

Dobrinka Chankova (ed.)
Ivan Pankevych (ed.)

Dynamic Elements in the Contemporary Business Law



**Dynamic Elements in the Contemporary
Business Law**

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Preface

Editors

*Professor **Dobrinka Chankova***

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This volume contains the scientific papers presented at the Ninth International Conference „Perspectives of Business Law in the Third Millennium” that was held on 8 November 2019 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 five chapters:

- *Development of the market economy*. The papers in this chapter refer to the violation of minority shareholder rights - analysis on the mandatory takeover bid; the contract of transportation according to Kosovo legislation; the administrator - representative or employee of the limited liability company - aspects of comparative law; legal conditions of unusual terms institution; axiological basis for the tax system; characteristics of the dissolution of non-banking financial institutions; legal regime of private military companies.
- *International business law*. This chapter includes papers on: Concept of charterparty as an international contract for engagement of ship for transportation of cargo and legal perspective on critical areas of charterparty for avoidance of disputes; cross - border merger - analysis of comparative law; guarantees, rights and obligations in international trade through electronic media; cooperation-based approaches in competition law – the whistleblower versus the prisoner’s dilemma.
- *Criminal law in business context*. The papers in this chapter refer to crimes motivated by hate, differentiation and religious discussion in compared criminal law (Romania and the Republic of Moldova); drawing to the criminal liability of the legal person; the offense of destroying at fault in the Romanian law; some considerations regarding false testimony in the Romanian law - critical opinions and *de lege ferenda* proposals; measuring crime; new trends of international tax evasion - international legal regulations and modern combating methods; improving efficiency

to combat VAT frauds at the European Union level.

- *Contemporary labor law*. This chapter includes papers on: precarious work – challenges of labour law in Europe; non-compliance of the law of the remuneration with non-discrimination rules; the professional adequacy and the performance of the employee -differences and similarities.
- *Public affairs and business law - constitutional developments*. The papers in this chapter refer to the constitutional guarantees for ownership rights and the development of the market economy; parliamentary groups - internal structures of the Chamber of Deputies and the Senate - controversial aspects on establishing parliamentary groups arising from the parliamentary practice.

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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**DEVELOPMENT OF THE MARKET
ECONOMY**

Violation of Minority Shareholder Rights. Analysis on the Mandatory Takeover Bid

Lecturer Marius Cristian MILOȘ¹

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Abstract

The mandatory takeover bid is seen by the legislator as a way of protection of minority shareholders, by making the intention of the shareholder who exceeds a certain holding threshold and wishes to take control of the company more transparent, making in this way possible for the minority shareholders to exit the company, if this is seen as appropriate, and not remaining trapped in a company where they could no longer exercise any influence. The objective of this paper is realizing a comparative analysis at the European level regarding the mandatory takeover bid, by outlining the legal provisions that apply, the similarities and differences between the EU member states. Not in the least, on the basis of the Romanian jurisprudence, that is related with mandatory takeover bids, there are being questioned the pronounced sentences. According to the comparative study, we can observe the existence in the European national law (including Romania) of the provision regarding the mandatory takeover bid that has positive consequences from a legally point of view, by ensuring the protection of minority shareholders, contributing to the overall growth of the European stock markets.

Keywords: minority shareholder protection; European Union; mandatory takeover bid; stock market.

JEL Classification: K20, K22, K42

1. Introduction

The protection of the minority shareholders is the backbone of any stock market development. Investor protection is ensured by both quality of regulation, and regulation enforcement. The commercial law, as well as the specific stock market regulation that is governing the stock market provides several rights to the minority shareholder: *economic rights* (rights related with dividends and the distribution of assets, exit rights, rights related with the new issue or transfer of shares); *control rights* (rights related to the management/supervisory board of the company, rights related to general meeting, right to block alterations of the com-

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pany's constitution), *information rights, rights related with enforcement mechanisms, equal treatment rights*³.

The right to sell the shares is the right of shareholders to exit the company, to close the relation with it⁴. The situations for which a minority shareholder might want to withdraw are diverse, but in general are due to economic reasons. The doctrine shows that, at the level of the European Union member states, the minority shareholder is protected by the exit rights in the following situations: *buy-out, sell-out, squeeze-out, mandatory takeover bid, voluntary takeover bid*.

In the last decades, it has been noticed a growth of the takeovers realized on the European stock markets. The companies are facing stiffer competition and fight harder for obtaining control of the market. One of the main reasons why there are registered so many takeovers on the stock markets is represented by the potential economic growth of the offeree companies. The bidder sees in the takeover the possibility of development, either horizontally or vertically, or a benefit in the form of total cost reduction or R&D⁵.

The mandatory takeover bid, present in the legislation of each European Union member state, following the transposition of Directive 2004/25/CE⁶, states mainly that the person or the group of persons acting in concert which have as objective the acquisition of the control of the offeree company, when reaching a certain threshold from the total vote rights of the offeree company (which is different in accordance with the EU national law) are obliged to make a public offer "to all the holders of that company's securities, for all their holdings, at an equitable price". This provision applies to companies whose securities are at least partly traded on a regulated stock exchange⁷, being of interest not only for the individual investors, but also for the public authorities.

The reason for the existence of the mandatory takeover bid is represented by the protection of minority shareholders, by making the intention of the shareholder who exceeds a certain holding threshold and wishes to take control of the company more transparent, making in this way possible for the minority shareholders to exit the company, if this is seen as appropriate, and not remaining

³ See Marius Miloş, Laura Raisa Miloş, *Investor protection and stock market development. Empirical approach on the European Union case*, „Juridical Tribune - Tribuna Juridica”, vol. 9, issue 1, 2019, p. 114.

⁴ See Julian Velasco, *The Fundamental Rights of the Shareholder*, „U.C. Davis Law Review”, vol. 40, issue 2, 2006, p. 458.

⁵ See Eduardo Costa, Ana Marques, *Corporate governance and takeovers: inside from past research and suggestion for future research*, „Corporate Ownership & Control”, vol. 6 (3), 2009, p. 211-218.

⁶ Directive 2004/25/EC of the European Parliament and of the Council from April 21, 2004 on takeover bids, which represented the realization of a long-term project that had as its starting point the Robert Pennington report “Report on takeover and other bids”, from 1974; Historically, there were several failed attempts to adopt this directive at the level of the European Union member states (in 2001, for instance, it was blocked by the European Parliament, Germany being one of the countries that positioned itself against this directive).

⁷ *Ibid.*, art. (3)

trapped in a company where they could no longer exercise any influence, or in which they could feel disadvantaged due to the change of control.⁸

The rules that accompany the mandatory takeover bid diverge between the EU member states, depending on the way in which the members states transposed the Directive in the national law⁹. There is a wide literature that examines the manner in which the provisions regarding the mandatory takeover bid are applied in the European Union member states, the challenges and limits of this provision in what concerns the attainment of the regulation objective, which is ensuring a higher minority shareholder protection. The paper is structured as follows: in the second part, we realize a comparative analysis regarding the mandatory takeover bid characteristics and related rights granted to the minority shareholders in the European Union member states. In the third part, we will debate on the pronounced sentences in the Romanian cases that had to do with a violation of a minority shareholder right in respect with a mandatory takeover bid. The last part concludes.

2. Comparative analysis at the European Union level regarding the mandatory takeover bid

Habersack¹⁰ resumes the economic reasons underlying the necessity of regulation of the takeover bids, in order to ensure the protection of the company, of its shareholders, but also the protection of the other stakeholders in the company, such as its employees. Through them, we can mention:

- the conflict of interest between the management of the company and the potential bidders;
- the conflict of interest between the minority shareholders and the controlling shareholders;
- the conflict of interest between the minority shareholders and the employees of the offeree company.

The existence of an efficient regulatory framework for takeover bids creates a set of rules necessary in order to achieve the following two objectives: creating an efficient stock market from the corporate control point of view (which leads to optimal resource allocation and better management discipline), as well as ensuring minority shareholder protection against the unlawful actions of the controlling shareholder or of the company management. Certain authors claim the fact that a poor regulation of the takeover bids leads to market inefficiency, by increasing the trading costs or agency costs, which results from the competition

⁸ See Sebastian Bodu, *Piața de capital. Legea nr. 24/2017 privind emitenții de instrumente financiare și operațiuni de piață*, Rosetti International, Bucharest, 2019.

⁹ *Ibid.*

¹⁰ See Mathias Habersack, *Non-frustration rule and mandatory bid rule - cornerstones of European takeover law?*, „European Company and Financial Law Review”, vol. 15, issue 1, 2018, p.1-40.

between bidders¹¹, while others have this view, according to which regulation leads to a zero-sum game, generated by the transfer of a part of the potential gain of controlling shareholders towards minority shareholders¹². The acquisition of corporate control is seen by the latter as a way of sanctioning poor-performance managers, encouraging corporate restructuring and value creation. The argument is rather simple, in the case of a potential takeover, with no connection with the management of the company, that could easily end with the low-performance manager's dismissal from the company, the manager is being incentivised to act in the best interest of the shareholders, maintaining a relative unattractive market price of the company for the potential bidders. On the other hand, in the literature is outlined the quality of the current regulations regarding the takeover bids, being debated the level at which should be left the decision regarding the opportunity of a takeover bid, bringing arguments for a differentiation of this regulation in function of the particular conditions of the company (like for example, the ownership structure, that could be dispersed or concentrated ownership). The idea arises from the following question: who is able to make a better informed decision regarding the opportunity of corporate control change, that could lead or not to value creation in the company, the corporate management or the company's shareholders? The authors reach the conclusion that shareholders should decide, on the basis of specific internal conditions, the level at which should be taken the decision of opportunity regarding the future takeover bid¹³.

Habersack¹⁴ supports the idea that the directive has led to a certain harmonization of the takeover bids at the level of European Union member states, however he claims that the directive on takeover bids failed in what concerns the original intention of the legislator, that of balancing the management and shareholder rights, given the prohibition of the management of realizing any actions that could prejudice the takeover offer, provision that was transposed by the majority of the EU members states in their national law.

Under the mandatory bid rule¹⁵, if an entity takes control of a company, it is obliged to make a public offer to purchase all the remaining voting shares at

¹¹ See Hubert De La Bruslerie. *Equal opportunity rule vs. market rule in transfer of control: How can private benefits help to provide an answer?* „Journal of Corporate Finance” no. 23, 2013, p. 88–107; Luca Enriques, *The mandatory bid rule in the takeover directive: Harmonization without foundation?*, „European Company and Financial Law Review”, no. 1, 2004, p. 440–457.

¹² See Marc Goergen, Marina Martynova, Luc Renneboog, *Corporate governance convergence: Evidence from takeover regulation reforms in Europe*, „Oxford Review of Economic Policy”, no. 21, 2005, p. 1–27; Joseph A. McCahery, Luc Renneboog, Peer Ritter, Sascha Haller, *The economics of the proposed European Takeover Directive*, in: G. Ferrarini, K. Hopt, J. Winter, and E. Wymeersch (eds.), *Modern Company and Takeover law in Europe*, Oxford University Press, Oxford, pp. 575–646; Erik Berglöf, Mike Burkart, *European takeover regulation*, Economic Policy, no. 18, 2003, p. 171–213.

¹³ See Luca Enriques, Ronald J. Gilson, *The case for an unbiased takeover law (with an application to the European Union)*, „Harvard Business Law Review”, vol. 4, issue 1, 2014, p. 85–127.

¹⁴ Mathias Habersack, *op. cit.*, 2018, p. 1–40.

¹⁵ Art.5 of Directive 2004/25/EC on takeover bids.

an equitable price. On one hand, this provision protects the minority shareholder, by guaranteeing the exist right from the company, and on the other hand provides the minority shareholder with a pecuniary advantage, given by the control premium. The threshold from which appears the obligation of making a takeover bid depends on the national law of each member state. The surveillance and control stock market authorities could be authorised to adjust the equitable price in some circumstances and in accordance to some pre-bid criteria, on condition that these are made public¹⁶. In most cases, the equitable price is established taking into consideration the highest price paid by the bidder in a pre-bid period, that is to be established by the competent authorities, of minimum 6 months and maximum 1 year. A bidder that within this established period, buys securities from the market at a price above the one established by the competent authorities, is obliged to increase the price from the takeover bid¹⁷.

An important area regarding the protection of minority investors as far as concerns the takeover bids, regardless of the type of the bid (mandatory or voluntary) has to do with the amount of time needed by the minority investor in order to make an informed decision¹⁸. This implies even the acknowledgement of the effects that the mandatory takeover bid has on the economic activity of the offeree company and on its employees.

We could say that the mandatory takeover bid mainly comprise three areas: the obligation of making a public takeover offer, once a certain threshold has been reached, the level of the threshold, respectively the equitable price proposed by the bid. While the first and third area are established according to the European Directive 2004/25/EC, the second area is regulated by the national law of the EU member states. In a similar way, in some member states, in function of the way the Directive was transposed into national law, there are laid down additional rights and liabilities, as well as exemptions, that can eventually not lead to the materialization of the mandatory takeover bid.

Regulations regarding the protection of the minority shareholders in case of a mandatory takeover bid exist in every EU member state (excluding Sweden). In most of the countries, in order to exercise these rights, the controlling shareholder holdings should surpass 30 % of the voting rights, as a necessary condition for a mandatory takeover bid to be required.

The rights of minority shareholders in the case of mandatory takeover bids, as in squeeze-outs and sell-outs, derive from the EU Directive¹⁹ and are further developed in the EU national law. The national legislation applicable in

¹⁶ Marcus Partners, Mazars' Group, CEPS. *The takeover bids Directive Assessment Report*, European Commission, 2013.

¹⁷ Stefano Cacchi Pessani, et al., *Guide to public takeovers in Europe*. June, 2016, available at: <https://www.debrauw.com/wp-content/uploads/2016/06/Guide-to-Public-Takeovers-in-Europe-2016.pdf>, consulted on 1.10.2019.

¹⁸ Art. 3 (1) letter b), Directive 2004/25/EC on takeover bids.

¹⁹ Directive 2004/25/EC on takeover bids

the European Union member states stipulates the existence of the following rights for the minority shareholder, when a mandatory takeover bid is in question²⁰:

- **information rights** on the mandatory takeover bid, that should be granted as soon as possible; the documents accompanying the bid must be relevant for an informed decision of the minority shareholder; the surveillance authority must endorse the mandatory takeover bid, prior to getting public; an independent report performed by an expert must be attached in order to confirm that the bidder has the necessary resources for covering the takeover bid; the company must also present a report regarding the effect of the mandatory takeover bid on the company's activity, employees and creditors;

- **right of receiving and consulting related documents**, at the company's headquarters;

- **right to demand fair market price/equitable price**;

- **other rights**, which ensure additional protection to the minority shareholders (suspension of voting rights for the controlling shareholders until the date at which the bid is registered at the competent authority; the company management cannot take any actions that could in any way worsen the financial health of the company or the implementation in good conditions of the mandatory takeover bid, unless the actions have been approved by the general meeting of the shareholders; within those meetings the multiple votes shares will bear only one vote).

We will analyse the type of rights granted to the minority shareholders in all the European Union member states, based on the results of the questionnaire applied by Bartkus et al.²¹ in the period January 2017 - October 2017.

The most frequent combination of rights within the European Union member states is the information right, combined with the right to demand fair market price. We can notice the concurrent existence of the first three type of rights in less than half of the EU members states. In other states, just the right of demanding a fair market price is ruled (Greece, Hungary, Latvia, Luxembourg, Netherlands, UK). In the next figure (Fig.1), we present graphically the countries where are granted each of the rights mentioned above (in relationship with the mandatory takeover bid).

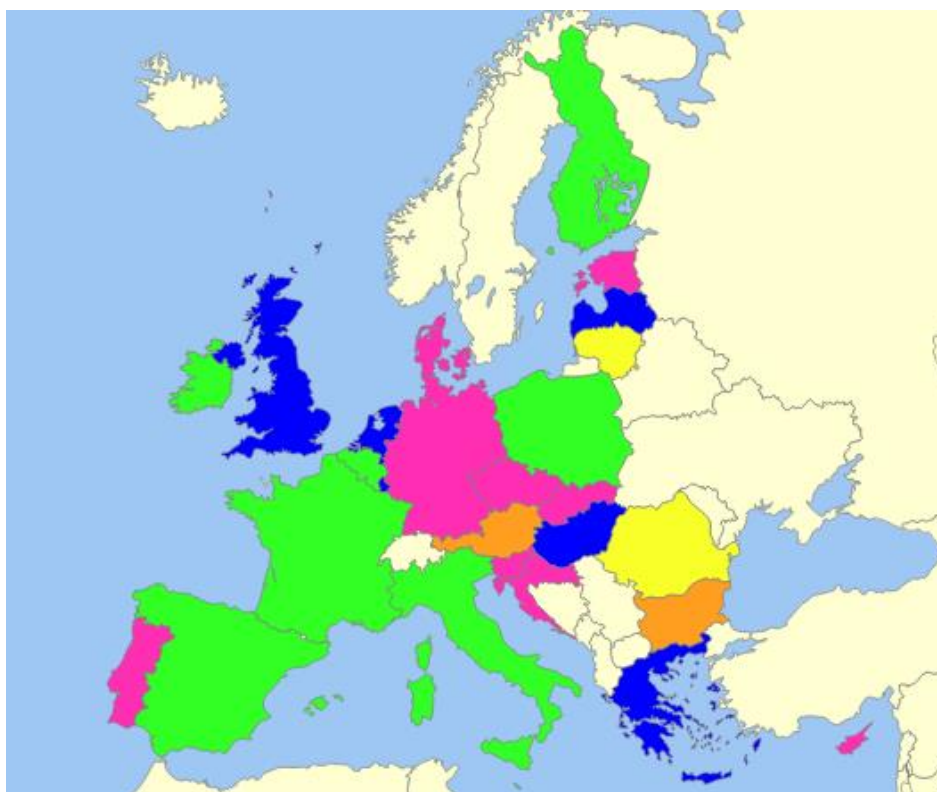
As we can notice from the below figure, the information right regarding the mandatory takeover bid is encountered in the majority of European Union member states, with the exception of Greece, Hungary, Latvia, Luxembourg, Netherlands and UK, where this right is not necessarily associated with the mandatory takeover bid. In Slovenia, for instance, this right assumes the notification of minority shareholders in regards to any change of the company's financial assets, during the period between the transfer of shares and the date of the general

²⁰ Gintautas Bartkus, Daina Belicka, Mindaugas Civilka, Pierre H. Conac, Christoph Teichmann, Tineke Lambooy, Brenda Hannigan, *Study on minority shareholders protection*, Publication Office of the European Union, 2018.



²¹ *Ibid.*

meeting of the shareholders. In Belgium, the bidder and the company (throughout the report that must be realized regarding the opportunity of making the mandatory takeover bid) must ensure that information obtained by some investors has been made available also for the minority shareholders, towards which the bid is addressed. In case of any false information, the bidder is made responsible for causing any prejudices to the minority shareholders related to the acceptance of the bid.

The right of receiving and consulting relevant documents regarding to the mandatory takeover bid (financial statements, audit reports, etc.) is present just in some EU countries (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Germany), due to the fact that it does not usually appear independent, but related with the information right.



Legend

<i>Identifier</i>	<i>Rights of the minority shareholder related with MTB</i>	<i>Country</i>
	<i>Right to demand fair market price</i>	<i>Greece, Hungary, Latvia, Luxembourg, Netherlands, UK</i>
	<i>Information right Right to demand fair market price</i>	<i>Belgium, Finland, France, Ireland, Italy, Malta, Poland, Spain</i>




	<i>Information right</i> <i>Right of receiving and consulting related documents</i> <i>Right to demand fair market price</i>	<i>Croatia, Cyprus, Czech Republic, Denmark, Estonia, Germany, Portugal, Slovakia, Slovenia</i>
	<i>Information right</i> <i>Right to demand fair market price</i> <i>Other rights</i>	<i>Lithuania, Romania</i>
	<i>Information right</i> <i>Right to demand fair market price</i> <i>Right of receiving and consulting related documents</i> <i>Other rights</i>	<i>Austria, Bulgaria</i>

Figure 1. Characteristics regarding the rights granted to minority shareholders in the case of a mandatory takeover bid within the European Union member states

*Note: the figure was realized with Phil Archer's software <http://www.philarcher.org/>
 Source: realised by authors, data provided by Bartkus et al. (2018) and own elaboration*

The right to demand a fair market price in the case of a mandatory takeover bid appears in all EU member states, although the methods of establishing it are quite diverse among states. These are based on either the market price of the securities from 3 up to 12 months prior to the bid, either on the highest/average price paid by the bidder in a period of maximum 6 months prior to the bid. In some states, there is also used a combination of these methods.

Likewise, in the national law of some members states there are often mentioned other rights that additionally enhance the protection of minority shareholders. In Austria, for instance, legislation requires that the management of the companies should not take any actions that could jeopardize the implementation in good conditions of the mandatory takeover bid, once it has been announced as an intention, without the decision of the general meeting of the shareholders, unless a better, competitive offer is sought.

In Romania and in Bulgaria the voting rights of the shares held by the person who exceeds the legal threshold are suspended until the mandatory takeover bid is carried out²². In Lithuania, it is prohibited by the law to the management of the company or the supervisory board to take any actions that could worsen the financial health of the company, or the implementation of the mandatory takeover bid, unless these actions have been approved by the general meeting of the shareholders. Within those meetings, the multiple votes shares will bear only one vote.

As far as concerns the legal threshold from which the takeover bid be-

²² Art.37 (1), (2) from Law no. 24/2017; Art.75(3) from FSB Regulation no. 5/2018

comes mandatory, for a company whose shares are at least partly listed on a regulated market, this varies among EU member states, and shall be reported to the voting rights, rather than to the social capital. The minimum threshold for which appears the mandatory takeover bid starts from 25% + 1 vote in Croatia, respectively Hungary²³, while for other countries it is of 30% (Austria, Belgia, Cyprus, Czech republic, Finland, France, Germany, Italy, Spain, UK), 33% (Romania, Bulgaria, Denmark, Greece, Hungary, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Slovenia) or even surpasses 50 % in the case of Latvia.

3. Violation of minority shareholder rights in Romania regarding the mandatory takeover bid

In Romania, the mandatory takeover bid is provisioned by Law no. 24/2017²⁴, as well as by the Regulation no.5/2018 of Financial Supervisory Board²⁵, through the applicable special provisions, in the case of the companies listed on the regulated market of Bucharest Stock Exchange. These stipulate that "the natural person or legal person, as a results of his/her own acquisition or the acquisition by persons acting in concert with him/her, which holds securities of an issuer which, added to any existing holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her more than 33 % of the voting rights in that issuer, is required to make a bid at the earliest opportunity addressed to all the holders of those securities for all their holdings at the equitable price, but not later than two months after that holding has been acquired"²⁶.

There are also stipulated in the law some exemptions, in the cases where the threshold holding position (33 %) has been attained due to²⁷:

- a privatization process;
- the acquisition of shares from public institutions, involved in budgetary credit claims procedures;
- the transfer of shares between the parent company and its subsidiaries;
- a voluntary takeover bid, for all shareholders holdings, addressed to them.

Furthermore, the legislator offers a derogation from the obligation to make a takeover bid for those cases when the holding threshold (of 33% from the voting rights) has been attained unintentionally, offering the following alternative scenarios: implementing a mandatory takeover bid, according to the law, or alienate the number of shares necessary in order to lose the unintentionally attained

²³ In case there is no other shareholder with a holding of more than 10 % of the voting rights

²⁴ Law no. 24/2017 on issuers of financial instruments and market operations

²⁵ FSB Regulation no.5/2018 on issuers of financial instruments and market operations

²⁶ Law no. 24/2017 on issuers of financial instruments and market operations, Art. 37

²⁷ *Ibidem*, art.39

holding²⁸.

Further we will take in discussion a recent case²⁹ with the object of limiting the right of the company to redeem its own shares from the existence of the obligation arising from the concertation of certain shareholders, who have exceeded the holding threshold stipulated by the law and fulfill the conditions for a mandatory takeover bid.

In the appeal, it was shown that a program for the redemption of the shares cannot be approved, as there is this situation of the concerted shareholders, who must first undergo the mandatory takeover bid procedure for the company shares and only at a later time, the company can redeem its own shares. In the analysis of the aforementioned, it was shown by the appellant that if the court intervenes by ruling that the financial resources of the company may be used in a certain way, in other words, it decides on whether the redemption program should be carried out or not, the judge would substitute the manager of the company. Further, a position in this regard would cause the courts to censure on the grounds of opportunity and not of legality. The appellant argues that Law 31/1990³⁰ allows the company to redeem its own shares and at the same time, argues that between the obligation of the concerted shareholders to make a takeover bid for all shares and the possibility of the company to redeem its own shares, cannot be any connection. Further, the appellant argues that the right of the company to redeem its own shares cannot be related to the obligations of the shareholders, because the company has no power to determine the respective shareholders to carry out a certain operation

The defendant of the plaintiff calls for a rejection of the appeal as unfounded and the maintenance of the court ruling as legal and sound, with the order of the party which opposes to pay the costs. From their point of view, the legal obligation of the concerted shareholders of realizing a takeover bid and the possibility of the company to redeem its own shares are connected. In this case, the law enforcement was correct, because the legal obligation of the concerted shareholders prevails, shareholders who, in this situation, were obliged to make a takeover bid 2 years earlier and who, in bad faith, avoided it, violating the legal provisions of Law 31/1990³¹. In the event that the concerted shareholders would circumvent the legal obligation to make a mandatory takeover bid, transmitting this obligation to the company, that would basically mean a masked operation of increasing the capital of the concerted shareholders. This is done by distributing free shares to concerted shareholders, following the redemption of the shares realized by the company, the members of the management board being exactly the

²⁸ *Ibidem*

²⁹ Decision no.111/18.02.2019, Pitești Court of Appeal, action for annulment of de Decision of the general meeting of shareholders (Litigations with professionals).

³⁰ Company Law no.31/16.11.1990, as republished and subsequently amended.

³¹ art. 136¹ which provides that "the shareholders must exercise their rights in good faith, while respecting the legitimate rights and interests of the company and of the other shareholders".

two companies that hold the majority of the share capital in the company in question.

The Court rejects the appeal, relying on a number of considerations, including the following:

- the criticism regarding the fact that the hypothesis according to which the first instance would have analyzed the legality of the decision in terms of reasons of opportunity is unfounded; In fact, the resolutions of the general meeting of the shareholders that are against the law can be challenged on the way of the nullity action, by the shareholders who did not take part in the general meeting of the shareholders or voted against in the general meeting;

- in case a part of the shareholders proves that the decision of the general meeting of the shareholders violates the legitimate interest of the company or is taken in bad faith, the court will pronounce the absolute nullity of the decision of the general meeting, the requirements according to art. 132 paragraph 2 of Law 31/1990;

- the first instance states, rightly, that by adopting a decision of the general meeting of shareholders to repurchase shares, the imperative obligations incumbent on the concerted majority shareholders should not be circumvented;

- when adopting decisions at the general meeting of shareholders, the requirements imposed by the special legislation on the capital market and the applicable Community legislation must also be respected³².

In the analyzed case, by adoption of the contested decision in the general meeting of the shareholders, the social interest was not pursued, instead there were pursued the interests of the concerted majority shareholders, who should have been obliged to make the public takeover bid. In fact, the aim was to transfer this obligation to the company, by using the financial resources of the company for another purpose than the company's object of activity.

Considering the legal provisions that oblige the concerted shareholders, which exceed a certain holding threshold, to realize a mandatory takeover bid, we can revise the protection elements in this case for the minority shareholders. The conflict of interests that has appeared between the management of the company and the concerted shareholders would have determined, in the absence of a ruling in favor of the plaintiff, the diminution of the legal obligations established according to the law for the concerted shareholders, regarding the mandatory takeover bid and moreover, their receipt of free shares, the concerted shareholders being also members of the management board of the company.

³² Regulation (EU) no. 596/2014 of the European Parliament and of the Council on market abuse; Directiva (EU) no. 1132/2017 of the European Parliament and of the Council relating to certain aspects of company law.

4. Conclusions

The mandatory takeover bid was introduced in the law of the European Union member states as a transposition of Directive 2004/25/EC, which establishes the obligation for the person or group of persons acting in concert and exceeding a certain threshold of holding in the company listed on a regulated capital market to make an offer for the rest of the shares for all minority shareholders (based on the principle of equal treatment), in order to protect the minority shareholders of that company at the time of change of control.

The mandatory takeover bids are increasingly present in the European capital markets, as a result of the increased competition and the increasing importance that the capital market has in the European economy. The existence of an efficient regulatory framework for mandatory takeover bids is meant to ensure the investors protection, the corporate governance of listed companies, by eliminating illicit acquisitions, but also meant to increase the competitiveness of existing companies on the market, by stimulating the managers to act in the best interest of shareholders and pursue the long-term growth of the market value of the company.

In the literature, however, there are studies that put into question the efficiency of the regulation of takeover bids. While there is a consensus that mandatory takeover bids ensure the protection of the minority shareholder by offering them the possibility of selling their shares at a fair market price in the case of takeovers that lead to a decline in the value of the companies, the academic opinions are divided when it comes to efficiency of these regulations in what concerns the takeovers that lead to an increase of the value of the companies. The arguments that are brought in this direction are usually related to the increase of the trading cost (due to the fact that the bidder has to pay more than they would need to gain control of the offeree company), which can lead to a discouragement of the bidders in making those acquisitions in the first place, acquisitions that could probably enhance more value for the companies.

We also brought into discussion the opportunity of the legal provision regarding the mandatory takeover bid in the case of a Romanian company, listed on the regulated market, using recent jurisprudence. We have shown that, in this case, the existence of the regulation led to the protection of the minority shareholder. Future studies could focus on a richer jurisprudence, at the level of several EU Member States, or have as objective the impact that the applicability of mandatory takeover bids has had on the development of capital markets at the European level, using in this purpose quantitative investigation methods.

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The Contract of Transportation According to Kosovo Legislation

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Abstract

The contract of transport is a contract based on which the transport of persons or goods is done from a place to the other place. This contract is one of the most important contracts in economy and the field of law of a country. By transport two main functions are realized: a) displacement of working objects for producing a new product and b) displacement of finished from a field of production to the field of circulation. By this paper the conditions for concluding of this contract subjects of this contract, its characteristics, types of transport as well as the ways of termination of this contract, will be explained. The methods of systemic and comparison analysis will be used. Efforts will be made for analysis, comparison and interpretation of norms of transport generally as well as the transport of goods, specifically. Transport of passengers is not included. Relations between contracting parts are not regulated only with the Law on Obligation Relations and they are also regulated with the other specific laws depending on the type of the transport. In the contract of transport, the obligation of transporter is an obligation whose objective is achievement of determined result what he concretely is obliged to send to persons, undamaged or goods, passenger or the sender of goods. If the contract of transport is concluded, then are other transports different. Here there appear various types of contracting relations. With the transport of passengers in one side there is the subject that organizes journey (touristic agency) and the passenger, whereas with the contract of the transport of goods as parties could appear seller of goods and transporter or the creator of the item and the transporter.

Keywords: law, contract, transport, passenger, item, goods.

JEL Classification: K12, K22

1. Introduction

Transport of goods and passengers from a place to the other in the modern times is very frequent. Paper interprets the ways based on which transport is done according to the Kosovo legislation comparing this with the countries of the region. Within the paper the report between transporters and replacement of objects from a place to the other are described. Conditions of concluding this contract are key elements so it could be valuable contract. If the contract is considered to have been concluded, then the obligation of transport is fulfilled if goods during the transport were damaged without the fault of transporter.

The paper during the analysis and during the comparison of legal norms

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manages to show who are subjects that conclude contract according to the positive law and if the characteristics of contracts determined by the positive law are fulfilled.

Since transport contains one of the main duties of sender in the paper there are described the ways of transport is done and conditions needed to be fulfilled from the sender to transporter in order to realize this type of contract.

Paper in its content presents only the transport of goods and not the transport of persons from a place to the other place which by the law is foreseen as a contract of specific type.

In the paper will be used methods of analysis, analyzing various theories and legal norms for transfer of goods. Through the systemic method the procedure up to the fulfillment of the obligation is analyzed. Method of comparison helps us to compare various theories and through this method the comparison of legislations of the countries from the region related to the contract of transport is done.

2. Notion

The contract of transport is a contract by which transport of persons and goods from a place to the other is made possible. Transporter is obliged to transport the determined subject to the requested place, determined goods to transport to the contracted place, whereas passenger respectively the sender of goods is obliged to pay the contracted price to him.² This contract is one of the most important economic contracts of a country. With the transport two functions are realized: a) replacement of the working object for producing new product and b) replacement of finished products from the field of production to the circulation.³ This contract is regulated by the legal disposals. With the contract of transport transporter is obliged to transport to a determined place some persons or goods, whereas passenger respectively sender is obliged to pay the determined amount.⁴

Sender is the person that is called transporter. By the contract of transport we would understand that contract by which the transport of goods and persons is made possible from a place to the other place.⁵ Transport of people and transport of goods is regulated with a special law which regulates specific types of transport. Relations between parties are not regulated with the Law on Obligation Relations. Norms by which the transport of passengers and goods is regulated derive from the law on transport, law on civil aviation, law on transport of dangerous goods, law on roads, convention on international transport of passengers

² Riza Smaka, *E Drejta Biznesore*, Iliria, Prishtinë, 2008, p. 415.

³ Mariana Tutulani-Semini, *E Drejta e Detyrimeve dhe e Kontratave*, Sanderbagbooks, Tiranë, 2006, p. 99.

⁴ Law on Obligation Relations, *Gazzete*, Kosovës, Prishtina. 2012, art. 662, par 1.

⁵ Ardian Nuni, Ilir Mustafaj & Asim Vokshi, *E Drejta e Detyrimeve*, II, Tiranë, 2008, p. 135.

and goods, convention on contracts related to international transport through roads. In the contract of transport the obligation of transporter is an obligation whose object is achievement of a determined result that he concretely is obliged to transport undamaged persons or goods or goods damaged without the fault of passenger or sender of goods.⁶

Albanian Civil Code also regulates the contract of transport. With the contract of transport, transporter takes the responsibility to transport persons from a place to the other place.⁷ Then, the contract of transport of goods is regulated also with the article 880 of the Law on Obligation Relations. With the contract of transport of goods, transporter takes the responsibility to transport goods from a place to the other.⁸

Regulation of transport of goods and passengers is regulated with special disposals because passengers and goods are different compared to each other. Passengers are human beings whereas goods even though could be damaged, they can be compensated while passengers, not. In the transport of passengers in one side we have the subject who organizes journeys that is touristic agency and the passenger, whereas the contract of transport of goods, as parties could appear are seller of goods and transporter or the creator of the item and transporter. Based on the territory in which the transport is developed, contract could be for international transport, regional transport and domestic transport.⁹

With the contract of international road transport, transporter is obliged to for the determined amount of money, to transport goods from a place to the other which belongs to the territory of different states.¹⁰ This means that transporter is obliged to conduct transport also outside the country where the law operates. After the transporter goes from our country to the other the competent legal norms that apply to this contract are those based on whom contract was concluded.

3. Conditions of concluding the contract

For concluding the contract of transport there should be fulfilled a series of conditions which are separated into:

- General conditions and
- Specific conditions

As the general conditions there are mentioned: ability to act (working ability), conciliation of will, object of the contract and the basis of the contract.

As the special conditions there are: the form of contract, the given consent of concluding contract and delivery of the item to be transported.

⁶ *Ibid.*, p. 135.

⁷ Albanian Civil Code, Republic of Albania Official Gazzette, Tirana, 1994, art. 877.

⁸ Po aty, neni 880.

⁹ Armand Krasniqi, *E Drejta Biznesore*, Dukagjini, Pejë, 2014, p. 431.

¹⁰ Armand Krasniqi, *E Drejta Kontraktore Biznesore*, CSARA, 2015, p. 282.

4. Ability to act (working ability)

Working ability of contracting parties is the general condition which is required for concluding the contract.¹¹ The ability to act of physic persons is gained at the age of 18. It could be gained before the age of 18 and only after the age of 16. But the ability to act after the age of 16 is gained only with the court decision. This happens when somebody enters into the marriage before the age of 18 and the court in such a case decides pro ability based on the expertise of experts which is called emancipation. The ability to act could be removed and this could be done with the final court decision.

Ability to act of legal persons is gained with the act of registration of these subjects. The registration is done before the Kosovo Agency for Registration of Businesses (ARBK). Registration starts with the act of application. Fulfillment of conditions for registration of subjects is based on determined disposals. Disposals emphasis that legal subjects should have their identity. Identity contents: name, residence, nationality, statute and the budget.

5. Consent of will

For concluding the contract of transport and for carrying goods and passengers the consent of seller of goods, respectively passengers and the transporter is needed. Regarding the fulfillment of contract, it is considered that parties should freely fulfil it.¹² In order to have consensual will of parties, it should be bilateral, serious, expressed clearly in that way that this general condition is fulfilled from what as the result contract is concluded.¹³ Will should be clear, serious and allowed. Both contracting parties should declare pro or contra contract conclusion. Contract should be signed by all contract parties. Parties shall sign without being imposed, without frauds, threat or mislead.

6. Subject of the contract

Subject of the contract is transport of goods or passengers from a place to the other and the realization of the obligation of transport without damaging goods which need to be transported or by transporting passengers under the good conditions as they were before the transport began. With the transport of goods transporter has the aim to achieve a result which is transfer of goods from a place to the other. Whereas order for transport of goods or even passengers have to reward transporter for organizing and transfer of goods from a place to the other.

¹¹ Nerxhivane Dauti, *E Drejta e Detyrimeve*, Universiteti I Prishtinës, Prishtinë, 2001, p. 63.

¹² *Ibid*, p. 60.

¹³ Mazllum Baralieu, *E Drejta Biznesore*, Universiteti I Prishtinës, Prishtinë, 2010, p. 473.

Payment is done as parties have agreed. The price of goods, time and the place of payment for transport of goods is also determined with the contract. Price depends on many factors, factors which have an impact are the length of road, the way of transport, the type of goods, packaging, etc. Transporter has also to be prepared with suitable means of transport and always making sure about the type of goods. Example: meat cannot be transported if transporter doesn't possess fridge in the means of transport and the same for ice creams, eggs, etc. Depending on the object of transport, transport is divided in: contracts of transport of passengers, and contract for transport of goods.

7. Contract parties

Contract parties of the transport contract are transporter and passenger, respectively sender of goods. In most cases sender of goods is not the person who should receive goods, third person is person who receives goods in which case transporter has determined obligations to receiver of goods even though with the contract of transport he is not a contracting party. Transporter is the other contract party who takes the responsibility that with his means of transport to transport goods in a determined determination within be determined deadline with the contract.¹⁴

In this contract the third party appears and that is receiver of goods. Receiver doesn't take part in concluding the contract but however in the time of delivery of goods he enters in the contract as the contracting party undertaking determined rights and obligations.¹⁵ Transporter shall take goods, he shall be equipped with needed documentation and to transport goods until reaching receiver.

8. Characteristics of contract of transport

Contract of transport is a contract by name because law foresees it with the disposals.

Contract of transport is consensual contract. Both parties determine conditions for concluding the contract from the negotiations, subject of contract, ways and the place of payment, etc.

Regarding the form this is a no formal which means that in concluding it there is no need for special form unless in cases when law requires this specifically.

This contract shall be concluded in a written form so it proves that the contract was concluded. This contract is a contract with the reward. For transportation of goods and passengers, transporter should be paid for service of transport

¹⁴ Mariana Semini, *E Drejta e Detyrimeve dhe e kontratave*, Skanderbagbooks, Tiranë, 2006, p. 107.

¹⁵ *Ibid*, p. 104.

to the destined place. The payment for the service of transport has to be done by sender of goods or by the passenger. Payment is done based on conditions determined by contract in the time and in the determined place.

Contract of transport is consensual contract. It is concluded between sender and transporter who have rights and obligations which are determined by the contract.

9. The obligations of contract parties

Both contracting parties have determined the obligations.

9.1. Obligations of transporter

Transporter shall put at the disposal the means of transportation at the time and at the determined place for the sender of goods in order to get goods for transportation.

In addition to cargo, transporter is obliged to be equipped with the accompanying documents with all data.

Transporter shall conduct transport of goods in the time and at the determined destination with the contract of transport. There are cases when goods are not delivered according to the determined way by contract and with this case transporter shall reimburse caused damage based on his fault.

Transporter is responsible for loses of goods or for damaged goods during the transport from the moment he takes the goods up to the moment when goods are received by receiver.

9.2. Obligations of sender

Obligations of sender are:

- sender shall make cargo which has to be transported along with the documents to accompany.
- sender is obliged to load means within determined time in its own expenses unless differently regulated by the contract.
- sender is obliged to pay price for transport according to the contract as agreed with the contract of transport.

9.3. Obligations of receiver

Receiver is obliged to make sure that his expenses before receiving goods for the identity and for the physic stage of goods which were transported.¹⁶

Receiver is obliged to do the discharge of goods in the storehouse in his

¹⁶ *Ibid*, p. 115.

own expenses and this is not done only if with the contract is regulated differently.

10. Suppression of contract

The contract of transport is suppressed like all other obligations as are: by fulfillment of the obligation, by the death, by the annuity, by bankruptcy, by liquidation and by renovation of the contract.

11. Contract for transport of goods

Transporter has the duty to transport the received goods and to deliver at the determined place by the sender or determined person (receiver).¹⁷

Object of this contract could be goods or persons therefore from the object of the contract the contract for transfer of goods and the contract for transport of passengers differ. Based on the object of contract the obligations and the rights of contracting parties are determined.

The main obligation of the transport of goods is the transportation of goods, which are received and the received goods have to be transported from the place goods were taken to the place of delivery. Item is transported from a place to the other but a receiver is needed, because he is the person that shall receive item.

The contract includes the transport deadline. Thus, item shall be received and delivered according to the deadline determined by the contract.

Item (goods) which is given to the transporter, has to be saved as it was received. He shall care about the item and shall behave with the intensified care for the item which has to be transported. Transporter is responsible for damaged goods or loosed goods while being transported.

Goods that are transported within the deadline shall be delivered to the person determined by the contract. Person who receives goods from transporter could be person who has given goods for transport or to the third person.

11.1. Subjects of contract of transport of goods

As subjects of the contract of transport are: transporter, sender of goods and the receiver. Sometime sender of goods could be person who receives goods. But the receiver could be also the third person.

11.2. Conditions for concluding the contract of transport of goods

Conditions for concluding the contract of transport of goods are those

¹⁷ Law on Obligational Relations, Kosovo Official Gazette, 2012, art. 667.

needed to be fulfilled so the contract is considered valid. Absence of these conditions brings to the annulment of the contract, so it is considered as the contract was never concluded.

Contract for transport of goods shall have general and the specific conditions. General conditions are: ability to act, the accordance of will, the subject of the contract and the basis of the contract.

Specific conditions are: delivery of goods, the form of contract and consent for the conclusion of the contract.

11.3. Characteristics of the contracts for transport of goods

Contract for the transport of goods is a contract by name because as such it is regulated by the law. It is a consensual contract because both contracting parties are those that determine their rights and duties. Contract for transport of goods is a commutative contract because parties since its conclusion know their goal and the object of this contract.

Contract for transport of goods is contract with the reward because for the transport transporter has to be compensated for the transportation of goods from sender to the receiver.

This contract is mutual obligatory because both parties have duties toward each other.

Transporter has to deliver the goods according to the contract in the place and the time determined by the contract. Whereas sender (receiver) has to fulfil the compensation. This contract is informal and the main contract.

11.4. The obligations of sender

As the main duty of sender is information for the transporter. Sender is obliged to inform transporter for the type of shipment, for its content and the quantity and to make it known regarding where has the shipment to be transported, name and the address as well as every needed element so the transporter could fulfil its obligations without delays and payment.¹⁸

Sender is obliged to inform the transporter when the valuable goods are to be transported as securities, also he is obliged to inform the transporter about the value of goods.

When we talk about the transport of dangerous goods that condition specific conditions of transport, sender is obliged to inform transporter on time so he undertakes necessary measures. If this information is not provided by the sender, then he is responsible for damages if they appeared.

Sender is obliged to pack goods according to the foreseen way or practiced in a way so goods are not damaged and that the security of people is not put

¹⁸Law on Obligational Relations, Kosovo Official Gazette, 2012, art. 668.

in danger as well as goods.

Sender is obliged to pay the contracted price (reward) as well as the expenses related to the transport.

11.5. The obligations of transporter

Transporter is obliged to do the transport in the contracted way. Transporter is obliged to inform sender for all circumstances which would have impact in conducting transport and to act according to given guidelines. Transporter is obliged to warn sender about shortcomings of packaging that could be noted. Transporter is not obliged for damage of shipment if he has warned about the shortcomings and that he had to do the transport no matter of the shortcomings.

Transporter is obliged to refuse shipment if shortcomings in packaging are such so the security of persons or goods is put in danger or a damage will be caused.¹⁹

Transporter is obliged to act as a good economist respectively as a good householder and for this to inform sender and to require further guidelines.

11.6. Extinction of the contract

Contract for transport of goods is extinction like most of contracts. They after producing judicial effects are extinguished. Contract of transport is extinguished: with the agreement, when its subject is disappeared, when the contracting party dies, by annulment and by non-execution of the contract.²⁰

12. Conclusion

Contract of transport is a contract which in the modern times keeps an important position in the legislation in the business law.

According to the analysis it is concluded that all countries of the region regarding this contract act similarly. Especially they are similar on the rights and the duties of transporter and the sender but also to the conditions for concluding the contract.

Paper explains conditions for concluding contract of transport. They are divided into the general and the specific conditions. Conditions for concluding the contract of transport are similar to those of the contract of passengers.

To the contract of transport as subjects for concluding contract and for fulfilling the contract are: transporter, sender and receiver of goods. In most cases ordered od transport is the receiver of goods, but not always receiver of goods is the same person who ordered the transport of goods.

¹⁹ *Ibid*, art. 672, par. 1, 2, 3, 4.

²⁰ Nerxhivane Dauti, *Kontratat*, Universiteti i Prishtinës, Prishtinë, 2012, p. 115.

To the contract of transport of goods, the condition of fulfilling the contract is the transport of goods and deliverance of goods as they were taken. Goods should be delivered as they were received by the transporter.

Contract for the transport of goods is considered as no fulfilled if goods are damaged during the transport due to the fault of transporter. In this case transporter is obliged to do the compensation where as compensation are covered moral and material damages. But if goods are packed in a way that the orderer of transport knew the goods would damage then transporter is not guilty and it is considered that the contract has been fulfilled.

As a contract it has its characteristics, it is a contract by name, commutative, consensual obligatory and by reward. For concluding the contract of transport there are no needs for some determined formalities ore ceremonials. It is classified as the principal contract that is nod dependent on any other contract. The contract of transport is extinguished in many ways. It is extinguished by fulfillment from both contract parties, by passing the deadliness, with the death of any of contracting parties and with the annulment of the contract decided by the court due to the nonfulfillment of the principal conditions for concluding the contract. When the subjects that concluded contract are judicial persons then the contract is extinguished with: bankruptcy, liquidation or the bankruptcy of the legal person.

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The Administrator - Representative or Employee of the Limited Liability Company. Aspects of Comparative Law

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Abstract

It has been frequently analyzed, in the doctrine and practice of commercial law, whether it is opportune to conclude an individual employment contract between the administrator and the limited liability company or a mandate contract. In the context of the free movement of persons in the Member States of the European Union, we consider that it is necessary to have a comparative analysis of company law, especially in the particular matter of the administrator-society relationship. The present study proposes an analysis of compared law between the provisions of Romanian law and those of French law regarding the management of contracts that may intervene between the administrator and the company. Thus, the difficulties related to determining the possibility or not of the administrator to conclude an individual employment contract with the limited liability company can find their solution through a mirror analysis of another legislative model.

Keywords: administrator, mandate contract, individual employment contract, limited liability company

JEL Classification: K20, K22

1. Introduction

In the doctrine and practice of corporate law, the question has frequently been asked to what extent an administrator can conclude an individual employment contract with the company he administers.

In the case of the joint stock company, the answer is offered unequivocally even by Law no. 31/1990, meaning in which art. 137¹ para. (3) expressly provides that "during the fulfillment of the mandate, the directors cannot conclude with the company an employment contract. If the directors have been appointed from the employees of the company, the individual employment contract is suspended during the term of the mandate". But another is the situation of the limited liability company, in which the silence of the law led to a series of polemics.

Obviously the problems that exist in the practice of commercial law, generated by the lack of an express provision of the law, demand, *de lege ferenda*, an intervention of the legislator that expresses its position clearly in the face of this controversy.

We will thus observe in the analysis of comparative law below, that the

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French company law clearly provides for the situation of the limited liability company a legislative solution, meaning that it has specifically the situations in which the director of a limited liability company has the possibility of concluding an individual employment contract with the company.

2. The legal nature of the relationship between the administrator and the company

The legal nature of the relationship between the administrator of a company and the company it manages is that of the mandate contract. In this regard, we consider the express provisions of art. 72 of Law no. 31/1990, according to which "the obligations and the responsibility of the administrators are regulated by the provisions regarding the mandate and those specifically provided for in this law". The contractual character of the legal relationship between the administrator and the company is also supported by the provisions of art. 153¹² which conditions the legal validity of the appointment of an administrator by the express acceptance by the named person. Thus, for the appointment of an administrator, respectively a member of the board of directors or the supervisory board, to be legally valid, the named person must expressly accept it².

The final thesis of art. 72 of Law no. 31/1990 accredits the opinion that the content of the administrator's mandate is not an exclusive contractual one, being supplemented with the legal provisions. Thus, we can conclude that the legal nature of the relationship between the administrator and the company is on the one hand a contractual one and on the other a legal one³.

3. Administrator - employee with an individual employment contract in a limited liability company

In the doctrine there are different opinions regarding the possibility of the administrator to conclude an individual employment contract with the company.

If, in the joint stock companies, as mentioned above, the prohibition of the conclusion of an individual employment contract by the directors, directors, members of the supervisory board, is express and unequivocal, in the case of the limited liability company, the absence of an express provision gives rise to interpretations.

The opinion that the administrator cannot have the status of employee of

² Stanciu D. Cărpenaru, *Tratat de drept comercial român*, 4th edition, Ed. Universul Juridic, Bucharest, 2014, p. 219.

³ I.L. Georgescu, *Drept comercial român*, vol. II, Ed. All. Beck, Bucharest, 2002, p. 387; Dragoș-Mihail Daghe, *Administratorul societății – privire retrospectiv-istorică, evoluție legislativă, repere contemporane*, in *Dreptul românesc la 100 de ani de la Marea Unire. Dimensiuni și tendințe*, 22-23 November 2018, Ed. Universul Juridic, Bucharest, p. 175; St. S. Cărpenaru, Gh. Piperea, S. David, *Legea societăților. Comentarii pe articole*, 5th edition, Ed. C.H. Beck, Bucharest, 2014, p. 254-255; Vasile Nemeș, *Drept comercial*, 3rd edition, Ed. Hamangiu, Bucharest, 2018, p. 160-161.

the company he manages is supported by a series of arguments. Thus, the provisions of art. 72 of the Companies Law, mentioned above, establishes that the administrator-company relationship is governed by the provisions regarding the mandate contract. In this context, if we would agree with the possibility of the administrator also having the quality of employee, then we would be in the presence of a clear conflict of interests, having on the one hand the mandate of the company and on the other the quality of employee of the society whose interests must protect them⁴.

Art. 1961 para. (3) of Law no. 31/1990 expressly provides for the possibility of the sole associate, who may also have the capacity of director, to conclude an individual employment contract with the limited liability company⁵. This provision is not capable of accrediting the idea that the directors of the limited liability companies may conclude an individual employment contract with the company, but it establishes an exception in favor of the sole partner⁶. Moreover, such a possibility granted to the sole shareholder is also justified by the fact that in the case of companies with limited liability with several associates, the financial interests of the other associates could be affected by granting the employee rights to the administrator, which aspect in the limited liability company with only one partner is not possible⁷.

Another argument for the impossibility of combining the quality of administrator with the one of the employee and in the case of the limited liability company, is justified by the provisions of art. 197 paragraph (4) of Law no. 31/1990 which stipulates that "the provisions regarding the management of joint stock companies are not applicable to limited liability companies, whether or not they are subject to the audit obligation". The interpretation of this article gives the idea that the management of the limited liability company cannot take the form of the unitary or dualistic system of managing the joint stock companies, the rest of the provisions being applicable, including the prohibition of the cumulating of the quality of employee with that of company administrator⁸.

⁴ Stanciu D. Cărpenaru, *op.cit.*, p. 212-213.

⁵ It should be mentioned that prior to the adoption of the Government Emergency Ordinance no. 82/2007 O.U.G. for amending and supplementing Law no. 31/1990 regarding commercial companies and other incidental acts, art. 1961 paragraph (3) of Law no. 31/1990, it had another content: "the sole partner may have the status of employee of the limited liability company whose sole partner is, unless he has the capacity of sole director or member of the board of directors".

⁶ More in the doctrine is found even the opinion that art. 196¹ of the Companies Law refers to the possibility of concluding an individual employment contract with the company and not to the cumulation of the quality of administrator with that of the employee - in this sense see Ștefan Vlad, *Cumulul calității de administrator cu cea de salariat*, available online at <http://www.dailybusiness.ro/bloguri/stefan-vlad/altele/cumulul-calitatii-de-administrator-cu-cea-de-salariat-353>, consulted on 1.10.2019.

⁷ I. T. Ștefănescu, Ș. Beligrădeanu, *Natura raportului juridic dintre societățile comerciale și administratorii sau directorii acestora*, „Dreptul” no. 8/2008, p. 57.

⁸ I. T. Ștefănescu, Ș. Beligrădeanu, *op. cit.*, p. 56.

The solution of the conclusion of a work contract between the administrator and the limited liability company, appears, in another opinion, to be at least a natural one, provided that in the frequent situations the administrator is chosen from the associates of the company. Thus, it is appreciated that the provisions of art. 137¹ para. (3) of the Companies Law are of strict interpretation and are not incidental also in the case of the limited liability company⁹.

In practice, the most relevant problem is that of dismissing the administrator from the position by decision of the general meeting of the associates with the rigorous modification of the articles of incorporation and maintaining the quality of the employee of the company.

The dismissal of the administrator from the position is made according to the procedure provided by Law no. 31/1990, not being necessary to motivate such a decision. However, although the company will modify the articles of incorporation and will have another director, the former administrator will retain his status as an employee, in the absence of a situation in which his individual employment contract can be dissolved.

The reasons for the dismissal of the administrator of the position may be due to a change in the company's management policy, reasons that cannot justify termination of employment relationships. In this case, any dismissal decision made without strictly observing the procedure for termination of the individual employment contract will inevitably lead to the nullity of the dismissal decision and to the reintegration of the employee, to the extent he or she so requests¹⁰.

The difficulties arising from such a situation are manifold and demand special attention from the legislator.

Thus, we consider that it would be necessary to regulate a prohibition similar to that of the joint stock company and in the case of the limited liability company, given that the risks arising from a possible labor dispute can lead to a blockage of the company.

4. The conclusion of a mandate contract between the limited liability company and the director

The mandate received by the administrator is, first and foremost, contractual in nature. The director is appointed according to the associates either by the instrument of incorporation, at the time of setting up the company or, subsequently, by the decision of the meeting of the associates. With the appointment to the position of administrator the associates will also establish the extension of

⁹ Monica Novac, *Calitatea de salariat si administrator al societății cu răspundere limitată*, available online at <https://www.juridice.ro/202417/calitatea-de-salariat-si-administrator-al-societatii-cu-raspundere-limitata.html>, consulted on 1.10. 2019.

¹⁰ Florentina Munteanu, Daniela Sora, *O controversă veche: administratorul salariat*, „Cariere” Journal, April/2010, available online at <https://revistacariere.ro/antreprenor/legal/o-controversa-veche-administratorul-salariat/>, consulted on 1.10. 2019.

the mandate, which may be with representation or without representation.

Revocation of the mandate given to the administrators can intervene at any time, according to the provisions of art. 137¹ of the Companies Law, by decision given by the meeting of the associates. Also relevant are the provisions of art. 1914 para. (2) Civil code which establishes that the administrator "may be revoked according to the rules of the mandate contract, unless otherwise provided in the company contract". Moreover, according to art. 132 of Law no. 31/1990 the administrators cannot appeal the decision of the general meeting regarding their dismissal from office.

However, if the revocation occurs without just cause, the administrator is entitled to payment of damages. We observe here a correlation with the provisions of art. 2032 of the Civil code stipulating the obligation of the principal who revokes the mandate, to remain obliged to execute his obligations towards the agent and to repair the damages suffered by the agent due to unjustified or unintentional revocation.

The conclusion of a mandate contract with the administrator, and not of an individual employment contract, presents on the one hand a number of advantages for the company, and on the other hand it has the role to avoid a series of significant incidents, generally circumscribed by the labor jurisdiction.

In this respect, the benefits of concluding a mandate contract with the company and not an individual employment contract are of the nature of the record. First of all, the problem generated by the situation of dismissal of the administrator creates far fewer practical problems, if the company has concluded a mandate contract with it.

Another benefit for the company is generated by the existing risks if the court considers that the mandate has been unjustifiably or inadvertently revoked. Thus, in such a situation, the company owes to the administrator any damages that may be added, in the case of the mandate with an onerous title, and the obligation to pay the representative the remuneration established by the mandate contract¹¹.

In addition, the clause may include a clause in which the parties establish a sum of money, with compensation for the non-executed period of the contract, which will be granted to the trustee in case the term is revoked inadvertently, independent of a fault in the execution of its mandate. For society, this possibility of limiting the risks is particularly favorable.

The solution is much milder compared to the situation generated by a labor law dispute in which the company will be obliged to pay equal compensation with the indexed, increased and updated salaries and with the other rights the employee would have benefited, until the final decision remains. court and possibly the reintegration of the employee. Moreover, the non-execution of the court

¹¹ Gheorghe Piperea G., *Contractul de mandat*, in Baias F. A., Chelaru E., Constantinovici R., Macovei I. (coord.), *Noul Cod civil: comentarii pe articole*, Ed. C.H. Beck, Bucharest, 2012, p. 2037.

decision regarding the payment of salaries within 15 days from the date of the enforcement request addressed to the employer by the interested party constitutes the offense of non-observance of the court decisions provided and sanctioned by the provisions of art. 287 of the Criminal Code.

The possibility of mentioning in the mandate contract a non-competition clause is much easier compared to the similar possibility in the individual employment contract, in the context where, in the latter situation, the provisions of art. 21 paragraph (1) of Law no. 53/2003 - The Labor Code imposes on the employer the obligation to pay the monthly non-competition allowance for the entire non-competition period.

Art. 197 para. (2) of the Companies Law stipulates the non-competition obligation of the administrators of the limited liability companies. They "cannot receive, without the authorization of the associates meeting, the mandate of administrator in other competing companies or having the same object of activity, nor do the same kind of trade or another competing on his own account or on the account of another natural or legal person, under the sanction of revocation and liability for damages". However, this obligation exists for the period during which the administrator is in office, for the period after the termination of his mandate, the principal may provide in the contract a non-competition clause that can produce its effects and for a period of time calculated from the date of termination of the mandate contract. The possible costs for establishing such a clause will be negotiated by the parties without the constraint of regulations specific to labor law. It should be noted in this sense that art. 21 of the Labor Code establishes a minimum limit for the monthly non-competition allowance due to the employee, namely "at least 50% of the average gross salary income of the employee in the last 6 months prior to the termination of the individual employment contract or, if the duration of the contract individual work was less than 6 months, from the average of the gross monthly salary income due to him during the contract".

5. Aspects of comparative law - the legal regime of the administrator in French company law

The legal nature of the relations between the administrator and the company is, in French commercial law, that of the social mandate, which goes beyond the notion of mandate *stricto sensu*. Thus, the administrator is more than a trustee of the company being considered a body of it¹².

For the position of administrator of the limited liability company, in French law we find the term "manager". Unlike our internal law, in which the legal nature of the relationship between the administrator and the company is a contractual and a legal one, in French law the legal nature of the administrator-

¹² Claudia Roșu, *Natura juridică a funcției administratorilor societăților comerciale în dreptul francez*, „Revista de Drept Comercial”, no. 10/2002, p. 168.

company relationship is legal, the administrators applying the regulations of the French Commercial Code, completed with the provisions of the constituent acts¹³.

The administrator of a limited liability company does not have the status of a trader, exactly as in our national law, but has the capacity of social agent and will be the legal representative of the company¹⁴.

The administration of the limited liability company can be performed exclusively by a natural person. The administrator of the limited liability company is appointed by the associates, according to art. 223-18 of the French Commercial Code, either in statute at the establishment of the company, or subsequently, by decision of the general meeting of the associates. The administrator may be revoked, with the majority required by law, and insofar as the revocation is made without a just cause, he may claim damages (art. 223-25 French Commercial Code).

Regarding the liability of the administrator in French law, the administrator of the limited liability company is held liable to the company or to third parties individually or jointly, depending on the situation¹⁵. We observe in this respect a significant distinction from our legislation in which the administrator is held liable only to the company and not to third parties, the only creditors of the company having an action in attracting the administrator's responsibility, which they will be able to exercise exceptionally only in the situation of the insolvency procedure.

Regarding the possibility of the company to conclude an individual contract of work with the director, the legislation provides this possibility both to the joint stock company, in certain cases expressly regulated by the French Commercial Code, and to the limited liability company.

The administrator of a limited liability company may, in accordance with French law, conclude an individual employment contract with the company he represents, if he is not a majority manager, by means of a majority manager, meaning the manager who owns more than 50% of the social capital. Thus, he can cumulate the function of administrator with the employee of the company if he is a minority or egalitarian administrator, that is, if he holds less or exactly 50% of the share capital, or if he is not a partner of the company. In his employment contract, the administrator exercises technical functions, different from those that he exercises as administrator¹⁶.

In this situation, the administrator will receive separate remuneration. On

¹³ Claudia Roșu, *op. cit.*, p. 162.

¹⁴ Annie Chamoulaud-Trapiers, *Droit des affaires*, 2nd edition, Ed. Breal, Rosny-sous-Bois, 2007, p. 43.

¹⁵ Nicole Ferry-Maccario, Jan Kleinheisterkamp, François Lenglard, Nicole Ferry-Maccario, Karim Medjad, Nicole Stolowy, *Gestion juridique de l'entreprise*, Ed. Pearson Education, Paris, 2006, p. 144.

¹⁶ Clara Ripault, *Être gérant et salarié en SARL: est-ce possible?*, available online at <https://www.legalstart.fr/fiches-pratiques/sarl/gerant-salarie-cumul/#ancr4>, consulted on 1.10. 2019.

the one hand he has the right to receive the salary by virtue of his quality of employee and on the other hand he has the right to a remuneration according to his activity as a company administrator.

We observe in French legislation a regulation diametrically opposed to our domestic law. Thus, in the conditions where, in our domestic law, the only associate who is also an administrator has the possibility of concluding a work contract with the company, in French law precisely the one who owns more than half of the share capital does not have the possibility to conclude an employment contract with society.

We consider correct and effective the solution offered by the French legislator, namely the granting of the possibility of the administrator to conclude a work contract with the company, a contract that must correspond to technical functions and distinct from those exercised as administrator of the company.

6. Conclusions

The problem raised in the Romanian doctrine regarding the possibility of the administrator to conclude an individual employment contract with the company is a common one also in French law. Although, much clearer the regulation in the French legislation, I could not fail to notice, in the research carried out, that the stated problem, regarding the relationship manager - limited liability company, is the subject of a constant question - maybe the administrator of a limited liability company does this function combine with that of the employee?

Indeed, I appreciate the solution offered by French law as a valuable and capable of answering the problem raised in the first part of the present study, namely what happens in the situation where the administrator dismissed from his position retains his quality of employee. Thus, in French law, the employment contract concluded by the administrator with the company does not concern his function as representative of the company but another function, which he can continue to exercise, in case the revocation of his mandate occurs.

In the conditions of a still unclear regulation in this matter in our domestic law, from the point of view of protecting the interests of the company, the solution of the ab initio conclusion of a mandate contract with the company administrator appears to be the most appropriate.

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Legal Conditions of Unusual Terms Institution

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Abstract

The institution of unusual clauses is a relatively new institution in the Romanian civil law, which has generated different interpretations in practice and in doctrine and which is aimed at preventing imbalances caused by the use of standard clauses. The standard terms serve the interests of the proposing party, setting out important aspects in the contractual relationship that is formed. They tend to change the contractual balance toward which each type of contract regulated by the legislator is approaching. This article analyses the legal conditions of unusual terms, which place one of the parties in a dominant position, shall entail. In particular, we will analyze (I) where the Romanian legislator was inspired to regulate the non-common clauses, (II) the conditions for a clause to be qualified as non-usual, (III) what penalty occurs in the event of non-compliance with the legal provisions on uncommon clauses, (IV) how we can derogate from the effect of the clauses, making them effective and holding the parties to perform that clause.

Keywords: *standard clauses, unusual clauses, contractual imbalance, professional.*

JEL Classification: K12

1. General presentation of unusual terms institution

The unusual terms institution derives from the abusive clauses regulated in consumer law. Both notions result from the same idea: it is unfair for a party to be bound by contractual provisions which it has not read and understood. „*The purpose of a regulation based on the theory of procedural fairness is to protect the internal will. The legal provisions edited for this purpose emphasize, in particular, the procedure of forming the contract and less the content of the contract.*”² Both institutions are based on negotiation and information formal duties.

Both unfair and unusual terms regulate the imbalance between the parties, by establishing mechanisms able to protect the weaker party (the consumer, the weaker party in the negotiating process), setting aside terms on which there is a suspicion of lack of consent. Their common feature is the lack of negotiations and the contractual imbalance generated by them.

The Romanian legislator was inspired by the Italian Civil Code, namely

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² B. Oglindă, *Clauze neuzuale în reglementarea Noului Cod civil român - provocare pentru jurisprudență și doctrină*, “Pandectele Române”, no. 3/2015.

Article 1341³. The institution is met also in the UNIDROIT Principles⁴, which defines them as „surprising terms”, in the Draft Common Frame of Reference and also in the Principles of European Contract Law⁵ where they are named as „not negotiated terms”.

According to the doctrine⁶ on unusual terms, „*Article 1203 of the Romanian Civil Code preserved the form of the Article 1341 from the Italian Civil Code but instead of referring to "general conditions of the contract" as it is the original provision, it refers only to "standard terms". The Romanian legislator also added to the listing of unusual terms the „applicable law” (terms that provide in the detriment of the other party the applicable law).*”

The unusual terms are defined by the Article 1203 from the Civil Code as being „*standard clauses providing for the benefit of the party that is proposing them the limitation of liability, the right to unilaterally terminate the contract, to suspend the execution of obligations or standard clauses that provide in the detriment of the other party the preclusion of its rights or of the benefit of the term, the limitation of the right to oppose exceptions, the restriction of freedom to contract with other persons, the tacit renewal of the contract, the applicable law, the arbitration clause or standard clauses that derogate from the rules on jurisdiction of courts shall not have effect unless they are expressly accepted in writing by the other party.*”

The premise for unusual terms is the existence of standard clauses. Only if we are dealing with standard clauses and they include an unusual term, the article 1203 of the Civil Code is applicable. Standard clauses are defined in the article 1202⁷ of the Civil Code as terms pre-established by a party, in order to be

³ Article 1341 Italian Civil Code: “*The general terms of the contract proposed by one of the co-contractors shall have effect to the detriment of the other party if at the time of the conclusion of the contract they knew or ought to have known them by taking due care.*”

⁴ Article 2.1.20 (Surprising terms): “*(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party. (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.*”

⁵ Article 2:104 (ex. art. 5:103 A) - Terms not individually negotiated: *(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document.*

⁶ I. F. Popa, *Tirania” clauzelor neuzuale*, „Revista Română de Drept Privat”, no. 1/2016.

⁷ Article 1202, Civil Code- Standard terms: *(1) Under the provisions of Article 1203 Civil Code, the provisions of this section shall also apply when standard clauses are used at the conclusion of the contract. (2) The standard clauses are the terms of the contract set out in advance by one of the parties for general and repeated use and which are included in the contract without having been negotiated with the other party. (3) The negotiated terms shall prevail over the standard terms. (4) Where both parties use standard clauses and do not agree on them, the contract shall, however, be concluded on the basis of the agreed terms and any common standard clauses in their substance, unless one of the parties notifies the other party either before the conclusion of the contract, or immediately thereafter, that it does not intend to be held by such a contract.*

generally and repeatedly used and included in the contract without being negotiated.

Usually, standard clauses serve the interests of the proposing party, who is elaborating a contract framework adapted to the economic area in which it operates. Therefore, although it has the advantage of shortening the negotiation time and covering a wide range of circumstances related to the specialized field of the contract, the use of standard clauses may also give rise to certain risks by giving a dominant position to the person proposing them and thus derogating from the principle of equality between the parties in the negotiation phase.

In order to prevent such risks, the Romanian law has regulated the institution of unusual clauses which alleviates the contractual imbalance created during the contract conclusion phase by inserting certain standard clauses.⁸

As examples of uncommon clauses encountered in practice, we present the following: *“With regard to the clause in Article IX, point 91.1 which states that, in the event of disputes, jurisdiction shall be assigned to the court at the purchaser's headquarters, the court shall find that it is subsumed to the system of unusual clauses.(...) It is noted that this clause has not been expressly accepted by the defendant and the court considers that only the signing of the full contract does not cover this legal requirement. To this end, there was a need for a declaration of express acceptance of the uncommonly agreed terms after the parties' signatures, which would bear a separate set of signatures. Consequently, it is noted that this term of jurisdiction is ineffective, as provided for by the Civil Code (...)”*⁹.

Another example¹⁰ in the practice of the Romanian courts is the following: *“(...) In all transport orders issued by the complainant , it prohibited its collaborators from establishing direct contractual relations with their customers, with the retribution of a penalty of 20,000 euros (Article 11 of the orders), and one of these costumers was PGS SOFA. The court considers that the clause restricting the right of collaborators to establish contractual relations meets the conditions for being an unusual clause.(...) This is also the case in the present case, and the complainant has imposed this standard clause to all its collaborators, clause which provides for limitations on their right to contract, without any express, one-off agreement, with regard to this clause; it is inserted directly into the transport orders (which ended quickly, by phone or by e-mail), but not into the framework contract between the parties.”*

⁸ B. Oglindă, *op. cit.*, 2015, p. 15.

⁹ Buzău District Court, Civil Decision no. 3704/2018, available online: www.sintact.ro, consulted on 1.10.2019.

¹⁰ Oradea Court, Civil Decision no 4055/2017, available online: www.sintact.ro, consulted on 1.10.2019.

2. The legal conditions of unusual terms institution

As indicated above, for a clause to be classified as unusual, it must fulfill certain conditions. First, the clause must be a standard clause within the meaning of Article 1202 Civil Code. It must then be examined whether the clause in question falls within the list provided for in the Article 1203 Civil Code, and, finally, it has to be considered whether that clause creates a contractual imbalance, giving unfair benefits to the drafting party or by putting at a disadvantage the party accepting it.

2.1. In order to be unusual, it must be a standard clause

The conclusion of contracts is currently dominated by the use of predefined clauses as a set of rules established in advance by one of the parties and inserted into contracts, thus adapting them to its interest. Standard clauses are used in various areas, such as transport, banking or distribution of goods, and have the advantage that they reduce the duration of negotiations or even make them unnecessary.

Standard clauses are defined in Article 1202 Civil Code as terms predefined by a party and used in a general and repeated manner, included in each contract without further negotiation. They have been defined over time in the doctrine¹¹ as clauses outside the contract, which are included without negotiation: *„The parties shall be bound, according to the principle of obligation, to respect the contract between them, the content of which shall not be limited to what is provided for in it. In addition to customary practice (they must therefore be complied with if they are proven to be constantly used between the parties), the content of a contract also includes certain clauses not included in the contract signed by the parties, but in another document with which the contract is clearly linked. We are therefore talking here about external clauses, as the new Romanian Civil Code calls them, that is, those clauses which are not included in the contract signed by the parties but to which the contract refers.”*

On the other hand, a clause can be a standard one even if it is inserted in the contract draft, if it meets the condition stated in Article 1202 of the Romanian Civil Code.

Therefore, in order for a clause to be considered a standard term, it has to fulfill two conditions: to be established by one of the parties in order to be used in a general and repeated manner and to not have been negotiated with the other party.

¹¹ G.I Tita- Nicolescu, *Considerații generale privind principiul obligativității efectelor contractului în reglementarea Noului Cod civil*, „Pandectele Romane” no. 9/2012, p. 23.

i. With regard to the first condition, in the comments of Unidroit Principles¹², it is assessed that it is not important neither how the clauses are presented (whether they have been incorporated in the contract or they are available in and additional document), nor who drafted them, nor the number of standard terms used by one of the parties.

