalent of rates and accessories invoiced and unpaid at the opening date of the proceedings, plus the remaining amounts owed by the debtor under the lease contract, their cumulation decreasing by the market value of the asset recovered, determined by an independent valuator.

So, although in the light of the law as we have shown in the present study in the event of termination, the financier will benefit from a mortgage equal in rank with the leasing operation or of registration to the statement of assets and liabilities with the equivalent rates and accessories invoiced and paid on the opening date of the proceedings, plus the remaining amounts owed by the debtor under the lease contract, their cumulation diminishing by the market value of the property recovered they failed to make a clear distinction between the financed amount and the value of the property, namely the value of the leasing operation. In this regard, I believe it would be appropriate to underline that the financed amount in most cases is not equivalent to the value of the lease contract because by means of the payments that the user makes by way of advance it virtually self-finances its investment. It is known from the practice of leasing companies that on the date of the conclusion of the lease contract they charge the user an advance between 20-50% of the property value.

Article 6, paragraph 2, letter c), GO 51/1997, requires mandatorily, in case of the financial lease contract to specify in the wording of clauses, the amount of the advance that the user will pay to the financier in order to purchase the asset, the object of the lease contract. This confirms the ground of collection of certain amounts in advance, contrary to the concept of leasing which is essentially the full funding of an investment. By its cashing, the responsibility of the financier is to subsidize only the difference between the total cost of the asset and the advance collected. So, the user will not only be a poor regulator of the property acquired under leasing, but also co-owner of a share equivalent to the percentage covered by the advance paid to the financier to purchase the asset.

So, I think that regarding this aspect we will have to make a clear distinction between the financed amount and the value of the lease contract because in the event of termination the transfer of ownership will operate, and the financier will have reason to acquire a mortgage only for the financed amount, which actually represents the value of the leasing operation less the amount of the advance paid initially by the user.

If the asset is recovered by the financier, it will owe to the insolvent user, the return of the advance paid when starting leasing operations, because concretely the advance is the co-participation of the latter in the purchase of the asset. If the property is repossessed by the financier, and it does not operate the return of the advance paid by the user, we are witnessing a change of roles in the lease contract, thus leading to the absurd situation in which the financier, the owner of the property, will benefit from user's financing through the advance that it paid at the conclusion of the lease contract, in order to purchase the asset.

Of course, the possibility of maintaining the lease contract after the date of declaring the insolvency procedure open is not excluded, and if the insolvent debtor in a position of user/lessee does pay at the due deadlines the claims arising under the lease contract in progress, then the completion of the contract will be considered successful and will be subordinated to the provisions of Government Ordinance 51/1997, namely it will be completed by the user's option to operate the transfer of ownership, to return the asset or continue the lease contract.

For assets acquired prior to the date of declaring the imposition of the insolvency procedure, and registered on the list of creditors, these will follow the legal regime of secured debts.

3. Conclusion

Although this version of the new regulations has not escaped the criticism of specialists in the field, it remains to appreciate the initiative of the legislature to create a secure and predictable environment in the so controversial field of registration of receivables arising from a lease contract in progress on the date of declaring the opening of the insolvency procedures.

"The law of collective procedures has become over the years increasingly more complex, without ever reaching satisfactory results, as in the case of bankruptcy everybody loses, so that in this area there are no good laws, but laws less worse than others." (Y.Guyon)²⁸.

It remains at the discretion of the courts, and of the insolvency practitioners to succeed to value these new conceptual regulations as *actus interpretandus est potius ut valeat, quam ut pereat*.

²⁸ Nasz C.B, Motica R., *Declansarea procedurii insolventei (Triggering the insolvency proceedings)*, Hamangiu Publishing House, Bucharest, 2014, p. 22.

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Considerations Regarding the Contract Assignment in the Romanian Civil Code

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Abstract

This article aims to give an overview of an institution that has not benefited from general rules in Romanian legislation before 2011 (the year that the actual Civil Code has entered into force) respectively the assignment of contract. The paper starts with a brief review of some aspects of comparative law regarding the assignment contract, moving through the few applications of this operation that were present in the Civil Code of 1864, to end with the actual regulation of the contract assignment, with its particular applications.

Keywords: *obligations, assignment of contract, relativity of contract, Romanian civil code,*

JEL Classification: K12

1. Introductory aspects

The contract assignment is a legal principle newly introduced into the Romanian civil law with the entry into force of the current Civil Code, although the legal operation itself was not new to the legal environment in our country, finding its applications even under the rule of the Civil Code of 1864 (for example, in the matter of the lease contract, in the case of the lessor's alienation of the leased asset, in which case the new owner took over all rights and obligations of the person succeeded).

The inspiration source of the Romanian legislature of 2009 was, on the one hand, the Italian Civil Code (art. 1406 to 1410 of the Italian Civil Code), and on the other hand, the UNIDROIT Principles, which allocate to the contract assignment a number of 7 articles (from 9.3.1. to 9.3.7.).

2. Contract assignment - aspects of comparative law

From the point of view of comparative law, we note that some European legislations expressly acknowledge the existence of the contract assignment (Italian law, Lithuanian law, Portuguese law, Dutch law) as other systems of law in the absence of legal texts, admit this type of assignment, either as a substitution

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of person, or as a total transmission of rights and obligations arising from a contract to a third party (French law, German law, Austrian law, Belgian law, Spanish law etc.). But what they have in common, all the national legislations, is the need for the consent of the assigned, either for the effectiveness of the operation, or for its validity.

Italian Civil Code recognizes the right of any party to substitute a third party in relation arising out of a contract with mutual services, if the services have not yet been executed and the other party hereto consents (art. 1406 Italian Civil Code). We are talking therefore about a trilateral contract, where the consent of the assigned is essential, either it is given in advance, or concurrently with the consent of the other participants in the legal operation, namely the consent of the assignee and assignor of (art. 1407 in the Italian Civil Code). As soon as the contract assignment becomes effective, the assignor is released from all his obligations to the assigned contractor, excepted when the latter does not agree to his release (art. 1408 Italian Civil Code). Finally, art. 1409 in the Italian Civil Code recognizes to the original party to the contract the right to oppose the assignee all defenses arising from the contract, except those arising from other relationships with the assignor, excepting the case where he reserved this right when he consented to the substitution.

Portuguese Civil Code allows the contract assignment on the same terms, approximately as the Italian one, in the four articles devoted to this type of convention (art. 424-427 of the Port. Civil Code). The consent of the assigned party is necessary, either before or concurrently with the assignment (art. 424 of the Port. Civil Code), while the form, the ability to dispose of and receive, the vices of consent or lack thereof at the time of the assignment is assessed according to the assigned contract (art. 425 of the Port. Civil Code). Like the Italian law, the assignor guarantees the existence of the contractual position transmitted, but the enforcement of the obligations of the other party shall be expressly provided for in the assignment contract (art. 426 of the Port. Civil Code). In addition, according to art. 427 Port. Civil Code, the assigned contractor may oppose the assignee all defenses he could have raised also to the assignor, except the compensation, as was stated in the Portuguese literature².

Also the Lithuanian law of obligations act (LOA)³ is speaking about the contract assignment, stating that a party to a contract can transfer to a third party all rights and obligations arising from a contract, having, of course, the assigned contractor's consent (Art. 179 para. 1 LOA). The deal is seen as a transfer of

² Antunes Varela, *Obrigações em geral*, vol. II cited in *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, found on the website http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, p. 1125, consulted on 10.09.2016.