What is important is the drafting of these clauses in advance for general and repeated use. It was also considered that it is not important whether that clause was actually used in relations with other persons or whether it had only the purpose to be used in the future. Of course, there remains the problem that the party invoking the standard nature of a clause should prove that the purpose of the clause is to be used repeatedly. This characteristic of the clause can be deduced from the way it is drafted, meaning that the clause does not detail specific features from the particular contract (for example, it does not detail specific features of goods, services, works that are object of the contract), but they can be included and can regulate, in general, a contract concluded by the tenderer in its area of activity.¹³

In the doctrine¹⁴, it was assessed that what is important when we look at this condition is the intention of the author of the clause. A clause may be standard since the first effective use, as the mere repetition of a clause in similar contracts concluded by the same party does not necessarily lead to the clause being qualified as standard. In relations between professionals, who frequently conclude a particular type of contract, there is a simple presumption that they intend to use generally and repeatedly a clause which frequently appears in the type of contracts used in their area of activity.

ii. Looking at the second condition, namely, the lack of negotiations, we consider that negotiations consist in a contradictory discussion between two parties, with the real possibility of amending certain clauses or proposing certain provisions. The lack of negotiations is a fact that must be analyzed objectively. Standardization is not removed by the existence of an opportunity to negotiate the clause, but only by effective negotiations, by giving effect to the possibility to negotiate that clause. At the same time, the lack of negotiations should be analyzed in relation to each clause and not by looking at clauses globally.

In practice¹⁵, in relation to this condition, the institution of unusual terms was applied in a highly critical manner from our perspective, misunderstanding its purpose and with the effect of converting the institution of unusual terms into an institution that is not applicable in any context: „*Thus, first, the Court notes*

¹² UNIDROIT, *Principiile UNIDROIT 2010*, C.H. Beck, Bucharest, 2015, p. 70-73.

¹³ E. Sârbu, *Pot fi neuzuale clauzele standard specifice unui sector de business?*, “Revista Romana de Drept al Afacerilor” no. 1/2019, p. 37.

¹⁴ A. A. Moise, *Comentariu art 1203*, in F. A. Baias a.o, *Noul Cod Civil. Comentariu pe articole*, C.H. Beck, 2nd ed., Bucharest, 2014, p. 1337-1339.

¹⁵ Bucharest Court of Appeal, Civil Decision no. 465/2015, available online: www.sintact.ro, consulted on 1.10.2019.

that, since the parties have agreed on both the law applicable to the contract (Spanish law) and the Spanish jurisdiction, the provisions of Article 1203 of the Romanian Civil Code are not applicable, and therefore such support is ungrounded in the light of the circumstances of the case.

On the other hand, the claimant itself invoked the contract between her and D_ in the form of the offer followed by the acceptance, a contract valid in its entirety, concluded between absences, widely practiced between traders. However, since the applicant himself claims in support of his subjective rights the contractual legal relationship entered into in this form, part of the clauses cannot be removed from the contract itself, because some of them would be customary and some would be uncommonly used, as it pleases, or as it is in the procedural interest that the case may be judged in Romania or Spain. Thus emphasizing the Court's conclusion that the contract was valid in the form of the tender followed by acceptance, including the clause on the applicable law and the Spanish jurisdiction, the Court will reject that criticism as being unfounded."

This court decision is deeply criticized from three perspectives.

First, it establishes that an applicable law clause cannot be *de plano* an unusual clause, when the chosen law does not regulate the institution of unusual clauses. However, if the conclusion of the contract is governed by Romanian law, irrespective of the provisions of the law chosen, the clause will be governed by Romanian law in terms of its validity or its unusual character. Since article 1203 of the Civil Code regulates that a clause of applicable law can be an unusual term, it follows that the reasoning of the court is in conflict with the provision of the law which it infringes by limiting the scope of the institution.

Secondly, it is questionable how the condition of express and written acceptance is being treated. The court is assuming that, as long as the contract in electronic form is widely accepted in all legal systems, then an electronic offer, followed by an electronic acceptance, is worth the contract assumed as a whole, including the applicable law clause and jurisdiction clause. However, the application of the express and written conditions of acceptance is not excluded in the case of an electronic contract. It remains the obligation to extract the two clauses from the entire proposed contract and to draw the acceptant's attention over these clauses, and ask him to expressly accept them, even though it is an electronic acceptance, by e-mail exchanges. The mere acceptance of the offer as a whole cannot be assimilated to the achievement of the institution's aim, because it does not achieve the desire to highlight the surprising terms.

Thirdly, the reprehensible interpretation of the institution of unusual terms in the above case shows a structural misunderstanding of this institution, revealed by the following reasoning: *„part of the clauses cannot be removed from the contract itself, because some of them would be customary and some would be uncommonly used, as it pleases, or as it is in the procedural interest that the case may be judged in Romania or Spain."*

Dissociating between the notion of procedural law abuse, which the court

seems to be sanctioning, and the notion of unusual terms, we believe that the application of unusual terms institution must have an effect contrary to the one from the case-law cited above, because the purpose of unusual terms institution is precisely the one denied by the court - to remove the unusual term from the contract itself. The abuse of procedural law differs from unusual terms. The abuse of procedural law concerns the conduct of the party during the trial, whereas the examination of unusual terms is made referring to the time of conclusion of the contract, on the basis of the conditions drawn up by Article 1203 of the Civil Code. Nothing prevents the admission of both institutions in this case, both the abuse of procedural law and unusual terms. But to reject the institution of unusual clauses by analyzing the abuse of procedural law is a superficial approach, carried out in breach of the principle of availability, because the court has in fact shown a refusal to judge the party's factual and legal reasons.

2.2. The clause shall fall within the list provided for in Article 1203 of the Civil Code

Looking at the second condition, we can classify the clauses into three categories:

A. Standard clauses which are established for the benefit of the proposing party and provides a limitation of liability, the right to unilaterally terminate the contract or to suspend the performance of obligations;

B. Standard clauses providing against the other party the preclusion of time limit or its right, limitation of the right to oppose exceptions, restriction of the freedom to contract with other persons, tacit renewal of the contract;

C. Clauses providing for applicable law, arbitration clauses or clauses derogating from the rules of jurisdiction of the courts.

In the comments made on UNIDROIT Principles¹⁶ it is specified that *“notwithstanding its acceptance of the standard terms as a whole, the adhering party is not bound by those terms which by virtue of their content, language or presentation are of such a character that it could not reasonably have expected them. The reason for this exception is the desire to avoid a party which uses standard terms taking undue advantage of its position by surreptitiously attempting to impose terms on the other party which that party would scarcely have accepted had it been aware of them”*.

As in the case of unfair terms, the legislator has chosen to list the terms in order to simplify the identification of those who may fall within the category of unusual terms. Even if there is a list, the law specialists insisted that it is not enough that a clause is mentioned on that list to be qualified as an unusual clause: *“In both cases, the insertion in the contract of such a clause of the list does not implicitly qualify it as non-usual or abusive. A contractual term listed on the list*

¹⁶UNIDROIT, *Principiile UNIDROIT 2010*, C.H. Beck, Bucharest, 2015, p. 70-73.

of Law No 193/2000 will be unfair if it meets the criteria laid down by law. A clause of those listed in Article 1.203 Civil Code shall also be classified as unusual in so far as the conditions presented above for the application of Article 1203 Civil Code are fulfilled.”¹⁷

In practice, Article 1203 of the Civil Code has been interpreted differently. Some courts¹⁸ considered the list as a restrictive one. For example: “*Specifically and restrictively, the standard clauses considered by the law to be uncommon are listed by the Civil Code, a list which, for ease, we define in three categories.*”

On the other hand, other courts¹⁹ have established that the legislator's listing is one that helps to take of evidence and does not limit the examples of clauses: “*The listing of these clauses shall result in the presumption of stipulations which fall under one of the above categories as lacking transparency, leading to a simplification of the evidently effects.*”

However, other authors believe that the list provided for in Article 1203 of the Civil Code should be interpreted restrictively: “*In our opinion, expressed in another study on the uncommon clauses, the list of clauses in Article 1203 of the Civil Code is a limited one.*”²⁰

“*Article 1203 of the Civil Code only affects certain standard clauses, restrictively provided by the text. In other words, each time we meet a prior provision laid down by one of the parties, for general and repeated use and which is included in the contract without having been negotiated with the other party, and that provision is not on the list mentioned by Article 1203 of the Civil Code, the standard clause shall be capable of being binding without the express written acceptance.*”²¹

An important benchmark for balancing the two opinions set out above could be how contractual coding projects deals with this dilemma. UNIDROIT Principles²² do not list the clauses that could be considered surprising, but they indicate of the general criteria that will be used to qualify a clause as unusual. The same flexible approach is found in the Principles of European Contract Law²³, Draft Common Frame of Goods and Contracts for the International of

¹⁷ B. Oglindă, *op. cit.*, 2015, p. 16.

¹⁸ Oradea Court, Civil decision no. 4807/2019, available online: www.sintact.ro, consulted on 1.10.2019.

¹⁹ Bacău Tribunal, Civil Decision no. 1029/2018, available online: www.sintact.ro, consulted on 1.10.2019.

²⁰ C. Tabirta, *Despre eroarea-viciu de consimțământ în noul Cod civil*, “Revista Romana de Drept al Afacerilor” no 6/2013, p. 65.

²¹ A. A. Moise, *op. cit.*, 2014, p. 1337-1339.

²² UNIDROIT, *Principiile UNIDROIT 2010*, C.H. Beck, Bucharest, 2015, p. 70-73.

²³ Article 2:104 (ex. art. 5:103 A) - Terms not individually negotiated: (1) *Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded.* (2) *Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document.*

Goods.²⁴

In our opinion, we support the extensive interpretation thesis, as we show in a former study: “*The Italian doctrine argues that the list of oppressive clauses is rigid, and the possibility of extending by analogy the scope of Article 1341 of the Italian Civil Code to other categories of clauses is excluded. However, even in the court’s practice, extensive interpretation is nevertheless claimed to be admissible only at the level and within the limits of each of the categories of clauses listed, to the extent that certain contractual provisions may be framed in the milestones outlined in Article 1341 Italian Civil Code. Thus, an extensive interpretation is allowed under each type of clause listed.*”²⁵

2.3. The clause should create a contractual imbalance in the sense of stipulating either for the benefit of one party or to the detriment of the other party

Standard clauses limiting the liability of a party, providing the right to terminate the contract unilaterally or to suspend performance of obligations are uncommon clauses only if those benefits are offered to the proposing party. If the right is stipulated in favor of another person than the one proposing the clause, it will not require express written acceptance to produce effects, leaving a standard clause operable without the need to be accepted expressly and in writing. Standard clauses which provide the preclusion of the right or the benefit of the term, the limitation of the right to oppose exceptions, the restriction of the freedom to contract with other persons, the tacit renewal of the contract, the applicable law, the arbitration clauses, derogations concerning the jurisdiction of courts will not be considered unusual terms if they are stipulated to the detriment of the party proposing them. In order that the provisions of article 1203 to be applicable, they must be stipulated to the disadvantage of the party who has not proposed them and who must accept them on the proposal of the other co-contractor.

The doctrine²⁶ considered that clauses limiting liability or giving the right to unilaterally terminate the contract or to suspend the performance of obligations would not be qualified as unusual if they set out those benefits in favor of the opposing party or in favor of a third party: “*In the case of standard terms limiting the liability of a party, or giving the right to terminate the contract unilaterally or to suspend performance of obligations, article 1203 shall apply only if those benefits are offered to the one proposing the clause. Consequently, if that right is*

²⁴ Art. II.—8:103: Interpretation against supplier of term or dominant party: “(1) *Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred. (2) Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.*”

²⁵ E. Sârbu, *op. cit.*, 2019, p. 38.

²⁶ A. A. Moise, *op. cit.*, 2014, p. 1337-1339.

stipulated in favor of another person other than the one proposing the clause, the clause may remain standard, but there will be no need to expressly accept it in writing in order to be effective. In addition, the clauses providing for preclusion of the benefit of the term, limitation of the right to oppose exceptions, restriction of the freedom to contract with other persons, applicable law, tacit renewal of the contract or arbitration clauses will only fall within the scope of article 1203 of the Civil Code if stipulated to the detriment of the other party. With regard to the clauses derogating from the rules of jurisdiction, article 1203 of the Civil Code shall apply irrespective of whether they are stipulated or not to the detriment of the opposing party.”

As regards the clauses which derogate from the rules of jurisdiction or the arbitration clauses, the literature²⁷ was of the opinion that regardless of whether the text does not fall into one of the two categories (in favor/to the detriment) there is a simple presumption that the party proposing that clause will do so for its benefit and not necessarily to the detriment of the other party: *“In the case of clauses that regulates jurisdiction, we believe that article 1203 of the Civil Code shall apply, irrespective of whether they are stipulated to the detriment of the opposing party to the standard clause or not. In practice, the party using a standard choice-of-court clause would be expected to stipulate the jurisdiction of the court in his place of residence or establishment, which would be an advantage to the detriment of the opposing party. Whether it should be noted that a standard choice-of-court clause must be unfavorable to the party adhering to the clause, we consider that no evidence is necessary to establish the potentially unfavorable character, which is the result of the circumstances of the case.”*

3. Legal effects of unusual terms institution

The doctrine and the jurisprudence illustrated all the views on the matter: absolute invalidity of the clause, relative nullity, unenforceability or, more simply, regarding the clause as unwritten.

Enforceability implies that the rights and obligations between the parties are validly founded, and for various reasons they cannot be opposed to third parties. This penalty cannot apply to unusual terms, since the legislator provides that they will not have any effect if they are not expressly accepted in writing.

Seeking to differentiate the unwritten clauses from the null and void clauses, the doctrine²⁸ has concluded that the difference was a formal one - in the case of unwritten clauses, the legislator expressly indicates them in the legislative

²⁷ Gh.-L. Zidaru, *Comentariu art. 126 C.Proc.Civ.*, in V. M. Ciobanu a.o. *Noul Cod de Procedură Civilă, comentariu pe articole*, Universul Juridic, Bucharest, 2013, p. 371-373.

²⁸ M. Nicolae, *Nulitatea parțială și clauzele considerate nescrise în lumina Noului Cod civil. Aspecte de drept material și drept tranzitoriu*, „Dreptul” no. 11/2012, p. 11.

text. "Substantially, both categories of clauses are subject to the same legal regime and cause the same legal inefficiency."²⁹

The non-written clauses were then considered as partial null and void.³⁰ With regard to what kind of nullity affects the unwritten clauses, special literature³¹ has said that we are talking about an absolute and partial nullity, since only absolute nullity could work *ex officio*, from the very moment of insertion of the clause in contract.

In essence, the mechanism of unusual clauses is intended to lead to a limitation of the contractual field to those clauses in respect of which it is certain that they have been noticed and agreed by both parties, with the natural consequence of the exclusion of the uncommon clauses.

The proper solution would be to consider the clause as unwritten. In fact, the practical issue is reduced as long as the clause does not produce effects, as expressed by the legislator itself in the final part of article 1203 Civil Code.

Since the unusual clause cannot refer to the main subject of the contract, which is supposed to be always foreseen by contracting parties, the unusual clause will not lead to the termination of the contract. Furthermore, its removal from the contractual field will result in its replacement with the applicable legal provisions. If the intention of the parties was to attribute an essential character to the unusual clause, considering that they don't have any effect if they are not expressly accepted, then the contract will be void in full. Nothing prevents the parties from replacing clauses which are ineffective with new contractual provisions, negotiated or at least accepted by the subscribing party.

Unanimously accepted in the doctrine³² was that in order to produce effects, the clause must be accepted in writing by the opposing party otherwise, the clause will have no effect:" *As long as it is expressly accepted by the other party, it will have effect as any other valid clause in a contract. If it is not accepted, an unusual clause does not produce any effect and is considered unwritten. The legislator by means of this enumeration only establishes informative formalism and the penalty for not respecting it. The legislator, making this enumeration only establishes an informative formalism and the penalty for not respecting it. Not knowing or understanding such a clause, it will not have any effect and it should be considered unwritten.*"

²⁹ Ibid.

³⁰ G. Boroi, C. Angheliescu, *Curs de Drept Civil. Parte general*, Hamangiu, Bucharest, 2012, pp. 247-250.

³¹ Ibid.

³² B. Oglindă, *Dreptul afacerilor - Teoria generală a contractului*, Universul Juridic, Bucharest, 2012, p. 90.

4. Derogation from the effects of unusual clauses: express and written agreement of the party affected by the contractual imbalance caused by the unusual terms

According to the law, in order to produce effects, unusual clauses must be expressly accepted in writing. In the doctrine³³, it was said that acceptance of the entire contract, in general terms, was not enough, because the inferior party is no longer protected in the negotiation process.

Thus, in the case of an uncommon clause, proof of full understanding must be provided by separate and express acceptance. In the absence of a valid consent, the clause will be considered unwritten. In practice, only the serial number of the unusual contract terms and/or the headings of the unusual terms shall be used, as appropriate, or placing the declaration of express acceptance of the uncommon terms after the parties' signatures, and to bear a separate set of signatures or expressly assuming them in a separate document.

The doctrine³⁴ also considered that the mere signing of the contract does not include the express agreement on unusual terms:” *Although the law does not expressly provide, we consider that the mere signing of the document establishing the agreement which also contains standard clauses is not sufficient to prove that those unusual clauses have been effectively agreed by the party. It is necessary to draw the party's attention to the existence of certain special clauses and to obtain his express consent regarding them. Evidence of such disclosure results from formalities such as the graphic demonstration of those clauses (thickening, writing in print characters of a certain size), followed either by a reference to each clause or by a final clause providing, in an intelligible form, both graphically and conceptually, that the party has become aware of the terms. We believe that a written clause in small, unclear, printed in a non-ordinary manner does not comply with the provisions of article 1203 of the Civil Code and should be considered as unbinding. We do not rule out that the agreement is expressed in an addendum, but only if it is concluded at the same time as the agreement containing the standard clauses.*”

However, there are also opinions that there is no need to sign after: “*Any written wording (distinct from the clauses in question) which indicates that the party has accepted those clauses meets the legal requirements. It does not matter whether the acceptance is followed by a signature of the party specifically made for that acceptance (distinct from the principal signature on the document) or whether the acceptance itself is handwritten or not, it is sufficient that the document establishing acceptance will give the express undertaking of the clause.*

³³ Gh.-L. Zidaru, *op. cit.*, 2013, pp.371-373.

³⁴ *Ibid.*

*Therefore, the document establishing acceptance may be the one establishing the contract which contains the standard clauses, but also another document representing an addendum.*³⁵

However, it was considered in the doctrine³⁶ that there are also cases where express acceptance of unusual clauses is not necessary, such as when the clause is laid down in a regulatory act, when the contract is authentic, when the clauses are drawn up by a third party who is not representing a party, or when the clauses have been inserted as a result of collective bargaining, as is the case in collective labor agreements.

A similar situation is also regarding the terms that translate commercial or regulatory usages. In this case, the requirement of express acceptance is replaced by the presumption of knowing the practices in question.³⁷

Thus, even if a standard clause is included in the contract by the party in a dominant position, if that clause is the result of cooperation and negotiation between the parties, express and written consent is no longer required for it to have effect, since article 1203 of the Civil Code does not apply anymore. In this situation, the conduct of the party invoking the application of Article 1203 NCC in order to remove the applicability of the clause may be regarded as abusive.³⁸

Not even the court practice has not been constant. There have been courts that have taken the view that it is necessary to respect the formalism imposed by the legislator and the parties must agree to each clause: *“only by signing the full contract, the legal requirement laid down in article 1203 from the Civil Code is not covered. To this end, there should be a declaration of express acceptance of the unusual terms after the parties' signatures, which will bear a separate set of signatures”*³⁹ or *“as stated in the literature”*⁴⁰, *express acceptance has the meaning of a nominated acceptance of the non-usual clause, which is entitled to the wording of the above legal text. This is also the situation in the present case, and the complainant has imposed this standard clause to all its collaborators, clause which provides for limitations on their right to contract, without any express agreement with regard to this clause, it is inserted directly into the transport orders (which ended quickly, by phone or by e-mail), but not into the framework contract between the parties.*⁴¹

We can also recall the following example: *“express acceptance implies the nominalized acceptance of the clause, i.e. possibly the nominal indication of*

³⁵ A. A. Moise, *op. cit.*, 2014, p. 1337-1339.

³⁶ L. Pop, I.F. Popa, S.I. Vidu, *Tratat elementar de drept civil - Obligațiile*, Universul Juridic, Bucharest, 2012, p.126.

³⁷ E. Sârbu, *op. cit.*, 2019, p. 38.

³⁸ *Ibid.*

³⁹ Buzău District Court, Civil Decision no. 3704/2018, available online: www.sintact.ro, consulted on 1.10.2019.

⁴⁰ L. Pop, I.F. Popa, S.I. Vidu, *op. cit.*, 2012, p. 126.

⁴¹ Oradea Court, Civil Decision no. 4055/2017, available online: www.sintact.ro, consulted on 1.10.2019.

the unusual clause that is the subject of acceptance."⁴²

However, there were courts that were not of the same opinion. For example: "*if unusual standard clauses are incorporated in the document establishing the contract which is endorsed by the signature of the parties, article 1203 is no longer applicable, since it must be considered that the party has given his consent in respect of the entire content of the contract. Indeed, it would be excessive if in such a situation the party had to express his consent twice, both in terms of the conclusion of the entire contract and regarding any unusual standard clauses in the contract, on the one hand, and on the other, it would mean a disregard for the mental capacity of persons, who cannot understand the legal consequences of their acts, which is unacceptable.*"⁴³

In the comments made on UNDRUIT Principles⁴⁴, it was stated that: "*A particular term contained in standard terms may come as a surprise to the adhering party first by reason of its content. The risk of the adhering party being taken by surprise by the kind of terms so far discussed clearly no longer exists if in a given case the other party draws the adhering party's attention to them and the adhering party accepts them. This Article therefore provides that a party may no longer rely on the "surprising" nature of a term in order to challenge its effectiveness, once it has expressly accepted the term.*"

In the examples given above, we can appreciate that the use of unusual clauses is not prohibited by law, but they must be made known to the parties either at the time of the negotiation of the contract or following subsequent amendment of the contract which also occurred following the negotiation of the parties. The clauses shall remain uncommon, creating an imbalance between the contracting parties, but by express acceptance, the party is accepting them and is assuming them and the contract shall thus be validly concluded by the express agreement of the parties.

5. Conclusions

The institution of unusual terms is a new institution in the Romanian contract law and produces different interpretations in both doctrine and judicial practice. This new legal provision improves the situation of the weaker party in the contract.

At this point in the Romanian case-law, it is highly questionable whether the desire of the legislator has been achieved in practice. We have analyzed above court decisions showing a structural misunderstanding of the institution, as well as decisions showing the correct and effective application of this institution in

⁴² Bacău Tribunal, Civil Decision no. 1029/2018, available online: www.sintact.ro, consulted on 1.10.2019.

⁴³ Bucharest District Court 2, Civil Decision no. 5115/2016, available online: www.sintact.ro, consulted on 1.10.2019.

⁴⁴ UNIDROIT, *Principiile UNIDROIT*, 2010, C.H. Beck, Bucharest, 2015, pp. 70-73.

balancing onerous contracts for the vulnerable party in the negotiation phase.

We can only express the hope that this study will bring a contribution to the unification of judicial practice and to the application of this institution in the spirit and in the legal conditions in which the legislator has created it.

The dichotomy between the institution's restrictive or expansive scope also remains topical, but as long as the clause creates a significant contractual imbalance and unfairly links the weaker part to respect issues that it has not known and understood, we appreciate that the judge or arbitrator should interpret the scope of the institution expansive and carefully check whether the clause could fall within the typologies listed in article 1203 Civil Code, so that the social and economic purpose of justice brings the restoration of contractual equity and ensures a business environment where "small players" also have their chance to survive and make profit.

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Axiological Basis for the Tax System

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Abstract

The study is carried out within the boundaries of the research “Taxation policy of the Republic of Latvia within the context of the principle of equity”. The subject of the study is the creation of a theoretical basis for considering the principles of the tax system in terms of the axiology of law. The work is based on the legislative practice of the Republic of Latvia, including with the increasing use of electronic systems for collecting and processing information about the tax base. The study relies on legal literature, judicial practice, state planning documents and the researches ordered by the government and carried out by private contractors or scientists, as well as on statistics. The data collection does not confine itself to the research of phenomena and the systematization of the new knowledge and the knowledge acquired before, but mostly uses the empiric scientific method – observations, surveys. The study also employs the theoretical scientific method by analyzing the aforementioned documents and literature and using these as a basis for developing the theory and suggesting hypotheses, as well as through scientific (conceptual) modeling. Relying on the acquired data, the author verifies the forecasting power in order to achieve the objective of the study.

Keywords: *taxation, system, axiology, law, electronic, data, tax, principle, living wage, wealth.*

JEL Classification: K34

1. Introductory considerations

Taxes play an important role in generating government revenue. With the help of taxes, the state performs its economic, social and other functions. Taxes are the main revenue source of the state, providing financing for its activities. Funds collected by the state in the form of taxes go to the state budget and extra-budgetary funds of the state. Further, distributed and redistributed, these funds are spent on the maintenance of public administration bodies, law enforcement agencies, defense, financing of sectors of the national economy, payment of public debt, financing of education, healthcare, social welfare and social protection and other areas. Insufficiency of tax funds, inefficiency of the tax mechanism, low tax collection, ill-conceived tax policy will negatively affect the state and its citizens, the economy. The state can exist effectively when it has certain financial resources, it uses various ways to attract resources, but still the main ones are taxes. An effective tax system is the basis of the life of any state. Thus, the issues of taxes and taxation are relevant in any state.

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The purpose of this study is to determine the significance of legal values in the tax system. And also, whether modern electronic systems for collecting and processing information can affect the harmonization of the tax system.

In order to achieve the goal of the study, it is necessary to conduct a theoretical study of the interaction between conclusions of the axiology of law and formation of the tax system. In other words, to determine the place of taxes in the system of legal values. And also to trace how modern electronic systems for collecting and processing information can affect the culture of paying taxes. The author adheres to the assumption that culture of tax payment, i.e. discipline of citizens in relation to the fulfillment of tax obligations is the best indicator of harmoniousness of tax system. The author considers a system of taxation a number of legislative acts, customs and traditions, aimed not only at establishing the subjects of taxation and the tax base and rate, but also at tax accounting and tax collection. The results of tax collection, processed in the state reporting and statistical data, shows how much the public relations evolving in connection with the establishment and collection of taxes and duties are effectively (harmoniously) regulated by legal norms. By monitoring changes in tax laws and taxation difficulties in the Republic of Latvia, author will be able clearly determine which role modern electronic data collection and processing systems can play in improving the efficiency of the tax system.

2. Axiological basis for the tax system in Latvia

On July 22, 2014, the Law of the Republic of Latvia “Amendment to the Constitution of the Republic of Latvia” entered into force. In the final reading, the law was adopted at a meeting of the Seima of the Republic of Latvia on June 19, 2014, and on July 8, 2014, the law was proclaimed by Andris Berzins. The law:

To make the following amendment to the Constitution of the Republic of Latvia:

To introduce the Constitution of the Republic of Latvia in the following wording:

"The State of Latvia, proclaimed on 18 November 1918, has been established by uniting historical Latvian lands and on the basis of the unwavering will of the Latvian nation to have its own State and its inalienable right of self-determination in order to guarantee the existence and development of the Latvian nation, its language and culture throughout the centuries, to ensure freedom and promote welfare of the people of Latvia and each individual.

The people of Latvia won their State in the War of Liberation. They consolidated the system of government and adopted the Constitution in a freely elected Constitutional Assembly.

The people of Latvia did not recognise the Occupation regimes, resisted them and regained their freedom by restoring national independence on 4 May

1990 on the basis of continuity of the State. They honour their freedom fighters, commemorate victims of foreign powers, condemn the Communist and Nazi totalitarian regimes and their crimes.

Latvia as democratic, socially responsible and national state is based on the rule of law and on respect for human dignity and freedom; it recognises and protects fundamental human rights and respects ethnic minorities. The people of Latvia protect their sovereignty, national independence, territory territorial integrity and democratic system of government of the State of Latvia.

Since ancient times, the identity of Latvia in the European cultural space has been shaped by Latvian and Liv traditions, Latvian folk wisdom, the Latvian language, universal human and Christian values. Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society. Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature.

While acknowledging its equal status in the international community, Latvia protects its national interests and promotes sustainable and democratic development of a united Europe and the world.

God, bless Latvia! [19 June 2014]"²

In the annotation of the legal act in paragraph 1.1. - 1.3. recorded:

“1. Why is the law necessary?

1. The effective Constitution of the Republic of Latvia was adopted on February 15, 1922, less than four years after the proclamation of the state and two years after the fierce struggle for Freedom, in which an independent, democratic Latvian nation as a result of the self-determination of the Latvian state, it was fought against networks of other countries and political forces. At that time, it was clear to everyone why and for what purpose the Latvian state was founded and fought. Therefore, although the Constitutional Assembly Commission, which drafted the Satversme, was discussing it, at that time there was no obvious need to disclose the meaning and essence of the Latvian state in a visible way in the preamble or introduction of the Satversme. At the time, in other constitutions, such an explanation was not yet very widespread. Therefore, the present introductory part of the Satversme, while noting the important fact of the final consolidation of the constitutional order of the Latvian state, does not reflect the broader foundations of the State.

2. Since then the situation has changed. First of all, Latvia has experienced a long period of occupation, where the totalitarian occupation power tried to eradicate the historical memory of the Latvian people about their country, its meaning and essence, and at the same time to prevent a positive attitude towards

² Law of the Republic of Latvia: June 19, 2014 Amendment to the Constitution of the Republic of Latvia. The Latvian Journal 131, 08.07.2014. available: <https://likumi.lv/doc.php?id=267428>, consulted on 1.10.2019.

it in the future. It still partly influences public attitude towards the Latvian state.

Secondly, at that time, it was not yet mature enough to make the understanding of one's country, its meaning and substance, its aims, values and guiding principles desirable, in order to promote broad and constructive participation in the political process.

This heightened requirement for the visibility of the foundations of the state is reflected in the fact that most democracies' constitutions adopted after World War II, either in their preambles or in the body of the constitution, reflect their foundations, their national and constitutional identities. This also applies to the constitutions adopted in 1992 by our neighbors, Estonia and Lithuania. Of the 50 constituted democracies currently constituted, 37 have a preamble which sets out the foundations of the State, and five have these foundations in the body of the constitution, and only eight have such an extended preamble. The visibility function of the introductory part, both in the constitution and in the law, is also emphasized in modern good law theory.

3. For these two reasons, it would be desirable to supplement the Satversme with a new Introduction appropriate to these findings. The state is a long-lasting, indefinite formation, covering past, present and future generations. It must therefore respect the achievements of previous generations in the struggle and development of our country, meet the needs of the present, and mark the responsibility for future generations to whom our country must be passed down in the best possible order.

To be able to do this, you need to be aware of certain facts, values, and principles that are outlined in this Introduction.”³

In addition, in paragraph 1.6. - 1.8. indicated:

6. The third paragraph of the Introduction introduces the general principles of the Latvian state. They correspond to a modern Western-type democratic state, also showing the specific features of Latvia.

Latvia is considered to be a democratic, legal, socially responsible and national state. The political and legal content of these categories characterizing the Latvian state system is further elaborated in the institutional and human rights sections of the Satversme, laws adopted by the Saeima, the European Union legal norms binding on Latvia, judgments of the Constitutional Court and other courts.

All state action is based on human dignity and freedom as the national philosophical axiom of law and human rights as the external framework of state action. Although this follows from the stated principle of respect for human rights, minority rights are specifically mentioned.

The second sentence states that Latvia cannot be vulnerable. The people of Latvia are protecting their national foundations - they are protecting their sovereignty, the independence of Latvia's state, territory and democratic state system.

³ State Chancellery: Annotation of the Draft Law “Amendment to the Constitution of the Republic of Latvia”. Available: <http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/64D394CCE1123A42C2257C7D00523485?OpenDocument>, consulted on 1.10.2019.

It is everyone's right and moral duty, but in statutory cases it can also be a legal obligation (eg military service, criminal defense of these grounds). It is the duty of the representatives of the Latvian people - state officials in particular.

7. The fourth paragraph of the introduction sets out the values on which our society is based and the references to the key factors that make up our identity. By "we" we mean anyone who, on the basis of these values, feels his belonging to Latvia. The list is, of course, not exhaustive, only the essential values and factors are listed. The individual is by no means forced to join them, everyone can create their own value system and identity, using some or all of the factors listed here. It is fully guaranteed by human rights.

The first sentence outlines our geopolitical location - we are in the cultural space of Europe. The first sentence below points to the roots of our cultural identity, rooted in both the original Latvian "branch" (traditions, life-style), the universal human values, largely rooted in ideas of enlightenment, and the Christian values that have influenced European cultural space. against churches governed by the second sentence of Article 99 of the Satversme). The central component of our identity is the Latvian language. The list is not exhaustive, only the most important factors are listed here.

The second sentence, which corresponds to the Saeima statement of 2 February 2012 on the state role of the Latvian language, points to the Latvian language as the basis for democratic participation and a cohesive society. The Latvian language must be common to all who feel Latvian, regardless of their origin and national identity. Without it, full democratic participation and a cohesive society are not possible. Therefore, the state must promote it so that it truly becomes our common language.

The third sentence refers to the most fundamental values of society - freedom, fairness, justice, solidarity, equality. These values are necessary for the functioning of a democratic and rule-of-law state and its corresponding rights, since any right is always based on axiomatic fundamental values. These core values are also reflected in the structure of the state. In turn off, references to family and work mean that these forms of social life are morally and legally recognized and encouraged.

The fourth sentence refers to the individual's place in society and its relation to it. An individual must at least care about himself or herself, his or her relatives, and the general good of society to the best of their ability. It is a moral reminder against the unilateral use of society. The individual is thus required to make a positive contribution. It is specifically determined by law, but the individual is called upon to give to the public more than the law requires. What follows is the responsibility of the individual to behave responsibly towards others, the country, the environment, nature, and future generations. Unlike the above, what is required here is not a positive contribution but only responsible behavior, i.e. not undermine these values.

8. The fifth paragraph of the introduction presents Latvia's place and role

in the international community. As a small country, Latvia must actively participate in world politics. In doing so, Latvia has two goals - first, to defend its interests and, second, to contribute to the humane, sustainable and democratic development of the world and a united Europe (especially the European Union). Although these goals are defined in very broad terms, they are clear enough to determine Latvia's positive role in the world and in Europe"⁴

The above bill and its annotation are clear examples of how legal values are constitutionally enshrined. What values relate to the tax system, and what may be their significance.

According to the founder of the French public figure, Pierre Joseph Proudhon (1809-1865), "in essence, the question of taxes is a question of the state."

B.A. Reisberg points out: "Taxes have been known to people since ancient times. Life is so arranged that part of our income has to be given to others. Such a duty, duty has been imposed and is still imposed on those who receive something, have something. The first tax collectors were apparently the gods themselves. According to pagan beliefs, it was necessary to make sacrifices to the gods. These were taxes in their original form, in the form of a sacrifice."⁵

The first written sources of taxes dated back to the 18th century. BC, when the Babylonian king Hammurabi (1792-1750 BC) issued a series of laws, known as the Hammurabi code, which have survived to our time.

The Pentateuch of Moses says: "... and every tithe on the earth from the seed of the earth and the fruits of the tree belongs to the Lord." As the state developed, "secular" tithe arose, which was levied in favor of the sovereign princes and sovereigns along with church tithe. This practice has existed in various countries for many centuries: from Ancient Babylon and Egypt to medieval Europe⁶.

The principles of taxation formulated in the fundamental work of the Scottish economist Adam Smith (1723-1790), "A Study on the Nature and Causes of the Wealth of Nations" in the V book "On the Monarch's and Republic's Incomes", published in 1776, gained historical fame. These principles were later named "The Great Charter of the Taxpayer's Liberties", or "Declaration of the Rights of Taxpayers".

1. "Subjects of the state should, as far as possible, according to their ability and forces to participate in the content of the government, i.e. according to the income they use under the auspices and protection of the state" (principle of justice).

⁴ *Idem.*

⁵ Райзберг Б.А., *Основы экономики*, М.: Инфра-М, 2000. С. 187-188 (Reisberg B.A. *Fundamentals of Economics*, Moscow : Infra-M, 2000, p. 187,188).

⁶ Теория и история налогообложения: учебник для академического бакалавриата / Д.Г. Черник, Ю.Д. Шмелев; под ред. Д.Г. Черника. М.: Юрайт, 2014. 364 с. Серия «Бакалавр. Академический курс» (*Theory and history of taxation: a textbook for academic undergraduate / D.G. Chernik, Yu.D. Shmelev; under the editorship of D.G. Blueberries, Moscow: Yurayt, 2014, p. 364, Series "Bachelor. Academic Course"*).

2. “The tax that each individual is obligated to pay must be precisely determined, and not arbitrary. Payment term, method of payment, payment amount - all this should be clear and definite for the payer and each other person” (certainty principle).

3. “Each tax should be levied at the time and in the way when and how it should be most convenient for the payer to pay it” (convenience principle).

4. “Each tax should be conceived and designed so that it takes and holds out of the pockets of the people as little as possible beyond what it brings to the state treasury (the principle of profitability).⁷

The listed principles of taxation have not lost their significance in modern conditions. These principles are used as a kind of ideal that must be used in developing the principles of tax systems at various stages of development of the state economy.

Much later than the theory developed by Adam Smith, the theory of taxes and economic theory was studied by the English economist John Maynard Keynes (1883-1946). In his main work, *The General Theory of Employment, Interest, and Money*, published in 1936, he substantiated the tools of state regulation of the economy. Along with other economic levers, he paid much attention to tax regulation; emphasized that tax policy can have a powerful effect on economic growth, increasing employment, and stimulating the propensity to consume⁸.

In turn off, J. Stiglitz in his works pays much attention to the problems of optimal taxation. He emphasizes that the optimal tax structure is one that maximizes public welfare⁹.

This brief historical analysis shows the development of tax thought, as well as the fact that theoretical studies on taxes, as well as tax systems themselves are developed on the basis of taxation principles, which, in turn off, depend on the idea of values in a particular society in a specific time period.

The ignorance of the ruler (the author means the legislative system of the state), i.e. taxation, contrary to the prevailing notions of state values among the majority of the population, can lead to very sad consequences. Such consequences can be expressed both in the economy of the country, for example, insufficient fees to the treasury to ensure the effective functioning of the state apparatus, which can lead to an economic recession, and in extreme cases in the manifestation of public disobedience, for example, public unrest, protests, riots and etc. The importance of a fair and well-thought-out tax policy in basic research is shown by David F. Burg in his work “*A World History of Tax Rebellions: An Encyclopedia of Tax Rebels, Revolts, and Riots from Antiquity to the Present.*”

⁷ Смит А., *Исследование о природе и причинах богатства народов*. М., 1962. С. 588-603 (Smith A., *Research on the nature and causes of the wealth of peoples*, Moscow, 1962, p. 588-603).

⁸ Кейнс Дж.М., *Общая теория занятости, процента и денег*. М., 1978 (Keynes J.M., *General theory of employment, interest and money*, Moscow, 1978).

⁹ Joseph E. Stiglitz, *The Great Divide: Unequal Societies and What We Can Do About Them*. W. W. Norton Company, 2016. p. 206.

His work is an exhaustive reference source of information on more than 4,300 years of unrest, uprisings, protests and wars provoked by inappropriate taxation and tax collection systems around the world. Each of the chronologically ordered records is devoted to a specific historical event, an analysis of its roots and a socio-economic context¹⁰.

In order to better understand how the axiology of law is connected with the taxation system and why the idea of the values of law is important to understand and to take into account when drawing up legislative acts on tax, the author means it necessary to consider the basics of the axiological (value) theory of law.

The anthropocentric, liberal, moral concept of law was developed by the Russian jurist Sergei Sergeevich Alekseev (1924-2013), who was one of the authors of the Constitution of the Russian Federation, adopted in 1993. The scientist carries out the value measurement of law from several positions: the value of law consists, firstly, in its socio-political purpose; secondly, in its properties as a highly effective and appropriate regulator of social relations, ensuring their orderliness, certainty, stability, dynamism and systematic character; thirdly, in the ability to develop democratic principles, affirm and protect the rights and freedoms of the individual; fourthly, in a means of expressing the spiritual, cultural and moral values of society.¹¹

Legal regulation in the taxation system of a modern democratic and legal state is both the basis of the system and the guarantor of its effectiveness. The effectiveness of the tax system is also the result of a tax culture. Therefore, general legal principles cannot be neglected either when creating a legal act in the field of taxes or when enforcing fees, since general legal principles are based on the values embodied in law (in other words, the value of law).

The postmodern era requires a consistent response to many eternal questions of philosophy and theory of law, Nina Tsintsadze believes. It becomes obvious that the classical types of legal thinking do not satisfy the post-industrial needs described by I.L. Chistnov as the destruction of the logocentrism of scientific thinking. She believes that a fundamentally new type of legal understanding must be sought in social philosophy (or theoretical sociology), because it is philosophical concepts that can serve as the basis for a new type of legal understanding that can respond to the challenge of postmodernism.

Of these philosophical trends that can offer a new approach to law, I.L. Chistnov distinguishes phenomenology, hermeneutics, anthropology and synergetic. Due to the fact that modern legal reality is characterized by such qualities as dynamism, variability, instability, dependence on subjective perception, as the researcher believes, the most significant theories of legal understanding can be developed on the basis of a synthesis of these philosophical directions.

¹⁰ David F. Burg, *A World History of Tax Rebellions: An Encyclopedia of Tax Rebels, Revolts, and Riots from Antiquity to the Present*, Routledge, 2003.

¹¹ Алексеев С.С., *Собрание сочинений*: в 10 томах. М. 2010. Т.3. С.26 (Alekseev S.S., *Collected Works*: in 10 volumes, Moscow, 2010, V.3., p. 26).

We share the opinion of I.L. Chistnov that special prospects in a comprehensive understanding of the essence of law are in synergetic, as the youngest interdisciplinary direction of scientific research, containing a non-linear type of thinking and a probabilistic picture of the world that studies the morality, instability and irreversibility of complex objects and processes. Any system does not tolerate stagnation, but it is necessary to make changes basing on traditions.¹²

Understanding the value of law from the perspective of a synergistic approach will allow you to penetrate into its essence, taking into account the specific historical conditions of its existence. The high heuristic and methodological potential of the cooperation of legal theory with philosophy and sociology is undeniable. The theoretical and methodological crisis of modern law, as it seems to us, requires updating or rethinking the paradigm of legal awareness, cleansing it of ideological ideology cluttering scientific knowledge, developing a unified and clear theoretical platform that combines various concepts of legal understanding on the basis of methodological pluralism, including and the axiosphere of law. With reference to M.I. Baitin¹³ about the need to develop a single concept of law, without which the theory of law is threatened with erosion.

Legal regulation in the taxation system of a modern democratic legal state is both its basis and the guarantor of efficiency. Therefore, ruler cannot neglect social and legal values when creating a legal act or enforcing tax laws.

Modern taxpayers are gaining greater mobility and wider access to improving technologies and services, which creates the need for tax authorities to use a number of different methods to match the level of modern society.

Effective tax administration in modern conditions should be able to offer services and assistance based on the latest information technologies, build on the respect and trust of taxpayers thanks to automated high-level services, professionalism of employees and high standards of tax conduct¹⁴.

The value function of tax culture is expressed using a system of axiological characteristics, which are a set of values in the field of taxation. Spiritual and legal values are the basis of the tax culture, they become the regulator of the relationship between people. The main objective of this function is to introduce the

¹² Цицнадзе Н.С. *Концептуальные аспекты аксиологической теории права*, „Вестник Тамбовского университета. Серия Гуманитарные науки”. Тамбов. 2012. Вып.4 (108) С 351-354. [Tsitsnadze N.S., *Conceptual aspects of the axiological theory of law*, „Bulletin of the Tambov University. Series Humanitarian sciences”, Tambov, 2012. Issue 4 (108), p. 351-354].

¹³ Байтин М.И. О современном нормативном понимании права, „Журнал российского права”, 1999, №1 (Baytin M.I., *On the modern regulatory understanding of law*, „Journal of Russian Law”, 1999, No. 1).

¹⁴ Е.В.Надточий, *Налоговая культура общества как основа развития налоговой системы*, „Стратегия развития экономики” 15 (204) – 2013 [E.V. Nadtochiy, *The tax culture of society as the basis for the development of the tax system*, „Economic Development Strategy” 15 (204) – 2013].

subjects of tax relations into the system of value-semantic and regulatory-regulatory categories of the state tax system.¹⁵

This is indicated in the second, third, fourth, fifth and sixth consolidated report of the Republic of Latvia on the implementation of the international covenant of 1966 on economic, social and cultural rights in 2008-2017.

In the country, wages are regulated by the minimum monthly wage, which is mandatory for the employer to provide workers with regular working hours (40 hours a week). The minimum monthly wage is a tool for protecting low-skilled workers and reducing social inequalities. Regulations of the Cabinet of Ministers "Procedure for Determining and Revising the Minimum Monthly Wage" have been elaborated for the improvement of the system of determination and revision of the minimum monthly wage. Comparing the ratio of the minimum monthly wage to the CSB calculated average monthly AMzin_08102018_ICESCR_2008-2017; Consolidated Second, Third, Fourth, Fifth, Sixth Regular Reports of the Republic of Latvia on Implementation of the 1966 International Covenant on Economic, Social and Cultural Rights in Latvia 2008-2017 35 gross wages and salaries for the previous year; The minimum monthly wage for the last three years is decreasing as a percentage of the calculated average monthly gross wage for the previous years.

3. Conclusions

Considering the reports of the previous period and the change in the minimum wage in the Republic of Latvia, we can conclude that the situation is improving, as well as a positive trend in consolidating legal principles and values at the legal level. However, one of the important indicators, as follows from newspaper publications - the basket of a living wage, remains uncertain¹⁶. Thus, the consolidation of principles at the legal level is still more formal in nature than it gives the possibility of practical improvement of the tax culture, however, stable work is shown in the implementation of long-term strategic plans for the development of the state economy.

Today we have an effective tool - an electronic system for collecting and processing information during taxation. Using this tool wisely, the state will be able to achieve the highest efficiency in the processes of budget planning and tax collection, thereby increasing the level of tax culture.

The author of the study tried to state the importance of the axiology of law in understanding the legal theory and axiological basis for the state tax system. The author also examined the basic principles of taxation. The author, on the example of the development of the tax system in the Republic of Latvia, noted

¹⁵ *Ibid.*

¹⁶ The new size of the subsistence basket is planned to be announced next year - <https://www.diena.lv/raksts/atvija/zinas/iztikas-minimuma-groza-jauno-apmeru-plano-nosaukt-nakamgad-14214966>, consulted on 1.10.2019.

positive trends in the formalization of taxation principles, but still observes the difficulties in applying the result of such formalization in practice. The author emphasized the importance of increasing the tax culture, and how modern information technologies can contribute to this. To increase the tax culture, a thoughtful definition of the tax base, as well as simplification and automation of the tax collection system, is of considerable importance. Axiological values, including those formally enshrined, contribute to the improvement of the tax culture, and at the same time, increase the efficiency of the tax system. The core values should increasingly be consistent with Pan-European policies and the state development strategy, including with international documents of fiscal discipline. Electronic systems for collecting and processing information, and summary data from them, should be more actively used in determining the tax base and rate. All the previously mentioned guidelines should be reflected not only in the documents of political planning, but also at the constitutional level, as well as in the system of legal and by-laws, for more successful budget planning and budget revenues.

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Characteristics of the Dissolution of Non-Banking Financial Institutions

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Abstract

This paper deals with a fundamental aspect of the legal framework of companies, i.e. the end of the existence of companies, by dissolution and liquidation. We consider that tackling such a topic is very current and fully justified theoretically and practically. Companies reflect the evolution of the society in which they coexist, being undeniably linked to the economic life of civil society. Similar to natural persons, legal persons are born, they carry out their social life according to the purpose for which they were created and disappear through dissolution and liquidation. The presentness of this paper results, thus, not only from the fact that the existence of companies as "engines" of social life affects the entire civil society, but also from the fact that, in the current economic context, the study of companies' operations of dissolution and liquidation is extremely appropriate for legal practitioners and others².

Keywords: dissolution, liquidation, nullity, company.

JEL Classification: K10, K20, K22, K29

1. The notions of dissolution and liquidation of a company

The company is constituted on the basis of a constitutive act and by fulfilling the formalities required by the law, and during its existence it performs the activities specified in the object of its activity, as decided by the associates. As a legal person, the company establishes legal relationships with both associates and third parties. The process of terminating the legal personality of a company usually requires two mandatory steps, i.e. the dissolution and liquidation of the company.

The dissolution of companies has been defined by some authors as a start-up phase of the process of ending a legal personality, along with liquidation, which it precedes³. According to another opinion, the dissolution meant the abolition of the company's legal personality, i.e. the termination of its existence. Other theorists have found that dissolution is a legal way of ending the existence

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² Roș, V., *Dizolvarea societăților comerciale. Particularități ale dizolvării pe cale judiciară. Lichidarea societăților comerciale. Momentul în care intervine rolul instanței de judecată în mersul lichidării*, „Revista de Drept Comercial”, no. 1/1996, p. 58; Cârpenaru, S. D., *Tratat de drept comercial român*, revised 5th edition, Universul Juridic Publishing House, Bucharest, 2016, p. 213.

³ Diaconu, R., *Instituții financiare nebancare*, C.H. Beck Publishing House, Bucharest, 2011, p. 75.

of a company⁴. Certain specialized papers identify dissolution with a fact that determines the end of a company's existence as an active organism, which aims to achieve benefits from activities and liquidation of companies. According to other authors, dissolution is a technical process which prepares the liquidation phase.

Beyond the nuances of the definition in the specialized literature, we consider that the dissolution of a company actually concerns those operations that trigger the process of its termination, and which provide the premises for the liquidation of the company's patrimony. We think that these operations refer to the decision to dissolve the company and to bring it to the attention of the stakeholders. In accordance with the law on companies, the decision to dissolve the company is taken either by the assembly of the associates, or by the court, and only as an exception the dissolution of the company occurs in compliance with the law.

The dissolution does not affect the legal personality of the company, as the operations taking place at this stage only have the role of triggering the process of terminating the existence of a company. The termination of the existence of a company requires performing operations that will result not only in the termination of the legal personality, but also in the liquidation of the company's patrimony, by exercising rights and fulfilling social obligations.

Hereinafter, we want to carry out a brief analysis of the particular situations and causes of dissolution specific to non-banking financial institutions, legal entities that present a series of characteristics regulated by a special legislation.

2. Declaring the nullity of a company and the impossibility of achieving the company's object of activity

The declaration of the company's nullity and the impossibility of achieving the company's object of activity are causes of dissolution, which in the case of non-banking financial institutions need a series of explanations.

According to the provisions of Law 93/2009 on non-banking financial institutions and of the National Bank of Romania (BNR) Regulation no. 20 of 2009 on non-banking financial institutions, the constitutive act must be drafted and acknowledged by a Civil Law Notary or bear a certified date. At the same time, the nullity of a company registered in the Trade Registry may be declared by the court when the constitutive act is missing or has not been drafted and

⁴ Hinescu, A., *Fuziunea si divizarea societăților, Practica judiciara adnotata*, Hamangiu Publishing House, Bucharest, 2016, p. 123, Smarandache, L., *Regimul juridic al instituțiilor de credit, persoane juridice române, în context European*, Hamangiu Publishing House, Bucharest, 2013, p. 97; Stanca, I.-A., *Dizolvarea și lichidarea societăților comerciale in Practică judiciară*, Hamangiu Publishing House, Bucharest, 2011, p. 185; Turcu, I., *Teoria și practica dreptului comercial roman*, vol. I, Lumina Lex Publishing House, Bucharest, 1998, p. 401.

acknowledged by a Civil Law Notary⁵. We consider that in the absence of an authenticated form of the constitutive act or a certified date the conditions provided by the law for the declaration of nullity of a company by the court of law, in this case the court, are met.

Apart from the existence of a cause of nullity, the lack of the form required by the law for the constitutive act attracts the refusal of the National Bank of Romania to enroll the company in the Special Register, to issue its operating permit, and, implicitly, the impossibility of carrying out the object of its activity.

The proof of the registration of the company with the Trade Register Office is a mandatory document for the issuance of the operating permit, the lack of which attracts both the possibility of invoking a nullity cause and the refusal of registration by the BNR.

There is, therefore, a double checking on the fulfillment of the conditions stipulated by the legislation in force, i.e. the analysis of the fulfillment of the conditions at the moment of the registration of the company with the Trade Register, as well as their evaluation at the moment of requesting the registration with the Special Register of the non-banking financial institutions.

The general causes of the declaration of a company's nullity also subsist in the case of non-banking financial institutions, but their analysis presents a number of significant characteristics.

The impossibility of achieving the company's object of activity is closely related to the authorization of the National Bank of Romania.

We consider that in the absence of the authorization by the National Bank of Romania the prerequisites for invoking the impossibility to achieve the company's object of activity as the cause of dissolution are created.

The object of activity of the non-banking financial institutions is limited to the activities provided by the provisions of art. 14 of Law 93/2009, the lending activities permitted being the following:

- a) credit granting, including, but not limited to: consumer loans, mortgage loans, real estate loans, microcredits, financing of commercial transactions, factoring, discount credits, lump-sums;
- b) financial leasing;
- c) issuance of guarantees, guarantee commitments, financing commitments;
- d) granting credits with the receipt of mortgaged goods, respectively pawn shops;
- e) granting credits to members of non-patrimony associations organized on the basis of the free consent of employees/pensioners, in order to support their members by financial loans from these entities, organized according to the mutual aid funds' legal form;
- f) other forms of credit financing.

⁵ Law no. 31/1990 - art. 56.

It is worth mentioning that during the lending activity, non-banking financial institutions can provide credit card issuance and administration services for clients, other than those falling under the provisions of *Government Emergency Ordinance no. 113/2009*, approved with amendments by *Law no. 197/2010*, with its subsequent amendments and completions, and may carry out activities related to the processing of transactions with the above-mentioned, in compliance with the regulations in the field.

Non-banking financial institutions may conduct related and auxiliary activities related to the performance of lending activities or the operation of the entity. Insofar as the activities under consideration correspond to the lending activities included in the activity object of the non-banking financial institution, it may perform mandate operations and may provide consulting services.

The non-banking financial institutions registered in the General Register may also perform foreign exchange operations related to the permitted activities, subject to all the conditions laid down by the applicable regulations.

We must not overlook the fact that non-banking financial institutions can administer public funds granted as microcredit funds by government agencies, subject to the conditions specified in *Government Ordinance no. 40/2000* regarding the accreditation of credit agencies for the administration of funds for granting microcredits, approved with amendments and completions by *Law no. 376/2002*, with subsequent amendments and completions.

The non-banking financial institutions listed in the Register may also carry out the activities required by the special legislation regulating their activity, as well as the auxiliary activities related to their realization.

Non-banking financial institutions listed in the General Register may carry out in relation to the entities in the group, non-financial mandate or commission operations related to the activities necessary to support the operation of the respective entities.

Furthermore, non-banking financial institutions listed in the General Register may provide payment services and may grant credits related to the payment activity in accordance with the provisions of *Government Emergency Ordinance no. 113/2009*, approved with amendments by *Law no. 197/2010*, with subsequent amendments and completions.

The law explicitly forbids non-banking financial institutions to include in the main object of activity an activity that is not specified in Article 14 (1) on the one hand, and on the other hand, the inclusion in the secondary object of activity of any activity other than those stipulated in art. 14.

It is also unequivocally forbidden for non-banking financial institutions to carry out the following activities:

- a) attracting deposits or other repayable funds from the public;
- b) issuance of bonds, except for the public offer addressed to qualified investors, under the capital market law;
- c) movable and immovable property transactions, with the exception of

those relating to the lending activity or those necessary for the appropriate operation of the entity;

d) granting credits, conditional upon the sale or purchase of the shares of the non-banking financial institution;

e) granting of credits, conditional upon the acceptance by the client of services unrelated to the respective lending operation.

Regulation 20/2009 also regulates the time limits for the notification of the National Bank of Romania, i.e. 30 days from the date of registration in the Trade Register.

3. Non-banking financial institutions may carry out lending activities only after registration with the General Register

Non-banking financial institutions are registered in the General Register if, following notification, they prove compliance with the applicable legal requirements. The National Bank of Romania shall transmit to the non-banking financial institutions the document certifying the entry in the General Register within 30 days from the date when the submitted documentation is complete and appropriate.

Failure to comply with the applicable legal requirements results in the rejection of the entity's request for registration with the General Register and, implicitly, the failure to grant permission to carry out a lending activity.

Although the law does not expressly provide for the possibility of the dissolution of a company, we consider that the situation is circumscribed to the general causes provided by Law of Companies no. 31/1990.

The deletion of a non-banking financial institution is, in our opinion, another cause of a company's dissolution. The deletion from the General Register may be done in the following situations:

a) at the request of the non-banking financial institution;

b) following the application of the sanction in art. 59 para. (2) letter e) of Regulation 20;

c) if the non-banking financial institution has been permanently and irrevocably prohibited from conducting lending activity;

d) if the non-banking financial institution ceases to exist as a result of a merger, division or in other cases provided by the law.

The National Bank of Romania shall publish the deletion from the General Register in the Official Journal of Romania, Part I, and in two national newspapers.

4. Lack of legal administrative authorization for setting up a company

According to the law, certain special permits are required prior to the establishment of the company in certain fields of activity. In the absence of a specific administrative authorization, the company will be annulled.

For the banking companies, as a prior special permit, the temporary authorization is required from the National Bank of Romania, for the companies participating in the capital market the in principle approval and the permit of the National Securities Commission are necessary, and for the insurance companies the authorization of the Supervisory Insurance Commission is needed. In order for the lack of legal administrative authorization to be a ground for nullity, it is taken into account when founding a company. As a consequence, any subsequent annulment of the authorization is not a ground for nullity. Such a subsequent annulment of the authorization may, however, lead to the dissolution of the company.

As regards the non-banking financial institutions, Law 93/2009 provides for the obligation to notify the National Bank of Romania, which implies a follow-up action to the registration procedures in the Trade Registry. Authorization is, therefore, a subsequent procedure for which the law stipulates a period of 60 days, i.e. about 30 days from registration to notify BNR and another 30 days from the notification for the National Bank to issue the authorization either in the context of the fulfillment of the conditions or to transmit the refusal of the authorization and, respectively, the registration with the General Register.

5. Breach of the legal provisions regarding minimum, subscribed and paid up share capital

By mandatory provisions of the Companies' Law, the minimum ceiling of the share capital of the joint-stock company or the limited partnership company cannot be less than 90,000 lei, the Government being able to modify, no sooner than two years, the minimum amount of the share capital, so that this quantum represents the RON equivalent of 25,000 EURO. The share capital of a limited liability company cannot be less than 200 lei and is divided into equal shares, which cannot be less than 10 lei.

As regards the joint stock company constituted by public subscription, the company may be formed only if the entire share capital has been subscribed and each acceptor has paid in cash half of the value of shares subscribed to CEC or at a bank. The remainder of the subscribed share capital will have to be paid within 12 months from the registration. In the case of a full and simultaneous subscription of the share capital by all the signatories to the constitutive act, the social capital paid at the establishment of the company may not be less than 30% of the subscribed one, and the remainder of the share capital subscribed will be

paid: ~ for the shares issued for a cash contribution within 12 months from the date of the company's registration; ~ for shares issued for a contribution in kind, no later than 2 years from the date of registration, according to art. 9 of Law no. 31/1990.

As regards the unlimited company, the limited partnership and the limited liability company, they are obliged, according to art. 9 of Law no. 31/1990, to fully pay up the subscribed share capital at the establishment date. According to art. 22 of Law no. 31/1990, if public subscriptions exceed or are lower than the share capital stipulated in the prospectus, the founders are obliged to subject the increase to the approval of the constitutive assembly or, as the case may be, to the reduction of the share capital subscription level. Breach of any such legal provision stating the minimum subscribed and paid-up share capital in relation to the legal form of the company means the violation of imperative rules on this essential element of the company and is sanctioned by the nullity of the company⁶.

The minimum share capital of non-banking financial institutions may not be less than the equivalent in lei of EUR 200,000, respectively EUR 3,000,000 in the case of non-banking financial institutions granting mortgage loans.

The National Bank of Romania may establish by regulation superior levels of the minimum share capital, differentiated according to the type of activity of the non-banking financial institution.

The share capital of non-banking financial institutions must be fully paid up at the time of subscription, including in the case of an increase. Share capital is constituted and increased by cash contributions, contributions in kind not being allowed.

In order to determine the compliance with the minimum share capital requirement, in euro equivalent, the foreign exchange market rate communicated by the National Bank of Romania shall be used for the date of the subscription and its payment.

The reduction of the share capital below the values provided above is naturally a cause for a company's dissolution. We consider that, the National Bank of Romania, in fulfilling its supervisory and monitoring duties, beside sanctions, such as the withdrawal of the operating authorization, is an entity with active procedural standing to ask the court or the National Trade Register Office to dissolve a non-banking financial institution.

6. Non-compliance with the provisions of the law regarding associates and managers

The special legislation in the field regulates meticulously the conditions for shareholders and managers of non-banking financial institutions. The shares

⁶ Roş, V., *op. cit.*, 1996, p. 58.

issued by non-banking financial institutions can only be nominal shares. Non-banking financial institutions are obligated to provide the National Bank of Romania with information regarding the significant shareholders and the structure of the groups to which they belong in accordance with the regulations issued for the enforcement of the law.

Furthermore, the managers of non-banking financial institutions must have adequate reputation and experience in order to exercise the responsibilities entrusted to them, according to the criteria set by the National Bank of Romania.

In the enforcement of art. 16 of Law no. 93/2009, the National Bank of Romania shall assess the shareholders on the basis of the documents provided in art. 23 of the BNR Regulation no. 20/2009 and taking into consideration the available public information on them.

In assessing the reputation of the managers, the National Bank of Romania takes into consideration at least the following aspects:

a) the existence of a conviction for corruption offenses, money laundering, terrorism, patrimony crimes, abuse of office, bribe receiving or giving, forgery and use of forgery, misappropriation of funds, tax evasion, receipt of undue benefits, trafficking influence, false testimony, offenses provided by special legislation in the financial-banking field, company legislation, insolvency or consumer protection or any other relevant facts;

b) the manager is prosecuted or tried for any of the offenses referred to in letter a);

c) pending and past investigations and/or measures applied to the manager or the imposition of administrative sanctions for failure to comply with the provisions governing the banking, financial, insurance activity or any other financial services legislation;

d) ongoing or past investigations and/or measures and sanctions imposed by any regulatory or professional body for non-compliance with any relevant regulations.

In assessing the reputation of the managers, the issues referred to in art. 14 are considered, on a case-by-case basis, depending on the severity of the circumstances of each situation, to the extent that they may cast doubt on the fulfillment of the manager reputation criterion.

The National Bank of Romania may consider the reputation requirements for the manager to be fulfilled, if he:

a) already is a person considered to have a good reputation in view of his significant shareholder status in an entity regulated and monitored/ supervised by the National Bank of Romania, the National Securities Commission, the Insurance Supervisory Commission or the Supervisory Commission of the Private Pension System or a supervisory authority with similar responsibilities in another Member State;

b) is a person who manages and/or administers the activity of an entity

regulated and monitored/supervised by the National Bank of Romania, the National Securities Commission, the Insurance Supervisory Commission or the Supervisory Commission of the Private Pension System or a supervisory authority with similar responsibilities in another Member State;

In order to meet the requirement on professional experience, the applicant must demonstrate that the persons designated as managers have adequate theoretical and practical knowledge regarding the activities to be carried out by the non-banking financial institution, as well as experience gained in a management position.

Non-banking financial institutions must have an audit committee consisting of at least 2 members appointed by the general assembly. The composition, functioning and attributions of the audit committee are governed by Government Emergency Ordinance no. 90/2008 on the statutory audit of annual balance sheets and the consolidated balance sheets, approved with amendments by Law no. 278/2008, with its subsequent amendments and completions, by the present regulation and by the internal regulations of each non-banking financial institution.

The quality of the significant shareholders and the structure of the groups they are a part of must ensure the stability and development of the non-banking financial institution and allow the National Bank of Romania to carry out effective supervision. The managers, administrators and members of the supervisory board must have a good reputation and an experience appropriate for the nature, extent and complexity of the non-banking financial institution's activity and the responsibilities entrusted to them.

7. Conclusions

Article 237 of Law no. 31/1990 regulates the cases of dissolution-sanction, in which the court will be able to take action against non-operational companies. The dissolution-sanction of the company shall be ruled by the court at the request of the National Trade Register Office or of any interested person. Situations regulated by the law in which dissolution can be applied as a sanction have a judicial dissolution character.

In addition to the general requirements, non-banking financial institutions registered in the Special Register must also meet other requirements set out in the regulations issued by the National Bank of Romania. The National Bank of Romania establishes by regulation the criteria for the registration of non-banking financial institutions in the Special Register. These criteria may refer to: turnover, loan volume, debt ratio, total assets, equity.

The National Bank of Romania shall be entitled to take, in relation to a non-banking financial institution or to the administrators, as the case may be, the members of the supervisory board, or the managers who violate the provisions of this law, regulations or other acts issued pursuant to this law, the necessary

measures in order to remove deficiencies and their causes, and/or to impose sanctions.

Non-banking financial institutions which are no longer allowed to carry out one or more lending activities under art. 14 may continue the maturity of contracts related to these activities, without modifying them other than with the extension of the repayment term.

The current regulation in the field does not explicitly foresee other special causes of dissolution for non-banking financial institutions, which are circumscribed to general causes.

However, we consider that there are situations that require a series of explicit regulations regarding the dissolution of non-banking financial institutions in the case of non-fulfillment of the special conditions provided by the Law 93/2009 or BNR Regulation no. 20/2009. We also feel that there is a need to clarify possible transit situations between the emergence of the dissolution cause and a possible amendment of the constituent acts in order to change the object of activity so that the applicability of the derogation provisions ceases to be applicable.

This material is part of the scientific research activity within the Doctoral School, in the process of completing the doctoral thesis titled *Judicial and economic characteristics of the dissolution of non-banking financial institutions*. We also envision this work to be able to support students, young people, lawyers, magistrates, jurists, and those interested in studying commercial law. Moreover, when completed, we hope the doctoral thesis will be able not only to represent a law enforcement guide, but also a potential tool for correcting certain regulatory deficiencies.

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Legal Regime of Private Military Companies

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Abstract

Private military companies are independent companies that offers military services to national governments, international organizations, and substate actors. Private military companies (PMCs) are an important and deeply controversial element of the privatized military industry. PMCs specialize in providing combat and protection forces. Their work ranges from running small-scale training missions to providing combat units composed of up to several hundred highly trained soldiers. The use of military force by private-sector organizations is not new. It is present since Middle Ages. The most known example in modern history is british East India Company private military units, present in India until 1857.

Keywords: *private military companies, mercenary, United Nations, European Union.*

JEL Classification: K21, K33

1. Introduction

The subject in making use of international humanitarian law depends on exactly what the prison popularity of PMCs are. International humanitarian law is reflected in the 1949 Geneva Conventions with the two accompanying 1977 Geneva Protocols, which makes best distinctions between rights, privileges and immunities of combatants and non-combatants in armed conflict. Due to the blurring difference between fighters and non-combatants, numerous issues are raised for the operation of the Geneva Conventions and Protocols on an international law level.²

2. International instruments

Armed civilians create issues for the application of the Geneva Conventions and Protocols. In an worldwide armed struggle they ought to be classified as both one of four categories.³

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² Tung, H., *Under International law, what is the legal status of Private Military Contractors during military occupation and under*, United Nations Peace Keeping Operations?, Peace Operations Training Institute 2005. p. 7

³ *Idem*, p. 8.

Firstly, as noncombatants accompanying armed forces entitled to certain immunities if taken as POWs underneath Geneva III (Article 4) provided they are only armed beneath self-defense.

Secondly, as privileged opponents who take up arms spontaneous to withstand invading forces, respecting the laws and customs of war, are entitled to immunities if taken as POWs underneath Geneva III.⁴

Thirdly, as non-privileged warring parties who meet neither of the exceptions stated above and consequently will not be entitled to POW status if captured nor any combatant immunity and fourthly, as a mercenary who has no proper to be a combatant or a POW (Protocol I, Article 47).⁵

Civilians that accompany an armed force will in most occasions be entitled to claim protection under Geneva III Article 4, then again the concern arises when the civilian contractors are not frequently attached to the navy forces who are armed other than for purposes of private self defence and who take part in some issue of armed conflict. There is concern that as they are armed and are in a warfare sector there is the risk that they will be classified as mercenaries and thereby having no privileges beneath International humanitarian law.⁶

However, an essential difference is for the purposes of Protocol I, Article 47 whether such humans have been ‘specially recruited locally or abroad in order to battle in an armed conflict. It seems that this provision would leave out many categories of civilian contractors different than those specially contracted to supply protection offerings who will lift mild arms. The difficulty arises as to whether recruitment to ‘fight’ in an armed hostilities and recruitment to grant safety of a protection nature in an armed conflict. The distinctions are tough to make.

Secondly, it has to be an internal conflict with two states as a substitute than a worldwide conflict. Hence once these prerequisites are cozy then mercenaries utilized with the aid of one of the state events should be eligible as a ‘militia’ structure phase of the armed forces of the State [Article 4(A) (1)]. Other State Contracted PMC personnel would possibly fall inside Article 4(A)(4) as accompanying the armed forces.⁷

The Geneva Conventions and Protocols clarify the duties of States to defend civilians beneath global and non-international armed conflict. The tasks of State navy forces toward civilians in struggle zones are much less clear under International law.⁸

Under Protocol I, Article 58 provides that parties to the combat shall to the most extent feasible, without prejudice to Article forty-nine of the Fourth Convention, endeavor to do away with the civilian population, character civilians

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Idem*, p. 9.

and civilian objects beneath their manipulate from the neighbourhood of army objectives. Take the different necessary precautions to guard the civilian population, individual civilians and civilian objects under their control against the dangers ensuing from army operations.

The obstacle with this provision is that Article fifty-eight used to be meant to tackle the responsibilities of a State Party in its own territory closer to its very own nations, or in the case of territory below its control toward the civilian population. We need to question whether or not the terminology of Article 58 is huge sufficient to prolong to situations where civilians accompany army forces are inside warfare zones.⁹

The terms of ‘maximum extent feasible’ in Article fifty-eight is sizeable and suggests that elements of military necessity can be factored in when selections are taken involving the extent of the safety that civilians should be afforded. It is suggested that possibly a whole withdrawal of positive individual civilians who are regarded quintessential to the navy effort might also now not be required in all instances.

A nation that is a Party to the Geneva Conventions, but has not ratified the Additional Protocol, is no longer sure through the definition of mercenary in Article 47. While the global community has agreed to the authentic Geneva Conventions, not all countries have agreed to these Additional Protocols, in spite of their e-book over thirty years ago. For example, the United States protested the Article 47 provisions on mercenaries, refusing to apprehend the definition, or accept the Additional Protocols. Therefore Article forty seven is not a sturdy reflection of ordinary worldwide law, because even after thirty years, not all of the parties to the Geneva Convention have accepted the Additional Protocol that contains Article 47 ideas of common global law (“CIL”) canal so be observed through evaluating felony systems global and searching for indispensable trends).¹⁰

The search for common international law now turns to worldwide assist for the U.N. Convention. Only those international locations that sign the U.N. Convention are bound by way of it, so that definition solely without delay applies to activities in the signatory countries. However, the U.N. Convention has garnered even much less help than Article 47: it has taken decades to come into effect, and some distance fewer states have signed the Convention than ratified Article 47.

The lack of world vast aid for Article 47 and the U.N. Convention demonstrates that they do not mirror the generic international law of nations. Therefore, it is misleading to claim PMCs are not “mercenaries” certainly due to

⁹ *Ibid.*

¹⁰ Scheimer, M., *Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support the Reflects Customary International Law*, „American University International Law Review”, vol. 24, issue 3, 2009, p. 632.

the fact they do no longer fall below the Article 47 and U.N. Convention definitions, when these definitions are now not even typical by all countries as global law.¹¹

The limiting results of the restrictive definitions of Article 47 and the U.N. Convention frustrates the view of the worldwide neighborhood that states continue the authority to use PMCs for particular duties in the same way that auxiliary groups have been permissibly used for thousands of years. Examining worldwide practice, it is clear that many states hire PMCs, however at the equal time profess to discourage or even outlaw mercenaries. States worldwide continue to searching for reputable navy help from PMCs, such as states that strongly adversarial to mercenaries in the past.¹²

The distinguishing issue is that the mercenaries in the 1960s, that gave upward jostle to the Article forty-seven and U.N. Convention definitions, have been a from the "freebooter," an worldwide criminal that does not obey the laws of war, Geneva Conventions, and International Declaration of Human Rights and Freedoms.

The everyday fashion of home laws across the world demonstrates that states keep prison authority for the use of violence, and PMCs are only reputable actors when licensed by a state. A quantity of states have laws proscribing their residents from serving as mercenaries abroad, and prohibiting the recruitment of mercenaries on their territory.¹³

The modem upward thrust of PMCs coincided with the quit of the Cold War and the ensuing "surplus of pretty trained, expert soldiers in search of employment opportunities. As unemployed expert soldiers flooded the market, the give way of Cold War alliances created an instability that led to extended regional struggle and extra failed states, which also created an acceptable probability for unemployed soldiers. A top notch instance of PMC involvement in an important struggle earlier than September 11, 2001, was the function of the American PMC, Military Professional Resources, Inc. (MPRI), in the Balkans." Some commentators accredit the successful Croat assault on Serb forces in 1995 to the MPRI. The movements of the MPRI in the Balkans serve as an instance of how a PMC's domestic nation might also tacitly aid PMC action overseas in order to improve its overseas coverage objectives.¹⁴

3. Particular aspects

¹¹ *Idem*, p. 633.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Irvin G., *Rething the role and regulation of private military companies. What the United States and Unioted Kingdom can learn from shared experiences in thw war on terror*, „University of Georgia Journal of International and Comparative Law”, vol. 39, no. 2, 2011, p. 451.

There are three motives a kingdom would possibly use a PMC to similarly its foreign policy.

First, "the state's armed forces could be overstretched", two second, "the [PMC] ought to be in a role to provide the protection offerings extra cost efficiently than the state's armed forces" and finally, "the [PMC] can also have desirable contacts inside the retaining/deploying government". Although the motives for the proliferation of PMCs are greater complicated than the three factors stated above, some mixture of these factors probably explains the amplify in the use of PMCs with the aid of both the United States and the United Kingdom in Iraq and Afghanistan.¹⁵

Generally, there are two different categories of actors related with the PMCs; particularly mercenaries and the private protection companies. However, there is regularly confusion between the that means of every of these terms.

These categories are mentioned below¹⁶.

Mercenaries are man or woman warring parties' warfare in overseas conflicts for financial gain. Most attention to mercenaries was drawn with the aid of their use towards country wide liberation actions in the course of the early post-colonial Africa period, and they are nevertheless conventional these days in many conflicts. Hired for their apparent military supremacy, a relatively small mercenary pressure could pose a serious threat to an emerging newly-independent state.¹⁷

Private military companies are company entities imparting a range of army offerings to clients. It is predominantly governments that use these services to make a military impact on a given conflict. Examples consist of MPRI from the US and Sandline International from the UK Services encompass fight and combat related functions.¹⁸

Private security companies are similar to private army companies but supply protective safety services to shield humans and property. Examples consist of DSL (part of Armour Group) from the UK and Wackenhut from the US. They are used by using multinational agencies in the mining and aid sector, and by global and humanitarian agencies in combat and unstable areas. Private protection groups are in idea distinct from personal army companies in that they are typically unarmed and are concerned with the protection of property and personnel, instead than having an army affect on a conflict in a given situation.

However, this is a blurred line as some businesses display characteristics of both kinds of organizations via being worried in each safety and PMC-related activities¹⁹.

¹⁵ *Ibid.*

¹⁶ Gulam H., *The rise and rise of Private Military Companies*, Peace Operations Training Institute 2002, p 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

The next essential legal regime to deal with mercenaries used to be set up via the 1949 Geneva Conventions. Its intent was once to trend prerequisites of truthful therapy of prisoners of combat (PWs) and set up ideal activities in armed conflict. As lengthy as mercenaries had been section of a legally described armed force, they have been entitled to PW protection. PW protection furnished an essential status, as it ascribed extraordinary safety and treatment, inclusive of immunity from prosecution for normal acts of war.²⁰

In 1968, the U.N. surpassed a resolution condemning the use of mercenaries towards movements of country wide liberation. The resolution was later codified in the 1970 ‘Declaration of Principles of International Law Concerning Friendly Relations and Cooperation amongst States’.

The 1970 Declaration represented an essential transition in international law, as mercenaries became ‘outlaws’. However, it nonetheless placed the burden of enforcement completely on nation regimes, failing to take into account that they have been regularly unwilling, unable, or simply bored to death in the task.

The 1977 First Additional Protocol to the Geneva Conventions did no longer legislate towards mercenary activity, but instead stated the existence and practice of such people within struggle and sought to define their criminal fame and codify their standing within the context of worldwide humanitarian law.²¹

The Additional Protocol contained two precept paragraphs.

Paragraph 1: excluded the mercenary from the category and rights of recognised combatants and prisoners of war.

Paragraph 2: defined the cumulative and concurrent requirements that should be met in order to decide who is a mercenary and who is not.

Article 47 described a mercenary as any one who:²²

a) is in particular recruited locally or abroad in order to fight in an armed conflict;

b) does, in fact, take direct phase in the hostilities;

c) is influenced to take section in the war really by way of the want for private obtain and, in fact, is promised, by means of or on behalf of a birthday celebration to the conflict, fabric compensation drastically in extra of that promised or paid to fighters of comparable ranks and features in the armed forces of that party;

d) is neither a country wide of a birthday celebration to the war nor a resident of territory controlled by a party to the conflict;

e) is no longer a member of the armed forces of a birthday celebration to the conflict; and

f) has now not been sent by a country which is now not a birthday celebration to the battle on professional obligation as a member of the armed forces.

²⁰ *Ibid.*

²¹ *Idem*, p. 9.

²² *Ibid.*

It must be cited that this definition is cumulative, i.e. a mercenary is described as any one to whom all of the above apply.

A range of governments along with the UK Government viewed this definition as unworkable for realistic purposes. In particular, it would be challenging to prove the motivation of any person accused of mercenary activities. Contracts could additionally be drafted so that these employed underneath them fell backyard the definitions in the Protocol: for example, in its aborted contract with Papua New Guinea (1997), Sandline International's personnel were to be termed 'Special Constables' and hence not have been classified as mercenaries because (under (e) above) they would have been contributors of the armed forces of a birthday party to the conflict. There are additionally cases of overseas nationals supplying navy services who have been granted or have applied for nearby citizenship with the impact that they should no longer be described as mercenaries.

As mentioned Article 47 defines a mercenary as any man or woman who satisfies the cumulative and concurrent requirements. The explanatory remarks within the framework of the Additional Protocol highlight exceptions to the necessities contained inside the subparagraphs.

These exceptions enable a broader interpretation of the cumulative requirements but additionally a potential with which to legally nullify the applicability of some of the obligatory requirements.

Subparagraph 2(a) excludes volunteers who enter service on a permanent or longlasting groundwork in a foreign army, irrespective of whether as an in simple terms man or woman enlistment (i.e. participants of the French Foreign Legion) or on arrangement made by using countrywide authorities (i.e. Swiss Guards of the Vatican and Nepalese Ghurkhas used by using India and the UK). For example, some Islamic Fundamentalists lift out what they agree with to be Allah's will by using travelling to useful resource struggling Islamic opponents in different nations, as was the case at some stage in the Soviet Union's occupation of Afghanistan.

Subparagraph 2(b) excludes overseas advisors and navy technicians even when their presence was motivated by means of economic gain. This big difference was included to realise the very technical nature of contemporary weapons and help systems that might also necessitate the presence of such persons for their operation and maintenance. 'As long as these men and women do no longer take any direct phase in hostilities, they are neither combatants nor mercenaries, however civilians who do now not participate in combat.'

As the Cold War wound down, PMCs and private safety businesses ("PSCs") arrived on the world scene.²³

Commentators vicinity such agencies on a scale ranging from true armed

²³ *Idem*, p. 10.

combat support to guide roles, security, and logistical support. PMCs are business entities with a certainly described business shape and they overtly compete on the international market to supply offerings to states, different multinational corporations, global institutions, and even non-governmental organizations (“NGOs”).

In 1976, the British government conducted an investigation into the position of British combatants in Angola, and concluded that present home legal guidelines on mercenaries were ineffective. 35 Decades later, the British government in addition examined the role of PMCs throughout a series of hearings before the House of Commons Foreign Affairs Committee. Although the Hearings Report proposed selections for regulating PMCs, none of them have come to be law. South Africa is notable for being the solely state with a vast regulation regulating foreign military help South Africa’s regulation on mercenaries covers some distance greater things to do than the international definitions, which center of attention solely on military conflict. The South African statute clearly outlaws mercenary endeavor and makes use of a more traditional, simplified definition of a mercenary in lieu of the difficult Article forty-seven and Convention language. At the identical time the South African regulation has a huge “foreign army assistance” definition, which covers a range of activities that PMCs usually engage in, and requires government approval to engage in such activities.²⁴

The United States already has laws in vicinity for regulating army services furnished to overseas entities. The United States currently revised the Uniform Code of Military Justice (“UCMJ”), which beforehand utilized only to individuals of the armed forces, to cowl civilians accompanying military forces.

Before this enlargement of the UCMJ’s jurisdiction, contractors working for the U.S. army were solely guilty to the Military Extraterritorial Jurisdiction Act (“MEJA”). Since the MEJA and the prolonged UCMJ nonetheless solely practice to personnel working for the Department of Defense (“DoD”), these laws fail to capture safety contractors working for different authorities’ agencies, like Blackwater and Unity Resources, who provide armed security for the U.S. State Department. While the United States may additionally have the potential to prosecute American citizens working for PMCs beneath the UCMJ and MEJA, U.S. jurisdiction might also not constantly lengthen to overseas nationals working in Iraq.²⁵

If PMCs can keep away from the definitions of Article 47 and the U.N. Convention, then it would appear that they are not mercenaries underneath global law, which would depart their global repute in a battle unclear. However, that is solely part of the analysis. In addition to treaties, worldwide law also consists

²⁴ Scheimer, M., *op. cit.*, p. 619.

²⁵ *Idem*, p. 621.

of the customs and practices arising between states. If regularly occurring world-wide law covers PMCs, then PMCs cannot break out global accountability purely due to the fact they do not meet the definitions of mercenaries in Article 47 and the U.N. Convention.²⁶

4. The situation in European Union

Since efforts to adjust the non-public army and security industry center of attention usually both on controlling the corporations or their services their definition has caused a lot of discussion. Early research differentiated between two sorts of companies which still inform the prevailing terminology: ‘private army companies’ (PMCs) and ‘private security companies’ (PSCs).²⁷

According to this distinction, PMCs denote included companies imparting navy capabilities and aid services, whilst PSCs are businesses providing non-public safety and danger management.

Since many corporations oppose being conflated with PMCs such as Sandline International, there have been a range of attempts to redefine these terms. Most companies insist on labelling themselves PSCs even if they grant army services, and the ordinary term ‘private contractor’ has end up pervasive in Iraq and Afghanistan.

Despite the absence of a frequent regulatory framework for PMCs/PSCs, the EU has performed a criticalrole in merchandising countrywide and regional controls over the provision and export of a number of navy and security services. Its policies and rules fall into three categories. The first class consists of Council ‘Regulations’, such as the Council Regulation (EC) no. 428 /2009 placing up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, which is immediately applicable to member states. The second category pertains to Council ‘Common Positions’, binding criminal acts which have to be applied into countrywide legal guidelines or practices.²⁸

It includes the Council Common Position 2008/944/CFSP, which replaced the EU Code of Conduct on Arms Exports, Council Common Position 2003/468/CFSP on the manage of palms brokering, and numerous Common Positions setting up embargoes on the provision of technical help and navy services to choose nations or individuals. The third class refers to Council ‘Joint Actions’, i.e. felony acts defining frequent moves such as the Common Foreign and Security Policies (CFSP) on two technical assistance associated to weapons of mass destruction (WMDs) and to embargoed destinations, and the export of small hands and light weapons. In addition to these policies the EU Court of Justice has affirmed EU competence over the legislation of interior safety services under the

²⁶ *Idem*, p. 632

²⁷ Krahmann, E., Abzhaparova, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options*, European University Institute, 2010, p. 10.

²⁸ *Idem*, p. 12.

first pillar.²⁹

In 2000, the EU first set up a Community regime for the export manage of dual-use objects and technology, i.e. goods with civilian and navy applications. Since then, the regime has been amended a number of times.

The today's Council Regulation (EC) no. 428/2009 extends the Community regime from the control of exports and transfers to the brokering and transit of dual-use gadgets listed in the Annex 29.

In rare circumstances the latter may be applicable for PMCs/PSCs due to the fact the regime accommodates the export, transfer and brokering of dual-use goods listed in classes 1 to 9 of the Annex, such as telecommunications and records security, sensors and lasers, navigation and avionics, marine technology, and aerospace and propulsion systems, consisting of dual-use gadgets that might be bought by using PMCs/PSCs as part of their offerings such as jamming equipment, radio path finding equipment, cryptographic software program and radar systems.³⁰

5. Conclusions

States have to recognize that contracting PMCs to furnish sure services does no longer carry their accountability for the consequences of these actions. This is sincerely the case the place PMCs work as State agents,

There additionally wants to be a clear definition of the duty of States when it comes to making sure compliance with global humanitarian law, a preferred of due diligence. This is all the extra genuine as PMCs work in unstable battle areas, performing tasks prone to increase in human rights abuses and humanitarian law violations. Moreover, jurisdiction over acts committed by means of PMCs has to be prolonged to both the exporting and receiving State. There can be no lawful rules of PMCs if they gain immunity for their acts.

International law wants to take into account the advantages as nicely as the dangers of using PMCs.

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INTERNATIONAL BUSINESS LAW

Concept of Charterparty as an International Contract for Engagement of Ship for Transportation of Cargo and Legal Perspective on Critical Areas of Charterparty for Avoidance of Disputes

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"Beware of little expenses; a small leak will sink a great ship."
Benjamin Franklin

Abstract

In international business charterparty is a main legal contract of engaging a vessel for transportation of cargo. It is a highly important document since it defines the performance obligations as rights, duties, liabilities, risks, earnings, costs and profits between the contracted parties, i.e. the shipowner and the charterer. The proper incorporation, interpretation and understanding of charterparty terms is crucial for chartering business. Therefore, this paper based on the observations of the various judicial authorities, emphasis on the main types of charter and deals with usual clauses qua distribution of the liabilities and expenses between the ship-owner and the charterer. More specifically, type of the charter, important clauses in the charterparty for suitability of the vessel, its seaworthiness, the avoidance of unjustifiable deviations, the ship's arrival at the port, the loading and discharging operations, the delivery of cargo, liabilities, exceptions to liabilities etc. The instant paper is based on shipping practices followed in accordance with international and English common laws in pre-to-post fixture in execution of chartering process. As chartering is one of the most critical commercial operation under international business contracts with significant operational, financial and legal consequences. The deliberations in this paper is from a contractual and legal perspective to understand this special purpose contract for better execution and avoidance of disputes.

Keywords: charterparty, shipping, cargo, seaworthiness, voyage, perils.

JEL Classification: K22, K33

1. Introduction: charterparty a contract for vessel to transport cargo

The concept of charterparty is as old as the term ship for commercial purpose. In maritime business the key players handling the cargo across water bodies are namely, seller of cargo, buyer of cargo, shipper transporter of cargo, ship owner whose ship is use for transportation of cargo and charterer a middle man who hires the ship from ship-owner and use it for transportation of cargo. A

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charterparty (sometimes charter-party) is a maritime contract between a "ship-owner" and a "charterer" for the hire of either a ship for the carriage of passengers or cargo, or a yacht for pleasure purposes. It means that the charterparty will clearly and unambiguously set out the rights and responsibilities of the ship owner and the charterer and any subsequent dispute between them will be settled in the court of law or any agreed forum with reference to the agreed terms and conditions as embodied in the charterparty. The name "charterparty" is an anglicisation the French *charte partie*, or "split paper", i.e. a document written in duplicate so that each party retains half. *Chisholm Hugh, ed.*². The Latin term *charta partita* is a back-formation, and not a true etymological source.

A charterparty has been defined in Halsbury, *Edn.*³, as follows: "A contract by charterparty is a contract by which an entire ship or some principal part thereof is let to a merchant, who is called the charterer, for the conveyance of goods on a determined voyage to one or more place, or until the expiration of a specified period". It will be noticed that an essential part of the definition is that the contract must be for the hiring of an entire ship or some principal part thereof. Then in the same volume in para. 481 at page 283 it is stated as follows: "It is usual to specify the name of the ship which is to be chartered in the charterparty and to give her description in detail. The description usually includes statements as to the nature of the ship, her registered tonnage, her classification at Lloyd's, her position at the date of the charterparty, and her fitness for the purposes of the charterer; it may, in addition, specify her carrying capacity and the name of her master."

It is clear from this passage that the name of the ship is usually specified, and the importance of doing so is to be seen from the passage that follows in Halsbury which is as follows (p. 284): "Of these statements, those relating to the name and nature of the ship, to her position at the date of the charterparty, and to her carrying capacity are to be regarded as conditions precedent on the non-fulfilment of which the charterer may treat the contract as repudiated". Therefore, before parties can have a charterparty, there must be (a) the hiring of a ship or some principal part of a ship, and (b) the ship must be specified. Reliance is, however, placed on a footnote (o) at p. 284 where it is stated as follows: "There seems to be no direct authority for the proposition that the statement as to the name of the ship is a condition precedent. The proposition is retained from the previous edition. It is submitted that the proposition is in accordance with principle, subject to the qualification that if the parties were agreed as to the identity of the ship an incorrect statement of her name might be immaterial"⁴. Now, accepting the law as stated in this footnote to be correct, it amounts to this that if the identity of the

² Chisholm Hugh (ed.), *Encyclopedia Britannica* 5, 11th ed., Cambridge University Press, 1911, p. 953.

³ Halsbury, Hardinge Stanley Giffard, Earl of, *The laws of England, being a complete statement of the whole law of England*, vol. 30, London, Butterworth, 1917, para. 472, p. 273.

⁴ *Idem*, p. 284.

ship can be established as having been agreed upon between the parties, it would not matter whether the name of the ship was given or not given in the charterparty⁵.

2. Classification of charterparty

Commonly charterparties can be broadly classified into two kinds, namely, a) Voyage charter parties and b) Time charter parties. Time charterparties are also known as charterparties by demise because the ship is leased out to the charterer for the time being. Whether a charter party is voyage charterparty of time charterparty depends on the intension of the parties that will be shown in their contract. There is yet another kind of charterparty known as Port, berth or dock-charter party.

2.1. Voyage charterparty

A voyage charter is a charter under which the ship owner provides a ship and crew, and places them at the disposal of the charterer for the carriage of cargo to a designated port, according to Black's Law dictionary. Under a voyage charter the vessel is let out to the charterer for a specific voyage. The voyage charterer may lease the entire vessel for a voyage or a series of voyage or may lease only a part of the vessel (by space charterparty).

The ship owner will be paid freight which will cover its costs, including fuel and crew, as well as its profit. Legally, freight is a special type of payment, as the usual 'rule of set off' will not apply to it. In voyage charter the set time and lay time will also be provided for the loading and discharging operations. If these operations exceed the permitted lay time, the ship owner will be compensated by demurrage at the rate set down in the charter. For its part, the ship owner owes the charter the duty of proceeding with reasonable dispatch on the charterparty voyage or voyages, in the case of a consecutive voyage charter⁶.

A voyage charter differs from time charter in many respects, but primarily in that it is a contract to carry specific goods on a defined voyage or voyages, the remuneration of the ship owner being a freight calculated on the basis of the quantity of cargo loaded or carried or sometimes a lump sum freight. A voyage charterparty usually carries a cancellation clause that gives the charterer the right to cancel the charter if the ship is not as his disposal at the port of loading at the specified time. The charterer would have to fix a cancellation date before exercising this right.

⁵ Sir Alan Abraham Mocatta and Sir Michael J. Mustill and Stewart C. Boyd, *Scrutton on Charterparties and Bills of Lading*, 19th edition, Sweet and Maxwell, 1984, p. 75.

⁶ Simon Baughen, *Shipping Law*, 3rd edition, Cavendish Publishing Ltd., 2004, p. 136.

2.2. Time charterparty

A time charterparty is also known as charterparty by demise. It is a contract for the hire of a ship or charterparty for a specified period of time; the charterer pays for the bunker fuel, fresh water, port charges etc. in addition to the charter hire. According to Black's law dictionary, charter for a specified period, rather than for a specific task or voyage; a charter under which the ship owner continues to manage and control the vessel but the charterer designates the ports of call and the cargo carried. Each party bears the expenses related to its functions and for any damage it causes. Also termed as catch-time charter⁷.

A charter by demise operates as a lease of the ship itself, to which the services of the master and the crew may or may not be superadded. The charterer⁸ becomes for the time being the owner of the vessel; the master and crew become his servants and through them the possession of the ship is in him. Under a charter not by demise the ship owner agrees with the charterer to render services by his master and crew to carry the goods that are put on board his ship by or on behalf of the charterer. In this case it was held that the ownership and also the possession of the ship remained with the original owner through the master and crew though the charterer has the temporary right to have his goods loaded and conveyed in the vessel.

2.3. Port, berth or dock charterparty

A charterparty that simply states the port at which the ship shall be made available is called port charterparty. Where the ship is to be made available at the specified at the specified loading spot in a port or dock, it is called berth or dock charter party. In such a case the obligation of the charterer is to bring the ship at the specified berth or dock. If that place is not in a position to receive the ship due to some congestion or some other cause, the waiting period would go to the ship owners account. In the case of a port charter party, it is enough for the ship owner to bring the ship to the area of the port where ships usually wait for berth and from where it can be put at charterer. Such area is designated as the commercial area of the port. There have been difficulties in identifying the commercial areas of a port. But the house of lord in cation of cases held that the emphasis has been not on distance from the loading place but upon the fact that the ship should be at the disposal of the charterer.

⁷ [(1905) 1 KB 697].

⁸ (1985) 2 Ll. Rep 325.

3. Common or usual clauses of charterparty

Like any other contract it is open to the parties to include in a charter party or contract of affreightment any lawful terms. Over the period of time many such terms have now become more or less stereotyped and are known as usual clauses of a charter party. The use of these laws depends upon its relative importance some of such terms are as under:

3.1. Seaworthiness clause

As per this clause as observed by Channell J in *McFadden v Blue Star Line*⁵, that: “A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it... Would a prudent owner have required that it (i.e. the defect) should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy...” Accordingly, the essential standard of seaworthiness depends not only upon physical fit, but also to the nature and age of the ship, the type of the carried cargo, the manner of voyage envisaged, and all other relative conditions.

It is worth noting that the following examples would amount to unseaworthiness breach of duty⁹; a) An incompetent crew b) A crew which is insufficiently instructed or insufficient in numbers c) Out of date charts d) Insufficient bunkers for the voyage (depends on the type of charterparty) e) Storage which affects the safety of the ship f) Deficient systems ashore or on board g) The absence of documents required by law (including local law) for the satisfactory completion of the contemplated voyage h) Documents which are not required by law may not render the ship unseaworthy.

3.2. Ready to load

Charterparty usually contains a statement as the position of the ship ready to load. In certain circumstances such a statement may become the term of the contract. Any breach of this term entitles the charter to repudiate the contract. For example, in *Bentsen v. Taylor sons and Co*¹⁰, a charterparty dated March 29 described the ship as now sailed or about to sail to the United Kingdom, and that the ship after discharging homeward cargo, shall proceed to load. But in fact she sailed to the United Kingdom on April 23. The parties then entered into correspondence. The ship arrived and the charterers refused to load. The court went on to hold that the main substance of the contract was the description of the ship as

⁹ (1893) 2 QB 281.

¹⁰ (1893) 2 QB 281.

now sailed or about to sail. The court then took a look into the subject and went on to hold that the above said description is not a mere warranty and so the defendants had the right to repudiate the contract. But their correspondence amounted to waiver such right to repudiate and they were liable for their freight subject to their right to recover such damages as they could prove that they had sustained by reason of the breach of the condition. The court then looked into the clause that the ship is expected ready to load at a given date. But the court went on to hold that this does not mean that the ship must not be in such a position, it only means that there must be an honest belief, founded on reasonable grounds, that the ship will be load at that date. But the ship at that was not ready to load until a long time after wards but a representation was made without any reasonable grounds for making it and this was a breach of condition.

3.3. Fit for voyage

Charter parties usually provide that ship shall be tight, staunch and strong and every way fitted for the voyage. The court of appeal has admitted in *Hong Kong for Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd*¹¹ that it is difficult to distinguish whether such statements are conditions or mere warranty. In this case a charterparty provided that the ship was in every way fitted for ordinary cargo services. The experience of the voyage was different as the ship kept breaking down time to time. Actually, this was due to incompetence and inadequacy of the engine room staff. But it was held that the statement as to the seaworthiness of the ship was not a condition and the charterers were restrained from repudiating the contract.

In *Diplock LJ in Bentsen v. Taylor sons & Co*¹² said that stipulation as to the sea worthiness of a ship is of complex nature¹³. He said that the ship owners undertaking to tender a seaworthy ship has, a result for numerous decisions as to what can amount to unseaworthiness, become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in total loss of the vessel.

3.4. Full and complete cargo

Full and complete cargo means that the charterer undertakes to supply the agreed cargo lest the ship owner may suffer loss of freight. In *Heathfield Co Ltd v. Rodenacher*¹⁴ the charterer refuses to load more than 2673 tones. But the

¹¹ 2 QB 26, EWCA Civ 7,1 All ER 474.

¹² (1893) 2 QB 281.

¹³ (1896) 2 Com Cas 55, CA.

¹⁴ (1887) AC 518, at pages 526-527.

full and complete cargo would have been 2950 tones. The court held that the charterer ought to have loaded full complete cargo and freight was payable accordingly. In another case, the charterer agreed to load cargo not less than 6500 tones and not exceeding 7000 tones. The court laid down that the words not less than 6500 tones was a warranty given by the ship owner to the charterer that much quantity can be loaded and the words not exceeding 7000 tones was a binding condition preventing the ship owner from asking more quantity than 7000 tones. In this case the ship owner asked for more than 7000 tones and the charterer were forced to bring than quantity. He brought that under duress and protest. Now the ship owner claimed extra freight for that extra quantity. But the ship owner was not allowed to recover the extra freight for that extra quantity.

The ship owner is also bound to provide sufficient space on board for full and complete cargo. In *Darling v. Reburn*¹⁵ the ship owner loaded large amount of bunker coal than what was required for that voyage and this reduced the space for full and complete cargo which resulted in reducing the cargo. The ship owner was held liable for the expenses. A clause giving protection to "failure to load" the cargo will apply only if the loading itself is prevented and not where the party is unable to bring such goods to the port. Loading can be prevented by strikes, frosts or other unavoidable accidents. In a decided case the goods could not be brought to docks due to frost. The House of Lords held the charterer responsible for the delay in loading as the frost has not prevented the loading but the bringing of the goods to the docks.

3.5. King's enemies and restraints of princes

The charter parties usually provide that the ship owner would not be liable in certain events. For example, there would be no liability on events arising out of act of god or because of national enemies. Such perils or dangers are known as excepted perils. The words King's enemies mean the enemies of the country or the sovereign of the person who made the bill of lading. All restraints or interruptions made by any lawful authority are considered as Restraints of Princes¹⁶. The dangers from the sea pirates are not included in this category. In a decided case a ship owner was justified in the nonperformance of a contract which involved the voyage through turkey. It was obvious that the ship would be seized because of the war between Turkey and Greece. In this case the war has already been declared but if there was only a mere speculation that there would be a war, the charterer cannot be justified if he repudiates the contract. A voyage, which involved the risk of the ship being sunk by the German submarines, was held to be one that involves the risk of seizure or capture. If the intervention of the restraint is due to the negligence of the ship owner, he cannot avail the exception of this

¹⁵ (1887) AC 518, at pages 526-527.

¹⁶ (1887) AC 518, at pages 526-527.

clause.

3.6. Perils of sea

Charter parties also contain an exception in favor of the dangers of the sea i.e. if the goods are lost or damaged on account of a peril of the sea, the ship owner would not be held liable. The term peril of the sea does not cover every accident or causality which may occur to the goods in the ship. It must be a peril of the sea. The natural action of winds and waves is not considered as perils of sea. There must be some causality, some which could not be foreseen as one of the incidences of the adventure. For example, the cargo in a ship was damaged due to the collision of that ship with another ship which according to the House of Lords was a peril of the sea.

In *Hamilton, Fraser & Co v. Pandorf & Co*¹⁷, rice was shipped under a charter party which contained the exception for the dangers and accidents of the seas. During the voyage some rats gnawed a hole in a pipe on board the ship which resulted in the seepage of sea water and damaged the rice. Here the rice was damaged without the neglect of the ship owner or the crew. The court held that damage was within the exception of perils of sea and the ship owners were not held responsible for the loss. In this case if rats directly damaged the rice then it would have amounted to the neglect of the crew and they won't be getting this exception because there is no direct relation between sea and this accident. But here the sea water damaged the rice and this was not a foreseeable accident. Similarly, a damage caused by the collision of two vessels due to the negligence of either of the vessels will not be a peril of sea.

3.7. Bunker clause

A bunker clause stipulates that the charterer shall accept and pay for all fuel oil in the vessel's bunkers at port of delivery and conversely, (owners) shall pay for all fuel oil in the vessel's bunkers at port of re-delivery at current price at the respective ports. It is customary to agree upon a certain minimum and maximum quantity in bunkers on re-delivery of the vessel. Since the OW Bunker test case, ship operators need to take care to ensure that bunker supply terms are suitable.

3.8. Ship clause

Under this clause, the owner of the ship writes clearly that the ship would be seaworthy at the start of the voyage in every respect, in other words, the ship would be appropriate to travel to the country for which it is taken.

¹⁷ (1995) FJHC 136; Hbc0555d.94s (10 August 1995).

3.9. Ice clause

An ice clause is inserted in a bill of lading or a charterparty when a vessel is bound for a port or ports which may be closed to shipping by ice when the vessel arrives or after the vessel's arrival.

3.10. Lighterage clause

A lighterage clause is inserted into charter-parties which show as port of discharge any safe port in a certain range, e.g. Havre/Hamburg range.

3.11. Negligence clause

A negligence clause tends to exclude ship owner's or carrier's liability for loss or damage resulting from an act, default or neglect of the master, mariner, pilot or the servants of the carrier in the navigation of maneuvering of a ship, not resulting, however, from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager.

3.12. Ready berth clause

A ready berth clause is inserted in a charterparty, i.e. a stipulation to the effect that lay days will begin to count as soon as the vessel has arrived at the port of loading or discharge "whether in berth or not". It protects shipowner's interests against delays which arise from ships having to wait for a berth.

4. Persons bound by the charterparty

Apart from the ship owner and charterer, the following persons are bound by a charter party.

4.1. Part owner of shares in ship

Any part owner of a ship may object to its employment in any particular way, though such employment is under a charter made by a managing owner. In such a case that part owner will neither share the profits nor be liable for the losses of such voyage.

4.2. Purchaser

The purchaser or assignee of a partial interest in a ship under charter is

bound by the charter in existence, but is not liable for expenses or losses on charters that were completed before his purchase.

4.3. Mortgagor or mortgagee

A mortgager in possession has by statute the powers of an ordinary owner, except that he must not materially impair the value of the mortgagee's security. Any charter that does not impair his security therefore binds the mortgagee out of possession, and the burden of proving that a charter is of such a nature is on him. But the mortgagee is not bound by a charter, entered into by the mortgagor after the mortgagee, which does impair the mortgagee's security- e.g. a charter to carry contraband of war to a port of a belligerent power at a time when insurance against the risk of capture is impossible.

4.4. Insurer or underwriter

An underwriter on a ship, by acceptance of notice of abandonment of a ship, becomes entitled to freight earned by her subsequently but does not become entitled to the benefits or liable to the obligations of any pending contract of affreightment.

5. Leading cases on charterparty

5.1. On scope of injunctive relief for forfeiture of vessel in a dispute. In *Karim's Ltd v Feeders Seafood Ltd*¹⁸. That, the equitable injunctive relief against forfeiture is narrow in scope. In the case of a charterparty the withdrawal of the vessel is not truly a forfeiture because the charter transfers no interest in the vessel to the charterer but is merely a contract of service.¹⁹

The plaintiff chartered a vessel from the defendant. There was a disagreement on the contract and the defendant withdrew the vessel. The defendant sued for breach of contract. Among other complaints, the defendant claimed that the plaintiff had not insured the vessel and was behind in its monthly payments required by the charterparty. The plaintiff counter sued for damages and losses resulting from the breach of contract and forfeiture of the vessel. The plaintiff (charterer) in this proceeding applied to the court for an injunction to restrain the defendant from selling, leasing or chartering the vessel, or for an order for immediate return of the vessel to the plaintiff pending the hearing between the parties on the breach of contract action.

The Hon'ble court dismissed the application holding that the equitable injunctive relief against forfeiture is narrow in scope. In the case of a charterparty

¹⁸ <http://www.pacii.org/fj/cases/FJHC/1995/136.html>, consulted on 1.10.2019.

¹⁹ (1965) PGSC 23; [1965-66] PNGLR 213 (17 April 1966).

the withdrawal of the vessel is not truly a forfeiture because the charter transfers no interest in the vessel to the charterer but is merely a contract of service. As such, the plaintiff has suffered only the loss of a contractual right and that alone is not enough to raise an equity in the plaintiff's favor. To grant an injunction prohibiting withdrawal would be tantamount to an order for specific performance which is generally refused in contract. The plaintiff had failed to ensure the vessel as provided by the contract. That constituted a breach so serious that withdrawal of the vessel was the only way that the defendant could protect its position from substantial losses.

5.2. On damages in case of withdrawal of vessel. In *Karlander v Eriama Shipping Co. Ltd.*²⁰ it was held that withdrawal of vessel for breach of contract by charterer-charterer's default- damages are difference between lost hire less profits earned after withdrawal.

In this case the plaintiff vessel owner sought arrears under a charterparty as well as damages for breach of the charter. The defendant charterer had failed to make advance payments for hire as agreed in the charterparty. The plaintiff withdrew the vessel from the service of the defendant. It attempted, but failed to find alternate charters for the vessel but arranged voyages for the vessel until it was sold. The plaintiff claimed to be entitled to damages being the difference between the hire as provided in the charterparty less the profits earned after its withdrawal up until the sale of the vessel. The plaintiff's claim was allowed, holding that the clause which entitles the ship owner to withdraw the ship on default by the charterer on the payment for hire cannot be treated as cutting down the right of the owner to treat the contract at an end, and to recover damages based on the charterer's repudiation of the charter. The plaintiff had lost the benefit of the hire for the remaining period of the charterparty and was therefore entitled to the difference between hire less the profits earned after the withdrawal.

5.3. On implied warranty by ship owner for seaworthiness in *National Trading Corporation Ltd v Huggett*²¹ held that implied warranty of seaworthiness at the commencement of the voyage boat owner must indemnify charterer for repairs.

In this case the first defendant, the charterer was held to be liable to the plaintiff for the repairs to the boat engine. The first defendant was to be indemnified by the 2d defendant, the owner of the vessel. The 2d defendant appealed the findings. The vessel's engine had broken down and had to be towed in while on the charter. While rejecting the appeal the court held that the ordinary rule is that there is an implied warranty that the ship is seaworthy at the commencement of the voyage. There was nothing in the charter to exclude or limit this rule. The fault in the engine which caused the breakdown existed when the vessel started and therefore the vessel was not seaworthy for the voyage²².

²⁰ <http://www.pacii.org/pg/cases/PGSC/1965/23.html>, consulted on 1.10.2019.

²¹ <http://www.pacii.org/fj/cases/FJHC/1999/6.html>, consulted on 1.10.2019.

²² (1999) FJHC 6; Hba0011j.98s (19 February 1999).

5.4. On withdrawal of vessel due to breach of charterparty in *Premier Makira/Ulawa Province v Universal Graphics & Designs Ltd*²³ held that withdrawal of vessel for breach of contract non punctual payment of hire fees may be excused where the charterer has a counterclaim against the owner of the vessel- interlocutory withdrawal of vessel not granted until rights determined.

The plaintiff had filed a writ of summons claiming that the defendant was in arrears of hire fees for the vessel for 2 ½ months accruing in a charterparty. The plaintiff sought the fees owing and return of the vessel. The defendant counter claimed for money owed by the plaintiff to the defendant for spare parts and mechanical work done at the beginning of an earlier charter. The sum claimed by the defendant exceeded the accrued arrears under the charterparty. Before the action was heard, the plaintiff sought interlocutory relief in the form of orders to prevent the defendant from removing the vessel from Honiara, and the return of the vessel.

In this matter interlocutory injunction refused holding that the primary purpose of an interlocutory injunction is to preserve the status quo until rights have been determined in the case. The court must consider if monetary damages will be adequate compensation in the event that the plaintiff's interlocutory relief is refused and the plaintiff succeeds in obtaining a final permanent injunction; or if the interlocutory relief is granted and the defendant succeeds at final determination. The court found that the charterer has leeway to pay off the default arrears before the owner withdraws the ship under the charterparty, and the defendant's counterclaim may qualify for the 'special circumstances' where the nonpunctual payment of hire may be excused.²⁴

5.5. On no onus of shipowner for illegal fishing by charterparty in *State v Hung Kuo Hui*²⁵, held that Charterer guilty of illegal fishing- vessel forfeited with no requirement to name owner as party.

The defendant company was Fijian owned and operated. The defendant company and captain were found guilty of illegal fishing in Fijian territorial waters. The state sought forfeiture of the vessel as part the penalty. The vessel was chartered from a company in Taiwan. In this case order for forfeiture granted, holding that the court found that the illegal fishing was blatant and repeated in spite of warnings. The penalties were meant to be harsh. It was not necessary to add the owner of the vessel as a party. Owners and charterers should be aware of the law and the penalties.

5.6. On court's no jurisdiction on ship owner for pollution in bareboat charter, in *Yap v MV Cecilia*²⁶ I held that pollution offences alleged against charterer and owner of vessel, court gains no personal jurisdiction over vessel owner on basis of bareboat charter.

²³ (1996) SBHC 18; HC-CC 107 of 1996 (15 April 1996).

²⁴ (2006) FJHC 113; HAC40.2004 (24 February 2006).

²⁵ (2006) FJHC 113; HAC40.2004 (24 February 2006).

²⁶ (2005) FMSC 41; 13 FSM Intrm. 403 (Yap 2005) (19 September 2005).

In this case there were five causes of action all based on a central allegation that the vessel had on numerous occasions discharged petroleum-based effluent. The vessel was under a bareboat charter between the defendant owner and the defendant charterer. The defendant owner served a motion to dismiss for lack of personal jurisdiction on the basis that he had no control over the vessel and he lacked the minimum contacts with the forum sufficient to subject to the court's jurisdiction.

In this case motion was granted by the court holding that under a demise or bareboat charter the charterer takes complete control of the vessel, mans it with its own crew and is treated by law as its legal owner. The charterer is potentially liable for collision, personal injury to master, crew and third parties, pollution damages, and for the loss or damage to the chartered vessel. Vessel owners normally have no personal liability but the vessel may be liable in rem. As such, the existence of the bareboat charter did not bring the owner into the court's jurisdiction either on the basis of 'doing business' provision of the long arm statute, or under the provision based on the operation of the vessel within territorial waters.²⁷

5.7. On supply of bunkers in *RES COGITANS OW Bunker Group*²⁸, Judgement Portal, where the Supreme Court upheld the decision of the court of appeal that, despite its references to buyers and sellers, OW Bunker's standard contract was not a contract of sale, but a permit for the owners of the "RES COGITANS" to consume bunkers, even if title had not passed to the OW Bunkers company, and could not be transferred to the Shipowner. So, the owners of "RES COGITANS" were found liable to pay the OW Bunkers company at English law, even if they might also face a valid claim from the physical supplier of the bunkers in some other jurisdiction.

5.8. On ship arrest under time charter in *NYK Bulkship (Atlantic) NV v Cargill International SA (The "Global Santosh), NYK Bulkship Atlantic NV v. Cargill International SA*²⁹, held that the "GLOBAL SANTOSH" had been time-chartered by her owners to Cargill, with a series of further charterers beyond Cargill. The time charter, on NYPE form, held that the ship would be off-hire for time lost by reason of an arrest, unless the arrest was "occasioned by any personal act or omission or default of the charterers or their agents". In December 2008, the ship was arrested, apparently mistakenly, by one of the receivers of the cargo. Owners argued that any sub-charterers and their agents were to be considered as agents of the charterers for the purpose of this clause. The Supreme Court held that the arresting party was not acting in the role of Cargill's agents in making the arrest, or acting on Cargill's behalf in so doing, and that the ship was off-hire for the time lost.

5.9. On the effect of a failure to make a hire payment under a time charter in *ASTRA Flux J* gave judgment in *Kuwait Rocks Co v AMB Bulkcarriers Inc*

²⁷ The UK Supreme Court 2016.

²⁸ SA(2016)UKSC 20.

²⁹ (2013) EWHC 30 (Comm).

(*The Astra*)³⁰ the Court of appeal resolved a recent controversy about the effect of a failure to make a hire payment under a time charter. In a High Court decision in 2013, the "ASTRA", Flaux J held that the obligation to make punctual payment of each instalment of hire was a condition of the charterparty contract, and that any failure to do this entitled to owners to withdraw from the time charter and to claim damages. In a 2015 High Court case, *Spar Shipping v Grand China Logistics*³¹, Popplewell J disagreed with this, and held that the timely payment of hire in full was not a condition of the contract. Given the controversy over this point, an appeal was allowed, and the court of appeal has now held that the ASTRA was wrongly decided. The Court of Appeal went on to give useful guidance on when an owner might consider that a charterparty has been repudiated by charterer's actions or failures to perform.³²

5.10. On Time Charter Trips in *WEHR TRAVE SBT Star Bulk & Tankers (Germany) GmbH & Co KG v Cosmotrade SA*³³ (The "Wehr Trave") held that Time Charter Trips are common in the commercial world, but there is little case law about such contracts. In May, in the "WEHR TRAVE", the High Court considered the question of when a "trip" is a trip, and decided that in this case the charterers were entitled to make two cargo voyages as part of one trip.

5.11. On the effect of the Inter Club Agreement in a time charter *YANGTZE XING HUA The Yangtze Xing Hua*³⁴, held in a dispute about the effect of the Inter Club Agreement in a time charter, the "YANGTZE XING HUA", the High Court held that, where the ICA states that a cargo claim will be borne 100% by one party to the charter, where "there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors)" then the "act" of one party does not necessarily require any fault of that party or their servant.

5.12. On demurrage accruing on containers trapped in a port in voyage charters, in *MSC v COTTONEX*³⁵, held that in a demurrage case, *MSC v Cottonex*, actually involving demurrage accruing on containers trapped in a port, the court of appeal seemed reluctant to allow that the contract, and the right to accrue demurrage, could continue indefinitely, and decided that the contracts for carriage of the containers had been repudiated by a delay which frustrated the commercial purpose of the venture, such that the contracts, and the right to demurrage, automatically came to an end.

5.13. On ship owner's no obligation for mitigation in *D'AMICO SHIPPING v ENDOFA, D'Amico Shipping Italia SPA v Endofa DMCC & Anor*

³⁰ (2013) EWHC 30 (Comm).

³¹ (2016) EWCA CIV 982.

³² (2016) CFI 043.

³³ (2016) EWHC 583(Comm).

³⁴ (2016) EWHC 3132 (Comm).

³⁵ (2016) EWHC 3132 (Comm).

(2016)³⁶, held that in *D'Amico Shipping v Endofa*, the High Court decided that owners claim for an outstanding balance of freight was a claim for a debt owed, not a claim for damages, so that the owners were not under any obligation to mitigate their loss.

5.14. On the issue of onus to prove in case of negligence of cargo in carriage of goods by sea matters. In the case *Volcafe v CSAV*³⁷ held that the claims by Volcafe and other coffee merchants against container line CSAV were for a sum of only \$62,500 and the legal costs involved have probably greatly exceeded the sum in dispute. The case has brought some clarity to English law with respect to the application of The Hague-Visby Rules. Bags of coffee, in containers, had been shipped, clean on board but arrived with condensation damage. The High Court had held that the onus was on the carrier to prove that they had not been negligent in the carriage, and the carrier could not do so. The Court of appeal held that, once the carrier had established a prima facie case that the damage was due to inherent vice (one of that Art. IV rule 2 exceptions), then the burden shifted to the cargo claimant, who had to prove negligence of the carrier. On the facts of this claim, the court held that the damage to the coffee was due to inherent vice, and the carrier's appeal against the High Court decision was allowed.

5.15. On the application of Hague Rules on limitation in the *AQASIA*³⁸ matter in October 2016, the High Court decided that the package limitation of the Hague Rules does not apply to bulk cargoes, although the Hague-Visby rules do have a provision allowing for limitation per package or per kilogram of gross weight, whichever is higher.

5.16. On application of Hague-Visby rules in place of Hague Rules in case of disputes pertain to Bill Of Lading in *Yemgas FZCO & Ors v Superior Pescadores*³⁹. In the *SUPERIOR PESCADORES*, the Court of appeal held that parties to the carriage of goods covered by a conger bill of lading were subject to the limitations of the Hague-Visby Rules, and not the Hague Rules.

5.17. On the issue of the ransom payment was allowed as a General Average expense in the "LONGCHAMP" was captured by pirates in the Gulf of Aden, and after a period of negotiation a ransom of US \$ 1.85 million was agreed and paid to release the vessel and her crew. The ransom payment was allowed as a General Average expense and cargo interests paid their share. However, cargo interests did not agree that the Owner's cost of crew wages, bonuses, maintenance and the bunkers consumed during the detention were GA expenses. The High Court agreed these costs were GA expenses under Rule F of YAR 1974 and had "no doubt" that the expenditure was incurred in substitute for a higher ransom payment. The Court of Appeal also agreed because there was no alternative

³⁶ (2016) CFI 043.

³⁷ (2016) EWCA Civ 1103. <https://www.steamshipmutual.com/publications/Articles/burdenofproof1116.htm>, consulted on 1.10.2019.

³⁸ (2016) CC UK.

³⁹ (2016) EWCA Civ 101.

course of action open to Owners.⁴⁰

5.18. The burden of proof in seeking to break limitation under The Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol) lies on the party in *Kairos Shipping Limited and others v Enja & Co LLC and others (The "Atlantik Confidence")* held that the burden of proof in seeking to break limitation under The Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol) lies on the party seeking to do so, and is a heavy one because of the nature of the conduct which must be proved. In the "ATLANTIK CONFIDENCE", the vessel sank in deep water and could not be inspected with a view to determining the cause of the fire or the cause of the sinking. The decision does not suggest any weakening of the test to deny limitation.⁴¹

6. Conclusion

The term "charterparty" stands for the contract between the owner of a vessel and the charterer, which is the one that takes over the vessel for a certain amount of time or voyage. When there is an agreement or contract to carry some goods or provide a ship for carrying the same, a document called charterparty contains the contract of affreightment. By this document the ship owner lets the ship for the purpose of carrying the cargo or undertakes to carry the full cargo on the ship on voyage or time basis. The contract of affreightment may be either in the form of bill of lading or charterparty. A bill of lading is a pure and simple contract to carry the goods whereas a charterparty involves the complete hiring of the ship itself. In simple terms, if a ship is booked by a shipper for his exclusive use for a voyage or a for certain period of time, that is called a charterparty.

As defined in the Black's Law Dictionary, a charterparty means a contract by which a ship or a principal part of it, is led by the owner especially to a merchant for the conveyance of goods on a predetermined voyage to one or more places; a special contract between the ship owner and charters, especially for the carriage of goods etc. and this contract is governed by the various mutually agreed upon clauses related to vessel, cargo capacity, seaworthiness, port, dock and berth clauses, act of god, act of government, cost and damage calculation etc. Therefore, considering the importance of transportation of goods by sea, charterparty is an essential document for the effective and efficacious movement of goods by sea. Various judicial pronouncement over the period of time has given sufficient explanation to the usual clauses of charterparty. Hence, it is essential that the parties engaged in this business properly deliberate on the clauses of the charter party considering over all facts and circumstances along with international laws and interpretation given by the judicial authorities before entering into it the

⁴⁰ (2014) EWCA Civ 217.

⁴¹ (2014) EWCA Civ 217.

contract of Charterparty, so that ambiguity in the contract is avoided and hassle free execution of the chart party in the best interest of all the parties be achieved.

“It is not the going out of port, but the coming in, that determines the success of a voyage.”
Henry Ward Beecher

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Cross - Border Merger. Analysis of Comparative Law

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Abstract

The study presents some considerations regarding the merger of companies (section 1.1), then includes the union provisions in the matter of mergers (section 1.2), the Romanian regulation in the matter (section 1.3) and the comparative analysis of the Romanian regulation with the European Union one, with proposals de lege ferenda (section .2).

Keywords: *cross-border merger, European Directive, absorbing company, absorbed company, creditors.*

JEL Classification: K22, K33

1. Introductory considerations

Some of the most important changes to the internal regulations on mergers took place as a result of the transposition of European norms, which aimed to uniformize the European market and to create a favorable context for cross-border mergers. Moreover, the European merger directives aimed to ensure the protection of shareholders and third parties against the effects of the mergers, with the European legislator initially focusing on the uniformization of internal legal frameworks and subsequently on cross-border mergers.

1.1. Union provisions on the matter

The creation of a uniform legal framework in the national law of the Member States for the realization of mergers between companies was achieved by the introduction of the 3rd Directive no.78/855/C.E.E.³, in 1978. The third Directive of the Council was applicable only in case of joint stock companies and contained provisions regarding the organization of the merger, the procedure for achieving the merger by absorption, the particular case of the merger by absorption, when the absorbing company holds more than 90% of the shares of the absorbed company, the procedure for the realization of the merger by establishing

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³ Directive no. 78/855/C.E.E. regarding the merger of anonymous societies, JO L 295, 20.10.1978, p. 36.

a new company and provisions regarding the operations assimilated to the merger. The Directive was repealed, but its content was taken over in Directive 2011/35/EU, the main regulatory framework for the merger of joint stock companies.

The purpose of this directive is to protect the interests of associates and third parties and imposes certain obligations, including informing as appropriate and as objective as possible the shareholders of the merging companies, so that their rights are adequately protected.

Thus, Article 5⁴ of Directive 2011/35/EU explicitly provides the minimum content of the merger project, while Article 7⁵ regulates the conditions under which the vote in the General Assembly may be exercised for such an operation, thus ensuring that a fair allocation of voting rights takes place, the allocation established according to the categories of existing shareholders.

The Directive also contains provisions relating to the advertising conditions for the merger project and requires the adoption of measures to protect creditors. Directive 2011/35/EU⁶ is of particular importance also because it aims to limit the cases of nullity of the merger operations. Thus, Article 22 provides the possibility of covering the irregularities whenever possible and restricts the term in which the invalidity can be invoked, to 6 months from the date when the merger is opposed to the person invoking the nullity or if the situation has been rectified.

The regulation provided in Directive 2011/35/EU is complemented by

⁴ According to which: "The administrative or management bodies of the merging companies shall draw up a merger draft in writing." (2) The merger project shall mention at least the following: (a) the legal form, name and registered office of the merging companies; (b) the exchange rate of the shares and the amount of any cash payments; (c) the conditions for the allocation of shares to the absorbing company; (d) the date from which the holding of such shares confers on the shareholders the right to participate in benefits, as well as any special conditions affecting that right; EN 29.4.2011 Official Journal of the European Union L 110/3; (e) the date from which the transactions of the absorbed company are considered from the accounting point of view as belonging to the absorbing company; (f) the rights granted by the absorbing company to the holders of shares conferring special rights and to the holders of securities other than shares or the measures proposed in respect thereof; (g) any special advantage granted to the experts referred to in Article 10 (1) and to the members of the administrative, management, supervisory and control bodies of the merging companies."

⁵ According to which, "For a merger, at least the approval of the General Assembly of each of the merging companies is required. The laws of the Member States provide that a majority of at least two thirds of the votes for the shares or subscribed capital represented is required for the approval decision in question. However, the laws of the Member States may provide that a simple majority of the votes indicated in the first paragraph is sufficient, if at least half of the share capital is represented. In addition, if applicable, the rules regarding the change of status apply; (2) If there are several categories of shares, the decision on the merger shall be subject to a separate vote at least for each category of shareholders whose rights are affected by the transaction; (3) The decision concerns both the approval of the merger project, as well as any modification of the statute, necessary for the realization of the merger."

⁶ Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 on mergers of Companies by shares, OJ L 110/29.4.2011.

other directives, in particular by Directive 2011/23/C.E. on the protection of employees' rights⁷ and Directive 2009/109/C.E. on reporting obligations and the drafting of the necessary documentation in the case of mergers⁸, which aim to reduce the volume of activities relating to the information obligations of the companies involved in the merger, so that these obligations do not represent a real barrier to the realization of the merger. It is intended at the same time to ensure that the interests of creditors, shareholders and other interested parties are protected.

In this regard, we specify that Directive 2009/109/C.E. provides the possibility for participating companies to publish the required information on their websites, so that the process is streamlined and the costs related to the information activity are reduced.

Even if the EU focused its attention on the merger operation early on, the possibility for companies from different Member States to merge would be regulated only from 2005. Previously, European Union law did not provide a clear and structured framework for achieving cross-border mergers, this possibility being provided only in the form of intra-union mergers regulated by the Regulation⁹ 2157/2001.

According to the provisions contained in this Regulation, the merger could be carried out between at least two companies registered in two different Member States, in the form of setting up a European Company (E.S.). The creation of a European Society was possible either through a merger operation or by transforming the absorbing society into a European Society. In 2005, after a long process, the first directive regulating this matter appears, namely Directive 2005/5/E.C¹⁰. Creating a framework to regulate cross-border mergers was of particular importance, given the principle of free movement of labor and capital on the Union market.

The merit of this first directive was the establishment of a clear framework and procedures for carrying out such a concentration operation outside the borders of a state. The Directive has been amended by two subsequent normative acts, Directive 2009/109/C.E., regarding the obligations of reporting and drawing up the documentation required in the case of mergers and divisions and Directive¹¹ 2012/17/U.E.

⁷ Directive 2011/23/C.E. regarding the protection of the employees' rights.

⁸ Directive No. 109/2009 amending Directives 77/91/C.E.E., 78/855/C.E.E. and 82/891/C. E. E. of the Council and Directive 2005/56/C.E. regarding the reporting and drafting requirements of the necessary documentation in the case of mergers and Divisions, OJ L 013, 16.1.2002.

⁹ Council regulation C. E. no. 2157/2001 of 8 October 2001 on the Statute of the European Company (S.E.).

¹⁰ Directive 2005/56/C.E. of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of companies by shares; Text with relevance for S. E, JOL 310/1, 25.11.2005.

¹¹ Directive 2012/17/U.E., relating to the interconnection of central, trade and company registers, JOC 248, 25.08.2011.

According to Directive 2005/56/C.E.¹², also known as Directive X, cross-border merger has become possible between any type of capital company. Such an operation can be performed within the framework of national law, thus eliminating the limitation of the merger only between the joint stock companies.

1.2. Romanian regulations of the matter

The provisions of Directive 2005/56/C.E. were transposed into Romanian law through a series of amendments and completions of Law no. 31/1990, made by E.O.G.¹³ no. 52/2008. Regarding the tax regime of mergers, it was established by Directive 90/434/C.E.E.¹⁴ as amended by Directive 2005/19/C.E.¹⁵ on the tax regime applicable to mergers, divisions, divestments of assets and exchanges of shares between companies in different Member States.

The cross-border merger may involve joint stock companies, limited partnership companies, limited liability companies, which are Romanian legal entities, as well as European companies with their registered office in Romania. They may merge with companies which have their registered office or, as the case may be, the central administration or the main office in other Member States of the European Union or in countries belonging to the European Economic Area.¹⁶ Exempt from applying these regulations are collective investment undertakings in securities and closed-end investment funds, as well as any other entities whose activity object is the collective placement of resources attracted from the public and which operate on the principle of risk sharing and whose securities may be redeemed, directly or indirectly, at the request of the owners, from the assets of the entity concerned. Cross-border merger is the operation by which:

- a) one or more companies, of which at least two are governed by the

¹² Directive 2005/56/C.E. of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of companies by shares., JOL 310, 25.11.2005.

¹³ Emergency Ordinance no. 52/2008 for the modification and completion of Law no. 31/1990 on companies and for the completion of Law no. 26/1990 on the Register of Commerce. Published in the OM. no. 778/20.11.2008.

¹⁴ Directive 90/434/C.E.E. of 23 July 1990 on the common tax regime applicable to mergers, divisions, transfer of assets and exchanges of shares between companies of different Member States, JOL 225/20.08.1990.

¹⁵ Directive 2005/19/C. E. of 17 February 2005 amending Directive 90/434/C.E.E. on the common tax regime applicable to mergers, divisions, transfer of assets and exchanges of shares between companies of different Member States, JOL 58/19, 4.03.2005.

¹⁶ Cărpenaru St. D., David S., Piperea Gh., *Company law. Comment on articles*, 5th ed., Ed. CH. Beck, Bucharest, 2014, p.844; cross-border merger can pose a number of theoretical and practical problems to the participating companies including the change of the laws applicable to the company absorbed by a company based in another member state of the EU; in this respect, Cărpenaru St. D., *Treaty of Romanian commercial law*, Ed. Universul Juridic, Bucharest, 2012, p.257. In the sense that the company legislator deviates from the provisions of the Directive no.205/56/C.E. and tries to offer a broad definition of the cross-border merger - see Adam I., Savu C.N., *The Law of commercial companies. Comments and explanations*, Ed. C.H. Beck, Bucharest, 2010, p. 928 and Hinescu A., *The merger of companies*, Ed. Hamangiu, Bucharest, 2016, p. 157.

legislation of two different Member States, are dissolved without liquidation and transfer their assets to another already existing company (the absorbing company), in exchange for the distribution to the shareholders/associates of the absorbed company shares/ shares and, possibly, a cash payment of up to 10% of the nominal value of shares/shares so distributed;

b) several companies, of which at least two, are governed by the legislation of two different Member States, are dissolved without liquidation and transfer their assets to a company they constitute (the absorbing company), in exchange for the distribution to their shareholders/social shares and, possibly, a cash payment of up to 10% of the nominal value of the shares/social shares distributed;

c) a company is dissolved without entering into liquidation and transfers its assets to another company, which owns all its shares/ shares or other titles conferring voting rights in the General Assembly.

2. Comparative analysis. Proposals *de lege ferenda*

Analyzing the national and European regulations in the field of cross-border merger, we observe that the internal norm has a broader regulatory object by including the joint stock company, limited shareholding, and the European companies (S.E.) based in Romania. Thus, companies in the member states of the U.E. participants in the cross-border merger regulated by Law no. 31/1990 can wear any form of organization under the conditions in which the companies established in Romania cannot be organized as a company in a collective name or in a simple partnership.

Depending on its method, the merger has the following consequences¹⁷:

a) transfer to the absorbent/newly established company of all assets and liabilities of the company absorbed;

b) shareholders or associations of the company acquired/participating in the merger become shareholders and associates of the acquiring/newly established company in accordance with the rules of allocation established in the draft merger;

c) the company being absorbed, i.e. societies forming the new company by merger, ceases to exist.

The rights and obligations of companies absorbed arising from employment relationships and which exist on the date of entry into force of the cross-border merger shall be transferred to the acquiring or newly established company.

Art. 251⁶ paragraph (1) of Law 31/1990 stipulates that the joint merger project, signed by the representatives of the participating companies, accompanied by a declaration on how the advertising is carried out, is submitted to the Trade Register Office where the Romanian legal entities are registered and/ or

¹⁷ Cărpenu St. D., David S., Piperea Gh., *op. cit.*, p. 844.

European companies based in Romania, participating in the merger¹⁸. The delegated judge appoints one or more experts, natural or legal persons, to examine the joint merger project and has drafted a written report to the shareholders/ associates¹⁹. Art. 251⁶ paragraph (2) of the Companies Law stipulates that the delegated judge is the one who performs the legality control of the cross-border merger project, while art. 5²⁰ of the E.O. 116/2009 attributes this competence to the director of O.R.C. We consider that, according to *de lege ferenda*, it is necessary to agree to these contradictory legal provisions.

Moreover, comparing the provisions of art. 251⁶ paragraph (1)²¹ with those of art. 242²² of the Companies Law, however, we observe that there is another mismatch, this time in terms of content. Thus, art. 251⁶ did not faithfully take over the content of art. 242, which represents the common law in the matter, regarding the filing of the declaration on how to extinguish the liability of the company that ceases to exist. We consider that *de lege ferenda* is necessary to agree on the content of the two articles in order to avoid procedural difficulties.

The creditors of the companies, which take part in the merger, may oppose the merger under the conditions of art. 243 of the Companies Law. We also point out that, besides the independent expert's report, there must also be a written and detailed report of the governing bodies of the companies participating in the merger, explaining and justifying the legal and economic aspects of the cross-border merger and which details the implications of the cross-border merger for

¹⁸ If the benefit of the cross-border merger is a European company based in Romania, advertising will be carried out in the Official Journal of the EU.

¹⁹ In the sense that the prerogative to designate the expert who will carry out the report on the draft merger rests with the Director of the Trade Register office or the person designated with that competence, see Hinescu A., *op. cit.*, p. 160; of an exceptional nature according to article 5 of G.P.O. 116/2009 The control of legality on the cross-border merger is carried out by the Director of the Trade Register office or by the designated person.

²⁰ In the case of cross-border merger, the tasks of verifying the legality of the procedure followed by the companies participating in the merger - Romanian legal entities or European companies with their registered office in Romania - and, if applicable, the newly established company - Romanian legal person or European company with the registered office in Romania - belong to the director of the trade register office next to the court and/or to the person or persons designated by the general director of the National Trade Register Office, except for the attributions provided in art. 251¹³ and 251¹⁴ of Law no. 31/1990, republished, with the subsequent modifications and completions, which will be exercised by the court, the commercial section. For the applications within the jurisdiction of the court's resolution, art. 4 applies accordingly.

²¹ According to which: "the joint cross-border merger project, signed by the representatives of the participating companies, is deposited at the Trade Register office where Romanian legal persons and/or companies are registered. European Union based in Romania, participating in the merger, accompanied by a statement on how to publish the draft merger".

²² According to which: "the draft merger or division, signed by the representatives of the participating companies, shall be lodged at the Trade Register office where each company is registered, accompanied by a declaration of the company which ceases to exist Following the merger or division of the manner in which he decided to put an end to his liability, as well as a statement on how to publish the draft merger or division".

associates²³, creditors and employees²⁴. However, by a decision of all the shareholders/associates of the companies participating in the merger, the merger project examination and the report may be waived. If the report is made, it must be made available to the associates and the employees' representatives at least 30 days before the date of the meeting in which the General Assembly is to decide on the merger. If the company has its own website, the report is also published on the website, for the free access of shareholders/associates and employees.

An issue requiring a special analysis of the legal regime for the invalidity of the cross-border merger in Romanian law in relation to the European regulation and the rules governing the internal merger.

Thus, in accordance with Articles 17²⁵ and 12²⁶ of Directive 2005/56/C.E., The cross-border merger that becomes effective cannot be declared null and void. The Romanian legislator regulates this aspect by the provisions of art. 251¹ of the Law of companies no. 31/1990²⁷. Analyzing the content of this article, we observe that the provisions of Article 251 of the Companies Law²⁸, which regulate the legal regime of internal merger, are largely taken over. Thus, art.251¹ paragraph (1)²⁹ stipulates *expressis verbis* the judicial character of the nullity of the merger, as well as the inadmissibility of introducing the action in finding the

²³ Stoica C-F., Cristea S., *Business law. Topics and contracts.*, Ed. A.S.E., Bucharest, 2011, p. 157.

²⁴ Gheorghe C., *Romanian commercial law*, Ed.C.H. Beck, Bucharest, 2013, p. 526; Stoica C-F., Cristea S.-L., *op.cit.*, p. 157; Cărpenu St. D., *op. cit.*, 2012, p. 259. As stated, the competence to control the legality of the cross-border merger rests with the Romanian court (where the companies involved in the merger or the newly-created company have their seat) to see Nemeș V., *Commercial law*, Ed. Universul Juridic, Bucharest, 2011, p. 181, 182 and Stoica C.-F., Cristea S.-L., *op.cit.*, 2011, p.157.

²⁵ According to which: "The cross-border merger which enters into force in accordance with article 12 cannot be declared null and void".

²⁶ According to which: "The law of the Member State under which the company resulting from the cross-border merger is established shall determine the date from which the cross-border merger takes effect. That date shall be after the inspection referred to in article 11".

²⁷ According to which: "(1) The nullity of a merger can be declared only by a court decision; (2) The nullity of the merger cannot take place after the date on which it took effect, the date established according to art. 251¹⁵ para. (2).; (3) The procedures for cancellation and declaration of invalidity cannot be initiated if the situation has been rectified. If the irregularity that may lead to the declaration of the nullity of a merger can be remedied, the competent court grants the participating companies a period for rectifying it; (4) The final decision declaring the merger null and void shall be submitted ex officio by the court of the trade register offices from the headquarters of the companies involved in the merger".

²⁸ According to which: "(1) The nullity of a merger or division may be declared only by a court decision; (2) From the date of its realization, according to art. 249, the merger, respectively the division, can be declared null only if it has not been subjected to judicial control in accordance with the provisions of art. 37 or if the decision of one of the general assemblies that voted on the draft of the merger or division is null or void.; (3) The procedures for cancellation and declaration of the nullity of the merger or division cannot be initiated after the expiry of a period of 6 months from the date on which the merger or division became effective, pursuant to art. 249, or if the situation has been rectified".

²⁹ The nullity of a merger may be declared only by a court decision.

nullity if the situation has been remedied. The differentiation aspect is determined by the fact that, in the case of the internal merger, the action can be brought within a maximum of 6 months from the effects of the merger according to article 249 of the Companies Law, while in the case of the cross-border merger, we can find out that the action for annulment is admitted only before this moment, as stipulated by art. 251¹ paragraph (2)³⁰.

3. Conclusions

We consider that, given the production conditions and the effects of the nullity of the cross-border merger, the wording of this article is deficient. Thus, we consider that only after the merger has produced its effects can it be considered a complete legal act, which can be challenged with an action, by which its cancellation is requested. In view of these aspects, we propose that *de lege ferenda* the text of art. 251¹ paragraph (2) should be modified in the sense that the invalidity action may be introduced after the merger is finalized.

Another aspect that needs to be clarified concerns the phrase "the void of law" used by the Union legislator in the content of art.17³¹ of the above-mentioned directive. Therefore:

- if we consider that the EU legislator takes into consideration only the causes of absolute nullity, then on the contrary, after the moment when the cross-border merger becomes effective, it may be requested to cancel the merger in question for reasons of relative nullity;

- if we consider that the same legislature also took into account the reasons for relative nullity then, after the moment when the merger becomes effective, the action can no longer be annulled.

We consider that a literal analysis can lead to the conclusion that the Union legislature considered only the reasons for absolute nullity. By interpreting in this way the provisions of Article 17 of Directive 2005/56/C.E., the existence in Law 31/1990 on companies of articles dedicated to the regulation of the invalidity of the cross-border merger is justified.

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³⁰ The nullity of the merger may not intervene after the date on which it produced its effects, the date established according to art. 251¹⁵ para. (2).

³¹ According to which: "The cross-border merger which enters into force in accordance with article 12 cannot be declared null and void".

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Guarantees, Rights and Obligations in International Trade through Electronic Media

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Abstract

The virtual world and artificial intelligence are a daily "reality". The electronic environment defined as On-Line has taken over a large amount of commercial transactions from the classical environment. Classical trading allows you to meet your partners and negotiate directly. In the international trade from On-Line the partners are not often known and they act on a trust given by the community. Business guarantees no longer fall within the attribute of the state (community of states) that confirms the verifiable existence of the company by registering with the Trade Register and/or by fiscal registration. There is no guarantee in e-commerce! The reliable guarantee of the partner's creditworthiness is the system based on trust and the opinions of the other partners who have used transactions before. There are situations in which the provider does not exist in the form presented on the web page. There are situations in which the partner company only has an Internet domain and in reality, it does not exist. Our paper opens a number of issues that can be debated starting with the statute and the legal definition of companies that act exclusively on-line as "legal persons of private law in the online environment". We assist and participate in a new society that has no defined regulations. How, Who and When will it be able to regulate it?

Keywords: *cyber law, law and IT companies, law and smart society, artificial law and intelligence.*

JEL Classification: K10, K15, K24, K38

1. Introductory considerations

Over time, social relations have developed and transformed through the impact of trade between different regions or even between continents. The silk road was an artery through which goods, knowledge about science, art, literature, etc. were transmitted, but also ideologies. Those stations where the caravans stopped for food were centers where exchanges of ideas, cultural and new knowledge about science brought progress to the area and created a smaller and more interactive world. In time, technology based on artificial intelligence has

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created computer networks with stations (HUBs), through whose servers information is stored and circulated. This is the premise from which e-commerce starts. We can say that the Internet is a "*silk road*" of the future. E-commerce started shy about 20 years ago. As the technologies have developed through the processing power of information in the electronic environment, through the speeds of information circulation (upload or download) in and from the virtual environment, society and economy, both state and global, fundamentally change.

International trade using electronic media is a certainty, also volumes and efficiency can no longer be neglected by manufacturers, suppliers, distributors and customers. An order placed on a virtual store is processed within minutes, and the time the product or service is received takes from a few minutes to a few days, or at most weeks. When referring to a horizon of a few weeks, we know that the product comes from thousands of kilometers away by boat or by land. We specify that the halving of waiting times in online commerce is achieved by suppliers or distributors through the creation of logistics centers - regional warehouses. In these centers merchandise with a certain marketability is located.

The mechanism described above, procedurally, is used by economic entities or legal persons and individuals of private law, who also act in the classical system. They have legal attributes of civil law, with a company statute or constitutive act, registered office and secondary offices or point of work, registered capital at the Trade Register and at the tax authorities. These entities present financial statements, have bank guarantees and are subject to the laws of a state or of state unions. For greater productivity, they also act through the internet, and virtual reality. The aim of our approach is not to investigate this market known and under the authority of the states.

Our goal is to discuss parallel economic systems, which have no structures with real or public legal entities. These operators do not have identification at fixed addresses, do not pay taxes but provide services and products, entering into direct competition with the classical business environment. Although they operate without identifiable identity, they are accepted by society and the open market. Operators who do not have their identity defined in a certain region have developed distribution networks of products of uncertain origin and quality, but listing competitive prices to the classical market. These operators have reached huge commercial volumes, the values competing with the gross domestic product of many states.

2. International trade through electronic media

Low price made the consumer's attention to be transferred from the classical trade by physical shop to the virtual system, the users saying they risk paying a stranger a small amount, even if they might lose it, but could save money from that product and its utility. These operators have expanded their strength, making contracts with certain suppliers of products and services, which have an important

technical value and a great interest for the market. The same operators have started to establish their headquarters in certain offshore tax havens or in some countries that have a *dumping* policy, thus directly competing with companies that are registered in countries with medium or high taxation.

The question arises: *What authority regulates or should be established to regulate this kind of business? Which operators should these laws be subject to? And which is the suprastatal authority that checks the flows of goods and financial fluxes?*

At first glance, the problem can be summarized quite simply, but a larger analysis makes us find that things are extremely complicated:

1. the operations are carried out intercontinental, so the laws are different, and some logistics centers are in international territorial waters, even on ships. To which legislation is that warehouse subject to the conditions under which the ship is registered in certain flag countries?

2. financial flows often take place in a controllable area, after which they pass to a cryptocurrency, meaning a banking system that is outside the international and national monetary policy authorities. It is very difficult to see where the money and profits go.

3. The human resource that contributes to realizing the surplus-value and the profit cannot be identified, since, for the most part, these are freelancers who are positioned in different states and work under the protection of anonymity. In the whole of this mechanism, the consumer develops the power of this system, because the system itself is based on trust, it does not have a state authority behind it, it does not have an authority to guarantee the banking system, it does not have an authority to protect the consumer, purely and simply the system generates trust, and the consumer develops and increases the fiscal value.

We need to understand that these businesses are transnational affairs, they are not limited to the territory of a state. We must understand that these businesses bypass the protectionism of fiscality, bypass the protectionism of a state, that of generating fiscal revenues out of their added value. We ask ourselves the question: *how will such a system be regulated and under what conditions the known norms of law can be applied to these parallel systems based on virtual reality and artificial intelligence?*

We consider that these entities should be defined at international level, these *operators*, as we called them at the beginning, a definition that should be something like "legal entity governed by private law in the electronic environment, acting on a certain domain (.com, .org, .ro, .fr etc.)".