³ Law of Obligations Act, entered into force on 01.07.2002, found on the website <https://www.rigitateaja.ee/en/eli/506112013011/consolide> consulted on 10.09.2016.

contractual position, focusing on the effects of debt takeover, as a key element of the entire operation.

The same conditions also rule the transfer of contractual position in the Netherlands Civil Code (art. 6: 159), in accordance with the provisions of which, one party may transfer the rights and obligations arising from a contract to a third party, with the consent of his contractor, by deed under private signature or by notarized document. As a result of this agreement, all rights and obligations will be transferred to the third party assignee, except those whose performance has already occurred or that became payable or those on which the parties have agreed otherwise.

On a closer examination of the provisions of the Italian Civil Code, we note that in reality they were little more than an inspiration, the articles concerning the contract assignment in the Italian code being taken over word-for-word in our code civil. For this reason, we will not comment further at this time concerning the services taken over, stressing however, where will be the case when we analyze the contract assignment in our law, the corresponding articles in the Italian code.

But the UNIDROIT principles, unlike the legislations referred to above, offers a definition of the contract assignment, which it treats as *being the transmission a conventionally performed by a person ("the assignor") to another person ("the assignee") of the assignor's rights and obligations arising from a contract concluded with another person ("the other party")*⁴ – art. 9.3.1. As stated in legal doctrine, the UNIDROIT Principles reduce the contract, by this definition, to its effects, proposing a normative vision of the contract assignment⁵, unlike the Italian codification (and also the Romanian one) that reduces this operation to substitution of person rather than an actual transfer of rights and obligations that make up a whole.

Thus, according to the UNIDROIT principles, the contract assignment finally constitutes a transfer of rights and obligations, the corresponding provisions being properly completed with the ones in the credit assignment (for example, art. 9.3.6, paragraph 1 referring to the provisions of art. 9.1.13) and the assignment of debt (for example, art. 9.3.6 para. 2 referring to the provisions of art. 9.2.7.).

However, as shown above, not all European laws have established a separate legal regime to the contract assignment, although most admit the validity of such an operation, either by doctrinal or judicial way.

⁴ Romanian translation of the UNIDROIT Principles can be found on the Internet, at <http://www.unidroit.org/english/principles/contracts/principles2010/translations/blackletter2010-romanian.pdf>, consulted on 10.09.2016.

⁵ P. Vasilescu, *Cesiunea de contract – între nominalism și realism juridic*, in the paper P. Vasilescu (coordinator), *Cesiunea de contract. Repere pentru o teorie generală a formării progresive a contractelor*, Sfera Juridică, Cluj-Napoca, 2007, p. 22.

French law as well as the Romanian one, before the entry into force of the current Civil Code does not contain express provisions outlining a general legal status of the contract assignment, but the literature of Hexagon was full of theories that have sought to substantiate the contract assignment as a stand-alone operation, given especially that the debt assignment was not allowed. Such were developed two theories: the dualist (analytical) theory and the monistic theory⁶.

According to analytical (dualistic) theory, the contract assignment contract is seen not only of a contract assignment, seen as a whole, but as an assignment of its constituents, namely the rights and obligations and their accessories. From this perspective, the contract assignment is split into two distinct legal operations: a debt assignment and a debt assumption; this split has the drawback of making the validity of the contract assignment depend on the validity of each transaction separately⁷. In addition, traditionally, was analyzed the contract assignment following the kind of the submitted contract; thus, if it was a unilateral contract, the contract assignment was reduced either to a credit assignment, or to a debt assignment, and if what was assigned was a mutually binding contract, the credit assignment was added to a remission of debt⁸.

Monistic theory, which now tends to affirm at the doctrinal level, starts from an objective view on the contract, according to which this is an intangible good susceptible to circulate; in this vision, the contract assignment should not be regarded as a mere addition of two distinct legal operations, but as a transmission of the contract in its entirety⁹. The assignment deed does nothing else but to provide the continuity of the contract, thus maintaining its binding force, representing a remedy for termination and a stability factor of the contract, thus being provided its binding force¹⁰.

From the point of view of the conditions, French doctrine held that, in principle, any contract is assignable, being though necessary the consent of the assigned party, given either upon assignment, or previously by a provision included in the contract that will be the object of the assignment. There is, however, no legitimate reason that the assigned party oppose the assignment, as long as the cause and the object of the contract remain; otherwise, it would defeat, by his attitude, the principle of the contract's binding force¹¹.

⁶ For a detailed analysis of both theories, see A.I. Dănilă, *Cesiunea de contract*, Hamangiu, Bucharest, 2010, p. 5-15; L. Retegan, *Cesiunea de creanță în raport cu alte operațiuni juridice triunghiulare*, in „Studia Universitatis Babeș-Bolyai Iurisprudentia”, no. 3/2009, consulted on the website <http://studia.law.ubbcluj.ro>, on 10.09.2016, p. 56.

⁷ A.I. Dănilă, *op.cit.*, p. 6.

⁸ P.Malaurie, L.Aynes, P. Stoffel-Munck, *Drept civil. Obligațiile*, Wolters Kluwer, Bucharest, 2009, p. 509.

⁹ A.I. Dănilă, *op.cit.*, p. 14.

¹⁰ L.Retegan, *op.cit.*, p. 57.

¹¹ P.Malaurie, L.Aynes, P.Stoffel-Munck, *op.cit.*, p. 510.

In French doctrine, as in the Romanian one, the contract assignments are classified in: assignments that have a legal regime (assignment of lease, assignment of a travel sale, etc.) and assignments related to the freedom of contract (assignment of promise of sale, assignment of supply agreement, etc.); assignments required by law, mandatory (e.g. the assignment of lease in case of alienation of the leased property, assignment of employment contracts for transfer of the undertaking, etc.) and assignments related to the initiative of the parties or by a decision of a court in case of bankruptcy, for example¹².

German law, also, does not know any express provision of the contract assignment, despite the legal regime of the debt and credit assignments; however, applications of this operation are encountered with the transfer of a property leased or in the service contract.

The same applies to the Swiss code of obligations, which contains provisions relating to the credit assignment (art. 164 - 174) and the debt assignment (art. 175- 183), but without speaking of the contract assignment as stand-alone operation.

3. The contract assignment under the rule of the 1864 Romanian Civil Code

Neither the previous Romanian Civil Code was a supporter of this contract assignment or contractual position, especially considering the vision on the debt assignment, whose validity was denied vehemently. However, under the influence of French doctrine in particular, some authors¹³ brought forward arguments for the admission of the contract assignment, citing in support of their assertion the principle according to which what is not expressly forbidden is allowed, as long as it does not derogate from the public order and morals, but also the case in which, sometimes the law expressly prohibited the contract assignment, the conclusion that can be extracted here from being that, *per a contrario*, usually this operation is permissible¹⁴.

¹² *Idem*, p.504-505.