Another problem may be that international entities should agree on a register in which operators must register with a minimum of information, in order to grant creditworthiness. States, in turn, may block operations on their territory for certain sites that are not registered in the e-commerce registers. This is also a working hypothesis.

In addition to large volumes of onerous transactions through the electronic environment, many cases of fraud and deception manifest. Criminal law registers many new cases in which unknown persons sell products that do not exist, and buyers, credulous, pay the price before seeing the goods. There are complaints that result in cases of non-compliant merchandise with presentation of the initial photographs. The use of the Internet allows the manipulation of some people to pay a certain tax in order to *gain* possession of so-called "*inherited*" or "*won*" values in gambling. The range of crimes in the IT environment is immense, and the possibilities of action of the law enforcement bodies in criminal investigation are limited geographically and by jurisdiction.

In the Romanian judicial practice, we find both species dealing with deception, as well as species dealing with computer fraud.

By deception, in the sense of the penal code we understand, according to disp. art. 244, paragraph (1) "*misleading a person by presenting as true a false act or as a liar a true fact, in order to obtain for himself or another an unfair patrimonial use and if a loss has been caused*", or in aggravated form, according to disp. art. 244, paragraph (2) "*the deception committed by the use of false names or qualities or other fraudulent means .If the fraudulent means is itself a crime, the rules of the crime contest apply.*"

Thus, the Mediaş District Court, through the criminal sentence no. 88/2018, established that the act of the CL defendant to post non-adverts on OLX, and by an ad misleading the injured person IC from obtaining 100 euros from it, meets the constituent elements of the crime of deception and not of computer fraud, as mentioned in the indictment of the Prosecutor's Office attached to the Mediaş District Court, the court changing the legal classification of the crime offense, provided for and punished by art. 249 of the Criminal Code in the fraudulent offense, provided by art.244, paragraph (2) of the same code.

In the case presented above, the parties reconciliation intervened, so that the criminal proceedings against the defendant ceased.

By the crime of computer fraud, we mean, according to the provisions of art. 249 of the Criminal Code "*the introduction, modification or deletion of computer data, restriction of access to this data or in any way impeding the functioning of a computer system, in order to obtain a material benefit for himself or for another, if a loss has been caused to a person*".

At the same time, the international cooperation has caused two Romanian citizens to be extradited to the USA for their trial for the crimes of computer fraud, counterfeiting.

A. By the Criminal Sentence no. 29 of February 13, 2018 the Court of Appeal of Bucharest, the criminal section I ordered: on the basis of art.52 paragraph (1) letter c) of Law no. 302/2004 republished and art.2 and 8 of Law no. 111/2008 for the ratification of the extradition treaty between Romania and the United States of America admitted the extradition request made by the American

judicial authorities regarding the extraditable person A. based on the arrest warrants issued on December 11, 2017 and January 30, 2018 by the District Court for the District of Columbia.

The court found in the sentencing considerations that the facts retained by the extraditable persons are found correspondent in the Romanian criminal law, realizing the constitutive content of the offenses of computer fraud and complicity to the computer fraud, fraudulently carrying out financial operations, illegal access to a computer system, altering the integrity of the computer data and disturbing the functioning of the information systems provided by art. 249 of the Criminal Code, art. 48 related to art. 249 and art. 250 paragraph (3) of the Criminal Code, art. 360 paragraphs (1) - (3), art. 362 and art. 363 of the Criminal Code. Also, it is found that the substantive and form conditions of the extradition provided by art. 24, 26 and art.3 6 of the Law no. 302/2004 republished, art. 2 and art. X of the Law no. 111/2008 for the ratification of the Extradition Treaty between Romania and the United States of America.

B. By the criminal sentence no. 288/F/2018 of the Bucharest Court of Appeal, pursuant to art.52 paragraph 3 of Law no. 302/2004 and art. 1 of the Extradition Treaty between Romania and the USA, ratified by Romania by Law no. 111/2008, the extradition request made by the United States was admitted and in fact, it was held that the extraditable person, together with other persons accused by the US authorities, participated in a fraud scheme for victims in the United States of America through executing a fraud with online auctions and money laundering operations through the A... Online Auction Fraud. The AOF network has used online auctions and retail sites such as E-bay and Craigslist to give fake ads for luxury items such as vehicles. The network convinced the victims to send money for the goods advertised, by convincing methods, claiming that the person who posted the ad is a military man who posted the ad because he must sell the good before being posted to a military unit or to a family member who he died. Members of the network also used invoices that contained counterfeit trademarks of official online auctions, invoices that contained indications for victims about how to make the payment, and inspired them with security. The payments from the injured persons were often made in the form of rechargeable prepaid cards, prepaid debit cards and gift cards of various types, postal orders made in the United States of America, bank guaranteed bank checks, money transfers through MoneyGram and Western Union, deposits and bank transfers .Subsequently, network members also collaborated in laundering the proceeds of fraudulent online auctions by changing victims' payments in Bitcoin currencies in the US, transferring Bitcoin to Eastern Europe, and eventually changing Bitcoin currencies back into national currencies. The extraditable person was a mid-level manager within the network of fraudulent auctions on the Internet.

On 05.07.2018 the District Court of the United States of America-Eastern District of the State of Kentucky registered the indictment no. YY which constitutes the indictment for the listed facts.

The court appreciated that the offenses for which the extraditable person is accused have a correspondent in the Romanian criminal law, confining themselves to the offenses provided by art. 367 paragraph 1) of the Criminal Code, art. 48 related to art. 249 of the Criminal Code, art. 48 related to art. 250 of the Criminal Code, art. 48 related to art. 29, paragraph 1) of the Law no. 656/2002 and being punished with imprisonment of more than one year.

The above cases open a new horizon in which those who manipulate information on the Internet do not always have the best intentions. The cases can be solved through the cooperation between criminal investigation bodies and justice in several states. The perpetrators and the victims, most of the times are of different nationalities, have different residences in jurisdictions with different legislative systems.

3. Conclusions

Artificial intelligence and the informational highways of the Internet are elements that facilitate the trade of products and services. In addition to honest and honest operators, a market is created for criminals who resort to frauds and computer fraud. State authorities are not prepared for these sophisticated work schemes whereby the end user is harmed and deceived.

Users/Consumers of products delivered via the Internet do not have anyone's guarantee when buying different products. Naivety and good faith transform people into secure victims of crime and fraud through the virtual environment.

In many situations, the state cannot offer guarantees regarding the goodness and seriousness of the market created by the Internet world. The state can only check addresses that are registered in the.ro domain. Guarantees regarding the protection of personal data strictly regulated in the classical information systems, on the Internet lose their efficiency. There are known situations regarding the "right to be forgotten", whereby users who are dissatisfied that their personal information is on the Internet, advertise the companies that have search engines for information on the Internet, requesting that personal data be ignored. The solution for the moment is that these personal data are not indexed when the information is searched on Internet domains from national spaces regulated by European Directive or national law. At the same time, search engines reveal personal information on domains of countries that have not regulated the problem.

The rights of natural or legal persons are often affected by operations in the online environment. There are also many transactions that respect the rights of individuals when selling products and services over the Internet.

The obligations of those who resort to international trade by electronic means are partially regulated.

The persons selling have the obligation to have a web page in which the consumer identifies a minimum of information:

- the legal identity and location of the seller;

- the legislation governing the activity;
- procedures and guarantees regarding the use of personal data and bank secrecy;
- the procedure for granting the guarantee for the purchased product;
- contact and information;

People who want to buy products or services through the Internet have the obligation to inform about the seller (supplier) and to verify a minimum of information on its quality, history, reality.

The electronic environment is a system that will take over classical commerce, but will not replace it. The authorities will have to regulate the status of those operating in the online environment. International cooperation agreements will be required in order to identify the perpetrators, to hold them accountable according to the facts committed. Also, procedures for pre-settling the scams are required.

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Cooperation-Based Approaches in Competition Law – the Whistleblower Versus the Prisoner’s Dilemma

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Abstract

Cooperation-based approaches have shaped the trends in European Union Competition Law and in United States Antitrust Law. The present article assesses the latest developments in this area, emphasizing the positive effects of cooperation in competition law issues and proposing solutions in terms of dealing with international competition law cases. Cartels are analyzed using the model of the Prisoner’s Dilemma and the modern Game Theory. The Whistleblower, which gained increasing importance both in European Union Competition Law and in United States Antitrust Law, is assessed taking into consideration these models. A comparative view of European Union Competition Law and United States Antitrust Law on the importance of the Whistleblower is presented. The present article uses an interdisciplinary research method, appropriate to the debated issue, combing aspects of business law, European Union Law and economics in an international perspective. Relevant case law illustrates the presented approaches, trying to find an answer to the research question to what extent can cooperation be seen as a possible solution for competition law issues and to what extent can settlements be accepted as a time-saving solution in competition law cases.

Keywords: cooperation, competition law, Whistleblower, Prisoner’s Dilemma, Game Theory.

JEL Classification: D18, K21, K22, K33, L43, L51, M16

1. Introduction

Competition law is a field of business law which brings together aspects of European Union Competition Law, business, economics, psychology, sociology and even mathematics, when considering models for understanding the behavior of market participants. It is a multidisciplinary field showing us that business issues are not separated in different subjects, they are complex and a holistic view is needed in order to deal with them.

Connectivity is a key factor for decisions in competition law. In order to achieve an interconnected thinking paradigm, it is essential to reunite several experts of different fields, bringing their view and expertise on the debated issues. Cooperation is thus a key element for dealing with competition law cases. The research objective of the present article is thus to bring a new, interdisciplinary perspective on cooperation-based approaches in competition law.

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The term of cooperation needs to be further analyzed and defined, in order to have a common understanding of this term and a common accepted terminology. Furthermore, the present article assesses the position towards cooperative approaches in competition law in European Union Competition Law versus United States Antitrust Law, presenting a comparative view of these approaches. The acceptance towards cooperation-based approaches in competition law is assessed in an international perspective, analyzing the position towards the Whistleblower and towards leniency policies in European Union Competition Law as well as in the United States Antitrust Law. Advantages but as well possible limits or challenges of leniency programs are taken into consideration for the evaluation of these measures.

Theories and models such as the Game Theory and the Prisoner's Dilemma are analyzed related to competition law measures. The Prisoner's Dilemma is a concept used for business decisions, environmental issues, strategic decisions at social and even at strategic war decisions. The reflection of this paradigm in Competition Law issues is analyzed in the present article in order to find out how and to what extent this concept is applied in cartel related issues.

Cooperation is as well understood at international level, defining the collaboration between several institutions, such as competition law authorities at national and supranational level in order to achieve win-win situations when dealing with international competition cases. Aspects of extraterritoriality in cartels with international dimension are considered and evaluated, emphasizing the importance of cooperation-based approaches in this context.

Relevant case law illustrates the theoretical aspects debated, the legal theory, the legal principles and the legal provisions that are analyzed in the present paper.

The element of novelty and originality of the present research is given by its multidisciplinary approach and by applying models and theories usually implemented in the business environment in the specific field of competition law.

The Whistleblower concept is assessed in the global context of compliance and of related new measures in companies, defining new strategic views at corporate level. The social impact of the whistleblower concept is as well taken into consideration, showing its implications at corporate level but as well at general level, in our society.

The research results of the present paper can be further developed, as it is a field of great interest and of increasing importance for the globalized business environment.

2. Research topic

In the globalized business environment nowadays, with multinational companies as main actors of the market, competition law gains an increasing im-

portance, as it is in fact the law applicable to the behavior of multinational companies. Such a behavior can include agreements between market participants, cartels, other types of anticompetitive behavior such as the exchange of strategic information or abuse of dominance on the market. As most of the markets are oligopolistic markets, all these types of behaviour gain increasing importance. Most of all the consequences on consumers but as well on other market participants, such as other competitors need to be considered. A type of behavior which is permitted for small companies is forbidden for dominant actors of the market. A dominant position on the market brings another type of responsibility for the company with a dominant position on the market, responsibility which has not only a business dimension but as well a social dimension.

Competition law is a field which reunites business, economics, psychology, sociology, social psychology and even mathematics as a basis for modeling market developments. An interdisciplinary perspective is thus needed in order to understand this field and the way it can develop.

Connectivity as a basis for understanding competition issues is a very important element for assessing decisions related to competition law. The field of competition law brings lawyers and economists together at the same table in order to find common accepted solutions. This is not an easy task to deal with, as lawyers and economists have divergent views on the debated subjects. Lawyers need predictability of laws and a symmetrical approach of each case, while economists need evaluations for each situation in particular and are not willing to draft general principles applicable to all the situations. Detailed assessments of each situation are needed according to economists. Nevertheless, a common solution is needed for competition law cases, which reunite aspects of business and business law. As this situation is a very common one, research is needed in this field and given the fact that European Union Competition Law is a recent field of law, there is a research gap in this field.

The present paper addresses the research question of defining cooperation in the context of competition law situations thus clarifying the used terminology. Cooperation can be understood on the one hand as a behavior which occurs between market participants. It can be as well a behavior defining the willingness of cartelist to collaborate with competition law authorities. Cooperation based approaches in competition law may refer as well to what is permitted in terms of competition law regarding cooperation between market participants. This refers especially to the concept of legal exemption reflected in article 101 paragraph 3 of the Treaty on the Functioning of the European Union. These definitions of cooperation and their impact on business environment situations are analyzed in the present paper.

The acceptance of cooperation-based approaches in competition law is different in European Union Competition Law and in United States Antitrust Law. The differences are based on different legal cultures and on the compliance

with different legal principles. These different legal views are assessed in a comparative manner in the present paper.

A concrete expression of cooperation is the leniency policy, which is a key element of competition policy both in the European Union and in the United States of America. The importance of leniency programs is analyzed in the present paper, presenting advantages but as well challenges and limits of this instrument.

The whistleblower as part of the leniency policy is analyzed in the international context of compliance and its strategic importance for companies.

The present paper presents results based on theories and models such as the Prisoner's Dilemma, analyzing to what extent this concept is applied in competition law, for example in cartels. Game Theory and Nash equilibrium are other theoretical concept used in the present paper in order to emphasize the multidisciplinary dimension of competition law issues.

Besides analyzing cooperation as an attitude or a behavior, cooperation-based approaches in competition law refer as well to the cooperation at institutional level, to the cooperation between competition authorities both at national and supranational level. This aspect is as well evaluated in the present paper, formulating results regarding the importance of institutional cooperation for dealing with international competition law issues, such as cross-border cartels.

Competition law aspects are very important in the context of corporate compliance. The whistleblower is an instrument used in companies, with an impact at business level but as well at social level, aspects which are analyzed in the present paper.

The present paper acts like a bridge between the existing literature and practical issues of the business world. It is in line with the studied previous literature, further developing the ideas of previous research. As elements of originality and novelty, the present paper brings a new, interdisciplinary view on competition law situations and of business law situations.

As such situations are developing in the globalized business environment, with multinational companies acting as main actors of the market with increasing power, the research field is one of great interest, so that the research results can be further used for extended research.

As European Union Competition Law is a relativ young area of legal research compared to its tradition in the United States of America, a research gap is identified in this area.

3. Research structure

The research structure corresponds to the research topic. The present research defines terms like competition and cooperation. Furtheron, the dimensions of cooperation are analyzed in the context of competition law situations. Cooperation is assessed as an attitude defining a behaviour between market participants,

relying on legal provisions of European Union Competition Law (article 101 and 102 of the Treaty on the Functioning of the European Union). It is as well defined as an attitude in the relation with competition authorities. Related to this aspect, different views in European Union Competition Law and United States Antitrust Law are presented in a comparative manner.

The importance of institutional cooperation at national and supranational or international level is highlighted in the present research.

The impact of cooperation-based approaches, such as the Whistleblower on the business environment, at corporate level but as well at social level is assessed.

The researched topics are illustrated by theoretical models, such as Game Theory, the Prisoner's Dilemma or the Nash equilibrium, concepts that can explain types of behaviour which are relevant for competition law, for example for the behavior of cartelists.

On the other hand, the researched topics are illustrated by relevant case law of the Court of Justice of the European Union, such as the case Dutch T-Mobile, the case Irish Beef Industry and the Woodpulp case.

These cases reflect among other aspects the cross-border dimension of competition law issues and their importance, with an impact at global level.

The research results point out the multidisciplinary of competition law issues and the need of a holistic view when dealing with competition law issues.

4. Research methodology

The present paper uses a multidisciplinary research method which is appropriate to the research topic and reunites aspects of business, economics, European Union Competition Law, sociology and psychology.

The relevant literature on the debated topic has been studied. For this purpose, relevant books, monographies, scientific articles, European Union legislation, jurisprudence of the European Court of Justice as well as websites have been taken into consideration.

The provisions of European Union Competition Law, meaning primary European Union Law, have been interpreted taking into account the research objectives. Article 101 and 102 of the Treaty on the Functioning of the European Union are the basis for European Union Competition Law, which is used as well in this research paper. Especially the provisions of article 101 of the Treaty on the Functioning of the European Union are interpreted in order to define the behavior of cartelists.

The teleological interpretation method has been used for interpreting the provisions of article 101 paragraph 3 of the Treaty on the Functioning of the European Union, taking into consideration the objective of consumer welfare and of consumer protection.

The theoretical concepts used in business and strategy, such as Game

Theory, Nash equilibrium and the Prisoner's Dilemma have been applied in the specific field of European Competition Law.

The researched topics have been illustrated by the interpretation of case law of the Court of Justice of the European Union, such as Case C-8/08 *T-Mobile Netherlands*, Case C-209/07 *Irish Beef Industry* and the case "*Wood Pulp*", Joined cases 89, 104, 114, 116, 117 and 125 to 129/85.

The case law points out an international dimension of competition law issues, with a strong cross-border character and cross-border impact to be considered².

5. Solutions

Competition law or antitrust law, as it appears in the United States of America, is a business law field related to the global business environment, with multinational companies acting as main actors with a high degree of power on the market. Competition law is the law applicable to the behavior of multinational companies. The term competition itself has its roots in the theory of Adam Smith, back to the year 1776 and was further developed by David Ricardo and John St. Mill³.

According to the primary European Union Law, as defined in article 101 of the Treaty on the Functioning of the European Union, agreements between competitors constitute anti-competitive behavior by reducing competition in the sector, which has a negative effect on the market and on the consumer⁴.

A cartel can be described as a situation of applying the Prisoner's Dilemma, a concept of Game Theory. In this case, if cartelist A cooperates with cartelist B, they would get a lower sentence in years of jail. But due to the individualistic interests and to the irrational behavior, each of them has the tendency to betray the other cartelist and to cooperate with the competition authority. This example is a reflection of the Prisoner's Dilemma and of Game Theory in competition law⁵. The situation described corresponds to a Nash equilibrium situation, in which each of the cartelists does what is best for him individually, but not what is best for the collective interest.

² See Joined Cases "*Wood Pulp*", Joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, Judgment of the Court of 27 September 1988, European Court Reports 1988 -05193, European Court Reports 1988 -05193.

³ See Schwintowski, Hans Peter, *Wettbewerbs und Kartellrecht*, C.H. Beck München, 4. Auflage, 2007, pp. 105-113.

⁴ See Treaty on the Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, art. 101.

⁵ See Insko, Chester A.; Wildschut, Tim; Cohen, Taya R, *Interindividual-intergroup discontinuity in the prisoner's dilemma game: How common fate, proximity, and similarity affect intergroup competition*, „Organizational Behavior and Human Decision Processes”, March 2013, Vol.120 (2), pp.168-180, DOI: 10.1016/j.obhdp.2012.07.004.

Not only explicit agreements are an anti-competitive behaviour but as well the exchange of strategic, confidential information is an anti-competitive behavior⁶. As all markets are nowadays oligopolistic markets, such an exchange of strategic information is an anti-competitive behavior, as it reduces market uncertainty.

Not even in case of crisis cartels are price agreements or other types of anti-competitive behaviors permitted, as it is reflected in the Irish Beef Industry Case, so that such types of behavior are always forbidden⁷.

The only situation in which cooperation among competitors is permitted is settled down in article 101 paragraph 3 of the Treaty on the Functioning of the European Union, which functions as a legal exemption considering the Consumer Welfare Standard⁸.

There are no legal exemptions for abuse of dominance, as it is described in article 102 of the Treaty on the Functioning of the European Union⁹.

Cooperation is an attitude reflected in the willingness of cartelists to work together with competition authorities. A concrete expression of this cooperation are leniency programs, which are a key element both in European Union Competition Law and in United States Antitrust Law. Although this instrument is used in both competition law systems, the acceptance of cooperation-based approaches in competition law is different in European Union Competition Law and in the United States Antitrust Law. Due to legal principles and different legal cultures, it is rather not acceptable in European Union Competition Law to put prosecutor and cartelists at the same table for negotiating a settlement. This practice is commonly used in the United States Antitrust Law due to efficiency reasons and for time saving, which is an important element in United States Antitrust Law. In the European Union Law, principles are more important and have an important value, thus, even it is time-consuming, authorities try to demonstrate that legal principles are in fact values of our society and that they count. They try to do justice even if this approach is time consuming, meaning investigations of several years. Different legal cultures and legal backgrounds lead to such different views in the United States Antitrust Law versus the European Union Competition Law.

Cooperation-based approaches in competition law refer as well to the importance of institutional cooperation between competition authorities at national and supranational level. The practical expression of this institutional cooperation

⁶ See Case C-8/08 *T-Mobile Netherlands* and Others, Judgment of the Court (Third Chamber) of 4 June 2009, Reports of Cases 2009 I-04529, ECLI:EU:C:2009:343.

⁷ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.*, Judgment of the Court (Third Chamber) of 20 November 2008, European Court Reports 2008 I-08637, ECLI identifier: ECLI:EU:C:2008:643.

⁸ See van Doorn, Frederik, *The Law and Economics of Buyer Power in EU Competition Policy*, Eleven International Publishing, 2015, p. 144.

⁹ See Treaty on the Functioning of the European Union, **Consolidated version of the Treaty on the Functioning of the European Union**, OJ C 326, 26.10.2012, art. 102.

is the European Competition Network, dealing with cross-border competition issues. The European Commission as supranational competition authority of the European Union works together with national competition authorities in such cross-border competition issues.

This cooperation is important especially in cross-border cartels, as the Woodpulp case demonstrated it, where extra-territoriality played a key role¹⁰, pointing out that agreements concluded outside the European Union are subject to European Union Competition Law, if they affect the European Union market.

A result of cooperation-based approaches in competition law is the Whistleblower, an instrument created as a tool for the leniency policy in competition law. Developing such a tool had a major impact at corporate level, as it came along with social responsibility. Nowadays, the Whistleblower is part of Compliance policy of companies, having an impact on business strategies and having as well social impact¹¹.

Leniency programs are essential for competition authorities in order to get evidence to incriminate cartels and they offer advantages both to the competition authorities and to the cartelists, through granting immunity or fine reductions. Nevertheless, they are as well related to challenges, as it is not clear yet to what extent they can collude with civil damages or with private enforcement. It is possible that at some point in time, conflicts are generated between leniency programs and the civil damages related to competition law cases¹².

As it is a developing field, the solutions of this paper can be further improved and they can be used as a basis for further research.

6. Conclusions

Cooperation-based approaches are very important in the field of competition law. The Whistleblower as an instrument of compliance gains an increasing importance at corporate level. Cartels can be seen as an application of Game Theory and of the Prisoner's Dilemma in the field of competition law. These aspects underline the multidisciplinary nature of competition law issues, bringing together aspects of European Union Competition Law, business, economics, behavioral economics, psychology, sociology and even mathematics.

Cooperation-based approaches are essential in order to deal with competition law issues, a view that is shared both by European Union Competition Law and by United States Antitrust Law despite some differences in the acceptance of

¹⁰ See Joined Cases "Wood Pulp", Joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, Judgment of the Court of 27 September 1988, European Court Reports 1988 -05193, European Court Reports 1988 -05193.

¹¹ See Mäger, Thorsten, *Europäisches Kartellrecht*, Nomos verlagsgesellschaft, Baden-Baden, 2006, pp. 34-35.

¹² See Nazzini, Renato, *Concurrent Proceedings in Competition Law – Procedure, Evidence and Remedies*, Oxford University Press, 2004, p. 426.

these approaches.

The field is new and dynamic, so that further research will for sure be needed and the results of the present paper can be further improved and extended, thus representing a contribution to academia.

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CRIMINAL LAW IN BUSINESS CONTEXT

Crimes Motivated by Hate, Differentiation and Religious Discussion in Compared Criminal Law (Romania and the Republic of Moldova)

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Abstract

This scientific article is devoted to the legal-criminal analysis of offenses motivated by hatred, differentiation and religious division in criminal law compared to the model of the criminal law of Romania and of the Republic of Moldova. The purpose of this study is to identify and analyze crimes motivated by hatred, differentiation and religious separation in the criminal law of Romania and the Republic of Moldova. Following the study undertaken, certain legislative gaps were identified that can be easily overcome by reviewing the incriminating framework of offenses motivated by hatred, differentiation and religious division. The conclusions of the broad law and the recommendations de lege ferenda created under the empire of the latest legislative tendencies at European level can be taken into account in the legislative process.

Keywords: *religious freedom; religious belief; the right to religious belief; crime motivated by religious hatred; religious differentiation; religious separation; religious discord; religious propaganda.*

JEL Classification: K10, K14

1. Introductory considerations

Pursuant to the EU Guidelines on the promotion and protection of freedom of religion or belief, Brussels, June 24, 2013², all persons have the right to express their religion or belief, either individually or with others, both in public and in private, through worship, performing rites, practices and teaching, without fear of intimidation, discrimination, violence or attacks. Persons who change or renounce their religion or belief, as well as those who are adept at non-theistic or atheistic beliefs, should equally be protected, as well as those who do not profess a religion or belief.

In the spirit of this international document, the terms "belief" and "religion" should be interpreted broadly, and the application of Article 9 of the Convention

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² EU guidelines on the promotion and protection of freedom of religion or belief, Brussels, 24 June 2013 (25.06), 10963/13 COHOM 117 COPS 231 CFSP 698 FREMP 83, <http://data.consilium.europa.eu/doc/document/ST-11491-2013-INIT/ro/pdf>, consulted on 10.10.2019.

should not be limited to traditional religions or to religions or beliefs with institutional characteristics or practices analogous to those of traditional religions³.

2. Crimes motivated by hate, differentiation and religious Discussion in Romania and the Republic of Moldova

The norm provided in paragraph (2) of art.13 of the Law of Romania no.489/2006 regarding the religious freedom and the general regime of the cults⁴, in Romania are prohibited any forms, means, acts or actions of defamation and religious prejudice, as well as the offense. public brought to religious symbols, and according to paragraph (3) art.13 of this normative act, the hindrance or disturbance of the freedom to exercise a religious activity, which is carried out according to the law, is punished according to the provisions of the criminal law.

Although, in Romania are prohibited any forms, means, acts or actions of defamation and religious prejudice, as well as the public offense brought to religious symbols (paragraph (2) art.13 of the Law of Romania no. 489/2006 on religious freedom and the general regime of the cults), the Penal Code of Romania did not foresee any norm that would sanction such acts. which, in the exercise of the duties of service, impedes the exercise of a person's right, or creates for it a situation of inferiority on the basis of race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, chronic non-contagious disease or HIV/ AIDS infection [para. (2) art.297 of the Penal Code (C.pen.)].

Generally, in the Special Part of the Romanian Penal Code we find an entire Chapter dedicated to the offenses against religious freedom and the respect due to the dead. It is about Chapter III of Title VIII of the Special Part (Offenses which affect relations regarding social coexistence), which includes the following articles: 1) preventing the exercise of religious freedom (art. 381 of the Penal Code); 2) desecration of buildings or objects of worship (art. 382 C.pen.); 3) desecration of corpses or graves (art. 383 C.pen.); 4) illegal removal of tissues or organs (art.384 C.pen.). We specify that Title XII "Crimes of genocide, against humanity and war" contains three articles that incriminate crimes motivated by religious hatred (art. 438 C.pen., art. 439 C.pen., art. 444 C.pen.).

Unlike the criminal law of Romania, the Criminal Code of the Republic of Moldova (CP RM) contains a stand-alone legal-criminal norm that incriminates the criminal offense provided for in art. 346 CP RM (Intentional actions aimed at harassing the spell, differentiation or national, ethnic, racial or ethnic division. religious) that consists of the intentional actions, the public exhortations, including through the media, written and electronic, aimed at harassing the spell, dif-

³ *Idem.*

⁴ The Official Monitor of Romania. Part I, no. 11/08.01.2007.

ferentiating or dividing national, ethnic, racial or religious, towards the degradation of national honor and dignity, as well as limitation, direct or indirect, of the rights or establishment of advantages, direct or indirect, to the citizens according to their national, ethnic, racial or religious belonging.

The special legal object of the criminal offense provided for in art. 346 CP RM is religious equality, religious dignity and freedom to profess any religion based on personal beliefs⁵. According to art. 31 paragraphs (1) and (3), 32 paragraphs (1) and (3) of the Constitution of the Republic of Moldova, freedom of conscience is guaranteed, it must be manifested in the spirit of tolerance and mutual respect. As a secondary legal object, the life and health of the person, the interests of the family and of the minors, the social order, the health of the population, the social morals, the patrimony of another person as well as their inviolability or sexual freedom can be recognized.

The immediate targets of the crimes motivated by the prejudice may be the person, his life or physical integrity, as well as the property associated with the victim. But the real target is the community with which the person is assimilated, in real or presumed. The impact of the crime is not limited to the psychological impact on the victim, but also the impact on the community to which the victim belongs or with whom it is associated, and its intimidation.

The increased degree of danger and the distinct legal approach of the crimes motivated by the prejudice is determined by the impact of these facts, not only on the victim but also on the community, the way in which such manifestations of intolerance can cause social, inter-ethnic or inter-religious disturbances⁶. For example, the burning of a place of worship, an ethnic store, the headquarters of a company that is associated with a particular community, is based on the same prejudice-based mobile and intends to send a message of rejection to the community associated with the particular building⁷.

In the relations between the religious cults any manifestation of prejudice is forbidden. Every citizen is guaranteed freedom of thought, opinion, and freedom of expression in public by word, image or other possible means. The mechanism to stimulate religious discord is to humiliate the religious dignity of the victim. In this sense, the arousal of religious discord implies a negative verbal

⁵ Бодобаев К.А., *Уголовная ответственность за возбуждение религиозной вражды*. Вестник Кыргызской государственной юридической академии, 2013, №3, с.88-92. (Bodobaev K.A., *Criminal liability for inciting religious hatred*, „Bulletin of the Kyrgyz State Law Academy”, 2013, no. 3, pp. 88-92).

⁶ Opinion on the draft law: hate crimes and denial of the existence of the Holocaust - amendment and completion of acts (Prepared by Jeremy McBride, consultant of the Council of Europe): Final project May 15, 2017, <https://rm.coe.int/coe-moldova-hate-crime-law-opinion-ro/1680730246>, consulted on 10.10.2019.

⁷https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/REC7-2003-8-ROM.pdf, consulted on 10.10. 2019.

condemnation or an action against the person in relation to his religious affiliation, or any negative expression referring to a religious group⁸. Religious dignity is a category of personal or group consciousness.

To apply this qualifying sign, it is sufficient to file a complaint from a person or a group of persons who have suffered as a result of this criminal attack. In questionable and uncertain times, it is recommended to carry out a historical-cultural expertise that allows the determination of the circumstances whether or not the religious feelings have been affected. An undoubted index of humiliation of one's religious dignity is the use of non-normative lexicon; the use of offensive names applied to this religious group; comparing followers of religious groups with certain material or animal objects; ridicule of saints or religious events that represent significance for the followers of a religion. In any case, the main criterion of humiliation is established at the discretion of the representatives of the religious group that had suffered⁹.

The victim of this crime can be any person discriminated against on the basis of a certain characteristic related to their identity, in particular, on the basis of a religious characteristic. In committing this type of crime, a special significance belongs not to the victim and her personal qualities, but to her belonging to a religious confession. As demonstrated in the Opinion on the draft Law no. 301 for the modification and completion of some legislative acts, formulated by the Center of legal resources of Moldova, the crimes motivated by the prejudice are crimes determined by the identity of the person¹⁰. In the case of offenses, given their seriousness, the special sign of prejudice should be included, in order to mark their increased danger if they are committed for prejudicial reasons¹¹. The impact of these crimes, when they are based on intolerance, is much greater, focusing on the individual victim, the group of which she is a member or with whom she is associated, as well as on the whole society.

The perpetrator regards the fundamental religious characteristic (belonging to a religion or atheism) as a proof of inferiority or as unacceptable and commits the crime by transmitting this message of humiliation. As correctly stated by the authors D. Ududec, L. Peltonen, D. Nita, hate crimes have the potential to cause more serious post-victimization emotional and psychological traumas compared to similar hate crimes. The cited authors point out that such particular and unique reactions happen because this category of criminal acts represents attacks on the essence of the victim's identity - "crimes as message" transmitting to the victim and to those who share the victim's identity that they are worthless, that they are

⁸ Jeflea A., Moraru V. *Infrațiuni ce implică semne de extremism religios: aspecte de drept penal*, „Studia Universitatis”, 2016, no. 8(98), p. 170-177, p. 171.

⁹ *Idem*, p.172.

¹⁰ Opinion on the draft law no. 301 for the modification and completion of some legislative acts (the July 2017 version, after merging with project no. 277). Legal Resource Center of Moldova, <https://crjm.org/wp-content/uploads/2017/09/2017-09-05-Opinie-CRJM-Proiect-301-infr-de-preju-decata.pdf>, consulted on 10.10.2019.

¹¹ *Idem*.

rejected, that they are degraded, despised and even hated¹².

Careful analysis of the objective side of the criminal offenses referred to in paragraph (1) art.346 Penal Code of the Republic of Moldova¹³ allows us to highlight eight components of the crimes committed out of religious hatred:

- 1) the deliberate actions aimed at harassing the religious spell (the challenge of the enemy - the author's note);
- 2) the intentional actions aimed at increasing religious differentiation;
- 3) the intentional actions aimed at increasing religious separation;
- 4) public calls directed at the assassination of the religious spell;
- 5) public calls aimed at increasing religious differentiation;
- 6) public calls aimed at increasing religious division;
- 7) the limitation, directly or indirectly, of the rights of the citizens according to their religious affiliation;
- 8) establishing the advantages, direct or indirect, to the citizens according to their religious affiliation.

The criminal law does not materialize in what the intentional actions enumerated by us in points 1, 2, 3 are manifested, but we can conclude that they are directed to the spell, differentiation or religious separation.

Another group of harmful facts includes in itself the public calls that are directed to the spell, differentiation or religious division. It should be mentioned that in this case the criminal liability arises only if the indicated actions are committed by a certain method - in public, including through the media.

This fact will include, for example, propagating the exclusivity, superiority or inferiority of the person depending on his religious affiliation or his attitude towards religion. The concept of propaganda involves systematic actions aimed at inserting certain ideas into the public consciousness or forming certain settings and beliefs. The authors A. Jeflea and V. Moraru highlight some situations in which the analyzed criminal composition will be missing:

- 1) one-time statements or reasonings or the formulation of theses in ideological or political debates, for example, statements by participants of TV shows in talk shows or on online forums;
- 2) expressions formulated by people with low cultural and educational level that would not allow them to adequately argue their own opinion, participate in a debate and raise awareness of the social responsibility for the words spoken.
- 3) dissemination of opinions regarding the quality of electing the followers of certain religions¹⁴.

¹² Ududec D., Peltonen L., Niță D., *Combaterea infracțiunilor motivate de ură: Ghid pentru practicieni și decidenți*. Bucharest, Center for Legal Resources, June 2015. Publication made within the project "Monitoring of human rights through international mechanisms" implemented by the Center of Legal Resources, financed through the SEE grants 2009-2014, within the NGO Fund in Romania: www.fondong.fdsc.ro, consulted on 10.10.2019.

¹³ The Penal Code of the Republic of Moldova, no. 985-XV of April 18, 2002. In: Official Monitor of the Republic of Moldova, 2002, no. 128-129, 134.

¹⁴ Jeflea A., Moraru V., *op. cit.*, p.173-176.

Such opinions and beliefs take place in almost all religions, but their propagation will be recognized as extremist only if this declaration implies the requirement to change the volume of the civil rights and obligations of the person or to harm the personal dignity of a religious or ethnic group. religious. For example, the statement that only the followers of a certain religion know the Truth, is not considered to be an extremist. At the same time, the statement about the adherents of another religion or that the power of the State must belong exclusively to the followers of a certain religion must be recognized as extremist.

The lexicon used by the subjects of this crime is always very emotional - the subject proceeds to the conscious and special use of the objects of worship, verbal touch brought to the religious objects, bringing serious offenses to the religious feelings of the people, provoking the religious discord, etc., being combined with the propagation of one's own superiority or the imperfection of the representatives of other religious denominations. Parallel to the above, in practice the formation of settings regarding the incompatibility of some religious groups is encountered (one proceeds with materials in which the deviation from the logical laws is used, the use of drawings and caricatures in order to form an incorrect and negative image about certain religious confessions).

In our opinion, highlighting a criminal component that consists of "public calls" along with "intentional actions" is required to be a correct step on the part of the legislator. Thus, some forms of informational influence, such as in our case public calls, are not always appreciated as a sufficient basis for criminal liability on the basis of art. 346 CP RM, but the presence of this self-standing category will allow the legislator to react promptly to this criminal offense and apply the measures of criminal restraint.

In the legal-criminal literature (D. Ududec, L. Peltonen, D. Nita¹⁵) the definition of hate crimes is encountered. The authors state that "hate crimes" is an umbrella term that refers to all those crimes committed by the perpetrator on the basis of a discriminatory motivation, and includes two elements: a) are facts that the criminal law provides as offenses and b) in committing the crime, the perpetrator acts on the basis of prejudices¹⁶.

In Recommendation R(97)20 of the Committee of Ministers of the Council of Europe, hate speech is defined as: "all forms of expression that propagate, incite, promote or justify racial hatred, xenophobia, anti-Semitism or others hatred based on intolerance, including intolerance expressed in the form of aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, immigrants and persons from immigration"¹⁷.

¹⁵ Ududec D., Peltonen L., Niță D., *op. cit.*, 2015.

¹⁶ *Idem.*

¹⁷ Recommendation no. R (97) 20 of the Committee Of Ministers To Member States On „Hate Speech” (Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers’ Deputies), [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh_lgbt_docs/CM_Rec\(97\)20_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh_lgbt_docs/CM_Rec(97)20_en.pdf), consulted on 10.10.2019.

The hate speech when it is spoken in public may constitute the crime component provided for in art. 346 CP RM (Spelling, differentiation or national, ethnic, racial or religious division)¹⁸, that is, intentional actions, public exhortations, including through mass-media, written and electronic, aimed at harassing the spell, differentiating or dividing national, ethnic, racial or religious, to diminish national honor and dignity, as well as limiting, directly or indirectly, the rights or establishing advantages, direct or indirect, to the citizens in function. by their national, ethnic, racial or religious affiliation.

The purpose of criminal prosecution for provoking religious hatred is, first and foremost, to protect the constitutional rights and freedoms of citizens who can use and protect them regardless of their religious affiliation¹⁹.

The challenge of religious division involves the artificial creation of a strong disgrace towards the representatives of different religious groups. In principle, the attainment of the religious division (art. 346 CP RM) can be performed by competition along with the attention to the person and the rights of citizens in the form of preaching religious beliefs and performing religious rites (art. 185 CP RM). As correctly mentioned by the authors D. Obadă and A. Cazacicov, a group for preaching religious beliefs and performing religious rites, as in the case of art. 185 CP RM (Attention to the person and to the rights of citizens in the form of preaching religious beliefs and for performing religious rites), in accordance with article 43 of the Criminal Code in force, constitutes one of four forms of criminal participation [simple participation, complex participation, organized criminal group, criminal organization (association)], in particular, criminal group organized²⁰.

Such behavior can be manifested in indecent expressions, texts and drawings addressed to representatives of the religious group, movie demonstrations, organizing shows, applying defamatory inscriptions, using materials that express the desecration of the traditions of the religious cult and which represent a special value for its followers; cynical interpretation of the content of the holy scriptures; committing other insulting actions against the follower²¹.

The actions in question must be of a public character and directed against the religious group, therefore, this sign is considered to be irrelevant in the case of interpersonal conflicts, when the parties of this conflict to offend and insult each other resort to the use of personal characteristics they relate to their private

¹⁸ The Penal Code of the Republic of Moldova no.855-XV of April 18, 2002. In: The Official Gazette of the Republic of Moldova, 2002, no. 128-129.

¹⁹ Бодобаев К.А., (Bodobaev K.A.), *op. cit.*, pp. 88-92.

²⁰ Obadă D., Cazacicov A., *Grupul infracțional organizat în contextul criminalității transnaționale*, „Revista Institutului Național de Justiție”, 2018, no. 2, p. 24-31, p. 25.

²¹ Шилин Д.В., *Уголовная и административная ответственность за нарушение права на свободу совести и вероисповедания: проблемы разграничения*. В: Журнал российского права № 5, 2016, с.81 (Shilin D.V., *Criminal and administrative liability for violation of the right to freedom of conscience and religion: problems of differentiation*, „Journal of Russian Law”, no. 5, 2016, p. 81).

lives, especially their attitude towards one religion or another²². The public character implies bringing this information to the knowledge of an indeterminate sky of persons by different methods and means, including and under conditions indicated in art. 131 CP RM (The deed committed in public place). As an example, they can serve: calls for committing a murder; applying blows or deporting persons belonging to a religious group; organizing, committing or inciting to commit such acts.

Therefore, by the act committed in the public is understood the deed committed:

a) in a place which, by its nature or destination, is always accessible to the public, even if at the time of the deed there was no person present, but the perpetrator realized that the deed could reach the public's knowledge;

b) in any other place accessible to the public if two or more persons were present at the time of the crime;

c) in a place inaccessible to the public, with the intention, however, that the deed be heard or seen, if it occurred to two or more persons;

d) in a meeting or meeting of several persons, except for meetings that can be considered family, due to the nature of the relationships between the participants;

e) by any means resorting to which the perpetrator realized that the deed could reach the public's knowledge.

The criminal component is a formal one. For the occurrence of the criminal liability, it is sufficient to commit the actions that may cause such an enmity, division or differentiation, the occurrence of the prejudicial consequences is outside the limits of the criminal jurisdiction provided in art. 346 CP RM.

I do not fall under the scope of the criminal law to speak of ideas that have a character of discussion, controversy, because the externalized ideas are not directed to provoke the feeling of disgrace and enmity towards the representatives of another religious confession and do not contain calls to commit any violent actions against the representatives of another. religious or atheist confessions.

The methods of communication through which hate speech can be transmitted can be verbal, in the online environment, on paper or even through drawn symbols. The criminal act manifests itself in the form of an intentional verbal presentation of thoughts through the medium of language, as well as through other forms of information transmission (linguistic or graphic means).

In this context, hate speeches in the form of racist and xenophobic propaganda promoted on social networks represent facts that the Council of Europe condemns and considers serious enough to propose their sanction by criminal penalties when they represent the following facts: 1) distribution of materials racist and xenophobic through computer systems; 2) the threat based on a racist and xenophobic motivation; 3) denial, gross minimization, approval or justification

²² Jeflea A., Moraru V., *op. cit.*, 2016, p. 171.

of genocide or crimes against humanity.

As it is found in the contemporary criminal doctrine, as means and methods of committing crimes of an extremist nature can be recognized: the knife, the hunting weapon, the car, etc. In rare cases criminal acts of an extremist nature can be committed without any means, for example, applying the victim's blows. In other cases the extremist manifestations can be outsourced in the use of documents²³.

The subjective side of the offense provided in art. 346 CP RM is characterized by guilt in the form of direct intention. The perpetrator is aware of the harmful nature of the crime and wants to commit it. The differentiation of this criminal fact from other related facts is made on the basis of the subjective side. Violation of the equality of citizens (art.176 CP RM) should not be aimed at harassing the religious spell, such a fact is committed because of personal hatred towards the representative or representatives of a particular religion or atheists. In case the violation of the equality of the rights and freedoms of the human and the citizen is committed in public with the purpose of provoking the enemy, the separation or the differentiation, the act shall be qualified by competition with the criminal offense provided in art. 346 CP RM.

The obligatory subjective sign of the criminal offense provided in art. 346 CP RM is the special purpose - the establishment of spell, differentiation or religious separation.

Although the content of the criminal offense analyzed appears to be a huli-ganic and extremist one we consider, however, that at the time of this crime the extremist and non-huliganic motive prevail. Offenses of an extremist character of religious origin involve committing violent acts for religious reasons. In the specialized literature (V.V. Revina, A. Jeflea, V. Moraru), "extremist hooliganism", in comparison with hooliganism that attends to the social order, has a different object of attention²⁴. The essence of the extremist motive is not reduced to the sublimation and accentuation of one's own Ego towards the concrete victim, and the fundamental thesis of extremist hooliganism is the contradiction according to the principle "I, therefore we - they". Such a contradiction does not constitute a

²³ Хлус А.М. *Криминалистические возможности выявления фактов экстремизма при расследовании преступлений*. В: Актуальные проблемы правового противодействия экстремизму: доктрина и практика : материалы Международной науч.-практ. конф. (19-20 апреля 2012 г.) / отв. ред. Г.И. Цепляева. – Петрозаводск, 2012, с.89-90. [Khлus A.M., *Forensic opportunities to identify facts of extremism in the investigation of crimes*, Actual problems of the legal counteraction to extremism: doctrine and practice: materials of the International scientific-practical. conf. (April 19-20, 2012)/rep. ed. G.I. Tseplyaeva. - Petrozavodsk, 2012, p. 89-90].

²⁴ Ревина В.В. *Экстремизм в российском уголовном праве*: Автореферат диссертации на соискание ученой степени кандидата юридических наук. Специальность 12.00.08 – уголовное право и криминология; уголовно-исполнительное право. Москва: Российский университет дружбы народов, 2010, p.18-19 (Revina V.V., *Extremism in Russian criminal law*: Abstract of dissertation for the degree of candidate of legal sciences. Specialty 12.00.08 - criminal law and criminology; penal law. Moscow: Peoples' Friendship University of Russia, 2010, p. 18-19).

mere fact of differentiation as it is closely linked to the tendency to limit or infringe the criminal rights and freedoms of other persons through the criminal act, because "they are not like us"²⁵.

It should be borne in mind that the criminal law of the Republic of Moldova does not operate with the term "extremism", it does not contain any express rules that would contain the prohibition of religious extremism or the practice of religious extremist activity. Although some of the extremist religious activities are incriminated in the Special Part of the Criminal Code (art. 185 CP RM; art. 346 CP RM).

The essence of the extremist motive is expressed in the opposition "I, therefore we - they" against other people who are not part of this group. Extremist motives are to be provided in a series of articles of the Criminal Code, which will acquire the characteristic of the obligatory subjective sign and which will have to be proved in each case of religious extremism. Although the purpose of these offenses is not expressly indicated by the legislature, in most cases the religious discord is pursued.

The perverse effect of over claiming religious ideas and values stemming from religious identity generates fundamentalism and intolerant attitudes. In the opinion of the Romanian author A. Jeflea, crimes motivated by religious hatred constitute the proliferation of religious extremism²⁶. The quoted author considers that religious extremism as a criminological phenomenon constitutes the attitude or doctrine of religious or pseudo-religious trends, which, based on extreme theories, ideas or opinions, seek, by violent or radical measures, to impose their program for the purpose of change, through violence, the foundations of the constitutional regime and the violation of state integrity; undermining state security; the usurpation of state power or official qualities; creation of illegal armed formations; conducting terrorist activity; provoking religious hatred; humiliation of personal dignity; causing mass disorders; committing acts of hooliganism or vandalism on grounds of hatred or religious enmity; as well as the propagation of exclusivity, superiority or inferiority of citizens according to the criterion of their attitude towards religion or according to the criterion of religion²⁷.

It should be specified that the evaluation of the motives and the identification of their extremist character require special knowledge, and the informational materials containing the reflected extremist visions will be subject to judicial expertise in the criminal prosecution.

The reasons for these categories of offenses carry a religious connotation. Committing the crime for reasons of spell, differentiation or religious separation, implies the intent of the perpetrator to demonstrate the presence of disgrace to a

²⁵ *Ibid.*, Jeflea A., Moraru V., *op. cit.*, 2016, p.171.

²⁶ Jeflea A. *Spre clarificarea conceptului terorismului religios în accepțiunea criminologică*. „*Buletinul Științific al Universității de Stat 'Bogdan Petriceicu Hasdeu' din Cahul*”, 2017, №1(5), 2017 (Social sciences), p. 136.

²⁷ *Idem*, p. 136-137.

certain religion and its representatives. As indicated in the foreign legal literature, criminal acts of an extremist nature are the selective nature of their actions, the temptation to demonstrate the negative attitude not towards the society as a whole, but only towards part of it. The logic of the huliganic motive is simplistic - "it is not ours, it does not belong to our team", in other words, anyone who is not part of our group can become the target of the attack. The reason for committing such an offense may also be insignificant (for example, the lack of cigarettes to the victim). According to the logic of extremism, the "stranger" (ie the victim) is chosen according to the determined religious sign - not all persons, but only those belonging to another religious group²⁸.

Religious separation as the motive of the crime is a conscious impulse that manifests the perpetrator's attitude of strong dislike towards the adherents of another religion, atheist, or non-theist, and which determines the desire to commit the crime, this motive being expressly provided as a sign of the subjective side in the criminal law and having an impact in the process of differentiation and individualization of criminal responsibility and punishment.

Religious differentiation is a form of social differentiation, which involves the dismemberment of an entire religious in the religious elements that appear in the process of evolution, transition, the formation of ideas, sects, religious and philosophical trends, the modification of religious settings, etc. In other words, the stratification of the society according to the religious beliefs takes place, which, in the end, can lead to illegality, competition and conflict. Information is considered to be challenging if it contains an emotional appreciation and forms the negative setting towards a religious group or the followers of such a group, instigates the limitation of rights and leads to violent actions against them²⁹. Religious differentiation is opposed to syncretism, which means the gathering of heterogeneous elements belonging to different philosophical doctrines or different religions.

Religious spell (religious enmity) is the open manifestation of displeasure and disgrace based on the religious beliefs of the person. Enmity (spell) is only the consequence of division. The religious spell is to be interpreted as a sign of the objective side and, respectively, it cannot be treated as a content of the criminal motive³⁰. The rise of the religious spell signifies the artificial creation of the religious conflict or the attempt to create such a conflict in the form of hostile

²⁸ Миникаева А.Ф. *Религиозная ненависть или вражда как мотив совершения преступления: уголовно-правовой и криминологический аспекты*. Автореферат диссертации на соискание ученой степени кандидата юридических наук Специальность 12.00.08 - уголовное право и криминология; уголовно-исполнительное право. Казань: Казанский государственный университет им. В.И. Ульянова-Ленина -2005, 28 с. [Minekaeva A.F., *Religious hatred or enmity as a motive for committing a crime: criminal law and criminological aspects*. Abstract of dissertation for the degree of candidate of legal sciences Specialty 12.00.08 - criminal law and criminology; penal law. Kazan: Kazan State University V.I. Ulyanov-Lenin -2005, p. 28].

²⁹ Бодобаев К.А. (Bodobayev K.A.), *op. cit.*, p. 88-92.

³⁰ Миникаева А.Ф. (Minekaeva A.F), *op. cit.*, p. 28; Шилин Д.В. (Shilin D.V.), *op. cit.*, p. 81.

relations in an open form between representatives of different social groups, especially representatives of different religious denominations³¹.

The reasons for the crime can be deduced from the contents of the slogans (either verbal or in written form) declared at the time of the crime committed. Such slogans must contain the signs of religious hatred and humiliation of personal dignity.

Spell, differentiation, or religious split can become the reason for committing the crime both against the follower of a religion and against an atheist, or a non-theist³². Often the stated reasons compete with other criminal motives (political reasons of ideological or religious connotation). In such cases, the perpetrator tends not only to express his own contemptuous attitude and enmity towards other believers, but strives to reorganize the order of society according to certain religious doctrine³³.

3. Conclusions

The problem of the legal-criminal qualification of the actions aimed at provoking the spell, differentiation and religious division is related, first of all, to the direction of the perpetrator's intention, to identify the reasons and the goals set. It is often the case that the attack within the meaning of art. 346 CP RM, forms a crime contest with the armed rebellion (art. 340 CP RM); mass disorders (art. 285 CP RM). At the same time, if in connection with the performance of the duties of the person the person will be discriminated against on the grounds of religion, the committed ones will be qualified by competition with art. 176 CP RM (Violation of equality of rights of citizens).

Both the criminal law in force of the Republic of Moldova and the national case law do not provide for what kind of behavior constitutes religious hatred from the perspective of the extremist motive. The identification and evaluation of discriminatory and extremist motives requires certain special knowledge and the materials that reflect extremist opinions are to be subjected to an expertise in criminal prosecution. In our opinion, the extremist motives will be expressly provided for in several articles in the Special Part of the Criminal Code of the Republic of Moldova and in the Criminal Code of Romania.

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³¹ Бодобаев К.А. (Bodobaev K.A.), *op. cit.*, p. 88-92.

³² Минекаева А.Ф. (Minekaeva A.F.), *op. cit.*, p. 28.

³³ *Ibid.*

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Drawing to the Criminal Liability of the Legal Person

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Abstract

Legal entities, other than those excepted, are criminally liable whether they are public or private. The guilt of the legal person refers to the organs and its organization, so that establishing the guilt of the natural persons who make up the bodies of the legal person is equivalent to establishing the guilt of the legal person concerned. The judicial bodies must establish the rules and practices existing in the organization and functioning of the respective legal person, and if it turns out that the bodies of the legal person have decided, have known or have not prevented, based on the levers available, the commission of crimes, the liability can be committed criminal of the legal person, if the form of guilt required by law for the examined crime is fulfilled.

Keywords: criminal liability, legal person, criminal offense, criminal law.

JEL Classification: K14

1. Introductory considerations

The procedure regarding the taking to criminal liability of the legal person is regulated in the Code of criminal procedure, the special part, special procedures, title IV, chapter II, art. 489-503.

We appreciate the fact that a series of articles in Title IV, Chapter II do not represent the special provisions, but demonstrate that certain institutions are applicable to legal entities as well.

Thus, according to the provisions of art. 489 paragraph 1 of the Code of Criminal Procedure entitled "General provisions", "the provisions of the code apply to legal persons who commit crimes, in carrying out the object of activity, in the interest or on behalf of the legal person".

We consider this statement to be superfluous or unnecessary, because according to the criminal law, these are the conditions under which the liability of the legal person can be incurred.

2. Drawing to the criminal liability of the legal person

By Decision no. 21/2016² pronounced by the Completion for the unraveling of some questions of law in criminal matters within the High Court of Cassation and Justice regarding the interpretation of the provisions of art. 90 letter c)

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² Published in the Official Gazette no. 884 of November 04, 2016.

from the Code of Criminal Procedure, it was established that "during the preliminary chamber procedure and during the trial, in cases where the law provides for the crime committed for life imprisonment or the sentence of imprisonment of more than 5 years, legal assistance is mandatory for the defendant legal entity, in relation to the provisions of art. 187 of the Criminal Code".

Pursuant to the provisions of art. 187 of the Criminal Code, by "the punishment provided by the law" is meant the punishment provided in the law text that incriminates the deed committed in consumed form, without considering the causes of reduction or increase of the punishment.

The possibility of the accumulation of the qualities of civilly responsible party and of the defendant in the same criminal trial is of particular importance for the judicial practice.

The criminal liability of the legal person is a direct liability, for their own deed, they do not answer for the deed of another person, so that when he has the capacity to be charged in the criminal case, the legal person is charged with his own deed.

In any case, the natural persons always answer for their own deed, the criminal responsibility being personal. For the same act, the natural persons who contributed to the same crime can be prosecuted and convicted, as it concerns the same violation brought to the social value protected by the law, regardless of the legal classification that will receive this touch (instigators, accomplices, etc.).

Civil liability is a liability for one's own deed, just like the criminal liability, and within the civil side of the criminal process, the liability of the civilly responsible party is a liability for the deed of another, and not for one's own crime, being a criminal liability - art. 1372-1373 of the Civil Code.

We considered that in the same criminal trial the quality of suspect or defendant of a legal person with that of a civilly responsible party can be cumulated, so that a legal person can be acquitted as an accused, but he can be held responsible for the act of the foreskin.

Regarding the same fact, in the same criminal trial, a legal person cannot be held liable from a civil point of view in his capacity as a defendant, as well as in that of a civilly responsible party.

The possibility of convicting the legal person as an offender and civilly responsible party has practical utility, considering that the liability for one's own deed excludes liability for the deed of another person.

According to the provisions of art. 1382 of the Civil Code, when the harmful act is attributable to several persons, they are held jointly for compensation.

In accordance with the provisions of art. 1443 of the Civil Code, the legal person is liable for the entire amount with which the person injured by the crime committed constituted a civil part, regardless of the fact that this amount is also requested from the natural persons who have the procedural quality of the defendants in question.

If the legal person pays the whole amount, he has a right of recourse against the natural person obliged in solidarity, and the right of recourse is based on the legal act of the payment, according to art. 1384 of the Civil Code.

The territorial competence of the judicial bodies regarding the criminal liability of the legal person is regulated by art. 41 of the Code of Criminal Procedure entitled "jurisdiction for offenses committed on the territory of Romania"³.

Competence by territory is determined, in order:

a) the place where the crime was committed - art. 41 (1) letter a) of the Code of Criminal Procedure.

b) the headquarters of the defendant of the legal person, at the moment when the deed committed - art. 41 (1) letter c) second thesis;

c) the headquarters of the injured person - art. 41 (1) letter d) second thesis.

We consider that the agreement for recognizing the guilt cannot be concluded by a legal person who has the capacity to be charged in a criminal case, in relation to the provisions of art. 482 of the Code of Criminal Procedure entitled "Content of the agreement for the recognition of guilt".

According to art. 482 paragraph 1, letter b) from the Code of Criminal Procedure, the acknowledgment of guilt must contain the name, first name of the defendant, the data provided in art. 107 paragraph 1 of the Code of Criminal Procedure, respectively nickname, personal numeric code, parents' names and surnames, civil status, military situation, studies, profession or occupation, job, interpreter, etc.

Decision no. 1/2016 of the High Court of Cassation and Justice, pronounced by the Complaint for the unraveling of some questions of law in criminal matters, to establish that the individual enterprise, organized by the entrepreneur natural person under the Government Emergency Ordinance no. 44/2008 does not have legal personality and, therefore, cannot answer criminally under the conditions of art. 135 of the Criminal Code

The provisions regarding the preliminary chamber procedure are applicable also to the legal person who has the capacity of defendant or civilly responsible party, without any particularity.

The object of the criminal action is to bring to criminal liability the legal persons who have committed crimes, according to art. 490 of the Code of Criminal Procedure entitled "The object of the criminal action".

If the legal person and his legal representative are criminally prosecuted

³ Gr. Theodoru, *Tratat de drept procesual penal*, 3rd edition, Ed. Hamangiu, Bucharest, 2013, p. 263; I. Neagu, M. Damaschin, *Tratat de procedura penala. Partea generala in lumina noului Cod de procedura penala*, Ed. Universul Juridic, Bucharest, 2014, p. 341; A. Crisu, *Drept procesual penal. Partea generala conform Noului Cod de Procedura Penala*, 3rd edition, Ed. Hamangiu, Bucharest, 2018, p. 233.

for the same deed or related facts, having the capacity of defendants, the representation is provided by a judicial representative⁴.

The appointment of the judicial representative by the legal person represents a procedural right, but also a procedural obligation of the legal person.

The legal person has the right to appoint a trustee because the legislator uses the phrase "names itself" and from the interpretation of the text of the law it results that it is an imperative norm.

The sanction of the violation of the obligation to appoint a judicial representative by the legal person, is the fact that the judicial representative will be appointed by the judicial body according to art. 491 para. 3 of the Code of Criminal Procedure.

We consider that the legal person must have a unique representative as a judicial agent, throughout the criminal process, regardless of how he was appointed, by the legal person or by the judicial bodies.

We mentioned that the judicial agent exercises all rights and fulfills all the procedural and procedural obligations incumbent on the legal person, being limited only to the representation of the legal person in the criminal process.

The administrator or the legal representative of the legal person may continue to make payments, may conclude legal documents, because the power of the judicial agent is only to represent the legal person in the criminal process, and not to intervene in the administration of the company⁵.

The rights and obligations of the judicial agent are not provided for in the criminal procedural law, but the judicial agent is remunerated.

Regarding the place of citation of the legal person, the rule in this matter is the fact that it is cited at its headquarters⁶.

If the headquarters of the legal person is fictitious or the legal person no longer works at the declared headquarters, and the new headquarters is not known, a notification is displayed at the headquarters of the judicial body, which is different from the citation.

In the event that no person is presented for the communication of the summons, the summons is considered communicated when the deadline stipulated in the notification is fulfilled.

In the situation in which a judicial representative has been appointed, the legal person is summoned to his or her home or office.

During the criminal prosecution, in accordance with the provisions of art. 495 of the Code of Criminal Procedure, the prosecutor communicates to the body

⁴ A. Crisu, *Drept procesual penal*, 4th edition, Ed. Hamangiu, Bucharest, 2013, p. 664.

⁵ F. Stretanu, R. Chiriță, *Răspunderea penală a persoanelor juridice*, Ed. C.H. Beck, Bucharest, 2007, p. 384.

⁶ Gr. Theodoru, *op. cit.*, 2013, p. 417; I. Neagu, M. Damaschin, *op. cit.*, 2014, p. 673; A. Crisu, *op. cit.*, 2018, p. 565.

that authorized the establishment of the legal person and to the body that registered the legal person⁷, the initiation of the criminal action and the prosecution of the legal person, in order to make the appropriate statements.

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⁷ A. Crisu, *op. cit.*, 2013, p. 665.

The Offense of Destroying at Fault in the Romanian Law

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Abstract

In the present work we have examined the destroying at fault offense provided for in the provisions of art. 255 of Criminal Code. Also, given the transitional situation we are in, the elements of similarity and differentiation between the previous and the current regulations have been analysed, a useful examination regarding the application of the more favorable criminal law. The examination carried out is part of an extensive work to be published in a nationally recognized publishing house. The paper can be useful to students, master students and doctoral students of the country's faculties, as well as practitioners.

Keywords: *the objective side; the subjective side; the more favorable criminal law; the subjects of the crime.*

JEL Classification: K14

1. Introduction

The offense of destroying at fault is provided in the Romanian Criminal Code and is part of Title II with the marginal title “*Offenses against patrimony*”, Chapter V “*Destruction and disturbance of possession*”.

In an absolutely normative order, the offense we intend to examine briefly, is mentioned after the crimes of destruction and qualified destruction.

Specifically, it is mentioned in the provisions of art. 255 par. (1) of Criminal Code, and it consists in the destruction, degradation or bringing into a state of non-use, at fault, of a good, even if it belongs to the perpetrator, if the deed is committed by arson, explosion or any other such means and if it is likely to endanger other persons or property.

In the par. (2) an aggravated way is provided, which will take into account the situation in which the aforementioned facts have resulted in a disaster.

The term “*disaster*” means “*the destruction or degradation of immovable property or of works, equipment, installations or components thereof and which resulted in the death or personal injury of two or more persons*”.

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

The offense of destroying at fault was provided in a similar regulation also in the Criminal Code of 1969, at art. 219, between the two regulations, there

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are some common elements as well as some different ones.

As these similarities and differences are of particular interest for both doctrine and judicial practice, at least viewed in the light of the application of more favorable criminal law, we will try to highlight them.

Thus, among the elements of resemblance we mention: the preservation of the same marginal title, incriminating the act only if the act of destruction was carried out by arson, explosion or by any other such means, it is applied the more severe sanction of the act when a disaster occurred.

As elements of differentiation we point out: the renunciation of the current legislator to sanction the destruction at fault that caused very serious consequences (this renunciation being replaced with the sanction of the act when it had as a result a disaster); renouncing the distinct incrimination of the action of destruction, degradation or bringing into disuse of an oil or gas pipeline, an electrical network, telecommunications equipment and installations or by broadcasting radio and television programs or water supply systems of the water supply pipelines; renouncing the requirement that the deed in the simple way will be such as to create a public danger and replacing it with the requirement that the deed will likely to endanger other persons; the renunciation of the incrimination of the act of leaving the post or of committing any act by the management personnel of a means of public transport or by the personnel directly assuring the security of such transports.

At the same time, we also highlight major differences in terms of the sanctioning regime, which is much lower in the new law (imprisonment from 3 months to one year or fine compared to imprisonment from one month to 2 years or fine in the case of the simple way, imprisonment from 5 to 12 years, compared to prison from 5 to 15 years in the aggravated way).

Regarding the elements of differentiation and similarity between the two regulations, in the recent doctrine it has been argued that “In the current regulation, this crime has been considerably simplified, only retaining the type and aggravation of a disaster. Thus, the destruction at fault in the version described in art. 219, par. (4) of previous Criminal Code, as such an act constitutes firstly a service offense because it is committed by a breach of a service attribution (leaving the job or any other act by the management personnel of a means of transport or by the personnel which directly ensures the security of such transports) and, secondly, it is difficult to accept such an act to be committed at fault. Moreover, the practice did not register cases of application of the respective text. Also, it has been waved on the option of aggravating the destruction, degradation or bringing into disuse of an oil or gas pipeline, a high voltage cable, telecommunication equipment and installations, or for broadcasting radio and television programs or water supply systems and water supply pipelines”².

² Vasile Dobrinoiu, in Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, *Noul Cod penal*,

Another author states that “compared to the lack of a judicial practice in this matter, the New Criminal Code no longer provides as aggravated variant the destruction, degradation or bringing into a non-use state, at fault, of an asset, even if it belongs to the perpetrator, in the case it has had particularly serious consequences or if it resulted in a disaster, when the repercussions occurred as a result of leaving the job or committing any other act by the management personnel of a means of public transport or by the directly insuring personnel the security of such transports; in this case, a service offense (being committed by breach of a service attribution) will be held in competition with the offense of aggravated misconduct”³.

In another opinion it is stated that “Firstly, it needs to be observed that the results of the deed from the old regulations relate to a concrete danger, whereas in the current regulation the legislator reports this consequence to a potential danger - a *destruction that may* (...). An essential change is the renunciation of the notion of *public danger*, a concept that does not respect *the requirements of the principle of legality of the incrimination*. In the current Criminal Code, the results concern the danger to which other persons or goods are subjected. We do not necessarily talk about narrowing the scope of the text of incrimination, because the potential danger in the new regulation has a wider sphere than the concrete one, and the danger of other people or goods is subsumed by the idea of *public danger*. It is difficult for us to imagine a hypothesis in which the achievement of a *public danger* is not taken into account by the current regulations”⁴.

3. The pre-existing elements

3.1. The legal object

The special legal object is formed by the social relations regarding the protection of the patrimony against any action or inaction of destruction, degradation or bringing into disuse status of any movable or immovable property.

3.2. The material object

The material object is represented by any movable or immovable property belonging to the owner or to another natural or legal person.

According to the recent doctrine “it cannot be a material object of the

comentat, Partea specială/New Criminal Code, commented, Special part, 3rd ed. revised and added, Ed. Universul Juridic, Bucharest, 2016, pp. 350-351.

³ Mihail UdROIU, *Drept penal, Partea specială/Criminal Code. The Special Part*, 6th ed., C.H. Beck, Bucharest, 2019, p. 389.

⁴ Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *Noul Cod penal, Partea specială, Analize, Explicații, Comentarii, Perspectiva Clujeană/The New Criminal Code, Special Part, Analysis, Explanations, Comments, Cluj Perspective*, Ed. Universul Juridic, Bucharest, 2014, pp. 297-298.

crime of destruction: the abandoned goods or those that belong to no one, goods in an extremely advanced state of degradation or those that are of no significance and without any use.”⁵

3.3. Subjects of the crime

The *active subject* of the crime can be any natural or legal person who proves to have the criminal capacity to be liable for his deed, including the owner of the good.

The co-authorship “is possible in the case of detaining the common fault of several persons in committing the typical act; improper criminal participation is possible, the persons who determined, facilitated or helped in any way, with intent, in committing the destruction of the guilt being sanctioned for instigating, respectively complicity in the offense of destruction (art. 253 the New Criminal Code)”⁶.

The *passive subject* of the crime may be any natural or legal person to whom it belongs the destroyed, property degraded or brought into disuse status.

4. The legal structure and content of the crime

4.1. The premise situation

The premise situation consists in the existence of a susceptible good “to suffer an alteration of its substance or a diminution of its qualities of use. It is not relevant if the good is completely new or in perfect condition, it is sufficient to be used. The existence of a thing without value cannot constitute a premise situation for a possible offense of destruction”⁷.

4.2. The constitutive content

4.2.1. The objective side

The *material element* of the objective side consists in the action or inaction that results in the destruction, degradation or bringing into disuse of a good, even if it is of the perpetrator.

Destruction is understood as “*the abolition, the destruction, the suppres-*

⁵ Mihail Udoiu, *op. cit.*, p. 389.

⁶ *Idem*, p. 389.

⁷ Constantin Sima, in George Antoniu, Tudorel Toader (coord.), George Antoniu, Versavia Brutaru, Constantin Duvac, Ion Ifrim, Ilie Pascu, Marieta Safta, Constantin Sima, Tudorel Toader, Ioana Vasii, *Explicațiile Noului Cod penal, vol. III, Art. 188-256/Explanations of the New Criminal Code, vol. III, Art. 188-256*, Ed. Universul Juridic, Bucharest, 2015, p. 635.

*sion, the crushing, the reduction to mere remains, which, even if they have a certain value, is well below the initial value of the asset*⁸.

The degradation of a good “means its deterioration, its partial alteration, i.e. a substantial change that causes the good to no longer have the qualities and the potential of its previous use”⁹.

Bringing it into a state of non-use “means the good loses completely its initial qualities that ensured the potential of use, thus becoming completely unusable.”¹⁰

Essential requirements. For the existence of the crime it is necessary to cumulatively fulfill two essential requirements, respectively: the act to be committed by arson, explosion or by any other such means and the act may endanger other persons or property. In the absence of one of these two requirements, the deed will not fulfill the constituent elements of the crime from an objective point of view and consequently will not constitute an offense¹¹.

In this regard, in the judicial practice “it was decided that there is no crime of destruction at fault, if the destruction or degradation did not occur by arson, explosion or other such means and if there was no public danger¹² or, in the event of a traffic accident, the driver only caused some damage to the property of a natural person at his fault”¹³.

We emphasize the fact that the requirement to be a public danger has been replaced in the new law with the requirement that the deed is likely to endanger other persons or property.

The immediate consequence is the creation of a state of danger for other persons or goods in the vicinity of the place where the goods were destroyed by arson, explosion or by any other such means.

Between the incriminated act or inaction and the immediate follow-up, there must be a *causality link*.

4.2.2. The subjective side

The form of guilt with which the crime is committed is *the fault*, with both of its ways.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Supreme Court of Justice, Criminal Sentence no 2334/1997, in *Culegere de decizii pe anul 1997/ Decision collection for 1997*, p. 329.

¹² Supreme Court of Justice, Criminal Sentence no 4523/1972, in RRD no. 3/1973, p. 162.

¹³ Constantin Sima in George Antoniu, Tudorel Toader (coord.) et al., *op. cit.*, p. 645; the author refers to Sibiu Court, Criminal Sentence no. 428/1972, in RRD no. 4/1973, p. 165.

5. Forms, ways, sanctions

5.1. Forms

Since the examined offense can be committed only at fault, we have only the consumed form, excluding the preparatory acts and the attempt.

5.2. Ways

The offense examined has a simple normative way (type) and an aggravated normative way.

Provided in the provisions of art. 255, par. (1) of Criminal Code, *the simple normative way* consists in the destruction, degradation or bringing into disuse of a good, even if it belongs to the perpetrator, even if the deed is committed by arson, explosion or by any other such means and if it is likely to endanger other persons or property.

The *aggravated normative way* is provided in the provisions of art. 255 par. (2) of Criminal Code and it will be held under the conditions where the acts committed under the conditions of the simple normative way have resulted in a disaster.

The *factual ways* are numerous depending on the concrete circumstances of committing each deed.

5.3. Penalties

In the case of the simple normative way, the sanction provided by law is the imprisonment from 3 months to one year or a fine, and in the case of the aggravated normative way, the sanction provided is the imprisonment from 5 to 12 years.

6. Complementary explanations

6.1. The connection to other offenses

The offense examined has some direct links with the crime of destruction and the crime of qualified destruction, between these incriminations and there are fundamental differences which consist first of all in the guilt with which the active subject acts and the consequence that occurs.

6.2. Some procedural aspects

The jurisdiction in the court of first instance belongs to the court in the

area in which the deed was committed, except the cases where the jurisdiction according to the quality of the person belongs to the court, the court of appeal or the High Court of Cassation and Justice.