¹³ See in this regard, among others, I. Deleanu, *Părțile și terții. Relativitatea și opozabilitatea efectelor juridice*, Rosetti, Bucharest, 2002, p. 56; P. Vasilescu, *Cesiunea de contract – între nominalism și realism juridic*, and J. Goicovici, *Utilitarism juridic- contractul înțeles ca valoare patrimonială cesibilă*, in the volume *Cesiunea de contract. Repere pentru o teorie generală a formării progresive a contractelor*, Sfera Juridică, Cluj-Napoca, 2007, p.5-55; L. Pop, *Tratat de drept civil. Obligațiile. Volumul I: Regimul juridic general*, C.H. Beck, Bucharest, 2006, p.289-294; Fl. A. Steopan, *Considerații privind cesiunea convențională de contract* in „Studia Universitatis Babeș-Bolyai Iurisprudenția” no. 2/2003, pp. 96-117.

¹⁴ However, we believe that based on this claim, the example offered in its support is not a particularly happy one, the author referring to the provisions of art. 22 of Law no. 16/1994, as amended, under which any act of sublease total or partial, is void. For differences between contract assignment and subcontract, see J. Goicovici, *Cesiunea contractului în reglementarea art. 1315-1320 din Noul Cod civil*, „Curierul Judiciar” no. 5/2010, p. 265.

In this context, it was stated that by the contract assignment is performed the active and passive transmission of rights and obligations arising under the contract to a third person, the extension of the binding effects of the contracts¹⁵, without prejudicing, however, the principle of relativity, the effects occurring now between the assignor and assignor, as part resulted in the contract.

Under the previous Civil Code empire, there distinguished two major forms of the contract assignment, classification whose criterion was the source of the assignment: the statutory assignment and the conventional one.¹⁶ However, was not denied either the existence, rarely encountered it's true, of the contract assignments resulting either from a unilateral manifestation of will, the example given for this type of transfer being the one given in the French law, respectively the case in which the law allows to a third party the right to substitute any of the parties to the contract by its unilateral manifestation of will, or from a court decision, such as in the case of the judicial reorganization¹⁷.

As concerns the conditions for the validity or enforceability of the contract assignment, it was stated that they are different, as it is in the case of a legal assignment or a conventional contract assignment. Thus, in the case of legal assignment, is required an express provision of the law, but also the fulfillment of the special formalities provided by the law.¹⁸ As can be seen, in the opinion of this author, the assigned contractor's consent is not necessary, either *ad validitatem*, or for the operation efficiency in the case of statutory contract assignment.

However, taking over an under-classification of the legal contract assignments in French doctrine, it was shown¹⁹ that they can be divided into four categories, depending on the conditions imposed by the legislature to achieve them, in particular depending on the requirement to obtain the assigned contractor's consent. There, there would be 1) assignments prohibited by law, even despite the expressed consent of the assigned contractor (the case of the lease contract, whose assignment is prohibited, except as required by art. 21¹ of Law no.16 / 1994); 2) assignments permitted by law only in the presence of the assigned party's consent (such as, for example, the case of the lease and editing contracts); 3) permitted assignments, even without the agreement of the assigned contractor, without being required (for example, in matters of leasing agreements - art. 1418 Civil Code 1864); and 4) assignments occurring as accessory and imperative effect upon the conclusion of certain contracts (applicable to certain property insurance contracts, alienation of property forming the subject of the lease contract, according to art. 1441 Civil Code 1864 etc.).

¹⁵ I. Deleanu, *op.cit.*, p. 58.

¹⁶ See A.I. Dănilă, *op.cit.*, p. 19.

¹⁷ I. Deleanu, *op.cit.*, p. 57, footnote no.2.

¹⁸ *Idem*, p.57.

¹⁹ The classification is to be found in J. Ghestin, C. Jamin, M. Billiau, *Traite de droit civil. Les effets du contrat*, LGDJ, Paris, 2001, p. 1149-1153, *apud* A. I. Dănilă, *op.cit.*, p. 21 a.f.

As for the conventional contract assignment, the conditions that must be met are: a) are contracts with successive performance, or with *uno ictu* execution, but whose provisions have not yet been performed²⁰; b) is not a non-assignable contract; c) there is the assigned contractor's consent, as well as that of the other two participants in the operation (assignor and assignee).

In respect of the second condition, have been identified three situations in which a contract could not be the subject of an assignment: contract concluded *intuitu personae*, the contract declared non-assignable by the will of the legislature and the contract declared non-assignable by the will of the originating parties. However, the ban on the assignability of the *intuitu personae* contracts is not absolute, in this matter being necessary to distinguish according to the way the contract is concluded in consideration of subjective or objective qualities of the contractor. Thus, it was argued that the concept of *intuitu personae* splits into two distinct concepts, depending on which element is based, being able to talk about a subjective *intuitu personae*, focused on a feeling and an objective *intuitu personae*, whose base is taking into account of the qualities and skills of a person. In other words, it's a subjective *intuitu personae* when, upon contracting, the partner's human qualities are those that count, and an objective *intuitu personae* when the contract was concluded in consideration of qualities appreciated as objective (technical capacity, experience, competency).²¹ As regards these two categories of *intuitu personae* deeds, it was argued that non-assignability is absolute in the case of the first species, the contract assignment being unimaginable, given the lack of repeatability of the person in consideration of whom was signed the initial contract.²²

The assigned contractor's consent has been accepted by most authors²³ as being a prerequisite for assignment; what was and continues to be a cause of controversy is the value of such consent: condition of validity of the assignment, or only of its efficacy, enforceability? Or, in other words, the contract assignment is a trilateral transaction, requiring the consent of all parties involved, or a bilateral agreement in which essential for validity is just the expression of the assignor's and assignee's consent, the assigned party's will having only role for the enforcement against him of the deed to which he is a third party.

Supporters of the idea of the assigned party's consent - condition of validity believe it would be difficult or even impossible to imagine that a contracting

²⁰ It was accepted, even before the entry into force of the current Romanian Civil Code, that could be assigned both unilateral and bilateral contracts. For the opinion according to which the contract assignment concerns only the bilateral contracts, see I.Popa, *Cesiunea contractului*, in „Dreptul” no.10/2006, p.124.

²¹ J. Goicovici, *Utilitarism juridic – contractul înțeles ca valoare patrimonială cesibilă*, in the volume *Cesiunea de contract. Repere pentru o teorie generală a formării progresive a contractului*, Sfera Juridică, Cluj-Napoca, 2007, p. 112.

²² *Ibidem*.

²³ For the opinion according to which the assigned party's consent is not necessary, it only serves to release the assignor, see Fl. A. Steopan, *op.cit.*, p. 96 a. f.

party be simply thrown out of the contractual relationship without its consent, to be replaced by a third party, the requirement of the triangular agreement resulting from the unity of the contractual relation and from the unity of the contract assignment²⁴.

On the other hand, based on a series of rulings in the French jurisprudence²⁵, Romanian authors rallied most doctrinarians in the Hexagon, embracing the idea of the assigned party's consent - efficacy conditions, seen as an entitlement, which is why it can be given and anticipated, the unreasonable refusal to consent can be defeated by a judgment of the court, which will decide upon the interests of the case.²⁶

4. Contract assignment in the current Romanian Civil Code

In the current civil code, the conventional contract assignment received own regulation, the Romanian legislator joining other European legislation in this regard, inspiring in the shaping of its legal status, as mentioned above, from the Italian Civil Code. Along with the conventional contract assignment, we also meet legal assignment applications, some also existing in the previous legislation, others representing a novelty in the matter.

The conventional contract assignment shall be devoted six articles (from 1315-1320), located in Book V (About obligations), Title II (Sources of obligations), Chapter I (The contract), characterizing this operation by the possibility it has, in the absence of legal prohibitions, to substitute a third party in the relations arising out of a contract, but only if the services have not yet been fully executed and the other party consents hereto (art. 1315 Civil Code).