As a rule, the competence of criminal prosecution belongs to the criminal investigation bodies of the judicial police under the supervision of the prosecutor from the prosecutor's office next to the territorial competent court. If the jurisdiction of the court of first instance belongs to the High Court of Cassation and Justice, the criminal prosecution will be exercised by the prosecutor.

The criminal action is initiated *ex officio*.

7. Legislative Background and Transitional Situations

7.1. Previous Legislation

As mentioned above, the offense examined was provided for in the provisions of art. 219 of the Criminal Code of 1969.

7.2. Transitional Situations. Applying the More Favorable Criminal Law

As other offenses, given the fact that the sentence limits provided in the two laws differ, as well as some different conditions of incrimination, in transient situations, the problem of applying a more favorable criminal law will be raised.

Thus, in relation to the concrete circumstances of committing each act, with the seriousness of the crime and the danger of the offender the more favorable criminal law can be both the old law and the new law.

Assuming the existence of one or more mitigating circumstances is retained, even if in the old law the penalties are higher, the more favorable criminal law will most often be the old law. Under the conditions of existence and withholding of aggravating circumstances, the more favorable criminal law will be the new law, because the maximum limits are lower, in relation to the old law.

8. Conclusions

Maintaining the incrimination of the destruction offense in the Criminal Code in the large group of offenses against patrimony in a separate chapter, is justified at the present time, due to the evolution of crimes in this area and the need to defend by criminal law rules of the property.

Although there may be other opinions, we consider that the current incrimination, in terms of its legal content, but also the limits of punishment correspond to the current needs, which involve the prevention and combating of this type of crime. We appreciate that the judicial practice in the field will foreshadow both the necessity of maintaining it in the Criminal Code, as well as a possible

completion of the legal content.

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Some Considerations Regarding False Testimony in the Romanian Law. Active Subjects of the Offense. Critical Opinions and *De Lege Ferenda* Proposals

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Abstract

In this paper we have examined some pre-existing conditions for the offense of false testimony, respectively, of the active subjects of this offence. We also presented some considerations regarding the elements of differentiation and similarity between the current and existing regulations in the Criminal Code of 1969. The examination also considered the formulation of critical opinions, supplemented by de lege ferenda proposals meant to contribute to the improvement of the text in force. The paper can be useful to students and masters of law faculties in the country, as well as to practitioners in the field of criminal law.

Keywords: *crime; witness with protected identity; witness protection program; false testimony.*

JEL Classification: K14

1. Introduction

Provided in the provisions of art. 273 par. (1) of the Romanian Criminal Code in force, the crime of false testimony consists in the act of the witness who, in a criminal, civil case or in any other procedure in which witnesses are heard, makes false statements or does not say everything he knows about the essential facts or circumstances in which he is interrogated.

According to the provisions contained in par. (2) of the same article, the crime is considered to be more serious being sanctioned accordingly, under the conditions in which the false testimony is committed by certain persons, such as: the witness with protected identity or who is in the Witness Protection Program; the undercover investigator or a person who draws up an expert report or an interpreter, as well as when it is committed in connection with an act for which the law provides for the sentence of life imprisonment or imprisonment of 10 years or more.

In addition to the typical and aggravated modalities, the text of incrimination also provides for some special causes of non-punishment, respectively, in the event that the active subject withdraws his testimony, in criminal cases before the arrest, arrest or movement of the criminal action or in other cases before a

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judgment has been passed or another solution has been given, as a result of the false testimony.

Referring to the reason of the incrimination and the social value protected the recent doctrine the evidence that “This incrimination text provides criminal protection to the credibility of the evidence with witnesses in a judicial procedure. It is certain that the statements of witnesses or persons assimilated to them (interpreter, expert) are one of the most important means of proof by which the truth can be obtained, and they essentially contribute to the treatment of the most exact correspondence between legal and material truth. From this point of view, it is natural for the legislator to incriminate the obligation of the witnesses to contribute to the establishment of the “legal” truth, such conduct being able to prejudice in an essential manner the act of justice. It would be difficult to imagine a system in which the statements of the witnesses would be devoid of credibility and therefore unnecessary from the perspective of the correct solution of the case in which witnesses are heard”².

It should be noted that the facts of the witness making false statements in connection with circumstances not essential to the case or not declaring circumstances essential to the cause, not being asked about them by the competent judicial body, do not meet the typical conditions of this offense.

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

The mentioned offense was regulated in a similar formulation and in the Criminal Code of 1969, in art. 260.

The comparative examination of the two incriminations allows us to identify elements of differentiation, as well as others of similarity.

The differentiating elements are:

- the inclusion of aggravated normative ways consisting of, the act committed by certain categories of persons, directly involved in the complex activity of performing the act of justice, such as: the witness with protected identity or who is in the Witness Protection Program, the undercover investigator or a person who draws up an expert report or an interpreter, or the false testimony committed in connection with a fact for which the law provides for the sentence of life imprisonment or imprisonment of 10 years or more;

- waiving the cause of mitigation the sentence, when the withdrawal of the false testimony intervened in the criminal cases after the arrest of the defendant or in all the cases after a decision was passed or another solution was given as a result of the false testimony;

- the special cause of non-punishment is more restrictive by imposing the obligation to withdraw the false testimony before the moment of arrest, arrest or

² Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *Noul Cod penal, Partea specială, Analize, explicații, comentarii, Perspectiva clujeană/New Criminal Code, Special Part, Analysis, explanations, comments, Cluj perspective*, Ed. Universul Juridic, Bucharest, 2014, p. 353.

movement of the criminal action or in other cases before a decision has been given or another decision has been given solution, as a result of the false testimony; in the previous regulation the special cause of non-punishment consisted of the witness's testimony that in criminal cases, before the arrest of the defendant or in all the cases before a decision was given or another solution was given as a result of the testimony a liar, he withdraws his testimony;

- the renunciation of the current legislator to sanction the interpreter or the expert in the standard way and to include their sanction in the aggravated normative way;

- in the type of normative mode, the sanction provided in the new law is lower, being provided alternatively and with a fine (imprisonment from 6 months to 3 years or a fine, compared to imprisonment from one to 5 years.

As elements of resemblance we mention the marginal name, the legal content of the standard modality of both laws, as well as minimum and maximum penalty limits identical for the aggravated normative way of the new law and the normative modality of the previous law.

The identification of the elements of similarity and distinction between the two regulations is of major importance in the complex activity of identifying and applying the more favorable criminal law in transitional situations.

3. Active subjects of the crime

The active subject of the offense is qualified as it can only be a person who has the status of a witness or one of the following qualities: a witness with a protected identity, a witness in the Witness Protection Program, an undercover investigator, or a person who prepares a report of expertise or an interpreter.

According to DEX³, the witness is a person who “attends or witnesses an incident, a discussion, an event, etc. (and who can tell or attest to how the facts went)” or “the person called to testify before a court or other investigative body everything he knows about a fact he knows directly”.

According to the provisions of art. 34 Criminal Procedure Code *the witness* belongs to the category of procedural subjects.

According to the doctrine “In order for the offense of false testimony to be committed, the quality of a person's witness must be legally ascribed at the time of his hearing. Therefore, persons who cannot be heard as witnesses, for any reason, cannot be directly active subjects of the crime of false testimony”⁴.

³ Academia Română, Institutul de Lingvistică „Iorgu Iordan”, *Dicționarul explicativ al limbii române/The Romanian Academy, the Iorgu Iordan Institute of Linguistics, The Explanatory Dictionary of the Romanian Language*, 2nd ed., Univers Enciclopedic, Bucharest, 1998, p. 601.

⁴ Nicoleta Iliescu in Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, *Explicații teoretice ale Codului penal român, vol. IV, Partea special/Theoretical explanations of the Romanian Criminal Code, vol. IV, Special part*, Publishing House of the Academy, Bucharest, 1972, p. 179.

In the provisions of art. 114 par. (1) of Criminal Procedure Code, it is stipulated that “any person who is aware of facts or circumstances which constitute evidence in the criminal case may be heard as a witness”.

Regarding the obligations of the witness, they are provided in the provisions of art. 114 paragraph (2) Criminal Procedure Code, and consist of: presenting before the judicial body that cited it at the place, day and time provided in the summons, taking the oath or solemn declaration and telling the truth.

Considering its importance in the criminal trial, the quality of a witness takes precedence over the quality of an expert or lawyer, mediator or representative of one of the parties or of a main procedural subject, regarding the facts and the factual circumstances on which the person knew them before acquiring this quality.⁵

Depending on the specific circumstances of the commission of the deed, the persons referred to in art. 61 and 62 Criminal Procedure Code are also included.

Any person can be cited and heard as a witness, with the exception of the parties (in the criminal case the parties are: the defendant, the civil party and the civilly responsible party) and the main procedural subjects (the suspect and the injured person).

According to the provisions of the law, persons in a situation that reasonably question the ability to witness can only be heard when the judicial body finds that the person is able to consciously report facts and circumstances in fact compliant with reality. In order to decide on the ability of a person to be a witness, the judicial body has, upon request or ex officio, any necessary examination, by means provided by the law.

Also, “he can be heard as a witness under the legal conditions and the minor, he can also commit the crime of false testimony, of course, when, according to the law, he can be criminally liable. It may be the subject of the crime mentioned and the witness listened by the oath, the spouse or close relative of the accused or the accused.”⁶

In the criminal case, the hearing of the minor witness who did not reach the age of 14 at the date of the hearing raised various problems, the legislator instituting a special procedure, which takes into account a special position in which both the judicial bodies and the minor witness are.

In this regard, we make the specification that according to the law, it can be heard only in the presence of one of the parents, the guardian, the person or the representative of the institution to whom it is entrusted for growth and education. The minor who has not attained the age of 14 years cannot be the author of

⁵ Art. 114 par. (3) Criminal Procedure Code.

⁶ Vasile Dobrinou in Vasile Dobrinou, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Maxim Dobrinou, Norel Neagu, Mircea Constantin Sinescu, *Noul Cod penal, comentat, Partea specială/The new Criminal Code, commented, Special Part*, third edition, revised and added, Ed. Universul Juridic, Bucharest, 2016, p. 431.

the crime of false testimony, unlike the minor who has reached this age who can be an active subject of this offense.

If the above-mentioned persons cannot be present at the hearing for various reasons, they either have the capacity of suspect, defendant, injured person, civil party, civilly responsible party or witness concerned or there is reasonable suspicion that they may influence the statement of the minor, hearing the minor takes place in the presence of a representative of the guardianship authority or a relative with full exercise capacity, established by the judicial body.

If it is considered necessary, upon request or *ex officio*, the criminal investigation body or the court orders that a psychologist to be present at the hearing of the minor witness.

Also from a procedural point of view, the judicial bodies that carry out the hearing should avoid producing any negative effect on its mental state.

The minor witness who at the date of the hearing had not reached the age of 14 years is not notified of the obligations provided in art. 120 paragraph (2) letter d) Criminal Procedure Code and he does not take an oath, but he is advised to tell the truth.

The injured person “who did not constitute a civil party can be the author of the crime in the situation in which he gave up this quality in a criminal trial in which the criminal action is exerted *ex officio*”⁷, the same quality can be attributed to the finding body that can be heard as a witness and commits the crime of false testimony.

According to the recent doctrine “they cannot be directly active subjects, the persons according to art. 315-317 Criminal Procedure Code according to art. 116-117 of Criminal Procedure Code, can refuse to give statements as a witness, if there is such a refusal (for example, in criminal cases: the spouse, ascendants and descendants in direct line, as well as the brothers and sisters of the suspect or the defendant; persons who have been the spouse of the suspect or the defendant, the person obliged to keep the secret or confidentiality regarding the facts and circumstances of which he became aware in the exercise of the profession, without the approval of the competent authority or of the person entitled to express his agreement in this regard, or if there is a legal cause for removing the obligation to keep the secret or confidentiality); if these persons give a statement, regardless of whether they have not exercised the right provided for by the law, or have not been notified in advance that they can use this right (if the witness statement is not excluded), their status as author may be retained; if the false statement by the witness was administered illegally and is subsequently excluded (legal and material), we do not believe that the existence of the crime can be retained, regardless of the content of the statement”⁸.

Also, they cannot have the quality of authors of the offense the person for

⁷ Mihail Udriou, *Drept penal, Partea specială, Sinteze și grille/Criminal Law, Special Part, Synthesis and Grids*, 6th edition, Ed. C.H. Beck, Bucharest, 2019, p. 484.

⁸ *Ibid.*, p. 394.

whom there is a legal prohibition for the hearing as a witness in the review procedure, according to the provisions of art. 461 paragraph (5) Criminal Procedure Code, the civil party and the civilly liable party.

By Decision no. 562/2017⁹, the Constitutional Court admitted the exception of unconstitutionality and found that *“the legislative solution contained in art. 117 paragraph (1) letters a) and b) of the Code of Criminal Procedure, which excludes from the right to refuse to be heard as a witness the persons who have established relations similar to those of spouses, is unconstitutional”*.

We specify that although up to this date the legislator has not operated the modification imposed by the Court, we consider that in the category of persons who have the right to refuse to give statements as a witness is included also the person who has established relations similar to those of spouses (concubine).

By Decision no. 10/2019¹⁰, High Court of Cassation and Justice - Completion for the unraveling of some questions of law in criminal matters admitted the referral made by the Bucharest Court of Appeal, the Second Criminal Section, and established that: *“(...) the participant in the commission a crime that has been tried separately from the other participants and subsequently heard as a witness, in the disjunctive case, cannot have the active subject status of the crime of false testimony provided by art. 273 of the Criminal Code”*.

In the event that one of these persons agrees to testify as a witness, and at the hearing makes false statements or does not say everything he knows about the essential facts or circumstances about which he was asked, he will commit the crime of false testimony.

By Decision no. 1/2019¹¹ High Court of Cassation and Justice - The RIL Completion admitted the appeal in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, and established that: *“The act of a person heard as a witness, to do false statements or not to say everything he knows about the essential facts or circumstances on which he was asked, meets only the constituent elements of the crime of false testimony, provided by art. 273 par. (1) of the Criminal Code”*.

Within the aggravated normative way provided in par. (2) in art. 273 Criminal Code, the active subject may have certain special qualities that imply on his part increased responsibilities in the criminal process, respectively: witness with protected identity or in the Protection of witnesses program, investigator under cover, a person who draws up a report of expertise or an interpreter or witness heard in connection with a fact for which the law provides for the sentence of life imprisonment or imprisonment of 10 years or more.

The witness phrase with protected identity is not defined in the Romanian law, but it results from the way of regulating the provisions contained in art. 125-129 of Criminal Procedure Code.

⁹ Published in the Official Monitor of Romania, Part I, no. 837 of October 23, 2017.

¹⁰ Published in the Official Monitor of Romania, Part I, no. 416 of May 28, 2019.

¹¹ Published in the Official Monitor of Romania, Part I, no. 187 of March 8, 2019.

In this sense it is necessary to have in mind the phrase of witness threatened by art. 125 Criminal Procedure Code.

In view of the above, we appreciate that through a witness with a protected identity, within the meaning of the provisions of art. 273 par. (2) letter a) thesis I, Criminal Code is understood the witness who acquired the status of threatened witness in the phase of criminal prosecution or in the phase of trial, against which one of the protective measures provided for in art. 126 letter c) and d) or art. 127 letter d) and e) Criminal Procedure Code.

We specify that according to the provisions of art. 126 par. (1) Criminal Procedure Code, during the criminal prosecution, once it has been granted the status of threatened witness, the prosecutor orders the application of one of the following measures:

- the protection of identity data, by granting a pseudonym with which the witness will sign his statement; and
- hearing the witness without him being present, by means of the audio-visual means of transmission, with the distorted voice and image, when the other measures are not sufficient.

In this situation, the witness statement will not include the actual address or his identity data, these being recorded in a special register to which only the criminal prosecution body, the judge of rights and freedoms, the preliminary chamber judge or the court, will have access to, under strict conditions of confidentiality.

In the event that the danger status for the witness appeared during the preliminary chamber procedure, the preliminary chamber judge, ex officio or at the prosecutor's notice, disposes of the protection measures provided in art. 127 of Criminal Procedure Code.

The granting of the protected witness status can also be ordered in the court phase by the court under the same conditions with the provision of the same measures as during the criminal prosecution, mentioned above.

We consider that *de lege ferenda* the legislator should intervene and proceed to replace the phrase *witness with protected identity*, with the word *threatened witness*, or to proceed with the preservation of the word *witness with protected identity*, which will be followed by its legal interpretation.

However, we consider that it is necessary to correlate the provisions of the Criminal Code with those of the Criminal Procedure Code in this matter.

The witness statement in the Witness Protection Program is provided in the provisions of Law no. 682/2002 regarding the protection of witnesses, as subsequently amended and supplemented, republished¹².

Thus, in accordance with the provisions of art. 2 letter a) from the special law, the witness is the person who is in one of the following situations:

¹² Published in the Official Monitor of Romania, Part I, no. 964 of 28.12.2002, republished in the Official Monitor of Romania, Part I, no. 288 of 18.04.2014.

1. It has the capacity of witness, according to the Code of Criminal Procedure, and by its statements provides information and data of decisive feature in finding out the truth about serious crimes or contributing to the prevention of production or to recover any special damages that could be caused by the commission of such offenses;

2. without having a procedural quality in question, through decisive information and data, it contributes to finding the truth in cases concerning serious crimes or to prevent the occurrence of special damages that could be caused by committing such crimes or to recover them; in this category it is included the person who has the quality of defendant in another case;

3. it is in the process of executing a sentence of deprivation of liberty and, through the information and data of decisive character that they provide, contributes to finding out the truth in cases regarding serious crimes or to preventing the production or to recover any special damages that could be caused by committing such crimes.

It is also worth mentioning that the *serious crime* is the crime that belongs to one of the following categories:

- genocide and crimes against humanity;
- war crimes;
- offenses against national security;
- terrorism;
- killing;
- drug trafficking offenses;
- human trafficking;
- trafficking of minors;
- money laundering;
- counterfeiting currency or other values;
- offenses related to non-compliance with the regime of weapons, ammunition, explosives, nuclear or other radioactive materials;
- corruption offenses;
- any other offense for which the law provides for the punishment of imprisonment, whose special maximum is 10 years or more.

As regards the *special prejudice* referred to in the special law, it must exceed the equivalent in lei of 50,000 euros (the damage caused by crime), according to the provisions of art. 2 letter c) from the special law, the protected witness is the witness, the members of his family and the persons close to him included in the witness protection program, according to the provisions of the law.

The witness protection program represents the specific activities carried out by the National Office for the Protection of Witnesses, with the support of the central and local public administration, in order to defend the life, bodily integrity and health of the persons who have acquired the quality of protected witnesses, under the special law conditions.

The *undercover investigator* is the operative worker in the judicial police. According to the provisions of the law, in case of investigation of crimes against national security and terrorist offenses can be used as undercover investigators and operative workers within the state bodies that carry out, according to the law, intelligence activities in order to ensure national security.

Regarding the provisions of art. 148 paragraph (4) Criminal Procedure Code, mentioned above, we consider that they cannot produce legal consequences within the meaning of the provisions of the text, because it is incident with the decision of the Constitutional Court no. 51/2016.¹³

We appreciate that the provisions of art. 148 par. (4) Criminal Procedure Code, which confers the right to have the quality of undercover investigator in the case of crimes against state security and those of terrorism to the operative workers of the state bodies that carry out intelligence activities in order to ensure national security are at least questionable, if not really unconstitutional.

De lege ferenda we propose to reformulate the text in question.

Undercover investigators can be heard as witnesses in criminal proceedings under the same conditions as threatened witnesses.

The phrase *person who draws up an expert report* means the person who actually formulates or writes the expert report. In this way, the legislator wanted to sanction both the expert and the person who actually formulated or drafted the expert report, often this person identifies with the expert.

From the interpretation of this phrase it follows that the active subject of the crime examined may be even the person typing an expert report who, with intent, mentions in its contents or conclusions data that is not in line with the reality that results from the expert's opinion.

Regarding the notion of expert, in DEX it is shown that this is a person *who has a solid knowledge in a certain field; a high-class specialist or competent person in a specific field, appointed by a state body or by the interested parties to do an expertise*¹⁴.

The expertise is a technical research conducted by an expert, at the request of a court or criminal prosecution body or of the parties, on a situation, problems, etc., whose clarity interests the solution of the case; report prepared by an expert on the research carried out¹⁵.

In his capacity as an active subject, the expert can commit this crime in two ways, respectively: by mentioning situations that are not in conformity with the reality in the expert report drawn up or by deposition not conforming to the reality given before the judicial bodies, in both hypotheses it is necessary that the false statements made or mentioned in the expert report or omissions regarding essential facts or circumstances in which they were asked.

Regarding the interpretation of the deed for which the law provides for

¹³ Published in the Official Monitor of Romania, Part I, no. 190 of March 14, 2016.

¹⁴ The Romanian Academy, the Iorgu Iordan Institute of Linguistics, *op. cit.*, 1998, p. 358.

¹⁵ *Ibid.*, p. 358.

the sentence of life imprisonment or imprisonment of 10 years or more, we consider that no other explanations are necessary, the cause being incidental in all situations in which the witness commits the deed mentioned in para. (1) in art. 273 Criminal Code. In cases where the maximum penalty provided by law for the offense in question is life imprisonment or imprisonment of 10 years or more.

Criminal participation is possible both in the form of instigation and complicity.

Being “an offense with an exclusive perpetrator, the co-authorship is not possible when the deed is committed by a witness (regardless of whether or not he is subject to a protective measure) by an undercover investigator, an expert (who draws up the expert report alone or who is heard by the court) or an interpreter; the co-author will be withheld for the crime of false testimony and if several experts are appointed to jointly produce an expert report and within it they decide together to file false statements; a hypothesis of co-authoring can also be retained when the false translation or interpretation is carried out by several interpreters who decide together to present untrue facts or circumstances (for example, they translate together a document in which they jointly decide to insert false statements); it must be emphasized that these hypotheses of co-authoring are purely theoretical, so far there is no case in the practice in which to be retained the co-authorship”¹⁶.

The *main passive subject* is the state as the holder of the defended social value, and the secondary passive subject is the natural or legal person who has suffered as a result of committing the incriminated offense.

4. Conclusions

As it is clear from the title of the paper, the examination carried out took into account the active subjects of the crime of false testimony, with direct reference to the recent Romanian doctrine in this matter.

Without claiming to have exhausted the whole issue related to this topic, which will be resumed in a larger paper to be published later, collectively, the subject is of particular interest for both doctrine and judicial practice.

It is noteworthy that, up to this date, the Romanian legislator has not made the necessary changes to agree the provisions of the law in force with those of the Constitution.

On the other hand, the critical opinions formulated and scientifically argued, supplemented by the corresponding legal proposals are likely to lead to the improvement of the legal norms concerned.

¹⁶ Mihail Udroi, *op. cit.*, pp. 484-485.

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Measuring Crime

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Abstract

Questions about how crime is measured and what those measurements reveal about the nature and extent of crime are among the most important issues in contemporary criminology. Researchers, theorists, and practitioners need information in order to explain and prevent crime and to operate agencies that deal with the crime problem. It is extremely difficult, however, to gather accurate information. Because of these difficulties, it is necessary for students of criminology to understand how data are collected, what they mean, and whether they are useful. After we look at the objectives and methods of collecting information, we will consider the limitations of the three information sources criminologists most frequently use to estimate the nature and extent of crime. We then explore measurement of the characteristics of crimes, criminals, and victims.

Keywords: *crime, criminal law, contemporary criminology, victim.*

JEL Classification: K14

1. Introductory considerations

There are three major reasons for measuring characteristics of crimes, criminals, and victims. First of all, researchers need to collect and analyze information in order to test theories about why people commit crime. One criminologist might record the kinds of offenses committed by people of different ages; another might count the number of crimes committed at different times of the year. But without ordering these observations in some purposeful way, without a theory, a systematic set of principles that explain how two or more phenomena are related, scientists would be limited in their ability to make predictions from the data they collect.

The types of data that are collected and the way they are collected are crucial to the research process. Criminologists analyze these data and use their findings to support or refute theories.

We examine several theories (including the one outlined briefly here) that explain why people commit crime, and we will see how these theories have been tested.

One theory of crime causation, for example, is that high crime rates result from wide disparity between people's goals and the means available to them for reaching those goals. Those who lack legitimate opportunities to achieve their goals try to reach them through criminal means. To test this theory, researchers

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might begin with the hypothesis (a testable proposition that describes how two or more factors are related) that lower- class individuals engage in more serious crimes and do so more frequently than middle-class individuals. Next they would collect facts, observations, and other pertinent information - called data -on the criminal behavior of both lower-class and middle-class individuals. A finding that lower-class persons commit more crimes would support the theory that people commit crimes because they do not have legitimate means to reach their goals.

The second objective of measurement is to enhance our knowledge of the characteristics of various types of offenses. Why are some more likely to be committed than others? What situational factors, such as time of day or type of place, influence the commission of crime? Experts have argued that this information is needed if we are to prevent crime and develop strategies to control it.

Measurement has a third major objective: criminal justice agencies depend on certain kinds of information to facilitate daily operations and to anticipate future needs. How many persons flow through county jails? How many will receive prison sentences? Besides the questions that deal with the day-to-day functioning of the system (number of beds, distribution and hiring of personnel), other questions affect legislative and policy decisions. For instance, what effect does a change in law have on the amount of crime committed? Consider legislation on the death penalty. Some people claim that homicides decrease when a death penalty is instituted. Others claim that capital punishment laws make no difference. Does fear of crime go down if we put more police officers in a neighborhood? Does drug smuggling move to another entry point if old access routes are cut off? These and other potential changes need to be evaluated - and evaluations require measurement.

2. Methods of collecting data

Given the importance of data for research, policy making, and the daily operation and planning of the criminal justice system, criminologists have been working to perfect data collection techniques. Through the years these methods have become increasingly more sophisticated.

Depending on what questions they are asking, criminologists can and do collect their data in a variety of ways: through survey research, experiments, observation, and case studies.

Data can be found in a wide variety of sources, but the most frequently used sources are statistics compiled by government agencies and private foundations. Familiarity with the sources of data and the methods used to gather data will help in understanding the studies we discuss throughout this book. The facts and observations researchers gather for the purpose of a particular study are called primary data. Those they find in government sources, or data that were previously collected for a different investigation, are called secondary data.

3. Surveys

Most of us are familiar with surveys - in public opinion polls, marketing research, and election-prediction studies. Criminologists use surveys to obtain quantitative data. A survey is the systematic collection of respondents' answers to questions asked in questionnaires or interviews; interviews may be conducted face-to-face or by telephone. Generally, surveys are used to gather information about the attitudes, characteristics, or behavior of a large group of persons who are called the population of the survey. Surveys conducted by criminologists measure, for example, the amount of crime, attitudes toward police or toward the sentencing of dangerous offenders, assessment of drug abuse, and fear of crimes. Instead of interviewing the total population under study, most researchers interview a representative subset of that population - a sample. If a sample is carefully drawn, researchers can generalize the results from the sample to the population. A sample determined by random selection, whereby each person in the population to be studied has an equal chance of being selected, is called a random sample;

Surveys are a cost-effective method, but they have limitations. If a study of drug use by high school students was done one time only, the finding of a relationship between drug use and poor grades would not tell us whether drug use caused bad grades, whether students with bad grades turned to drugs, or whether bad grades and drug taking result from some other factor, such as family ties.

4. Experiments

The experiment is a technique used in the physical and biological sciences, and in the social sciences as well. An investigator introduces a change into a process and makes measurements or observations in order to evaluate the effects of the change. Through experimentation, scientists test hypotheses about how two or more variables (factors that may change) are related. The basic model for an experiment involves changing one variable, keeping all other factors the same (controlling them, or holding them constant), and observing the effect of that change on another variable. If you change one variable while keeping all other factors constant and then find that another variable changes as well, you may safely assume that the change in the second variable was caused by the change in the first.

Experiments in the real world are costly and difficult to carry out, but they have the advantage of increasing scientists' ability to establish cause and effect.

5. Participant and nonparticipant observation

Researchers who engage in participant and nonparticipant observation

have different goals. These methods provide detailed descriptions of life as it actually is lived in prisons, gangs, and other settings.

Observation is the most direct means of studying behavior. Investigators may play a variety of roles in observing social situations. When they engage in nonparticipant observation, they do not join in the activities of the groups they are studying; they simply observe the activities in everyday settings and record what they see. Investigators who engage in participant observation take part in many of the group's activities in order to gain acceptance, but they generally make clear the purpose of their participation.

Observations of groups in their natural setting afford the researcher insights into behavior and attitudes that cannot be obtained through such techniques as surveys and experiments.

6. Case studies

A case study is an analysis of all pertinent aspects of one unit of study, such as an individual, an institution, a group, or a community. The sources of information are documents like life histories, biographies, diaries, journals, letters, and other records. A classic demonstration of criminologists' use of the case-study method is found in Edwin Sutherland's *The Professional Thief*, which is based on interviews with a professional thief.

Sutherland learned about the relationship between amateur and professional thieves, how thieves communicate, how they determine whether to trust each other, and the process of networking. From discussions with the thief and an analysis of his writings on topics selected by the researcher, Sutherland was able to draw several conclusions that other techniques would not have yielded. For instance, a person is not a "professional thief" unless he is recognized as such by other professional thieves. Training by professional thieves is necessary for the development of the skills, attitudes, and connections required in the "profession."² One of the drawbacks of the case-study method is that the information given by the subject may be biased or wrong and by its nature is limited. For these reasons it is difficult to generalize from one person's story - in this instance, to all professional thieves.

7. Using available data in research

To study the relationship between crime and such a variable as income or a single-parent family, one might make use of the national police statistics.

Researchers who use available data can save a great deal of time and expense. However, they have to exercise caution in fitting data not collected for the

² Edwin H. Sutherland, *The Professional Thief*, University of Chicago Press, Chicago, 1937, p. 15.

purpose of a particular study into their research. Many official records are incomplete or have been collected in such a way as to make them inadequate for the research. It is also frequently difficult to gain permission to use agency data that are not available to the public because of a concern about confidentiality.

8. Ethics and the researcher

In the course of their research, criminologists encounter many ethical issues. Chief among such issues is confidentiality. Consider the dilemma faced by a group of researchers in the late 1960s. In interviewing a sample of 9954 boys born in 1945, the team collected extensive self-reported criminal histories of offenses the boys had committed before and after they turned 18. Among the findings were 4 unreported homicides and 75 rapes. The researchers were naturally excited about capturing such interesting data: these findings supported the hypothesis of "hidden" delinquency (discussed below). More important, the researchers had feelings of grave concern. How should they handle their findings? Should the results of these interviews be published?

Could the failure of the research staff to disclose names be considered the crime of "obstructing justice"?

Does an obligation to society as a whole to release the names of the offenders transcend a researcher's obligation to safeguard a subject's confidentiality?

What is the best response to a demand by the police, a district attorney, or a court for the researcher's files containing the subjects' names?

Should criminologists be immune to prosecution for their failure to disclose the names of their subjects?

Is it possible to develop a technique that can ensure against the identification of a subject in a research file?³

Such questions have few clear-cut answers. When researchers encounter these problems, however, they can rely on standards for ethical human experimentation. Human-experimentation review committees at most universities and government agencies check all proposals for research projects to ensure the protection of human subjects. In addition, researchers are required to inform their subjects about the nature of the study and to obtain written and informed agreement to participate.

Despite heightened awareness of the ethical issues involved in human experimentation - particularly in correctional institutions, where coercion is difficult to avoid - the field of criminology has not yet adopted a formal code of ethics. Some members of the discipline are arguing in favor of one. Frank Hagan,

³ Marvin E. Wolfgang, *Ethics and Research*, in A. F. Ellison and N. Bowie (ed.), *Ethics, Public Policy, and Criminal Justice*, Cambridge, Mass.: Oelgeschlager, Gunn & Hain, 1982, p. 37.

for example, has suggested that the code include guidelines on honoring commitments made to respondents, avoiding procedures that might harm subjects, exercising integrity in the performance and reporting of research, and protecting confidentiality.⁴ In the end, however, as Seth Bloomberg and Leslie Wilkins have noted, "the responsibility for safeguarding human subjects ultimately rests with the researcher. ... A code of ethics may provide useful guidelines, but it will not relieve the scientist of moral choice."⁵

9. The nature and extent of crime

As we have seen, criminologists gather their information in many ways. The methods they choose depend on the questions they want to answer. To estimate the nature and extent of crime they rely primarily on data compiled by the police; on the National Crime Victimization Survey, which measures crime through reports by victims; and on various self-report surveys, which ask individuals about criminal acts they have committed, whether or not these acts have come to the attention of the authorities.

Official statistics gathered from law enforcement agencies provide information available on the crimes actually investigated and reported by these agencies. But not all crimes appear in police statistics. In order for a criminal act to be "known to the police," the act first must be *perceived* by an individual (the car is not in the garage where it was left). It must then be *defined*, or classified, as something that places it within the purview of the criminal justice system (a theft has taken place), and it must be *reported* to the police. Once the police are notified, they classify it and often *redefine* what may have taken place before *recording* the act as a crime known to the police.

Information about criminal acts may be lost at any point along this processing route, and many crimes are never discovered to begin with.

10. Review

Researchers have three main objectives in measuring crime and criminal behavior patterns. They need to collect and analyze data to test theories about why people commit crime, to learn the situational characteristics of crimes in order to develop prevention strategies, and to run the criminal justice system on a daily basis. Data are collected by surveys, experiments, nonparticipant and participant observation, and case studies. It is often cost-effective to use repositories of information gathered by public and private organizations for their own purposes

⁴ Frank E. Hagan, *Research Methods in Criminal Justice and Criminology*, Macmillan, New York 1989, p. 358.

⁵ Seth A. Bloomberg and Leslie Wilkins, *Ethics of Research Involving Human Subjects in Criminal Justice*, „Crime and Delinquency”, 23 (4),1977, p. 435-444.

By measuring the characteristics of crime, criminals, and victims, we can identify crime trends, the places and times at which crimes are most likely to be committed, and the public's evaluation of the seriousness of offenses.

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New Trends of International Tax Evasion - International Legal Regulations and Modern Combating Methods

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Abstract

Within the contemporary market economy and the generalization of open type economies, interdependent international economic relations have emerged based on an open system of both economic and financial exchanges. They have contributed to the emergence of new business relationships based on the international exchange of outcrying type that did not involve, due to the dynamism as well as of the new economies of the type of digital economies, and a quick adaptation of the customary normative framework and of the legal framework to the new context. The objectives of this article are represented by the identification of these new economic-social relations as well as of the corresponding legal and normative framework and of the forms of circumvention of the resulting taxation principles. The research methods used were qualitative methods respectively descriptive methods as well as quantitative methods respectively indices and aggregate economic indicators and econometric relations of regressive and correlative type. The results of the article aimed to identify new modern and self-contained methods of combating international tax evasion, respectively the exchange of information and the adequacy of the legal normative framework to the new economic realities. The implications are complex and represent the identification of some methods of preventing unfair competition and of not distorting the mechanism of the international competition market with implications on national budgets.

Keywords: *international tax evasion, tax avoidance methods, money laundering, offshore jurisdictions, cryptocurrencies.*

JEL Classification: K14, K33, K34

1. Introduction

In the last period and here we are talking about the post-crisis period of the crisis of 2008, it was accredited the idea that international economic interdependence led to the development and propagation of some mechanisms of transmission of the feedback of the economic-financial flows in the national systems and that the mechanisms of self-regulation nationals cannot cope with the resulting new dimensions.

As a result of the crisis, there have been several situations in which

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commercial economic entities have tried to hide the taxable sources of economic activity within offshore jurisdictions.

Hiding the real beneficiary of the profits for various reasons: the real beneficiary cannot have the legal status of associate and administrator in an economic entity or there are prohibitions regarding the assets he can own (measures for the confiscation of wealth, member of an organization criminal etc)

The profits obtained in another jurisdiction, the beneficiary does not want to tax them in the national jurisdiction in order to circumvent the higher taxes and to protect their own interests and accumulated assets. In particular, the countries that undergo marked social and economic transformation processes, including Romania, are facing multiple problems of fraud, organized crime and corruption, which reach an alarming level. Fiscal evasion, speculative acts with legal temptation and deception, money laundering operations become more socially dangerous, fueled by the economic difficulties of the crisis of 2008, the lack of procedural and legislative coherence or weakening of the coercive mechanisms of governments, unable to provide the appropriate legal framework for a stable society. The Romanian society for the last three decades has been characterized by a major deficiency in the application of the rules of a coherent economy, but also in a reversal of the value system, by which rudimentary capitalism has determined the polarization of wealth. All these aspects have led to an escalation of deviant behavior, as a "normal" phenomenon of adaptation to the state of anomaly, within the meaning of the concept promoted by Durkheim³ or as an "innovative" behavior⁴.

2. Trends in international tax evasion

The international tax evasion aims to hide the tax base or to reduce it in tax-favorable areas as well as transferring the funds anonymously in order to protect them from the authorities in onshore or national areas. Thus, in order to achieve this goal, tax subjects use certain legal or financial vehicles to conceal the origin and purpose of the original transactions.

It is noteworthy in the last period the use of modern vehicles regarding the international tax evasion which can be classified as follows:

1. Modern legal structures
2. Bitcoin and cryptocurrencies

³ Emile Durkheim, *Diviziunea muncii sociale*, Ed Antet, Bucharest, 2008, p. 32.

⁴ Robert K. Merton, *The Unanticipated Consequence of Purposive Social Action*, „American Sociological Review”, 1(6), 1936, p. 894-904.

2.1. Modern legal structures used in the tax evasion activity

2.1.1. International trading companies

The most used companies registered in low-tax jurisdictions include the "International Trade Company" or IBC (International Business Company). Its intelligent use in international trade generates to investors important economies in the payment of direct taxes (corporate tax, dividends, income tax from the sale of assets, etc.).

If the offshore company purchases certain goods from one state and then sells them in another country, it will accumulate the profit related to the respective transaction, avoiding its taxation in the source country. For transactions in the European Union, the Isle of Man and Madeira have become very popular locations for international trade agreements. Both Isle of Man and Madeira are capable of issuing the VAT registration number required for transactions with EU states.

For example, if a company resident in the Isle of Man wants to import from France and sell to Germany, it will inform the French company about the registration number as a VAT payer, so it can invoice the sale with a 0. So the French company won't have to invoice VAT to the Isle of Man company.

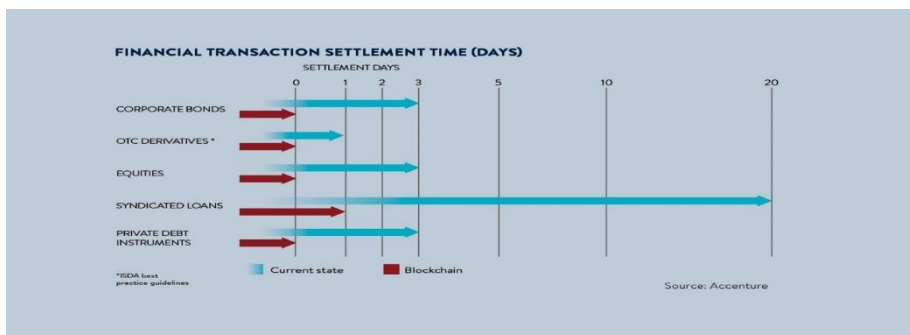
After this, the Isle of Man company will obtain the VAT registration number of the German company, so it will be able to invoice in a row with VAT 0. This type of transaction would not have been possible in other jurisdictions that require the establishment of a representative or fiscal representative. In the European Union, which would greatly complicate the tax scheme. Factoring the commercial debts of a resident company in a high tax jurisdiction through a company established in a low tax country allows the transfer of funds to the latter.

Another use of these offshore entities is the acquisition in large quantities. Such a structure is usually established by a group of associated companies that intend to benefit from the savings and reduced administrative costs.

2.1.2. International investment companies

Both multinationals and individuals with significant incomes use offshore companies for optimum management of portfolio investments (cash, shares, bonds or other specific instruments).

The cash held by offshore companies can be placed in mutual funds or it can generate interest on deposits. Often, individuals use offshore companies as holding companies, which manage their investments in different markets and in different countries.



2.1.3. Real estate companies

Owning a real estate asset by an offshore company can often lead to tax advantages, including the legal avoidance of taxation of capital income, property transfer taxes or inheritance.

If, for example, an offshore company, owned by a non-resident in the United Kingdom, buys a property in the United Kingdom for investment purposes and then sells it to a third party, the capital gain generated by the transaction is not taxable in Great Britain. In addition, by structuring the financing properly, through a back-to-back loan, the offshore company can reduce the effect of any tax on the income of non-residents related to the rents generated by the respective property.

2.1.4. Employment companies

Many companies use offshore companies for the recruitment of personnel in branches or subsidiaries abroad. This leads to a minimization of the costs associated with payroll, bonus policy and transportation, and can sometimes also provide social assistance to staff.

2.1.5. Companies holding intellectual property rights and franchising

Intellectual property rights (trademarks, franchises, source codes, software, technical know-how, patents and others) may be owned by offshore companies. After the acquisition of these rights, the offshore company may conclude licensing, transfer of ownership or franchise agreements with any natural or legal persons interested in the exploitation of these rights worldwide.

2.1.6. Financial companies

Offshore financial companies are registered for the intra-group management of treasury functions, so that the payment of interest for the group companies may be subject to the income tax of non-residents, but in practice these taxes are much lower than the state income tax. of residence of the respective companies.

The interest paid will be a tax deductible expense, so that, by consolidating the interest payment within the group, a major reduction of the taxes paid by the group is shown. Many large companies have established the structure of offshore companies so that the dividends due from their subsidiaries are transferred with minimum tax paid.

2.1.7. Exempted companies

Exempted companies are companies exempted from the payment of normal tax obligations, subject to the fulfillment of certain conditions. The exemption from carrying out duties related to taxes and taxes is granted on the basis of a statement of the directors/administrators of the company, who undertakes that they will not carry on commercial activities with other companies registered in the same jurisdiction.

2.1.8. Non-resident companies

They are the simplest, from the statutory point of view, companies, being used, in particular, in the Commonwealth area. Although a statutory non-resident company will be registered in one jurisdiction, it will subsequently have fiscal residence in another state. Generally, these companies are used when it comes to filing a prestigious jurisdiction. For example, a non-resident company may be incorporated in the United Kingdom (Scotland Partnership, for example), while being registered in the Bahamas.

2.1.9. Limited liability associations

The companies with several limited partnerships (Limited Partnership) are a form of L.L.C. companies, through which the partners are directly involved in the management of the business, answering unlimitedly, with their entire personal assets, for social obligations and in front of the creditors. The other associates respond only within the limit of the subscribed share capital. Due to these aspects, these offshore entities may have a shadow of goodness and honor, being even eligible for bank loans from their traditional credit institutions.

2.2. Cryptocurrencies, the new tax havens

For acryby, cryptocurrency is a virtual digital currency, which can be used as a means of payment. The use of the prefix "crypto" demonstrates that this means of payment uses cryptography, which makes its falsification techniques almost impossible.

With the support of decentralized technologies, users can make secure payments and, especially, anonymised, because there is no longer the obligation to personally identify, at the counter (virtual or real) as in the case of using traditional banking services. Each virtual currency runs on a public register called "blockchain".

The cryptocurrencies were designed to be created by a process called mining, which involves using the processor from a device to solve complicated statistical and mathematical problems, resulting in coins.

They use protocols, proof-of-work "based on hashing algorithms (SHA-256, invented by Bitcoin, and scrypt, the most used). Users can buy coins from various brokers, after which they can store or The most widely used cryptocurrencies are: Bitcoin, Ethereum, Stellar Lumens, Eos, Coinomies, Litecoin or Ripple.

Virtual currency (cryptocurrency), according to the law, is not an electronic currency. Thus, in Romania, Article 4 (f) of Law 127/2011 on the activity of issuing electronic money, defines electronic currency as "an electronically stored monetary value, including magnetically, representing a claim on the issuer, issued upon receipt of funds for the purpose performing payment transactions and which is accepted by a person other than the electronic money issuer".

Authorities around the world⁵ fear that virtual currencies could become the new tax havens. It's just that this is already happening. British Prime Minister Theresa May and Indian Prime Minister Narendra Modi are among the world leaders who have expressed concerns about the rise of virtual cash moving into offshore structures.

The US Congress even held hearings in March 2018, and Treasury Secretary Steven Mnuchin urged the world's 20 largest economies to work together to ensure that virtual currencies do not become "the next Swiss bank account." The concern comes after a series of measures of international repression against tax havens and the opaque banking sector.

The offenders were the first to feel the potential of virtual currencies, and their involvement has grown steadily, according to a three-year study by the Foundation for the Defense of Democracies, an American think tank. Therefore,

⁵ <https://www.bloomberg.com/news/articles/2018-01-29/crypto-as-next-swiss-bank-account-sends-governments-scrumbling>, consulted on 01.11.2019.

better oversight of trading platforms would help to legitimize the industry.

Bitcoin Charts



On the other hand, the technology behind cryptocurrencies, including the "blockchain", offers significant improvements that could help millions of developing countries without bank accounts, and regulators can use cryptography and artificial intelligence to improve digital security and identify transactions with dirty money extremely quickly.

Before reaching there, however, the phenomenon must be analyzed in its entirety. These digital offers are typically designed in a decentralized manner and are therefore not supervised by any central bank. Like cash transactions, cryptocurrency transactions are anonymous, which could result in a new money laundering vehicle.

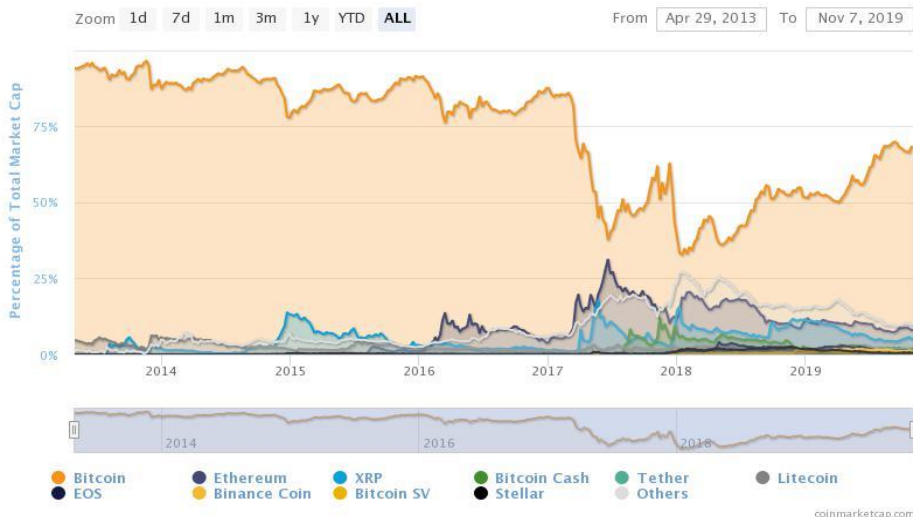
In today's world, there is a demand for new ways of hiding assets, after the US and European authorities are constantly struggling with tax havens and non-transparent banks. The implementation of the "know the client" and anti-money laundering rules forced offshore financial institutions to disclose customer information. The campaign prompted many large financial companies to limit customers' access to Switzerland's secret banking system, which made it more difficult to hide funds from the eyes of authorities, courts or life partners.

Virtual currency exchanges are regulated by fairly lax rules, but their application has not been consistent, especially outside the U.S. The use of virtual money to store offshore assets is evolving rapidly, by introducing so-called privacy coins, such as ZCash and Monero, which use methods such as encryption to make them impossible to identify.

For the first time in history, it is possible for anyone to be able to store their money privately, as if they had their own bank, because people are willing to pay for the confidentiality of capital investments. Even if ZCash hinders the impenetrability of its encryption technology, governmental oversight is still

needed.

Percentage of Total Market Capitalization (Dominance)



Bitcoin, the most popular virtual currency, is anonymous, though it can be tracked, using the electronic public blockchain registry, which tracks each transaction. Even though everything revealed by buyers and sellers are letters and numbers, law enforcement agencies have developed a technology for tracking and confiscating illicit Bitcoins.

Existing laws require banks to report suspicious activity, including withdrawals of over \$ 10,000 while digital currency exchanges are required to keep customer records and take similar measures. Once a Bitcoin currency is purchased, there is software that can detect and track the owner. The study of the Foundation for the Defense of Democracies on money laundering recommends to the authorities to monitor the criminal uses of virtual currencies, but to respect, at the same time, financial innovation.

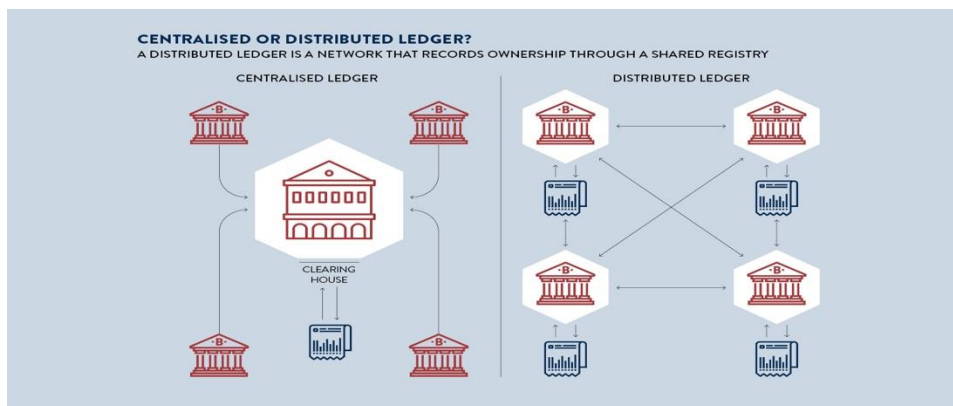
When credit cards appeared, there were abuses or scams, they still exist today, but authorities around the world have developed and implemented methods and means to deal with them.

The study looked at money laundering through Bitcoin ATMs, exchanges, gambling sites and mixers - services that convert digital currency to another - and found that illicit use increased steadily between 2013 and 2016. his research.

It was also concluded that the conversion services in Europe had the highest share of illicit Bitcoin, more than five times more than the North American services. Asia had a very small share in money laundering, even though the services in this region had the most transactions.

The huge gains made by cryptocurrencies in 2017 captured the interest of regular investors, but enthusiasm was dampened by volatility and concerns about its usefulness as a currency. The regulatory authorities have carefully followed the development of these currencies and have not yet elaborated a definition.

It is worth mentioning that virtual currencies are not supported by core assets and investors may have very large losses rather than good profits, the risks being very similar to those associated with gambling, as there are signs that current valuations of these currencies are enhanced by speculative investment flows.



3. International legal regulations

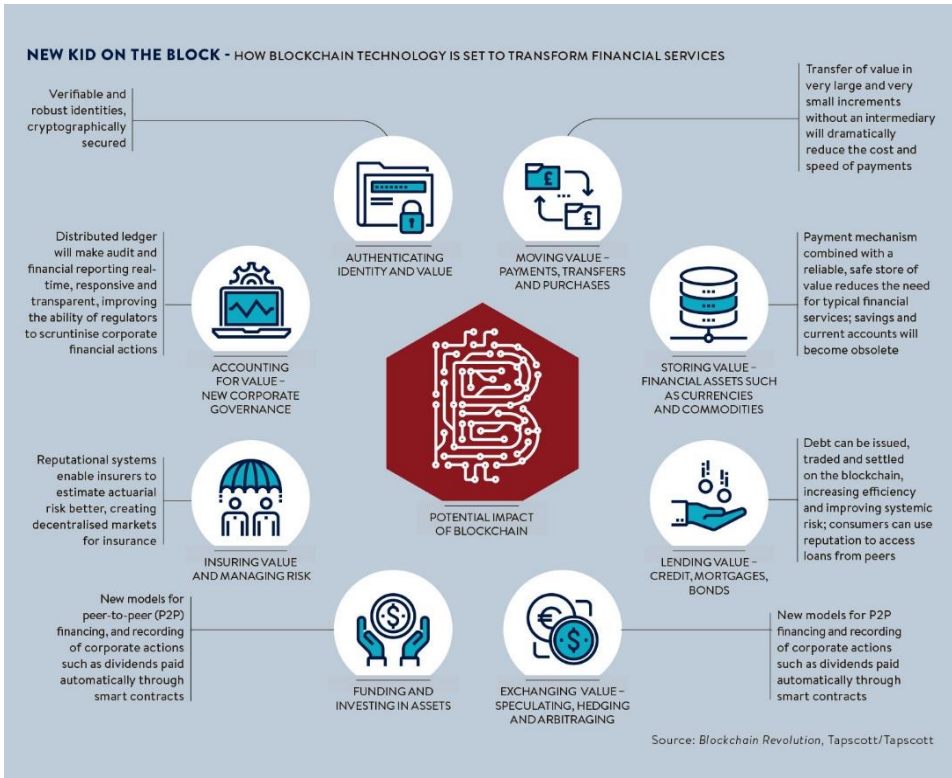
Accession to the European Community bloc has led to a deeper integration of the economies of the member countries, registering a "boom" of cross-border transactions, in conjunction with the reduction of the costs and risks associated with these commercial operations. The integration has generated social and economic privileges, special for European citizens and companies, but, on the other hand, it has created a series of additional challenges for national tax authorities.

The practice has shown that the countries of the Old Continent can face these challenges firmly only if they act in a coordinated manner, based on the normative framework agreed at the level of the EU.

Within the single Community market, the inconsistencies, the "legal gates" and the gaps in the laws of each state are easily exploited by all those who seek to circumvent the tax obligations imposed. The EU can boast of a solid policy on good governance in the tax field, whose principles include transparency, fairness of taxation, automatic exchange of information, neutrality of measures in relation to the different categories of investors and capital and fair fiscal competition.

It is no less true that the successive accessions of the member countries to the Community Bloc gave rise to a conglomeration of regulations (directives, regulations, decisions, recommendations, opinions). These norms are intended to harmonize and unify the laws of the member countries, but, until a definitive normative unit will be finalized, each state individually, will face its own practical and legislative difficulties in the fight against fraud and tax evasion.

Although, to a large extent, it falls within the competence of the member countries, combating economic fraud is not a challenge that can be solved exclusively at the level of each state.



The aim of a coherent strategy at the level of the U.E. to combat economic-financial crime must be to minimize the losses generated by the various types of tax fraud, by identifying the economic sectors in which rectifications can be made both to the Community legislation, as well as to the criminal and administrative cooperation between the states.

These are the arguments for which the European Union has initiated a fight plan to quell the fraudulent mechanisms undertaken by some taxpayers. Given that the most widespread manifestations of tax fraud, at Community level, were occurring in the field of value added tax, in 2003, Regulation (EC) No.

1798/2003 of administrative cooperation in the field of VAT⁶, which involves an algorithm for automatic exchange of information between member countries, with the stated purpose of controlling and applying in accordance with this indirect tax.

In essence, Regulation (EC) no. 1798/2003, with direct and compulsory applicability, implies the establishment in each Member State of a specialized liaison department that provides information on the economic operators registered for VAT purposes necessary to the other member countries. Thus, an attempt was made to control and record the existing taxpayers, as well as the transactions carried out and recorded by them, in order to combat tax frauds.

The idea embraced by this Regulation is the need to protect the internal community market, by combating the underground economy as efficiently as possible. In support of achieving this ambitious objective, this normative act stipulates the need for cooperation between the member countries by carrying out the most complete information exchanges and in a much faster way.

A brave step of this Regulation is represented by the provisions of art. 33, which regulates the establishment of an entity called "Eurofisc" - a single control entity at Union level, with the purpose of gathering and centralizing all the information obtained from the member countries and coordinating the collaboration between them, in order to mitigate tax frauds.

The system was also implemented in the Romanian fiscal circuit, in which the centralization of taxpayers paying VAT and the operations undertaken by them are administered through the data centralization mechanism, the Recapitulative Statement 394, and their effective control is carried out by the "National Agency for Fiscal Administration" (ANAF)⁷ through the "Directorate General for Fiscal Fraud".

Remaining within the sphere of administrative cooperation between the tax authorities of the member countries, at Union level the VIES⁸ (VAT Information Exchange System) system was set up, with the objective of checking all transactions undertaken by taxpayers, with implication in the field of VAT⁹. These checks are performed in an electronic system, in real time, the databases being continuously updated by the tax authorities of each Member State.

The control is undertaken by the authorities of each European country, mainly in the situations presumed to be fraudulent, but this verification obligation is also incumbent on the economic agent, when contracting a good or service. By entering that code in the indicated field, online, the economic agent will know if that code provided by his contractual partner is valid.

Thus, any honest economic agent will refuse to sign the respective

⁶ http://europa.eu/legislation_summaries/taxation/131003_ro.htm, consulted on 31.10.2019.

⁷ Government Decision no. 520/2013 regarding the organization and functioning of ANAF.

⁸ http://ec.europa.eu/taxation_customs/vies/faq.html?locale=ro, consulted on 31.10.2019.

⁹ Aurelian Opre, *Noi obligații privind taxa pe valoare adăugată impuse de legislația fiscal comunitară*, „Curierul Fiscal no. 7/2006”, p. 4.

transaction, avoiding fraudulent contracting. The ease of carrying out this control by the taxpayer will give rise to the negative presumption of bad faith in his person, if he does not do all the necessary diligence in performing this simple online verification.

As a result of the disappearance of customs barriers, which resulted in the elimination of the rudimentary customs controls between the member countries, a system of records of the economic agents that carry out intra-Community commercial transactions, hereinafter referred to as Intrastat¹⁰, has been established.

The Intrastat value thresholds set for 2018 are: for intra-community introductions: 900,000 lei, and for intra-community shipments: 900,000 lei. The taxpayers are thus obliged to complete an Intrastat declaration, specifying: the identification data of the company, the quantity, the flow of the transaction, the reference period, the state of destination/the state of dispatch, the mode of transport, the freight code, the nature of the transaction, delivery terms and invoiced value. If we were to draw a parallel between the Intrastat Declaration and Declaration 390 of the V.I.E.S. - which contains data only on the supplier, the jurisdiction of origin of the goods and the amount paid - we can see that the first declaration is much more elaborate and complex. Thus, the financial administrations can initiate a more elaborate scriptural verification on these economic agents, obliged to prepare and submit Intrastat statements.

However, there is a connection between the two systems, considering that both the centralized information in the Intrastat statistical system and the information obtained in the V.I.E.S. are used for certain purposes, namely obtaining data on the economic agents obliged to prepare Intrastat declarations. Thus, these taxpayers will be monitored, monitoring whether they have prepared and declared the act in full and complete.

The connection also resides in the fact that the economic agents obliged to draw up the Intrastat declaration are nominated by the National Institute of Statistics, by verifying the settlements of VAT and the recapitulative statement 390, V.I.E.S.

Thus, according to the value found in the declaration V.I.E.S., the National Institute of Statistics verifies that the respective economic agent has exceeded the value threshold established by the law in that year.

Another measure, adopted by the European Commission, with applicability in the field of combating tax fraud and money laundering, is the Directive no. 2013/42/EU, which implements measures of reverse charge, control and rapid reaction against fraud in the field of VAT.

The measure consists of "the possibility of Member States to identify solutions to cases of sudden and massive fraud with major financial impact", by applying the reverse charge mechanism and by flexing the procedures in order to

¹⁰ http://www.intrastat.ro/di_cri.php, consulted on 10.10.2019.

carry out immediate controls and adequate information.

Following the application of this Directive, the Commission has established that the measures taken by each member country concerned will be analyzed, in order to eliminate the fraudulent mechanisms, with the aim of elaborating an action plan implemented throughout the Union.

The provision suggests member countries to implement a new system of collection of VAT, because the current model, which is proving old, leads to substantial fiscal losses to national budgets.

This fact was highlighted in the changes that took place in the market. In Romania in 2015, for example, this legislative impetus had an overwhelming influence in the bakery industry, in which the tax rate for the delivery of bakery products (bread and flour) was reduced from 24% to 9%. The strategy has been very successful, drastically reducing the fiscal fraud at the level of VAT in the field of bakery, because, due to the new quota, the temptation of fraud is low, the benefit thus obtained being insignificant.

A new concept contained in this Report is found in point 53, from the chapter "Tax evasion and aggressive tax planning", which requires the establishment of a centralized database, globally, of all those who make cross-border transactions.

This centralization will be coordinated by a community body, and to each person - legal, but also physical - will be assigned an identification number -T.I.N (Tax Identification Number), like the registration code of the V.I.E .S system.

In this way, taxpayers who circumvent the tax obligations, as well as those who do not pay certain taxes, in particular VAT.

Tax fraud and tax evasion are creating global challenges and increasingly complex issues. Although the national regulations have a well-defined role, these provisions considered alone will not remove by far the irregularities in the practical activity of the neon taxpayers. Therefore, the European Union and its member countries are constantly required to develop effective cooperation, taking into account best practices¹¹.

Several measures have been taken, except that, in practice, Member States do not use all available legal instruments in a coordinated manner. By combating tax evasion and money laundering, the countries in the Community Bloc can increase their budget revenues, which will allow them greater leeway to restructure their tax systems in line with their own economic growth policies.

Reducing tax evasion and fraud also has the role of supporting the efforts of European states whose objective is to alleviate the tax burden borne by low income people and vulnerable social blankets. In the Annual Growth Analysis for 2017, the European Commission has advocated the need for differentiated budgetary consolidation, favorable to economic growth, as a priority for the fiscal

¹¹http://ec.europa.eu/taxation_customs/taxation/tax_fraud_evasion/acting_together/index_en.html, consulted on 01.11.2019.

policy of each state.

At the level of each Member State, it is necessary to implement the suggestions and recommendations that have been made for each individual state, in order to improve fiscal governance.

Member countries are also obliged to apply the European Commission's recommendations on non-cooperative fiscal territories and aggressive tax planning.

At least on a declarative level, the European Commission is providing legal and technical assistance to any country, which is working to strengthen its tax and tax collection system. In Greece, Potrugalia and Spain, for example, the Cooperative Groups, together with experts from the member villages, actively contributed, between 2008 and 2014, to the consolidation of fiscal systems, and the positive results were not delayed.

U.E. initiated a comprehensive set of legal instruments needed to improve member countries' ability to combat money laundering and tax evasion, a set that includes not only legislative rules, but also actions recommended to Member States (eg those targeting aggressive tax planning and tax havens) and specific state specifics.

Through the Fiscalis 2020 program, the U.E. will provide financial support for cooperation between national tax authorities, especially as the U.E. it is based on the principle of automatic exchange of information, and the Union is a world leader in this regard.

The coordinated exchange of data between the member countries was initiated in 2003 and was, with timid attempts, implemented in 2005, by the Directive on the taxation of income from savings¹². Thanks to this directive, the member countries carry out a real exchange of information on the gross earnings of the non-resident taxpayers, their amount exceeding annually the amount of 20 billion euros, at the level of the whole Community Bloc.

In addition, the Administrative Cooperation Directive¹³ stipulates the automatic exchange of data on a wide range of revenues, providing the authorities with important support in the fight against structures such as those highlighted by the "Paradise Papers" investigation. Recently, the United States has introduced this principle in the conventions regarding the fiscal compliance applicable to the foreign account Tax Compliance Act (FATCA)¹⁴.

The European Commission has also designed specific electronic formats necessary for the automatic exchange of information, as well as secure communication channels, permanently updated and extended to include other types of revenue, according to the Directive on administrative cooperation.

¹² Directive no. 2060/2015 repealing Directive 2003/48/EEC on taxation of savings income in the form of interest payments (OJ L 301, 18.11.2015).

¹³ *Ibid.*

¹⁴ www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca, consulted on 01.11.2019.

The Union's set of legal instruments for combating acts of fraud and tax evasion also includes the following normative acts:

1. "Directive U.E. regarding the taxation of gains from savings" (since 2005), which establishes the principle of automatic exchange of information.

2. The agreements concluded by the U.E., starting with 2005, with the tax havens close to its borders: Switzerland, Andorra, Liechtenstein, Monaco and San Marino, which aim to ensure a level playing field between the U.E. and its neighbors.

3. "Directive on administrative cooperation in the field of direct taxation" (in force since 2015) regulates the automatic exchange of data in the following fields: earnings of a nature, pensions, life insurance products that do not fall under other Community instruments, fees members of boards of directors and real estate income.

4. "Regulation on tax-administrative cooperation in the field of VAT" (in force since 2012), which establishes the procedure by which the customs services of a European country exchange information with other Member States, regarding the deliveries of VAT-bearing goods

5. "The Directive on Mutual Assistance for Tax and Tax Recovery" (in force since 2010), which aims to improve the capacity of the countries in the Community Bloc to efficiently collect and coordinate the related taxes.

The Commission has proposed a set of legislative rules to adapt the legal framework regarding money laundering acts and funds transfers, in particular to identify as accurately as possible the actual beneficiaries to whom the money amounts.

The new U.E. regarding the capital conditions imposed on the banking institutions will lead to a greater transparency of the operations carried out between banks and multinational companies.

The legislative additions agreed at the level of the accounting norms of the U.E. will introduce a specific reporting system for each state. These will target large private companies in the U.E. or the listed companies in the Union, whose activity object is the exploitation of the forestry, extractive, oil and natural gas sectors. Reporting the taxes paid, taxes, royalties and premiums by a multinational company to the host country's budget is a promising start for ensuring fiscal transparency, as well as for combating fraud, corruption and money laundering.

Although already existing legal instruments have greatly improved the exchange of data, Member States are not yet using them efficiently and comprehensively, the potential of many of these tools being not fully exploited by the tax administrations in the Member States.

Without real political will, the Union's legal instruments cannot be fully applied. Although Member States benefit from the Commission's support, in their efforts, including the provision of practical means and tools, the responsibility for engaging in effective administrative cooperation rests solely with those states,

which alone have full sovereignty over tax collection.

There is still much to be done not only at the level of each state, but also in the bureaucratic context of Brussels. For example, the principle of automatic information exchange in the EU. it should be expanded to cover all relevant types of revenue. The Commission will have to submit a legislative draft to supplement the U.E. Directive. regarding administrative cooperation, in order to increase the scope of the automatic exchange of information at Community level, by including the automatic exchange of data and information regarding the withdrawn dividends, capital income and other gains.

As part of the Commission's 2012 action plan on strengthening the fight against tax evasion and fraud. member countries are obliged to give priority to concrete activities and less to abstract principles. A timid step was made on September 29, 2016, when EU Finance Ministers, meeting in Luxembourg, adopted the ECOFIN Measure Package to Combat Tax Avoidance, agreeing on the proposed rules against fiscal "acrobatics" that are affecting the way. directly functioning of the internal market.

This package of measures seeks a coordinated response at the level of the U.E. on the issue of money laundering, tax evasion and aggressive fiscal practices of multinationals. Thus, there is a minimum protection for the tax systems of companies in the Member States. The new rules aim to eliminate loopholes that some multinational companies use to avoid paying certain taxes.

The legislative package includes anti-abuse measures aimed at: interest deductibility; taxing the transfer of assets; switching from tax exemption to granting loans.

It is estimated that by 2022, all these measures will harmonize the laws of the Member States with the Union, without the need for an increase in tax rates, especially given that the tendency of policies around the world is to reduce fiscal burdens.

U.E. thus, it should take the lead role in promoting good governance and, in particular, the automatic exchange of information internationally, and the Commission, at least on a declarative level, will focus primarily on efforts to combat money laundering and tax evasion.

The future meetings of the leaders of the G8 and G20 states will provide important opportunities in combating tax fraud, evasion and money laundering. O.C.D.E., supported by the G20 and G8 states, is also making efforts in this regard. Based on the mechanisms of the U.E., a strong and coordinated position of the European Union in the G8, G20 and O.C.D.E. will be able to contribute to guaranteeing the automatic exchange of tax data in the new global standard in this area.

The crime of "white collars" has expanded exponentially throughout the Globe, and therefore, any effective plan for combating fraud must be combined

beyond the borders of the Union¹⁵. The increasingly active involvement of the European Union in order to mitigate these frauds can be seen in especially, in constant attendance at meetings.

In recent years, a priority of the O.C.D.E. it was confined to the financial-banking insecurity, the restoration of a sustainable economy, as well as the working relationships under legal conditions.

In this context, the fight against fraud, tax evasion and money laundering acts has been a prime objective of the Organization. As the fight against the dark veil of tax fraud became the main objective of the Organization, the norms in the field did not cease to appear: in 1980, it published its first vast report entitled "Tax fraud and evasion"¹⁶.

Nowadays, the states can implement the "Action Plan" of the BEPS ("Base Erosion and Profit Shifting" - "erosion of the tax base and transfer of profits"), a norm that in Romania is also considered by the tax authorities in establishing commercial transactions. The BEPS project was elaborated and approved by the OECD Secretariat, at the meeting of the finance ministers of the G20 states, held from 27 to 28 February 2016, in Shanghai.

Among the major objectives of this plan are the neutralization of the effects of inappropriate hybrid agreements, but also the establishment of fiscal mechanisms in the new digital age. It also aims to implement coordinated mechanisms for collecting indirect taxes, especially on V.A.T., especially in electronic and online transactions.

In order to achieve this goal, the provisions of the basic Treaty of the O.C.D.E., as well as the initiation of directives addressed to the member states, regarding the implementation of legal texts to eliminate the aggressive fiscal practices from the international agreements that allow double deduction, are considered¹⁷.

Another action concerns the adoption of effective means of combating harmful fiscal practices, taking into account the principle of transparency of tax information. Although Romania is not a member of the OECD, the administrative-fiscal bodies and the courts often apply the directives and recommendations of this organization in files and cases, considering them as "doctrinal opinions". Also, our country applies the principles of BEPS, and this was seen in the legislation through the amendments of the Fiscal Code, GEO 79/2017.

However, Romania has joined the states that collaborate with the Organization and the G20 group in developing the standards of the B.E.P.S. Project. (Base Erosion and Profit Shifting), on combating the erosion of tax bases

¹⁵ http://ec.europa.eu/taxation_customs/taxation/tax_fraud_evasion/acting_globally/index_en.htm, consulted on 02.11.2019.

¹⁶ Dan Drosu Șaguna, *Drept financiar și fiscal european*, Ed. C.H. Beck, Bucharest, 2010, p. 257.

¹⁷ Mircea Ștefan Minea, C.F. Costaș, D.M. Ionescu, *Legea evaziunii fiscale comentarii și explicații*, Ed. C.H. Beck, Bucharest, 2006, p. 199.

and the transfer of profits. The Government of Romania, through a Memorandum, adopted, on June 2, 2016, the accession of Romania, as an associate member, to the Forum for the implementation of the B.E.P.S. Project, which will ensure the implementation of the measures of this project in Romania.

How the B.E.P.S. it also involves suggestions for changes in the domestic law, in order to prevent the cases of erosion of the tax base, this fact will cause to make changes in the Standard Model of convention for avoiding double taxation in the O.C.D.E., as well as in the fiscal procedures of each country. The objective is to achieve the remediation of the mechanisms for solving double taxation situations.

Another component of the Action Plan is to expand and intensify the automatic and immediate exchange of data and information to include cross-border tax decisions, in line with the proposal to amend the U.E. Directive. regarding the exchange of information.

Transfer pricing is another component of the attention of the B.E.P.S. Plan, Romania assuming the provisions of the Guidelines established by O.C.D.E. regarding transfer prices for transnational companies and tax administrations, by taking over and adapting them to national law. Although the documentation elaborated in the debates initiated by this organization is obligatory only for the O.C.D.E. member countries, the regulations in question can also be adopted by the non-member countries, constituting a reporting point for the future normative regulations.

4. Conclusions

The mechanisms of international tax evasion identified in this article highlight as recent tax evasion mechanisms the use of legal vehicles registered in offshore constituencies as well as the use of alternative methods of transferring funds and virtual currencies.

Bitcoin and cryptocurrencies are increasingly used in international tax evasion as well as in the transfer of funds because, unlike traditional forms of cross-border transfer, they do not have the purpose of regulating through KYC or reporting financial-fiscal data in both jurisdictions, respectively the origin jurisdiction. and the jurisdiction of destination.

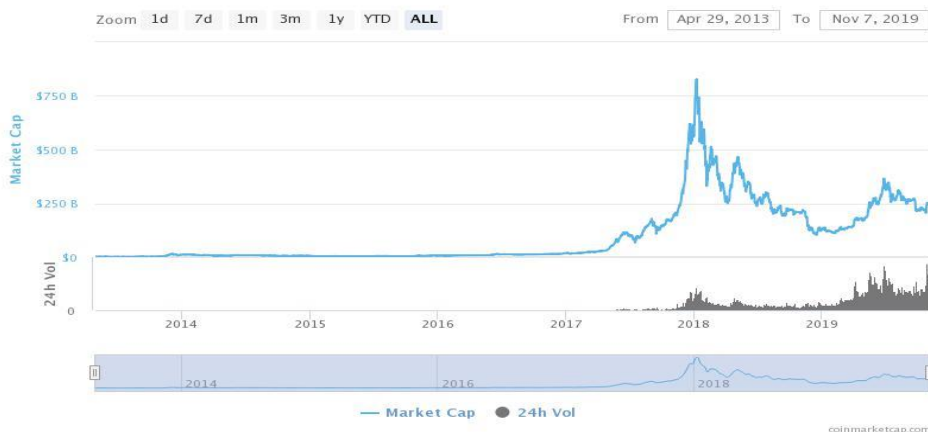
Another form of tax evasion at international level is the erosion of the tax base through portrayals of transfer prices.