Despite the opinion expressed in the literature, according to which the contract assignment of is not much a translated convention, but more a person substitution contract, which provides the continuity of the old contract, but with new parties²⁷, we believe that the Romanian legislator, although did not admit the idea of a total patrimonialization of the obligation relation nor the free assignability thereof, sees the contract assignment as a way of transferring the contractual rights and obligations over and against the initial contractor and which has the effect of both of the transmission of such rights and obligations, and the release of the assigned the contractor to this operation²⁸.

²⁴ I. Deleanu, *op. cit.*, p. 58.

²⁵ Cass. Fr.com., 6 May 1997, no.95-10.252 și nr. 94-16.335, in L.Pop, I.F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile*, Universul Juridic, Bucharest, 2012, p. 678, footnote no.3.

²⁶ P.Malaurie, L.Aynes, P.Stoffel-Munck, *op.cit.*, p. 510.

²⁷ P. Vasilescu, *Drept civil. Obligații*, Hamangiu, Bucharest, 2012, p. 44-45.

²⁸ L.Pop, I.F.Popa, S.I.Vidu, *op. cit.*, p. 676.

From the definition²⁹ provided by the legislature, stem out some specific elements of the conventional contract assignment: firstly, we note that this operation is seen more as an assignment of contractual position than as a separate contract assignment, as it is conceived by the supporters of the objective theory³⁰, fact that yet, we think, has no influence on the legal regime and utility of the assignment.

Then, from the legal text can be extracted the conditions for the existence of the contract assignment: 1) there is no legal prohibition on the contract assignment; 2) it is a contract whose services have not been fully executed and 3) there is the consent of the assigned party.

Compared to the above before proceeding to analyze those three conditions, we shall however define the conventional contract assignment, as being the Convention by which a Contracting party (the assignor contractor) transmits to a third party (the assignee contractor) his rights and obligations in a contract whose services have not yet been executed, subject to its acceptance by the other party (the assigned contractor)³¹.

1) Regarding the first condition, we mention only the provisions of art. 1846 Civil Code, which, although does not expressly upheld the non-assignability of the lease agreement, establishes the conditions under which can operate the assignment, namely there has to exist the written consent of the lessor and the contract be assigned only to the lessee's spouse, who participates in the exploitation of the rented goods or to his/her major descendants, and those of art. 2258 Civil Code, that rule on the non-assignable nature of the maintenance.

Although art. 1315, paragraph 2 of the Civil Code speaks only of the legal assignment prohibitions, we consider that also in the case in which the contract is declared non-assignable by the will of the parties, will not operate an assignment of contractual position, in the conditions of art. 1315-1320 Civil Code, unless the parties return on their initial agreement.

2) The second condition of credit assignment requires that services arising from the contract have not yet been fully executed. As can be seen, the law limits the scope of the contract assignment only from the perspective effects of the contract³², without making assignability conditional upon certain types of contracts. Thus, the assignment is possible both on successive performance contracts (which in reality is the norm) and on those with *uno actu* execution, as long as the services have not been fully executed. A contract already executed cannot

²⁹ In reality, we do not consider that the provisions of art. 1315 Civil Code constitute a definition of the contract assignment, despite the marginal name of "Notion", but rather a presentation of the conditions that the assignment has to fulfill in order to produce legal effects.

³⁰ See in this regard P.Malaurie, L.Aynes, P.Stoffel-Munck, *op.cit.*, p. 501.

³¹ G. Boroi, M.M.Pivniceru (coord.), *Fișe de drept civil. Partea generală. Persoane. Drepturi reale principale. Obligații. Contracte. Succesiuni. Familie*, Hamangiu, Bucharest, 2016, p. 144.

³² H. Dumitrescu, în F.A.Baias, E.Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole*, 2nd ed., C.H. Beck, Bucharest 2014, p. 1496.

maintain the quality to be transmitted, but if the performance of the main service/services was postponed (act affected by a standstill period), or if its very existence is contingent (act affected by a suspensive condition), then assignability is not affected.

In addition, the contract assignment covers both bilateral and unilateral conventions, the civil code not distinguishing in this regard, and in what concerns the contracts concluded *intuitu personae*, we consider that remains current the distinction made under the old civil code, between subjective *intuitu personae* and objective *intuitu personae* contracts.

3) Finally, the third condition, relating to the consent of the assigned contractor is the one that sparked the liveliest disputes, as there is currently no unanimous opinion on the role that this consent plays in the construction of the contract assignment.

According to an opinion³³, the consent of the assigned contractor is a condition of validity of the contract assignment of, in contrast to the credit assignment, where the will of the assigned third party is not an *ad validitatem* requirement. It is claimed that the will of the assigned party is in fact a consent giving birth to a deed, namely an agreement consent, a case of progressive constitution of the contract³⁴. As argument, it is shown that the effects of the contract are not but the cause of the act, expressed, brought to light, objectified; or, the main effect of the contract assignment contract is transmitting the contractual position of the assignor to the assignee's patrimony, and this cannot occur (as it would defeat the principle of binding force of the contract), without the *ad validitatem* consent of the assigned party³⁵.

In antinomy with the vision expressed above, most Romanian doctrinarians advocate the idea of a consent with role of enforceability of the contract assignment to the assigned party, with repercussions on the effects of the contract assignment, similar to the debt takeover.

Moreover, it is also supported the idea of a contract affected by a suspensive condition, in the circumstance where the assigned party's consent is required after the conclusion of the assignment contract between the assignor and the assignee³⁶.

We also adhere to this latter view, especially if we consider the effects of the assignment (thereafter, we can talk about a perfect assignment and an imperfect assignment), but also the legal status of the debt takeover in the current Romanian Civil Code.

³³ Supported, among others, by P. Vasilescu, *op. cit. (Obligajii...)*, p. 48.

³⁴ On the varieties of consent – forming consent (with its categories) and the effective consent, see J. Goicovici, *op. cit. (Utilitarism juridic)*, p. 114-116.

³⁵ *Idem*, p.116.

³⁶ G. Boroș, C.A. Angheliescu, *Curs de drept civil. Partea generală*, 2nd ed., Hamangiu, Bucharest, 2012, p. 100. In the same way, also see L. Pop, I.G. Popa, S.I. Vidu, *op. cit.*, p. 679; L. Retegan, *op.cit.*, p. 58.

In addition to the special substantive conditions to which law expressly refers to in art. 1315 Civil Code, contract assignment must also meet the general substantive conditions, as set out in art. 1179 Civil Code, respectively capacity, consent (of the assignor and assignee), object and cause.

As for the formal conditions, art. 1316 Civil Code provides that the contract assignment and its acceptance by the assigned contractor shall be concluded in the form required by law for the validity of the assigned contract. Failure to observe the formal condition of the contract assignment will attract the absolute nullity of the entire operation, according to art. 1242 paragraph 1 Civil Code. However, from the formal requirement imposed by art. 1316 Civil Code there are also exceptions prescribed by law: a) the lease contract is not by its nature a solemn act, but acceptance by the lessor of the assignment of lease of a movable good must be in writing (art. 1805, paragraph 1 last sentence); b) acceptance of the lease contract assignment must be in writing (art. 1833 Civil Code.); c) for the insurance contract, law does not stipulate the *ad validitatem* written form (but only *ad probationem*, art. 2200 Civil Code), but it is required in case the insured accepts the contract assignment (art. 2212 para. 1 Civil Code)³⁷.