We make an explanation regarding the use of the term tax evasion in the context of this material as being used both in the acceptance of legal tax evasion and as fraudulent tax evasion.

Regarding the activity described and identified above, we mention that it can be from both invoices and that the distinction is given by the source and the purpose pursued by the initiator. The border between the two is also interpretable.

As modern methods of combating the phenomenon described above, we conclude that in our opinion the most effective are the exchange of information and international regulation both within international bodies and as a form of regional cooperation, in response to economic realities, but without stifling innovation. technological and financial.

Total Market Capitalization



The exchange of information consists in creating databases accessible by the members of the association as well as by identifying each tax subject at international level through a unique number, the so-called TIN (tax identification number).

The international legal regulations must follow the FATCA type legislation regarding the mechanism for combating and disseminating people as well as much stricter regulations based on international agreements regarding B.E.P.S. The central point of these regulations is the agreement, so that each subject of the agreement does not undermine the set of objectives pursued.

The application of new technologies at the state institutional level will undoubtedly lead to financial-fiscal transparency as well as to a form of self-regulation of competition on the free market: in this sense the new technologies allow total transparency (blockchain) and the irreversibility of transactions without the consent of all to the parties involved as initial signatories.

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Improving Efficiency to Combat VAT Frauds at the European Union Level

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Abstract

The value-added tax is an indirect tax that represents both an inherent resource of the European Union budget and a resource of EU Member States budgets. Consequently, frauds against national VAT affect both the national budget and the Member States' budget, which entail the activities for combating this type of fraud to be correlated both at national and at the Community level. Therefore, the Romanian jurisprudence provides examples in which the national judicial authorities have identified a continuous circulation, a "carousel" type, of VAT fraud, between several Member States of the European Union, which has harmed each of the budgets of the states on whose territory it has "transited" and implicitly, the Community budget. The investigation of these frauds and the criminal prosecution of the perpetrators was carried out only at the national level, in a fragmented way, but it also required the judicial cooperation of the Member States in order to support the requesting states in carrying out the investigations. However, the national authorities are missing the cross-border dimension, which requires a European Union authority to investigate such frauds, to correct the deficiencies of the current regime regarding compliance with law, based exclusively on national efforts and to increase their consistency and coordination.

Keywords: VAT frauds, European Union, case law, European cooperation.

JEL Classification: K33, K34

1. VAT and its weight in the budget of the European Union

The value-added tax is an indirect tax which represents both an inherent resource of the European Union general budget and a resource of the Community states' budgets³.

For a perspective regarding the weight this tax has at the level of the Community budget, we forward the Annual Report on the implementation of the budget for 2018, published in the Official Journal of the European Union, in

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³ See in this regard Mihaela Tofan, *A View on the VAT Split Procedure: the Estimated Effects of the Proposal for Regulation*, in Adriana Moțatu, Ioana Nely Militaru (eds.), *Diversity and Interdisciplinarity in Business Law*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 205.

which it was highlighted that the VAT-based inherent resource represents 12% of the European Union revenues. Contributions to this inherent resource are calculated starting from a uniform rate applied to harmonized bases for VAT assessment at Member States level⁴.

As a consequence, and implicitly, frauds against national VAT currently affect both the national budget and the budget of the European Communities, which requires that the activities of fighting against this type of fraud to be correlated both on national and on the community level.

In a broader context, we point out that the general budget of the European Union and the budgets administered by it or on its behalf comprise the revenue and expenditure sections.

In an authentic interpretation given by the explanatory report of the *Convention on the protection of the financial interests of the European Communities of 26 July 1995*⁵, the main revenues to the general budget of the European Union consist of:

- a part of the national VAT of each European Union Member State;
- a share equal to a certain percentage of the gross national income and the traditional own resources of each Member State (differentiated according to its economic development);
- customs duties levied on imports of products originating in third countries into the European Union;
- agricultural taxes levied on imports of agricultural products from third countries (covering the difference between the world price of the product and the price on the Community Market and the quotas provided for in the common market);
- fines in the matter of competition.

The resources to which the income fraud referred to, at that time, were considered only the customs duties levied on the import into the European Union of products originating from third countries and the agricultural levies, respectively the import of agricultural products from third countries. The involvement of the other resources listed above did not fall within the scope of the facts regulated in this survey.

According to the official interpretation initially given at that time, *fraud affecting national VAT* was not included among those affecting the budget of the European Communities in terms of revenue⁶.

⁴ *Official Journal of European Union for 2018*, document available online on <https://www.eca.europa.eu/Lists/ECADocuments/annualreports-2017/annualreports-2017-RO.pdf>, consulted on 1.10.2019.

⁵ *Convention on the protection of European Communities' financial interests of 26 July 1995*, available online on <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A41995A1127%2803%29>, consulted on 1.10.2019.

⁶ Norel Neagu, *Fraudarea bugetului Uniunii Europene și evaziunea fiscală în materie de TVA - politică penală națională versus politică penală europeană* [Fraud on the budget of the European Union and tax evasion in what concerns VAT - national criminal policy versus European criminal

Gradually, however, the reality proved that this type of fraud has had an upward evolution, so that, currently, at the European Union level, the average of the losses caused by committing VAT frauds was 9-10 percent of the total taxes owed to each of the national budgets. Countries such as Luxembourg, Malta, Croatia, Sweden and Spain recorded the lowest percentages, while Romania occupies a dishonourable first place, with losses of 36% of total revenues (which means annual losses amounting 27,55 billion lei, the equivalent of about 6 billion euros, out of the total due revenues), followed by Greece, which registered losses of almost 30%⁷.

2. Relevant Romanian case law regarding VAT fraud

For the purposes of the above, we mention two cases implemented by the National Anticorruption Directorate - Târgu Mureş Territorial Service.

a) In the first case, through the indictment no. 75/P/2012 of 14.12.2016⁸ the arraignment of the defendants was ordered

- S.S., for committing the offenses of:

setting up of an organized criminal group for the purpose of committing tax evasion criminal offences, deed provided and punished by Article 7 paragraph 1 of Law 39/2003, with the application of Article 5, para. 1 Criminal Code,

continuous tax evasion, a deed provided and punished by Article 9, para. (1), letter b) and para. (3) of Law no. 241/2005 (in force on 30.09.2012), with the application of Article 41, paragraph (2) Criminal Code 1969 (*474 material acts*), all with the application of Article 5 Criminal Code,

continuous tax evasion, a deed provided and punished by Article 9, para. (1), letter c) and para. (3) of Law no. 241/2005 (in force on 29.12.2014), with the application of Article 41, paragraph (2) Criminal Code 1969 (*2194 material acts*), all with the application of Article 5 Criminal Code,

continuous money laundering, deed provided and punished by Article 29, para. (1), letter b) and c) of Law no. 656/2002 (in force on 29.12.2014), with the application of Article 41, para. (2) Criminal Code 1969 (*29 material acts*), all with the application of Article 5 Criminal Code,

with the application of Article 33 letter a) Criminal Code 1969 and the application of Article 5 Criminal Code

- H.D., for committing the offences of:

policy], document available online at <https://lege5.ro/Gratuit/gmztcnbthe4q/fraudarea-bugetului-uniunii-europene-si-evaziunea-fiscala-in-materie-de-tva-politica-penala-nationala-versus-politica-penala-europeana#N15>, document last accessed on 01.10.2019.

⁷ *European Commission Report „VAT Gap”*, published at the end of 2018. Document available online at <https://www.fiscalitatea.ro/romania-tara-in-care-frauda-cu-tva-este-la-cele-mai-ridicate-cote-din-ue-18811/>, document last accessed on 5.10.2019.

⁸ The case file was submitted by the indictment no. 75/P/2012 of 14.12.2016 – not published, at Mureş County Court, for carrying out the procedure in the preliminary chamber and for trial; the case is still ongoing.

participation in an organized criminal group for the purpose of committing tax evasion criminal offences, deed provided and punished by Article 7 para. 1 of Law 39/2003, with the application of Article 5 Criminal Code,

continuous tax evasion, deed provided and punished by Article 9, para. (1), letter b) and para. (3) of Law no. 241/2005 (in force on 30.09.2012), with the application of Article 41, para. (2) Criminal Code 1969 (352 material acts), all with the application of Article 5 Criminal Code,

continuous tax evasion, deed provided and punished by Article 9, para. (1), letter c) and para. (3) of Law no. 241/2005 (in force on 29.12.2014), with the application of Article 41, para. (2) Criminal Code 1969 (2064 material acts), all with the application of Article 5 Criminal Code,

continuous money laundering, deed provided and punished by Article 29, para. (1), letter b) and c) of Law no. 656/2002, with the application of Article 41, para. (2) Criminal Code 1969 (29 material acts), all with the application of Article 5 Criminal Code,

with the application of Article 33 letter a) Criminal Code 1969 and the application of Article 5 Criminal Code

- R.I., for committing the offences of:

participation to an organized criminal group for the purpose of committing tax evasion criminal offences, deed provided and punished by Article 7 para. 1 of Law 39/2003, with the application of Article 5 Criminal Code,

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter b) and para. (3) of Law no. 241/2005 (in force on 30.09.2012), with the application of Article 41, para. (2) Criminal Code 1969 (348 material acts), all with the application of Article 5 Criminal Code,

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter c) and para. (3) of Law no. 241/2005 (in force on 29.12.2014), with the application of Article 41, para. (2) Criminal Code 1969 (1142 material acts), all with the application of Article 5 Criminal Code,

with the application of Article 33 letter a) Criminal Code 1969 and the application of Article 5 Criminal Code;

- S.L., for committing the offences of:

participation to an organized criminal group for the purpose of committing tax evasion criminal offences, deed provided and punished by Article 7 para. 1 of Law 39/2003, with the application of Article 5 Criminal Code,

continuous tax evasion, deed provided and punished by Article 9, para. (1), letter b) of Law no. 241/2005 (in force on 31.12.2011), with the application of Article 41, para. (2) Criminal Code 1969 (4 material acts), all with the application of Article 5 Criminal Code,

continuous tax evasion, deed provided and punished by Article 9, para. (1), letter c) of Law no. 241/2005 (in force on 30.06.2011), with the application

of Article 41, para. (2) Criminal Code 1969 (922 *material acts*), all with the application of Article 5 Criminal Code,

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter b) and para. (3) of Law no. 241/2005 (in force on 30.09.2012), with the application of Article 41, paragraph (2) Criminal Code 1969 (348 *material acts*), all with the application of Article 5 Criminal Code,

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter c) and para. (3) of Law no. 241/2005 (in force on 29.12.2014), with the application of Article 41, para. (2) Criminal Code 1969 (1142 *material acts*), all with the application of Article 5 Criminal Code, with the application of Article 33 letter a) Criminal Code 1969 and the application of Article 5 Criminal Code.

- S.Su., for committing the offences of:

participation to an organized criminal group for the purpose of committing tax evasion criminal offences, deed provided and punished by Article 7 para. 1 of Law 39/2003, with the application of Article 5 Criminal Code,

continuous tax evasion, deed provided and punished by Article 9, para. (1), letter b) of Law no. 241/2005 (in force on 31.12.2011), with the application of Article 41, para. (2) Criminal Code 1969 (4 *material acts*), all with the application of Article 5 Criminal Code,

continuous tax evasion, deed provided and punished by Article 9, para. (1), letter c) of Law no. 241/2005 (in force on 30.06.2011), with the application of Article 41, para. (2) Criminal Code 1969 (922 *material acts*), all with the application of Article 5 Criminal Code,

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter b) and para. (3) of Law no. 241/2005 (in force on 30.09.2012), with the application of Article 41, paragraph (2) Criminal Code 1969 (348 *material acts*), all with the application of Article 5 Criminal Code,

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter c) and para. (3) of Law no. 241/2005 (in force on 29.12.2014), with the application of Article 41, para. (2) Criminal Code 1969 (1142 *material acts*), all with the application of Article 5 Criminal Code, with the application of Article 33 letter a) Criminal Code 1969 and the application of Article 5 Criminal Code.

- G.R., for committing the offenses of:

participation to an organized criminal group for the purpose of committing tax evasion criminal offences, deed provided and punished by Article 7 paragraph 1 of Law 39/2003, with the application of Article 5 Criminal Code,

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter b) and para. (3) of Law no. 241/2005 (in force on 23.09.2012), with the application of Article 41,

para. (2) Criminal Code 1969 (*169 material acts*), all with the application of Article 5 Criminal Code, with the application of Article 33 letter a) Criminal Code 1969 and the application of Article 5 Criminal Code.

Of the criminal offences retained in the indictment, a number of 179 material acts of:

tax evasion offenses in continuous form, deed provided and punished by Article 9, para. (1), letter c) and para. (3) of Law no. 241/2005 (in force on 29.12.2014), with the application of Article 41, para. (2) Criminal Code 1969, all with the application of Article 5 Criminal Code, for which defendants S.S., H.D., were found guilty, respectively

complicity in continuous tax evasion, deed provided and punished by Article 26 Criminal Code 1969 related to Article 9, para. (1), letter c) and para. (3) of Law no. 241/2005 (in force on 29.12.2014), with the application of Article 41, para. (2) Criminal Code 1969, all with the application of Article 5 Criminal Code, for which the defendants R.I., S.L. and S.SU. were found guilty,

consisting in disclosing/facilitating the disclosure in the accounting documents of SC S.F. SRL, between May 2012 and September 2012, of a number of 179 invoices issued and declared fictitious as intra-Community deliveries in Hungary and Austria, given that the goods entered in the documents did not leave the territory of the country, proceedings by which SC S.F. SRL has prejudiced the state budget with the amount of 2,974,135 lei representing the value-added tax owed by the company, resulting from the registration of the 179 mentioned invoices,

had as consequence the avoidance of taxes and fees payment to the state budget with the amount of 2,974,135 lei as mentioned before, standing for the value-added tax owed by the company (*179 material acts*).

In such conditions, there was the suspicion that the VAT subsequently applied to the fictitious goods allegedly delivered in Austria and Hungary would have had a fiscal impact on the national budgets of the two countries, within the meaning of reducing the tax base registered by the "beneficiary" companies of the fictitiously delivered goods by the Romanian company.

b) In another case, through the indictment no. 22/P/2012 of 22.07.2016⁹, was ordered:

I. the arraignment, in a state of preventive arrest of the defendant K.I., a

⁹ The file was submitted through the indictment no. 22/P/2012 from 14.12.2016 - not published, at Harghita County Court, for carrying out the procedure in the preliminary chamber and for trial; through the judgment no. 109/08 June 2017 of the Harghita County Court, not published and subsequently, in the appeal, through the criminal decision no. 193/A/29 March 2018-not published, of the Court of Appeal Tg. Mureș, as a result of the changes of legal classification and the merger of the penalties applied for each of the offenses, the conviction of the defendant K.I. was ordered at the sentence of 5.6 years' imprisonment, the conviction of the defendant C.I. to the sentence of 3 years' imprisonment, as well as the conviction of the defendant SC I. SRL O.S. to the penalty of a fine amounting 450,000 lei.

Hungarian citizen, for committing the offences of

improper participation in continuous tax evasion (89 material acts), provided by Article 31, para. 2 Criminal Code 1969 related to Article 9 paragraph 1 letter c) and para. 3 of Law no. 241/2005 (the form existing on 30.06.2011), with the application of Article 41 para. 2 Criminal Code 1969 and Article 5 para. 1 Criminal Code,

improper participation in forgery of documents under private signature, in continuous form (13 material acts), provided by Article 31 para. 2 Criminal Code (1969) related to Article 290 Criminal Code (1969), with the application of Article 41 para. 2 of the Criminal Code (1969) and Article 5 para. 1 Criminal Code,

money laundering through the acquisition, possession or use of goods, knowing that they come from the commission of offences, in a continuous form provided and punished 29 paragraph 1 letter c of Law no. 656/2002 with the application of Article 41 para. 2 Criminal Code (64 material acts),

with the application of Article 33 letter a) Criminal Code 1969 and Article 5 para. 1 Criminal Code.

II. the arraignment of the defendants:

- C. I. (at large), Romanian citizen, for committing offences of:

improper participation in continued tax evasion (89 material acts), provided by Article 31, para. 2 Criminal Code (1969) related to Article 9 para. 1 letter c) and para. 3 of Law no. 241/2005 (the form existing on 30.06.2011), with the application of Article 41 para. 2 Criminal Code (1969) and Article 5, para. 1 Criminal Code,

improper participation in forgery of documents under private signature, in continuous form (14 material acts), provided by Article 31, para. 2 Criminal Code (1969) related to Article 290 Criminal Code (1969), with the application of Article 41 para. 2 of the Criminal Code (1969) and Article 5, para. 1 Criminal Code,

forgery of documents under private signature, in continuous form (61 material acts), provided by Article 290 Criminal Code (1969), with the application of Article 41 paragraph 2 Criminal Code (1969) and Article 5 paragraph 1 Criminal Code,

use of false documents (70 offences), provided by Article 291 Criminal Code (1969), with the application of Article 33 letter b) Criminal Code (1969) and Article 5 paragraph 1 Criminal Code,

all with the application of Article 33 letter a) of the Criminal Code (1969) and Article 5, para. 1 Criminal Code

- S.C. I. S.R.L., for committing the offences of:

continuous tax evasion (89 material acts) - (highlighting, in accounting documents or other legal documents, the expenses that are not based on real operations or highlighting other fictitious operations, in order to evade fiscal obligations), provided by Article 9 para. 1 letter c) and para. 3 of Law no. 241/2005

(the form existing on 30.06.2011), with the application of Article 41 para. 2 Criminal Code (1969) and Article 5, para. 1 Criminal Code,

forgery of documents under private signature, in continuous form (62 material acts), provided by Article 290 Criminal Code (1969), with the application of Article 41 para. 2 Criminal Code (1969) and Article 5, para. 1 Criminal Code,

use of false documents (70 offences), provided by Article 291 Criminal Code (1969), with the application of Article 33 letter b) Criminal Code (1969) and Article 5 para. 1 Criminal Code,

all with the application of Article 33 letter a of the Criminal Code (1969) and Article 5, para. 1 Criminal Code.

The evidence used in the latter case file indicated that the commercial transactions included in the 89 abovementioned invoices, which were the object of the tax evasion offences retained in the indictment, are fictitious and are part of a wider series of fictitious transactions unrolled scriptically at an intra-community level. Thus, the trading chain that was finally created, controlled and, at the same time, proved in this case, included fictitious commercial relations running consecutively between companies in Hungary, Romania and Slovakia.

At the end of the billing chain, the defendant SC I SRL benefited from the VAT deduction in the amount of 13,847,087 lei, input tax not being paid and the VAT exemption amounting to 13,410,843 lei for the subsequent intra-community deliveries declared towards two Slovak companies, P. 99. and P.X.

In this case, there was the suspicion that the VAT applied to the fictitious goods allegedly purchased from Hungary and allegedly delivered to the two companies in Slovakia would have generated a fiscal impact in the national budgets of these two countries, in the similar sense of reducing the tax base registered by both the "supplier" company in Hungary of the fictitious goods, as well as by the "beneficiary" companies in Slovakia of the fictitious goods delivered by the Romanian company.

c) In each of the two cases, under the Criminal Procedure Code and Law no. 302/2004 regarding the international judicial cooperation in criminal matters, requests for judicial assistance were made to the other mentioned European countries, in which the state of fact ascertained in the respective cases was brought to the attention of the judicial and fiscal authorities, showing at the same time their availability in granting support for any investigation, in the idea that there were suspicions of fraud in the territories of the other mentioned states.

These requests were indispensable for the judgment of the two cases, meaning that it was necessary to prove the intracommunity context in which the facts contained in the indictment were committed and implicitly, we consider, they also represented acts of notification of the other national authorities about possible suspicions of fraud committed also in the territories of their states in relation to the facts charged by the Romanian authorities.

Moreover, the national member of Romania at Eurojust was notified

about the factual status retained in the criminal file no. 22/P/2012, who achieved a way of communication with national members at this institution of the other countries mentioned above.

3. European cooperation in the field of combating VAT fraud

We will not insist on the legal instruments available at this time for the prevention and combating of frauds at Community level, including those committed through VAT, as there is a wide range of specialized legal literature.

The current classical ways of international cooperation through mutual legal assistance requests or through joint investigation teams often do not work well enough to allow an effective investigation and prosecution of such criminal offences, despite the efforts of European bodies such as Eurojust and Europol.

Responses to mutual legal assistance requests are often very slow, and police and judicial authorities encounter practical difficulties in contacting and cooperating with colleagues abroad due to language problems and differences between legal systems. In some states, slow and inefficient international cooperation has often led to the impossibility of investigating the case due to the expiry of the limitation period. In addition, cases that are detrimental to the EU's financial interests are particularly complex.

As regards cooperation at Union level, mixed experiences have been reported in what concerns the cooperation with Eurojust and Europol and between Member States and OLAF.

However, we must highlight the need to involve in such measures a supranational, community authority, which should also take into account the fiscal impact on both the national budgets of the countries transited by this "VAT carousel" and on the community budget (taking into account that a certain percentage of the VAT collected from the national budgets is transferred to the consolidated budget of the European Union).

From the aforementioned considerations, a proposal from the European Commission issued since 2013¹⁰ aims at establishing an independent European Prosecutor's Office responsible for the investigation, prosecution and arraignment of offenders and their accomplices who harmed the financial interests of the EU, proposal which has never been more actual than it is now, considering the evolution of offences in this sector.

¹⁰ Proposal for a Regulation of the Council to establish a European Public Prosecutor's Office/*COM/2013/0534 final -2013/0255 (APP)*. The document is available online at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52013PC0534>, the document was last accessed on 11.10.2019. There are numerous views expressed on this subject, therefore we bring forth several online addresses where the documents can be viewed, respectively: <https://blog.avocato.ro/parchetul-european-investigarea-fraudelor-impotriva-bugetului-ue/>, https://en.wikipedia.org/wiki/European_Public_Prosecutor, http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm, <http://www.consilium.europa.eu/en/press/press-releases/2017/10/12/ep-po-20-ms-confirms/>, consulted on 11.10.2019.

4. Conclusions

In conclusion, the investigation of such frauds and the criminal prosecution of those responsible is carried out, at least as far as we know, only at national level, in a fragmented way, being needed also a judicial cooperation of the Member States to support the applicant states in conducting the investigations.

The reality has shown, however, that the national authorities are sometimes missing the cross-border dimension (as it also results from the two cases illustrated above), aspect which requires an EU authority to investigate such frauds, to correct the deficiencies of the current law enforcement regime based exclusively on national efforts and to increase their consistency and coordination¹¹.

Through the arguments presented in this article, we opt for the establishment and operationalization of the European Public Prosecutor's Office, which will exercise public action in relation to offenses that harm the financial interests of the European Union before the competent courts of the Member States.

Also, according to the law, we suggest that cross-border VAT frauds resulting in the avoidance of VAT payment to the national budget, and implicitly, to the European Union budget, should be separately incriminated also as deeds committed against financial interests of the European Union, considering that at present they are incriminated only in Law no. 241/2005 for the prevention and combating of tax evasion, which only considers the offences that result in harming the national budget.

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¹¹ *Ibid.*

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CONTEMPORARY LABOR LAW

Precarious Work – Challenges of Labour Law in Europe. Case Law: Uber

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Abstract

The main purpose of this article is to analyse the issue of precarious work in Europe, where the proliferation of the new types of employment without the whole spectrum of rights associated with the standard employment relationship has engendered considerable labour market fragmentation and social polarization. Precarious work poses unique challenges to the European social model of secure employment and decent social protection. To address these challenges, we seek to analyse the reasons for the spread of precarious work in various countries in Europe to explain the different types of precarious work and to make proposals to address the phenomenon through improved labour regulation and practice.

Keywords: precarious work, worker, Uber, atypical form, risk.

JEL Classification: K31, K33

1. Introduction

Precarity of work is one of the core concerns of contemporary labour law research. The need to examine closely the notion of precariousness in employment relationships emerged in the context of globalization and automation that induced a breakdown of traditional modes of working in the first decade of the twenty first century and made increasingly commonplace the practice of using more flexible forms of employment without the whole spectrum of rights associated with the standard employment relationship of regular, full-time work.

The need to address precarious work through labour regulation has been given new impetus by the worldwide shift to more insecure jobs since the global financial crisis, as well as the rise of “gig economy” which has, through digitalization, transferred the risk element in the employment relation from employer to worker.

Since the 1970s, the discussion within academic and policy circles has been largely centered on a key question: What constitutes precarious work?²

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² Sylos Labini, P., *Precarious Employment in Sicily*, „International Labour Review”, 89, 1964, p. 268 et seq.; Waite, L., *A Place and Space for a Critical Geography of Precarity?*, „Geography Compass”, 311, 2009, pp. 412–433; Olsthoorn, M., *Measuring Precarious Employment: A Proposal for Two Indicators of Precarious Employment Based on Set-Theory and Tested with Dutch Labor Market-Data*, „Social Indicators Research”, 119, 2014, p. 421 et seq.

Despite the persistent conceptual conundrum over the correlation between precarious work, atypical employment and contingent work, and the lack of a universally acknowledged taxonomy of standard/nonstandard employment in the literature, considered cumulatively the existing conceptions, superficially at least, provide the fullest portrayal of complexity of the precarity of work phenomenon, an understanding of which is vital for the proper legal articulation of the protection machinery/framework required.

However, in the academic discourse, the question of what the impact of precarious work should be on the labour market regulation within EU and its Member States, considering the recent process of remodeling of the transnational component of the European social model, remains a contested terrain.

At this juncture, it is self-evident that the deepening proliferation of new types of precarious employment, such as that found in the “gig economy”, poses unique challenges to the European social model of secure employment and decent social protection as a result of its engendering considerable labour market fragmentation and social polarization.

The prohibition of abuse of employment relationships leading to precarious working conditions, including abuse of atypical contracts, incorporated in the recently adopted European Pillar of Social Rights Chapter II: “Fair working conditions” points beyond the current social *acquis* of the EU centered on the guarantee of equal treatment with respect to workers working under nonstandard employment relationship.

The inclusion of such a broadly conceived principle of fair and equal treatment is undeniably a step forward in acknowledging the importance of the issue for the preservation of the European social model and rises hopes for the development of more adequate norms of protection for workers whose employment relationship lack certainly, such as zero hours’ contract workers.

Yet, it may not *per se* suffice to counter precariousness and the resultant poverty, social exclusion and inequity in Europe, since, without further regulation at the EU level, each Member State may define the balance between security and flexibility in its labour market differently, which makes the risk of deregulatory competition between national labour law regimes in Europe still tangible.

2. Uber drivers are “workers”: the expanding scope of the “worker” concept in the UK’s gig economy

According to Jeff Kenner, shortly before the 2012 Olympic Games, the modern business phenomenon, known as Uber set out to “conquer” London’s taxi market.

Rather like upstart mill owners of the early 1800s, who destroyed the guild model in the English textile industry by introducing new machinery and undermining long established practices of professional regulation, Uber disrupted London’s century-old system of regulated private transportation by launching its

app to match passengers directly with logged-on licensed owner drivers and, simultaneously control their journeys and fares for every ride.

Within three years, there were more Ubers than black cabs with metered taxis.

In practice, Uber had created a “human supply chain”³ of drivers who were free to decide when to seek work but under constant pressure to be logged on and available or face penalties, as Uber strove to maximize productivity to meet rising demand and undercut its competitors.

This article aims, first, to evaluate the importance of granting “worker” status to self-employed gig workers and second, to address complex issues of precarity that remain even when workers on digital platforms have some modicum of employment protection.

Self-employment constitutes 15 per cent of workforce.⁴ Zero hours contracts, with no guaranteed minimum hours, have flourished as the ultimate form of the legalized commoditization of labour, because they allow employers to transfer the risk of fluctuations of demand to workers. This process of economic burden shifting, has reached its apogee in the digital age with the growth of task-based gig work introduced by startup companies using apps as an intermediary or platform to connect workers with customers who need labour to provide them with a service. In the gig economy, work is rebranded as entrepreneurship and labour sold as technology, with humans as service for the needs of enterprise.

Self-employed gig workers face multiple challenges. On average, in 2014-2015, self-employed workers earned 10.800 Pounds per year, compared to 20.000 P per year earned by employees. Only 16% contributed to a pension. In 2017, a Parliament Committee heard from many contractors for whom the reality of gig and self-employment did not live up to the flexible ideal... rather, we heard of low pay, inflexible in working times, long hours, instability and difficulties in taking time off.

While the committee noted that such employment is entrepreneurial and promotes a culture of self reliance, it found that some companies use self-employment workers as “cheap labour” and are “excusing themselves” not only from responsibilities as “employers”, but also from liabilities they would have if their workers were employees, such as social security contributions and automatic enrolment for pensions.

Self-employed workers contribute less towards social security but have almost equal access to the support available through the welfare state.

Low pay provides an incentive for workers to opt for self employed status but leads to a substantial loss of revenue to support public services and increases the strain of welfare state.

Often such work is a stop gap to achieve a short term financial objective,

³ Jennifer Gordon, *Regulating the Human Supply Chain*, „Iowa Law Review”, vol. 102, Issue 2, 2017, p. 445 et seq.

⁴ House of Commons Work and pensions Committee, self-employment and the gig economy.

reflecting a culture of low pay and uncertain hours. Only those with in-demand skills can afford to rely on gig work to make a decent living and it is this group that is most satisfied.

It follows that one of the most difficult problems facing gig workers is uncertainty about their employment status. First, there is the issue of “sham” contract terms. Workers are typically labeled as “independent contractors” which is part of a global phenomenon of misclassification. In reality, the more the worker needs work – any work, any time – the more likely it is that they must “take it or leave it” and accept the employers terms. The prevalence of “sham” contracts amounts to serial misrepresentation of the contractual relationship.

Second, intimately connected with the true agreement requirement, there is the difficulty of establishing “employee” status, which provides a gateway to rights such as protection against unfair dismissal and redundancy compensation. The on demand gig model is based on a presumption that “just in time” workforce is available anytime, anywhere, to get the task done. In the gig economy there is strong evidence of the degree of control by an employer that is associated with a contract of employment, but the inherent flexibility of this type of work means that the ultimate decision of availability for work is made by the worker, and if one worker says no, other is ready and waiting to perform the task.

In UK law there must be an “irreducible minimum of obligations on each side” to create a contract of employment. At its strictest, this requires mutuality of obligations, for the employer to promise work and the employee to promise to accept it.

Third, if each gig is a contract of employment, it is still necessary to fulfil a period of continuous employment is required for an employee to bring a claim for unfair dismissal.

Uber’s business model is essentially the same in cities throughout the world. This has given rise to litigation across the globe as drivers seek to establish employment rights and authorities attempt to regulate Ubers activities to protect the public interest. Uber presents itself as an information society service offering a digital platform to people who need on demand transportation. An Uber driver is depicted as “Everyone’s private driver”, to conjure up the image that each driver is an entrepreneur directly serving millions of people.

In London, Uber hires qualified drivers online and requires them to attend an introduction event.

Uber system works as follows: each driver decides when and where to log on, but once logged on, he/she is available to be allocated rides. Passengers use the Uber app to match them with nearest available driver.

Once selected, the driver has ten seconds to accept the trip using his/her app. If there is no response another driver is selected. The driver who accepts the ride is put in direct communication with the passenger via smartphone and a fare is indicated, but the destination is not given until the driver picks up the passenger.

The driver is expected to follow GPS navigation via the app unless the passenger stipulates another route. When trip is complete, Uber's fare is charged automatically to passengers credit/debit card.

In return for signing up to Uber, passengers must accept "Rider terms" which create contractual relation between passengers and drivers. Drivers are described as "independent third party contractors who are not employed by Uber, in this way, Uber presents itself as an intermediary and not a transportation service.

Drivers are paid weekly under "Partner Terms". Pay comprises the combined fares earned by the drivers less a 25% service fee.

In a submission to the Greater London Authority Transport Committee, Uber admitted that drivers are paid a commission.

Separately, a Service Agreement, issued unilaterally to drivers, contradicts the "Partners Terms" by describing the costumer/passenger as a User and Uber, as Costumer and The Driver.

Despite this, Uber exercises ultimate control by reserving the "right to deactivate" the driver app of hir/her average user rating falls bellow out of 5.

In the light of this confusing and often contradictory documentary evidence, Judge Snelson had the task of determining whether, in all the circumstances of case, the drivers were "workers" and therefore entitled to pursue a claim.

A worker is defined as an individual working under any contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or costumer, or any profession or undertaking carried on by the individual.

This provision is intended to create an intermediate class of protected worker, who is on the one hand not an employee, but on the other hand cannot in some narrower sense be regarded as carrying on a business. This is hardly new 0 the intermediate category of "workman" was recognized as long ago, but the concept of "dependent contractor" has evolved over time as Parliament has recognized that some workers have "substantively and economically" the same "degree of dependence" as employees, or at least are "semi-dependent" and should be provided with limited employment protection.

The issue, therefore, was whether the drivers fell into the second category of "kinds of people" who were "workers" for the purposes above mentioned.

In determining the dominant purpose of the contract, the judge had to apply the law to the facts, distinguishing between situations when the drivers' app is turned on or off. Drivers can be "dormant" with no obligation to switch on the app and, when is switched off, there is no obligation to provide services.

It followed that the drivers did not have an overarching umbrella contract. However, when the app is switched on, the position is different because "any driver who (a) has the app on, (b) is within the territory in which he is authorized to work, (c) is able and willing to accept assignments, is for as long as those

conditions are satisfied, working for Uber under a “worker” contract.

Central to this conclusion was the finding that Uber is a transportation service. At the heart of Uber’s enterprise is a licensed private hire vehicle business serviced by drivers who are required to be loyal. It went against common sense to deny this.

Next, the relationship between drivers and passengers had to be correctly understood. The Riders Terms and Partner Terms, which purported to be a driver/passenger contract, would, if interpreted literally, give drivers enforceable rights against passengers to reclaim fares in the event of Uber’s insolvency, and passengers could be exposed to liability as the drivers’ employer.

As there was no contract between driver and passenger it was inevitable that the drivers had contracts to provide their work personally for Uber that fell full square and related provisions concerning the entitlement of workers to the minimum wage and paid annual leave.

Having established that the drivers were workers, the remaining issue was when they were working.

The drivers were working when three conditions were satisfied: the app was switched on; they were in the territory and they were ready and willing to accept tips.

In his conclusion, the judge ruled that the drivers were workers who were entitled to the minimum wage and paid annual leave relating to the hours when they were available.

3. Conclusion

Recent case law illustrates the vibrancy of the common law and its capacity to recognize what the ILO has described as the “primary of fact” principle, “whereby the determination of the existence of the employment relationship is to be guided by the facts relating to the actual performance of work and not on the basis of how the parties described the relationship.

Grating: “worker” status to self-employed, but dependent on demand, gig workers provides a gateway to basic but important employment rights. It recognizes that digital technology is used to control the workforce and restrict its autonomy but does the law go far enough to address the many problems of precarity?

The purpose of labour law is to act as a corrective to the intrinsic problem of asymmetric power of employment relation. In the gig economy, direction, surveillance and monitoring of performance are, in many ways, stricter than in the standard employment relationship and yet, in the absence of an ongoing obligation to perform work, workers in the UK may be denied employee status. Even if they are “employees”, they may not benefit from rights reserved for protection against unfair dismissal and minimum redundancy payment.

Should the right to refuse work or the option to provide a substitute –

even if unused – or payment gig by gig lead to an outcome where precarious workers can be dismissed at will?

The issue of “employee” status was untested in Uber, but Uber drivers work for a wage, they are controlled and they personally perform work, main features for employee status.

Mutuality of obligation should be regarded as unnecessary if there is sufficient evidence that work is required on demand, gig by gig, because the individual in an employee within the wage – work bargain. On this basis, Uber drivers are employees.

While the protective trend of the common law in recent years is welcome, it may prove ephemeral.

An alternative starting point would be to consider ILO Recommendation no 198 concerning the employment relationship as a basis for identifying factors to establish a presumption to employee status.

The ILO indicators place emphasis on inter alia: the obligation to work in accordance with the instructions under the control of another party, integration in the organization of the enterprise, work performed solely for the benefit of another and work carried out personally by the worker.

Employment status is but one of many complex issues of precarity facing gig economy workers. New technology can be liberating for consumers and workers alike, but it does not provide a valid excuse to evade the law.

Legislative clarification is required to ensure that on demand workers receive the minimum wage for all periods when they are available for work. It is important for those working in the gig economy to have opportunities to contribute to pension and make social security and tax contributions on a similar basis to other dependent workers. It is improbable to find a “one size fits all” solution to these issues.

Entities such as Uber are not merely digital platforms but employers with a social function to guarantee rights for a fair standard living.

Widening and deepening the scope of employment protection, reforms to tax and social security classification and imaginative approaches to licensing regulation can provide the freedom for platforms to operate in fair competition with established providers while guaranteeing decent employment.

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Non-Compliance of the Law of the Remuneration with Non-Discrimination Rules

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Abstract

Discrimination in the legal employment relations represents the enforcement of differentiations regarding the rights of the employees, their non-acknowledgement resulting in a disuse of fundamental freedoms. The existence of discrimination is found to be a circumvention of the provisions of the protected criteria contained in the internal and international normative acts, in the sense of not recognizing the principle of equal treatment, by inducing direct or apparently neutral practices of restriction, by the removal of the use or exercise of the employees' rights in employment relations. The article details the phenomenon of wage discrimination in the legal employment relations, with reference to the application of the wage law in the case of civil servants, especially from the point of view of the contrary provisions regarding non-discrimination.

Keywords: *discrimination, rights, remuneration, criteria, institutions.*

JEL Classification: K31

1. Introduction

Discrimination acts can be carried out by both the employers and the employees, having in common the occurrence of an inequality situation, acknowledged, as a rule, to take place between people who find themselves in comparable situations, and which leads to a restriction of their rights.

On the contrary, we can see that discrimination is found even in the case of persons in non-comparable situations that would be subject to differentiated treatment. It is also possible to occur when a different situation implies a similar approach, by direct or indirect action.

As a result, a direct action² that does not take into account the existence of protected criteria such as gender, age, ethnicity, and race can be considered as a form of discrimination, the same as an apparently neutral behavior, situations related to the objective³ or subjective character of the authors' acts. In this respect, the national or international⁴ normative acts contain specific rules for eliminating the acts of discrimination, the protected criteria being diverse and including the

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² Alexandru Țiclea, *Tratat de dreptul muncii*, Ed. Universul Juridic, Bucharest, 2005, p. 22.

³ Alexandru Țiclea, *Codul muncii*, Ed. Universul Juridic, Bucharest, 2015, p. 21.

⁴ Andrei Popescu, *Dreptul internațional și european al muncii*, 2nd ed., Ed. C.H. Beck, Bucharest, 2008, p. 340-341.

right to equal remuneration for similar attributions, aspects that would interest the legislator when issuing provisions in this field.

From the point of view of the protected criteria, discrimination was initially understood with reference to race, religion or gender, as a main core of protective measures; subsequently, it was no longer being limitedly reported, given that the rules of non-discrimination were provided with derogations or potential exceptions. Thus, although initially two universal protected criteria were considered (nationality and gender), the application of the principle of equality imposed to adoption of national laws incompatible with discrimination, an aspect found in the *Mangold* case⁵.

Basically, the laws of the national states stipulated the non-discrimination norms at constitutional level, generally regarding equal access to the legal employment relations. It was thus obvious the necessity of transferring such non-discrimination rules to the field of organic laws, but also an extension of the analysis through the jurisprudence⁶.

Last but not least, we can see that the non-discrimination provisions were more favorable to the employees in terms of acknowledging the principle of equality, while respecting dignity as a basis of the protected criteria was more limited. However, if the principle of equality has a general application, discrimination in employment relationships by referring to protected criteria also allows exceptions. These exceptions, such as objective and justified cases, beget the rise of the presumption of illegality, analyzing the purpose of the employers' illegal conduct.

On the contrary, the recognition of the protected criteria was not general, when, for example, in France, for historical reasons, race was not defined, accepting instead the analysis of racism; and in other countries, the criterion of nationality was reported when granting the right of residence and not discrimination.

2. Applicable law on remuneration

In European law, the principle of equal treatment in terms of wages was initially found in the provisions of Article 141, para. (1) of the EC Treaty, in Article 157 TFEU, as well as in Article 21 of the Charter of Fundamental Rights of the European Union⁷.

Later on, the equal treatment was taken over by art.14 para. (1) point a) of the Directive 2009/50/EC regarding the conditions of entry and residence of

⁵ *Werner Mangold against Rüdiger Helm*, C-144/04, CJUE.

⁶ Attempts to limit or prohibit racism and sexism have started from reporting the concept of non-discrimination extensively from the principle of equality to the appreciation of dignity.

⁷ On the Charter of Fundamental Rights of the European Union see Ioana-Nely Militaru, *Protection of fundamental rights in the European Union*, „Perspectives of Law and Public Administration”, Volume 8, Issue 2, December 2019, p. 354, 355.

the third-country nationals for the employment of highly qualified jobs, regarding working conditions, including remuneration.

Directive 2006/54/EC⁸ taking over the provisions of Article 141 of the Treaty, imposes in Article 4 the fact that for the same work or for work of equal value, direct or indirect discrimination on the basis of gender must be eliminated from the application of the payment terms. Also, the directive specifies that if a professional classification system is used when determining the remuneration, equal treatment and non-discrimination constitute the common criteria applicable; according to art. 14 paragraph (1) point c) any forms of direct or indirect discrimination on the criterion of gender, both in the public and private sectors are prohibited. In this respect, all parties involved in determining access to employment or vocational training are encouraged to eliminate any forms of discrimination on the grounds of gender, in accordance with the provisions of Article 26 of the Directive.

As regards national laws, they contain specific rules aimed at non-discrimination, retaining non-limiting protected criteria.

Basically, equal pay is enshrined in the Romanian Constitution through the provisions of Article 41 paragraph (4) regarding equal pay, a measure subsequently adopted in Article 6 paragraph (3) of the Labor Code, with reference to the prohibition of any discrimination on the grounds of gender for equal work or equal work value, regarding the elements and conditions of remuneration. In the same sense, according to article 159 paragraph (3) of the Labor Code, setting and paying the salary must be made in the absence of any discrimination based on gender, genetic criteria, or of social or family origin, race, color, ethnicity, age, religion, nationality, political views or union membership and disability.

The right to get payment for the work submitted is recognized by the provisions of art. 39 paragraph (1) point a) of the Labor Code regarding the rights and obligations of the employees, the salary representing the consideration for the work submitted according to art.159 paragraphs (1) and (2); based on the individual employment contract, each employee has the right to a salary expressed in money.

Regarding the method of establishing salary, the provisions of art. 41 paragraph (1) point e) of the Labor Code enforce the possibility to modify the individual employment contract only through the agreement of the parties, and art. 160 paragraph (1) and (2) regulates the calculation of the basic salary with reference to factors related to the professional qualification, importance, training and competence, as well as to the complexity of the duties, aspects that concern both the employee and the position they occupy, in relation to their expertise.

On the other hand, in the case of the remuneration of personnel from public authorities and institutions financed wholly or partially from the state budget,

⁸ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation.

art.162 paragraph (3) of the Labor Code requires salary to be set directly by law, which implies that, although equality of treatment requires granting equal wages for equal work, in the budgetary system there is no real negotiation and agreement of wills; the financial possibilities of the state are the priority. For this reason, the comparison of the acts of employers in terms of discrimination against a public-sector employee and a private sector employee is not valid, the systems being based differently, the principle of equal pay for similar work being applicable only in the same field or branch of activity, with reference only to aspects concerning the graduated studies, the complexity of the work or the responsibilities of the respective position.

The Government Ordinance no.137/2000 on the prevention and sanctioning of all forms of discrimination represents the framework regulation in the field of discrimination, being based on the norms in the matter contained in the Directive no. 2000/43/EC⁹ and in Directive 2000/78/EC¹⁰.

The Ordinance requires guaranteeing the fundamental rights and the principle of equality, issues initially found in the International Labor Organization, the Treaties on the European Union and on the functioning of the European Union, as well as the Charter of Fundamental Rights, with regard to the legal employment relations, regarding the acknowledgement of equal treatment in choosing employment, of working conditions, fair remuneration, in order to eliminate inequality of opportunities.

3. Unconstitutionality or discrimination

As for the issues regarding the salaries of civil servants, we can appreciate that the Law no. 153/2018 on the remuneration of the personnel paid from public funds does not comply with the norms regarding the support that the public authorities must give in respect of the principle of equal opportunities, as necessary for the development of their career.

The inconsistency between the provisions of Laws no. 153/2018 and no. 188/1999 in this respect is also based on the provisions of Article 27 paragraph (2) of the Government Decision no. 611/2008 on the approval of the norms regarding the organization and career development of the civil servants; these norms prohibit any kind of discrimination, considering the process of motivating them is absolutely necessary.

On the other hand, the question arises as to what extent a right earned, for example the one to a fair remuneration, can be canceled or restricted only in the case of the civil servants, by means of the possibility indicated in art. 162 paragraph (3) of the Labor Code that the remuneration of the personnel within

⁹ Directive no. 2000/43/EC regarding the equal treatment of persons, regardless of race or ethnic origin.

¹⁰ Directive 2000/78/EC on the field of employment and labour.

the public authorities and institutions financed from the state budget should be set directly by law, without admitting a real negotiation between parties. In this case, although the financial possibilities of the state can be considered a priority, however, in the sense of the legality principle specified in Law no. 153/2017, it can be appreciated that there is a violation, including that of the provisions of Romanian Constitution, provided that art. 15 contains the universality in granting rights to citizens, and article 16 defines equality before the law and public institutions, the norms asserting the absence of privileges or discrimination.

In fact, we can see that by the imperative provisions of art. 38 paragraph (3) of Law no.153/2017, there was introduced a reduction of the remuneration in the budgetary sector, as compared to the previous wage levels enforced by Law no. 284/2010 on payroll. Thus, for example, the requirement that for January 2018 the basic salary be assimilated to the amount of December 2017 increased by 25% led to an amount that exceeded the one set in the grid for the year 2022, the subsequent application of art. 38 paragraph (6) producing a significant salary reduction compared to the earnings prior to the issuance of Law no. 153/2017.

We can see that the constitutional provisions require that no person be above the law, article 41 including equal work, considering that only in an exceptional and non-discriminatory manner such as the defense of national security can a restriction of the exercise of certain rights or freedoms be admitted.

However, Law no.153/2017 regarding the remuneration of the personnel paid from public funds evokes the fact that in the case of the personnel paid from public funds, the basic salaries of the management positions should be established by the head of the respective public institution. In this respect, the law indicates certain criteria that will be taken into account in order to assess the amount of the salary, respectively the responsibility, the complexity and the impact of the decisions issued by a person, in relation to the position they occupy. On the other hand, the law also contains details regarding the calculation of basic salaries in the case of management positions, differentiating them by applying 1st or 2nd grades, but without defining the modalities of application.

In conclusion, we can specify that Law no. 153/2017 regarding the remuneration of the personnel paid from public funds stipulates at art. 19 paragraph (1) and (2) that the basic salary for the management positions is established by the head of the public institution, in relation to the responsibility, complexity and impact of the decisions imposed by the attributions corresponding to the activity performed, but also that in the basic salary for the management positions for both the first and second grades, the grade for the range of seniority at work is included, with grades I and II being indicated for all public budgetary institutions, but without showing any objective criteria for classification.

Thus, we can appreciate that, although it must comply with the non-discrimination criteria, Law no.153/2017 does not contain objective criteria related to the way basic salaries are set, being based more on subjective criteria that will

be directly related to the assessment the manager of a public institution will make about a certain employee. The possibility of discrimination in terms of wage is thus obvious and unlimited by law, considering that the respective degrees can be applied at the discretion of the head of the institution, who can assess the responsibility, complexity or impact of the decisions of a subordinated civil servant. Moreover, the situation is possible that the respective head of institution will appreciate their own activity, from the point of view of its complexity, setting their own salary to the highest grade, although they are thus directly in a genuine conflict of interests.

In this regard, for example, we can see that Law no. 153/2017 becomes deficient, for example in the case of public health departments, because in comparison with the former Law no. 284/2010 on payroll, which stipulated that the criteria for the classification by categories of health units will be set by order of the Minister of Health, now the establishment of the basic salary on the gradations no longer refers to an eventual order or to the Order 1078/2010 already existent before the enforcement to take effect.

Previously, Order no. 1078/2010 regarding the approval of the rules for organization and operation and of the organizational structure of the County Public Health Directorates specified the division of the public authorities' personnel, respectively in public officials and medical-sanitary and contractual health aids, which Law no. 153/2017 no longer includes. Also, Law no. 153/2017 contains opposite norms regarding the salary, the medical-sanitary personnel being paid according to Annex II, and of the civil servants and the contract staff, although they carry out similar tasks, according to Annex VIII. Thus, we find a different way of paying two categories of medical personnel with similar attributions, one with the status of civil servant and one contracted by the same institution, which leads to the occurrence of unjustified inequalities for similar positions and implicitly to discrimination.

Such inequalities resulting from the uninspired drafting of the law, as well as from the non-correlation with other normative acts in the matter leads to the situation in which, although the Law no. 153/2017 is grounded by the principle of non-discrimination, equal treatment is not to be found in the case of public authority personnel who perform similar activities. We can see that although the civil servants involved have the same seniority in work, the principle of equal pay does not actually guarantee them equal pay for equal work. In addition, the application of requirements regarding the social importance of the work, the responsibility, the complexity and the risks of the job, or the level of studies is not ensured; the principle of the vertical and horizontal hierarchy, provided for in art. 8 paragraph (1) of the law on the importance of the conducted activities, becomes illusory at best.

Basically, ranking positions in order to establish the basic salaries ac-

ording to the provisions of art. 8 paragraph (1) applies both to the fields of activity and within the same field, in parallel with the reference to aspects related to professional knowledge and experience, judgment and impact of decisions, complexity and responsibility, creativity and diversity of activities, as well as working conditions.

As I mentioned earlier, in the case of Public Health Departments the relations between civil servants in management positions and the relevant Ministry are covered by the provisions of the Order of the Ministry of Health (OMH) no. 1078/2010, corroborated with art. 62 paragraphs (2) and (4) of Law no.188/1999 and art. 3 paragraph (3) of Law no. 153/2017.

In this respect, art. 2 paragraph (1) of the OMH no. 1078 of July 27, 2010 on the approval of the rules of organization and operation and of the organizational structure of the County Public Health Directorates and of the municipality of Bucharest, mentions the executive directors, and art. 4 paragraph (2) specifies the quality of their secondary authorizing officer, the main authorizing officer being the Ministry of Health itself. According to the provisions of art. 6 paragraph (1) and (6) the executive directors are appointed or dismissed by the Minister of Health.

According to the repealed provisions of art. 62 paragraph (2) and (4) of Law no. 188/1999¹¹, norm found in article 618 paragraph (1) point b) of the Government Emergency Ordinance (GEO) no. 57/2019¹², the heads of public authorities are appointed in public management positions by administrative documents in written form that must also include the corresponding wage rights.

In corroborating these norms, we can find that the executive directors of the Public Health Directorates are appointed by the Minister of Health by decision, the administrative document must also contain the basic salary related to the respective function, along with the ranking in the 1st or 2nd grade of the salary bracket, which would also indicate a calculation basis for any subordinated civil servants, thus limiting a non-discriminatory application.

In the same sense, art. 3 paragraph (3) of Law no. 153/2017 on the remuneration of the personnel paid from public funds requires that the management of the remuneration system of personnel in the network of the Ministry of Health and of the authorities of the local public administration belong to the main authorizing officers, or the provisions of the law regarding the way of setting salaries violate the provisions of art. 5 and 6 from the Labor Code referring to equal treatment, respectively the prohibition of discrimination on the protected criteria. We can thus consider that any acts of exclusion, restriction or removal of the use of a right, including wage matters, are the subject of discrimination, considering

¹¹ Law no. 188/1999 on the Statute of civil servants.

¹² Government Emergency Ordinance no. 57/2019 regarding the Administrative Code.

that in the case of public institutions¹³ employees must benefit from the same payment terms for equal work.

The norms of non-discrimination in salary matters are also found in art. 1 and 2 points e) and i) of the Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination guaranteeing the right to equal pay for equal work, respectively to fair pay, in transposing the provisions of Council Directives 2000/43/EC implementing the principle of equal treatment between persons, without distinction in race or ethnicity and 2000/78/EC creating a general framework in favor of equal treatment, in terms of employment and labor.

However, discrimination becomes possible if Law no. 153/2017 specifies in art. 19 paragraph (1) and (2) the fact that the basic salaries for management positions are set by the head of the public institution, in relation to the responsibility, complexity and impact of the decisions imposed by the attributions corresponding to the conducted activities, which represents an application of some subjective criteria, given that no reference is made to any order of the minister that classifies the sanitary units for the purpose of setting the level of pay per grade, according to the annexes to the law.

On the other hand, the inclusion in the basic salary of the grade related to the seniority bracket at the maximum level for the management positions leads to a discrimination on the age criterion, because an employee who just got hired in a management position obtains the same advantages to another who has a significant seniority in a similar position.

In conclusion, although the provisions of Law no. 153/2017 were enforced so as to aim at eliminating the inequities, in reality they caused the decrease of the basic salaries for management positions, the increase of the salaries of the contract staff and the reduction of the remuneration for the contracted civil servants as compared to the amounts prior to its being enforced. All these inequalities were allowed although the previous tasks, activities and responsibilities were maintained, establishing various forms¹⁴ of differentiation, such as the situation in which an executive director had a calculated salary equivalent to that of a civil servant under his subordination.

4. Conclusions

Non-discrimination in terms of salary is imposed by the provisions of art. 41 paragraph (4) of the Romanian Constitution, with reference to the fact that

¹³ Antonie Iorgovan, *Tratat de drept administrativ*, Ed. All Beck, vol. I, Bucharest, 2005, p. 589; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 385.

¹⁴ Loredana Manuela Muscalu, *Discriminarea în relațiile de muncă*, Ed. Hamangiu, Bucharest, 2015, p. 17.

women and men have equal pay for equal work, which means acknowledging the principle of equality in legal employment relationships.

Provisions of non-discrimination and respectively the enforcement of equal treatment in employment relations are found in the provisions of articles 63 and 159 paragraph 3 of the Labor Code, but also in the framework law on the matter, the Government Ordinance (G.O.) no.137/2000 on the prevention and sanctioning of all forms of discrimination through the provisions of art.1 paragraph (2) point i) and which require the guarantee of the principle of equality between citizens, of the exclusion of privileges and discrimination in the exercise of the right to work, of the free choice of employment, on fair and satisfactory working conditions, on protection against unemployment, on equal pay for equal work, on fair and satisfactory remuneration.

As a result, guaranteeing the right to equal pay for equal work in domestic law implies the need to provide fair and satisfactory salaries, otherwise creating the possibility of imposing uneven conditions that limit the application of the principle of undifferentiated treatment between the staff of public institutions, civil servants and contractual staff.

Thus it can be seen that Law no. 153/2017 regarding the remuneration of the personnel paid from public funds requires in art. 19 paragraph (1) and (2) that the basic salary for the management positions be established by the head of the public institution, in relation to the responsibility, complexity and impact of the decisions of the assessed person, but also the possibility of applying 1st or 2nd grades in the payment grid, without indicating the objective classification criteria. Basically, the law does not contain objective criteria for setting the basic salaries, a greater applicability being granted to the subjective criteria that are at the discretion of the head of the respective institution; wage discrimination thus becomes possible.

Given that Law no. 153/2017 on the remuneration of the personnel paid from public funds no longer covers objectively the way in which basic salaries are set, in the case of the Public Health Directorates there is the impossibility to refer to the criteria for the classification by categories as stipulated in an existing Order of the Ministry, which leads implicitly to the possibility that the head of the institution applies the conditions regarding the responsibility, complexity or impact of the decisions of the assessed civil servant quite discretionary.

Similarly, the Law no. 153/2017 induces contrary aspects regarding the wage provisions, given that, in the case of two categories of medical personnel with similar attributions, one with the quality of civil servant and one contracted by the same institution, different norms are applied: some contained in Annex II to the law, and others according to Annex VIII, although the two categories carry out similar tasks; this leads to the occurrence of inequalities that define discrimination.

Thus it can be seen that Law no. 153/2017 does not respect the principles

of non-discrimination, in the sense of establishing equal treatment regarding payment rights; the principles of equality, by not providing equal basic salaries for work with equal value; the principles of the social importance of work in relation to responsibility, the complexity, the risks of the position, as well as the principles of ranking, vertically and horizontally, within the same field, depending on the complexity and importance of the activity carried out.

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The Professional Adequacy and the Performance of the Employee. Differences and Similarities¹

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Abstract

The career path of the employee is complex and not without risks. Thus, achieving performance becomes the very reason for establishing individual employment relationships, as they determine the collective performance of the organization and determine the success of the business. Therefore, the concern for performance is present at all times preceding the employment, during the probation period and during the execution of the individual employment agreement and culminates with the solution of a supreme dilemma when dismissing for professional inadequacy. The Labour Code itself requires various interpretations and clarifications in order to be able to transpose the concepts regarding employee performance. Therefore, the present study critically examines the doctrine in the matter, compares the legal texts and interpretation solutions of the courts and applies the common sense of human resources management to determine the way to be followed where the legislator is silent. Thus, the conclusion is clear that at all stages of the employment relationship the employer has in view the performance of the employee, but the objectives, criteria, methods of assessment and measurement are different, depending on the purpose of its evaluation and legal consequences and from the perspective of human resources management. The result of this study is a set of benchmarks regarding the evaluation of the performance and the evaluation of the professional adequacy, the interferences and delimitations between them and other related institutions, interpreted in a multidisciplinary context.

Keywords: *performance, professional inadequacy, evaluation criteria, objectives, dismissal.*

JEL Classification: K31

1. Professional correspondence at key moments of the employment relationship

It is unanimously recognized the right of the employer to assess the professional adequacy of the employee during his worklife. This right naturally arises from its own freedom to select the right personnel for the job by applying available recruitment techniques, but also to continue to analyse his adaptation/adequacy within the organization by using the probation period.

Referring to the framework in which the dismissal of the employee for

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professional inadequacy can be decided, constantly, the judicial doctrine³ and practice presents the professional inadequacy as circumstance of an objective or subjective nature that leads or is capable of leading to lower professional performances than those which, reasonably, the employer is entitled to expect from the employee and which implies not knowing the rules specific to a function, profession or profession.

Thus we can say that the achievement of the performance is the very reason for establishing the individual labour relations, since they determine the collective performance of the organization and determine the success of the business.

The professional career of the employee is complex and not without dangers, therefore it is appropriate to analyse all the moments when his performance becomes relevant and is evaluated by the employer by specific means (appropriate methods and tools) with different effects on the employment relationship. What are the legal requirements in carrying out a procedure on professional adequacy, as it can be delimited by other legal situations, which are the consequences of not observing the procedure, are just some of the questions we ask ourselves in this article.

1.1. Performance, professional correspondence and probationary period

In contrast to the initial vision of the Labor Code⁴ on the professional adequacy of the employee, the current legal provisions indicate the need to make a noticeable difference between approaches towards eventual inadequacy during probation period compared to one found after a long working period, in which the employment relationship becomes stable.

At the beginning of the employment relationship, the appraisal of employee's adequacy leaves room for errors (especially since the employer does not have the opportunity from the beginning to test the employee in a real working environment, having only possibility to apply work sample). The errors of appraisal that can occur during the recruitment process must, therefore, be corrected with speed and minimum effort.

The evolution of the professional life implies a continuous interest of adaptation from employer's side in taking over new, more efficient technologies, as well as an effort to update the professional knowledge and of continuous learning from employee's side, called to use these technologies, that is why by executing

³ Alexandru Țiclea, quoted from Raluca Dimitriu, *Employee dismissal. Romanian and Comparative Law*, Ed. Omnia UNI SAT, Brasov, 1999, p. 192.

⁴ The initial wording of art. 31 of the Labor Code regarding the probation period did not contain references to the termination of the individual employment contract during or by the expiration of the probation period based on a simple notification of either party, so that such termination was treated at the time as a simplified procedure of professional adequacy appraisal.

the individual labor agreement, the parties commit to mutual efforts towards achieving performance targets.

And for these reasons, the renunciation of the employment relationship in the beginning periods of the employment relationship is subjected by the legislator to minimal formalities. Thus, the lack of knowledge and skills when hiring either causes the employer's option not to select candidate or, if he has been selected and hired by an individual employment agreement, it may be a cause of annulment of the individual employment contract. After the employment, during the probation period or at the termination thereof, this lack of professional knowledge can be a reason for termination of the individual employment contract by the mere notification issued by the employer, without other formalities, in accordance with the provisions of art. 31 paragraph (4) of the Labor Code. The legislator leaves this possibility of terminating the employment relationship during the probation period at the discretion of both parties and does not indicate the need to motivate the decision within the written notification of them.

Thus, less formal, the evaluation of the adequacy during the probation period may result in termination of the employment contract, without the rigors of form and merits, except for notifying in writing the employer's option to end the labor relationship. The distinction between the evaluation of professional adequacy during the probation period and the one performed after the consolidation of the employment relationship by the expiration of the probation period must thus be distinguished. The means of evaluation (the procedure) and the aspects to be evaluated used in the two situations are qualitatively different and, why not, also quantitative. Once the probation period has passed, the evaluation requirements change and become more rigorous. Thus, the objectives pursued in the professional activity during the probation period must be different and adequate, that is, to ensure a learning process and adaptation to the organization, while the actual activity after the consolidation of the employment relationship at the expiry of the probation will aim at concrete objectives in the life of organization, but even these will be established in relation to the degree of integration of the employee in the company.

On the other hand, we consider the criteria for evaluating the employee's performance as a constant throughout the entire period of the employment relationship, these being of general applicability and arising from the internal regulations, also, agreed by the parties when signing the individual employment contract. The performance standards (the level of performance) specific to each period, must be established, but in relation to the degree of adaptation of the employee to the organization, so different in the probation period, compared to the normal activity period. Thus, it is known that the probation period is a period of accommodation to the specific of the organization, in which a compatibility between the employee and the employer is established, the technical knowledge and

the winning behaviours being only a few coordinates that can lead to the maintenance of the employee in the organization after the probation period. When employer denounces the employment contract during the probation period, this follows a simplified procedure, in which the motivation in fact is not necessary. This can be linked not only to circumstances related to the person of the employee (as in the case of professional inadequacy, but also to objective aspects that may be related to the evolution of the organization, such as giving up certain business initiatives or difficulties of the employer may that recommend interrupting the labour relationship during the probation period.

1.2. Professional adequacy during the execution of the individual labour contract

The professional inadequacy manifested during the employment relationship, due to its non-imputable character unanimously recognized by the doctrine, as per the legislation is subject to control that limits the employer's abuses and verifies the validity of such a conclusion.

The legislator has bound the employer to establish inadequacy: only if its verification is done in relation to the job position; a special procedure for its establishment is performed, a procedure that enjoys a special regulatory framework provides to the employee certain guarantees (collective labor contract or, in the absence of this, internal regulation); limitation of the right of the employer to decide the dismissal is performed within 30 calendar days; by imposing the employer to offer a vacant job, compatible with the vocational training.

1.2.1. The verification of professional adequacy refers to that job position

Professional adequacy is not generic and does not refer abstractly to the knowledge and skills that a professional must possess in a particular field, but is established in relation to the particularities of the employer, its specific requirements and the good practices of the organization. Professional adequacy implies the possession of technical knowledge, skills and psycho-behavioral characteristics appropriate to the position, as it was designed within the organization. It is evaluated in relation to the concrete requirements of the job description, depending on the nature of the activity, the place and role and importance of the job within the functional hierarchy and, depending on them, both the complexity of tasks and responsibilities, as well as the objectives, performance standards and criteria for appraisal of the employee's activity is established. For this reason, the employer's dissatisfaction with the employee's performance leading to the subse-

quent finding of a professional inadequacy must have a high degree of concreteness, so that the inadequacy can be supported by evidence, both from the current activity (by non-fulfillment of some activities, by not performing tasks and responsibilities of the job description), as well as during the preliminary appraisal procedure for establishing professional inadequacy. The termination of the individual employment contract during the probation period generates low legal risks also from the perspective of a court action, and the challenge of the written notification issued as per the law can be filed for procedural grounds. In the situation of termination of the individual labor agreement during the probation period, the formality required by law is that the employer issues a written notification indicating the date of the actual termination of the labor relationship. Since the notification issued by the employer does not contain the factual reasons, but merely indicates the termination of the individual employment contract within or after the probation period expires, in principle there are no issues that could be subject to a court evaluation in the event of a legal complaint. However, the employee could argue that the expiry of the probation period disqualifies the employer to order the termination of the contract pursuant to art. 31 paragraph (3) of the Labor Code. On the other hand, in the situation of finding the professional inadequacy, the employer complies with the preliminary appraisal procedure and issues a dismissal decision, grounded on facts and on legal provisions which may be subject to appeal. In this regard, see also the relevant legal practice⁵.

1.2.2. The development of poor performance. The professional inadequacy is induced by loss of professional skills

There must be a cause-and-effect link between the employee's loss of professional skills and obtaining poor results in the daily activity, so that the procedure on professional adequacy aims to identify precisely the prerequisite cause of poor performance, whether or not there is a dissolution or inability to update those technical knowledge, skills and competencies necessary for the proper performance of the tasks reasonably. These concrete requirements related to tasks and responsibilities of the job description also provide the levers for the stability of the employment relationship. To the extent that the organization changes the complexity of the positions in relation to a changing business strategy, the contractual terms of the position will be renegotiated by the parties, as well as the performance requirements. In this context, the legal practice constantly points out the need to provide the employee with vocational training to ensure his adaptation to the changing requirements of the employer. It is still to be considered to what extent the concern for updating professional knowledge should be an obligation

⁵ Brasov Court of Appeal, Civil Judgment and for cases with minors and family, labor conflicts and social insurance, Decision no. 303/2008, www.costelgilca.ro, consulted on 1.10.2019.

for the parties⁶. For the employee this would mean to identify appropriate training modalities and attending it, for the employer would mean to provide time and resources for employee to attend training programs. The doctrine⁷ recognizes that "the errors in the performing job duties must also be analysed in relation to the level of vocational education reached by the employee incumbent on the employer". But the legal practice is not fully in line with the doctrine opinions. Thus, it is highlighted⁸ that the professional inadequacy of the employee cannot derive from employer's failure to provide training or improvement programs, adapted to new methods or technologies implemented.

2. The distinction between performance (appraisal) and professional adequacy (appraisal)

Both the doctrine and the legal practice clearly separate the notions of performance evaluation within the performance management system (current activity) from the appraisal of professional adequacy.

The aspects that differentiate the two types of evaluations:

2.1. Regulatory framework for appraisal procedures

On the one hand, the performance evaluation procedure is regulated by art. 242 letter i) of the Labour Code concerning the content of the internal regulations of the employer. The internal regulation will contain "criteria and procedures for the professional evaluation of employees". Moreover, the right of the employer to evaluate the employee is an attribute that derives from the prerogative of guidance and control and is subsequent to the setting of the objectives, respectively of the criteria for evaluating the individual performance. On the other hand, the evaluation procedure regarding professional adequacy is a special procedure that enjoys another regulatory framework - the collective labor contract - and, in its absence, the internal regulation, as per art. 63 paragraph (2) of the Labor Code.

⁶ The French legislation stipulates that the employee may refuse training only if it would result in a modification of his employment contract. The employee must accept training regarding new techniques, new tools or procedures that are introduced to perform the job duties. This obligation also stems from the needs of the company and is a reflection of the employer's responsibility for adapting the employee - Patricia Weinert, Michele Baukens, Patrick Bollerot, Marina Pineschi-Gapenne, Ulrich Walwei, *Employability: From Theory to Practice*, „International Social Security Series”, volume 7, Transactions Publishers New Brunswick (USA) and London (UK), 2001, p. 70.

⁷ Alexandru Țiclea, <https://sintact.ro> - Bucharest Court of Appeal, Section VII, for cases regarding labor conflict and social insurance, Decision no. 1431/R/2011, consulted on 1.10.2019; Daniela Georgeta Enache, Maria Ceașescu, *Labor Litigation. Relevant case law of the Bucharest Court of Appeal semester I/2011*, Ed. Hamangiu, Bucharest, 2011, pp. 72-73.

⁸ Costel Gilcă, *Commented and annotated Labor Code*, second edition, 2015, Rosetti Publishing House, Bucharest, 2015, p. 132.

2.2. Purpose and objectives of the appraisal

Substantially, performance appraisal provides a natural function of management with the main objective of increasing the efficiency of the organization and reinforcing its favorable behaviors through various human resources processes (reward, learning and only ultimately the termination of the employment relationship). In contrast to the professional inadequacy that derives from causes linked to the employee, the temporary lack of performance (either by the failure to achieve objectives, or by not manifesting the appropriate behaviors) may appear without it being caused by the lack of knowledge or skills.

The lack of performance can be caused by external factors, distinct from the employee himself, which may be due to the evolution of the business environment, economic-financial difficulties. In other words, the current performance (measured during periodic evaluations) can be a result of internal factors (related to the concrete actions and behaviors of the employee), but also of external ones that are not always influenced in particular by the employee's activity. From the point of view of the object and purpose of the evaluation process regarding professional adequacy, we believe that it tends to determine whether there is a generic, stable professional adequacy for a significant period of time, that is, to determine if the employee is generally in line with the requirements of the job (from the Job descriptions) and the job rank in the organizational hierarchy. On the other hand, the purpose of repetitive performance evaluation is to determine whether or not in the respective evaluation cycle the employee has achieved the objectives assumed in relation to projects, works and operations that are quantifiable and measurable over time, that is in relation to certain specific objectives, assumed briefly and temporarily by the parties.

Other authors⁹ state that "professional inadequacy cannot be related to a single moment, but to a certain period performed under the individual employment contract" in relation to tasks set under the contract, the job description or based on applicable work procedures. Therefore, it is necessary for the employer to prove objective and repeated facts able to emphasize such professional deficiencies, as to delineate from accidental, but guilty, breach of obligations (as in the case of disciplinary liability¹⁰).

The specific role of this procedure is to establish the adequacy of the employee in terms of possessing the technical knowledge necessary to continue the activity, of the practical skills, of the learning capacity, in the context of the technological changes or of some procedures or regulations. Therefore, during the

⁹ M.C. Predut, *Labor Code commented*, Universul Juridic Publishing House, Bucharest, 2016, p. 94.

¹⁰ A. Țiclea, *Bucharest Court of Appeal, Section VII, for cases regarding labor conflicts and social insurance, Decision no. 5660/R/2009*, „Revista Română de Dreptul Muncii” no. 8/2009, p. 18.

procedure of establishing the professional adequacy, the employer will not be limited to using results of the regular appraisal, but will analyze the causes of the lack of performance, aiming to determine whether under special conditions and in an active learning environment (by upgrading procedures) the employee is persistent in the process of improving his knowledge and skills.

The opinions expressed in the doctrine¹¹ show that “dismissal of the employee for professional inadequacy must have objective criteria based on the quantity and quality of the work performed by the employee, criteria (...) known and accepted by the employee when concluding the individual labour contract or when acknowledging the internal regulations of the employer.

However, we consider that during the procedure on professional adequacy, there will be an evaluation on specific objectives that can be achieved during the period of this special procedure; Criteria are already specific to the employment relationship (agreed via individual labour contract) and are applied to maintain the same relevant and consistent system for measuring performance; implicitly, part of the objectives specific to this period will be learning objectives and the evaluation thereof can be proved by verification tests, respectively by appraisal of objectives set especially for this specific evaluation period. Therefore, professional inadequacy appears as a situation that prevents the employee from properly performing his job duties, not accidentally, but as the consequence of a loss of professional skills and related to concrete requirements of the employer and despite the vocational training opportunities already offered to the employee.

In extremis, we could talk about a continuous behavior that illustrates the professional inadequacy and it is essential to see the distinction between the factual elements - the poor results highlighted by performance appraisal and their cause - the professional inadequacy of the employee. At the same time, "in order to ascertain the professional inadequacy of the employee, it is not required for the employee to cause certain damage¹²". Professional adequacy is valued as normality, not as manifestation of excellence, all the more so as the objectives set by the employer and assumed by the employee must be achievable.