Before proceeding to analyze the effects of the conventional contract assignment, a review of the legal contract assignment is required to be made, the type of assignment that differs by way of regulation from the general legal provisions in the matter of the conventional contract assignment.

Cases of legal contract assignment we meet: a) in the matter of the lease contract, according to the alienation of the leased asset, in which case, if the conditions provided for by art. 1811 Civil Code are complied with, the purchaser shall be subrogated in all rights and obligations of the lessor that stem out from the lease (art. 1813 para. 1 Civil Code)³⁸; b) also in case of sale of the good regarding which there is a preemption right, legal or conventional, the concluded contract is affected by a suspensive condition, namely that of non-exercise of the preemption right by the preemptor (art. 1731 Civil Code.). If the buyer who has priority exercises its right, the sales contract is deemed concluded between the buyer who has priority and the vendor under the conditions contained in the contract concluded with the third party, the latter contract being terminated retroactively (art. 1733 paragraph 1 Civil Code.); c) in case of the insured property alienation, in the absence of stipulation to the contrary, the property insurance contract does not cease, but it will still take effect between the insurer and the purchaser (art. 2220 paragraph 1 Civil Code).

When analyzing the effects of the conventional contract assignment, should be considered first, temporal criteria, and then, interpersonal criteria.

³⁷ G. Boroi, M.M. Pivniceru (coord.), *Fișe de drept civil. Partea generală. Persoane. Drepturi reale principale. Obligații. Contracte. Succesiuni. Familie*, Hamangiu, Bucharest, 2016, p. 145.

³⁸ For an analysis that is still valid, regarding this legal case of contract assignment, see M. David, *Cesiunea legală de contract – mijloc de protecție a locatarului*, in the volume Paul Vasilescu (coord), *op. cit. (Cesiunea de contract)*, p. 277-309.

Thus, the effects of the contract assignment will vary as we talk about A) period between the conclusion of the assignment between assignor and assignee and the moment of the assigned party expressing its consent, or about the period after this moment, on the one hand, B) and on the other hand, how stand the relationships between assignor and assignee, between assigned party and assignee, between assignor and assigned party, and also to third parties.

In addition, the assignor's situation will be different as it is released (perfect contract assignment) or held further as fideiusor, in the relation arising from the contract it has assigned (imperfect contract assignment).

A) The effects of the contract assignment prior to the express consent of the assigned contractor

Between the parties (assignor and assignee), the assignment will produce specific effects, according to the principle of binding force of the contract, expressed in art. 1270 Civil Code, depending on whether the contract is for a consideration or free of charge. Thus, for example, if the assignment involves a price or other additional obligations resulting from the convention, the services assumed shall be executed accordingly by the assignor and the assignee, given the character of distinct contract of the understanding between them.³⁹ In addition, as specific effect, under the law, according to art. 1320 paragraph 1 Civil Code, the assignor guarantees the validity of the contract assigned, but can also guarantee the enforcement of the contract, in which case it will be kept as fideiusor for the assigned contractor's obligations (art. 1320, paragraph 2 of the Civil Code).

With respect to the assignor, in this period, the assignment contract is a *res inter alios acta*, not being bound to meet its obligations to the assignee, as can neither request from the latter the execution of its own services. It was argued, however, in the literature that in the period prior to the assigned party's express consent, may occur in reality either a credit assignment or a subrogation consented by the creditor, if the contractor assignee makes an actual payment directly to the assigned contractor, thus taking place the transmission of the active part of the legal obligation relationship⁴⁰.

The same will be the effects in case the assigned contractor refuses to give consent to the assignment. In connection with this circumstance, the question is whether this refusal may be treated as an abuse of law and whether the court can replace the assigned party's agreement, making the contract assignment opposable to it, too. Taking on the view expressed in the French doctrine⁴¹, it was stated, rightly, that the right of the assigned party to refuse the assignment is a potestative right, not being though, at the same time, a discretionary right⁴². In

³⁹ L. Pop, I. F. Popa, S.I. Vidu, *op. cit.*, p. 680, footnote no.1.

⁴⁰ *Idem*, p. 681.

⁴¹ P. Malaurie, L. Aynes, P. Stoffel-Munck, *op.cit.*, p. 510.

⁴² For a discussion on the difference between potestative and discretionary rights, see J. Goicovici, *op. cit. (Utilitarianism juridic)*, p. 131-139 as examples of discretionary rights are given the right of

respect to this qualification, it is alleged that court intervention in order to replace the assigned contractor's agreement to the assignment between assignee and assignor is possible, if the refusal to consent has a teasing purpose, being exercised in bad faith.

B) The effects of the contract assignment after the assigned contractor's express consent

First, it needs to recall the moment this consent must, and can be given so that the contract assignment produces its effects also on the assigned party.

According to art. 1317 based on art. 1318 Civil Code, in order to produce effects, the contract assignment must be accepted by the assigned contractor, the latter having the possibility to choose whether to order or not the release of the contractor assignor of its obligations, the acceptance can occur either prior to or concurrently or subsequently to the assignment between assignor and assignee.

Prior acceptance can be either a clause inserted in the original contract, which makes this contract be, by the express will of the parties, assignable, or an agreement subsequent to the conclusion of the contract, accessory to it, but situated previously the conclusion of the assignment contract⁴³. It is also possible that the anticipated agreement to the assignment be deducted from standardized provisions - such as the clause "to order" or another equivalent mention that allow concluding that the contract transmission may occur by the simple effect of endorsement (art. 1317, paragraph 2 of the Civil Code)⁴⁴, without having to notify the assigned contractor.

Co-acceptance involves, as shown before, the conclusion of a tripartite agreement, involving all stakeholders: the assignor, the assignee and the assigned party.

Finally, subsequent acceptance can take the form of unilateral declaration of acceptance of the assignment by the assigned contractor.

In line with an opinion expressed in the literature⁴⁵, we believe that the agreement of the assigned party can be silent too, for as long as it is unambiguously clear from its action or inaction that it has accepted the translation of the contract to which it is part, to a person, who becomes, following the assignment, contractor.

Once the assigned party expressed his consent, the contract assignment shall take effect between the latter and the assignor, but also between the assignee and the assigned party.

the donor spouse to revoke the donation during marriage, the right to demand the severance of the joint tenancy, the testator's right to exheredate its heirs etc.

⁴³ We express reservations about the view according to which prior acceptance, contained in a convention accessory to the initial contract may occur at the latest simultaneously to the conclusion of the contract assignment since, in our opinion, in this case, it is not about previous acceptance, but about co-acceptance, the operation becoming a tripartite one – G. Boroi, M.M. Pivniceru (coord.), *op. cit. (Fişe de drept civil)*, p. 145.

⁴⁴ L. Pop, I.F. Popa, S.I. Vidu, *op. cit.*, p. 682.

⁴⁵ *Idem*, p. 682.

Thus, in the absence of a rule to the contrary, the assigned party's consent to the assignment expresses the assignor's discharge of its obligations under the contract (art. 1318 paragraph 1 Civil Code), this meaning thus that the assigned party will not be able to claim anymore the enforcement of obligations from the assignor, nor the latter will have demands concerning the execution of the obligations not due yet by the assigned contractor. Otherwise, i.e. if the assigned party declares that it does not discharge the assignor (imperfect assignment), it may turn against it when the assignee fails to perform its obligations (the assignor seems to be a guarantor of fulfillment of the obligations by the contractor assignee), but if it notified about this issue, within 15 days from the date on which the contractor assignee had to perform its obligations or the date on which it became aware of the non-performance (art. 1318, paragraph 2 of the Civil Code). The penalty for failing to comply with this deadline consists precisely in the loss of the right of recourse, reason for which it can fall into the category of limitations of substantive law.

Between assignee and assignor, the contract will continue to have effect (the assignment not having retroactive effects) as if it had occurred a contract assignment, the assigned party may oppose the assignee all the exceptions resulting from the assigned contract (e.g. the absolute nullity of the contract, the extinctive prescription, forfeiture, exception of non-performance)⁴⁶, except those relating to the vices of consent, and any exceptions or defenses or exceptions arising from the relationship with the assignor (e.g. compensation) (art. 1319 Civil Code).

The contract assignment takes effect to third parties too, represented in particular by the creditors of the parties involved. Thus, where by the contract assignment was trying to fraud the interests of creditors, they have available to them the revocatory action (Paulian), under the conditions of art. 1562-1656 Civil Code, as may require the declaration of unenforceability against them, by the same means, and possible declaration of acceptance of the contract assignment, made by the assigned party.

The assigned contractor's creditors may request, by means of the oblique action, the assignee and assignor liability, when the latter has not been released from its obligations.

As regards third parties who have personally guaranteed the obligations of parties to the original contract, should be made the following distinctions: the guarantees agreed in order to guarantee fulfillment of the obligations of the assigned contractor will be maintained for the benefit of the assignee, but those accorded to guarantee fulfillment of the obligations of the assignor will not be maintained (if it is released), unless the settlor has consented expressly on keeping them and in the event of assignment of the case where we are talking about legal guarantees (legal privileges and mortgages) imposed on the assets of the

⁴⁶ G. Boroi, M.M. Pivniceru (coord.), *op. cit.* (*Fișe de drept civil*), p. 146.

assignor or if the guarantors expressly assumed keeping the guarantees in case of assignment⁴⁷.

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Consultation between Social Partners. From a General View to a Particular One

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Abstract

The paper was based on an analysis that focuses on the following aspects: Can the social partnership be the same thing as social dialogue? What is the place of the social dialogue in the consultation and information procedures among partners? Is the Law. 62/2011 an obstacle to a real social partnership? Also, it refers to the advantages and disadvantages for close dialogue from the baseline - the unit (including discussions on the concept of unity, according to the latest practices of European law) but also the employee's right to be informed and the transition from the individual to the collective. For a thorough research of the problem it addresses the following: The general framework of information and consultation procedure established by Law no. 467/2006, the specific information and consultation procedures established on normative aspects but also the specific information and consultation procedures established by convention but also the strengthening of the social partnership. Last but not least, we analyze the social intervention in economic and managerial decision with their limits and risks.

Keywords: social partnership, social dialogue, labor law, collective labor agreement, individual employment contract.

JEL Classification: K31

1. The correlation between social partnership and social dialogue

In an ABC of basic concepts at the base of industrial relations, the concept of social dialogue and partnership is primordial. It's the reason why these concepts find themselves within article 1 from Law 62/2011 as being the first concepts for which a legal definition was made. Art 1 a) establishes that social partners are all those that interact in social dialogue, referring to unions, employers' associations, as well as representatives from the public sector.

We mention that this definition is not the most indicated for this concept, taking into account article 221 and the following from the Labour Code; in social dialogue we must have representatives from the employees, these having an active role as social dialogue representatives of the employees for any problems they may have as well as when the law states it. (for example: see art 241 Labor Code, which states that the internal regulation is done by the employer, while consulting with the union representatives or employee representatives, depending on the

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case) art 69 par 1 preamble in case the employer intends to conduct collective firing he has the obligation to conduct in due time, as stated by law, consultation meetings with the union or employee representatives.

Furthermore, the representatives of the employees can have decision making powers in the conditions outlined by art 135 from Law 62/2011 in companies which do not have Representative Unions get representation from Employee Representatives, either alone, together or along with the representatives of the Union's Federation representatives in the case in which at the level at company there are unrepresentative unions which are a part of the Union Federation that is representative at the sector level.

In conclusion, from the mechanism of Social Partnership/Dialogue the representatives of the employees cannot be excluded interacting directly in the process of social dialogue. On the other hand, there is a problem of in what measure the representatives from the Public Administration find their place in this situation. These representatives intervene whenever the mechanism of tripartism is put under question (mechanism which is required for the functioning of the International Labor Organization)

In industrial relations, dialogue partners (active partners) are the ones that represent the interests of employees on the hand (and as such representing social interests) and the representatives of the employers on the other (monetary interests). The authorities are called to ensure a balance in this dialogue, to mediate certain grievances which might arise between the two partners and to look with for the most correct solution to maintain social peace.

Regarding the concept of social dialogue, this represents different definitions to the lawmaker, on the one hand wishing to expand upon social dialogue in general and on the other hand expanding in particular to bipartisan and tripartisan social dialogue. Thus, social dialogue in general is considered a voluntary process which goes between social partners and which assumes collective information, consultation and negotiation. The purpose for this dialogue is obtaining a common accord. This purpose requires the diligence of the social partners and initiating the procedures outlined above (collective information, consultation and negotiation) with good faith. Furthermore, the Romanian jurist defines within the same regulation that art 1 Law 62/2011 and the procedures specific to social dialogue consider information as the transmission of data from the employer to the union representatives or employee representatives² such that they can familiarize themselves in time.

According to Law 62/2011 consultations means „an exchange of opinions within social dialogue” as in the voluntary process in which the social partners participate, as the concept of social partner is outlined in art. 1 a) from Law 62/2011 does not include the representatives of employees which are regulated

²Although the chosen representatives of the employees are not signaled as social partners, they must be informed nonetheless.

by art. 221 and the following from the Labor Code. The fact of not including these representatives is a mistake on the behalf of the Romanian lawmaker also stems from aligning to art.1 b) thesis II from e) from the Labor Code which mentions on of the main obligations of the employer as consulting with the union or representatives from the employees regarding the decisions susceptible to substantially affect their rights and interests³. Art. 1 b) thesis II establishes that an exchange of opinion specific to consultations occurs within social dialogue, to which main actors are union or employee representatives on the one hand and the employer on the other, recognizing the intervention of representatives from the authorities. Through this formula, the specifics of the consultation within the Labor Code widens significantly to include the concept of any other exchange of opinions to which the central or local authorities intervene.⁴

In social dialogue the Romanian lawmaker introduces the concept of collective negotiations. Unlike informing or consulting, negotiating clearly involves only two parts, the representatives of the employer or group of employers and those of the unions or employees. Also, the jurist intends to provide a clear definition of bipartisan social dialogue which clearly intervenes in the case of collective negotiating but also can intervene in the information and consultation procedures and in the tripartisan social dialogue when the authorities intervene, such a dialogue being added in the information and consultation procedures.