Unfortunately, the management methods used in the retail industries in Romania, in the conditions of market volatility, show a tendency to induce better results by setting hard-to-reach performance objectives, combined with the implementation of wage systems based on bonuses, rather than providing an important part of the income by granting consistent base salaries. The current analysis does not concern, however, the efficiency and influence of such wage models on organizational culture and health of the employees within competitive environment. It should, though, be noted that the base salary must be set in line with

¹¹ *Ibid.*

¹² A. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Labor Code, Articles Comment*, Ed. C.H. Beck, Bucharest, 2011, p. 337.

the complexity of the job position and its ranking in the hierarchy of the job positions (by references to required level of education), so that it would cover the current needs the worker. The big share of volatile incomes within the wages (bonuses and allowances) goes together with setting unattainable targets; this does not only affect productivity on medium and long term, but can also cause demotivation/non-performance while there is need for stable staff and good workers in the labor markets.

The doctrine recognizes¹³ that errors in performing tasks must be analyzed in relation to the total workload (it is obvious that a very large amount of work generates a higher percentage of errors and a poor quality of the work product). Provided that “the objective was attainable, but, despite these conditions, the employee did not achieve it (not fulfilling his attributions at a certain qualitative level)”¹⁴.

2.3. Subjects of evaluation. Assessors

The periodic evaluation procedure aims to evaluate all the employees in order to make the necessary measurements of the individual contribution to the overall performance of the organization. Its results do not directly indicate a true professional inadequacy of each employee, but provide a set of clues for an initial referral able to empower assessors within the special procedure on professional adequacy to identify by specific methods (written, practical tests etc.) if skills and abilities necessary to perform the tasks are present. So, depending on the type of appraisal, its purpose and specific methods applied, as well as the effects generated by the performance of such procedure, certain actors need to be involved in the appraisal process of the employee and his activity.

Although the law is not explicit, it is obvious that the objectivity of the appraisal of professional adequacy can only be achieved if one of the assessors is the one who initiated professional adequacy procedure, respectively that specific assessor who performed the performance evaluation that indicated the eventual adequacy issue. If performance evaluation case, an essential role rests with the line manager who best knows the activity and achievements of the employee.

In case of professional adequacy appraisal, the assessor role is usually assigned to a commission that is called to analyze the professional capacity objectively, starting with the results of professional activity and by applying specific and objective evaluation methods that may objectively challenge the line managers' findings so that a reasonable conclusion may result by reference to reasonable requirements of the job description. It is frequently indicated in the doctrine and also by the courts of law that it is best practice to appoint a commission for the

¹³ Costel Gilcă, *op. cit.*, 2015, p. 133.

¹⁴ Ion Traian Ștefănescu, *Theoretical and Practical Labor Law*, Universul Juridic Publishing House, 2017, p. 417.

evaluation of the employee, since it is questionable¹⁵ and brings certain risk if appraisal stays "usually with the strictly professional opinion of one person regarding another employee". The professional appraisal commission may include the hierarchical head of the employee, the psychologist of the organization, a representative of the union, a human resources responsible, that is a group that provides a complex and objective analysis. We believe that the employer can establish for the union representative the role of observer and guarantee the legality of the procedure regarding professional correspondence.

Therefore, the law maker establishes a set of rights and guarantees designed to ensure the protection of the employee against potential abuses of the employer. Precisely these procedural guarantees, as well as the substantial elements that delineate different types of contract termination for grounds related to employee's performance, constantly expose to failure employers' practice and, thus, an important number of labor contract terminations based on art. 61 lit. d) of the Labor Code are annulled by law courts. This is while "such dismissal" is considered (or should be) the most common grounds for dismissal: as the employer is not satisfied with the work of his employee"¹⁶.

2.4. Methods of appraisal and measurement. Evaluation criteria

In the case of performance appraisal of the current activity, the legislation talks about setting objectives and criteria for evaluating the professional activity of the employee, both being subject to employee's agreement. In the case of conducting a professional adequacy appraisal, the law is not explicit, leaving the employer's will to establish the transparency and predictability when setting objectives and criteria for this special procedure.

If, in performance evaluation case, the objectives and evaluation criteria are related to the regular, normal activity, while performing duties specific to the job, in professional adequacy procedure, we refer to objectives and criteria for assessing technical skills, abilities, behaviors or learning and re-learning skills in relation to the reasonable expectations of the employer towards any occupant of such job. Best practices on evaluation prescribe that performance standards and indicators be formulated as to ensure objective measurement; those can be set both by the performance appraisal procedure and by professional adequacy procedure.

The doctrine¹⁷ frequently highlights that performance appraisal precedes

¹⁵ Ion Traian Stefanescu, Ezer Marius, Gheorghe Monica, Sorica Irina, Teleoaca-Vartolomei Brandusa, Uluitu Aurelian Gabriel, Voinescu Veronica, *Labor Code*, Universul Juridic, 2017, p. 210.

¹⁶ Raluca Dimitriu, *Reflections on the termination of the individual contract is work from the perspective of the new regulations*, in „Revista Română de Dreptul Muncii” no. 3/2011, p. 64.

¹⁷ Gilcă Costel, *op. cit.*, 2015, p. 133.

the appraisal of professional adequacy. When talking about the initiation of a procedure on professional adequacy in the light of legal practice, an author states that the employer "before dismissing the employee, the employer did not proceed to the evaluation of performance goals set when individual employment contract was concluded, according to the procedure and the criteria listed within that annex therein. Surprisingly, it is shown¹⁸ that neither before nor after the notification of inadequacy an assessment was carried out to establish the professional performance in relation to the goals and criteria set out in the annex to the individual employment contract.

Whether it is the performance goals set for the current activity (subject to the annual performance appraisal) or the goals specific to the period of professional adequacy appraisal, both of them are relevant for that specific time frame. Therefore, the goals are not to be set when individual employment contract is concluded, as it is subject to permanent update, depending on the business strategy evolution.

Therefore, a distinction must also be made between the performance goals and the performance criteria, which represent a constant, a scale with precise elements based on which the performance of the employee is being coherently measured in time.

Depending on the type of job position, the performance of the employee can be evaluated by taking into consideration some evaluation criteria¹⁹ such as: technical competence; knowledge and compliance with regulations, manifestation of professional characteristics (attention, speed of reaction, accuracy of maneuvers, self-control); such criteria may work in the case of positions that involve the handling of installations or applications for safety (in traffic, in operation), orientation towards excellence; concern for the general well being of the company, for resources; personality characteristics, aptitudes, behaviors.

Therefore, we highlight that both in performance appraisal and in professional adequacy appraisal, the elements and methods are different and specific to each procedure and period (goals in regular activity/learning objectives). Thus, the only constant during both procedures remains the application of common evaluation criteria set in the individual employment contract, which are established via internal regulations and general applicable to all employees or categories of employees.

3. Distinction between professional inadequacy and disciplinary liability

¹⁸ Târgu-Mureș Court of Appeal, Decision no. 370/R of August 21, 2014.

¹⁹ Dodu M., Raboca H., Tripon C., *Human resource management course support*. Postgraduate Program in Public Administration Management, p. 55, http://www.apubb.ro/wp-content/uploads/2011/03/Managementul_resurselor_umane.pdf, consulted on 1.10.2019.

It is unanimously acknowledged by the doctrine that the factual element for establishing the disciplinary liability, respectively for establishing the professional inadequacy is similar, therefore is almost impossible to separate the two legal situations without considering also subjective aspects, such as employee's guilt. Thus, if there is an omission to perform tasks this may come from the insufficient knowledge of the technical rules and procedures, from the lack of professional skills and may be associated with the professional inadequacy. At the same time, the same omission to perform tasks, their inappropriate fulfillment associated with the subjective attitude of the employee (in the form of guilt or intention) represents a failure to comply with legal obligations, which may lead to the disciplinary liability of the employee.

Therefore, the distinction between the two types of conducts that may lead to the termination of the individual employment contract for reasons pertaining to the employee will be made by the courts based on the factual elements and the concrete evidence of these elements arising from the preliminary procedure. Sometimes, investigations initiated for disciplinary grounds, may highlight some specific elements of professional inadequacy, as the reciprocal may also occur. De facto situation and the associated evidence are essential for applying the respective termination decision. The unclear facts, which may appear both in disciplinary cases and in professional inadequacy cases, corroborated with the legal grounds for professional inadequacy - art. 61 lit. d) from the Labor Code, may raise confusion with respect to reasons of the termination decided by the employer. Such confusion concerning the grounds is in fact inadmissible and may be considered by court as reason for annulment of the employer's decision.

We therefore join the majority of the doctrine opinions, which recommend for the employer to expressly indicate extensive references to the factual elements and the evidence proving it, when documenting the circumstances of the deed both in the stage of preliminary investigation and within the content of the termination decision. For the distinction of the two situations play "subjective aspects" of the deed an important role, namely if there is or not an aspect of guilt of the employee. Such clarity is all the more necessary, as both types of dismissals require prior procedures to be performed by the employer and errors in setting legal grounds for dismissals are often found by law courts rulings.

Moreover, the doctrine emphasizes that disciplinary liability is often associated with the accidental failure to perform the duties and responsibilities specific to the job, while continuing to fail to fulfil the specific job responsibilities may arise from professional gaps.

For a qualitative distinction between disciplinary aspects and those related to the professional inadequacy, the facts (objective elements) must be analyzed in relation to the employee's subjective attitude towards his obligations and the expectations of the employer.

Thus, they are considered disciplinary facts²⁰, and not evidence of professional inadequacy: "the delay in carrying out works, improper use of subordinate staff, disregard of recommendations of the hierarchical chief, lack of responsibility for delaying work, tensions among staff, the disruption of the orders of the unit manager". The mere and opposite professional opinion contrary to the one expressed by colleagues or line manager which is not followed by employee's actions to facilitate, block, or carrying out actions, operations or processes, agreed procedures or good practices at the level of the employer, can neither be considered evidence for the professional unfitness nor for disciplinary liability. Under such conditions, the confirmation or ruling out of some objective and subjective aspects are evaluated by the employer via preliminary procedures required to establish certain measures; these are distinct procedures from a legal perspective.

Apart from the factual aspects which delineate the two types of dismissals, delimitation can also be made by reference to: the preliminary procedures to be applied, the "assessors" called to analyze the facts, methods and instruments of assessment. Thus, in order to establish the disciplinary liability, the employer issues the procedure on the preliminary disciplinary investigation, according to art. 63 paragraph (1) in conjunction with art. 242 of the Labor Code, while for the appraisal of professional inadequacy he elaborates the procedure of prior evaluation according to art. 63 paragraph (2) of the Labor Code. Specifically, any of the two types of bodies (commissions) called to evaluate the employer's notice concerning deeds of an employee, start from checking the fulfillment of tasks and responsibilities of the said position, while the particular circumstances in which the deed is performed highlight his subjective attitude and, implicitly, the cause of such non-compliance.

It should be noted that the two types of assessments (disciplinary, and professional inadequacy) could not be applied by the same assessors, although there is no legal restriction in this regard. Thus, the specific analysis under disciplinary procedures and under procedure for professional adequacy is performed via specific methods.

The disciplinary procedure aims to establish and prove the facts and the subjective aspect of guilt, as well as the causal link between the deed and its consequences. In the procedure on professional adequacy, it is necessary not only to exclude any professional blame as to delineate it from disciplinary misconduct, but also to establish the cause for not fulfilling or improperly fulfilling the tasks, namely the gaps of professional expertise and inability to accomplish tasks. However, this requires a certain expertise of the assessor himself.

Under such conditions and, depending on the particularities of *de facto* situation, during the verifications performed in the preliminary procedure the dis-

²⁰ Alexandru Țiclea, *Galați Court of Appeal, Decision no. 65/R/2007*, „Revista Română de Dreptul Muncii”, no. 4/2007, p. 139-146.

cipline assessors may even decline their "judgement" to assessors capable to perform professional adequacy appraisal (while the reciprocal is also valid in case a deed is first investigated as inadequacy and proves to be in the and a disciplinary misconduct). Each of the two types of commissions applies specific evaluation methods and procedures to obtain viable conclusions likely to support the employer's decision. The disciplinary commission hears and provides evidence arising from the current activity of the employee, while the commission performing evaluation for professional adequacy resorts to other specific methods, such as professional tests, improvement programs, professional training, new work samples.

At the same time, the result of the two types assessments, as well as their consequences may be different. If evidence indicate professional inadequacy, this can lead to enrolling the employee in programs for improvement; also the employee may be offered a vacant job position compatible with the professional training and, only finally, the dismissal decision may be applied according to art. 61 letter d) of the Labor Code. On the other hand, when disciplinary liability is set, this may lead to the application of any the sanctions provided by art. 248 para. (1) of the Labor Code or, to the disciplinary dismissal as per art. 61 letter a) of the Labor Code.

4. The delimitation of professional adequacy with the psychical/ mental fitness of the employee

It is known that modern systems recognize the dichotomy of performance, considering on the one hand concrete goals to be achieved, on the other hand a subjective element, manifestation of behaviors favorable to the performance in line with the organizational culture supporting business strategy. When one considers that particular the behavior of the employee is a factor that generates the performance, finally one can also speak about a psychic attitude towards the members of the organization and, with the purpose and objectives of the organization.

If appropriate behaviors are not manifested, this must be generally assessed by reference to the values of the organization both by the line manager under the performance appraisal and by the experts empowered to perform professional adequacy appraisal. In this sense, there is also the relevant legal practice which shows that "the psychological factor is an important component of the evaluation process and evidence to this is the high scores associated to this element (behaviors) in the final results of the evaluation²¹". Or such a general evaluation can be made by the line manager directly observing employee's behaviors or, by a specialist in organizational psychology. Thus it is noted that "through the

²¹ Civil Decision no. 900 from September 24, 2014, pronounced by the Poiești Court of Appeal, www.mcp-avocati.ro, consulted on 1.10.2019.

psychological evaluation performed it was not intended to investigate whether the applicant is physically or mentally fit for work. Moreover, these aspects exceed the attributions of psychologists specialized in occupational medicine"²². To the extent that, inappropriate behaviors may be caused by medical reasons, the expertise and specialization required as per the law for assessing the employee's behaviors belongs to physicians.

5. Some procedural aspects

5.1. The procedure of prior evaluation concerning professional adequacy is mandatory for the dismissal under art. 61 letter d) of the Labor Code

The above procedure is often mentioned in the doctrine as a procedure for finding professional inadequacy. We do not embrace this doctrinal reference for the following reasons: the terminology used by the Labor Code both in art. 63 paragraph (2), as well as at art. 242 letter i) is that of an evaluation procedure, where the law maker refrains to determine any purpose or target of such an evaluation. In other words, even the assessment is carried out to identify the causes for which the employee has shown a poor performance during an evaluation cycle, this cannot indicate the direction towards which the employer tends - namely the establishment of professional inadequacy.

Thus, the special procedure mentioned in the aforementioned articles should refer to various methods to identify the causes of employees under performance. Specific manifestations may need to be analyzed by the employer's representatives in order to delineate a possible professional inadequacy with a disciplinary misconduct or a psychical/mental inability. Moreover, the procedure indicated in art. 63 paragraph (2) of the Labor Code may reveal that the employee is not a proper professional, being in a process of professional knowledge decay, that can only be restored through improvement and mentoring activities or by professional training.

We can even speak of degrees of professional adequacy, since this is neither abstract nor absolute by nature, but refers to a measurement against a scale that may change over time (for example in the case of the re-technological upgrades, where the company embraces new technologies and asks for similar improvements from its employees); Thus, professional adequacy refers to the requirements for a certain position and a particular employer; thus, what represents inadequate for a complex employer, can be considered as adequate by another employer with a less sophisticated business. On the other hand, an employer who has had certain performance standards at one point, by evolving the business and increasing the complexity of the business model and its implementation tools, it

²² *Ibid.*

can increase the standards of assessing the activity and, implicitly, the demands on the employees.

The rank of employee adequacy (under expectations, correspondingly, inappropriately) can be established by applying objective criteria and measurement algorithms, which avoids subjective indicators such as "loss of employer confidence". The loss of the employer's confidence in his employee cannot, in itself, be a cause for dismissal for professional inadequacy if the employer establishes ranks of professional adequacy measured by indicators and measuring instruments that allow a correct calibration of the demands of the employer with the activity and behaviors of the employee. "In the absence of a score grid for evaluation, the applicant's assessment is arbitrary (...) if there was no possibility to challenge the evaluation result at an appeal commission"²³.

Therefore, the evaluation procedure regarding the adequacy (established by the applicable collective labor contract or, by the internal regulation) must indicate with transparency the evaluation methods, the evaluation instruments, the way they are elaborated and applied, the subjects responsible for drafting it and manage it, content elements that can ensure the objectivity of the results, as well as the benchmarks according to which one can assess the correctness of the evaluation. Thus, it was considered²⁴ necessary to have a scoring grid, in order to exclude the arbitrariness of an evaluation, given that the court does not have the competence to verify the correctness of the evaluation. In cases where the court cannot substitute the employer for his right to evaluate in substance professional adequacy²⁵, this will be limited to the assessment of the legality regarding the procedural aspects, the transparency and their objectivity.

For objectivity purposes, an evaluation of the behaviors performed by the line manager in the procedure on professional adequacy is less appropriate, since it also requires a degree of abstraction, while the line manager's evaluation if justified in the annual evaluation procedure, because this appraisal directly concerns the employee's activity.

In the context of professional adequacy, generic requirements for a job and an ideal occupant of this job are considered. Therefore, an assessment of behaviors could be applied rather by a specialist in organizational psychology (internal or external expert). However, a psychological evaluation of an occupational physician (based on art. 61 letter c) of the Labor Code is not justified)

²³ Alexandru Țiclea, *Labor Code commented and annotated with related legislation and relevant jurisprudence*, Universul Juridic Publishing House, 2017, p. 145.

²⁴ Craiova Court of Appeal, labor litigation and social insurance section, Decision no. 2774/2008, <https://sintact.ro/#/jurisprudence/52122598>, consulted on 1.10.2019.

²⁵ "The court does not have the competence to verify whether the applicant's answers to the two questions addressed to the evaluation commission were correct or not, as well as the correctness of the rating and the score given by the evaluation commission." (Craiova Court of Appeal, labor litigation and social insurance section, Decision no. 2774/2008, *loc.cit.*).

whereas such an occupational expert would evaluate the employee psychologically in comparison with the requirements highlighted in the risks description, thus establishing his ability to occupy the job as designed by the employer; in his context manifestation of the "winning" behaviors necessary to perform on that position are nor actually considered. Even more, we have to delineate the behavioral (psychological) adequacy with the work capacity (mental state) of the employee, relevant in the context of an evaluation made by a social insurance expert for medical retirement.

The cause of such medical retirement as a result of the loss of work capacity may be the result of a mental illness due to which the employee cannot perform any work activity, let alone one specific to a certain job designed by the employer²⁶.

5.2. Specific procedural deadlines

In case of professional inadequacy, the employer has the obligation to issue the dismissal decision within 30 calendar days from the date of the finding of the dismissal cause, respectively from the moment when the conclusions of the analysis within the preliminary procedure are communicated to the unit management. This requirement is a guarantee of stability of the employment relationship and protection of the employee in the face of abusive positioning of the employer. "The principle of the protection of the employees in case of dismissal is also embodied by establishing a term within which, (...) the employer can issue the decision of dismissal, (...) removing the situation (...) of uncertainty and continuous hasard of the employee"²⁷.

5.2.1. The legal nature of the 30 days' deadline

The term of 30 calendar days is a limitation period and, consequently, it is possible to suspend and interrupt²⁸. Therefore, in the event that during the 30-day period in which the employer is entitled to issue the dismissal decision for professional inadequacy, a cause of suspension of the individual employment contract intervenes, art. 49 paragraph (6) of the Labor Code is applied and the flow of this term is suspended. This will be resumed upon termination of the cause of suspension. Thus, in the situation of the intervention of a long-term medical leave, of a leave to raise the child, we could find ourselves in the situation where, over time, there would arise a question if the situation that was the basis of the dismissal - professional inadequacy still persists.

²⁶ See the conceptual and substantive inconsistencies highlighted in Civil Decision no. 900 from September 24, 2014, pronounced by the Ploiesti Court of Appeal.

²⁷ A. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *op. cit.*, p. 346.

²⁸ *Idem*, p. 347.

Thus, an employee found in the uncertain period between the moment of applying the evaluation for professional adequacy and issuing the dismissal decision, could argue that after the leave period for raising the child the *de facto* reasons on which the dismissal decision was based (yet not communicated due to the protection mentioned at art. 60 of the Labor Code) no longer exists when she returns to work, because a vocational training has provided her an update of her professional knowledge. In this case, the employer, who could not issue in the past the decision, or could not validly communicate the decision according to art. 61 letter d) from the Labor Code before that leave, in order to continue and apply the dismissal he must invoke that the inadequacy still exist upon employee's return from the leave for raising a child. Considering this is a termination related to the employee, such grounds can be hardly effective in front of courts.

Moreover, after the return of the employee from the suspension of the individual labor agreement, the 6 months of protection will be taken into account for the adaptation at the workplace, a period stipulated for protection in case of arguments of loss of professional skills arising from the period of leave for the child raise. Therefore, the term of 30 days from the moment of finding the professional inadequacy, is the limits in time for the employer decide the dismissal; thus an obligation to be diligent is set for the employer and also a protection system for the employee, whose situation is required to be clarified in a reasonable time.

5.3. Other procedural aspects. Content of the dismissal decision

By referring to the provisions of art. 76 of the Labor Code, the dismissal decision for professional inadequacy must contain the grounds for the dismissal (in fact and per the law), the duration of the notice (at least 20 working days), the list of all the available jobs in the unit and the deadline in which the employees may opt for a vacant job, under the conditions of art. 64 of the Labor Code.

De facto grounds are a priority for the analysis carried out by the court, while the legal grounds of the measure may be secondary. The doctrine is not unitary²⁹ as to the effects of not indicating the factual details in the dismissal decision. Some authors show that mentioning in the dismissal decision another document (finding notes), indicating the reasons for dismissal, is also acceptable. Others³⁰ believe that grounds must be expressly indicated in the dismissal decision. Contrary to the situation of the motivation in fact, the indication of the legal grounds in the decision is not an equally important requirement. "The lack of the legal grounds does not, *eo ipso*, trigger the absolute nullity of it, but it is the right and the duty of the court to proceed during judgment to rectify the legal grounds

²⁹ L. Uță, F. Rotaru, S. Cristescu quoted in comments made by Costel Gilcă, *op. cit.*, 2015, p. 133.

³⁰ A. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *op. cit.*, p. 349-350.

of the termination of the individual employment contract by the dismissal decision issued by the employer".

On the other hand, the legal grounds must be illustrated by the factual situation indicated therein. Faced with the wrong legal grounds, "the mere reference³¹ to the provisions of art. 61 letter d) of the Labor Code (...) it is not possible to determine the cause of the dismissal, since in the factual situation invoked by the respondent include also reference to disciplinary aspects.

Last but not least, we must consider the obligation of the employer to propose to the employee other vacancies, compatible with the vocational training (art. 63 paragraph (1) of the Labor Code). The aforementioned rule of law has is imperative, and the failure to comply with this obligation leads to the nullity of the dismissal decision, "insofar as the employee was injured by employer failing provide the list of all available jobs in the unit³²".

On the other hand, the law maker refers only to the vacant positions, that is to say those positions that exist in the organizational chart of the employer (approved by the statutory bodies). It is also necessary that the vacancies be compatible with the professional training of the employee, and this condition is imprecisely indicated by the law maker, especially in the context of establishing a professional inadequacy of the said employee. As per the letter of the law, even an employee who is proven unprofessional in the preliminary evaluation procedure, fulfills certain studies conditions, which means the professional training of the employee *lato sensu*.

However, the legal obligation mentioned must be interpreted *stricto sensu*, also concerning the conditions that have to be fulfilled for the job by a candidate (possessing those technical knowledge, practical and behavioral skills to occupy the position), that is those practical aspects that are also established within the framework the procedure for professional adequacy. However, undergoing preliminary procedures indicates the correspondence of the employee with respect to a certain position.

On the other hand, his reallocation to another position compatible with his professional training logically means a new assessment, this time within an internal recruitment process, which is achieved by taking into account a job profile and of a specific candidate profile for each position to be filled. Only in the case of positions with similar candidate profile we could admit (similar to some doctrinaires) that the employer must directly propose to the inadequate employee the vacant position, without applying a selection process together with other candidates. If the relocation obligation exists and is not fulfilled by the employer, this leads to the loss of a potential job by the inadequate employee, which entitles

³¹ Șerban Beligrădeanu, *Essential aspects regarding the form, content and nullity of the dismissal decision in the light of labor law*, Studies of Romanian labor law, Ed. C.H. Beck, Bucharest, 2007, p. 153, 154.

³² M.C. Predut, *op. cit.*, p. 90.

him to challenge and annul the dismissal decision, for not fulfilling the legal procedure for his dismissal, as provided art. 78 of the Labor Code.

If the employer does not have vacancies compatible with the professional training of the employee, he has the obligation to request the support of the territorial employment agency in order to redistribute the employee, according to the professional training, according to art. 63 paragraph (2) of the Labor Code. Failure of the employer to fulfill this obligation is not likely to influence the evolution of the employment relationship, even ceasing under the conditions of the redistribution carried out by the employment authority. Therefore, the failure to fulfill this obligation does not determine the nullity of the dismissal measure.

"The employee has a period of 3 working days from the communication of the employer regarding the internal vacancy to express his/her consent in writing about the new job offered. In case the employee does not show his consent within the legal deadline, as well as after the notification of the case to the territorial employment agency, the employer may order the dismissal of the employee"³³.

6. Conclusions

We propose to replace the phrase "the procedure of professional inadequacy" used in the doctrine with "the evaluation procedure aiming to clarify the rank of professional adequacy of the employee" (or "the procedure regarding professional adequacy"), based on the following arguments:

- the employer must initiate a special evaluation process, distinct from the performance evaluation and following it;
- the two types of evaluation must be based on different measuring instruments; to determine the internal causes of the professional degradation, from the perspective of the methods, it is necessary to consider the procedure on professional adequacy as similar with the selection procedure used when hiring employees;
- the purpose of this subsequent procedure cannot be to reach an inevitable result - the confirmation of the suspicion of professional inadequacy; this would mean prior judgement of a factual situation (inadequacy) based on non-specific means used by the regular performance evaluation; If we admit that the annual assessment directly indicates the inadequacy, this would be equivalent to the existence of an assumption of professional inadequacy arising from the regular, annual performance evaluation procedure;
- we can even speak of an evolution (ranking) of professional inadequacy, jointly with the evolution of the organization; this does not have an abstract and absolute nature, but refers to a position, to an organization at a certain moment in its development and which applies standards and a measurement scale that can

³³ Art. 63 para. (3) and (4) of the Labor Code.

change over time depending on the complexity of the business; therefore, it does not speak of a professional inadequacy of the employee in the abstract, but of one related to a certain moment and to specific requirements.

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**PUBLIC AFFAIRS AND BUSINESS LAW –
CONSTITUTIONAL DEVELOPMENTS**

Constitutional Guarantees for Ownership Rights and the Development of the Market Economy

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Abstract

This paper presents an analysis of constitutional guarantees for ownership rights set in the key legislation of European states and their impact on the market economy growth. It focuses primarily on the evaluation of the guarantees set in the Constitution and other acting laws of Ukraine granting the ownership rights. In this study, the author employed such research methods as logical, observation, comparative law analysis, etc. The market economy is the opposite of planned economy since decisions are made on production, distribution, pricing, or investments by the owners of production means guided by their interests. Therefore, the topic of constitutional guarantees for ownership and the development of the market economy in post-Soviet and post-Socialist European states can be considered exclusively upon their regained independence (in case of former Soviet Union republics) or upon the collapse of the Socialist system and the termination of activities of the Council for Mutual Economic Assistance (in case of most European post-socialist states). A state would always pursue to restrict private ownership. The right cannot be considered as absolute but it shall be reliably protected by the state against any claims. Ownership rights, in line with such rights and freedoms as freedom of entrepreneurial activity, freedom of contract, freedom to choose the place of employment and residence, establish the legal framework for the market. This article may be of value to students of law and economics faculties, experts in the theory of law, constitutional law, and civil law.

Keywords: constitutional guarantees, ownership, property rights, the market economy, economic operations.

JEL Classification: K11, K15, K19, P14

1. Introduction

Over the centuries, the market economy has been expanding its impact and is currently dominating in the modern world. It has become the basis for the growth of welfare for millions of people. As regards post-Socialist states, the process of market economy development started there as late as in the 1990s. Until that time, they had functioned for quite a long time within the so-called planned economy in which all decisions on production and consumption of products were made by the state. The market economy, for which the decisions on production

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technicalities, distribution, pricing, or investment are taken by the owners of production facilities guided by their interests, is an antipode of the planned economy. Therefore, the constitutional guarantees for ownership rights or the market economy development in post-Soviet and post-Socialist European states can be considered exclusively upon their regained independence (in case with former Soviet Union republics) or upon the collapse of the so-called Socialist system and the termination of activities of the Council for Mutual Economic Assistance² (in case of most European post-Socialist states).

2. Development of the Institute of Ownership in Ukraine

In the Soviet Union and the Ukrainian Soviet Socialist Republic, as part thereof, any state guarantee for immunity of ownership was out of the question. A socialist state was considered as such that did not face any issues with the ownership guarantees since the state liquidated private property. On the other hand, state property and state power were the same notion: power became an element of the structure of state property, while ownership became an element within the structure of power. The Constitution of the Ukrainian SSR dated April 20, 1978, in effect at that time, declared that property shall belong to the people, while the state shall manage it on behalf of the people³.

After Ukraine regained its independence, the institute of ownership has undergone fundamental changes. As an economic category, property turned into the stronghold of market relations, a form of expression of the will of a person and their role in society. As of today, Ukraine is going through a complex process of modifying the role of a modern state to expand its social functions, as well as to change the scope of activities in order to reach the balance between private interests of individuals and the overall interests of the community. A decisive factor in the modification of the role of the state is the institute of ownership and a mechanism for dispute resolution between individual owners (between a private owner and a state, among others), as well as the mechanism for control over the exercise of owners' rights. The market economy provides for various ownership forms. Immediately upon the Declaration on the State Sovereignty of Ukraine dated July 19, 1990⁴, and long before the adoption of the Act of the Declaration

² The Council for Mutual Economic Assistance was an inter-state organization of the Socialist block countries established in January 1949, for economic integration and mutual assistance. It ceased its operations on June 28, 1991.

³ Конституція (Основний Закон) Української Радянської Соціалістичної Республіки від 20.04.1978 р. № 888-IX (Constitution (Basic Law) of Ukrainian Soviet Socialist Republic dated 20.04.1978 №888-IX).

⁴ Декларація про державний суверенітет України від 16.07.1990 р. № 55-XII (Declaration on State Sovereignty of Ukraine dated 16.07.1990, No. 55-XII).

of Independence of Ukraine dated August 24, 1991⁵, a series of the first and most important laws adopted in Ukraine (that was formally still part of the Soviet Union for the moment) included the Law of Ukraine “on Property” dated February 7, 1991⁶. Article 2 of the Law stipulated that property rights are the legally regulated social relations on ownership, use, and management of property. Ownership in Ukraine shall be secured by the law. The state shall provide for consistency of legal relations of ownership. Each citizen in Ukraine shall be entitled to own, use, and manage the property personally or sharing with others. Property in Ukraine is available in such forms as private, collective, and state-owned. All forms of property shall be equal⁷. The following Article 3 of the Law sets that subjects of ownership in Ukraine shall be recognized as the following: the people of Ukraine, citizens, legal entities, and the state⁸. However, although the scope of the law was revolutionary evidence to systemic change in Ukraine, it also contained several ‘flaws’ that have been further regulated by the following laws on property rights. The first to consider is the Constitution of Ukraine. Article 3 of the acting Constitution of Ukraine dated June 28, 1996, stipulates that human rights and freedoms, and guarantees thereof shall determine the essence and course of the activities of the State. The State shall be responsible to an individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State⁹. Article 13 of the Fundamental law of Ukraine provides that “the land, its subsoil, atmosphere, water and other natural resources within the territory of Ukraine, natural resources of its continental shelf and of the exclusive (maritime) economic zone shall be the objects of property rights of the Ukrainian people. State authorities and local self-government bodies shall exercise the ownership rights on behalf of the Ukrainian people within the limits determined by this Constitution. Every citizen shall have the right to utilise the natural objects of the people’s property rights in accordance with the law. Property entails responsibility. Property shall not be used to the detriment of an individual or society.”¹⁰ The Constitution defines property rights so as not to infringe on the interest of an individual and society. In fact, a legislator undertakes double responsibility: firstly, provisions of private law to protect the property have been established; secondly, a legislator has to protect social interests, mostly by public law regulations.

The next important legal act setting fundamentals for the regulation of

⁵ Про проголошення незалежності України: Постанова Верховної Ради Української РСР від 24.08.1991 р. № 1427-XII (on Declaring the Independence of Ukraine: Resolution of the Supreme Council of the Ukrainian SSR dated 24.08.1991 № 1427-XII).

⁶ Про власність: Закон України від 07.02.1991 р. № 697-XII (Law of Ukraine “on Property”, dated 07.02.1991 № 697-XII).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Конституція України від 28.06.1996 р. № 254к/96-ВР (Constitution of Ukraine dated 28.06.1996 №254к/96-ВР).

property rights is the current Civil Code of Ukraine¹¹ adopted by the Parliament of Ukraine on January 16, 2003. Its adoption repelled the above mentioned law “on Property” dated February 7, 1991, since the issue of ownership is regulated in the Civil Code of Ukraine in a voluminous book III “Ownership Right and Other Proprietary Rights” Article 316 of the Code covering the concept of ownership sets that ownership shall be the right of a person for an object (property) exercised under the law at their free will, irrespective of other persons’ will. A special kind of ownership rights is the right for trust ownership arising due to the law or trust agreement¹². An important provision of the Civil Code is article 319 “Exercising Property Rights” that sets that when exercising their rights and fulfilling obligations, an owner shall abide by moral principles in society; an owner shall not use the property right to infringe on other rights, freedoms, and dignity of citizens, or interests of society, to harm the environment and degrade natural properties of land; the owner’s activity can be restricted or terminated, or the owner can be obliged to enable access of other persons to utilization of his/her property only in cases and under procedures provided by the law¹³. At the same time, Article 321 of the Civil Code of Ukraine guarantees the integrity of property rights and sets the possibility to exempt from it or restrict its exercise. In particular, forced alienation of property rights objects can be applied only as an exception, for social necessity, on the grounds and under procedures set by the law, and upon prior and full reimbursement of their cost¹⁴. The Civil Code of Ukraine also changed the catalogue of property right forms in Ukraine and excluded collective property, stating that property shall function in the form of property rights of the Ukrainian people, private property rights, right of state property and the right of municipal property¹⁵.

Among the range of important legal acts on property rights, along with the Civil Code of Ukraine, we find it essential to mention the Land Code of Ukraine. Within several months upon regaining independence in Ukraine, legal relations on land ownership and land use were regulated by the provisions of the Land Code of the Ukrainian SSR dated December 18, 1990¹⁶. However, on March 13, 1992, the Ukrainian Parliament adopted the reviewed version of the code. It was the first time in the contemporary history of Ukrainian state that the law set that citizens of Ukraine shall be entitled to receive the land plots into property¹⁷.

¹¹ Цивільний кодекс України від 16.01.2003 р. № 435-IV (Civil Code of Ukraine dated 16.01.2003 № 435-IV).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Земельний кодекс Української РСР від 18.12.1990 р. № 561-XII (Land Code of Ukrainian SSR dated 18.12.1990 № 561-XII).

¹⁷ Земельний кодекс України від 13.03.1992 р. № 2196-XII (Land Code of Ukraine dated 13.03.1992 № 2196-XII).

In the past, Ukraine (the same as the entire Soviet Union) did not have any property other than state-owned. An exceptional case was in Poland, among other Socialist European states, where they had the private property for land even during the Polish People's Republic. As regards USSR citizens, they were entitled to be allocated with land plots to build their residential houses thereon, upon the decisions of local Councils of people's deputies. The houses belonged to them on the grounds of the so-called personal property, while the land plots were granted for permanent use. Thus, provisions of the Land Code of Ukraine appeared to be a litmus paper which proved radical political and economic changes in Ukraine. Nevertheless, in terms of the political situation of the times, and the prevailing political powers in the parliament¹⁸, part 2 of Article 17 of the Code stipulated that the owners of land plots granted upon decisions of the Council of people's deputies shall not be entitled to sell them or alienate them in other ways before six years upon receipt of the property rights. They were only allowed to pass them down or to pass them over to the Council of People's Deputies on the same conditions they had been granted the land plot by the Council. In case of reasonable circumstances, a court (upon a lawsuit from the land plot owner) could reduce the stated period.¹⁹ Thus, we can see that a legislator had established the private property rights for land plots for Ukrainian citizens but also simultaneously restricted it. In addition, Article 6 of the Code stipulated that foreign citizens and a stateless person cannot be given land plots into ownership.²⁰ Therefore, in this case, the state granted its citizens a privileged status. It should be stated that such legislative practices go against international standards when property rights for the land shall not depend upon the citizenship of a prospective applicant. However, in our opinion, the practice is the "flaw" of almost all post-Socialist states where implemented economic reforms caused impoverishment of the major part of the population. The ban on selling land to foreigners was a certain response to prevent the possible acquisition of large areas by wealthy foreigners.

Based on the Land Code of Ukraine, on December 26, 1992, the Cabinet of Ministers of Ukraine adopted a Decree no. 15-92 "on Privatization of Land Plots". Paragraph 1 therein established that village, township, town and city Councils of People's Deputies shall provide for transfer into private property of citizens the land plots allocated to them for private plot activities, construction, and maintenance of a residential house and household buildings (homestead land), gardening, summer house and garage construction, within 1993, and under

¹⁸ The majority in the Ukrainian Parliament at the time consisted of members of the Communist Party of Ukraine, currently banned.

¹⁹ Земельний кодекс України від 13.03.1992 р. № 2196-XII (Land Code of Ukraine dated 13.03.1992 № 2196-XII).

²⁰ *Ibid.*

provisions of the Land Code of Ukraine.²¹ At the same time, par. 4 of the Decree provided that citizens of Ukraine shall be entitled to sell or in other ways alienate the land plots allocated to them for purposes stated in Article 1 of the Decree, without changing their designated use.²² Thus, it cancelled a legal provision that used to set the six years ban to sell the land plots received into private property. Later, Ukrainian legislators also introduced changes to the Land Code of Ukraine and kept the restriction for sale of land only for agricultural lands. They also set the possibility to assume ownership for land for foreign citizens, but it was only related to the land plots for construction and maintenance of the residential house and the household buildings (homestead land).

Another important aspect that requires scrutiny and analysis is the issue of restricting owners' rights for land plots for public or social interests. The analysis of this issue in the theory of the Ukrainian agrarian law prompts suggesting that most experts deem it justified to have such restrictions imposed to create due conditions for the legal regulation of the nationally prioritized growth areas. The law of the European states with long experience in the field does not precondition the private land ownership on an individual's citizenship. Moreover, they set certain restrictions in the area of exercising private property rights for land plots. For instance, Italian law is guided by intentions to rationally use the land and enhance fair social relations, and thus restrict private land ownership by setting its maximum area in different parts of the country. Therefore, they introduce amelioration of land, restructure large agrarian businesses, and support the development of small agricultural farms and mid-scale land owners. Article 88 of the Civil Code of France also sets a series of legislative limits. They include, among others, a possibility of a mandatory repurchase of the land plot from the owner who does not undertake any agricultural activities thereon or if their agricultural methods harm social interests²³.

Article 41 of the Constitution of Ukraine stipulates that everyone shall have the right to own, use, or dispose of his property and the results of his intellectual or creative activities. The right for private property shall be acquired in compliance with the procedure established by law. Citizens may use the objects of state or communal property in accordance with the law to satisfy their needs. No one shall be unlawfully deprived of the right for property. The right for private property shall be inviolable. The expropriation of private property objects may be applied only as an exception for the reasons of social necessity, on the grounds of, and in the order established by law, and on the terms of advance and complete

²¹ Про приватизацію земельних ділянок: Декрет Кабінету Міністрів України від 26.12.1992 р. № 1592 (on Privatization of Land Plots: Decree of the Cabinet of Ministers of Ukraine dated 26.12.1992 № 1592).

²² *Ibid.*

²³ Земельное законодательство зарубежных стран. Москва. 1982. С. 352 (Land Code of Foreign States. Moscow. 1982, p. 352).

compensation of the value of such objects. The expropriation of such objects with subsequent complete compensation of their value shall be permitted only under conditions of martial law or a state of emergency²⁴. The viability of Ukrainian constitutional provisions depends on how compliant they will be with other Ukrainian legal provisions or international and European human rights standards, and whether they will guarantee due living conditions for citizens.

3. Restriction of ownership in European constitutions

The practice of constitutional restrictions of ownership is also available in other European states. For instance, Article 33 of the Constitution of Spain dated December 27, 1978, sets that no individual can be exempt of their property and the rights thereon, except for the grounded cause related to social relevance or social interests, provided there is due reimbursement under the law.²⁵ Article 17¹⁴ of the Constitution of Greece dated June 9, 1975, declares that property is protected by the state. At the same time, however, it establishes that the use of property rights shall not go against public interests.²⁶ Constitution of Italy dated December 27, 1947, declares in Article 42 that private property shall be defined and guaranteed by the law that defines the manners of assuming and exercising it, and also its limits – in order to provide for its social function and accessibility to all.²⁷ Meanwhile, the following Article 43 of the Basic Law, Italian legislators set the possibility to alienate private property by the state, public institutions, associations of employees, or consumers in the interests of common good²⁸. The Constitution of Belarus dated March 15, 1994, provides in Article 44 that exercise of the property right shall not contradict any common good and public security, harm environment, historical and cultural heritage, or infringe on the rights and lawful interests of other persons.²⁹ In addition, the article establishes a possibility of forced alienation of property only for social need, and in line with the terms and procedures under the law, and with the timely full reimbursement of the cost of the disposed property, as well as by decision of a court.³⁰ The Constitution of the Federative Republic of Germany dated May 23, 1949, proclaims in Article 14 the guaranteed property and inheritance rights, and also sets that property obliges.

²⁴ Конституція України від 28.06.1996 р. № 254к/96-ВР (Constitution of Ukraine dated 28.06.1996 № 254к/96-ВР).

²⁵ Constitución Espanola. Madrid 1987 // Les Constitutions de l'Europe des Douze. Paris, 1994.

²⁶ Konstytucja Grecji. Wyd. 2 zm. i uaktual. Tłum. Grażyna i Włodzimierz Uliccy. Warszawa, Wydawnictwo Sejmowe 2005.

²⁷ Costituzione della Repubblica Italiana // Roma: Fondo Europeo per l'Integrazione di Cittadini di Paesi Terzi, Progetto cofinanziato dall'Unione Europea, Ministero dell'Interno Dipartimento per le Libertà Civili e l'Immigrazione, 2012, 258 p.

²⁸ *Ibid.*

²⁹ Constitution of the Republic of Belarus // Constitutions of the countries of the world. Gisbert H. Flanz ed., Patricie H. Warf assoc. ed., Vol. 2: Bahrain - Bolivias. New York: Oceana Publ., 2003.

³⁰ *Ibid.*

The use of property shall serve the common good, while its alienation can only be possible for public convenience.³¹ Article 41 of the Constitution of Romania dated November 21, 1991, on the protection of property rights provides the possibility for the expropriation of property for public convenience established by the law, with fair and prior reimbursement.³² Article 64 of the Constitution of Poland dated April 2, 1997, stipulates that each individual shall have the right for property, other property rights, right of inheritance, as well as legal protection equal for all. Simultaneously, it also anchors that property can be restricted only under the law and in the scope that does not contradict the essence of ownership.³³

It shall be noted that constitutional restrictions for property rights are typical not only for European states but are common also in other parts of the world. For instance, Article 29 of the Constitution of Japan dated November 3, 1946, sets the inviolability of ownership, while providing for the possibility to alienate private property for public convenience, with fair reimbursement.³⁴

As we can see, the state regulates legal framework not only for public property, but also for private property, thus directly impacting its development and functioning. Therefore, there is a problem in setting limits for the interference of the state into social relations related to property rights. Under this setting, it does not make much difference whether the economy in the country is of a market type or state-regulated, such as in Belarus. In other words, in case of having other than public kind of property (private property in the first place), the state shall always have its vested interest and can interfere with the exercise of property rights by other property rights subjects.

It has been stated above that the constitutions and the laws of European countries set some grounds to restrict or even forcefully alienate private property rights. For example, the Constitution of Hungary shall guarantee the property right in Article 13 but also sets the possibility to alienate it for public convenience in the manner stipulated by the law and with complete and unconditional prompt reimbursement.³⁵ A similar enforcement practice is also found in other European states, including Ukraine.

³¹ Grundgesetz für die Bundesrepublik Deutschland, Deutscher Bundestag und Bundesarchiv (Hg.), Der Parlamentarische Rat 1948-1949. Akten und Protokolle, 13 Bde., Boppard u.a. 1975–2002.

³² Конституция Румынии от 21 ноября 1991 г. (Constitutions of Romania dated November, 21, 1991) - <https://legals.com/download/books/cons/romania.pdf>, consulted on 1.10.2019.

³³ Konstytucja Rzeczypospolitej Polskiej, Dziennik Ustaw, 1997, Nr, 78, poz. 483 (Constitution of the Republic of Poland, Journal of Laws, 1997, no. 78, item 483).

³⁴ Konstytucja Japonii. Tłumaczenie z języka japońskiego Teruji Suzuki. Wstęp Teruji Suzuki, Wydawnictwo Sejmowe. Warszawa, 2014 (Japanese Constitution. Translated from Japanese by Teruji Suzuki. Introduction by Teruji Suzuki, Sejm Publishing House. Warsaw, 2014).

³⁵ Ustawa Zasadnicza Węgier. Tłumaczenie: Jerzy Snopek. Wstęp: Witold Brodziński, Wydawnictwo Sejmowe. Warszawa, 2012 (Basic Law of Hungary. Translation: Jerzy Snopek. Introduction: Witold Brodziński, Sejm Publishing House. Warsaw, 2012).

4. Principles for restrictions of ownership

The analysis of the acting law and court practices in Ukraine and other European states highlights the following principles to restrict ownership:

- possibility to restrict private property in the interests of the “common good” or “public interests”;
- fair reimbursement by the state of the loss of property to owners;
- setting restrictions strictly under the law;
- court protection of private property rights.

Analysis of the grounds for restricting private property rights in the Constitution of Ukraine and the constitutions of some other European countries shows that all the legal regulatory acts use such grounds for restricting rights as “social interests” or the “common good.” It seems that in that case, we might conclude that these terms are used as synonyms. In the acting Ukrainian law, we only found one law that offers a definition for the concept of the “common good”. In particular, Article 1 of the Law of Ukraine “On General Safety of Non-Food Products” dated December 2, 2010,³⁶ with the definitions of terms, defines social interest as health and life safety of persons, safe working conditions, consumer (customer) protection, environment protection.³⁷ The concept of social interest is also partially explained in the Law of Ukraine “On Information” dated October 2, 1992.³⁸ Article 29 of the law includes a list of information that presents social interest and thus is socially necessary. The list is not exhaustive and contains information that has signs of a threat to national sovereignty and territorial integrity of Ukraine. In addition, it the information that provides for the exercise of Constitutional rights and freedoms and implies the possibility of infringement on human rights, may mislead the public and cause environmental and other negative consequences of acts (inaction) of natural or legal persons.³⁹ In our estimation, the list can be applied with reference to the institute of private property rights, when adjusted for certain specificities.

Let us analyze some definitions suggested by various researchers for the concept of public interest. Researcher Zavadskaya contends that social interest is something which society and its social groups believe to be an asset whose value

³⁶ Про загальну безпечність нехарчової продукції: Закон України від 02.12.2010 р. № 2736-VI (Law of Ukraine “On general safety of non-food products”, dated 02.12.2010 № 2736-VI).

³⁷ *Ibid.*

³⁸ Про інформацію: Закон України від 02.10.1992 р. № 2657-XII (Law of Ukraine “about information”, dated 02.10.1992 № 2657-XII).

³⁹ *Ibid.*

satisfies material, spiritual, aesthetic, and other needs, and therefore shall be protected under the law.⁴⁰ Tikhomirov considers social interest to be formally recognized by the state and secured by the law interest of a social community whose satisfaction serves a priority condition and a guarantee for its existence and development.⁴¹ He identifies several conditions to provide for social interest, namely inviolability of the principles of constitutional order; protection of national borders, defense of country, public security; sustainability of power and its institutions; legal distinction between authorities of different levels; political autonomy and activity of citizens, priority of national interests in certain areas of economy and culture.⁴² In our view, Tikhomirov equates national and social interests since he lists among the means of legal support for social interest a priority national interests. The statement seems erroneous since the state shall always have its specific interests which could either fail to match or even go against social interests.

We can also suggest a definition for the notion of social good suggested by a US researcher Ostrom who interprets the phenomenon as a kind of activity that yields benefits to the entire country or a certain social group.⁴³ Ostrom states that it is hard to establish social good in quantitative terms, and claims that it does not imply it would be impossible to evaluate the tangible cost it takes to reach it. In his opinion, the best option to reach social good is a certain optimal level of activity where benefits exceed the cost.⁴⁴ In that case, Ostrom's opinion is similar to an idea suggested by Maritz. She believes that general features of social interest include social necessity; legitimacy; relevance; benefit; and prevalence of social interest over possible harm from its spread.⁴⁵ Definition for social interests offered by Morozova is rather opportune. She describes social interest as public interests. However, they are not the interests of the state. They are the interests that yield benefit for the whole society or are meaningful for a certain social community. They are not short-term in their effect but rather serve as a precondition

⁴⁰ Завадская Л., *Теория права: новые идеи*. Выпуск 2. Москва. 1992. С. 45. (Zavadskaya L., *Theory of Law: New Ideas*. Issue 2. Moscow. 1992. p. 45).

⁴¹ Тихомиров Ю., *Публичное право: падения и взлеты*, „Государство и право”, 1996, № 1. С. 5. (Tikhomirov Yu., *Public law: failures and successes*, „State and the Law”, 1996, no. 1, p. 5).

⁴² *Ibid.*

⁴³ Остром В., *Смысл американского федерализма. Что такое самоуправляющееся общество*. Перевод с английского. Москва. 1993. С. 165. (Ostrom V., *The meaning of US federalism. What is a self-regulated society*. Translation from English. Moscow, 1993, p. 165).

⁴⁴ *Ibid.*

⁴⁵ Маріц Д., *Поняття суспільний інтерес в інформаційних правовідносинах*, „Підприємництво, господарство і право”. № 11, 2018, С. 169. (Marits D., *The concept of public convenience in informational legal arrangement*, „Entrepreneurship, Economy, and Law”, No. 11, 2018, p. 169).

for the functioning and development of society at large (individual social communities) and are oriented at fundamental constitutional values.⁴⁶ As regards interests of the state, Morozova believes that under the conditions of self-regulation of economy, the interference of the state into the economy has certain limits. It is typical in the context of the market economy. As a rule, it is reduced to: a) producing of economic policy; b) managing state-owned companies (with strict restriction of their number by most important industries of the national significance); c) to set legal principles of the market, such as incentives with public means of entrepreneurship, providing for equality of ownership forms, taking measures to prevent monopoly and unfair competition; d) to regulate foreign trade relations.⁴⁷

The analysis of the above-mentioned definitions of the concept of social interest leads to the conclusion that their interpretation depends on specific historical circumstances. In a totalitarian state, social interests would be different than in a democratic society. “Interests of society” and the “common good” are judgment-based. As duly mentioned by Kosovych, legislators of each country use them in legal acts in different senses, in terms of their contextualized interpretations based on their understanding of socially relevant aspects of social relations, social values of society, needs, interests, value paradigms, baselines, and preferences.⁴⁸ For example, the Constitution of the Russian Federation dated December, 12, 1993,⁴⁹ sets fewer grounds for restriction of human rights than the current Constitution of Ukraine. Moreover, Russian legislators used such restriction of rights as “public needs”, “public interests”, but not social interests, as it is found in the Constitution of Ukraine.⁵⁰ There is a good reason for that situation. In Russia, public interests prevail over social interests, as a result of a long period of functioning of the Russian state under totalitarian rule.

5. Guarantees for non-violation of property rights in Ukraine

⁴⁶ Морозова Л.А., *Государство, собственность и права человека*, Права человека в условиях становления гражданского общества. Материалы международной научно-практической конференции, Курск. 1997, С. 23. (Morozova L.A., *State, Property, and Human Rights*, Human Rights Under Establishment of Civil Society. Materials of International Research and Practical Conference, Kursk. 1997, p. 23).

⁴⁷ Морозова Л.А., *Функции российского государства на современном этапе*, „Государство и право”, 1993, № 6, С. 103. (Morozova L.A., *Functions of the Russian State in Contemporary World*, „State and the Law”, 1993, no. 6, p. 103).

⁴⁸ Косович В., *Оціночні поняття як засіб юридичної техніки*: монографія, В. М. Косович. - Львів. : Триада-плюс, 2010, 211 с. (Kosovych V., *Value Judgements as a Means of Legal Technique*: Monograph, V.M. Kosovych, Lviv. Triada-plus, 2010, p. 211).

⁴⁹ Конституция Российской Федерации, Российская газета, № 237, 25.12.1993 (Constitution of Russian Federation dated 12.12.1993, Russian Newspaper № 237, 25.12.1993).

⁵⁰ Конституція України від 28.06.1996 р. № 254к/96-ВР (Constitution of Ukraine dated 28.06.1996 №254к/96-ВР).

An important aspect that has an impact on the state's guarantee for immunity of ownership lies in due and transparent procedure of its registration. Over the several recent years, Ukraine has implemented a number of significant reforms. They include, among others, the reform for the procedure of registration of immovable property. Pursuant to Article 182 of the Civil Code of Ukraine, ownership and other property rights for immovable objects, restrictions of the rights, their accrual, transfer, and termination shall undergo state registration.⁵¹ On July, 1, 2004, Ukrainian Parliament adopted the Law "on State Registration of Corporeal Rights on Property and Their Encumbrances,"⁵² After several years, it was replaced by the Law of Ukraine "On Introducing Changes into the Law of Ukraine "on State Registration of Corporeal Rights on Property and Their Encumbrances" and Other Legal Acts" dated February, 11, 2010.⁵³ However, it was only upon introducing the following changes to the above mentioned law, such as upon the Parliament's approval of the Law of Ukraine "on Introducing Changes to the Law of Ukraine "on State Registration of Corporeal Rights for Immovable Property and Their Encumbrances": dated November, 26, 2015,⁵⁴ that one can speak of liberalization of the process of registering property rights, and also of transparency thereof. In other words, as of today, there is a single nationwide register of immovable property. At the same time, it was liquidated the monopoly of state in the area of registering property rights. Subsequently, presently, notaries (both private and public) shall be entitled to register corporeal rights and their encumbrances, in addition to state registrars. It does not imply that all challenges have been overcome. Challenges still persist in transparency of state's redemption of privately owned land plots for the common good. The concept of public convenience is underregulated on the national level, and is still cause to many conflicts between owners of the land plots and the state. Another pertinent issue is the moratorium on sale of agricultural land plots. It has been extended

⁵¹ Цивільний кодекс України від 16.01.2003 р. № 435-IV (Civil Code of Ukraine dated 16.01.2003 № 435-IV).

⁵² Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень: Закон України від 01.07.2004 р. № 1952-IV ("on State Registration of Corporeal Rights on Immovable Property and Their Encumbrances" dated July, 01, 2004 No.1952-IV).

⁵³ Про внесення змін до закону України «Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень»: Закон України від 11.02.2010 р. № 1878-VI (on Introducing Changes to the Law of Ukraine "on State Registration of Corporeal Rights on Immovable Property and Their Encumbrances": the Law of Ukraine dated February, 11, 2010 No.1878-VI).

⁵⁴ Про внесення змін до закону України «Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень» та деяких інших законодавчих актів України щодо децентралізації повноважень з державної реєстрації речових прав на нерухоме майно та їх обтяжень: Закон України від 25.11.2015 р. № 834-VIII (on Introducing Changes to the Law of Ukraine "on State Registration of Corporeal Rights on Immovable Property and Their Encumbrances" and some other legal acts of Ukraine on decentralization of powers for state registration of corporeal rights on immovable property and their encumbrances: the Law of Ukraine dated 25.11.2015 No. 834-VIII).

again by the Supreme Council of Ukraine to last until January, 1, 2020. Introduction of the full-fledged land market has long been a requirement for Ukraine coming from international creditors to grant their loans. The requirement is still included in the list from the International Monetary Fund. However, it is not only about lack of legal regulation, but also the current situation. According to recent surveys run by the “Rating” polling group as commissioned by the International Republican Institute in the end of June, 2019, 68% of Ukrainian citizens did not support lifting of the moratorium for sale of agricultural land. At the same time, only 20% of respondents would vote in favour in case of the referendum. 12% of respondents were undecided about the choice.⁵⁵ However, Volodymyr Zelenskyi elected to be the President of Ukraine on April, 21, 2019, during the recent official visit to Turkey on August, 8, 2019, state that the moratorium on the sale of agricultural land shall have been lifted by the end of 2019.⁵⁶ Another promise to take the next step on the way of land reform was given by Oleksiy Honcharuk, the Prime Minister of Ukraine, in his statement on September, 14, 2019, at the YES forum⁵⁷ in Kyiv. He suggested the land market be introduced in the country⁵⁸. In our view, since public opinions on that matter differ from statements of top public officials, the issue of introducing a new stage of land reform and free land market in Ukraine is going to be difficult and excessively politized to tackle.

6. Conclusions

When adopting the relevant laws and other legal acts related to economic aspects, the state would try to restrict private ownership. It can not be treated as absolute. However, it shall be reliably protected by the state from any infringements. After all, property rights, along with such rights and freedoms as the free-

⁵⁵ Лише 20% українців підтримують вільний продаж землі (Only 20% of Ukrainians support free sale of land), <https://www.ukrinform.ua/rubric-economy/2737624-lise-20-ukrainciv-pidtrimuut-vilnij-prodaz-zemli.html>, consulted on 1.10.2019.

⁵⁶ Зеленський: Мораторій на продаж землі в Україні буде знято до кінця року (Zelenskyi: suspension on the sale of land in Ukraine shall be lifted by the end of the year), <https://agropolit.com/news/13090-zelenskiy-moratoriy-na-prodaj-zemli-v-ukrayini-bude-znyatiy-do-kintsya-roku>, consulted on 1.10.2019.

⁵⁷ YES (Yalta European Strategy) – annual conventions of politicians, diplomats, public and civic activists, journalists, analysts, and business community from over fifty countries worldwide where they discuss new ideas and perspectives on the trends for development of Europe, Ukraine, and the entire globe. Since the moment of its establishment in 2003, they have taken place in Yalta, but after annexation of the territory of the Autonomous Republic of Crimea in 2014 by the Russian Federation, they have been held in Kyiv.

⁵⁸ Нові правила для працюючих і продаж землі: що пообіцяв прем'єр Гончарук на YES (New regulations for the employed population and the sale of land: what Prime Minister Honcharuk Promises at the YES), <https://www.obozrevatel.com/ukr/economics/economy/sprosyat-zvilnennya-dozvolyat-prodavati-zemlyu-i-zdivuyut-reformami-scho-poobitsyav-premer-goncharuk-na-yes.htm>, consulted on 1.10.2019.

dom of entrepreneurial activities, the freedom of contract, the choice of employment and residence, make a framework for legal infrastructure of the market. The peculiarity of Ukraine that differentiates it from other post-Socialist European states is both in large delay and in banal imitation of market reform in the country. In Ukraine, we still have political and economic authority of Soviet political elite. It disabled equal access to economic resources to other economically active citizens of Ukraine. Privatization of public property and land reform have long impeded economic growth in Ukraine. They intended to transform Ukrainian citizens into owners. However, lack of capital market, incapacity to search for an efficient owner, and uncompleted reform (land reform, in the first place) hindered the delivery of economic or social outcome from privatization and land reform. Engaging Ukrainian citizens into privatization acted as an imitation of market reform which signs are still visible today.

Despite the guarantees fixed in the Constitution of Ukraine and other acting laws for the exercise of property rights, it can be stated that, unfortunately, Ukraine is not a model of efficient development of market economy. After all, it is important not only to have the reforming law in line with the *Zeitgeist* but also the political will to implement unpopular but much needed market reform, such as, for example, in Poland some time ago. Today, we can confirm that with a much better starting point in terms of economic capacity, as compared to many other European Post-Socialist states, Ukraine was ruled by the “color-changed” Soviet party economic elite. Thus, it ended up with currently being one of the poorest European countries.

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Parliamentary Groups - Internal Structures of the Chamber of Deputies and the Senate. Controversial Aspects on Establishing Parliamentary Groups Arising from the Parliamentary Practice

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Abstract

The political configuration of the Parliament Chambers is determined by the citizens' vote and expresses the representative nature of the legislative chamber. The senators and the deputies are organized in parliamentary groups, according to regulations of each Chamber. Creating parliamentary groups represents a constitutional right and not an obligation; all and any imperative term is null. The activity of the political parties and other the political groups engaged in the election campaign continues within the Parliament, by forming "parliamentary groups" or "political groups", usually made of members of the Parliament under the same political group or who subscribe to the same program or are followers of the same idea. In the parliamentary practice, establishing parliamentary groups by the deputies and senators who become unaffiliated as a result of leaving the party under which they were elected is still a controversial aspect. The Constitutional Court of Romania has repeatedly ruled on the possibility to constitute such groups, of which establishment was blocked by the parliamentary majority existing at a given time.

Keywords: *parliamentary party, parliamentary group, independent Member of Parliament (MP), unaffiliated MP, decisions of the Constitutional Court.*

JEL Classification: K10, K23

1. Introductory considerations

As representative body, the Parliament is formed after the legislative elections, and the MPs express the political will of the electoral corpus, proportional to the number of votes obtained by each and every parliamentary political party. Consequently, the legislative Chambers acquire a new political configuration arising from the spectrum of the political parties which have obtained parliamentary mandates and from the number of such mandates, configuration which shall be maintained throughout the entire length of the legislature and will be reflected in the entire organization and functioning of each Chamber of the Parliament. Therefore, the political configuration shall correspond to the electoral

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will of the population expressed by the votes granted. In principle, the configuration of the Chambers of the Parliament may be changed only after new legislative elections.

The criterion of the political configuration used in organizing the structures of the Chambers of the Parliament was laid down in article 64 (5) of the Constitution according to which “*Permanent offices and parliamentary commissions are formed in line with the political configuration of each Chamber*”. The political configuration is the result of the votes granted by the voters to the candidates proposed by the political parties which registered to be part of the election campaign and also a fundamental requirement of the representative democracy. In addition, the political configuration of the Chambers of the Parliament expresses the representative nature of the legislative chamber. In a pluralistic political system, the more diverse the political configuration is, the higher the degree of representativeness is.

The Constitution of Romania³, Law no. 96/2006 regarding the Status of the Deputies and Senators⁴, the Regulations of the two Chambers clearly set forth how the Parliament should be organized and should function. The internal structures of the two Chambers of the Parliament are similar, consisting of a president, a permanent office, a committee of the leaders of the parliamentary groups, parliamentary groups, parliamentary commissions.

Considering that the Constitution defines in article 8 (2) the role of the political parties, i.e. to contribute “*to defining and expressing the political will of the citizens...*”, constituting the parliamentary groups is an imperative requirement, whereas every group has to be the result of the political will of the electors of a certain segment of the electoral corpus. Nonetheless, the parliamentary groups are not mandatory structures of the Parliament; they result from the voluntary association of the deputies and senators; creating parliamentary groups represents a constitutional right and not an obligation, as the deputies and the senators are independent and any imperative mandate is null. In direct relation to

³The Constitution of Romania, as amended and completed by Law for the revision of the Constitution of Romania no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003, republished by the Legislative Council, in accordance with article 152 of the Constitution, with update of the names and a new numbering of the texts (following republication, article 152 became article 156). The law for the revision of the Constitution of Romania no. 429/2003 was approved by national referendum on 18-19 October 2003 and came into force on 29 October 2003, date of publication in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 of the Decision of the Constitutional Court no. 3 of 22 October 2003 for confirmation of the result of the national referendum of 18-19 October 2003 for the law for the revision of the Constitution of Romania. In its initial form, the Constitution of Romania was adopted in the meeting of the Constituent Assembly of 21 November 1991, was published in the Official Gazette of Romania, Part I, no. 233 of 21 November 1991 and came into force following its approval by national referendum on 8 December 1991.

⁴Republication of Law no. 96/2006 regarding the Status of the Deputies and Senators was published in the Official Gazette of Romania, Part I no. 49 of 22 January 2016.

the vote granted by the electors, the parliamentary groups include a higher or, where appropriate, a lower number of members.

After 1990 there were controversies in respect of establishing parliamentary groups by the MPs who became independent by leaving the political parties on the lists of which they were elected or by being excluded from these parties. The normative acts, i.e. Law no. 96/2006 regarding the Status of Deputies and Senators and the Regulations of the Chamber of Deputies and the Regulations of the Senate, even though amended, failed to make references to the creation of the parliamentary groups, as the interest of the majority parties was to hinder the establishment of parliamentary groups by MPs who became independent.

The provisions of the Law no. 96/2006 regarding the Status of the two Chambers and the Regulations of the two Chambers regulating the creation of parliamentary groups, in particular by MPs who became independent or unaffiliated, were the subject matter of some referrals to the Constitutional Court of Romania. In this respect, between 1993 and 2018, the Constitutional Court of Romania ruled in several Decisions⁵, the general opinion being that the Regulations do not forbid creation of parliamentary groups by MPs who changed their parliamentary group, the MPs' possibility to affiliate to a parliamentary group or to establish a group made of MPs who became independent/unaffiliated.

Although the general opinion expressed by the Constitutional Court is the same as expressed previously, the parliamentary practice, determined by the will of the parties forming the parliamentary majority, is controversial. The creation of parliamentary groups by independent MPs was denied in several parliamentary sessions⁶/unaffiliated.

The blockage of establishing parliamentary groups by unaffiliated MPs is still an element of dispute between the parties forming the parliamentary majority and such MPs, as the latter's rights, as recognized by the Constitution of Romania, Law no. 96/2006 and the Regulations of the two Chambers, are therefore violated.

On the other hand, there is also a practical side to organizing deputies and senators in parliamentary groups, side highlighted by the unitary work, with the possibility to express and achieve more efficiently the political and social objectives to the best interest of the citizens. This is the reasons why the Permanent Offices of the Chambers of the Parliament should not prevent, based on contrary political reasons or interests, the will of the unaffiliated MPS to renounce their

⁵ For details see Chapter III, Section III *Controversial Aspects on Establishing Parliamentary Groups. Practice of the Constitutional Court of Romania regarding parliamentary groups.*

⁶ By way of example, see request to establish in the Senate the parliamentary groups UNIREA, DEMOCRATIA, which were denied as it was considered that they fail to meet the regulatory requirements, even though, under the same legal and regulatory requirements, the creation of the parliamentary group PRO EUROPA was acknowledged in the Chamber of Deputies, based on the decision of the Constitutional Court 85/2018.

capacity and affiliate to other political groups or reunite in groups without a distinct ideology or program, being animated only by their desire to fulfill some social objectives to the best interest of the citizens. The consequences of the establishment or the recognition of a parliamentary group arise from the provisions of the Regulations of the two Chambers. We enumerate below some of these consequences:

1. They may submit proposals to the president of the Chamber according to article 23 of the Regulations of the Senate and article 22 of the Regulations of the Chamber of Deputies;

2. They may propose representatives in the Permanent Offices, commissions of the Chamber and offices of the Chamber commissions, special commissions, commissions of inquiry or common commissions of the two Chambers according to article 18 of the Regulations of the Senate, article 15 (3) of the Regulations of the Chamber of Deputies.

3. They may propose candidates for positions in Permanent Offices according to article 18 in the Regulations of the Senate, article 15 (3) in the Regulations of the Chamber of Deputies;

4. They may propose candidates for the management of the Permanent Commissions (president, vice-president, secretary);

5. They may propose members in the Central Electoral Office, County Electoral Offices, Electoral Offices of the Polling Stations⁷;

6. They may request resubmission of a bill to the commission already notified in substance, by virtue of article 15 (3) in the Regulations of the Chamber of Deputies;

7. They may contest the result of the vote expressed in the plenary, according to article 18 in the Regulations of the Senate, article 15 (3) in the Regulations of the Chamber of Deputies;

8. They may request, through the leader of the group, the revocation of the members of the Permanent Office or the members of the offices of the commissions proposed by the groups they represent, according to article 18 in the Regulations of the Senate, article 15 (3) in the Regulations of the Chamber of Deputies.

Another controversy which should be analyzed regards the differences between “*political parties represented in the Parliament*”, “*parliamentary political parties*” or “*political parties and other political groups with a parliamentary group in minimum one of the Chambers of the Parliament*”.

Therefore, in the context of the presidential elections in November 2019,

⁷ Law no. 115/2015 for election of the local public administration authorities, Law no. 393/2004 regarding the Status of the local elected representatives, Law no. 370/2004 regarding election of the president of Romania, Law no. 208 of 20 July 2015 regarding election of the Senate and the Chamber of Deputies, as well as organization and functioning of the Permanent Electoral Authority).

the Ombudsman made a request to the Constitutional Court on 25 August 2019⁸, considering that:

(1) article 2 (2) letter e) of Law no. 370/2004 for the election of the President of Romania, republished, stating that “*parliamentary parties are political parties which have their own parliamentary groups in minimum one of the Parliament Chambers and which received, following the latest general elections for the Parliament of Romania, mandates of senators and deputies for the candidates registered on their lists or the lists of a political or electoral alliance to which such parties or political groups belonged*” *contravene article 2 (1), article 62 (1) as well as article 103 (1) of the Constitution as it assigns the syntagm “parliamentary political parties” the meaning of “parties and other political groups which have they own parliamentary group in minimum one of the Parliament Chambers, instead of “parties represented in the Parliament”*. In support of this request, the Ombudsman considers that the constitutional texts impose fulfillment of two cumulative conditions: (1) the party should have their own parliamentary group in minimum one of the two chambers of the Parliament, and (2) the party has received mandates of senators and deputies in the latest general elections for the Parliament of Romania. Consequently, this definition of the syntagm “parliamentary political party” institutes limitations of the procedural rights within the electoral process associated to the right of being elected. By way of example, it mentions: the right to be represented within the Central Electoral Office, the right to participate to the first stage of the drawing lots to establish the order of the names registered on the ballot papers, the right to be represented within county electoral offices/electoral offices of the sectors of Bucharest Municipality or the right to participate to the first stage of the completion of the electoral offices of the polling stations. The Ombudsman considers that a political party acquires the capacity of parliamentary party by virtue of the fact that it received mandates in the Parliament of Romania by popular ballot cast in the election process, having members in both Chambers of the Parliament elected by universal, equal, direct and secret vote, in accordance with provisions of article 62 (1) of the Constitution. The nature of the parliament party depends on the popular vote, and not on creating or not creating a parliamentary group, which may be, at a given time, prevented by administrative, procedural or circumstantial means used by the other electoral competitors.

(2) article 118 (2) of Law no. 208/2015 regarding election of the Senate and Chamber of Deputies, as well as organizing and functioning of the Permanent Electoral Authority, as amended, which mentions that “*Within the meaning of the present law, parliamentary political parties mean the parties or other political groups which have their own parliamentary group in minimum one of the Chambers of the Parliament and which have received, following the latest elections for*

⁸ The case was registered at the Constitutional Court of Romania under no. 8219/10.25.2019. The case has no court term, to be put in the Court's debate in the next period.

the Parliament of Romania, mandates of deputies and senators for the candidates registered on their lists or the lists of a political or electoral alliance to which such parties or political groups belonged, as well as political and electoral alliances which include such parties or political groups” is contrary to article 2 (1), article 62 (1), as well as article 103 (1) of the Constitution as it assigns the syntagm “parliamentary political parties” the meaning of “parties and other political groups which have they own parliamentary group in minimum one of the Parliament Chambers, instead of “parties represented in the Parliament”.

2. Principles, role and internal organization of the Parliament of Romania

2.1. Principles and rules of parliamentary conduct

It is essential for our study to analyze the principles and the rules of the parliamentary conduct. The normative acts regulating the matter are: the Constitution of Romania, Law no. 96/2006 regarding the Status of the Deputies and Senators, the Code of conduct for Deputies and Senators⁹.