2. General framework of the procedure of informing and consulting established by Law no. 467 of 2006

Social dialogue represents an ever present component within the main needs which form the basis of labor relations in general and special industrial relations. As outlined in point I social dialogue represents a form of objectifying

³ It could be considered that the rules from art 40 par 2 e) Labor Code make reference to specific consultations, as in those consultations which intervene in collective firing procedures or transfer of enterprise. Both internal law and EU directives (Directive 2001/23/CE 12 March 2001 regarding bringing together the legislation of member states regarding maintaining workers' rights in the case of a transfer of enterprise, units, or parts of these, respectively Directive 98/59/CE 20 July 1998 regarding bringing together the legislations of member states regarding collective firings) want the smooth operation of procedures with workers representatives, as in those who look after the interests of the workers as outlined in law and custom of member states. Furthermore art 2 par 2 EU Directive 98/59/CE establishes the minimal prerequisites for consultations. The fact that art 40 par 2 e) Labor Code imposes as main obligation of the employer the consultation only in the event of adopting decision liable to substantively effect the rights and interests of the employees does not limit the general obligation of consulting as shown in art 62 par 1 c) thesis II Law 62/2011 as even the legal framework regarding informing and consulting with employees, Law 467/2006 refers to consulting in the broad term, as in, exchanging idea and establishing a dialogue between the employer and the representatives of the employees

⁴ For example, the social dialogue commissions at the local level, from the prefectures or specific tripartite organisms in which there are general procedures of consultations.

the actions of social partners (evidently, an objective voluntary aspect). Exactly because social dialogue represents in equal measure action and purpose has there been a need to form a general ensemble of regulation for procedures which activate social dialogue. In this context at the EU level Directive 2002/14/CE from 11 March 2002 has been adopted in Romanian Law through Law 467/2006 regarding establishing the general framework for informing and consulting with employees⁵.

Law 467/2006 establishes a minimal framework for these procedures, nothing being against the parties adopting specific rules regarding the procedure for informing and consulting⁶.

Law 467/2006 establishes concrete elements regarding aspects to which the employer has the obligation to inform as well as rules regarding consultation. We underline the fact that the right to being informed from which the right to consultation stems from is not an absolute right so that the employer may impose on the unionized worker's representatives or not the maintaining of confidentiality regarding the information they receive as in which case the information may lead to the jeopardizing of the enterprise or lead to monetary loss to the employer. It is justified to refuse communication on the condition to justify this to employees. The right of the employer to impose confidentiality or refuse transmitting information is up to the courts of law⁷. Furthermore, art. 7 par (1) final thesis Law 467 establishes that the type of information subject to confidentiality clauses is established by the parties in the collective agreements or in another form agreed upon by the parties and has the form of a confidentiality clause.

Beyond the fact that making express reference to the concept of collective bargaining is today, after the ratification of Law 62/2011, inappropriate, may notice that the text is totally useless when companies in which there was not concluded a collective agreement. As a consequence, when a unit has no collective agreement, the employer is not entitled to request contract confidentiality on the transmission of information, which is inadmissible. However, could the employer oppose employees' representatives, unionized or not, confidentiality of information even if there is a collective agreement? There could be two hypotheses: either the employer would exercise the right to claim confidentiality exercise of this right impossible to be controlled by the court but only to the extent that would

⁵ Law no. 467/2006 was published in the Official Gazette No. 1006 from 18 December 2006 and began its force from the 1st of January 2007.

⁶ Most often in social practice social partners negotiate collective agreements and agree that information and consultation procedures to be more dense or involve wider issues than those specified by law. Besides a law that aims to establish a general frame cannot penetrate all the mechanisms necessary for developing a procedure of consultation and information. Such procedures are often developed in the collective labor contracts or other agreements that runs between employer / employees organizations and employees through their representatives.

⁷ In a situation of this case the court held that the union can not claim the list of all employees and their salaries by invoking the general right to information as it is recognized by Law 467/2006.

call into question the abuse of rights when between social partners bipartite dialogue would question the smooth transmission of information to consultations and negotiations as the case of the parties would agree on specific rules for information sharing and maintaining their confidentiality between parties, intervening practically a convention strictly on those aspects. If the first hypothesis could be questionable given the fact that there is a general right to information whose limits are functional only through the law and the legislature which requires parties' agreement regarding the content of confidential information, that the second hypothesis is perfectly functional if it is necessary to grant the provisions that are found in the last sentence of Article 7(1) of Law 467/2006 as a broad interpretation.⁸

Regarding consulting, the most important aspect is that usually, any consultation's purpose is reaching a consensus among those involved. Art. 5 par. 3 e) Law 467/2006 is very clear in pointing out that a consultation takes place: „*to reach an accord regarding which decisions fall to the employer*”. So we could say that any negotiates needs a consultation, but not every consultation *leads to a negotiation*. During the consultation procedures the parties seek consensus, but if that is failed to be reach, for a negotiation that is considered a failure, but a consultation could still be completed without the consensus of the parties. Towards these aspects, to note is the employer's responsibility for not satisfying the obligation to initiate consultations, in the case the employer makes a purely formal consultations, without seeking to reach an accord⁹. But when the employer seeks consensus in consultations but the demands of the worker's representatives cannot be validated for legal reasons, then it would not be considered a violation

⁸ Article 6 of Directive 2002/14 / EC has a wider regulatory than art. 7 of law 467/2006, which establishes that if certain information was supplied by the employer expressly in confidence, then the workers' representatives are not authorized to divulge such information even if exceptionally such information would allow to be sent to the representatives or third party confidentiality, which implies that the principle would extend to them. The guaranty of privacy is the social partner which has received information from the employer in question. Such expansion of the confidentiality formula is provided by Article 7 of Romanian law. Moreover, analyzing the social practice is observed that usually those who receive information in the procedure of consultation or negotiation are assuming confidentiality on grounds that their role at the table is to represent the interests of their members, accordingly they can not convey their information received as long as they have the quality of legal representative. On the other hand they can not guarantee maintaining the confidentiality of information as long as the number of employees representatives in a unit is very high. Against such assertions ask ourselves if we should note that a body grouping an existing union, prerogatives and competences totally detached from their own members when acting in procedures such as information, consultation and negotiation. If under the provisions of article 28 para. 3 out Law 62/2011 recognizes the procedural quality even when they act invoking the rights of their members, why not recognize the fact that a union is the entity in information and consultation procedures and therefore may assume the responsibilities of confidentiality.

⁹ See Curtea de Apel Alba Iulia, labor conflicts and social insurance section, Civil Decision no. 338/A/2014.

of the employer's obligations. This does not mean that the obligation to consult is a diligent one. The employer needs to consult with the social partner, inform him, as the law states. Such a negotiation can or cannot lead to establishing and agreement (be it a collective accord or hiring agreement, as outlined by art. 153 Law 62/2011), so can the procedures of consultation. A larger and smaller meaning can be seen in the concept of consultation. In the large sense, consultation would contain all the concrete procedures relevant to it regulated by law or conventionally, as well as any negotiation. In the smaller sense, consultations would contain only concrete procedures. Information should be the premise of any consultation or negotiation. Furthermore, information, as a procedure, could have its own existence.

3. Individual and collective informing

Art. 39 par (1) h) Labor Code enumerates among its fundamental workers' rights the right to consultation and information. As such we should admit that consultation and information have an individual connotation. If we analyze the employer obligations as outlined in art. 40 par (2) Labor Code, we can see there are two obligations which could be analyzed as individual obligations, both of them referring to information.