The principles underlying the parliamentary activity are:

1. Principle of national interest. The principle is defined in article 10 of Law no. 96/2006 providing that *“The deputies and senators shall act in the best interest of the whole nation and the inhabitants of the electoral constituency that they represent, respectively the citizens of the national minorities whom they represent.”*

2. Principle of the representative mandate. The representative role of the Parliament was instituted in the Constitution of Romania in 1866¹⁰ and taken over by all other Constitutions. Therefore, this regulation is found even today in article 69 (1) according to which *“In exercising their mandate, the deputies and the senators serve the people.”*

Specific to democracy, this principle excludes the possibility of an imperative mandate for deputies and senators as they serve only the people. Furthermore, the same article 69 (2) sets forth the nullity of the imperative mandate¹¹.

Although we may be tempted to consider that the most representative authority is the President of Romania¹², the Parliament is the supreme representative

⁹Adopted by Decision of the Romanian Parliament no. 77/2017, published in the Official Gazette of Romania, Part I no. 805 of 11.10.2017.

¹⁰Article 8 stated *“The members of both Assemblies represent the Nation, and not only the county or the locality which appointed them”*.

¹¹See Decisions of the Constitutional Court of Romania no. 44/1993, 45/1994, 46/1994.

¹²The President of Romania represents the Romanian state and guarantees the national independence, unity and territorial integrity of the country. The President of Romania shall see to the respect for the Constitution and the good functioning of the public authorities. To this end, the President

body of the Romanian people and the only legislative authority of the country¹³. It represents all relevant options of the society, the president being only the expression of an electoral majority.

3. Principle of legality. The principle is defined by Law no. 96/2006 in article 11 (1) which sets forth that *“In their capacity of elected representatives of the Romanian people, the deputies and the senators fulfill their tasks and exercise their rights in accordance with the Constitution, the country laws and the regulations of the Chamber of Deputies and the Senate, throughout the entire length of their office.”* Consequently, in relation to all and any activity carried out as representatives of the people, the MPs shall conduct in line with the provisions of the Constitution, the law and the regulations, as well as the requirements imposed by the Code of conduct for deputies and senators.

4. Principle of good faith. The principle of good faith is defined by Law no. 96/2006 in article 11 (2) which provides that *“The deputies and the senators are forbidden to assume in relation to natural or legal persons financial obligations or obligations of any other nature intended to influence the exercise of their mandate in good faith and conscientiously.”*

In the Code of conduct for deputies and senators this principle is found under the name of “Independence”. Therefore, article 2 takes over the provision on nullity of the imperative mandate and also imposes the deputies and senators the conduct of not conditioning the exercise of one’s voting rights on gaining some financial advantages.

In support of this principle, the deputies and the senators are imposed the obligation to publicize all and any personal interest which may influence their public actions (article 5 - *Probity* in the Code of conduct for deputies and senators).

5. Principle of transparency. This is one of the principles with the highest impact on the citizens represented by the deputies and senators. Defined in article 12 of Law no. 96/2006 as being the obligation of the deputies and senators to show transparency in their parliamentary activity, to maintain a permanent dialogue with the citizens on issues of interest for the latter and which results from assuming and exercising their mandate of MP, this principle was also taken over by the Code of Conduct in article 4 *“The deputies and senators shall participate to parliamentary activities, shall maintain contact with the citizens and shall exercise their mandate in a transparent manner”*.

6. Principle of loyalty. The definition of this principle may be found in article 13 of Law no. 96/2006 *“Throughout their mandate, the deputies and the senators shall be loyal to Romania, the people and the respect to citizens.”*

acts as a mediator between the state powers as well as the state and the society (Article 80 – Constitution of Romania).

¹³Article 61 (1) of the Constitution of Romania. For details, see Chapter II, Section II, 2.2.1 Role of the Parliament.

7. Principle of MPs' election by universal, equal, direct, secret and freely expressed vote. This principle is found in provisions of article 62 (1) of the Constitution of Romania according to which electing the Chamber of Deputies and the Senate by universal, equal, direct, secret and freely expressed vote is the essence of democracy.

The specificity of our constitutional regime consists in the right of the organizations which belong to national minorities to be represented in the Parliament. The representativeness is ensured by the organization which appoints a deputy providing that they received in the general elections throughout the country the number of votes corresponding to a specific representation rate. This is a positive discrimination as it is in favor of the respective minority and is justified by the right to identity as set forth in article 6 (1)¹⁴.

8. Principle of parliamentary sovereignty. Consecrated by article 64 of the Constitution of Romania, this principle is the essence of parliamentarism. It implies regulatory autonomy, financial autonomy and institutional autonomy.

In terms of regulatory autonomy, it legally means that each Chamber should be organized and should function in line with their own set of rules and regulations. The scope of the two sets of rules and regulations – one for the Chamber of Deputies and one for the Senate – also includes the regulations on joint meetings, according to procedure regulated by article 65 (2) letter k) of the Constitution of Romania.

The organization and functioning of each Chamber imply creation of their own permanent office, appointment of the president, organizing of the deputies and senators in parliamentary groups, establishing permanent and temporary commissions of inquiry, which are special and yet common to both Chambers. In political terms, establishing such structures shall comply with the political configuration.

The financial autonomy is ensured by the budget of each Chamber approved by the latter, as a component of the state budget.

The institutional autonomy implies creation of the organizational structures mentioned above, on the one side, and creation of the working apparatus made of parliamentary clerks under a separate administrative structure, on the other side.

2.2. Role and internal organization of the Parliament of Romania

2.2.1. Role of the Parliament

The Parliament of Romania is the supreme representative body and the

¹⁴Article 6 (1) of the Constitution of Romania provides: "The state recognizes and guarantees national minorities the right to maintain, develop and express their ethnic, cultural, linguistic and religious identity".

single legislative authority of Romania. It has a bicameral structure and is made of the Senate and the Chamber of Deputies¹⁵. The general material competency granted to the Parliament means that all and any issue of public interest is part of its scope. This is why, in its capacity of supreme body, the Parliament may engage the responsibility of the President of Romania, even though the latter benefits from a legitimacy similar to the Parliament and is elected, similarly to the MPs, through a universal, equal, direct, secret and freely expressed vote. The primacy of the two Chambers of the Parliament, the Chamber of Deputies and the Senate, confer the constitutional political regime its nature of parliamentary regime, despite the fact that, following election of the President by the electoral corpus, the former has also, from this point of view, a mixed character. In addition, as it is natural in such a political regime, the Government is politically accountable to the Parliament, which may dismiss them by adopting a motion of censure¹⁶.

We may conclude that, in our constitutional regime, the Parliament has a central place; the efficiency of the entire state and implicitly, the socio-economic efficiency depend, in the final analysis, on how the Parliament functions. Furthermore, the MPs are accountable to their electors and this is what makes the Parliament a central institution of the development of democracy.

2.2.2. Internal organization of the Parliament of Romania

As already mentioned in relation to the structure of the Parliament, this is structured on two Chambers: Senate and Chamber of Deputies. Each of these two Chambers has their own internal structures, respectively: President, Permanent Office, Committee of the leaders of the parliamentary groups, Specialist Commissions, Joint Commissions, Special Commissions and Commissions of inquiry.

A. Validation of mandates. The newly-elected Chambers are convened by the President of Romania. This convening has a double legal meaning: on the one side, according to article 70 (2) of Constitution, this is the date when the capacity of the MPs of the previous Parliament ceases; on the other side, the preliminary procedure on establishing leadership bodies and working bodies of the Parliament is launched and, therefore, the newly-elected MPs take over their office. No debates may be organized before the validation of the mandates, except the debate intended for validation. The validation seeks to check the electoral files of the elected MPs in order to detect any failures to comply with the constitutional

¹⁵ On the principle of bicameralism in Romanian law and in comparative law see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 7-21.

¹⁶Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăescu, *Constitution of Romania, Revised, Comments and Explanations*, ALL Beck Publishing House, Bucharest, 2004, p. 119.

and legal provisions regarding the election as well as any potential fraud.¹⁷ The mandates are validated or invalidated by the vote of the majority of the deputies/senators present. The validation commission has the status of a parliamentary commission.

Following validation of minimum two thirds of the number of the members of each Commission, it is considered that they are duly constituted and the deputies and senators whose mandates were validated shall pronounce the oath of allegiance provided in Law no. 96/2006 regarding the Status of Deputies and Senators. This is the moment when the members of the Parliament are entitled to fully exercise their mandate

After due establishment, the mandate of the President (the oldest member of the group) shall also cease as his/her prerogative was to chair the validation meetings.

B. Formation of the parliamentary groups. The system of the parliamentary groups is compatible with the principle of political pluralism, which means several parties and their right to submit candidacies in order to form the Parliament. The deputies and the senators elected shall present in the Parliament the program and the objectives of the party which proposed them as candidates and also supported them throughout the election process. This is therefore a basic condition that the deputies and senators should work in a unitary and organized manner, or, this involves conducting parliamentary activities inside the parliamentary groups and also a strict party discipline¹⁸.

The deputies and the senators reunite in parliamentary groups which are structures of the two Chamber of the Romanian Parliament.

A parliamentary group should have minimum 10 members, in case of deputies, and minimum 7 members, in case of senators. The parliamentary groups provide an indication as to the political structure of the Chamber of Deputies and Senate.

The creation of the parliamentary group, as a form of political organization of the Parliament, takes place just after the elections and conditions the entire weight in the economy of its functioning. The Parliament is “organized” after the parliamentary elections so that the votes expressed by the citizens of the country and the parliamentary configuration should be proportional and symmetric. The same applies when forming the Permanent Office and the Parliamentary commissions as well as when deciding on the leadership positions corresponding to such structures. The structure of the Permanent Office of the Chamber of Deputies is established depending on the time of the parliamentary elections and not on the formation of a new circumstantial political majority in the Parliament. Following the elections, the Parliament appoints their leadership structures and the parliamentary commissions, which created the so called “political algorithm”. In the

¹⁷Marian Enache, *Parliamentary Procedures*, Universul Juridic Publishing House, 2013, p. 21.

¹⁸*Ibid.*

light thereof, at the beginning of each parliamentary legislature, within the framework of some political negotiations, a decision is made on the parliamentary group who may appoint the president of the Chamber and also the positions within the Permanent Office which are to be distributed to each parliamentary group. This distribution is consolidated by the will of the electoral corpus, expressed on the occasion of the parliamentary elections, and may not be amended by political migrations of a potential reformation of the parliamentary majority. Therefore, a new parliamentary majority constituted during the exercise of one's mandate may not trigger alteration of the political structures of the permanent offices or adding new members to the parliamentary commissions¹⁹.

C. Appointing presidents of each Chamber and other members of the Permanent Offices. Pursuant to article 64 (2) of the Constitution, the president of the Chamber of Deputies and the president of the Senate are elected for the entire length of the mandate of the Chambers. Therefore, they are elected to fulfill a mandate of which content is to achieve the tasks provided by the Constitution and the Regulations for their positions. The Constitution expressly sets forth in article 66 (3), article 89 (1), article 98 (1) and article 146 letters a), b), c) and e), the duties of the presidents of the two Chambers of the Parliament. Article 34 of the Regulations of the Chamber of Deputies also sets forth the duties of the president by which the latter ensures functioning of the Chamber for its entire duration. Therefore, the position of the president of the Chamber is extremely important in constitutional terms, importance rendered by its complexity and its role of authority stated in title III of the Constitution. The president of the Chamber of Deputies is appointed for the entire duration of the Chamber, whereas the other members of the permanent offices are appointed at the beginning of each session. This distinction underlines the necessity to ensure the permanency of the position of president of the Chamber. The president is elected by the majority of the deputies²⁰ present, whereas the vice-presidents, secretaries and quaestors forming the Permanent Office are elected upon the proposals of the parliamentary groups, in line with their weight according to the political configuration of the Chamber of Deputies and the negotiations of the leaders of the parliamentary groups²¹. Consequently, the president of the Chamber, in consideration of the majority required for his/her election, represents the Chamber, as a whole, both in relations to other authorities, ensuring thus the liaison with the executive power, and at external level, with the MPs of other states. These are aspects distinguishing between the

¹⁹In this respect, see the Decision of the Constitutional Court no. 602/2005¹⁹ – in relation to provisions of article 64 (5) of the Constitution, both for the Permanent Office and for the commissions, their structure is determined by the political configuration of the Parliament emerged from elections.

²⁰See article 22 (2) of the Regulations of the Chamber of Deputies.

²¹See article 24 (1) of the Regulations of the Chamber of Deputies.

president of the Chamber as an institution and the other members of the Chamber.²²

In respect of the election of the president of the Senate, according to the Regulations of the Senate²³, after legal creation of the Senate, election is conducted to elect the president of the Senate, by secret ballot, for the entire length of the mandate, and the other members of the Permanent Office to which they belong: president of the Senate, 4 vice-presidents, 4 secretaries and 4 quaestors. The President of the Senate is also the president of the Permanent Office. The political affiliation of the members of the Permanent Office, in which the president of the Senate is also included, should reflect the political configuration arising from the elections. The candidate who received in the first round of elections the vote of the majority of the senators present is declared to be the president elected. In the event that no candidate received the number of votes required, new rounds of elections will be conducted to which competitors will be the first two candidates who received the highest number of votes or, where appropriate, all candidates who came first with the same number of votes, or the first and all candidates who came second, with the same number of votes. The candidate who received the vote of the majority of the senators present is declared to the president.

D. Specialist commissions, joint commissions, special commissions and commissions of inquiry. The commissions of the Chamber of Deputies²⁴ are working bodies of this Chamber created in order to fulfill tasks provided by the law and the regulations. The commissions of the Chamber of Deputies prepare the working documents for the plenary meetings of the Chamber and exercise the parliamentary control. The Chamber of Deputies constitutes permanent commissions and may constitute special commissions and commissions of inquiry. The permanent commissions of the Chamber of Deputies are made of 11 to 41 deputies, except the Regulatory Commission which is made of a representative of each parliamentary group. The number of permanent commissions is set, for individual case, in the plenary of the Chamber of Deputies, upon the proposal of the Committee of the leaders of the parliamentary groups. The objectives, the number of members, the nominal structure and the leadership of the special commissions

²²DECISION No. 312 of 20 May 2019 regarding the referral on unconstitutionality submitted by the Liberal Party of the provisions of article 35 (1) - (3) of the Regulations of the Chamber of Deputies, republished, by which provisions of article 35 (1) to (3) of the Regulations of the Chamber of Deputies are deemed to be unconstitutional, as, by lack of limitation of the delegation of duties of the President of the Chamber of Deputies toward vice-presidents, they violate requirements of article 1 (5) of the Constitution, in its structure referring to the status of the legal norms and article 146 letters a), b), c) and e) of the Constitution, with regard to the President's own, exclusive responsibility to refer certain matters to the Constitutional Court.

²³Articles 22 to 24 of the Regulations of the Senate.

²⁴Provisions regarding the Commissions of the Chamber of Deputies may be found at articles 40 to 83 of the Regulations of the Chamber of Deputies.

and commissions of inquiry of the Chamber of Deputies are approved in its plenary upon their establishment. A deputy shall be part of a single parliamentary commission, except the members of the Regulatory Commission, Validation Commission, Commission for information technology and communication, Commission for equal chances for men and women, Commission for communities of the Romanians abroad, Commission for investigation of abuse, corruption and for petitions and Commission for European affairs, who may also be members of other permanent commissions. Throughout their mandate, the members of the Permanent Office of the Chamber of Deputies may opt for one of the permanent commissions and for one of the commissions set as exceptions in the present paragraph. The deputies may also be members of the joint commissions with the Senate.

Only one parliamentary committee may belong: (1) the deputies and the senators who are members in the permanent joint committee of the Chamber of Deputies and the Senate for exercising parliamentary control over the Foreign Intelligence Service²⁵; (2) the deputies and the senators who are members in the permanent joint committee of the Chamber of Deputies and the Senate for exercising parliamentary control over the Romanian Intelligence Service²⁶.

In case of the Senate²⁷, the Commissions are internal working structures of the Senate, constituted to prepare the legislating activity and to exercise parliamentary control. The Senate constitutes their own permanent commissions and may institute commissions of inquiry, special commissions, including joint mediation commissions, and joint commissions with the Chamber of Deputies. The number of the commissions for inquiry, special or common commissions, the name and the structure of each and every commission as well as the number of such commissions are set by the Senate, upon the proposal of the Permanent Office or the Committee of the leaders, where appropriate. The number of seats in the commissions which is to be distributed to each parliamentary group is set by the Committee of the leaders, within the timeline set by the Permanent Office, so that the political configuration of the Senate at the beginning of each parliamentary session should be complied with.

In the event that one of the members of the commission resigns or is excluded from the parliamentary group which proposed him/her, the parliamentary group may propose another representative. The proposal is subjected to vote in

²⁵ Parliament's decision on the organization and functioning of the Standing Joint Committee of the Chamber of Deputies and the Senate for exercising parliamentary control over the Foreign Intelligence Service.

²⁶ Art. 6 of the Parliament Decision no. 3/1993 regarding the organization and functioning of the permanent Joint Commission of the Chamber of Deputies and the Senate for the exercise of parliamentary control over the Romanian Information Service - republished, published in the Official Gazette of Romania, Part I, no. 168 / 08.22.2018.

²⁷ Provisions regarding the commissions of the Senate may be found in articles 45 to 82 of the Regulations of the Senate.

the plenary of the Senate. The nominal proposals are announced by the leaders of the parliamentary groups within the timeline set by the Permanent Office. All senators, except the president of the Senate, shall be members of minimum one permanent commission. A senator may not be a member of more than two permanent commissions, except the Regulatory Commission. The Senate approves the nominal structure of each commission by open vote of the majority of the senators present. The commissions are led by an office made of: a president, a vice-president and a secretary. A senator may be a member of the leadership office of only one permanent commission.

At the level of the Parliament, there are permanent joint commissions²⁸ of the two Chambers, parliamentary friendship groups with other parliaments and permanent delegations to international parliamentary organizations. In addition to permanent joint commissions, the two Chambers may create special commissions and commissions for parliamentary inquiry. The leaders of the parliamentary groups in the Chamber of Deputies and Senate negotiate the numerical structure and make proposals on the nominal configuration of the joint structures and their leadership in order to ensure compliance with the political structure of the two Chambers and the ratio between the number of deputies and the number of senators.

3. Regulating the formation of the Parliamentary Groups. Functioning of the Parliamentary Groups

3.1. Evolution of legal regulation

The creation of the parliamentary group, as a form of political organization of the Parliament, takes place just after the elections and conditions the entire weight in the economy of its functioning. The Parliament is “organized” after the parliamentary elections so that the votes expressed by the citizens of the country and the parliamentary configuration should be proportional and symmetric. The same applies when forming the Permanent Office and the Parliamentary commissions as well as when deciding on the leadership positions corresponding to such structures. At the beginning of each parliamentary legislature, within the framework of some political negotiations, a decision is made on the parliamentary group who may appoint the president of the Chamber and also the positions within the Permanent Office which are to be distributed to each parliamentary group. This distribution is consolidated by the will of the electoral corpus, expressed on the occasion of the parliamentary elections, and may not be amended by political migrations of a potential reformation of the parliamentary majority.

²⁸Provisions regarding joint commissions of the Chamber of Deputies and Senate may be found in article 4 of the Regulations of the joint activities of the Chamber of Deputies and Senate, republished in the Official Gazette of Romania, Part I no. 110 of 05 February 2018.

Therefore, a new parliamentary majority constituted during the exercise of one's mandate may not trigger alteration of the political structures of the permanent offices or adding new members to the parliamentary commissions.

The requirement regarding formation of the parliamentary groups in the legislative Chambers is primarily a need of organizational nature: the parliamentary group reuniting in principle the senators and deputies who ran and were politically, financially, logistically, electorally supported by the same party or independent MPs, will be more efficient in parliamentary terms providing that they act as a united team, in line with a strict party discipline toward meeting their political objectives. From this perspective, the political groups are organizational forms by which the parliamentary parties participate to the governing act, they do politics, or politics is done depending on the interest of a certain party.

Opinions were expressed²⁹ according to which doing politics contradicts article 2 (2) of the Constitution which sets forth that “*no group or person may exercise sovereignty on their own behalf*”. The constitutional interdiction also refers to the creation of some parliamentary groups outside political parties which received mandates of senator or deputy. The connection between the principle of sovereignty and the political action of the parliamentary parties resides in the fact that the sovereignty expresses the will of the people and all and any political decision adopted by the Parliament, based on the senators' and deputies' vote, is an act of national sovereignty and is implemented as a sovereign will, which is generally mandatory. Under such circumstances, it is nonsensical to create a parliamentary group outside a party and without their support; it is an undertaking outside the logic and the philosophy of the parliamentary law.

3.1.1. Constitutional provisions

The starting point in our study concerning the creation of parliamentary groups is represented by provisions of the Constitution of Romania. We see that provisions of article 61 (3) of Constitution of Romania of 1991³⁰ stating that “*Deputies and senators may establish parliamentary groups according to regulations of each Chamber*” were taken over by the present Constitution of Romania in article 64 (3).

Pursuant to constitutional provisions, organizing and functioning of each Chamber involves creating a permanent office, appointing the president, organ-

²⁹ Cristian Ionescu, Corina Adriana Dumitrescu, *Constitution of Romania, Comments and Explanations*, C.H. Beck Publishing House, Bucharest, 2017, p. 723; Ion Deleanu, *Institutions and Constitutional Procedures in Romanian Law and in Compared Law*, C.H. Beck Publishing House, Bucharest, 2006, p. 268.

³⁰Constitution of Romania of 1991 was adopted in the meeting of the Constituent Assembly of 21 November 1991, was published in the Official Gazette of Romania, Part I, no. 233 of 21 November 1991 and came into force following its approval by national referendum of December 8, 1991.

izing in parliamentary groups by the members of each Chamber, constituting permanent commissions and temporary commissions which are special, inquiry and also common commissions of both Chambers. In political terms, establishing all these structures has to observe the political configuration.

Considering that the Constitution defines in article 8 (2) the role of the political parties, i.e. contributing to defining and expressing the political will of the citizens, the creation of parliamentary groups is a key requirement. The essential element in establishing a parliamentary group is the manifestation of the desire to affiliate or reunite in a parliamentary group of a certain number of deputies or senators. The method used to create parliamentary groups results in how the Chamber of Deputies or the Senate are politically configured. In this sense, the Constitutional Court ruled³¹ "*political configuration of each Chamber means its formation in harmony with the votes expressed in the election process, in line with the proportion received by the parliamentary groups compared to the total number of each Chamber*". Therefore, the political configuration of the Chambers of the Parliament is the result of the will expressed by the electoral corpus. Consequently, the regulatory provisions on establishment of parliamentary groups are underlined by the principle of freedom of association, as the senators and deputies are constitutionally entitled to associate in these structures, and not the interdiction of creating groups, except when, by creating such groups, the electoral life of the citizens is disregarded³².

Taking into account that electing the Chambers involves participation of the candidates proposed by the political parties, and, where appropriate, by political or electoral alliances, it is natural that the Parliament elected should have a certain political hue or configuration. This results from the spectrum of all political parties whose elected representatives – deputies and senators – are members of each Chamber. It is extremely important to know the political configuration of the Chamber of Deputies and the Senate, as the entire parliamentary activity expresses the confrontation or the collaboration among the political parties³³.

Some authors³⁴ consider that it is an organizational choice instead of a political obligation, even though the parliamentary groups associate in line with political criteria. The Constitution could not have provided the deputies and senators' obligation to create parliamentary groups, even in the context of the role of political parties becoming constitutional, as this is a characteristic of the parliamentary mandate which should be exercised by the person who was elected freely, any imperative mandate being null³⁵.

³¹Decision no. 601 of 14 November 2005, published in the Official Gazette of Romania no. 1022 of 17 November 2005.

³²In this respect, see article 16 (7) of the Regulations of Senate.

³³Cristian Ionescu, Corina Adriana Dumitrescu, *op. cit.*, 2017, p. 722.

³⁴*Ibid.*

³⁵Article 69 (2) of Constitution of Romania.

3.1.2. Provisions comprised in Law no. 96/2006 regarding the Status of deputies and senators

The MPs' right to establish parliamentary groups is mentioned in Law no. 96/2006 regarding the Status of deputies and senators. Therefore, according to article 33, they may create parliamentary groups in compliance with the regulations of each Chamber (par 1).

The second paragraph lays down who may belong to parliamentary groups: "deputies, respectively senators, who ran in the elections as representatives of the same political party, political group or political/electoral alliance or deputies or senators who ran as independent and were elected".

Law no.96/2006 does not contain special provisions on the hypothesis of a parliamentary group dissolving due to failure to meet the rules provided for minimum numerical structure (7 senators – in case of parliamentary groups within the Senate, and 10 deputies – in case of parliamentary groups within the Chamber of Deputies). Article 33 (4) of Law sets forth only the legislative solution in case of an MP leaving the parliamentary group, case in which the MPs who have this parliamentary approach become unaffiliated unless they affiliate to another group. The legislator omitted to regulate an objective situation: dissolution of the parliamentary group as a consequence of the reduction in the number imposed by the regulations of the Chamber. In such case, the legislator offers them the alternative to become unaffiliated or join an existing group. Practically, we witness a quasi-imperative mandate sanctioned by the constitutional text as null.

Furthermore, the final thesis of article 33(4) Law no. 96/2006 stipulates that the deputies or senators leaving their parliamentary group and becoming unaffiliated MPs may not create their own parliamentary groups³⁶. *De lege ferenda*, the Parliament should modify this legislative provision and bring it in harmony with the constitutional provisions. It is obvious that the parties which received a parliamentary majority did not want the independent MPs, the MPs who became independent or the unaffiliated MPs to create their own parliamentary groups, with all consequences arising from the capacity of an MP member of a parliamentary group. Another way to intervene on this norm would be a notice referred to the Constitutional Court of Romania by the Ombudsman, and, in the event that

³⁶Regulations of the Chambers completes the legal provision as it follows, for senators the situation is regulated by article 16 (6) corroborated with (5) "*Senators who are members of parties or organizations of citizens belonging to national minorities who do not have the number required to form a parliamentary group may affiliate to other parliamentary groups or may constitute mixed parliamentary groups*", while for deputies the situation is regulated by article 13 (5) "*The deputies of the political parties, political groups, political or electoral alliances as well as independent deputies who do not have the required number to form a parliamentary group may reunite in mixed parliamentary groups or may affiliate to other parliamentary groups.*"

the Court admits such notice, the Parliament should be forced to amend article 33 (4)³⁷.

3.1.3. Provisions comprised in the regulations of the two Chambers

The regulations of the two Chambers have set that the deputies, respectively the senators of a party or political/electoral alliance, may constitute only one parliamentary group. Some authors³⁸, with whose opinion we concur, consider that “the time of constituting a group is not important. The parliamentary group are certainly formed at the beginning of the legislature; yet, neither the Constitution nor the regulations forbid the MPs of a certain political party represented in the Chamber of Deputies or the Senate, who were initially members of another parliamentary group and, in the event they reach the number of members provided by the regulations, to establish a separate parliamentary group throughout the legislature. Should the requirement on the number of members necessary not be met, it may be fulfilled by attracting other MPs who previously left the political group to which they initially belonged, being therefore in the position to constitute a stand-alone parliamentary group.”

The Establishment of the parliamentary groups within the Senate is regulated by the Regulations of the Senate³⁹, in Chapter I – *Organization of the Senate*, Section 2 - *Parliamentary groups, articles 16 to 21*.

Analyzing the initial form of the Regulations of the Senate, adopted by Decision no. 16 of 30 June 1993⁴⁰, articles 13 to 14, we may find the same interdictions: the senators elected on the lists of the same political party or the same political group may constitute only one parliamentary group, the interdiction for the senators to change parliamentary groups or to affiliate to another parliamentary group if they left the group to which they belonged or the interdiction of the independent senators to constitute a parliamentary group. Even though the provisions of the two articles mentioned were deemed to be unconstitutional⁴¹ they may be also found in the current form the Regulations of the Senate.

³⁷ Article 147 of Constitution of Romania - (1) The provisions in the laws and the ordinances in force, as well as the provisions in the regulations, cease to take legal effect within 45 days of publication of the Decision of the Constitutional Court in the event that, within this timeframe, the Parliament or the Government, where appropriate, fails to bring into harmony the unconstitutional provisions with the provisions of the Constitution. In this timeframe, the provisions declared unconstitutional are rightfully suspended.

³⁸Cristian Ionescu, Corina Adriana Dumitrescu, *op. cit.*, p. 724

³⁹Published by virtue of article II of Decision of the Senate no. 163/2018 regarding amendment and completion of the Regulations of the Senate, approved by Decision of the Senate no. 28/2005, published in the Official Gazette of Romania, Part I, no. 919 of 31 October 2018, the texts being re-numbered.

⁴⁰Published in the Official Gazette of Romania, Part I, no. 178 of 27 June 1993.

⁴¹Decision of the Constitutional Court of Romania no. 46 of 17 May 1994, published in the Official Gazette of Romania no. 131 of 27 May 1994.

The senators create parliamentary groups which are internal structures of the Senate. A senator may belong to only one parliamentary group.

A parliamentary group may be constituted and may function providing that it comprises minimum 7 senators who were elected on the lists of the same party, organization of citizens under national minorities, political alliance⁴² or electoral alliance⁴³.

The senators of a political party or organization of citizens under national minorities may constitute only one parliamentary group.

The senators who were elected on the lists of an electoral or political alliance or the independent senators may create either parliamentary groups of the parties or organizations of citizens under national minorities or only one parliamentary group of the alliance or, in the event that they do not reach the number of members required to form parliamentary group, they may affiliate to other parliamentary groups or may establish a mixed parliamentary group.

The establishment of the parliamentary groups within the Chamber of Deputies is regulated by the Regulations of the Chamber of Deputies⁴⁴, in Chapter I – *Organization of the Chamber of Deputies*, Section 2 - *Parliamentary group*, articles 13 to 20.

Although the provisions in the initial form of the Regulations of the Chamber of Deputies was the subject matter of some amendments subjected to control of constitutionality, similarly to the parliamentary groups within the Senate, there are no interdictions, limitations of freedom of association, etc with regard to parliamentary groups within the Chamber of Deputies.

The parliamentary groups as structures of the Chamber of Deputies may be constituted by deputies who ran in the elections on the list of the same political party, the same political alliance, on the lists of a political or electoral alliance and by deputies who ran as independent.

The deputies who ran on the lists of a political or electoral alliance and are members of different political parties may create parliamentary groups of the parties to which they belong.

The parliamentary group within the Chamber of Deputies has to have minimum 10 members. In the event that the deputies do not have the number required to form a parliamentary group, as well as the independent deputies, may reunite in mixed parliamentary groups or may affiliate to other parliamentary

⁴²Definition of the political alliance may be found in article 28 (1) of Law 14/2003, law of political parties: “The political parties may associate based on an association protocol, constituting therefore a political alliance.”

⁴³Electoral alliance – association between parties and/or political alliances with a view to participating to elections, registered with the competent electoral body.

⁴⁴Republished by virtue of article II of Decision of the Chamber of Deputies no. 48/2016 regarding amendment and completion of the Regulations of the Chamber of Deputies, published in the Official Gazette of Romania no. 432 of 9 June 2016.

groups already established. The deputies who represent the organizations of citizens under national minorities, other than the Hungarian minority, may constitute only one parliamentary group.

According to regulatory provisions⁴⁵, the deputies of a party or a political group may constitute only one parliamentary group. This thesis, which we also found in the Regulations of the Senate, in article 16 (3), lays down the obligation to create only one parliamentary group by the political parties, taking therefore account of the political configuration obtained following the elections.

Contrary to the provisions of the Regulations of the Senate and Law no. 96/2006, the Regulations of the Chamber of Deputies provide in article 13 (4) that „*The parliamentary groups of some political parties which merged throughout a legislature establish only one parliamentary group under the name of the new party established by merger, effective the date on which the court decision regarding establishment of the new party remained final*”.

The deputies of the political parties, political groups, political or electoral alliances as well as independent deputies who do not reach the number of members required to form a parliamentary group may reunite in mixed parliamentary groups or may affiliate to other parliamentary groups already established.

3.2. Structure of the parliamentary groups, leadership and technical secretariat

3.2.1. Structure of the parliamentary groups

Corroborating the constitutional, legal and regulatory provisions, we may conclude in reference to the structure of the parliamentary groups, that they are formed as follows:

- MPs of the same political party, political or electoral alliance;
- independent MPs, MPs who became independent or unaffiliated ones;
- MPs of a political party who associated with independent or unaffiliated MPs – mixed parliamentary group;
- MPs of the parties or organizations of the citizens under national minorities.

It was considered in the doctrine⁴⁶ that the essential matters relating to parliamentary groups concern maintenance of their integrity, and “the parliamentary practice proves that the migration of the MPs from one party to another represents an uncontrollable phenomenon (...). In principle, the political migration is accepted at European and international level, starting from the freedom of politi-

⁴⁵Article 13 (2) of the Regulations of the Chamber of Deputies.

⁴⁶Ioan Muraru, E.S. Tănăsescu, *Constitution of Romania. Commentary by Articles*, C.H. Beck Publishing House, Bucharest, 2008, p. 631.

cal association, freedom which may not be stationed to one party. This rule applies to both MPs and any political party. The legal formalities do not usually avert MPs from leaving one party and joining another one, irrespective of their position in the hierarchy of the party which they decided to leave.”

3.2.2. Leadership of parliamentary groups

Each parliamentary group has management bodies, consisting of leaders, vice-leaders and secretaries; however, we see a difference between the provisions of the Regulations of the two Chambers. With regard to the Senate, there is an express mention on the number of vice-leaders, i.e. 2 to 4 vice-leaders, whereas the number is not specified for the Chamber of Deputies.

All and any amendment occurred in the leadership or the structure of a parliamentary group shall be brought to the attention of the president of the Senate, in writing, and shall be signed by the leader of the group.

The chairman of the meeting informs the MPs in the first public meeting on the amendments brought to the structure or the leadership of the parliamentary groups.

Group leaders. The duties of the leader of the parliamentary group within the Senate are enumerated in article 18 (1):

a) he/she presents the Senate, at the beginning of each parliamentary session, the name of the group and its numerical structure;

b) he/she introduces to the Senate the representatives of the group who will be involved in the negotiations regarding the structure of the Permanent Office as well as the negotiations for the structure of the Senate commissions and the offices of the Senate commissions;

c) he/she introduces to the Senate the candidates of the group for the positions in the Permanent Office;

d) he/she participates to the meetings of the Permanent Office, with no right to cast a ballot;

e) he/she may demand continuation, interruption or closure of the debates, in compliance with the provisions of the present regulations;

f) he/she may request the nominal list of the votes expressed on the occasion of the debates in the plenary of the Senate;

g) he/she may contest the result of the vote expressed in the plenary of the Senate;

h) he/she may request a pause for consultations within the parliamentary group of which leader he/she is or, where appropriate, with the other leaders of the parliamentary groups;

i) he/she may propose the method for casting the vote;

j) he/she may propose, on behalf of the parliamentary group, resubmission of a bill to the commission referred to in substance;

l) he/she presents the amendments regarding the participation of the members of the parliamentary group to the Senate commissions;

m) he/she demands, on behalf of the parliamentary group, revocation of the members of the Permanent Office or the members of the offices of the commissions proposed by the group which he/she represents;

n) he/she informs the members of the group on the activities of the Senate and of the Senate commissions;

o) he/she represents the group, whenever necessary, in the activities of the Senate;

p) he/she carries out all and any tasks laid down in the regulations of the group or decided based on the vote of the group.

The tasks of the leader of the parliamentary group within the Chamber of Deputies are regulated by article 15 (3) of the Regulations:

a) he/she presents the Chamber of Deputies the name of the parliamentary group, its numerical and nominal structure, the leadership as well as all amendments occurring throughout the mandate;

b) he/she proposes the Chamber of Deputies the representatives of the parliamentary group in the Validation Commission;

c) he/she represents the parliamentary group and negotiates on their behalf;

d) he/she nominates the representatives of the parliamentary group in the permanent commissions of the Chamber of Deputies, in the special commissions or commissions of inquiry of the Chamber or in the joint commissions of the Chamber of Deputies and the Senate;

e) nominates the representatives of the parliamentary group in the public institutions or authorities under the subordination of the Parliament of Romania, in the parliamentary friendship groups with other parliaments, in the international parliamentary structures to which Romania is part;

f) he/she makes proposals and presents the candidates of the parliamentary group for the leadership positions and the representatives in various structures of the Chamber of Deputies, positions to which the parliamentary group is lawfully entitled, in line with the weight of the parliamentary group in the political configuration of the Chamber of Deputies and the negotiations between the groups leaders;

g) he/she requests revocation or replacement of the representatives of his/her parliamentary group in the structures of the Chamber of Deputies;

h) he/she participates to the meetings of the Permanent Office of the Chamber of Deputies and to the debates, with no right to cast a vote;

i) he/she may demand the plenary of the Chamber of Deputies: a pause for consultations, verification of the quorum, holding some meetings in the plenary behind closed doors, closure of debates in the Chamber of Deputies and change of the work schedule;

j) he/she informs the members of his/her parliamentary group on the activities of the Chamber of Deputies and its structures;

k) he/she nominates the representatives of his/her parliamentary group who are to participate to the debates;

l) he/she presents the amendments of his/her parliamentary group to the bills and the legislative proposals under debate of the commissions of the Chamber of Deputies;

m) he/she makes proposals on resubmission to the commission of a bill or a legislative proposal, in compliance with the present regulations;

n) he/she makes proposals to the plenary of the Chamber of Deputies on the method for casting the vote;

o) he/she may present in the plenary of the Chamber of Deputies the standpoint of his/her parliamentary group with regard to the request for retention, arrest or search or approval for bringing criminal proceedings against, where appropriate, one of the members of his/her own parliamentary group;

p) he/she may delegate his responsibilities to one of the members of the leadership of his/her group; in case these members are not present, delegation is possible to any member of the group.

Vice-leaders. One of the vice-leaders of the parliamentary group replaces the leader when absent or whenever necessary, on the basis of a mandate granted by the latter.

Secretary of the parliamentary group. The secretary of the parliamentary group ensures the preparation of the documents that the parliamentary group needs.

3.2.3. Technical secretariat and logistics

The parliamentary groups create their own technical secretariat of which size and structure are set by the Permanent Office, depending on the size of the parliamentary groups. The persons forming the technical secretariats of the parliamentary groups are employed in accordance with the law and may be public servants or contract staff. The parliamentary public servants appointed within the specialist structures of the Chamber of Deputies and the Senate have a special status, conferred by their tasks and responsibilities undertaken with a view to fulfilling the constitutional prerogatives of the Parliament. According to article 6 of Law 7/2006 regarding the status of the parliamentary public servant⁴⁷(1) “The parliamentary public positions are classified in relation to the level of the tasks of the person holding such parliamentary public position, as follows: a) parliamentary public positions under the category of high-ranking officials; b) management parliamentary public positions; c) operating parliamentary public positions.” The contract staff serving the Parliament operates based on individual employment

⁴⁷Republished in the Official Gazette of Romania, no. 345 of 25 May 2009.

contract and complies with the provisions of the work legislation in force.

The staff working in the technical secretariat of the parliamentary groups are appointed and dismissed by order of the Secretary General of the Senate, upon the proposal of the respective parliamentary group, through their leader.

The parliamentary groups are entitled to means of transport and to the logistics required to carry out their activity as set by the Permanent Office, depending on the size of the parliamentary groups.

Wherever possible, the Permanent Office also provides the unaffiliated senators with the logistics required.

3.2.4. Parliamentary offices

In order to exercise their mandates in the electoral constituency the deputies and the senators are granted on a monthly basis a lump sum from the budget of the Chamber of Deputies, respective the Senate, for expenses required to organize and make their parliamentary offices functional. The staff of the parliamentary offices of the deputies and senators is employed based on an employment contract or legal agreement, both concluded for a definite duration. In case of employment contracts, the staff is employed upon the proposal of the deputy or senator concerned, while the legal agreements are concluded between the deputy or the senator concerned and the natural person⁴⁸.

3.3. Controversial aspects regarding establishment of parliamentary groups. Practice of the Constitutional Court of Romania

3.3.1. Establishing parliamentary groups of the independent/ unaffiliated MPs, mixed parliamentary groups

In order to conduct an accurate analysis of the legal norms and decisions of the Constitutional Court with regard to the possibility to create parliamentary groups, one must make a clear-cut distinction between the two categories of independent MPs:

- the MPs who were *elected as independent*, in compliance with the requirements stipulated in the electoral law;
- the MPs who *became independent* by their withdrawal from the parliamentary groups to which they belonged. The senators and the deputies who leave their political group throughout the legislature and do not associate or affiliate to another group, become *unaffiliated* senators or deputies.

The MPs who “became independent” but who ran and were elected based on the program of some political parties which, following their election as deputies or senators, they left, did not run and were not elected on the basis of their

⁴⁸Article 38 of Law 96/2006 regarding Status of deputies and senators.

own program, but the program of the parties which supported them. Therefore, they do not acquire the same status of independent as that status necessarily involved a position of independence in the process of the electoral consultation.

The Constitutional Court constantly and exclusively referred to the “independent” MPs who ran in the elections under this status, and not to those who “became independent throughout a legislature”, respectively to the right of the independent MPs to create a parliamentary group. Once validated and following their pronouncement of the oath of allegiance, the senators have a full independence status. This independence relates to the party which proposed and supported their candidacy as well as to the electors.

Nonetheless, they maintain in relation to their own political groups an ideological affiliation and a community of political interests. The MPs are the supporters of their own parties in the legislative Chambers and their vote is political, cast both on behalf of the entire nation and on behalf of the party to which they belong. In other words, the MPs are politically independent, as defined by article 64 (3) in the Constitution, and affiliated to their own party, which they support in their parliamentary activity. Article 16 (5) of the Regulation of the Senate, which refers to “senators who became independent” does not contradict the Constitution, which confers a status of full independence to all MPs (article 69 provides that the senators and deputies are in the service of the people and that any imperative mandate is null), the electoral law no. 208/2015⁴⁹, and the Law no.96/2006. However, we see that the two special laws do not use the term independent deputy or senator, within the meaning of article 16 (6) of the Regulations of the Senate.

The right of the “*elected senators or the senators who became independent*” stipulated in article 16 (6), relating to (5) of the same article, refers to a mixed parliamentary group, namely to a group which includes, in addition to “*senators who became independent*”, senators who maintained their membership within a certain political party.

It is true that article 16 (6) of the Regulations of the Senate improperly uses the syntagm senators “who became independent”. In this text, the Regulations refer to those senators who, due to various reasons, leave the parliamentary group which they had previously joined. In reality, according to article 69 (1) of the Constitution, all deputies and senators are independent, each of them being in the service of the people. The constitutional status of independence of the MPs is enhanced by article 69 (2) of the Constitution, which states that “*Any imperative mandate is null*”.

This means that the Regulations of the Senate enables the establishment of mixed parliamentary groups, formed of senators who no longer meet the numerical criterion to activate in a group, to which other senators are added by joining/affiliation, who are improperly considered senators who became independent,

⁴⁹Published in the Official Gazette of Romania, no. 553 of 24 July 2015.

as stipulated in article 16 (6) of the Regulations of this Chamber.

In our opinion, the senators of a group which ceased its activity due to the fact that the minimum number of members, i.e. 7, is not longer reached, return to their initial position at the beginning of their legislature, which allowed establishment of the respective parliamentary group. They are entitled to affiliate to a parliamentary group already established, carry out their activity outside the groups as unaffiliated senators, with the consequence of their representative mandate being affected, or reunite with other unaffiliated senators in order to create a new group. The regulations of the Senate do not institute any restriction for this last option. The present reality in the Romanian Senate is that the request for establishing the group of the unaffiliated senators “UNIREA” was denied⁵⁰.

The Constitutional Court stated in its jurisprudence⁵¹ that the interdiction to leave the parliamentary groups and the banning of changing the groups by the deputies and the senators contravene article 64 (3) and article 69 of Constitution, as it stands for limitation of the representative mandate of the deputies and the senators, sanctioning when noted the regulatory norms which limited this right, norms which, in essence, were deemed to come in contradiction with the provisions of article 69 (2) of the Constitution of Romania which rejects all and any form of imperative mandate.

Analyzing the exception of unconstitutionality of article 16 of the Regulations of the Senate, the Constitutional Court considers, in Decision no. 229/2007⁵², that this article contains only one interdiction with regard to creation of parliamentary groups, respectively the one stipulated in par (7), according to which “*it is forbidden to establish a parliamentary group which should represent or bear the name of a party, an organization of the citizens under national minorities, an electoral or political alliance which failed to receive mandates of senator in the election process*”. We consider that this interdiction is in line with the constitutional principle according to which in the Chambers of the Parliament may be represented only those political forces which obtained mandates of deputy or senator, and the formation of all working structures of the Chambers should reflect their political configuration, as arising from the elections.

The creation of a parliamentary group of the independent senators, throughout the legislature, pursuant to provisions set by the Senate in their own regulations, may not remain without consequences in terms of political and organizational relations. One of the essential aspects of the role of parliamentary groups in these relations is their involvement in establishing the other structures of the Chambers of the Parliament, by submitting proposals for the election of the permanent offices and the parliamentary commissions.

⁵⁰See Section 1 above – Introductory Considerations.

⁵¹Decision no. 45 of 17 May 1994, published in the Official Gazette of Romania, Part I, no. 131 of 27 May 1994 and Decision no.229/2007, published in the Official Gazette no. 236 of 5 April 2007.

⁵²Published in the Official Gazette of Romania, Part I, no. 236 of 5 April 2007.

Under these circumstances, the renegotiation of the structure of the Permanent Office of the Chamber of the Parliament, relating to formation of a group of independent deputies/senators effective the following session, is intended to reconcile the effects of this organizational restructuring occurred in the Parliament, and which, as a consequence of the rule concerning the representative mandate, as well as the optional character of forming a parliamentary groups, may not be sanctioned in line with the requirements arising from the imperative norm of complying with the political configuration in forming the Permanent Office and the parliamentary commissions. In addition, article 22 of the Regulations of the Senate retains the obligation relating to maintaining the number of seats in the Permanent Office, with a view to setting some rules which should enlarge on the phenomenon of parliamentary migration, the political configuration further being in harmony with the constitutional provisions, namely the political configuration emerged from the elections”. Consequently, the structure of the Permanent Office, as a result of re-negotiation, may be potentially amended “effective the following session”.

Nevertheless, there has been another point of view, which excludes the creation of parliamentary groups from senators who became independent throughout the mandate granted by the electoral corpus⁵³. It was considered that the creation of such groups would change the political configuration of the Chambers, the first result being the change of the ratios between the majority and the opposition, beyond the will of the electors, which would cause disruptions in implementing the legislative program of the Government, accepted by the Parliament which granted the vote of investiture, with a first consequence of nature to paralyze the activity of the legislative Chamber and even more seriously, creation of a precedent – future formation of other parliamentary groups.

As a result, the change of the political configuration of the Senate throughout a legislature, by creating new parliamentary groups, would affect its representativeness, as these groups will not have a distinct group of voters. This is the reason why the Regulations of the Senate forbids in article 16 (7) the formation of a parliamentary group which should represent or bear the name of a party, or electoral alliance or political alliance which failed to obtain mandates of senator in the election process.

The conclusions of this analysis, to which we line up, are best presented in the Decision of the Constitutional Court no. 44 of 8 July 1993⁵⁴ when the Constitutional Court ruled as follows: “Article 66 [at present article 69] (...) should represent the starting point in explaining the constitutional relations between the deputy/senator and their voters, the political party which propelled him/her, the Chamber to which he/she belongs. The interpretation of this constitutional article

⁵³Standpoint of the Commission for Constitutionality regarding creation of the Parliamentary Group UNIREA – Senate of Romania.

⁵⁴Published in the Official Gazette of Romania, Part I, no. 190 of 10 August 1993.

may only be in the sense that, in legal terms, the deputy/senator is no longer legally accountable to his/her voters in the constituency which elected him/her or to the party on the list of which he/she ran in the elections. His/her relations to the voters and the party are of moral and political nature, and not juridical. He/she is no longer forced to fulfill any obligation in relation to the latter, his/her obligations are only in relation to the people. In the Romanian constitutional context that exploits the representative mandate without limits, the only possibility for the party or the electors who are not satisfied with the deputy's/senator's activity is not to reelect him/him. [...] *Consequently, the deputy/senator has the constitutional faculty to join one parliamentary group or another, depending on his/her options, to get transferred to one parliamentary group or another, or declare that he/she wants to be independent in relation to all parliamentary groups. No other juridical, legal or regulatory norm may contravene these constitutional provisions.*"

3.3.2. Practice of Constitutional Court of Romania regarding parliamentary groups

1. The liberal group addressed the Constitutional Court on 30 June 1993 with regards to unconstitutionality of article 2 of the Regulations of the Chamber of Deputies according to which the Permanent Office of the Chamber of Deputies decided to forbid deputies to leave their parliamentary and join to another one. The Constitutional Court of Romania ruled by Decision no. 44/1993⁵⁵ that article 2 of the same Chamber, adopted in the Assembly of Deputies by Resolution no. 12 of 27 June 1990, published in the Official Gazette of Romania no. 87/28 June 1990, does not forbid a deputy to leave one parliamentary group and join another and therefore does not contradict the Constitution.

2. The Constitutional Court was requested by the president of the Chamber of Deputies to rule on the constitutionality of the Regulation of the Chamber of Deputies, approved by Decision no. 8 of 24 February 1994, published in the Official Gazette of Romania, Part I, no. 50 of 25 February 1994. By Decision no. 45 of 17 May 1994⁵⁶, article 18 of the Regulations regarding leaving a parliamentary group and interdiction to go to another one, was declared unconstitutional, as it contradicts article 61 (3) and article 66 of the Constitution, being considered to be a limitation of the representative mandate.

3. The parliamentary group of the Democratic Alliance of Hungarians in Romania (D.A.H.R) within the Senate referred to the Constitutional Court on the interdiction of the independent senators to constitute a parliamentary group, set forth in article 14 last paragraph of the Regulations, considered to be unconstitutional as it violates their freedom to choose and forces them, in the event they

⁵⁵Published in the Official Gazette of Romania, Part I, no. 190 of 10 August 1993

⁵⁶Published in the Official Gazette of Romania, Part I, no.131 of 27 May 1994.

decide to exercise their constitutional right to establish a parliamentary group, to have exclusive recourse to the possibility of affiliating to an existing parliamentary group, as per article 14 (1). By Decision of the Constitutional Court no. 46 of 17 May 1994⁵⁷, the Court notes that article 7; article 13 last paragraph, providing that it is forbidden to establish a parliamentary group by political kinship, in the event that the senators of a political party or group fail to receive the number required to constitute a distinct group; article 14 (2) and (3) with regards to interdicting the senators to change their initial parliamentary group or affiliate to a parliamentary group if they left their initial group; article 14 last paragraph with regards to interdicting the independent senators to constitute a parliamentary group, are unconstitutional due to the fact that “*they violate their freedom to choose and forces them, in the event that they decide to exercise their constitutional right to establish a parliamentary group, to have exclusive recourse to the possibility of affiliating to an existing parliamentary group*”; additionally, article 22 on the possibility of any parliamentary group to demand revocation of a member of the permanent office *is also unconstitutional*.

4. The parliamentary group of the National Liberal Party officially requested the Constitutional Court to rule on the constitutionality of some provisions of article 15 and 16 of the Regulations of the Senate, approved by Decision no. 16/1993, as amended and supplemented by decisions no. 5/2001 and no 20/2003. The parliamentary group of the National Liberal Party considers that the regulatory provisions of article 16 (2) and (3), regulating the interdiction provided for the senators to change their initial parliamentary group or to affiliate to another parliamentary group after they left their initial group, stand for some sanctions applied for leaving a parliamentary group, violate provisions of article 64 (3) of the Constitution, republished, and article 15 (1) of the Regulation of the Senate. In addition, the parliamentary group of the National Liberal Party indicates that the Permanent Office demanded the Judicial Commission for appointments, discipline, immunities and validations a report on the status of the parliamentary group of the Democrat Party, and the author of the referral claims that “The refusal of the Permanent Office of the Senate and the plenary to re-establish the Group of the Democrat Party is unconstitutional [...]”. By Decision of the Constitutional Court no. 196 of 28 April 2004⁵⁸ the Court, invoking the considerations and the solution of the Decision of the Constitutional Court no. 46 of 17 May 1994, ruled, among others, that the provisions of article 16 (4), according to which “*The senators elected as independent or who became independent as a result of their leaving the parliamentary groups may not associate toward constituting a parliamentary group*”, are unconstitutional, due to violation of provisions of article 64 (3) of the Constitution.

⁵⁷Published in the Official Gazette of Romania, Part I, no.131 of 27 May 1994.

⁵⁸Published in the Official Gazette of Romania, Part I, no.417 of 11 May 2004.

5. Following referral submitted by 42 senators with regards to unconstitutionality of some provisions of the Regulations of the Senate, relating to establishing parliamentary groups, by Decision of the Constitutional Court no. 317 of 13 April 2006⁵⁹, the Constitutional Court noted that the referral is groundless, as *“the apparent unconstitutionality of provisions of article 16 (2) of the Regulations is removed by statements in paragraphs (5) and (6) of the same article, which allow affiliation to other parliamentary groups and establishment of mixed groups, including groups for independent senators.”* Therefore, paragraph (5) of article 16 of the Regulations provides the right of the senators belonging to parties or to organizations of the citizens of national minorities who do not receive the number required to set up a parliamentary group to affiliate to other parliamentary groups or to constitute a mixed parliamentary group, and paragraph (6) of the same article states that the provisions of paragraph (5) apply duly to senators elected or senators who became independent.

We mention that in the current text, article 16 of the Regulations of the Senate contains only one interdiction with regard to constituting parliamentary groups, the one provided in paragraph (7), according to which *“Constituting a parliamentary group representing or bearing the name of a party, an organization of the citizens belonging to national minorities, an electoral alliance or political alliance which failed to receive senator mandates following the elections is forbidden”*.

6. In the year 2010 the Constitutional Court receives the referral of 74 deputies of the parliamentary group of the political alliance SDP+CP regarding the unconstitutionality of the Decision of the Chamber of Deputies no. 26/2010 regarding amendment and completion of article 12 of the Regulations of the Chamber of Deputies⁶⁰ and the Decision of the Chamber of Deputies no. 27/2010

⁵⁹Published in the Official Gazette of Romania, Part I, no. 446 of 23 May 2006.

⁶⁰Article 12 of the Regulations of the Chamber of Deputies, approved by Decision of the Chamber of Deputies no. 8/1994, published in the Official Gazette of Romania, Part I, no. 50 of 25 February 1994, as amended, is amended and completed as follows: 1. Paragraphs (1) and (4) are amended and shall have the following content: *«(1) Parliamentary groups are structures of the Chamber of Deputies. They may be made of deputies who ran in the elections on the list of the same political party, the same political group, on the lists of a political alliance or an electoral alliance and independent deputies or deputies who became independent. The deputies who represent organizations of citizens belonging to national minorities, who have received the mandate of deputy in accordance with article 62 (2) of the Constitution of Romania, republished, may constitute only one parliamentary group.[...] (4) The deputies of the political parties, political groups, political alliances and electoral alliances who have not received the number required to form a parliamentary group as well as the independent deputies or the deputies who have become independent during a legislature, may get together in mixed parliamentary groups or may affiliate to other parliamentary groups constituted in line with paragraph (1) or in a group of the independent deputies, where appropriate.»* 2. Paragraph (5) is amended and shall have the following content: *«(5) The deputies who have become independent during a legislature may constitute only one parliamentary group, in compliance with paragraph (6).»* 3. After paragraph (5) two new paragraphs are introduced - (6) and (7) -, with the following content: *«(6) A parliamentary group is made of minimum*

regarding amendment of the Regulations of the Chamber of Deputies. By Decision no. 1490 of 17 November 2010⁶¹, the Constitutional Court considers that the provisions of the article 12 do not contradict article 64 (3) of the Constitution, according to which “*The senators and the deputies may organize themselves in parliamentary groups, in line with the regulations of each chamber*”. Creating the parliamentary groups is a right, not an obligation of the MPs, and the Constitution sets forth no restriction with regard to the time of exercising this right.

7. Also in 2010 the Constitutional Court was referred to by 56 deputies of the Parliamentary Group of the Political Alliance SDP+CP on the unconstitutionality of the same article 12 of the Regulations of the Chamber of Deputies. On this occasion, by Decision no. 1611 of 15 December 2010⁶², the Court, which also analyzes the consequences of the political migration, considers that the mutations occurred in the structures of the existing parliamentary groups, as a consequence of the scission which may emerge within the parties represented by each group or the migration of the MPs from one group to another or leaving one group and not affiliating to others, possible mutations given that the Constitution sets expressly that all and any imperative mandate is null, may not remain without consequences on the representation of the parliamentary groups within the permanent offices. In addition, as opposed to the presidents of the Chambers, elected for the entire length of the mandate of the Chambers, the other members of the permanent offices are elected, according to article 64 (2) Second thesis of the Constitution, at the beginning of each session, in line with the structure of the parliamentary groups at that given time. In line with the text of article 69 (2), the constitutional text mentioned ensures representation, in the leadership structures of the Chambers of the Parliament, of the political restructures of the Parliament, which, similar to the political evolutions in the society, may not be stopped. On this occasion, the Court ruled that, due to the uninominal voting system, the potential migration of the MPs “from a party to another or leaving a political group leading to acquisition of the status of independent, is not of nature to seriously affect the interests of the electors represented by such members...”⁶³.

8. In December 2018 and February 2019 unaffiliated senators requested establishment of the parliamentary group “Union” within the Senate; however, the Commission for constitutionality considered that there was an express regulatory interdiction for establishing a new parliamentary group within the Senate consisting of senators who became independent. The right “*of the senators elected or who became independent*” provided in article 16 (6), relating to paragraph (5) of the same article, refers to a mixed parliamentary group, that is to a

10 deputies. (7) *In the event that new parliamentary groups are constituted, they shall be presented to the plenary by their leaders, at the beginning of the parliamentary session*”.

⁶¹Published in the Official Gazette of Romania, Part I, no. 861 of 22 December 2010.

⁶²Published in the Official Gazette of Romania, Part I, no. 866 of 23 December 2010.

⁶³ Decision of the Constitutional Court of Romania no. 1611 of 15 December 2010.

group of which structure includes, in addition to “*senators who became independent*”, also senators who maintained their capacity of members of a certain political party. Nevertheless, as shown from the two letters remitted to the Permanent Office of the Senate, all seven members mentioned as members of the parliamentary group “Union” are no longer members of a political party, therefore they may not form a mixed parliamentary group within the meaning of article 16 a (5) of the Regulations of the Senate, which implies membership of a political party.⁶⁴

9. In the year 2019, in the Chamber of Deputies, following a notice on unconstitutionality of article 13 (1), (6), (7), article 19 (1) relating to article 40 (1) and article 69 of Constitution⁶⁵ submitted by 63 deputies, who were former members of the Social Democratic Party, and members of the Pro Romania Party upon the time of the notice, the parliamentary group Pro Europa was created⁶⁶. Following analysis of the notice, the Court considers, by Decision no. 85/2019⁶⁷, that the articles mentioned above are constitutional and state that the interdiction to form a parliamentary group by unaffiliated deputies applies after these deputies freely expressed their option in the sense of not becoming members of some parliamentary groups or affiliating to some parliamentary groups or creating a group of independent deputies, case in which they become unaffiliated. In the solution awarded, the Court considered that the articles invoked are constitutional, “*are in line with the provisions of article of Constitution, which underlie the interpretation of the constitutional relations between the member of the parliament, on the one side, and their voters, the parties or the political groups which supported the candidacy of such member and the Chamber to which the member of the parliament belongs, on the other side. Or, pursuant to this constitutional article, the responsibility for a certain political option, manifested by the decision of the MP to leave the political party under which he/she was elected or by joining another political party, may only be a political choice, a moral one at most, and under no circumstances a juridical choice*”.

Summarizing the practice of the Constitutional Court of Romania, we may see that it has expressed opinions in line with the majority:

⁶⁴ Standpoint of the Commission for constitutionality within the Senate remitted to the Permanent Office on 26.02.2019.

⁶⁵ Article 13 (6) “*The deputies leaving their parliamentary group become unaffiliated unless they affiliate to another parliamentary group. The unaffiliated deputies may not create their own parliamentary group.*”; article 13 (7) “*In the event of creating new parliamentary groups, such groups shall be presented to the plenary by their leaders, at the beginning of the parliamentary session.*”; article 19 (1) “*Creating parliamentary groups of some political parties which received mandates as a consequence of the elections is forbidden*”.

⁶⁶ The group was created on 29 May 2019. At present, the parliamentary group is made of 29 members, under the leadership of Leader - Victor Viorel Ponta, Vice-leaders – Dobre Mircea Titus, Nechifor Cătălin Ioan, Petric Octavian, Podașcă Gabriela Maria, Stancu Florinel, Vlăducă Oana Silvia, Secretary – Văcaru Alin Vasile.

⁶⁷ Published in the Official Gazette of Romania, Part I, no. 326 of 25 April 2019.

a) the unlimited interdiction of the MPs to migrate from one parliamentary group to another, to affiliate to a parliamentary group or to create a group made of independent MPs, sanctioning every time when noted, the regulatory norms which limited this right, norms which, in essence, were deemed to come in contradiction with the provisions of article 69 (2) of the Constitution, which rejects all and any form of imperative mandate:

- Decision no. 44 of 8 July 1993, published in the Official Gazette of Romania, Part I, nr. 190 of 10 August 1993;

- Decision no. 45 of 17 May 1994, published in the Official Gazette of Romania, Part I, no. 131 of 27 May 1994;

- Decision no. 46 of 17 May 1994, published in the Official Gazette of Romania, Part I, no. 131 of 27 May 1994;

- Decision no. 196 of 28 April 2004, published in the Official Gazette of Romania, Part I, no. 417 of 11 May 2004;

- Decision no. 229 of 14 March 2007, published in the Official Gazette of Romania, Part I, no. 236 of 5 April 2007;

- Decision no. 1490 of 17 November 2010, published in the Official Gazette of Romania, Part I, no. 861 of 22 December 2010;

- Decision no. 1611 of 15 December 2010, published in the Official Gazette of Romania, Part I, no. 866 of 23 December 2010.

b) the lack of juridical regulation of the possibilities and the conditions required to organize parliamentary groups by deputies who resign from other parliamentary groups does not constitute a violation of any constitutional provisions, but an omission which may not be substituted by decisions of the Constitutional Court:

- Decision no. 47 of 15 March 2000, published in the Official Gazette of Romania, Part I, no. 153 of 13 April 2000;

- Decision no. 44 of 8 July 1993, published in the Official Gazette of Romania, Part I, no. 190 of 10 August 1993.

c) the use in the Regulations of the syntagm "political configuration", which means its formation in harmony with the votes expressed in the election process, in line with the proportion received by the parliamentary groups compared to the total number of each Chamber, and the imposition of the possibility to elect a new president of another parliamentary group, would have as consequence that the sanction enforced on the president of the Chamber of Deputies or the Senate, revoked from his/her position, should extend to the parliamentary group which proposed his/her election:

- Decision no. 601/2005, published in the Official Gazette of Romania, Part I, no. 1.022 of 17 November 2005;

- Decision no. 602/2005, published in the Official Gazette of Romania, Part I, no. 1.027 of 18 November 2005.

There were also contrary opinions to the Decisions of the Constitutional

Court enumerated above. By Decision no. 85/2019, published in the Official Gazette of Romania, Part I, no. 326 of 25 April 2019, the Court considers that the articles regulating the formation of the parliamentary group by the unaffiliated deputies intervenes after the respective deputies expressed their option, freely, toward not becoming members of any parliamentary groups or affiliating to any parliamentary groups or constituting a group of the independent deputies, case in which they become unaffiliated deputies are *constitutional*.

4. Aspects of compared law regarding establishment of parliamentary groups

In a compared analysis of the legislation applicable in other states with regard to creation of parliamentary groups, we enumerate the following examples:

*In Austria*⁶⁸, the Regulation of the National Council⁶⁹ set forth in article 7 that, at the beginning of each legislature, and no later than a month of the first meeting of the National Council, the members of the same political party may establish one parliamentary group. A parliamentary group may be constituted and may function providing that it has minimum 5 members. The creation of a parliamentary group and any other amendment occurred in its structure shall be brought to the attention of the president of the National Council.

The Regulations of the Federal Council⁷⁰ provides in article 14 that the members of the Federal Council, elected on the basis of the proposals made by the political party, may form a parliamentary group. A parliamentary group may be constituted and may function providing that it has minimum 5 members, and the ones who do not meet the requirements may establish the group with the consent of the Federal Council. The creation of a parliamentary group and any amendment occurred in its structure shall be brought to the attention of the president of the Federal Council, in writing, and shall be signed by the leader of the group.

*In Belgium*⁷¹, the Regulations of the Senate⁷² lay down that the senators who ran in the elections on the lists of the same political party may establish political groups. All and any amendment occurred in the structure of a parliamentary group shall be brought to the attention of the president of the Senate, in writing, and shall be signed by the leader of the group.

The Regulations of the Chamber of the Representatives⁷³ stipulates that

⁶⁸Bicameral parliamentary system: National Council – Nationalrat and Federal Council - Bundestrat

⁶⁹<http://www.parlament.gv.at>, consulted on 1.10.2019.

⁷⁰ *Ibid.*

⁷¹Bicameral parliamentary system: Senate and Chamber of Representatives of Belgium.

⁷²<http://www.senate.be/doc/reglement.fr>, consulted on 1.10.2019.

⁷³ <http://www.dekamer.be/kvvcr/publications/reglement.uk>, consulted on 1.10.2019.

a political group may be constituted and may function providing that it has minimum 5 members. An MP may belong to only one political group. The creation of a parliamentary group and any amendment occurred in its structure shall be brought to the attention of the president of the Chamber by the leader of the group.

*In Cyprus*⁷⁴, the Constitution provides in article 73 (12) that all political party which is represented by minimum 12% of the total number of the members in the Chamber of the Representatives may form and is entitled to be recognized as a political group.

*In France*⁷⁵, the Constitution provides that the parties and the political groups are constituted and conduct their activities freely. The Regulations of the National Assembly⁷⁶ provides that the MPs may form groups of minimum 15 members. All and Any amendment occurred shall be brought to the attention of the president of the Assembly, in writing, by the leader of the group.

The Regulations of the Senate⁷⁷ state that the senators may create groups of minimum 15 members. The political groups constituted of minimum 10 members may reunite for administrative purposes, in a group they choose themselves, with the consent of the respective group. The senators who are neither formal members of a group nor affiliated to a group may reunite to elect a delegate, with a view to representing their interests, who will have the same rights as the leader of the group.

*In Hungary*⁷⁸, the Resolution 10/2014 regarding certain provisions in the Procedure Regulations of the National Assembly⁷⁹ sets forth that all and any MP who joined a parliamentary political group is deemed to be an independent MP. The MP who resigned/was excluded from the political group is deemed to be an independent MP. The number of the independents increases at the end of the mandate as a consequence of the exclusions or resignations from the parliamentary political groups. Any member who left the political group or was excluded shall be deemed as an independent MP; the member who became independent in this manner may join another political group within 6 months of exclusion from or leaving the group. This regulatory provision is intended to consolidate the parliamentary political stability and to reduce the phenomenon of political migration.

*In Italy*⁸⁰, the Regulations of the Chamber of Deputies⁸¹ set forth that the parliamentary groups are formed by minimum 20 deputies. A group of fewer than 20 deputies may be constituted providing that they represent a party recognized at national level, which presented their own list of candidates in minimum twenty

⁷⁴Unicameral parliamentary system: Chamber of Representatives.

⁷⁵Bicameral parliamentary system: Senate and National Assembly of France.

⁷⁶<http://www2.assemblee-nationale.fr>, consulted on 1.10.2019.

⁷⁷ <http://www.senat.fr>, consulted on 1.10.2019.

⁷⁸ Unicameral parliamentary system: National Assembly of Hungary.

⁷⁹ <http://www.parlament.hu>, consulted on 1.10.2019.

⁸⁰ Bicameral parliamentary system.

⁸¹ <http://www.e.camera.it>, consulted on 1.10.2019.

electoral constituencies and received minimum one percent in a constituency, totaling a number of 300,000 votes duly expressed for their list of candidates. Within two days of the first meeting, the deputies shall inform the Secretary General of the Chamber with regard to the group to which they belong. The deputies who fail to do so or belong to no parliamentary group may reunite in a mixed parliamentary group. The deputies who belong to the mixed group may request the president of the Chamber to form political groups, providing that each group has at least 10 deputies.

The Regulations of the Senate⁸² lay down that a parliamentary group may be formed of minimum 10 senators who ran in the elections on the lists of the same political party, the same political group or political alliance. In the event that the number of the group members decrease to under the number required for the senators to establish a group, this group is dissolved and all and any senator of this group, unless they joined another group, will be registered in the group of the unaffiliated members, within three days of dissolution.

*In the Netherlands*⁸³, the Regulation of the Chamber of the Representatives⁸⁴ stipulate that the deputies who ran in the elections on the lists of the same political party may create only one parliamentary group. In the event that only one deputy on the list of candidates was elected, this deputy shall be considered as a parliamentary group. All amendments made to the structure of a parliamentary group shall be brought to the attention of the president of the Chamber, by the political group concerned. No other parliamentary groups except the ones mentioned above may be established throughout a legislature, excepting the merger of two or several existing parliamentary groups or the dissolution. In the event that one or several deputies left the group, but not a consequence of the dissolution, they shall be considered as a separate group, providing that they notify the president of the Chamber thereon.

*In Portugal*⁸⁵, the Constitution states that the MPs elected for each party or coalition of parties may form a parliamentary group. The Regulations of the Assembly of the Republic⁸⁶ lay down that the parliamentary groups may be formed by the MPs who ran in the elections on the lists of a political party or alliance. The creation of the parliamentary group and all amendments occurred in relation to the leadership or the structure of a parliamentary group shall be brought to the attention of the president of the Assembly, in writing, and shall be signed by each member of the parliamentary group. The members of the Assembly of the Republic who do not belong to a parliamentary group shall inform the

⁸² <http://www.senato.it>, consulted on 1.10.2019.

⁸³ Bicameral parliamentary system: Senate and Chamber of Representatives.

⁸⁴ <http://www.government.nl>, consulted on 1.10.2019.

⁸⁵ Unicameral parliamentary system: The Assembly of Republic of Portugal.

⁸⁶ <http://www.en.parlamento.pt>, consulted on 1.10.2019.

president of the Assembly of the Republic thereon and shall exercise their mandate as an unaffiliated member.

*In Poland*⁸⁷, the Regulations of the Sejm⁸⁸ provide that the deputies may create clubs of deputies, providing that such clubs have minimum 15 members, and groups of deputies, providing that such groups have minimum 3 members. A deputy may belong to only one club of deputies or only one group of deputies. The leaders of the clubs, groups and alliances shall inform the Marshall of the Sejm in respect of their structure and internal regulations.

The Regulations of the Senate⁸⁹ set forth that the senators may create clubs of senators, providing that such groups have minimum 7 members, or groups of senators, providing that such groups have minimum 3 members. A senator may be part of only one club or group of senators. The leaders of the clubs, groups and alliances shall inform the Presidium (made of the Marshall of the Senate and his/her deputies) in respect of their structure and internal regulations (status).

5. Conclusions

Analyzing the constitutional, legal and regulatory provisions and also the decisions of the Constitutional Court, we may conclude that, since accession to a parliamentary group is not an obligation but the manifestation of a subjective right of affiliation to a group already established, in line with an ideological affinity, it is the duty of each Chamber, through its permanent office, to create the framework necessary to exercise this right and not to set artificial restrictions, in the interest of the parliamentary majority, which would prevent the decision of the unaffiliated MPs to form a group. Being a right recognized by the fundamental Law, it should be enjoyed without exception by the MPs whose group was dissolved or the MPs who became independent by resigning from the party under which ideology they ran in the elections or were excluded from this party. They are fully entitled to reunite with other MPs who are in the same position, as well as with MPs unaffiliated to a group, with a view to establishing another group. Forbidding them to create their own group means to limit their constitutional framework to exercise their representative mandate.

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8. Law no. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003.
9. Law no. 96/2006 regarding the Status of deputies and senators, published in the Official Gazette of Romania, Part I, no. 49 of 22 January 2016.
10. Regulations of the Chamber of Deputies, republished in accordance with article II of the Decision of the Chamber of Deputies no. 48/2016 regarding amendment and completion of the Regulations of the Chamber of Deputies, published in the Official Gazette of Romania, no. 432 of 9 June 2016.
11. Regulations of the Senate, republished in accordance with article II of the Decision of the Senate no. 163/2018 regarding amendment and completion of the Regulations of the Senate, approved by Decision of the Senate no. 28/2005, published in the Official Gazette of Romania, Part I, no. 919 of 31 October 2018.