Art. 40 par (2) Labor Code states: „*The employer has the following obligations: a) to inform the employees regarding the working conditions and the elements which form their work and b) to periodically inform the employees of the financial status of their unit, apart from sensitive or secret information which might bring liability to the units activity. How periodic this information comes is decided in the collective labor contract applicable.*”

Art. 40 par (2) Labor code also exclusively mentions collective labor agreements it being the only measure that can establish how periodic certain information is given to the employees. What happens if there is no collective labor agreement at the unit? The employer would not have the same obligation to communicate the financial situation of the unit to his employees? Obviously the answer is that the employer has to communicate within the law the information to the employees. Even though aspects regarding how often this information is given could be missing from a collective agreement, it is imposed by the social partners in the bipartisan dialogues. If they do not reach a consensus regarding information, it could be said that the employer is absolved of his obligation. He must give this information in good thought and reasonable intervals. However, if the employees ask for this information, even if in the collective labor agreements there is no regulation on how often, should the employer give it to them? We believe that for the most part the answer is yes, for the following reason: Labor Law has protective clauses for the employee. As a consequence, whenever there is a question of interpretation, it fall in the employees favor. If there are no regulations regarding how often information is given to employees as outlined in art.

40 par. (2) d) Labor Code, it would result that the employees respective right must be fully functional, except when the employers right is exercised in an abusive manner. On the other hand, the Romanian Lawmaker left how often financial information is given to the accord of the parties involved. As a consequence, this decision is not up to the employer, but also to the employees. As most of the times in a collective trade agreement the employer cannot demand, but may merely agree or not with the rights demanded by the workers, when an obligation is involved (that to inform), the employer must rely on the employees also. If there is no institutional framework for determining how often information is given, the employer can cannot do what he wishes. The obligation is there is information is expressly asked for by employees.

It's worth noting that the obligation to inform, as regulated in art. 40 par (2) d) Labor Code is a conditional obligation. If the information given can lead to liability to the interests of the unit, the employer may refuse to give them.¹⁰

Art. 40 Par (2) a) contains regulation for individual employee or future employee information, going together with regulation present in art. 17 and sometimes, art. 18 Labor Code, while the information to which art. 40 par (1) lit. d) Labor Code, makes reference to tend to be about collective procedures. Usually, soliciting financial information of the unit occurs in collective negotiations. According to art. 130 par (4) Labor Code: " *The information the employer will give to union or employee representatives will at least contain information on: a) the financial situation and b) the unit's employment situation* " In this situation, the individual right of each employee is exercised by their representatives, union representatives, or employee representatives selected under art. 221 Labor Code.¹¹ .

¹⁰ To observe that at least partially, regulation in art. 40 par (2) d) Labor Code are in accord with those found in art. 7 par (2) Law 467/2006. Within the framework of the law, information and consultation is conditioned more strictly, the lawmaker making reference not only to the liability to the interests of the firm, but also the fact that divulging such information can lead to grave repercussions to the work of that enterprise. Art. 6 par (2) EU Directive 2002/14/CE, establishes that „The employer is not obligated to communicate information or initiate consultation if that information can objectively lead to liability to the enterprise”. So, the possibility to refuse giving information must be analyzed by objective criteria and by the whim of the employer. We add the fact that in the case of art. 7 par (2) Law 467/2006, and art. 6 par (2) EU Directive 2002/14/CE all information is considered, whereas art. 40 par (2) d) Labor Code only looks at the financial information of the employer.

¹¹ Regarding who represents the interests of the employees in collective negotiations, entry into force of Law no. 1/2016 it can be noticed a discrepancy between the provisions of art. 134 și 135 of Law no. 62/2011. In this sense, it's worth noting firstly that the Romanian Lawmaker, for the first time, did not underline the fact that employees are party to collective employment agreements, and that they negotiate through their representatives but underlines that employees cannot themselves be part to collective employment agreements, only through Union representatives. We consider such wording dangerous, at least by the principle of freedom of association, the negative meaning of it. As anybody can freely associate with a Union, then nobody is obligated to associate with a Union. As such, it appears that participating in a collective labor agreement is impossible without being member of a Union. If at the unit level, Unions are not that big (we do not talk about

Giving such information and keeping confidentiality is regulated by making Negotiating Rules, especially since art. 130 par (5) Law 62/2011 establishes the aspects which need to be addressed at the first meeting. Regarding the rules of information confidentiality, art. 130 Law 62/2011 makes reference to rules established in Law 467/2006.

If the right for information regarding the economical-financial situation of the company in the collective bargaining is obvious, the employees will have it through their representatives, any and every employee being covered, regarding the exercise of the right, through their legal representatives because, in the collective bargaining, those who negotiate for the employees, represent every employee in the company. Thus the questions: a single employee is entitled to solicit the communication of some information about the economical- financial situation of the company, and the employer, in this situation has the obligation to transmit the information asked?

We consider that the answer is yes, at least when looking at the regulations in art. 40 par (2) d) Labor Code. Obviously an abusive exercise of right is more likely to happen in this situation. That is why an employee can ask for information regarding the financial situation of the enterprise only for justifiable reasons. We believe that the text in art. 40 par (2) d) Labor Code is badly written, and that reference should be made to the obligation of information for the employee representatives.

Practically, regulation of the type found in art. 40 par (2) e) din Labor Code would be imposed, which give the employer the obligation to consult with the union or employee representatives, whenever decisions are made which might substantially affect the workers' rights and interests.

representation here, which as regulated by art. 51 Labor Code assumes half plus one total number of employees), most employees trusting their representatives, they cannot conduct a collective agreement under the current text. Furthermore, art. 134 pct. 2 a) Law no. 62/2011 establishes that at the unit level employees can be represented by a Union representative at the sector level should they lack one at the unit level. Only where there are no Unions can employees be represented by elected one, outlined in art. 221 Labor Code. Such a solution goes against the regulation present in art. 135 Labor Code which establish that the negotiation of the collective labor agreement (and not it's fulfilment) is done by the employee representatives even if the unit has a Union, but it is not representative, in which case members of the representative Union at the sector level of the unrepresentative unit level Union will be present. If we read into the current law, the collective labor agreement at the unit level would be negotiated by a certain category, but finalized by the sector level representative Union. Which is nonsense! It also goes against the principle of representation and majority, on which Law no. 62/2011 was built. Last but not least, the modification brought by Law no. 1/2016 are against the regulations in art. 146 par (2) Law no. 62/2011, which state " *At the unit level, the collective labor agreement will be registered without the signatures of all parties involved only if more than half of the employees sign.*" If only the sector level Union representatives could finalize a contract, then this contract would not represent the collective will of more than half the employees, the minority deciding for all employees (this has functioned in the previous legislation as well, art. 18 of Law no. 130/1996). Beyond these injustices, there remains massive discord in the text in Law no. 62/2011 regarding representation at the unit level and art. 134 and 135 Law, discord which needs to be removed.

Because, in the case of the information, we can analyze to what extent this would include an individual beneficiary, in the case of the consultations, the beneficiary of the obligation regulated by art. 40 para. (2) e) of the Labour Code will always be a subject of the collective right, whether union (any union and not only the representative), or, where applicable, employee representatives elected under Art. 221 et seq. the Labour Code. As such, if information would manifest in an individual procedure, consultations *lato sensu* (consultations which involve collective negotiations) or *stricto sensu* (consultation) would always assume collective procedures.

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